

International Human Rights
LGBTQ
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‘Autocratic regimes bolster their domestic authority by promoting nationalist campaigns based on ideals of moral (i.e., sexual) purity, which portray minority sexual orientations as manifestations of Western decadence. Those ideals are depicted as stemming from "ancient traditions," which, however, have little basis in historical fact.... Meanwhile, welcoming the opportunity to show how sensitive they are to "ancient" beliefs, Western States decline to insist on rights for sexual minorities.’¹

Is this a fair assessment of the international community’s approach to LGBTQ rights?

Sexual orientation is as complex as many other issues legislated on an international level, such as race or religion, but it’s omission continues to obscure it behind an impenetrable veil of confusion.² It is classified as too complicated for a universal international law and the refusal to create legislation about non-discrimination based on sexual orientation perpetuates its unacceptability as a topic of international law.³ Any recognition of rights for minority sexual orientations (MSO) is largely symbolic and ineffectual.⁴

I have chosen to examine MSO rights in international treaties, agreements, and resolutions. I will then compare domestic laws for criminalisation of homosexuality and any anti-discrimination measures adopted across four States across political and development conditions. The United States was chosen as an example of a Western Democracy. Russia was chosen as an example of a European/Colonial but autocratic/authoritarian State.⁵ Ethiopia was chosen as a Developing/Non-Western but

¹ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 283

² Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 284

³ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 284

⁴ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 284-85

⁵ BTI 2018 Russia Country Report

<<https://www.bti-project.org/de/berichte/laenderberichte/detail/itc/rus/itr/pse/>> accessed 29 March 2019

never colonized autocracy.⁶ Ghana was chosen as a Developing/Non-Western post-colonial democracy.⁷ Comparing the domestic and international laws with the political situations in each State will show that anti-MSO rights stances happen in all States within nationalist movements to foster an ‘us v them’ mentality to consolidate power. In order to best advocate for MSO rights across the world, perhaps it is best to work on the grass-roots side rather than the top-down through international laws. The United Nations (UN) and other international bodies must reach a consensus before achieving a critical mass for change, which does not look likely to happen for MSO rights for a long time.

International MSO Rights

The Universal Declaration of Human Rights of 1948 (UDHR) does not contain an explicit right to equality for everyone, however it does state that everyone is entitled to exercise the enumerated rights regardless of race, colour (which can accommodate bi-racial individuals), sex (which arguably accommodates gender-non-conforming individuals), language, religion, political, national origin, property, birth, or other status.⁸ Non-discrimination based on MSO is not explicit and many feel that, despite the *prima facie* case for MSO inclusion in “other status,” MSO rights will continue to be ineffectual without explicit inclusion as a new category.⁹ The best argument for the necessity of MSO rights as a new category is the case decisions including MSO under the “other status” provision of the European Convention on Human Rights (ECHR- whose article fourteen was modelled after UDHR article 2).¹⁰ *Marckx v. Belgium*¹¹, *Dudgeon v. United*

⁶ BTI 2018 Ethiopia Country Report

<<https://www.bti-project.org/de/berichte/laenderberichte/detail/itc/eth/itr/esa/>> accessed 29 March 2019

⁷ BTI 2018 Ghana Country Report

<<https://www.bti-project.org/de/berichte/laenderberichte/detail/itc/gha/itr/wca/#management>> accessed 29 March 2019

⁸ UDHR article 2- G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948)

⁹ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 285

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR], amended by Protocol No. 3 (1970), No. 5 (1971), No. 8 (1990), and No. 11 (1998) Art. 14

¹¹ *Marckx v. Belgium*, 31 Eur. Ct. H. R. (ser. A) at 8 (1979)

*Kingdom*¹², and *B v. France*¹³ all found that the list of protected categories was not exhaustive but decided the cases based on the article eight right to privacy.¹⁴ When offered the chance to definitively include MSO rights under article 14 of the ECHR, the Court in *Sutherland v. United Kingdom*¹⁵ stated that it was unnecessary to distinguish between the category of sex and inclusion of MSO in the ‘other status’ category as both led to the same conclusion of unlawful discrimination.¹⁶

Instead of protecting those with MSO from discrimination by the majority social opinion, something international human rights was arguably designed to accomplish, the Court instead defers to the social norms of the State by utilizing the “evolving consensus” doctrine to wait until social and legal norms within the State have accepted MSO as a protected status.¹⁷ The only outliers are instances where a small number of States are ordered to comply with the majority social norms of the remaining States such as Ireland and Cyprus which still follows the trend that the majority of the region must agree before the Court upholds MSO rights.¹⁸ The European regional court system has made more advances for MSO rights than other regional court systems like the Inter-American and African systems.¹⁹ Waiting for such a consensus in the international world is like waiting for it to snow in the Caribbean. It may happen in a climate altered future but you will be waiting a long time, meanwhile those individuals with MSO who are unlucky enough to

¹² *Dudgeon v. United Kingdom*, 126 Eur. Ct. H. R. (ser. A) at 11 (1987)

¹³ *B v. France*, 45 Eur. Ct. H. R. (ser. A) at 18 (1981)

¹⁴ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 286

¹⁵ *Sutherland v. United Kingdom* App. No. 25186/94, 24 Eur. H.R. Rep. (Comm'n Supp.) C.D. at 22 (1997)

¹⁶ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 287

¹⁷ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 288. But see *Norris v. Ireland*, 142 Eur. Ct. H. R. (ser. A)(1988) and *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (ser. A)(1993)

¹⁸ *Norris v. Ireland*, 142 Eur. Ct. H. R. (ser. A)(1988) and *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (ser. A)(1993) cited in Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 288

¹⁹ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 291

be born into States hostile to MSO rights will have to suffer through without any form of reliable international protection.²⁰

The International Covenant on Civil and Political Rights (ICCPR), which contains both a non-discrimination for enumerated rights in art. 2(1) and a blanket equality statement in art. 26.²¹ While it seems that the ICCPR provides better protection for MSO, it faces the same challenges as the UDHR. In both articles, the ICCPR enumerates specific categories for non-discrimination and MSO is not one of them.²² Under the ICCPR, MSO persons would have to argue for inclusion under the ‘other status’ category.²³ Any attempt to add a protocol to codify MSO as a category would face limited ratification and serve as a symbol rather than an effective protection.

The Human Rights Committee (HRC), created by the ICCPR, has issued decisions that mirror the ECHR decisions and found violations of privacy rather than MSO as a protected class.²⁴ The HRC has indicated that it would be willing to protect MSO but that may have little impact on the international community as its rulings are not binding.²⁵ In contrast, the ECHR plays a dominant role in defining human rights as its decisions are binding in international law and influences the law of member states.²⁶

Even within the politically acceptable international realm of women’s rights and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the explicit protection for MSO found little support. In fact, there were

²⁰ See Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 290

²¹ International Covenant on Civil and Political Rights, entered into force Mar. 23, 1976, 999 U.N.T.S. 171

²² Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 292

²³ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 292

²⁴ Communication No. 488/1992: Toonen v. Australia, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/50/D/488/1992 (1994), reprinted in 1 INT’L HUM. RTS. REP. 97 (1994)

²⁵ ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR], amended by Protocol No. 3 (1970), No. 5 (1971), No. 8 (1990), and No. 11 (1998), art. 46. But see HARRIS ET. AL., supra note 26, at 23-36 (noting the divergent effects of Court decisions within the domestic legal systems of the States Parties)

²⁶ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 293

express threats of refusals to sign or ratify the Beijing Declaration and Platform for Action under CEDAW if MSO rights were included.²⁷ With all of this animosity and ambivalence to MSO rights in the international realm, some critics wonder if an international agreement is the correct path to protect these rights.²⁸ The importance of international agreements on human rights relies not on its ability for immediate enforcement, but rather as a reliable generator for customary norms.²⁹ Rights under the UDHR that were once considered pipe dreams have found their way into domestic legislation and even constitutions.³⁰ This generating of international norms affects even those who do not ratify the agreement, like the case of the Declaration on the Rights of Indigenous Peoples.³¹ ‘[T]he problems of indigenous and tribal peoples now count among the well-recognized concerns of leading international human rights bodies, although only fourteen States have ratified the Convention on Indigenous and Tribal Peoples....’³²

If such a small number of ratifications can create a new international norm, the argument is that a specific treaty for protection of MSO rights could achieve significant shifts in international norms if those countries with MSO protections domestically were to ratify such a treaty.³³ In a recent report, Wintemute has identified more than 20 countries whose national laws expressly prohibit discrimination on grounds of sexual

²⁷ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 16th Sess., U.N. Doc. A/CONF.177/20 (1995), U.N. Doc. A/CONF.177/20.Add.1 (1995), reprinted in 35 I.L.M. 401 (1995) [hereinafter Beijing Declaration]

²⁸ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 299

²⁹ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 299

³⁰ South African Constitution that contains an extensive list of human rights, more so than the United States or European Countries.

³¹ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 299

³² See Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (June 8, 1994) (prepared by the Chair-Rapporteur of the Working Group on Indigenous Populations). See also THORNBERRY, *supra* note 81, at chs. 38-41. (The States are Argentina, Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, and Peru. See International Labour Organization, Convention No. C169 Was Ratified by 14 Countries, <http://ilolex.ilo.ch:1567/scripts/ratifce.pl?C169> (last modified March 7, 2000))

³³ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int’l L 299

orientation.³⁴ However, that is counting chickens before they hatch, as the protections provided for MSO in domestic legislation are not necessarily well settled law in those countries. Ratification of such an agreement may prove politically disadvantageous depending on what political party is in power within those States. The political will to protect MSO rights has lagged behind other anti-discrimination ideals despite having a shared history.

The United Nations General Assembly (UNGA) has adopted three resolutions specifically about MSO rights and authorized one report on their status.³⁵ All of these resolutions have come under the HRC and the deterioration in their language is unsettling. In 2011, the resolution listed the UDHR language with ‘other status’ and no explicit category for MSO rights.³⁶ It went on to express grave concern over the violence against MSO persons, request a study on MSO discrimination in member States, and convene a discussion over the eventual study to pursue ‘constructive, informed and transparent dialogue.’³⁷ The United States of America voted for, Ghana and Russia voted against, and Ethiopia was not part of the HRC.³⁸

The 2014 resolution followed the same pattern. It repeated the UDHR language.³⁹ It then proceeded to take a tough stand against cultural relativism as a defense to MSO persecution:

...that while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and

³⁴ See WINTEMUTE, ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 138-40 (1995), at x-xi, 265-67 (supplement on file with author)

³⁵ UNGA Human Rights Council (HRC) Resolution A/HRC/RES/17/19 14 July 2011; UNGA HRC Resolution A/HRC/RES/27/32 2 October 2014; UNGA HRC Resolution A/HRC/RES/32/2 15 July 2016; UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015

³⁶ UNGA Human Rights Council (HRC) Resolution A/HRC/RES/17/19 14 July 2011

³⁷ UNGA Human Rights Council (HRC) Resolution A/HRC/RES/17/19 14 July 2011

³⁸ UNGA Human Rights Council (HRC) Resolution A/HRC/RES/17/19 14 July 2011

³⁹ UNGA HRC Resolution A/HRC/RES/27/32 2 October 2014

cultural systems, to promote and protect all human rights and fundamental freedoms,⁴⁰

It reiterated the grave concern over violence and discrimination before urging the High Commissioner to update the report to include a list of good practices and examples of how to overcome the violence and discrimination.⁴¹ The United States voted in favour, Ethiopia and Russia voted against, and Ghana was not in the HRC at this time.⁴²

The report was published in May of 2015.⁴³ It condemns States that criminalize consensual homosexual acts as violating the international rights to privacy and non-discrimination, the rights typically referenced in court cases to avoid expanding ‘other status’ to include MSO.⁴⁴ At the time, 76 States had laws of this kind- sometimes left over from colonial rule.⁴⁵ It specifically called out ‘anti-propaganda’ laws, like those in Russia, for contributing to the discrimination of MSO persons but cited the rights to expression and assembly instead of MSO rights.⁴⁶ In addition to calling out unjust criminal laws, the report identified keys areas of discrimination against MSO persons, including; healthcare, education, employment, and housing.⁴⁷ Its goal in identifying these

⁴⁰ UNGA HRC Resolution A/HRC/RES/27/32 2 October 2014

⁴¹ UNGA HRC Resolution A/HRC/RES/27/32 2 October 2014

⁴² UNGA HRC Resolution A/HRC/RES/27/32 2 October 2014

⁴³ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 43

⁴⁴ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 43

⁴⁵ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 44

⁴⁶ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 48

⁴⁷ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 50, 55, 58, 59

key areas is to call for anti-discrimination laws to protect MSO rights.⁴⁸ At that time, 8 States have introduced anti-discrimination laws based on MSO.⁴⁹ It concludes by listing specific actions for States to take- enacting hate crime laws, decriminalizing homosexual acts, repealing ‘anti-propaganda’ laws, and enacting anti-discrimination laws.⁵⁰ The global response to this report is evident in the 2016 resolution.

The reaffirmation of the UDHR was buried in the middle of the resolution.⁵¹ It repeated the cultural relativism argument from 2014.⁵² It then does more than shy away from the topic, it blatantly states the cooperation on human rights needs to be ‘objective and non-confrontational’, respect ‘regional, cultural and religious value[s]’, respect domestic actions associated with ‘historical, cultural, social and religious sensitivities’, ‘deploring the use of external pressure and coercive measures against States’, and finally-

Concerned by any attempt to undermine the international human rights system by seeking to impose concepts or notions pertaining to social matters, including private individual conduct, that fall outside the internationally agreed human rights legal framework, and taking into account that such attempts constitute an expression of disregard for the universality of human rights,⁵³

While deploring the violence and discrimination, the resolution did little more than appoint an independent expert to analyze and facilitate dialogue and cooperation among the States.⁵⁴ Even with the excessive language about cooperation and discussion

⁴⁸ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015

⁴⁹ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 72

⁵⁰ UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 78-79

⁵¹ UNGA HRC Resolution A/HRC/RES/32/2 15 July 2016

⁵² UNGA HRC Resolution A/HRC/RES/32/2 15 July 2016

⁵³ UNGA HRC Resolution A/HRC/RES/32/2 15 July 2016

⁵⁴ UNGA HRC Resolution A/HRC/RES/32/2 15 July 2016

rather than condemnation and wielding international pressure for change, Ethiopia and Russia voted against, Ghana abstained, and the United States was not on the HRC at this time.⁵⁵ The progress of MSO specific international resolutions and agreements appears to be moving backwards towards sovereign deference rather than pushing forward to protect MSO rights for all individuals regardless of nationality or location. If cooperation and abandonment of incentives or coercion from international organizations and institutions are embraced then advocates for MSO rights may look for other avenues.⁵⁶

Defining an identity and living in society according to that identity are relatively modern concepts dating to the 19th and 20th centuries.⁵⁷ The perpetuation of MSO as a modern development is referring to this sense of identity and social living.⁵⁸ Engaging in homosexual activity has existed continuously in recorded history, but its prevalence as a social issue has not.⁵⁹ Practicing sodomy or sex with the same gender was not discussed in polite society and those with MSO married a person of the opposite sex and lived as was socially acceptable for that time period.⁶⁰ This continues in many African States today.⁶¹

Socially acceptable sexual norms pre-19th century were largely governed by restrictions on class, labor divisions, conduct, dress, religion, and also sex.⁶² Instead of the one 'scientific' distinction, sex was merely one of many factors and its importance

⁵⁵ UNGA HRC Resolution A/HRC/RES/32/2 15 July 2016

⁵⁶ Julie Mertus, 'The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US' (2007) 29 Human Rights Quarterly 1037

⁵⁷ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 303

⁵⁸ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 303

⁵⁹ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 303

⁶⁰ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 303

⁶¹ Rudolf P. Gaudio, "Male Lesbians and Other Queer Notions in Hausa" in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillan Press LTD 1998); Nii Ajen, "West African homoeroticism: West African Men Who Have Sex With Men" in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillan Press LTD 1998)

⁶² Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305

fluctuated depending on the society.⁶³ For example, in Plato's Athens the defining factor was status, not sex.⁶⁴ Male heads of households could engage in sodomy so long as the other man was of a lesser status.⁶⁵ Attitudes towards sexual conduct as a defining point in identity followed the creation of colonial justifications in the Victorian Era.⁶⁶

Condemnation of MSO followed closely with the creation of the colonial justifications. Both had significant religious justifications and a clear distinction between what constituted as civilized and un-civilized.⁶⁷ Colonized peoples were punished for many 'un-civil deviations' and having a MSO was one of them.⁶⁸ Many States kept penal codes with Victorian-era religious overtones for sex that violated 'the order of nature.'⁶⁹ 'Such a vocabulary has more to do with Victorian readings of the Old Testament Sodom and Gomorrah story than with anything that can clearly be called "traditional African values" or "traditional Asian values."' ⁷⁰ These laws have evolved over time. Laws punishing MSO developed a non-religious justification under Marxism- they were demonized as examples of the decadence of Western privilege or the bourgeoisie.⁷¹

Political leaders who speak of MSO as a Western construct of decadence 'perpetuate the selfsame colonial worldview they accuse Europeans of having imposed. The notion of minority sexual orientation as "un-African" or "un-Asian" is the embodiment of European-style racism... it ignores the histories of thousands of different

⁶³ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305

⁶⁴ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305

⁶⁵ See Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305

⁶⁶ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305-06

⁶⁷ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305-06

⁶⁸ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305-06

⁶⁹ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305-06

⁷⁰ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 305-06

⁷¹ Eric Heinze, 'Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity' (2000) 22 Mich J Int'l L 306-07

African and Asian peoples, throughout thousands of years of history, each with their own changing patterns of social and sexual norms.’⁷²

United States of America

The United States of America (US) has an interesting relationship with MSO rights. It follows along with Americans overall view of human rights, that America already does it well so the human rights laws must be for other States.⁷³ Rather than focus on top-down approaches with international or human rights organizations, the MSO rights movement in the US focused on public self-identification as a means to build grass-roots support.⁷⁴ Instead of relying on equality, dignity, and human rights, the MSO rights movements of the US focused on civil rights.⁷⁵ Using increasing numbers of people ‘coming out’ - being publicly identified as being homosexual, the US MSO movement became a voting bloc.⁷⁶ Using the right to vote and public grass-roots support, MSO movements were able to progressively assert rights slowly over time.

The laws in the US reflect this gradual shift. In 2003, the Supreme Court ruled that laws criminalizing adult, homosexual intercourse violated the due process clause of the Fourteenth Amendment to the United States Constitution.⁷⁷ It is a clear example of utilizing a civil rights/due process argument and the right to privacy rather than equal protection.⁷⁸ Within the opinion itself there were concurring and dissenting opinions - signaling that there was not consensus on the status of MSO rights.⁷⁹ In 2009, sexual

⁷² See, e.g. GREENBERG, DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988), chs. 2-5 cited in Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 *Mich J Int'l L* 307

⁷³ Julie Mertus, ‘The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US’ (2007) 29 *Human Rights Quarterly* 1050

⁷⁴ Julie Mertus, ‘The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US’ (2007) 29 *Human Rights Quarterly* 1052, 54

⁷⁵ Julie Mertus, ‘The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US’ (2007) 29 *Human Rights Quarterly* 1051

⁷⁶ Julie Mertus, ‘The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US’ (2007) 29 *Human Rights Quarterly* 1055, 58-59

⁷⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003)

⁷⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003)

⁷⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003)

orientation was named as a protected category of persons in a federal hate crime law.⁸⁰ Both steps were already taken by the US when the UNGA and the HRC came out with their report advising States to implement these measures.⁸¹

The remaining advice, related to anti-discrimination laws, advances piece-meal in the US. There are current pressures to pass an Equality Act, one that has failed to pass Congress for twenty years, that would standardize anti-discrimination laws at the federal level.⁸² The fact is that MSO rights have never been uncontroversial in the US. And, in many ways, recent years have seen a strong push back. With the various anti-LGBT orders from President Trump, it is doubtful that the President would sign any Equality Act.⁸³ There has also been a rash of cases pitting religious freedom against MSO discrimination, many siding with religious freedom granting an ability to limited discrimination.⁸⁴ In 2011, the US added sexual orientation as a protected class for housing discrimination in public housing.⁸⁵ This provides limited, but not complete protection. More detailed protections are left up to the individual states with only 20 having real protections against discrimination in employment and/or housing.⁸⁶

⁸⁰ The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249, was enacted as Division E of the National Defense Act for Fiscal Year 2010.

⁸¹ See UNGA HRC Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Discrimination and violence against individuals based on

their sexual orientation and gender identity A/HRC/29/23 4 May 2015 para 78-79

⁸² Katy Steinmetz, 'Why Federal Laws Don't Ban Discrimination Against LGBT Americans' TIME (March 21, 2019)

<<http://time.com/5554531/equality-act-lgbt-rights-trump/>> accessed 3 April 2019

⁸³ Katy Steinmetz, 'Why Federal Laws Don't Ban Discrimination Against LGBT Americans' TIME (March 21, 2019)

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⁸⁴ Katy Steinmetz, 'Why Federal Laws Don't Ban Discrimination Against LGBT Americans' TIME (March 21, 2019)

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⁸⁵ 24 Code of Federal Register 5.100 (2011)

⁸⁶ Katy Steinmetz, 'Why Federal Laws Don't Ban Discrimination Against LGBT Americans' TIME (March 21, 2019)

<<http://time.com/5554531/equality-act-lgbt-rights-trump/>> accessed 3 April 2019

President Obama, in 2014, signed an executive order to prohibit discrimination on the basis of sexual orientation in employment by the Federal Government.⁸⁷ He had addressed healthcare with partner visitation and other rights in 2010 by publishing a memorandum in the Federal Register that prohibited Medicare or Medicaid participating hospitals from discriminating on the basis of sexual orientation.⁸⁸ Neither of these created a right for MSO but did show how much influence the President had over the direction of the conversation around MSO rights.⁸⁹ The US is a democracy but the changes in politics and Presidents illuminate the reach of certain nationalist and authoritarian movements. The differences between President's Obama and Trump exemplify the unsettled nature of MSO rights in the US and how it approaches that topic domestically can be extrapolated to how it handles them on the international stage.

Russia

Russia criminalized homosexual sodomy under Article 121.1 of the Russian Federation criminal code until 1993.⁹⁰ It was pressure from the Council of Europe, and Russia's desire to join it, that convinced Russia to make its criminal code equal for MSOs.⁹¹ While the criminal code was modified, there are no anti-discrimination

⁸⁷ Executive Order 13672 Further Amendments To Executive Order 11478, Equal Employment Opportunity In The Federal Government, And Executive Order 11246, Equal Employment Opportunity (21 July 2014)

⁸⁸ President Barack Obama, Presidential Memorandum- Hospital Visitation: Memorandum for the Secretary of Health and Human Services (15 April 2010)

⁸⁹ President Barack Obama, Presidential Memorandum- Hospital Visitation: Memorandum for the Secretary of Health and Human Services (15 April 2010)

⁹⁰ Canada: Immigration and Refugee Board of Canada, Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals, 29 February 2000, RUS33940.E, available at: <https://www.refworld.org/docid/3ae6ad788c.html> [accessed 20 March 2019]

⁹¹ Canada: Immigration and Refugee Board of Canada, Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals, 29 February 2000, RUS33940.E, available at: <https://www.refworld.org/docid/3ae6ad788c.html> [accessed 20 March 2019]

protections for MSO in Russia.⁹² In fact, many MSO persons fear being labeled in public as homosexual and do not report crimes for fear of harassment.⁹³

Vladimir Putin began taking a more nationalist and authoritarian stance for Russia in 2004.⁹⁴ With hard fought gains in post-communist central European countries like Poland or Latvia tentative for economic policies, their social policies- like MSO rights- more closely follow Russia's, '[t]he political will to defend these rights is not as present as in Western Europe.'⁹⁵ 2012 saw Russia enact an 'anti-propaganda' law that banned public discourse of 'gay propaganda' in order to protect children.⁹⁶ It began as city legislation but spread through the whole State and indicates a lack of public support for MSO rights.⁹⁷ MSO has been labeled anti-traditional, a mental disorder, and a symptom of a bourgeois lifestyle.⁹⁸ The low visibility of homosexuality in the public creates a hostile environment where the public at large continues to assume MSO are perverted and foreign.⁹⁹ Increasing neo-nazi and nationalist movements combined with the

⁹² Canada: Immigration and Refugee Board of Canada, Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals, 29 February 2000, RUS33940.E, available at: <https://www.refworld.org/docid/3ae6ad788c.html> [accessed 20 March 2019]

⁹³ Canada: Immigration and Refugee Board of Canada, Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals, 29 February 2000, RUS33940.E, available at: <https://www.refworld.org/docid/3ae6ad788c.html> [accessed 20 March 2019]

⁹⁴ Lien Verpoest, 'End of Rhetories: LGBT policies in Russia and the European Union' (2017) 68 *Studia Diplomatica* 3

⁹⁵ Lien Verpoest, 'End of Rhetories: LGBT policies in Russia and the European Union' (2017) 68 *Studia Diplomatica* 4

⁹⁶ Code of the Russian Federation on Administrative Offenses, Art. 6.2: "Propaganda is the act of distributing information among minors that 1) is aimed at the creating nontraditional sexual attitudes, 2) makes nontraditional sexual relations attractive, 3) equates the social value of traditional and nontraditional sexual relations, or 4) creates an interest in nontraditional sexual relations" *Kodeks ob administrativnykh pravonarusheniyach* <http://www.zakonrf.info/koap/6.21/> ; Lien Verpoest, 'End of Rhetories: LGBT policies in Russia and the European Union' (2017) 68 *Studia Diplomatica* 9

⁹⁷ Lien Verpoest, 'End of Rhetories: LGBT policies in Russia and the European Union' (2017) 68 *Studia Diplomatica* 9

⁹⁸ Lien Verpoest, 'End of Rhetories: LGBT policies in Russia and the European Union' (2017) 68 *Studia Diplomatica* 10

⁹⁹ Lien Verpoest, 'End of Rhetories: LGBT policies in Russia and the European Union' (2017) 68 *Studia Diplomatica* 11

reinforced link between church and authoritarian state makes demonizing MSO easy while advocating for MSO rights butts up against the ‘anti-propaganda’ law which imposes fines from 5,000 to 1,000,000 rubles.¹⁰⁰

The influence of Russia has led many post-soviet States in Eastern Europe to utilize anti-MSO stances for political ends.¹⁰¹ Movements against MSO rights increased their public presence in the lead up to votes for Ukraine to join the European Union (EU).¹⁰² Similarly, a draft ‘anti-propaganda’ law was shelved around the same time and, after the Ukraine successfully negotiated an Association Agreement with the EU, it was permanently shelved.¹⁰³ Armenia caved to anti-MSO pressure and replaced a gender equality law with a man and woman equality law completely scrubbing gender and sexual orientation from the wording.¹⁰⁴ This was accomplished by nationalist movements painting MSOs as a foreign decadence and creating an ‘us v them’ mindset.¹⁰⁵

Ethiopia

Articles 629 and 630 of the Criminal Code of Ethiopia criminalize homosexual acts with up to fifteen years of ‘rigorous imprisonment.’¹⁰⁶ With criminal laws still on the books, it is easy to see why there are no anti-discrimination laws in Ethiopia. Political, social, and religious leaders in Ethiopia frequently denounce MSOs as ‘Western proxies seeking to subvert Ethiopian cultural values’.¹⁰⁷ Many continue to stoke the ‘us v them’

¹⁰⁰ Lien Verpoest, ‘End of Rhetories: LGBT policies in Russia and the European Union’ (2017) 68 *Studia Diplomatica* 11

¹⁰¹ Lien Verpoest, ‘End of Rhetories: LGBT policies in Russia and the European Union’ (2017) 68 *Studia Diplomatica* 12

¹⁰² Lien Verpoest, ‘End of Rhetories: LGBT policies in Russia and the European Union’ (2017) 68 *Studia Diplomatica* 12

¹⁰³ Lien Verpoest, ‘End of Rhetories: LGBT policies in Russia and the European Union’ (2017) 68 *Studia Diplomatica* 12

¹⁰⁴ Lien Verpoest, ‘End of Rhetories: LGBT policies in Russia and the European Union’ (2017) 68 *Studia Diplomatica* 13-14

¹⁰⁵ Lien Verpoest, ‘End of Rhetories: LGBT policies in Russia and the European Union’ (2017) 68 *Studia Diplomatica* 14

¹⁰⁶ The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004

<www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf> accessed 29 March 2019

¹⁰⁷ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., *State Sponsored Homophobia 2016: A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva; ILGA, May 2016) 66

as a way to preserve authority and anti-Western sentiment by purporting traditional Ethiopian values as heterosexual when it is likely that modern criminal laws and anti-MSO sentiment is the true Western influence.

Northern Ethiopia remained unconquered by European colonists in the nineteenth century.¹⁰⁸ While Christianity had spread from northern Ethiopia to the southern areas in the fourteenth centuries, southern Ethiopia- and Maale in particular, remained and developed independently.¹⁰⁹ ‘The south- archaic and traditional- was isolated from the rest of Ethiopia, and Ethiopia- un-colonized and free- was as independent of the rest of the world as possible in the twentieth century.’¹¹⁰ Even within this romantic notion, outside influences like Christianity, capitalism, and education in foreign languages encroached and affected Maale and Ethiopia as a whole.¹¹¹

Work in Maale was so engendered- typified as female work versus male work- that it had the power to alter a person’s gender.¹¹² If a man regularly engaged in ‘female work’ then they were seen as female or feminine by the society.¹¹³ These biological males who changed gender were called ‘*ashtime*’ and, in the modern sense, engaged in cross-dressing and homosexual relationships.¹¹⁴ While it is not clear if these individuals were homosexual or transgender, it is clear that traditional society in parts of Ethiopia accepted male/male relationships. But since this truth is inconvenient for those trying to portray MSOs as Western defects it is forgotten in public history.

Ghana

¹⁰⁸ Donald L. Donham, *Work & Power in Maale, Ethiopia* (2nd edn, Columbia University Press 1994) 2

¹⁰⁹ Donald L. Donham, *Work & Power in Maale, Ethiopia* (2nd edn, Columbia University Press 1994) 2

¹¹⁰ Donald L. Donham, *Work & Power in Maale, Ethiopia* (2nd edn, Columbia University Press 1994) 2

¹¹¹ Donald L. Donham, *Work & Power in Maale, Ethiopia* (2nd edn, Columbia University Press 1994) 3

¹¹² Donald L. Donham, *History, Power, Ideology: Central Issues in Marxism and Anthropology* (Cambridge University Press, 1990) 92

¹¹³ Donald L. Donham, *History, Power, Ideology: Central Issues in Marxism and Anthropology* (Cambridge University Press, 1990) 92

¹¹⁴ Donald L. Donham, *History, Power, Ideology: Central Issues in Marxism and Anthropology* (Cambridge University Press, 1990) 92

Ghana's criminal code does not mention anything about homosexuality, but it does, however, contain provisions about 'unnatural carnal knowledge' that may have been used to imprison individuals with MSOs.¹¹⁵ Ghana maintains in the international realm that its democratic constitution enshrines non-discrimination and equality for all its citizens.¹¹⁶ However, it also places colonial era practices and laws as well as religious freedom above MSO rights.¹¹⁷ Ghana has also been resistant to any attempts by Western Europe to influence their views on MSOs using aid packages.¹¹⁸ Ghana's President John Atta Mills stated that Ghana's culture related to MSOs were different than the UK.¹¹⁹ While he was right in some ways, he was alluding to Ghana's anti-MSO stance when the true history is more complex.

Hausa is 'the most widely spoken language in West Africa' where Ghana is located.¹²⁰ Hausaland, areas that speak Hausa and have a predominantly Muslim religious foundation, have a tradition of men dressing as women to engage in sexual relations with the same sex without outing them to the community.¹²¹ This practice is so culturally engrained that it has its own word- '*yan daudu*'- which translates to homosexual in

¹¹⁵ Criminal Code, 1960 (Act 29), as amended to 2003

<www.wipo.int/wipolex/en/text.jsp?file_id=339612>; International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., State Sponsored Homophobia 2016: A world survey of sexual orientation laws: criminalisation, protection and recognition (Geneva; ILGA, May 2016) 68

¹¹⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A., State Sponsored Homophobia 2016: A world survey of sexual orientation laws: criminalisation, protection and recognition (Geneva; ILGA, May 2016) 68

¹¹⁷ Report of the Working Group on the Universal Periodic Review: Ghana, A/HRC/22/6, 13 December 2012, at para 75, see: www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC226_English.pdf

¹¹⁸ 'Ghana refuses to grant gays' rights despite aid threat' BBC (2 November 2011) <<https://www.bbc.co.uk/news/world-africa-15558769>> accessed 29 March 2019

¹¹⁹ 'Ghana refuses to grant gays' rights despite aid threat' BBC (2 November 2011) <<https://www.bbc.co.uk/news/world-africa-15558769>> accessed 29 March 2019

¹²⁰ Rudolf P. Gaudio, "Male Lesbians and Other Queer Notions in Hausa" in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 115

¹²¹ Rudolf P. Gaudio, "Male Lesbians and Other Queer Notions in Hausa" in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 116

English.¹²² The language also includes terms for ‘men who seek men’ - *maza masu neman maza*.¹²³ Hausa *maza masu neman maza*, or men who identify as gay, do not have an understanding of homosexuality or gay culture in Western States.¹²⁴ This is blatantly apparent in the differences in defining gay. In Western States, homosexuality is an inherent aspect of the individual.¹²⁵ A person *is* gay. In Hausa cultures, homosexuality is an act separate from personal identity.¹²⁶ A person *does* homosexual acts. The slang terms for men who have sex with men follows this underlying logic.¹²⁷

Masu harka is ‘those who do the business’ and *masu yi* is ‘whose who do it.’¹²⁸ Both emphasise the act rather than a predisposition or identity. Further differences exist in the definition and sanctity of marriage.¹²⁹ Many *maza masu neman maza* get married to women and have children.¹³⁰ Marriage is a social and cultural imperative divorced from

¹²² Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 116

¹²³ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 116

¹²⁴ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 117

¹²⁵ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 117

¹²⁶ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 117

¹²⁷ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 118

¹²⁸ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 118

¹²⁹ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 118

¹³⁰ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 118

sexual acts or desires.¹³¹ In Western States, such behaviour is commonly called ‘closeted’ due to the understanding that homosexuality is more than an act, but a deeper part of a person’s identity.¹³²

‘*Yan daudu*’ do share some similarities with Western gay men in that their behaviours and work are typically reserved for females but they do not cross-dress like those recorded homosexual traditions in other parts of Africa or the transvestites of Western States.¹³³ Due to the taboo nature of homosexual interactions, ‘*yan daudu*’ are often found in social settings with female prostitutes and can be seen to serve as ‘pimps’ or intermediaries to take men to meet female sex workers.¹³⁴ Perhaps this helps to keep homosexual relations secret as both straight men and *maza masu neman maza* can be seen interacting regularly with ‘*yan daudu*’.¹³⁵ In Hausa society, the more feminine ‘*yan daudu*’ face more open discrimination and aggression than the masculine *maza masu neman maza*.¹³⁶ This indicates that demonization or persecution is based on identifiable ‘otherness’ rather than the underlying behaviours that are called out in the laws.

Colonialism, Victorian customs, and Christianity are all Western influences that have contributed to the social unacceptability of discussions on sex or sexuality in Ghana.¹³⁷ Even among tight-knit groups of friends, jokes and discourse about sex retain a

¹³¹ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 118

¹³² Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 132

¹³³ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 119

¹³⁴ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 119

¹³⁵ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 119

¹³⁶ Rudolf P. Gaudio, “Male Lesbians and Other Queer Notions in Hausa” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 122

¹³⁷ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 129-30

code of propriety by heavy use of euphemisms.¹³⁸ Decency, to Ghanaians, requires that none speak of their partner- the quality of the act is all that is open for discussion.¹³⁹ The only time homosexuality is discussed is when someone exhibits gender non-conformity.¹⁴⁰ Feminine men in Ghana are called *kojobesia*, which loosely translates as ‘man-woman’ in English.¹⁴¹

English boarding schools, particularly sex-exclusive or same sex boarding schools, were brought to Ghana during colonization and have continued.¹⁴² In both Ghana and England, these schools have a strong social current of homosexual activity.¹⁴³ Perhaps it is this tradition of same sex boarding school relationships that have contributed to Ghanaians viewing public displays of hand holding between members of the same sex as acceptable.¹⁴⁴ It is also true that women in Ghana receive much less scrutiny for public displays of affection towards the same sex than men.¹⁴⁵ ‘Brotherly warmth’ in Ghana extends to holding hands or even dancing with other men, but intimacy further than that

¹³⁸ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 129-30

¹³⁹ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 130

¹⁴⁰ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 130

¹⁴¹ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 130

¹⁴² Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 130

¹⁴³ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 130

¹⁴⁴ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

¹⁴⁵ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

carries homosexual connotations and condemnation.¹⁴⁶ This line between heterosexual and homosexual behaviour is much different in Western States where even those acts of ‘brotherly warmth’ are viewed as gay.¹⁴⁷

Homosexual acts are considered separate from personal identity and, provided they remain private and not visible in society, are not often discussed in social settings.¹⁴⁸ Lack of discussion means less open condemnation but also can make it easier to demonize homosexuals. Men who engage in homosexual acts frequently deny they are gay or that there are homosexuals in Africa.¹⁴⁹ However, denial of self-identification or silence in social realms does not equal absence of homosexuals in Ghana.¹⁵⁰

Young men, from puberty to around thirty years old and before marriage, often ‘play around’ in a homosexual manner that society tacitly accepts as a phase that lets off steam without endangering young women’s virginity (that coveted paradigm of virtue).¹⁵¹ This tacit acceptance of private homosexuality, even among those in public heterosexual relationships and marriages, contributes to an African view of homosexuality as an acceptable act that provides a reassuring and intimate bond with their partners while publically denying gay identity and, thus, any rights for non-conforming LGBT+ individuals (those who are exclusively homosexual).¹⁵²

¹⁴⁶ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

¹⁴⁷ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

¹⁴⁸ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

¹⁴⁹ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

¹⁵⁰ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 131

¹⁵¹ Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 132-33

¹⁵² Nii Ajen, “West African homoeroticism: West African Men Who Have Sex With Men” in Stephen O. Murray and Will Roscoe (eds.) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (Macmillian Press LTD 1998) 133-35

Conclusion

International reaction to MSO, despite such discrimination having clear ties to colonialism that the Western world is actively trying to dismantle, follows a different path than that of race, religion, or sex discrimination.¹⁵³ ‘Never did those bodies take the position that, for example, racial discrimination merely represents a given society's unique or sacred values, which should not be judged from outside; and moral or religious objections to women's rights did not prevent the drafting of the longest international human rights instrument in history, the Beijing Declaration, accompanied by ongoing UN efforts to realize their normative ideals in practice.’¹⁵⁴ Even European States, with Europe being perhaps the best region for MSO rights, heavily condemn MSO as deviant aberrations that should not be normalized.¹⁵⁵ Like the views on MSO identity in Africa, perhaps the best way around cultural relativism concerns is to focus on behaviors rather than try to strong arm States into accepting politically, socially, and/or religiously divisive new identity status.¹⁵⁶

I believe this distinction is due to the lack of consensus surrounding MSO rights in the Western world rather than the Western world showing sensitivity to ancient traditions. It is clear that the legal traditions opposing MSO rights are clearly Western colonial in origin and the Western world has had no qualms about dictating another State's actions regarding other colonial remnants. No, it is the use of MSO condemnation as a handy political tool to define a voting base through opposition to relatively new social developments (such as right to family planning and gay marriage) that prevent a level of domestic consensus among Western States that would translate to international consensus. MSO rights are ‘the bargaining chip par excellence in the negotiation between global human rights and cross-cultural "sensitivity.”’¹⁵⁷ Opposition to MSO rights is a

¹⁵³ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 309

¹⁵⁴ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 309

¹⁵⁵ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 301

¹⁵⁶ Julie Mertus, ‘The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US’ (2007) 29 Human Rights Quarterly 1064

¹⁵⁷ Eric Heinze, ‘Sexual orientation and international law: A study in the manufacture of cross-cultural sensitivity’ (2000) 22 Mich J Int'l L 309

hallmark of autocratic or nationalist movements in any State. Ancient traditions in developing countries have a much more complex history with MSO persons than is maintained by theories of homosexuality as Western decadence. Both of these things are true, but the last- that Western States decline to insist on MSO rights out of sympathy and sensitivity to ancient belief is not. Instead, Western States themselves lack consensus on MSO rights and frequently feign such sensitivity to use MSO rights as leverage to achieve other political and foreign policy aims.