

## Exploring the contours of African sexualities: Religion, law and power

Sylvia Tamale\*

School of Law, Makerere University, Uganda

### Summary

*This article explores of the diverse ways through which organised religion, personal spiritual convictions, culture and the law shape, challenge and potentially transform the sexualities of African peoples. I argue that, through the intersection of religion, statutory law and reinterpreted traditional customs, the complexity of African sexualities (particularly those of women) is instrumentalised, controlled and regulated by the patriarchal state. As sources of power, the institutions of culture, religion and law structure sexual morality in such a way that it congeals into states of domination. Attempts to assert sexual citizenship have spawned social movements on the continent, challenging the dominant sexual discourses and demanding increased sexual autonomy and freedom. These movements have the potential to profoundly reshape our understanding of the links between sexualities and religion.*

### 1 Introduction: Linking religion, culture, law and sexuality

Plurality is simultaneously the boon and the bane of Africa. The cultural diversity and richness found between and within the continent's religious and cultural communities lend to its versatility and beauty. Our historical and colonial legacy of pluralistic legal systems and multi-religious traditions holds both advantages and disadvantages. The plurality is further multiplied and problematised by the many permutations of religious beliefs/jurisprudence and the evolution of culture. It becomes even more complicated when one considers that organised religions on the continent operate at a global scale, albeit with a distinctly African flavour when transplanted to the continent.

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\* LLB (Hons) (Makerere), LLM (Harvard), PhD (Minnesota); [stamale@law.mak.ac.ug](mailto:stamale@law.mak.ac.ug)

African religious and cultural plurality spawns many contradictions and some absurdities. So one can only imagine the complexity involved in exploring varied African sexualities within such shifting paradigms and crosscurrents of discourses.<sup>1</sup> In order to make sense of such exploration, we approach the topic from a common ground where the plurality of laws, culture, religions and religiosity finds convergence in their engagement with African sexualities. Such common ground can be found in the twin forces of patriarchy and capitalism – forces that support and reinforce each other, while also introducing new tensions and contradictions to the situation.

My use of the term 'African sexualities' in this article is not because I am unaware of African people's heterogeneity and the significance of such differences. I know that, because of the rich and diverse socio-cultural, as well as some political differences across African societies, the statuses of African peoples differ based on gender, class, race, ethnicity, religion, age, sexual orientation, and so forth. However, my reference to Africans as a collective in relation to sexuality stems from two important factors. The first is to highlight those aspects of cultural ideology – the ethos of community, solidarity and *ubuntu* – that are widely shared among the vast majority of people within the geographical entity baptised 'Africa' by the colonial map makers. More importantly, the term is used politically to call attention to some of the commonalities and shared historical legacies inscribed in cultures and sexualities within the region by forces such as colonialism, capitalism, imperialism, globalisation and fundamentalism.<sup>2</sup> The African philosophy of *ubuntu* or humaneness refers to understanding diversity and the belief in a universal bond and sharing.<sup>3</sup> Justice Yvonne Mokgoro of the South African Constitutional Court elaborated this difficult-to-translate concept as follows:<sup>4</sup>

In its most fundamental sense it translates as personhood and 'morality'. Metaphorically ... [it describes] the significance of group solidarity on survival issues so central to the survival of communities. While it envelopes the key values of groups solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.

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1 Sexuality, as used in this article, encompasses a wide array of complex elements, including sexual knowledge, beliefs, values, attitudes and behaviours, as well as procreation, sexual orientation, and personal/interpersonal sexual relations. It touches a wide range of other issues, including pleasure, the human body, dress, self-esteem, gender identity, power and violence. It is an all-encompassing phenomenon that involves the human psyche, emotions, physical sensations, communication, creativity and ethics. The pluralistic use of the term is in recognition of the complex structures within which sexuality is constructed as well as its pluralistic articulations. S Tamale (ed) *African sexualities: A reader* (2011), especially S Tamale 'Researching and theorising sexualities in Africa' in Tamale (above) 11-36.

2 Tamale (n 1 above).

3 M Ramose *African philosophy through ubuntu* (1999).

4 Quoted in A Sachs *The strange alchemy of life and law* (2009) 106-107.

We speak of sexualities in the plural in recognition of the complex structures within which sexuality is constructed and in recognition of its pluralist articulations on the continent.<sup>5</sup>

A careful mapping of religions on the continent reveals that 86 per cent of its population subscribe to the imported monotheistic Abrahamic religions of Islam and Christianity.<sup>6</sup> All Abrahamic faiths believe that God is male, described in their different holy scriptures. They are also messianic in that they anticipate the coming of a God-sent Messiah. Islam had penetrated the continent by the twelfth century, while serious attempts to introduce Christianity only happened in the eighteenth century.<sup>7</sup> Historically, the process of proselytisation subverted, overthrew and demonised African traditional religions (ATR), which formed an integral part of African sexual culture.<sup>8</sup> Nevertheless, and despite the concerted effort to undermine its relevance to the African psyche, it is important to note that ATR currently exercise considerable influence on the populations and the tendency is for a significant number of people to practise them concurrently, even if discreetly, with the Messianic religions.<sup>9</sup> Mutua refers to this debilitating phenomenon as being 'suspended between a dim African past and a distorted, Westernised existence'.<sup>10</sup> This constitutes one of the inherent contradictions (and hypocritical deceptions) of plurality referred to earlier.

Although most African traditional religions are also monotheistic,<sup>11</sup> their Supreme Being is beyond gender – being neither male nor female, and they are non-Messianic.<sup>12</sup> Moreover, ATR is not located in sacred text and cannot be isolated from people's holistic and everyday existence. In that sense, ATR can be viewed as 'religion-plus', a *modus vivendi*. It is, as Mbiti tells us,<sup>13</sup>

lived (not read), it is experienced (not meditated), it is integrated into the life of the people: Wherever they are, their religiosity, their religion, is with them.

5 Tamale (n 1 above).

6 See Pew Forum on Religion and Public Life *Tolerance and tension: Islam and Christianity in sub-Saharan Africa* (2010); D Barrett (ed) *World Christian encyclopaedia: A comparative study of churches and religions in the modern world* (2001). Out of a total population of 820 million in Africa, approximately 234 million (28%) are Muslims, while 470 million (57%) are Christians (Pew Forum (above) i), with the remainder professing ATR.

7 J Trimmingham *The influence of Islam upon Africa* (1968).

8 M Mutua *Human rights: A political and cultural critique* (2002).

9 C Izugbara 'Sexuality and the supernatural in Africa' in Tamale (n 1 above) 531; Pew Forum (n 6 above); LO Sanneh 'The domestication of Islam and Christianity in African societies' (1980) 11 *Journal of Religion in Africa* 1-12.

10 Mutua (n 8 above) 110.

11 E Evans-Pritchard *Nuer (African people) religion* (1956).

12 J Mbiti 'General manifestations of African religiosity' paper presented at the First Meeting of the Standing Committee on the Contributions of Africa to the Religious Heritage of the World, <http://www.afrikaworld.net/afrel/mbiti.htm> (accessed 12 October 2012).

13 As above.

In other words, African traditional religions cannot be delinked from culture. For that reason, it is important to emphasise the distinction made in this article between 'religion' and 'religiosity'. Religion refers to 'a system of beliefs, practices, institutions, and relationships that provides the primary source of moral guidance for believers' (for example, Christianity, Islam, Hinduism and Judaism).<sup>14</sup> On the other hand, religiosity is one's pious conformity to a religion through practice and conduct (for example, how often one goes to church or mosque).<sup>15</sup> Both are of significance in understanding the diverse ways in which African peoples translate their sexualities within the contemporary world.

While noting the above distinction, it is also important to recall that several philosophers of ATR argue that there is continuity between the Abrahamic religions and ATR and, indeed, there are elements of convergence and mutual appropriation in the two forms of religion.<sup>16</sup> The positive convergence between ATR and notions of Christianity includes the belief in a Supreme Being that is responsible for the creation of humans and other living things and communication between the Supreme Being and the spirits on behalf of humans. However, the perceived negative spiritual entities of ATR have also been actively incorporated into the image of the Christian Devil.<sup>17</sup> The commonalities between Islam and ATR culture are seen in the practices of polygyny, male circumcision and bride wealth and their admission to evil forces.<sup>18</sup> However, a significant rupture between Abrahamic religions and ATR is that, while the former often views the female body as the seat of sin, moral corruption and a source of distraction from godly thoughts,<sup>19</sup> ATR celebrates and valorises the female body as a reproductive or sexual icon.

The influence of Messianic religions on African sexualities (practices, feelings, ideas, fantasies, excitements and aesthetics) has been enormous. Traditional sexual practices that were informed by ATR and indigenous culture have been seriously threatened. This article will

14 AA An-Na'im 'The politics of religion and the morality of globalisation' in M Juergensmeyer (ed) *Religion in global civil society* (2005) 24.

15 M McGuire *Religion: The social context* (1997).

16 F Wijsen 'Popular Christianity in East Africa: Inculturation or syncretism?' (1999) 29 *Exchange* 37-60; M Ojo 'The contextual significance of the charismatic movements in Western Nigeria' (1988) 57 *Africa* 175-92; Sanneh (n 9 above); B Kato *Theological pitfalls in Africa* (1975); J Mbiti 'Christianity and traditional religions in Africa' in D McGavran (ed) *Crucial issues in missions tomorrow* (1972) 91; J Mbiti 'The encounter of Christian faith and African religion' (1980) 97 *Christian Century* 817-820.

17 B Meyer 'Christianity in Africa: From African independent to pentecostal-charismatic churches' (2004) 33 *Annual Review of Anthropology* 447-474; Y Droz 'Si Dieu veut ... ou suppôts de Satan; incertitudes, millénarisme et sorcellerie parmi les migrants kikuyus' (1997) 145 *Cahiers d'Etudes Africaines* 85-114.

18 W Arens 'Islam and Christianity in sub-Saharan Africa: Ethnographic reality or ideology' (1975) 15 *Cahiers d'études africaines* 443-456.

19 J Entwistle *The fashioned body: Fashion, dress and modern social theory* (2000) 84; B Bakare-Yusuf 'Nudity and morality: Legislating women's bodies and dress in Nigeria' in Tamale (n 1 above) 122.

demonstrate that the positive conceptualisations of African sexualities (including the African female body) have largely been negated and overtaken by the state-supported advocacy of the Messianic religions. Mutua explains how African traditions were delegitimised by a new socio-political and religious order:<sup>20</sup>

Africa – from top to bottom – was remade in the image of Europe complete with Eurocentric modern states. Christianity played a crucial role in this process: weaning Africans from their roots and pacifying them for the new order. Utilising superior resources, it occupied most political space and practically killed local religious traditions and then closed off society from other persuasions ... Islam, which had invaded Africa at an earlier date, was equally insidious and destructive of local religions. Its forceful conversions and wars of conquest, together with its prohibition of its repudiation, were violative of the rights of Africans as well ... Progress, culture and humanity were identified entirely in Islamic or Christian terms, never with reference to indigenous traditions.

Far from suggesting that African cultural norms or ATR were universally egalitarian, I argue that many sexual practices that were acceptable in pre-colonial, pre-Islamic and pre-Christian Africa were encoded with the distinctive tags of 'deviant', 'illegitimate' and 'criminal' through the process of proselytisation and acculturation. African sexualities were reduced to a universalised, essentialised culture and integrated into the wider 'enlightened' culture.

Throughout this article, any reference to 'law' should be understood broadly to include codified or statutory law, as well as religious laws and uncoded customary laws rooted in culture.<sup>21</sup> All countries on the continent have pluralistic legal systems where codified law – formally or informally – operates side by side with customary law and/or Shari'a (Islamic law). Even where it is not explicitly stated that religion has the force of law, many religious principles find expression in the legal codes of most jurisdictions and are often used to justify and legitimise culture and law. Hence, in most African states, Christian and Islamic laws have been effectively domesticated. Indeed, the lines that separate law, culture and religion in Africa can sometimes be extremely blurred. Given how critical law and sexuality are to the lives of Africans, it is surprising how little scholarly attention has been paid to the intersection between these areas of our existence and how the complex relationships are played out. How do/can organised religion, personal spiritual convictions, culture and the law shape, challenge and potentially transform the sexualities of African peoples? How are religious norms and values institutionalised within African sexualities? How do people come to accept the rules that govern their sexuality and what explains the actions of those that resist or subvert such rules?

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20 Mutua (n 8 above) 109 110.

21 It must be noted, however, that in most African legal systems and jurisdictions, customary law is overridden by received colonial laws; Mutua (n 1 above).

In addition to this introduction, the article is divided into four parts. The second part of the article provides a discursive framework within which to articulate the conceptual link between power and knowledge in the construction of African sexualities. The third part of the article illustrates how law, culture and religion are used to strip certain people of sexual citizenship. The fourth part discusses the growth of the sexual rights movement on the continent, tracing its activism from the margins and demonstrating the small but significant gains that it has so far tucked under its belt. The final part of the article constitutes concluding remarks.

## 2 Law, culture and religion viewed through the lens of power

As the old adage goes, 'knowledge is power'. The saying can be interpreted in multiple ways: that knowledge equips one with potential power or that knowledge itself *is* power. In other words, behind the mask of knowledge lies real power dynamics. Knowledge reflects the 'truths' of the powerful, of those that pen and record history. The Italian theorist, Antonio Gramsci,<sup>22</sup> introduced the concept of 'hegemony' to illustrate how systems of power are constructed through knowledge. Hegemonic power convinces people to subscribe to the social values and norms of an inherently exploitative system.<sup>23</sup>

Contrary to popular belief, sexuality is not exclusively driven by biology; a very significant part of it is socially constructed through legal, cultural and religious forces driven by a politico-economic agenda.<sup>24</sup> Sexuality is very much a socio-cultural invention that is closely linked to power and to the processes of subjugation. As Africans, how we 'do' and experience sexuality is heavily influenced by society and culture. How and with whom we have sex, what we desire, what we take pleasure in, how we express that pleasure, why, under what circumstances and with what outcomes, are all forms of learned behaviour communicated, *inter alia*, through the institutions of culture, religion and law.<sup>25</sup> It is through these social institutions and social relationships that sexuality is reified or given meaning.

So, who 'sets the agenda' and imparts these 'sexual truths' as the universal norm? These are mainly people who, at a particular historical point in time, exercise power and control discourse – politicians,

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22 A Gramsci *Selections from the prison notebooks of Antonio Gramsci* trans Q Hoare & GN Smith (1971); A Gramsci *Prison notebooks Volume I* trans JA Buttigieg (1992); A Gramsci *Prison notebooks Volume II* trans JA Buttigieg (1996).

23 M Stoddart 'Ideology, hegemony, discourse: A critical review of theories of knowledge and power' (2007) 28 *Social Thought and Research* 191-225.

24 A Dallery 'The politics of writing (the) body' in A Jagger & S Bordo *Gender, body, knowledge: Feminist reconstructions of being and knowing* (1989).

25 As above.

media houses,<sup>26</sup> cultural leaders, religious leaders, mainstream educationists, multilateral institutions – using tools such as the law, culture, religion, media and educational textbooks to disseminate and legitimise these ‘truths’, thereby enforcing compliance. ‘Truth’ frameworks about good, respectable, normal sexuality as well as those for bad, immoral and unnatural sexuality are constructed by hegemonic discourses.<sup>27</sup>

Apart from the social and historical contexts that inform African sexuality and its relationship to law, culture and religion, there are also some developments at the international level that have cast their shadow over this phenomenon. During the past 50 years or so, in North America and Europe, there has emerged a new-fangled school of natural lawyers who seek to integrate a distinctive approach of Catholicism into law and legal systems.<sup>28</sup> Proponents of New Natural Law, such as John Finnis,<sup>29</sup> have breathed fresh life into anachronistic arguments against contraception, abortion, sexual activity outside of the heterosexual marriage (for example, fornication, masturbation, homoeroticism, adultery and prostitution)<sup>30</sup> and sexual acts between spouses that lack reproductive potential. Jurists such as Nicholas Bamforth and David Richards have challenged this school of thought for its fundamentalism which is rooted in patriarchal religious authority.<sup>31</sup> During the same period, fundamentalist doctrines also took root in Islam with moral teachings and sacred interpretations of gender and sexuality similar to those of the New Natural Law. And despite the doctrinal differences between the two religions, they often come together and lock arms when defending ‘conservative’ perspectives on sexuality. Such reinvigorated religious fundamentalism has infiltrated Africa via a highly-organised born-again evangelical movement and Christian groups as well as conservative branches of various Islamic sects.<sup>32</sup>

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26 There are thousands of popular media houses that are privately owned by mainstream religions as well as charismatic and pentecostal denominations all over the continent. Eg, in Uganda we have Top TV, Lighthouse TV, Channel 44 and over 40 religious broadcasting radio stations.

27 G Rubin ‘Thinking sex: Notes for a radical theory on the politics of sexuality’ in C Vance (ed) *Pleasure and danger: Exploring female sexuality* (1984).

28 G Grisez *et al* ‘Practical principles, moral truth and ultimate ends’ (1987) 32 *American Journal of Jurisprudence* 99-151.

29 J Finnis *Natural law and natural rights* (1980).

30 We use the term ‘prostitution’ on account of the structured and stigmatised official/legal uses of the term. ‘Sex work’ is the preferred reference to adult transactional sex in order to highlight its professional aspects and to move away from its derogatory associations.

31 N Bamforth & D Richards *Patriarchal religion, sexuality and gender: A critique of new natural law* (2007).

32 K Kaoma *Globalising the culture wars: US conservatives, African churches and homophobia* (2009); A Imam ‘The Muslim religious right (‘fundamentalists’) and sexuality’ in P Ilkkaracan (ed) *Women and sexuality in Muslim societies* (2000); P Gifford *The new crusaders: Christianity and the new right in Southern Africa* (1981).

The adjective 'conservative' is advisedly placed in quotes because, when used in relation to religions, it masks the political interests behind the so-called traditional interpretations of the sacred writings of these religions. The preference in this article is for the term 'political religions' instead of 'conservative religions' in order to highlight the current role of such religions in dictating African sexual politics.<sup>33</sup> As Pereira reminds us:<sup>34</sup>

While some dimensions of sexuality may always remain private, it is clear that sexuality is not, in its entirety, a private affair. Sexual politics are played out as much in the exercise of political authority as they are in intimate relations. Indeed, the intertwining of sex, violence and masculinity in the exercise of power by public office-holders is evident even (perhaps especially) among those who feel free to use religion for political ends.

Several historical-anthropological scholars have long erased the mythical line that tries to separate religion from the secular in Africa. They have demonstrated that religion, politics and the market have occupied the same sphere since the colonial period.<sup>35</sup> Religion greatly influences the development of social justice and ethical norms in our societies. Indeed, there is hardly any African state that strictly applies secularism; the tendency is to adopt an institutionalised and organic union between religion and the state.

When we speak about African sexualities, we are relying on discourses of law, culture and religion and the way that these structure their realities. Disciplinary power, in the Foucauldian sense,<sup>36</sup> fashions African people to conform to the mainstream notions of sexuality, thus 'voluntarily' colluding with patriarchal-capitalist sexual moral standards. One of the most radical examples of such self-surveillance can be seen in the acts of young women voluntarily submitting themselves for virginity testing in search of public approval. In South Africa and Zimbabwe, for example, many young women 'voluntarily' submit themselves for such tests in a bid to gain public approval, respond to demands for communal belonging and

33 H Ahmed-Ghosh 'Introduction: Lesbians, sexuality and Islam' (2012) 16 *Journal of Lesbian Studies* 377-380.

34 C Pereira 'Zina and transgressive heterosexuality in Northern Nigeria' (2005) 5 *Feminist Africa* 75.

35 K Fields *Revival and rebellion in colonial Central Africa* (1985); JDY Peel 'The pastor and the Babalawo: The interaction of religions in nineteenth century Yorubaland' (1990) 60 *Africa* 338-369; JDY Peel *Religious encounter and the making of the Yoruba* (2003); J Comaroff & J Comaroff *Of revelation and revolution: Christianity, colonialism, and consciousness in South Africa* (1991); J Comaroff & J Comaroff *Revelation and revolution: The dialectics of modernity on a South African frontier* (1997); N Etherington 'Recent trends in the historiography of Christianity in Southern Africa' (1996) 22 *Journal of Southern African Studies* 201-219; Meyer (n 17 above).

36 M Foucault 'Truth and power,' in C Gordon (ed) *Power/knowledge: Selected interviews and other writings, 1972-1977* (1980); M Foucault *The history of sexuality, volume I: An introduction* trans R Hurley (1978); M Foucault *Discipline and punish: The birth of the prison* trans A Sheridan (1977).

on account of the dignity and pride associated with it.<sup>37</sup> It is all part of the contradictions between bodily integrity, self-surveillance and religiosity.

It is thereby invaluable in facilitating our critical rethinking of how African people become subjects when we assume the gendered/sexualised identities that are constructed for us within the three power structures under scrutiny. Historically, all over Africa, the 'truth regimes' about sexuality are largely penned by the nib of legislation, custom and religion. The 'master frames' (or scripts) of sexuality that law, culture and religion construct for African people push many who do not conform to the very margins of society – sex workers, rape survivors, the youth, homosexuals, widows, single mothers, people living with HIV, and so forth. Their bodies become sites for political inscription even as they are constituted as the sexual 'other'. For example, the use of the term 'corrective rape' or 'curative rape' to describe sexual violence against African lesbians (to force them into heterosexuality) suggests that: (a) one's sexual orientation needs correcting; and (b) there are circumstances when rape can be warranted. In this respect, Hames discusses the need to change the discourse and speak of 'homophobic rape', refocusing on the punitive and hateful elements of the crime.<sup>38</sup>

In this era of the HIV pandemic, political Christianity and Islam, especially, have constructed a discourse that suggests that sexuality is the key moral issue on the continent today, diverting attention from the real critical moral issues for the majority of Africans, such as financial security or the plunder, misuse, disuse and misappropriation of public funds. The wanton and fraudulent diversion of public funds by the powerful that prevent the masses from accessing basic human needs such as health care, clean water, education, nutrition, shelter, jobs, clothing, information and security is the number one moral issue preoccupying the minds of the average African. Employing religion, culture and the law to flag sexuality as *the* biggest moral issue of our times and dislocating the *real* issue is a political act and must be recognised as such.

To further understand the fundamentalist views that people hold in religion and culture, it is useful to employ the public and social policy analytical framework of the three I's, namely, ideas, interests and institutions:<sup>39</sup> *Ideas* (based on a patriarchal-capitalist ideology);

37 D Lewis 'Gendered spectacle: New terrains of struggle in South Africa' in A Schlyter (ed) *Body politics and women citizens: African experiences* (2009).

38 M Hames 'Violence against black lesbians: Minding our language' (2011) 25 *Agenda* 87-90.

39 B Palier & Y Surel 'Les 'trois I' et l'analyse de l'Etat en action' (2005) 55 *Revue Française de Science Politique* 7-32; H Hecllo 'Ideas, interests and institutions,' in L Dodd & C Jillson (eds) *The dynamics of American politics approaches and interpretations* (1994); PA Hall 'The role of interests, institutions and ideas in the comparative political economy of the industrialised nations' in M Lichbach & A Zuckerman (eds) *Comparative politics: Rationality, culture and structure* (1997).

*interests* (of those with the power to influence policy); and *institutions* (including formal and informal laws, norms, customs and religions plus their enforcement mechanisms) all help to structure the politics of African sexualities and effectuate paradigm shifts therein. In this light, religions can be recognised as 'major sources of social identity and political allegiances, as well as of personal and communal morality for millions of people as well as also for many bodies politic'.<sup>40</sup> Indeed, in Africa where religion is largely a 'way of living', an integral part of culture and identity, this analytical framework assumes critical importance.

The ideological premises from which African religions and sexualities operate dictate a separation of the public and private realms. They emphasise domesticated female bodies designed primarily for reproduction and social production, on the one hand, and public male bodies, on the other. At the same time, because religion in most African states is practically in the public square, it forms part of the mechanism that regulates women's domesticated bodies and sexuality. During the last four decades, three major developments have operated to (re)shape sexualities in Africa: (a) the growth of the human rights and feminist movement; (b) the HIV epidemic; and (c) the cultural/religious fundamentalisms which grew out of a backlash against the rights of women and sexual minorities. The various forces and interests involved lead to gendered contradictions and double standards regarding acceptable sexual behaviour. The past four decades have also seen the growth of 'new social movements' based on gender and sexuality that have raised serious critiques and trenchant resistance to dominant sexuality ideologies.<sup>41</sup> We now move to a discussion of how these developments have played out in law and society.

### 3 The sexual citizen: Between desire and the law

It is against this backdrop that we can now analyse how African people experience and express themselves as sexual beings. Note that gender relations and sexuality (for the two are inseparable) play a crucial role in creating and sustaining patriarchy and capitalism.<sup>42</sup> Male dominance and female subordination, from the level of the family unit to the community and state levels, have to be maintained for the survival and supremacy of the two systems. How does an African subject – particularly one who does not conform to the dominant model of sexuality – articulate their sexuality in the public sphere? How can they strike a balance between claims for rights and freedoms in the public realm and demands for the protection of

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40 P Martin 'Human rights and religion: New thinking' (2012) 34 *Human Rights Quarterly* 900.

41 J Bennett 'Subversion and resistance: Activist initiatives' in Tamale (n 1 above).

42 Tamale (n 1 above).

separate 'private' sexual spaces? How do the law, culture and religion 'unsettle' sexual citizenship?

The need to control and regulate women's sexuality and reproductive capacity is crucial in patriarchal-capitalist societies at two levels. First, as one of the central tenets of the institutionalisation of women's exploitation, such control consolidates male domination through their control of resources and their relative greater economic power over women. The patriarchal family engenders these economic relations whereby the man, as head of the household, exercises control over the lives of women and children who are virtually treated as his property.<sup>43</sup> In this way, heteronormativity forms one of the essential power bases for men in the domestic arena. Capitalism required a new form of patriarchy than that which existed in pre-colonial Africa – one that embraced a particular (monogamous, nuclearised, heterosexual) family form.<sup>44</sup> It is essential that the man's acquired property and wealth is passed on to his male offspring in order to sustain the system of patriarchy. Hence, it becomes important to control women's sexuality in order to guarantee the paternity and legitimacy of children when bequeathing property. To this end, the monogamy of women is required, without necessarily disturbing men's polygynous sexuality. Such double standards are clearly reflected in legislation across Africa: for example, the crime of adultery applying to women and not to men. In fact, the double standards seen here reflect the culture in the Bible where it was acceptable for a Hebrew husband to have sex with any single woman and not commit adultery.<sup>45</sup> The inconsistency in sexual morality is also seen in the offence of prostitution around the continent that penalises only the sellers (the majority being women) and not the buyers (read men) of sex.

At another level, capitalist patriarchal societies are characterised by a separation of the 'public' sphere from the 'private' realm. The two spheres are highly gendered with the former representing men and the locus of socially-valued activities such as politics and waged labour, while the latter is representative of the mainly unremunerated and undervalued domestic activities performed by women. This necessitated the domestication of women's bodies and their relegation to the 'private' sphere, where they provide the necessities of productive and reproductive social life *gratuitously* (thus subsidising capital)<sup>46</sup> and are economically dependent on their male partners.<sup>47</sup>

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43 F Engels *The origin of the family, private property and the state* (1972); M Barrett *Women's oppression today: The Marxist/feminist encounter* (1988).

44 E Zaretsky *Capitalism, the family and personal life* (1976).

45 See Deuteronomy 22:22 & Leviticus 20:10.

46 Also by keeping women in a subordinate position, capitalism can justify and profit from paying women who work outside the home lower wages and employing them under worse conditions than men.

47 Zaretsky (n 45 above); L Nicholson *Gender and history: The limits of social theory in the age of the family* (1986).

In Africa, the process of separating the public-private spheres preceded colonisation but was precipitated, consolidated and reinforced by colonial policies and practices. Where there had been a blurred distinction between public and private life, colonial structures (law, religion) and policies (for example, educational) focused on delineating a clear distinction guided by an ideology that perceived men as public actors and women as private performers. Where domestic work had co-existed with commercial work in pre-colonial satellite households, a new form of domesticity, existing outside production, took over. Where land had been communally owned in pre-colonial societies, a tenure system that allowed for absolute and individual ownership in land took over. At the same time, politics and power were formalised and institutionalised with male public actors. The Western capitalist, political ideology (that is, liberal democratic theory) that was imposed on the African people focused on the individual, submerging the African tradition that valued the collective.

Statutory and religious jurisprudence in Africa, as well as its reinterpreted customary laws, are largely built on a heteronormative-reproductive ideal<sup>48</sup> with a presumed masculine juridical subject. I refer to 'reinterpreted' customs because, during the process of colonisation, many of the entrenched African cultural norms were distorted by the colonialists and their patriarch African collaborators to suit the new form of patriarchy required for the capitalist mode of production.<sup>49</sup> All three current legal regimes construct and reconstruct the African sexual terrain with particular emphasis on 'public morality'.<sup>50</sup> They dictate rules that govern marriage, divorce, adultery, transactional sex, incestuous sex, dress codes, and so forth.

There are several scriptural examples from the Messianic religions to illustrate this point. Most of them find practical expression based on the patriarchal-capitalist interpretations of the Bible and the Qur'an. Messianic religions are well known for their restraining influence on sexuality; relative to ATR, Christian and Islamic doctrines and sermons (as opportunistically and patriarchally interpreted) encourage sexual purity and virtue (especially for women). Whereas ATR generally tolerated practices such as masturbation, fornication, infidelity, adultery, non-penetrative sex, prostitution and homoerotics, the Messianic religions condemned them as sinful.<sup>51</sup> Religious leaders from all denominations are extremely vocal and influential within the sexual surveillance system around the continent. Additionally, the

48 O Oyewumi *The invention of women: Making an African sense of Western gender discourse* (1997); I Amadiume *Reinventing Africa: Matriarchy, religion and culture* (1997).

49 Zaretsky (n 45 above).

50 Imam (n 32 above).

51 See, eg, in the Bible, 1 Corinthians 6:9-10; Matthew 19:9; 1 Thessalonians 4:3; Genesis 38:9-10; Exodus 20:14; Leviticus 19:29; Leviticus 20:13; and Deuteronomy 22:22; and in the Qur'an, Sūrah 24:2-3, 30-33; Sūrah 4:15-16; and Sūrah 7:81-84. In addition, there are several Islamic examples found in *hadith* books, eg Sahih Buhari Vol 3 Book 48 No 817.

religious and political leadership regulate and police African sexualities by highlighting their negative aspects. By keeping sexual pleasure in the background and foregrounding the risks and dangers associated with sexuality, practices of self-surveillance, particularly for women, are intensified. The concepts of sin (religious), taboo (cultural) and criminalisation (legislation) play a crucial role in constructing sexuality and the manner in which African people experience it, ultimately exercising a regulatory and controlling role. Hence we see the implementation of the 'three I's' framework (ideas, interests and institutions) being accelerated into a surveillance mechanism.

A good example of how religion conjoins with politics and law in constructing African women's sexuality is seen in the 2008 Nigerian Bill 'for an Act to prohibit and punish public nudity, sexual intimidation and other related offences in Nigeria'. The Bill was presented by the Chairperson of the Senate Committee on Women and Youth Affairs, Senator Eme Ufot Ekaette, in a bid to regulate women's dress code. It was introduced in the wake of several arrests of women wearing trousers and skimpy clothes in Lagos. Pastor Enoch Adeboye, the general overseer of the Redeemed Christian Church of God, the largest Pentecostal church in the country, had also addressed the issue of moral laxity and social corruption among his congregation, condemning women's clothing and banning his female congregation from wearing trousers and revealing clothes.<sup>52</sup> But it was clause 16 of the Bill that was most revealing:

The roles of religious bodies in moral rejuvenation of our country is by this Act hereby guaranteed:

- (a) The Ministries of Information, Cultures and National Orientation shall develop policies and programmes for the integration of religious bodies in the reformation of the society for moral uprightness;
- (b) Religious bodies shall be encouraged in teaching moral uprightness to its adherents.

Analysing the Bill, Bakare-Yusuf writes:<sup>53</sup>

[T]he senator collapses various distinct issues into a confused and spuriously unified account. First, she assumes that there is a causal relationship between nudity and sexuality. Second, women's sartorial agency is assumed to always be directed at men and is held to be an invitation to an erotic encounter that might often lead to unwanted consequences. Women must therefore be disciplined and protected from any potential masculine sexual terror that acts under provocation. Finally, the senator assumes that the judicial system must be based on a religiously grounded morality, which can be universalised regardless of differences ... The unclothed body, which in many Nigerian cultures was previously read in a non-sexual way, is now overburdened with sexual meaning and anxiety that acts as a prelude to sexual intercourse.

52 See 'Breaking news: No more trousers for redeemed ladies, Adeboye Orders' <http://www.nairaland.com/71063/breaking-news-no-more-trousers> (accessed 5 January 2013).

53 Bakare-Yusuf (n 19 above) 117 122.

The Nigerian Bill illustrates the elaborate system that legal regimes deploy to reward those who conform to the rules and punishes those who transgress them. The text and implementation of the laws largely exercise double standards and discriminate against women.<sup>54</sup> At the same time, it is notable that they also invoke the notions of religious piety and sexual morality in order to justify what is clearly an effort at the reinforcement of patriarchal dominance.

Recalling that Messianic religions stress the impurity and inherent sin associated with women's bodies, Ruether informs us:<sup>55</sup>

Most human religions, from tribal to world religions, have treated woman's body, in its gender-specific sexual functions, as impure or polluted and thus to be distanced from sacred spaces and rites dominated by men.

It is not by coincidence that penal codes around the continent reduce religious sexual transgressions into punishable criminal offences, thereby laying down the laws of sexuality, ensuring that all citizens (believers and non-believers alike) adopt the hegemonic sexual discourse. Through the intersection of religion, the law and reinterpreted customs, the complexity of African sexualities (particularly women's) is instrumentalised, controlled and regulated by the patriarchal state.

Generally classified under the label 'offences against morality', sex laws are enumerated in African penal codes, prohibiting and/or regulating various sexual relations. Not only do these laws universalise sexuality, but they squarely place issues of 'sexual morality' between consenting adults within the realm of the state and the public. Such offences are often prejudicial to women and seek to maintain their subordinate status in society. Most of these laws found their way into African penal codes as direct imports from the legal regimes of former colonial powers. Ironically, while most victimless sex offences have been decriminalised in former colonial metropolises such as Britain, France, Portugal and Belgium, African jurisdictions maintain the moral surveillance regimes with enthusiasm. For example, while the offences of criminal adultery, pornography, prostitution, abortion, sodomy and elopement were all struck out of the penal codes of these Western countries, they remain intact in most of Africa. The legal protection of rape in marriage was also lifted in all these countries.

Equally antiquated are sexist defences available to sex offenders, such as 'mistaken belief'<sup>56</sup> and 'general immoral character'<sup>57</sup> as mitigating factors in rape cases, or the cautionary rule in cases of

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54 Pereira (n 34 above).

55 R Radford Ruether *Sexism and God-talk: Towards a feminist theology* (1983) 7.

56 Mistaken belief is a defence available to individuals accused of sexual offences. If they can establish that they had an honest and reasonable mistaken belief of a fact (eg the age of the victim), they will be let off the hook.

57 Evidentiary rules allow a man accused of rape to put up the defence of 'general immoral character' on the part of the female victim in order to impeach her credibility.

sexual assault that requires corroboration of the evidence provided by the complainant.<sup>58</sup> Under Shari'a, the rules of evidence dictate that the testimony of a female is only worth half of the value of a man's testimony. The injustice built into the evidentiary requirement of 'corroborating evidence' in rape trials (based on the assumption that women and girls fabricate rape) and admissibility of the complainant's sexual history were highlighted in the highly-publicised Jacob Zuma rape trial in South Africa in 2006.<sup>59</sup> Such rules turn the constitutional presumption of innocence until proven guilty in criminal cases on its head. Adultery as a crime or even as a ground for divorce has long been repealed in the countries that exported this law to Africa. However, most of these outmoded sex laws continue to enjoy currency in many African jurisdictions. In its most violent manifestation, stoning-to-death for adultery, for example, is still a legal form of punishment in Northern Nigeria's (mis)interpretation of Shari'a. This issue was thrown into sharp relief by the infamous case of Amina Lawal.<sup>60</sup>

The offence of prostitution criminalises sex work in all but one African nation. Senegal, which legalised prostitution in 1969, keeps a tight regulatory leash on those engaged in the trade. Historically, the reason for such a status in this former French West African colony was not a result of a liberal government, but rather an attempt to protect French colonial administrators from contracting sexually-transmitted diseases (STDs) from native women.<sup>61</sup> The continued total prohibition of sex work in African states is justified on two main grounds: (a) that prostitution promotes social immorality; and (b) that prostitution poses a public health hazard to society, particularly STDs such as HIV. The morality argument buckles in the face of the apparent double sexual moral standards that most African penal codes set for men and women; the law targets and penalises only the sellers of sex (mostly women), letting the clients (mostly men) off the legal hook.

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58 This evidentiary rule requires the evidence of a complainant in cases of sexual assault to be independently corroborated. Hence, the court must always warn itself of the danger of convicting an accused rapist on the uncorroborated evidence of the complainant.

59 In the case of *The State v Jacob Gedleyihlekisa Zuma*, the South African High Court allowed Zuma's lawyers to cross-examine the complainant about her sexual history, thereby violating her rights to dignity, privacy and equality. See J Moloi 'The case of *S v Zuma*: Implications of allowing evidence of sexual history in rape trials' (2006) 18 *South African Crime Quarterly* 25. Also see E Skeen 'The rape of a trial: Jacob Zuma, AIDS, conspiracy and tribalism in neo-liberal post-apartheid South Africa' BA thesis, Princeton University, 2007, <http://www.friendsofjz.co.za/documents/The%20Rape%20of%20a%20Trial.pdf> (accessed 26 December 2012).

60 Pereira (n 34 above).

61 K Ngalamulume 'Le péril vénérien: L'État colonial français et la sexualité à Saint-Louis-du-Sénégal, 1850-1920' ['The venereal peril: The French colonial state and sexuality in Saint-Louis, Senegal, 1850-1920'] in J-P Bado (ed) *Conquêtes médicales: Histoire de la médecine moderne et des maladies en Afrique* [Medical conquests: The history of modern medicine and diseases in Africa] (2006).

Professional public health literature indicates that the continued enforcement of prostitution laws only exacerbates the problem of public health. Indeed, this is borne out by the statistics of HIV adult prevalence rates; 0,7 per cent in Senegal compared to Uganda (6,5 per cent), South Africa (17,8 per cent), Botswana (24,8 per cent), Lesotho (23,6 per cent) and Swaziland (25,9 per cent).<sup>62</sup> The contradiction in the socio-cultural legal regimes is clearly seen in the fact that most African countries now include sex workers among the 'most at risk' populations in their multi-sectoral AIDS strategies, yet they maintain the prohibitive legal regime.<sup>63</sup> Studies on adult sex work on the poorest continent in the world shows that those engaged in the trade do so primarily for economic reasons and to meet the appeal of financial autonomy.<sup>64</sup>

A good example to illustrate how the Messianic faiths supplanted African cultural values pertaining to sexuality is seen in the labelling of same-sex erotic relationships as deviant. Indeed, the strength and influence of the hegemonic sexual discourse is clearly demonstrated in the area of homoeroticism. In Africa, not only does the discourse construct same-sex relations boldly as 'unnatural', but also as distinctly 'un-African' – an import from decadent Western societies. Political religions and reinterpreted culture are the chief inscribers of same-sex sexuality as 'un-African' and deploy it within the discourse of 'sin'. Hence, Africans engaged in same-sex sexual practices are viewed as undeserving aping sinners. In collaboration with state political leaders, the deviant-defining rule is reinforced and firmly entrenched into the public sphere. President Mugabe of Zimbabwe described homosexuals as 'worse than dogs and pigs' and is one of several African politicians who link homosexuality to Western imperialism. Others include Presidents Arap Moi of Kenya, Sam Nujoma of Namibia, Bingu wa Mutharika of Malawi, Olusegun Obasanjo of Nigeria and Abdoulaye Wade of Senegal – all of whom are on record for espousing homophobic bigotry and policies. Legislation provides the final authoritative and normalising framework for punishing and silencing 'deviant' individuals.

A respectable body of scholarship exists that suggests that, prior to the proselytising influence of the Messianic religions, there was a

62 UNAIDS *Report on the Global AIDS Epidemic*, [http://www.unaids.org/globalreport/Global\\_report.htm](http://www.unaids.org/globalreport/Global_report.htm) (accessed 18 December 2012).

63 S Tamale 'Paradoxes of sex work and sexuality in modern-day Uganda' (2009) 15 *East African Journal of Peace and Human Rights* 69-109.

64 African Sex Worker Alliance 'I expect to be abused and I have fear': Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries' Research Report <http://africansexworkeralliance.org/sites/default/files/ASWA%20Report%20HR%20Violations%20and%20Healthcare%20Barriers%2014%20April%202011.pdf> (accessed 12 December 2012); Tamale (n 64 above).

general tolerance, even acceptance, of homosexuality in Africa.<sup>65</sup> The enigmatic history of same-sex relations not only indicates that they were invested with ritualised significance (for instance, for healing, spiritual and magical powers), but they were also accepted as age-structured and erotic sexual pleasure in many African cultures. By re-writing the history of African sexualities, the power elite seek to obliterate same-sex relations in order to bolster their control over the political and social context; to maintain the hegemonic heteronormative hold on women. Such a revision facilitates the control of the nation's very identity. How is it even possible to talk about an African sexual morality on a continent as pluralistic and layered as Africa?

It is against such a background that it is important to appreciate that the current homophobic upsurge and the legal winds of re-criminalisation of same-sex relations that are sweeping across the African continent, from Dakar to Djibouti and from Cairo to Cape Town, are not coincidental, nor are they mere happenstance. Recent history has connected the religious and politically-inspired homophobia in African states to renewal evangelical movements (aligned with the neoconservative right) in the United States. Zambian Reverend Kaoma argues that Africa has become a critical locale for these groups due to the demographic shift of the centre of global Christianity to the global south.<sup>66</sup> He claims that the US Christian Right is using African churches, through the divisive issue of homosexuality, as proxies for US culture war battles. They work hand-in-glove with African religious and political leaders to oppose progress in the rights of lesbian, gay, bisexual and transgendered (LGBT) persons.

Far from being used by the American evangelical movements, as suggested by Kaoma, there is mutual benefit for both groups in spreading homophobic propaganda. The benefits are economic, populist and personality driven, tinged with hypocritical self-righteousness. Homophobia has become simply a political tool used by conservatives to achieve their selfish agendas. The more important point to note is that anti-homosexuality rhetoric legitimises the standing of its proponents in mainstream thought and maintains their social relevance – whether in the West or in Africa. They have whipped up stigma, discrimination and violence against people

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65 M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008); M Epprecht *Unspoken facts: A history of homosexuality in Africa* (2008); S Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies of African homosexualities* (1998); G Herdt 'Representations of homosexuality: An essay in cultural ontology and historical comparison, Parts I and II' (1991) 1 *Journal of the History of Sexuality* 481-505 603-632; B de Rachewiltz *Black eros: Sexual customs of Africa from prehistory to the present day* trans P Whigham (1964). Note that the concept 'homosexuality', which originated and evolved from the West, does not necessarily hold the same historical and contemporary meanings in the African context of same-sex relations and typologies.

66 Kaoma (n 32 above).

engaged (or those perceived to be engaged) in same-sex relations. It is this hysteria which explains why the incidents of so-called 'corrective rapes' of lesbians to turn them into heterosexuals and other homophobic violence are on the rise around the continent.<sup>67</sup>

It is also worth noting that these homophobic gusts blow amidst rising inflation, high unemployment, corruption, repression and increased hopelessness among the African populace. Whether it is the draconian Anti-Homosexuality Bill in Uganda or the Nigerian Same Gender Marriage (Prohibition) Act, all homophobic legislation around the continent enjoys populist support thanks to the hegemonic power structures. It was not accidental that the Ugandan Bill was tabled in parliament against the backdrop of a conference to expose the 'dark and hidden' agenda of homosexuality organised by a fundamentalist religious non-governmental organisation (NGO) called the Family Life Network and funded by right-wing American evangelicals.

All the new Bills around the continent targeting homoerotic relations ride on the back of existing legislative codes that criminalise 'unnatural' sexual relations in 38 of Africa's 54 states.<sup>68</sup> Even in South Africa – the only country on the continent that outlaws discrimination on grounds of sexual orientation – the legislative gains for sexual citizenship are constantly threatened by those who wish to reinstate the hegemonic discourse. In 2002, the then Deputy President Jacob Zuma launched the high-profile 'Moral Regeneration Movement' (MRM) which, as its name suggests, was meant to renew the spirituality and morality of the people of South Africa. The campaign, which was carried into Zuma's current presidential term, is implemented by government in partnership with faith-based organisations. One of its programmes is to build stronger (heterosexual) family structures.<sup>69</sup> Indeed, President Zuma himself is on record as saying that same-sex marriages were 'a disgrace to the nation and to God', a taboo that could not be tolerated in 'any normal society'.<sup>70</sup>

Zuma's remarks go to the core of the negative links between state actors who are intent on constricting the space for civil action and the dominant religious movements, which likewise seek to propagate a particular version of piety and morality. Among African dictatorships, non-conforming sexualities have become a metaphor for immorality and form an effective instrument in the politics of distraction. Instead of blaming political mismanagement and corruption for high unemployment, the high cost of living and poor health facilities, the red herrings will crystallise, *inter alia*, in the form of 'the vice of

67 Hames (n 38 above).

68 J Horn 'Re-righting the sexual body' (2006) 6 *Feminist Africa* 7-32.

69 L Vincent 'Moral panic and the politics of populism' (2009) 45 *Representation* 213-221.

70 L Seale 'Zuma's anti-gay comments lead to backlash' *The Star* 27 September 2006.

homosexuality' or 'the evil of prostitution'. And the red herrings are usually fished out of the sea of morality when political accountability is looming.

The irony seems to be lost on those who condemn same-sex relations as alien, while simultaneously bolstering their arguments with 'foreign' religions such as Christianity and Islam. Is it not the mother of all ironies for a Bible-wielding African politician named 'David' and dressed in a three-piece suit, caressing an iPhone and speaking a colonial language, to condemn anything for its un-Africanness? Another irony lies in the fact that, in African countries, ideological and political groupings, civic associations, cultural, linguistic and religious organisations that are staunchly opposed in their world views quickly rally together in their opposition to non-conforming sexualities. Hence, 'progressive' social groups (for instance, children's rights activists) have become strange bedfellows with the most oppressive regimes in Africa in condemning and attacking such sexualities.

The capacity of African women to control their sexual and reproductive lives and to break free from the chains of domesticity is continually curtailed by law, culture and religion.<sup>71</sup> Despite the staggering abortion-related mortality rates<sup>72</sup> on the continent, unrestricted abortions are only legal in Tunisia (1973), Cape Verde (1983) and South Africa (1996).<sup>73</sup> In 2007, Nigeria's efforts to domesticate the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) were thwarted by the patriarch elite who dismissed the CEDAW Bill as neo-imperialist. The words of Sonnie Ekwowusi echo those of many other African leaders:<sup>74</sup>

My humble submission is that Nigeria must not domesticate CEDAW ... the *raison d'être* of CEDAW, the main thrust of the 30-article CEDAW Convention, the whole live wire of CEDAW is centred in articles 10(h), 12, 14(b) and 16, which are aimed at legalising abortion, sterilisation of women to control population, prostitution, under the soft language of family planning ... I trust that neither the Speaker nor the President of the Senate nor any member of the National Assembly would be deceived to yield to the mounting pressures to domesticate CEDAW and legalise abortion in Nigeria, which run counter to the aspirations of the Nigerian people and the fundamental objectives and directive principles of state

71 S Shaikh 'Morality, justice and gender: Reading Muslim tradition on reproductive choices' in Tamale (n 1 above); S Tamale 'Gender trauma in Africa: Enhancing women's links to resources' (2004) 48 *Journal of African Law* 50-61.

72 The World Health Organisation (WHO) reported that in 2008, the unsafe abortion mortality ratio in Africa was 80 per 100 000 live births, four times higher than the Asian region and eight times as high as in the Latin American and Caribbean regions (see 'Unsafe abortion incidence and mortality: Global and regional levels and trends during 1990-2008' [http://apps.who.int/iris/bitstream/10665/75173/1/WHO\\_RHR\\_12.01\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/75173/1/WHO_RHR_12.01_eng.pdf) (accessed 15 December 2012)).

73 In the three countries, abortions are legally unrestricted during the first trimester of pregnancy and thereafter they can be procured under certain conditions.

74 'Why Nigeria must not domesticate CEDAW' *The Guardian* (Nigeria) 18 July 2007.

policy enshrined in our Constitution. We are obliged to make it known to our countrymen and women that CEDAW is a lying snake which must be killed before it crawls into the house ... Africa is for Africans. We must reject the use of African soil as a dumping ground for all sorts of evil by our neo-imperialists.

Even when African states ratify the hard-won women-friendly Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), many of them do so with a specific reservation to article 14 relating to the 'right to health and control of reproduction'. Article 14 describes abortion as a human rights issue and calls for member states to authorise medical abortions 'in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the foetus'. A faith-based website is dedicated to 'fight against [article 14 of] the Maputo Protocol'.<sup>75</sup> As I argue elsewhere, laws which restrict the abortion of unplanned pregnancies and force motherhood on women, mesh perfectly with the gender roles that the patriarchal-capitalist state has constructed for women, that is, childcare and homecare. It reinforces the basic notions of repronormativity and leaves little time and room for women to pursue goals outside the confines of domesticity. Thus, the *status quo* of 'private/domestic' women and the 'public/political' men is safely entrenched in African societies.<sup>76</sup>

Women are sometimes the unwitting reinforcers of the man-made negative discourse regarding our sexualities and the sexualities of 'failed' masculinities such as homosexuality. In analysing representations of African sexualities, Lewis suggests that the resilience of the reactionary constructions of our sexuality is because<sup>77</sup>

[African] individuals often rely on conservative fictions of self to gain acceptance within communities, societies or nations. Both men and women may collude in perpetuating customary laws and practices. This happens not because women and men gain equal measures of power from these, but because many women are able to derive a seemingly enduring and meaningful sense of self and belonging through them. The survival of fictions of sexuality in the myths by which many live and structure their lives is probably the most obvious indicator of our need to interrogate representations of sexuality today.

Given the taboos, silences and mysteries that surround issues of sexuality, the hegemonic discourse remained the master narrative (or meta-narrative) of African sexualities for decades in post-independence Africa. Even mainstream women's rights activists generally shied away from the topic beyond the classics of sexual violence, disease and population control. The hegemony was broken in 2003 when the African Gender Institute at the University of Cape

75 See <http://www.maputoprotocol.com/the-fight-against-the-maputo-protocol> (accessed 8 January 2013).

76 S Tamale 'Law, sexuality and politics in Uganda: Challenges for women's human rights NGOs' in M Mutua (ed) *Human rights NGOs in East Africa* (2009).

77 D Lewis 'Representing African sexualities' in Tamale (n 1 above) 213.

Town, in collaboration with the Institute of African Studies at the University of Ghana, organised a pan-African conference on mapping African sexualities.<sup>78</sup> In the next section of the article, I turn to some of the ways that African activists have interrogated and challenged (mis)representations of their sexuality in a bid to shift the normative sexual landscape that has been influenced by the dominant religious, cultural and legal discourses.

#### 4 Out of the margins: Challenging structures of sexual oppression

Needless to say, not all Africans passively conform to the hegemonic or dominant sexual discourses constructed by the establishment. Indeed, the turn of the century witnessed the growth of social movements which put up a courageous challenge and provided different inflections to the various 'truths' regarding the sexualities of Africans. African communities which have been pushed to the margins of sexual citizenship, particularly women, have made real attempts to construct a counter-hegemonic sexual discourse through subversion, activism, advocacy and research.<sup>79</sup> Their navigation around hegemonic discourses always throws up critical issues of intersectionality whereby the interactive influences of culture, religion, gender, class, race, ethnicity, age, disability, geographical location, and so forth, on one's sexuality are taken into account. Inevitably, such complexities lead to counter-hegemonic intersectional discourses of sexuality that highlight, for example, the sexual rights of disabled young women or those of poor refugee homosexuals.

Sexual minorities seek to explode the sexual myths based in essentialist attitudes towards African sexuality (as represented in the singular) and demand for inclusion, justice and dignity. The pursuit of social change has coalesced at the national (for example, INCREASE in Nigeria, Sister Namibia in Namibia and Sexual Minorities in Uganda), sub-regional (for example, Justice Associates (JASS) Southern Africa and The Mediterranean Women's Fund in the Maghreb sub-region) and regional (for example, Feminist Africa, African Sex Workers Alliance-ASWA and Pan-African Positive Women's Coalition) levels and happens within the range of formal NGOs, community-based organisations and unregistered grassroots and volunteer groups. Within their diversity, the activist work of sexual minorities across Africa has made serious attempts to build horizontal alliances with mainstream human rights organisations and to vertically link up with international actors (for instance, the African Union (AU), the European Union and the UN).

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78 Tamale 'Researching and theorising sexualities in Africa' (n 1 above); A Mama 'Is it ethical to study Africa? Preliminary thoughts on scholarship and freedom' (2007) 50 *African Studies Review* 1-26.

79 Bennett (n 42 above).

It must be remembered that African political struggles for sexual rights take place against the very powerful institutions of law, culture and religion, and their terms of engagement remain contested. This means that activists have to devise creative ways of advancing their cause. For example, fitting their agenda within the frameworks of public health or development is found to be more strategic for some groups than espousing the language of 'sexual empowerment'.<sup>80</sup> The rights framework is similarly attractive to some sexual minorities on the continent for its holistic approach. This section demonstrates how activists have responded to counter-essentialist 'truths' and hegemonic discourses about African sexualities. Today, sexuality is indeed on the cutting edge of human rights activism and research on the African continent.

In these struggles, the law is a double-edged sword. Even as it is deployed by states to construct the hegemonic discourse and to control and regulate the sexualities of African people, it can also be used by activists to challenge and overturn unjust practices and to effect fundamental change to the *status quo*.<sup>81</sup> Thanks to the activism of legal feminists, several African states have reformed their sex laws to sanction marital rape, the provision of which having been incorporated into the criminal justice systems of South Africa, Namibia, Zimbabwe, Seychelles and Lesotho. Not only do legal feminists and sexual activists around the continent lobby for law reform, but they also engage in strategic action litigation to engender social change in the area of sexuality. For example, laws against special corroboration in rape trials have been abolished by courts in Kenya, Tanzania and Uganda and are facing serious challenges elsewhere.<sup>82</sup>

Strategic litigation has indeed proved to be a powerful, if rather slow, vehicle for challenging 'dangerous' sexuality regulatory laws. In Uganda, feminists successfully challenged a sexist law which criminalised extramarital sexual relations for wives but not for husbands (unless they had sexual relations with another man's wife). Hence, the regulatory agenda behind sex laws and the glaring double standards of sexual morality set out in the law have been clearly exposed. In South Africa, although sex work has not yet been decriminalised, the NGO Sex Workers Education and Advocacy Task Force (SWEAT) won a significant victory when they got the High Court in the Western Cape to declare that the police was in violation of the rights and dignity of sex workers when they arrest them

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80 As above.

81 S Tamale *et al* 'Legal voice: Challenges and prospects in the documentation of African legal feminism' (2011) 15 *Feminist Africa* 1-15.

82 S Bott *et al* 'Preventing and responding to gender-based violence in middle and low-income countries: A global review and analysis' World Bank Policy Research Working Paper 3618 (2005); EK Quansah 'Corroborating the evidence of a rape victim in Botswana: Time for a fresh look' (1996) 28 *Botswana Notes and Records* 231-238.

'knowing with a high degree of probability that no prosecution will follow'.<sup>83</sup> Justice Burton Fourie elaborated:<sup>84</sup>

They [sex workers] are rounded up, arrested, detained and, virtually without fail, thereafter discharged without being prosecuted for any offence. I agree with the contention of applicant, that what the police are therefore targeting is not the illegality of sex work *per se*, but rather the public manifestations of it. The arrests of the sex workers therefore amounts to a form of social control.

In the oft-quoted case of *Sara Longwe v Intercontinental Hotels*,<sup>85</sup> a feminist in Zambia successfully challenged a hotel policy that prevented 'unaccompanied women' to access their hotel. This discriminatory policy was based on the assumption that women that patronised the hotel bar without male company were prostitutes; it was part of the oppressive patriarchal surveillance machinery.

The rights of homosexuals to human dignity and protection from inhuman treatment have been successfully tested in the Ugandan courts.<sup>86</sup> Through a constitutional law test case, the Ugandan penal code provision on adultery was also declared unconstitutional.<sup>87</sup> At the international level, the United Nations Working Group on Discrimination against Women recently urged governments around the world to repeal laws that criminalise adultery.<sup>88</sup> The emphatic statement said in part:

Almost two decades ago, international human rights jurisprudence established that criminalisation of sexual relations between consenting adults is a violation of their right to privacy and infringement of article 17 of the International Covenant on Civil and Political Rights ... Given continued discrimination and inequalities faced by women, including inferior roles attributed to them by patriarchal and traditional attitudes, and power imbalances in their relations with men, the mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality.

The production of shadow reports critiquing the progress of African governments in implementing UN human rights treaties is another

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83 Justice Burton Fourie in *SWEAT v The Minister of Safety and Security* 2009 (6) SA 513 57.

84 As above.

85 1992/HP/765. Also see S Hlupekile Longwe 'Case study: Legal action to stop hotels discriminating against women in Zambia' (2011) 15 *Feminist Africa* 83-104.

86 See the cases of *Victor Mukasa & Yvonne Ayo v AG* [Hct Misc Cause 247 of 2006] and *Kasha Jacqueline, David Kato & Onziema Patience v Rolling Stone Ltd & Giles Muhame* [Hct Misc Cause 163 of 2010].

87 See the case of *Law and Advocacy for Women in Uganda v Attorney-General* (unreported Const Pet 13 of 2005). Also see J Mujuzi 'The Constitutional Court of Uganda and women's right to equality: The "Adultery Judgment"' (2010) 16 *East African Journal of Peace and Human Rights* 474-492.

88 Dated 12 October 2012. See full statement at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E> (accessed 12 December 2012).

strategy that activists have adopted. For example, in 2008 a Nigerian NGO shadow report to the Committee on the Elimination of All Discrimination Against Women (CEDAW Committee) elaborated areas in which maternal health objectives could not be met due to failings in policy, legal and administrative areas.<sup>89</sup> Although such reports hardly cause a ripple in national law reform processes, they certainly draw the attention of the international community. They usually work to supplement other strategies mentioned above.

During the past three decades, reproductive justice has also been realised in some African countries (for instance, Algeria, Botswana, Bukina Faso, Ghana and Ethiopia), where abortion laws have been liberalised in some form.<sup>90</sup> The 1985 Abortion Amendment Law in Ghana, for example, expanded the conditions under which legal abortions could be procured, including pregnancies that result from rape, incest or defilement of a mentally-handicapped woman.<sup>91</sup> Similar conditions were incorporated into the highly-restrictive Ethiopian Criminal Code in 2004.<sup>92</sup> In both cases, advocates that lobbied for law reform worked within the frameworks of public health and human rights.

Creative and unique methods of resistance and contestation of hegemonic sexual discourses have been adopted across the continent, including silence. There is a legitimate silence surrounding the sexualities of African people whose citizenship has been rendered fragile - a silence that is ambiguous and not able to be engaged. But construction of counter-hegemonic discourses of African sexualities is also evident in poetry, novels, art works, theatre, cinema and photography.<sup>93</sup> For example, a documentary film entitled *Not yet rain* was produced in Ethiopia to highlight the evils of unsafe abortions. In that documentary, the mother who lost her daughter to a back alley abortion narrates how the abortionist used a catheter wrapped around an umbrella to perform the procedure on her daughter. In lusophone Africa, feminists have also engaged directly in the political reconstruction of hegemonic discourses on sexuality through critical and historical analyses of works of fiction. In their article 'Cape Verdean and Mozambican women's literature: Liberating the national and seizing the intimate',<sup>94</sup> Fêo Rodrigues and Sheldon analyse novels

89 See <http://www.fidh.org/IMG/pdf/BAOBABNigeria41.pdf> (accessed 26 December 2012). Also see A Godwin 'Women protest against delay in passing Bill on eliminating discrimination' *The Guardian* 16 November 2011.

90 M Berer 'Making abortions safe: A matter of good public health policy and practice' (2000) 78 *Bulletin of the World Health Organisation* 580-592.

91 See Ghanaian Criminal Code (Amendment) 1985 (amending Criminal Code 29 of 1960), secs 58 & 59.

92 See art 551 of the Federal Republic of Ethiopian Criminal Code as amended in 2004.

93 See eg Tamale (n 1 above).

94 I Fêo Rodrigues & K Sheldon 'Cape Verdean and Mozambican women's literature: Liberating the national and seizing the intimate' (2010) 53 *African Studies Review* 77-99.

to demonstrate the link between the political and the intimate arena of sexuality and motherhood.

More radical methods of resistance enlisted by sexual rights activists include the embodied acts of stripping naked - the traditional and powerful 'weapon' that African women have employed for centuries to articulate their anger towards injustice. Historically, women have used their gendered and sexualised bodies to protest extremities, including sexual oppression and their reclamation of their 'undisciplined' bodies. The shocking primordial exposure of women's nudity (or near nudity) in public acts of irreverence and parody has proved quite effective. Lewis argues that subversion of power through spectacle (such as women enlisting their bodies in resistance) signals a form of 'politics' beyond formal politics that undermines the foundations of the hegemony of repressive regimes.<sup>95</sup> Recently in Uganda, a group of women activists stripped to their bras in front of the central police station in the capital city to protest against the sexual assault of a female opposition leader by the police force.<sup>96</sup>

In 2008, hundreds of South African women marched to a commuter taxi stand dressed in miniskirts to protest against harassment for wearing miniskirts.<sup>97</sup> The protest had been sparked off by the treatment of a 25 year-old woman wearing a miniskirt who had been stripped, paraded naked and sexually assaulted by some drivers in Johannesburg.<sup>98</sup> Similar acts have been reported in Malawi, Nigeria, Democratic Republic of the Congo, Sierra Leone, Kenya and a host of other African countries. These 'disciplinary' actions by men are part of the patriarchal surveillance apparatus to preserve the *status quo* and the spectacle performance by activists is a direct rejection of the dominant gender sexual paradigms. The gay pride parades staged in South Africa (and more recently in Uganda) also demonstrate the subversive power against heterosexist-patriarchal oppression.<sup>99</sup> The power in all the embodied subversive examples given above is derived from the reversal of positions where the social superior is subjected to the position of spectator of the 'erotic' spectacle put on by the social inferior. It cannot be denied that those spaces of protest have a counter-hegemonic effect on society.

Finally, one important way that African sexual activists have directly responded to dominant religious discourses is by adopting analytical methodologies that engage in re-interpreting the sacred scripts in the

95 Lewis (n 37 above).

96 The police officers violently squeezed the breast of Ingrid Turinawe in the process of arresting her. See J Njoroge 'Police arrest women activists' *Daily Monitor* 23 April 2012 <http://www.monitor.co.ug/News/National/-/688334/1392006/-/avjh6iz/-/index.html> (accessed 27 December 2012).

97 C Lowe-Morna 'Long and short of the miniskirt debate' *The Argus* 3 March 2008.

98 See 'Hundreds of women in miniskirt protest' *Mail & Guardian* 4 March 2008 <http://mg.co.za/article/2008-03-04-hundreds-of-women-in-miniskirt-protest> (accessed 27 December 2012).

99 Lewis (n 37 above).

holy books, particularly the Bible. This epistemological approach addresses the important question: *How do we know?* Generally referred to as 'African feminist hermeneutics', these feminist biblical scholars use the African context to analyse the Bible from a critical and scientific point of view, in the bid to expose its sexism.<sup>100</sup> Feminist interpretations of the Bible seek to uncover the structures of exploitation and oppression embedded therein, to bring to central focus the role of women in history, theology and ethics, to critique the images of women as portrayed by the writers of the biblical text *and* as explored by its interpreters. African feminist hermeneutics seek alternative theories and methods by which the 'meaning' of the biblical text is generated, and therefrom discuss the relative merits not only of the Bible's interpretation and application, but of the Bible itself. This scholarship is critical in equipping the movement with the liberation language and in offering an alternative discourse from a theological perspective.

## 5 Conclusion: African religion and sexualities – Toward a socio-legal reconstruction

Since the turn of the century, African intellectuals have drawn serious attention to analysing issues of sexuality on the continent. However, the scholarship is still very much a 'work in progress' with a clear paucity of theoretical and empirical investigations that draw links between law, culture, religion and sexuality. It is important to comprehend the central role that the control and regulation of African sexualities plays in maintaining patriarchal-capitalist inequalities in order to strategise for effective social change. The article has attempted to illuminate the essentialist roles that law, culture and religion play in organising the moral, social and economic aspects of African sexualities. The pluralist nature of African legal systems both complicates and refines our understanding of sexualities simultaneously as an oppressive and potentially liberating force.

The article has further drawn attention to the growing presence of fundamentalist or political religions led by clergy with complex, often opaque, connections to key players from outside Africa and within, as well as to national politicians and, critically, the general population. As one of the most important forces that influence the belief systems that

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<sup>100</sup> See eg S Nadar 'Power, ideology and interpretation/s: Womanist and literary perspectives on the book of Esther as resources for gender-social transformation' presentation at the School of Theology, University of Natal, Pietermaritzburg, 2003; M Dube (ed) *Other ways of reading: African women and the Bible* (2001); M Dube *Post-colonial feminist interpretation of the Bible* (2000); DR Mbuwayesango 'Childlessness and women-to-women relationships in Genesis and in African patriarchal society: Sarah and Hagar from a Zimbabwean woman's perspective (Gen 16:116; 21:821)' (1997) 78 *Semeia* 2736; T Okure 'Feminist interpretation in Africa' in E Schüssler Fiorenza (ed) *Searching the Scriptures: A feminist introduction* (1993).

African people have, shaping and defining the deepest values that they hold, religion heavily impacts on issues of sexual morality. The sexual morality espoused by most religions and the law perpetuates gender hierarchies, thereby depriving certain groups of their full citizenship.

When religious fundamentalism worms its way into law, policies, regulations and institutions, it becomes political fundamentalism and targets powerless minorities. Predictably, most of the campaigning and policy efforts of these fundamentalist actors constitute a focused attack against African women's bodily autonomy, integrity and dignity and the criminalisation and persecution of sexual minorities. The power and authority vested in religions and their leaders are often used negatively by people to justify oppressing, excluding, stifling, manipulating and controlling others. And yet, paradoxically, religion has also provided a fulcrum on which arguments for equality, freedom and liberty have been founded. We need only think of the struggles against colonialism, slavery or apartheid, racial discrimination or civil rights to recognise the role that religion-based movements have played in liberation.

Statutory law provides an indispensable tool in the hands of the powerful to maintain the hierarchical *status quo*. However, activists around the continent have demonstrated that the same law can be used to engender social justice and transformation. However, shifting the broader forms of law found in culture and religion requires strategies that are better able to support people's appreciation of their day-to-day lives. Transformation of existing oppressive sexual scripts propped up by religion and culture would require a nuanced approach that seeks to integrate people's local understandings within the human rights discourse.

Some African scholars, such as An-Na'im, have devoted considerable time examining how religion and culture can be legitimately transformed to accommodate issues of human rights and constitutionalism. Given how much African people are entrenched in their traditional and religious beliefs, An-Na'im is convinced that any attempts to pursue reform must be adapted to local conditions.<sup>101</sup> In other words, it is only through people's conviction and agency that social change can happen.<sup>102</sup> Through what he terms 'internal cultural transformation' married to progressive religious interpretations, An-Na'im argues that it is possible to integrate human rights and constitutionalism into culture and religion. We must respect the fact that religion is a place where most Africans anchor their beliefs and values. As such, we should aim at reconstructing religion in

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101 AA An-Na'im *Human rights in cross-cultural perspectives: A quest for consensus* (1992); AA An-Na'im *Islam and the secular state: Negotiating the future of Shari'a* (2008).

102 This reasoning is in line with the perspectives of Western theorists Max Weber and Anthony Giddens.

a manner that makes it relevant to the needs of African people (particularly women) and work to un-learn the dominant hegemonic religious culture and re-learn a new liberating one. Mobilising religion as a source of rights will resonate with many African people.<sup>103</sup> The challenge is for activists and scholars to develop effective praxis-oriented methods of engendering legal and social change in the quest for sexual citizenship in Africa.

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103 G ter Haar *How God became African: African spirituality and Western secular thought* (2009).