

*Problematizing the diffusion of LGBTI rights in Africa:
The case of Malawi*

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A minor dissertation submitted in partial fulfillment of the requirements for the award
of the degree of Master of Social Science

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2013

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Abstract

African countries have increasingly come under fire for the maltreatment of homosexuals by those within the state and society. The region is rife with instances of homophobia manifesting themselves in acts of discrimination or even violence. In response to this international actors have sought to urge African countries to protect the rights of sexual minorities. However, the endeavour has proved somewhat unsuccessful as African nation states continue to resist the diffusion of the Lesbian, Gay, Bisexual, Transsexual, Intersex (LGBTI) norm. This study seeks to highlight the gaps within the Norm Life Cycle model as developed by Martha Finnemore and Kathryn Sikkink by exploring the difficulties faced in diffusing the LGBTI norm into Malawi.

The rejection of the LGBTI norm by Malawians at societal level shows an impediment to norm diffusion that is not considered by the Norm Cycle model. The case of Malawi illustrates the limitations of the model and, in turn, the need for a lens that takes into consideration the specificities at the local level. This dissertation shows that there is a need to analyse the 'norm takers' – one must take into account the variances between nation states in terms of such facets as culture, tradition and identity. It will utilise the rejection of the norm by Malawian society to argue for a more localised understanding of norm diffusion.

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Acronyms

BPfA: Beijing Platform for Action

CAA: Council of African Apostles

CEDAW: Convention on the Elimination of all Forms of Discrimination against Women

ICCPR: International Covenant of Civil and Political Rights

IGLA: International Lesbian, Gay, Bisexual, Trans and Intersex Association

IGLHRC: International Gay and Lesbian Human Rights Commission

LGBTI: Lesbian, Gay, Bisexual, Transsexual and Intersex

OAU: Organisation of African Unity

MDG: Millennium Development Goals

NEPAD: New Partnership for Africa's Development

UN: United Nations

UNHCR: United Nations Human Rights Commission

Chapter One: Introduction

1.1 Introduction and problem statement

Africa is a continent that has often been portrayed as problematic in terms of human rights protection, with many states and individuals within the region being accused of human rights violations. The issues surrounding various rights (women's rights, indigenous rights and children's rights for example) are ones that are often debated and explored within the political, social and academic realms. However, of all the human rights within Africa none is more contested (or less protected) than those of the Lesbian Gay Bisexual Transsexual Intersex (LGBTI) persons on the continent. In the past two decades, the legal recognition of same sex couples has become one of the prominent and contentious issues within the civil rights realm globally.¹ This is due, in large part, to the political and cultural debates triggered by policy proposals that seek to redefine core institutions such as marriage and the family unit. The issue of these rights became an increasingly 'hot topic' as more and more countries have sought to further the 'Gay Rights Agenda' both nationally and internationally through such bodies as the United Nations.² More and more, LGBTI rights have been recognised as part of the international body of 'human rights' with various bodies such as Human Rights Watch³ and the United Nations⁴ calling for the protection of the rights of sexual minorities. The call has come not only from organisations but many Western countries too, which have used various platforms to call for protection of the LGBTI rights as these rights remain under threat in various parts of the world.

Clarification on the term LGBTI and 'homosexual'

Within Africa (and in other parts of the world including western countries) there is a common misconception that the LGBTI banner is synonymous with being homosexual. This has meant that all alternative sexualities face persecution in the same manner as they are all deemed

¹ Fernandez, J., 'Supranational Cultural Norms, Domestic Value Orientations, and the Diffusion of Same-Sex Union Rights in Europe, 1988–2009' *International Sociology*, (2012), p. 3.

² Volsky, I., 'UN Secretary General calls on nations to end LGBTI discrimination at historic Human Rights Council hearing' *Think Progress*. <http://thinkprogress.org/LGBTI/2012/03/07/439543/un-secretary-general-calls-on-nations-to-end-LGBTI-discrimination-at-historic-human-rights-council-hearing/?mobile=nc> (accessed, 24 March 2012)

³ Human Rights Watch, 'Lesbian, Gay, Bisexual and Transgender Rights' *LGBTI Rights*. <http://www.hrw.org/LGBTI> (accessed, 23 March, 2012).

⁴ Jordans, F. 'U.N. Gay Rights Protection Resolution Passes, Hailed As 'Historic Moment' *Huff Post World* (June, 2011) http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes-_n_879032.html (accessed, 24 March 2012).

‘homosexual’ in nature. It is important to clarify that terming all persons who fall under the banner LGBTI as homosexual is erroneous as this grouping includes those who do not engage in homosexual (same sex) relationships. For example a transsexual man (the ‘T’ in ‘LGBTI’) may fall under the banner but does not engage in sexual relations or romantic relationships with men. As he does not identify as a woman but as a man he can then be termed ‘straight’. Thus one cannot claim that falling under the LGBTI banner is synonymous with being ‘homosexual’. The terms (LGBTI) however have been utilized within the African context to describe all persons who are not heterosexual in the ‘classic’ sense (born of a specific sex and engaging in sexual relations with persons of the opposite sex) thus including sexualities such as Intersex and Transsexual.

It is this misunderstanding of alternative sexualities and the role they play in shaping individual identities within the African continent that leads to notions of ‘imperialism’ and ‘not understanding the African way of life’. All persons who fall under the banner of being Gay, Lesbian, Transsexual, Bisexual face discrimination within Africa as these alternative sexualities are all seen as being ‘homosexual’ in nature, with no cognisance given to the differences between them. These and other misconceptions have led to wide spread discrimination of LGBTI persons under the banner that ‘homosexuality is un-African.’

It is within this context that there have been attempts by various states and organisations to further LGBTI rights with an express focus on Africa. An array of international actors have sought to compel African states to repeal their anti-homosexuality legislation and curb discrimination against LGBTI persons within their borders. A prominent example of such an attempt is that of the United Kingdom threatening in 2011 to suspend aid to Uganda over their ‘Anti-Gay Bill’, whilst warning other countries that criminalising homosexuality could lead to aid cuts.⁵ The Office of the Prime Minister clarified that the threats made to suspend aid were made in the context of the British government’s efforts to protect human rights around the world.⁶ In a statement the Office said that ‘the UK Government is at the forefront of work to promote human rights around the world, and [would] regularly criticize governments [which] violate those rights’.⁷ This is just one example of the ways in which

⁵ Wanambwa, R., ‘Uganda: UK Premier Threatens to Suspend Aid Over Anti-Gay Bill’ *AllAfrica.com* (Oct, 2011) <http://allafrica.com/stories/201110310862.html> (accessed, 31 January 2011).

⁶ Fox979online, ‘Cameron's office clarifies statement on gay rights’ *Fox979online.com* (Nov, 2011) http://www.fox979online.com/index.php?option=com_content&view=article&id=177:camerons-office-clarifies-statement-on-gay-rights&catid=1:general-news&Itemid=1 (accessed, 31 January 2012).

⁷ Ibid.

international actors have sought to get Africa to ‘tow the line’ in terms of LGBTI rights and one of the ways in which the norm pertaining to sexual orientation is being diffused.

Actions such as this, however, been met with great resistance by many African countries. Often those who are condemned for their violation of LGBTI rights have retorted with accusations of imperialism and accused those pushing for the rights of having little understanding of what it is to be African or how ‘things are done here’.⁸ International advocates of LGBTI rights have been accused of having little sensitivity and understanding of local customs and traditions. The reaction by African societies to the spread of the LGBTI norm raises a red flag to possible failings of the norm diffusion model.

This model was first introduced by Martha Finnemore and Kathryn Sikkink⁹ and sought to track the progression of norms within the international system. It seeks to show the origins of norms, the mechanisms by which they exercise influence and under which conditions they become influential within world politics.¹⁰ There is a standing notion that norms are easily spread. The African experience of LGBTI norm diffusion can be seen to challenge the notion of ‘universally accepted’ norms and has shown the need to explore further what happens once a norm enters the domestic realm.

The “grand supposition that the norms within the [Universal Declaration of Human Rights] are valid moral norms...worthy of implementation”¹¹ is what forms a large part of the critique against Finnemore and Sikkink’s model of norm diffusion. To assign a ‘universal’ quality to a norm denies states the ability to have a unique experience with it, assigning all states a homogenous identity. A state’s unique interaction with a norm, due to localized factors, can be argued to inform how well it can be internalized in the form in which it is assimilated. There have therefore been calls by theorists within the field of norm study such as Jeffery T. Checkel¹² who have called for a more localized look at norm diffusion which would take into consideration possible contextual challenges brought about in the differences

⁸ Amory, D. P., ‘Homosexuality’ in Africa: Issues and Debates,’ *Journal of opinion* Vol. 25 No. 1 (1997) pp. 5-10

⁹ Finnemore, M., and Sikkink, K., ‘International Norms Dynamics and Political Change’, *International Organisations*, Vol. 52 No 4. (1998) pp. 887-917, p. 895.

¹⁰ Finnemore and Sikkink (note 9) p. 888.

¹¹ Marsh, C. and Payne, D., ‘The Globalization of Human Rights and the Socialization of Human Rights Norms’ *Marsh-Payne.FIN.DOC* (2007) <http://lawreview.byu.edu/archives/2007/3/4MARSH-PAYNE.FIN.pdf>, p. 669 (accessed, 27 April 2012).

¹² Checkel, J.T, ‘Norms, Institutions and National Identity’ *International Studies Quarterly*, Vol. 43 No. 1 (1999) pp. 81-114, p. 114 also see Acharya, A., ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ *International Organisation*, Vol. 58 No. 2 (2004) pp. 239-275.

between nations. These differences in culture, belief, traditions and identity play an important role in how effectively a norm will be diffused.

1.2 Research aim

The study aims to pinpoint the gaps within Finnemore and Sikkink's¹³ norm diffusion model by exploring the difficulties in diffusing the LGBTI norm into Malawi. The argument shall be made that there is a need for a lens that takes into account the local context and the specificities they possess.

The choice of Malawi as a case study is due to the fact that one is able to witness the effects that a negative reaction from society can have on attempts to diffuse a norm. Had it not been for these impediments to the diffusion of the LGBTI norm, Malawi would have been the second country, after South Africa, to legalise homosexuality on the continent.¹⁴ The case of Malawi allows one to track the possibility of diffusion occurring (according to dominant norm diffusion frameworks) and the eventual halt of that diffusion due to societal factors. It is one of the only African countries in which one is able to track both a possible acceptance of a norm and the eventual withdrawal of that acceptance.

The dissertation will also seek to add to the literature challenging the notion that norms can be seen as universally good by all nation states, allowing for them to be easily diffused and incorporated into the local realm. In order to tackle the main question (what are the main drawbacks in the current Norm Diffusion Cycle framework) the following sub questions will be addressed:

- To what extent has the human rights framework expanded to include LGBTI rights?
- What obstacles within Africa hinder the spread of the LGBTI norm?
- What aspects of Malawian society (historical, cultural, identity based) have hindered the diffusion of the LGBTI norm?
- How can the current norm diffusion model be adapted to better understand these hindrances?

¹³ Finnemore and Sikkink (note 9) p. 895.

¹⁴ BBC, 'Malawi to overturn homosexual ban, Joyce Banda says' *BBC News* (2012) <http://www.bbc.co.uk/news/world-africa-18118350> (accessed, 15 October, 2012).

Caveat against over-generalisation

The problems faced by the African continent within the realm of human rights appear similar, whether one is speaking about issues concerning civil society, governments or litigation and implementation. Despite the ability to identify these resemblances it must be noted (especially for the purposes of this study) that there are variances amongst the states in terms of how human rights manifest themselves. The regional protection of human rights within the continent manifests itself in different ways within the various countries and one must be cognisant of the differences between nations states within the region. One experiences different levels of formal protection within African states. An example is the much higher level of formal legal protection given to women within the South African context, which is noticeably absent within the Congolese legal frame work.¹⁵ This is a notion that holds true even within the realm of in terms of LGBTI rights within the continent. Although the situation faced by LGBTI persons within the continent seems similar amongst all countries there are variances in the way LGBTI experience life.

1.3 Theoretical framework

The work of Constructivists has focused primarily on the role of ideational factors within the international realm. This dissertation will utilise the body of work produced by constructivist theorists Finnemore and Sikkink on norms¹⁶ as a starting point for the critique of the model of norm diffusion processes. It will also seek to build on the work begun by those who call for a deeper understanding of local context and increased focus on ‘norm takers’.

Finnemore and Sikkink seek to outline and analyse the life cycle of norms and explain how these norms influence and change the behaviour of states (norm agreement) throughout their cycles. The interest of the two lies in empirical research on social construction processes and norm influences on international politics. Their work tracks the emergence and growth of norms, mapping out three stages: norm emergence, norm cascade (which involves broad norm acceptance) and internalization.¹⁷ The first two stages of this cycle are separated by

¹⁵ The Economist, ‘Walking several paces behind’ *The Economist* (2010) <http://www.economist.com/node/17204625>. (accessed, 18 July 2012).

¹⁶ Finnemore and Sikkink (note 9) 891.

¹⁷ Finnemore and Sikkink (note 9) 895.

what Finnemore and Sikkink term a ‘tipping point’. They argue that change at each of the various stages is characterised by different motives, actors and mechanisms of influence.¹⁸

This dissertation will focus on the second stage, namely the stage in which the ‘norm cascade’ or ‘norm diffusion’ occurs, whilst making reference to the third stage, that of norm internalization. This is the stage, Finnemore and Sikkink argue, in which states, international organisations and networks get involved, taking over from the work done by ‘norm entrepreneurs’.¹⁹ A norm is said to reach a tipping point once a critical mass of states has been persuaded by norm entrepreneurs to adopt said norm. Finnemore and Sikkink focus on norm takers by stating that norm diffusion requires support from critical states and once ‘tipping’ begins a new dynamic takes over. The effectiveness of the spread of a norm is based in the notion of ‘critical states,’²⁰ namely which states adopt a norm and further it. They state that ‘some states are critical to a norms adoption’.²¹

The moment that follows is that in which a norm ‘cascades’²² and countries begin to adopt norms more rapidly. Finnemore and Sikkink argue that the primary mechanism for promoting norm diffusion is an active process of international socialization that seeks to make norm breakers into norm followers.²³ This framework explains norm diffusion by showing that some states bear more weight than others, leaving the rest to merely ‘follow suit’ once the game changers are on board with a certain norm. This is the section of the process that the dissertation seeks to critique as the focus here is purely on ‘norm givers’ and not ‘norm takers’. The model does not seek to explore the possibility that there may be some obstacles, in terms of the ‘norm takers’, during or after the tipping point which hinders the ‘rapid spreading’ of a norm. The dissertation seeks to explore what local hindrances there may be to a ‘norm cascade’ as the current mapping of the process tracks only the actions of those on the international realm who advocate for the furtherance of the norm.

¹⁸ Ibid.

¹⁹ Finnemore and Sikkink (note 9) 898.

²⁰ Finnemore and Sikkink (note 9) p. 901.

²¹ Finnemore and Sikkink (note 9) 895

²² Ibid.

²³ Finnemore and Sikkink (note 9) p. 902.

The study will utilize the model developed by Finnemore and Sikkink, the framework for the critique of this model will be drawn from various theorists including Amita Acharya²⁴ and Benjamin Gregg.²⁵ Theorists such as these seek to add to a body of literature that contains a more localized lens in terms of norm diffusion. The work by these and other theorists can be viewed as working towards the enhancement of the current models of norm diffusion. This is done by addressing the ‘blind spot’ that is the local context – or the understanding of local customs and cultures. They seek to understand the ways in which the people below the elite function, namely those who form part of society, or those who one may term ‘the man on the street’. With the aid of these and other authors who have also sought to look at the gaps in the framework, the dissertation will argue for the need to understand *why* some norms face opposition. Norm diffusion frameworks that take a more ‘local-centric’ approach will form the framework within which the critique operates as well as the argument for an understanding of the African context when dealing with the contentious issue that is LGBTI norms.

1.4 Research methodology

This dissertation will be qualitative in nature and will utilize secondary sources. In order to look at the issue of rights and more specifically the state of human rights and LGBTI rights within the African context the dissertation will make use of information gathered from various human rights organisations, official statements and media publications.

The study shall utilize academic sources that have outlined the progression of rights within the continent, seeking to analyse how far they have (or have not) come. All this will provide an overview of the human rights situation and more specifically the state of LGBTI rights within the continent and provide the context within which the push for the acknowledgment of LGBTI rights as human rights occurs. The theoretical framework shall be sourced primarily from academic sources.

²⁴ Acharya, A., ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ *International Organisation*, Vol. 58 No. 2 (2004) p 239-275 p.240.

²⁵ Gregg, B., ‘Anti-Imperialism: Generating Universal human rights out of Local Norms’ *Ratio Juris* Vol. 23 No 3. (2010) pp. 289-310 , p. 289.

1.5 Limitations

The greatest limitation of this study is the fact that topic is under-researched. Information remains scarce as discussions of sexuality on the continent are minimal due to the taboo nature of the subject matter.²⁶ Attempts to further the LGBTI norm form part of a fairly new endeavour with international organisations and nation states only beginning to actively champion the norm on the world stage around 2011.²⁷ This is then coupled with the fact that the field of study which deals with sexualities in Africa is, itself, in the early stages of development due, again, to the taboo nature of the subject matter. Both these factors make it so that in-depth analysis of the true effects of local context is difficult as the material one is able to engage with is underdeveloped and scarce.

A better developed understanding of attempts to push the LGBTI norm would take a far more longitudinal study and would allow for more information on the topic to emerge, both concerning sexualities within the African continent as well as the effect of these sexualities on the societies they operate in. Although there is some information pertaining to the perceptions of alternative sexualities²⁸ within the continent, the ability to truly understand the extent to which these local conceptions hinder the spread of the LGBTI norm in Africa would require one to undertake a more longitudinal multi-disciplinary study in order to track how the two aspects (local factors and the LGBTI norm) interact.

This dissertation chooses to utilise the case study method, mapping the path of the LGBTI norm within Malawi. Although the use of the method has various advantages (including the ability to map out a complex issue) there are also limitations to the method. For example, there may be some difficulty in arguing for a generalization of the findings due to the specific nature of the study. The method can however be utilised to produce studies of real life situations as is the case of LGBTI rights in Malawi.

²⁶ Mutch T., *Tales of taboo: Homosexuality in Africa* (Dec, 2011) <http://uncut.indexoncensorship.org/2011/12/tales-of-taboo-homosexuality-in-africa/> (accessed, 25 November, 2012).

²⁷ IGLHRC 'UN: Ban Ki-Moon Condemns Homophobic Laws' *International Gay and Lesbian Human Rights Commission* (2012) <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1632.html> (accessed, 31 January 2013).

²⁸ Alternative sexualities within society are often erroneously termed homosexuality. However the term homosexuality does not encompass the wide arrange of sexualities that can be expressed such as Transsexuals, Queer, Intersex or Asexual persons for example.

1.6 Road map of the study

Chapter Two will outline the history and progression of the human rights norm, mapping the construction of the human rights framework on the international stage. It shall in turn show how the LGBTI norm became a part of this framework and has gained increasing protection. This chapter shall explore the growth of the LGBTI norm on the international stage and how it has become an increasingly protected norm. It will also explore the notion of human rights within the African continent, outlining the various instruments and mechanisms that serve to form part of the rights framework within the region. It will seek to provide a brief analysis of the effectiveness of human rights protection mechanisms and of the actors who come into play when considering human rights. The chapter will, lastly, provide insight into the situation faced by LGBTI persons and the historical and current perceptions surrounding alternative sexualities.

Chapter Three will outline the theoretical framework provided by Finnemore and Sikkink, applying each of the various stages to the progression of the LGBTI norm. Chapter Four will outline the three main critiques against the norm diffusion model and provide the basis on which Chapter Five will utilise the case study of Malawi to illustrate the critiques.

The final chapter will give a summary of the findings and highlight possible areas of further study.

Chapter Two: Human rights as an international norm and human rights in Africa

2.1 Human rights: the birth and growth of a norm

2.1.1 History of human rights

Initial efforts to bring about a system that protected and promoted human rights were first witnessed during World War II. Traditionally, International Law had not conferred rights and protection to individual persons, choosing to focus primarily on the rights and duties of states.²⁹ Although during the period after World War I there had been attempts to bring about protection, efforts fell to the wayside with the rise of Nazi Germany. The culmination of World War II meant that countries involved in the war saw a need for organisations to ensure peace and security and within this the need to protect human rights as a means to this end.³⁰ Even prior to the birth of the United Nations countries such as those who formed part of the alliance termed ‘The Allies’ had forced human rights obligations upon fellow European countries and entities such as Italy and other central European nations.

The Charter of the United Nations made promises to “establish goals of protecting future generations from the ‘scourge of war’ and promote “fundamental human rights” and the ‘dignity and worth of the human person.’”³¹ Not long thereafter a committee was charged with the formulation of an International Bill of Rights which was to apply to all persons in all states. Diplomats from various countries had hoped for a more binding human rights treaty but what the United Nations General Assembly eventually adopted was the Universal Declaration of Human Rights,³² which held a set of *recommended* standards or ‘a statement of principles’, rather than binding clauses.³³ ³⁴ This weaker commitment was incorporated into the Charter, which was adapted to state that countries would try to individually and

²⁹Stanford, ‘International Human Rights and Law: Historical Overview’, *Stanford Encyclopaedia of Philosophy*, <http://plato.stanford.edu/entries/rights-human/#overview> (accessed, 12 November, 2012).

³⁰ Twiss, B.S. ‘History, Human rights, and Globalization’ *The Journal of Religious Ethics*, Vol. 32, No. 1 (2004), pp. 39-70, p. 41.

³¹ Stanford Encyclopaedia of Philosophy (note 27)

³² Risse, T. and Sikkink K., ‘The socialization of Human Rights norms into domestic practices: introduction’ *The Power of Human rights International Norms and Domesticity*, Thomas Risse, Stephen C. Ropp, Kathryn Sikkink (eds) (Cambridge: Cambridge University Press, 1999) p. 3.

³³Ibid.

³⁴ Ibid.

collectively promote human rights as well as work closely with ‘the Organisation’.³⁵ This, essentially, made human rights the mandate of the United Nations.

The Universal Declaration of Human Rights was born at a time in which the geopolitical climate at the time (the genesis of the Cold War) hindered somewhat the human rights movement.³⁶ This movement was however sustained by the push by Western European countries to continue the move towards protection. The drafters of the Declaration had sought to ensure that citizens within state borders would not endure the treatment witnessed during the years preceding the war, as some were stripped of civil and legal protection and subjected to inhumane practices.³⁷ The Third Committee (whose delegates had been tasked with discussing and debating the Declaration) had stated that ‘lessons had been learned from World War II’, one of which was that identifying and protecting the rights of minority groups, as had been done in human rights development before. This allowed for people to organize themselves in opposition to others.³⁸ Thus there was a push to look towards individual rights which would be guaranteed by the state.

Since the inception of the Universal Declaration of Human Rights there has been a steady growth of human rights treaties and organisations.³⁹ The norms enshrined have been widely institutionalized within international treaties that countries around the world have ratified. International bodies such as Amnesty International, Human Rights Watch and various United Nations organs have served to provide the world with a corpus of information dating back to the mid-1970s on human rights.⁴⁰ Not only has the core number of these agencies and instruments grown but so has the level of activity.⁴¹ Christopher Marsh and Daniel Payne state that the promotion of human rights through the acceptance of declarations, treaties, trade agreements and world opinion has gone a long way towards holding governments accountable.⁴² Since the beginning of the 21st Century more than 50, 000 international treaties

³⁵ Nickel, J. W., ‘Is Today's International Human Rights System a Global Governance Regime?’ *The Journal of Ethics*, Vol. 6, No. 4 (2002), pp. 353-371, p. 356.

³⁶ Stanford Encyclopaedia of Philosophy (note 27).

³⁷ Twiss (note 28)p. 42.

³⁸ Ibid.

³⁹ Nickel (note 33) p. 354.

⁴⁰ Risse and Sikink (note 31) p. 3.

⁴¹ Nickel (note 33) p. 354.

⁴² Marsh and Payne (note 11) p.665.

have emerged, covering nearly every aspect of international relations, including human rights.⁴³

Enthusiasts of globalization often argue that what is emerging is a ‘global governance regime’ constructed, in part, of the various international human rights institutions.⁴⁴ The argument posed is that a new ‘complex multi-layered form of governance is emerging’ that is serving to erode the sovereignty of states.⁴⁵ However, James Nickel argues that when one looks at certain criteria including global reach, whether a regime can be considered to be engaging in ‘global governance’⁴⁶ and how much power the agencies have, one can argue that the globe is not quite at the point of having a global governance regime.⁴⁷ It is almost a regime, due to the well-established norms within it, the institutions that create and modify these norms (whilst also identifying norm violators across the globe), agencies that call governments into account and the various means by which the rights norms can be promoted.⁴⁸ However, it does not quite equate to a global governance regime due in large part to its lack of power. In order for a regime to perform the act of ‘governance’ and not merely be a set of suggested rules for behaviour, there must be an element of power to it.⁴⁹ Nickel argues that international human rights agencies lack the power to produce respect for human rights as is witnessed by the violation of these rights in various countries. There is very little political muscle behind the decisions of human rights agencies

2.2 The rise and spread of LGBTI rights norm on the international stage

2.2.1 The progression of LGBTI rights

International Human Rights Law and the LGBTI movement have been said to ‘grow together’ over the post-war period.⁵⁰ The advent and origins of LGBTI rights within the framework of Human Rights Law is one based in a philosophical-legal debate surrounding the nature of rights and their invisibility. Originally when human rights were first established

⁴³ Hathaway, O. A., ‘Why do countries commit to human rights treaties?’ *The Journal of Conflict Resolution*, Vol. 51, No. 4 (2007), pp. 588-621, p. 588.

⁴⁴ Nickel (note 33) p. 353.

⁴⁵ Ibid.

⁴⁶ Nickel (note 33) p.355.

⁴⁷ Nickel (note 33) p.370.

⁴⁸ Nickel (note 33) p.371.

⁴⁹ Ibid.

⁵⁰ Saunders, D., ‘Human Rights and Sexual Orientation in International Law’, University of British Columbia (2001) accessed, 8 May, 2012. <http://heinv.home.xs4all.nl/hearingintergroup/documents/dougsanders.PDF>.

none of the parties would have thought to include LGBTI rights as behaviour contrary to clearly defined gender roles at the time was defined as criminal in most countries.⁵¹ This was an idea supported by various Human Rights Commissions, including the European Human Rights Commission. The idea of ‘the universality of human rights’, however, could not allow this perspective to endure. This change began to emerge in international and regional human rights systems in the period stemming from the early 1990s to the turn of the millennium.⁵² With increasing protection of rights, various factions have attempted to exclude certain rights from the scope of protection of human rights – rights based on sexual orientation and non-binary gender expression have been amongst those rights. The argument against exclusion is that this detracted from the universal nature of human rights protection and subjected this protection to a set of rules that reflect historically upheld values.⁵³

By the end of the 20th Century an increasing number of countries had begun to show growing concern for discrimination on the basis of sexual orientation under various national legal systems. These countries have sought to counter this discrimination through the work done by various international legal institutions.⁵⁴ For example, although the United Nations’ Human Rights Commission (UNHCR) had not expanded its definition of discrimination to include sexual orientation the idea had been unequivocally established by the United Nations Committee on Human Rights.

The notion of the indivisibility of rights is witnessed within the legal realm through various precedent-setting judgments. The European Human Rights Court showcased one of the first pro-LGBTI judgments in the case *Dudgeon v. the United Kingdom*, which was decided on 22 October 1981, where the Court held that discrimination against gay and lesbian people was a breach of human rights.⁵⁵ Within the case the Court took into account the fact that ‘in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should

⁵¹ Endsjo, D. O., ‘Lesbian, Gay, Bisexual, and Transgender Rights and the Religious Relativism of Human Rights’ *Human Rights Review*, Vol. 6 No. 2 (2005) pp. 102-10, p. 103.

⁵² Endsjo (note 49) p. 103.

⁵³ Endsjo (note 49) p.102.

⁵⁴ Saunders (note 48).

⁵⁵ Endsjo (note 49) p.104

be applied'.⁵⁶ In the 1992 case *Toonen v. Australia*, the UNHCR found that the Tasmanian state law prohibiting sexual acts between males was 'in contradiction of Article 17 of the International Covenant on Civil and Political Rights (ICCPR) protecting the rights to privacy'.⁵⁷ More recent examples include *L. and V. v. Austria* and *S.L. v. Austria*, of 9 January, 2003, in which the court ruled that in connection with national laws which "embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes could not of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour."⁵⁸ The precedent set by these judgments was seen in a more local setting such as within the United States in the case *Lawrence v. Texas* which was heard on 26 June, 2003.⁵⁹

These judgments mirrored the spread of the human rights sub-norm of LGBTI rights within the international legal system. Kelly Kollman identifies another set of actors, arguing that the diffusion of the LGBTI norm within the majority of Western states was as a result of a human rights orientated transnational network of LGBTI activists as well as the 'transnationally networked policy elites these activists influence'.⁶⁰ The LGBTI activists and international organisations created and continue to create awareness of the issues surrounding LGBTI persons, an act that is termed 'framing' by social movement theorists.⁶¹ Thus through the work done by activists and organisations the LGBTI norm has continued to build on its argument of being indivisible from other protected human rights.

2.2.2 LGBTI rights in the current human rights framework: the establishment of a norm

The argument of indivisibility continues to hold even within the current context. D. O. Endsjo states that LGBTI rights were not precluded from protection under conventions

⁵⁶ European Court of Human Rights, 'Dudgeon v. United Kingdom' Series A, No. 45 23 September (1981) http://www.hrcr.org/safrica/dignity/Dudgeon%20_UK.htm (accessed, 13 December 2011).

⁵⁷ Human Rights Committee, 'Toonen v Australia' No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1992) <http://iilj.org/courses/documents/Toonenv.Australia.pdf> (accessed, 11 December 2011).

⁵⁸ Endsjo (note 49) p. 104.

⁵⁹ Ibid.

⁶⁰ Kollman, K., 'Same-Sex Unions: The Globalization of an Idea' *International Studies Quarterly*, (2007) Vol. 51, pp. 329–357, p. 329.

⁶¹ Finnemore and Sikkink (note 9) p. 897.

already in place, despite not being specifically mentioned in various international treaties. He quotes Eric Heinze who states, 'those rights of sexual orientation which can be called fundamental human rights do not qualitatively differ from extant human rights in general . . . It is for this reason that we need not 'create' rights of sexual orientation, and then 'add' them to the extant corpus of rights, but rather can derive them from that corpus, as implicit within it, and necessary for its fuller its fuller realization.'⁶² This is an idea that speaks to the notion of the universality and interconnectivity of rights.

A number of articles within human rights instruments such as those within the International Covenant on Civil and Political Rights (ICCPR), although not providing explicit protection, provide protection from discrimination in a nature that is far less exhaustive than one would find when provided with a list of persons or grounds. Douglas Saunders argues that the LGBTI norm has grown from its 'Western origins' into a norm that entertains a worldwide presence.⁶³ The protection of these rights has gained increasing prominence on the international stage. The protection of sexual orientation rights and gender rights are based in the right to a private life as well as the right not to be discriminated against⁶⁴, both of which are protected within various human rights conventions such as articles 17 and 26 in the ICCPR.⁶⁵

One is able to argue that the norm has taken root within Western countries such as the United States, the United Kingdom, France and Canada⁶⁶ allowing them to take the lead as 'norm leaders' if one is to look to the history of case law and actions of organisations. The argument upholding the idea of norm diffusion amongst various countries was witnessed in June 2011 when the United Nations Human Rights Council (which was made up of a 47 states) passed a historic resolution that made LGBTI rights part of those rights termed 'universal human rights' and international protection was solidified.⁶⁷ Saunders argues that through the work done under the European Convention on Human Rights, within the United Nations and by

⁶² Endsjo (note 49) p. 102.

⁶³ Saunders (note 48).

⁶⁴ Massaro, T., 'Gay Rights: Thick and thin', *Stanford Law Review*, Vol. 49, No. 1 (1996) pp. 45-110, p. 45

⁶⁵ United Nations, 'International Covenant on Civil and Political Rights' (Dec, 1966) accessed 29 March 2012.
<http://www2.ohchr.org/english/law/ccpr.htm>.

⁶⁶ Amnesty International 'About LGBTI human rights' *AmnestyUSA.org*, accessed 23 April, 2012.

<http://www.amnestyusa.org/our-work/issues/LGBTI-rights/about-LGBTI-human-rights>

⁶⁷ Sambira, J., 'Malawi: Making Waves - Malawi Revives Debate On Gay Rights' *All Africa* (June, 2012)
<http://allafrica.com/stories/201206261048.html>. (accessed 16 October 2012).

various non-governmental organisations the issue of LGBTI rights can be said to have come firmly into the international lime light.⁶⁸ As has been stated before, countries such as the United Kingdom and the United States have been at the forefront of pushing for the protection of LGBTI rights in the West.

However, it should be noted that the LGBTI rights norm has not diffused equally to all areas amongst the 'norm takers' and the local context is not only important when it comes to norm followers but norm leaders as well. Within Europe there are differences, for example in the Netherlands the law recognizes same sex marriages whilst in the Balkans persons within the LGBTI community fear for their lives.⁶⁹ Despite being at the forefront of the LGBTI norm one witnesses divisions within places such as the United States (the 2012 elections 'gay debate'⁷⁰ being a prime example) as well as variances within the European continent. Kollman argues that this can be attributed to differences in the nature of national religious practices and the perceived legitimacy of international norms.⁷¹ These discrepancies, even within norm leaders, further the need to look at the local context.

However for the purposes of this study the focus shall be on Africa and the discrepancy it poses. This can be linked to the argument set forth by some within the field of norm diffusion who argue for a local lens when exploring the diffusion of norms concerning a right. If one is to understand how a norm works in an area one needs to understand how the local area functions. This is a notion that holds true for Africa.

2.3 Human rights in Africa

2.3.1 Human rights in Africa: An overview

The 21st Century is said to mark a critical juncture in the path taken by the continent's culture of protection and promotion of human rights.⁷² Africa's regional human rights system has

⁶⁸ Saunders (note 48)

⁶⁹ Elon Lumen Scholar, 'Human Rights Norm Change: LGBTI Rights in Wider Europe' *Elon University* <http://www.elon.edu/docs/e-web/administration/president/lumenprize/LGBTInEurope.pdf> (accessed, 14 December, 2012).

⁷⁰ The Guardian, 'US election ballots: from gay rights and abortion to borrowing billions - the full list', *Guardian.co.uk* <http://www.guardian.co.uk/news/datablog/2012/oct/15/us-election-ballots-listed> (accessed, 14 December, 2012).

⁷¹ Kollman (note 58) p. 329

⁷² Musa R., 'Women, Equality and the Human Rights System' *Africa's long road to rights* ed. Hakima Abbas, (Oxford, UK: Fahamu Books, 2008), 188. p. 24.

been described as the newest, least developed and least effective of all the regional systems.⁷³ It has also been described as the most distinctive and controversial. This view of the system comes from its inability to curb the atrocities that occur on the continent, with occurrences such as genocides, rebellions and dictatorships taking place throughout the region. The continent is said to be rife with contradictions between human rights violations and effective human rights protection.⁷⁴

Much has been written within the scholarly realm on the subject of human rights in Africa. Structural and normative scholars have attempted to unpack the issue of rights within a country through the use of scholarship in a various fields of thought, from the philosophical to the moral, the historical to the legal.⁷⁵ It has also been an engaging endeavour for these scholars to consider the contradicting ideas of the universalism of human rights as opposed to the notion of rights as alien to Africa. This has been done whilst also displaying the weaknesses, ambivalence or Utopian goals of the African regional human rights system.⁷⁶ Often the impediments of protection, as well as impracticality of certain human rights within Africa, form the focus of studies. However, B. Obina Okere argues that the protection of human rights is not an idea alien to Africa.⁷⁷ Given the array of instruments seeking to protect the vulnerable within the African context it is no longer feasible to state that social, economic and cultural rights still bear no legal status.⁷⁸ Thus within the continent there have been a number of mechanisms and actors that have emerged in light of the growth of the notion of human rights and its protection both internationally and regionally.

2.3.2 Human rights protection in Africa: International and domestic means of enforcement

2.3.2.1 Mechanisms

It has been argued that regional mechanisms used in the protection of human rights are better than those utilised by the United Nations system and other international mechanisms. This is

⁷³ Olowu, D., *An Integrative Rights-Based Approach to Human Development in Africa*. (Pretoria: Pretoria University Law Press (PULP), 2009), p.g 50.

⁷⁴ Ibid.

⁷⁵ Olowu (note 71) p. 51.

⁷⁶ Olowu (note 71) p. 51.

⁷⁷ Malcolm, E. and Murray, R., *The African Charter on Human and Peoples Rights: The System in Practice 1986-2006*, (Cambridge: Cambridge University Press, 2008) p. 141.

⁷⁸ Olowu (note 71) p. 69.

due to the fact that they are able to gauge the regional temperature better and thus decipher and locate the region's problems.⁷⁹ The United Nations system has even gone as far as to encourage the creation of regional human rights systems, thus African human rights instruments are created to be Afro-centric in nature.⁸⁰ In its workings it is meant to take into account certain values and customs particular to the continent. One particular example is the African Charter on Human and People's Rights.⁸¹ This mechanism is said to be both universal in nature, as well as distinctly African in its scope and principles.⁸²

The African Charter on Human and People's Rights

The continent is able to boast a whole host of human rights mechanisms, laws and norms at the heart of which lies the African Charter on Human and People's Rights.⁸³ In 2007 the African Charter on Human and People's Rights celebrated the 21st anniversary of its adoption, having been entered into force on 27 June 1981 in Nairobi, Kenya by the Organisation of African Unity (OAU), the predecessor to the African Union.⁸⁴ The Charter is a cross-continental example of an instrument whose contents bears semblance to those of the Universal Declaration.⁸⁵ It is hailed by some for its recognition of the indivisibility of civil and political rights and economic, cultural and social rights which makes it distinct from other treaties of this nature.⁸⁶

The African Charter was birthed within the context of the OAU, when the promotion of human rights was seen only in terms of promoting African Unity and not as being central in itself.⁸⁷ The preamble to the OAU Charter did make mention of the Universal Declaration of Human Rights, however it was clear that the notion of human rights was not central to the document. The African Charter however does give protection to an array of rights including economic, social and cultural rights, whilst placing emphasis on development.⁸⁸

⁷⁹ Olowu (note 71) p. 52.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Abbas, H., 'Africa's long road to rights' *Africa's long road to rights* ed. Hakima Abbas Fahamu Books, Oxford, UK. (2008) 188 p. 2.

⁸³ Ibid.

⁸⁴ Manji F., 'Marking the 20th Anniversary of the African Commission' *Africa's long road to rights* ed. Hakima Abbas, (Oxford, UK: Fahamu Books, 2008), 188 p. vii .

⁸⁵ Olowu (note 71) p. 52.

⁸⁶ Abbas (note 80) p. vii.

⁸⁷ Manji (note 82) p. 142.

⁸⁸ Manji (note 82) p.145.

The majority of the rights afforded under this treaty can be termed ‘classical’ in the sense that they do not deviate a great deal from international norms.⁸⁹ However there are some remarkable specificities enshrined that speak to the realities of the African situation, a fact best witnessed in terms of political and civil rights.⁹⁰ Notions such as equality before the law, the right to equal protection of the law⁹¹ and the right to the respect of the dignity inherent in a human being⁹² speak to a righting of the wrongs that historically plagued the continent whilst under colonial rule.

Atrocities that have plagued the continent have highlighted the need for explicit protection of certain rights that are in other regions taken for granted. Genocides, extra-judicial killings and other deviations from the human rights norm have brought into sharp focus the rights that state ‘human beings are inviolable’ and ‘every human shall be entitled to respect for his life and the integrity of his person’.⁹³ Historically African rights such as freedom of speech have found themselves under threat in light of military and other dictatorships and ‘one party’ states. Freedom of movement too has found itself under increasing strain in light of conflict and political tight holds. This has meant that notions such as freedom of speech and freedom of movement have had to be enshrined within the African Charter.

The African Charter also recognizes what is characterised as ‘third generation rights’ in that it recognizes the right to security, peace, a healthy environment and economic social and cultural development.⁹⁴ When considering the rights given under the African Charter one must take into account the notion of correlative duties. The African conceptualisation of ‘man’ is not of that of an isolated and abstract individual but an integral member of a group animated by a spirit of solidarity.⁹⁵ Membership to a group entails certain duties towards the group from the member. There are thus various public and private sphere relationships that emerge as a result of this philosophy.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Organisation of African Unity, ‘Art 3’ *African Charter on Human and People’s Rights* (1981) adopted 27 June 1981 Nairobi Kenya, entered into force 21 October 1986 http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 23 March 2012).

⁹² African Charter (note 89) Art 5.

⁹³ Ibid.

⁹⁴ Manji (note 82) p. 147.

⁹⁵ Manji (note 82) p.148.

Within the African Charter it is also significant to note the absence of any explicit derogation clause as is customary in Human Rights charters generally.⁹⁶ This is a clause that states that no African government is able to abridge these rights even within the most severe of emergencies. The obligation of state parties within the African Charter however is identical to what obtains under the International Bill of Rights.⁹⁷ Article 1 establishes the fundamental obligation of states to ‘recognise the rights duties and freedoms enshrined in the Charter’.⁹⁸ The rather general terms in which most of the rights are formulated leaves a great deal of discretion and autonomy when interpreting and enforcing the rights.⁹⁹ Stemming from this the principle mechanism of ensuring and monitoring compliance is the African Commission.¹⁰⁰ This Commission finds itself with the tripartite mandate to promote, interpret and ensure the human and people’s rights in the African Charter.¹⁰¹ This is done through the state reporting procedure, the complaints procedure and its promotional activities.

Other instruments within the region

Despite the African Charter being the pinnacle of human rights protection within the continent, a number of other mechanisms do exist. These include the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights concerning the Rights of Women as well as more region-specific instruments. These various instruments and others like them look to address specific rights within the African continent, placing more group specific obligations on the state parties. It obliges state parties to take legislative and other steps to protect certain economic, cultural and social rights for the more vulnerable members of society. Furthermore alongside the array of treaty obligations there is a broad assemblage of ‘soft law’ instruments in which leaders from Africa have reaffirmed their faith in human rights and in the need to protect the dignity of Africans.¹⁰² This array of binding and non-binding instruments, Dejo Olowu argues, creates

⁹⁶ Olowu (note 71) p. 55.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Manji (note 82) p. 149.

¹⁰⁰ Olowu (note 71) p. 59.

¹⁰¹ Ibid.

¹⁰² Olowu (note 71) p. 66.

an adequate legal and moral framework within which strategic activism for a rights-based approach for human development in Africa is able to take place.¹⁰³

Although there are a wide array of instruments present within the African continent the efficacy of the human rights treaties can only be assessed in terms of its domestic effect and not its normative value.¹⁰⁴ The only true measure would be the actual change in reality for individuals on the ground. The effectiveness of these instruments can only truly be tested by their efficacy at protecting human rights at grassroots level.¹⁰⁵ The scale of atrocities that have been committed, despite the instruments in place in a number of countries, can lead one to call for the instruments to be declared a failure. Olowu states that ordinary reasoning would dictate that those seeking relief from human rights violations should have the opportunity to do so within their own national courts. However this is not always an option for many within the continent who find they have to seek extra-national relief or, more often than not, receive no relief at all.

Litigation: The emerging human rights courts

Many African scholars are enthusiastic about the positive impact on the economic, social and cultural rights with the emergence of the African Court Protocol.¹⁰⁶ This is due to the fact that this protocol ushered in the African Court on Human and Peoples' Rights (African Court). One of the most innovative elements of the Court, which would contribute a great deal towards ensuring its effectiveness, would be the explicit competence of the Court to entertain cases brought by individuals and civil society groups.¹⁰⁷ This would be in respect of the breach of the African Charter or 'any other relevant human rights instrument ratified by the states concerned.'¹⁰⁸ This would provide a more holistic approach in terms of rights protection as the Court would be able to interpret and apply *all* relevant instruments which would give them more judicial meaning and define their enforceability quotient. This would give a viable platform on which Africans are able to bring their rights issues. However the lack of accessibility for the average African may still remain an issue. There remains a gap

¹⁰³ Olowu, D., 'Protecting Children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' *International Journal of Children's Rights*, Vol. 10 pp. 127-136, p. 135.

¹⁰⁴ Olowu (note 71) p 73.

¹⁰⁵ Abbas (note 80) p. 2.

¹⁰⁶ Olowu (note 71) p. 67.

¹⁰⁷ Olowu (note 71) p. 68.

¹⁰⁸ Ibid.

between the decisions made within the Court and the workings at the societal level in terms of people of the continent these judicial activities actually affect.¹⁰⁹

One major concern within the African continent is the issue of rights litigation. Despite the array of instruments meant to bring about litigation of human rights within various nations states, the regional legal system often finds itself lacking. In countries such as Zimbabwe the composition of the legal system often bodes ill for human rights.¹¹⁰ Within Zimbabwe human rights litigation is seen as an anti-government activity and as an act that is disloyal to the country.¹¹¹ Some countries such as the Democratic Republic of Congo face a number of internal challenges to the protection of human rights and one major cause is usually the state, especially one operating within a context of instability.¹¹² There are still those who continue to argue that the emerging African human rights court is an entity that could possibly resolve some of the problems faced by those seeking to enforce their rights.

Governments

Notions of non-interference, sovereignty and independence have long been enshrined in the workings of African regional bodies, and were some of the key notions in the OAU upon its conception. However, despite these notions being the key to effectiveness of bodies such as the OAU as an anti-colonial body, they have now become the very thing that stifles human rights on the continent.¹¹³ This has been done by implying political apathy towards the abuse by African states against their own people. Implementation of the decisions of Pan-African institutions at state level has been described as ‘detrimental’, as some argue there is an inability to enforce these decisions.¹¹⁴ There lies no internal pressure for implementation within the system.¹¹⁵

Analysts of African political economy often cite the incapacity of states to fulfil their human development goals, and state that development must come before human rights, as the former

¹⁰⁹ Abbas (note 80) p. 2.

¹¹⁰ De Bourbon, A., ‘Human Rights litigation in Zimbabwe: Past Present and Future’ *African Human Rights Law Journal*, Vol. 3 No. 2 (2003), p. 217.

¹¹¹ Ibid.

¹¹² Human Rights Watch, ‘World Report 2012: Democratic Republic Of Congo’, *Human Rights Watch*, <http://www.hrw.org/world-report-2012/world-report-2012-democratic-republic-congo>. (accessed, 23 April, 2012).

¹¹³ Abbas (note 80) p.1.

¹¹⁴ Abbas (note 80) p. 2.

¹¹⁵ Ibid.

dictates the ability to supply the later.¹¹⁶ Some leaders in Africa, however, have argued that this is not the case and human rights need to be tackled now. Despite this rhetoric one often finds various governments around the continent not promoting the very rights they deemed important.

Activist forces and civil society

Civil society has been defined as ‘an autonomous societal group that interacts with the state but delimits and constrains its action’.¹¹⁷ Within the African context ‘Civil Society’ is a concept that is difficult to utilise and conceptualise due to the fact that it finds origins in uniquely European historical and cultural milieu. However the concept itself has experienced transformation over time.¹¹⁸ There is the argument that the concept proves ‘unwieldy and complex’¹¹⁹ when applied to a non-Western context. Keeping this in mind one can look to the argument given by Hakima Abbas that in order for the mechanisms, institutions and avenues for advocacy in the continent to be effective the system must be utilised by civil society to its fullest potential.¹²⁰ The notion of civil society is, however, underdeveloped within the African context which has limited its ability to effect critical change. The space is often dominated by actors who push for various agendas some of which fall within the realm of human rights. Michael Bratton has argued that the notion of civil society is greatly underdeveloped within the African context. He has, nonetheless, made allowances for the emergence of some entities that have formed coherent material organisational and ideological bases that are removed from the state.¹²¹ These entities can be identified as the space termed ‘civil society’, which in many African countries seeks to promote the protection of various rights including those of women, children and persons of the LGBTI community.

2.3.3 The reality of rights: a possibly dark future for LGBTI rights

Social, economic and political rights are some of those that come under threat within the African context as individual rights are not always central to notions of what forms part of an

¹¹⁶ Olowu (note 71) p. 69.

¹¹⁷ Callaghy, T. ‘Civil Society, democracy and economic change in Africa: A dissenting opinion about resurgent societies’ in John Harbeson *et al* (eds) *Civil Society and the State in Africa* (Boulder: Lynne Rienner, 1994).

¹¹⁸ Bratton, M. ‘Civil Society and Political Transitions in Africa’ in John Harbeson, Donald Rothchild and Naomi Chazan (eds) *Civil Society and the State in Africa* (Boulder: Lynne Rienner, 1992) p. 49.

¹¹⁹ Bratton (note 116) p. 50.

¹²⁰ Abbas (note 80) p. 6.

¹²¹ Bratton (note 116) p. 50.

African society. When one looks at the way in which social, political and economic rights operate within the continent it becomes clear that they were not central to the thinking of African states.¹²² These rights remain on the periphery in many cases. This can be arguably part of the problem in terms of engraining LGBTI rights into the African rights framework. Aside from the argument that they are not part of the African identity a further dilemma faced by the rights is that the context they attempt to operate in is one that focuses on development (as envisioned by the authors of the African Charter¹²³) leaving little space for the operation of individual rights.

The above overview provides a picture of the obstacles that the LGBTI norm faces at an institutional and societal level. Social, economic, cultural and political rights face various hurdles in terms of political will, an underdeveloped civil society, judicial structures and even lack of adherence by members of society to the laws that protect these rights. These rights can be said to allow a degree of clairvoyance when looking at the future of LGBTI rights as this context is one in which these rights must attempt to operate and gain ground. One must question the ability for LGBTI rights to gain prominence and protection if more 'accepted' rights face a sometimes dire situation. One can make a compelling argument that LGBTI rights specifically face these as well as a host of further problems that would stem from notions of 'Africaness' and what it forms part of the African identity.

One is able to see that, despite the various mechanisms and structures in place, there are various groups who still face a very dangerous reality as their rights are not being protected. If one is to understand why in some cases there is no enforcement, despite the structures in place, one only needs to look at the lack of protection of women within the continent. Culturally, women are not seen as occupying the roles that are afforded to them by various rights. The matter returns to notions of being 'un-African' and the consideration of context comes into play. Women's rights (like LGBTI rights) challenge classical gender roles that form an integral part of African societal thinking. This causes them to come into conflict with a local context that does not see these rights as bolstering society but instead tearing at the fabric of society as they attack fundamental ideas that allow it to function. Many countries have accepted women's rights to the degree that they have been enshrined in law, but

¹²² Manji (note 82) p.145.

¹²³ Manji (note 82) p.145.

enforcement remains a problem as these rights (and the ensuing laws) are said to ‘clash’ with African customs.¹²⁴ This has caused them to often be disregarded both by society and even sometimes within institutions meant to uphold them. Feminist academics have fought to uphold the anthropological view that local context must be considered despite the rise of the rights of women globally.¹²⁵ Feminist anthropologists have argued that context is fundamental for understanding the enforcement and protection of the women’s rights.

This problem is witnessed on a grander scale for LGBTI rights. The lack of protection of these rights stems from the inability to marry the idea of ‘homosexuality’ with the African way of life. The impediments faced by these rights needs to be understood from a local perspective. The idea that homosexuality is ‘un-African’ means that to protect the rights of those who fall under the category would be to protect a foreign idea. Both cases speak to the obstacles that a norm faces when attempting to enter a locale. The norm diffusion model does not adequately engage with the importance of such impediments.

2.4 LGBTI community in Africa: The situation on the ground

2.4.1 History of homophobia in Africa

The root of the suppression of alternative sexualities within Africa can be traced back to the workings of anthropologists within the colonial era. During the period anthropologists tended to minimize or eroticize evidence of the presence of homosexual acts.¹²⁶ Maxwell Owusu, provided a somewhat harsh criticism, saying that ‘ethnography of African cultures from the 1920s to 1950s...is only useful today to the extent that it only shed light on how those colonial structures functioned’.¹²⁷ Thus the first people to claim that homosexuality was not African were not Africans but Europeans, some of whom had never even been to the region.¹²⁸ Much of the writing done was based on sweeping moral claims that mirrored European thinking rather than studies done on the ground. Evidence was brought forth from a small collective of heterosexual Africans with very little to no information sourced from

¹²⁴ LaFraniere, S., ‘Women’s Rights Laws and African Custom Clash’ (Dec, 2005) accessed 18 May 2013

¹²⁵ Fox, D., ‘Women’s rights in Africa: Beyond the Debate over the Universality of Human Rights, *African Studies Quarterly* <http://www.africa.ufl.edu/asq/v2/v2i3a2.htm> (accessed 18 May 2013).

¹²⁶ Epprecht, M., ‘“Bisexuality” and the Politics of Normal in African Ethnography’, *Anthropologica*, Vol. 48, No. 2 (2006), pp. 187-201, p. 186.

¹²⁷ Ibid.

¹²⁸ Epprecht, M., (2008) ‘Unspoken Facts: A History of homosexualities in Africa’ Harare, Zimbabwe *Gay and Lesbians of Zimbabwe (GALZ)* p. 12

traditional healers or diviners who would have proved a more in-depth source of knowledge.¹²⁹

Evidence of same sex relations within Africa were noted from as early as the 16th Century and often ‘coated in vague and disapproving language’.¹³⁰ There is evidence pointing to the existence of homoerotic acts within Africa for a wide array of motives, practices and emotions involved.¹³¹ It was denied by Westerners studying Africa that Africans could ‘engaged in homosexuality’ as they perceived Africans as being ‘too close to nature and far too uncivilised.’¹³² The act of homosexuality was seen as an act based in decadence. However, to be decadent one needed to be civilised and advanced as a society, which were qualities not afforded to African societies by colonialists.¹³³ The consensus held that homosexuality was anomalous to nature and flourished under certain conditions.¹³⁴ The more decadent or lax the civilization the more that they were prone to homosexual acts, the Turkish and Roman civilisations often cited as examples. Thus the African was seen as unable, in his primitive state, to express certain alternative sexualities.

2.4.2 *Alternative sexualities in African history*

As was stated before there was a sweeping denial of indigenous homosexual behaviours and indefinites¹³⁵ and it was only until more recent scholarship that the examination of evidence of alternative sexualities within Africa begun to emerge. Until recently, even within the smaller communities within African countries, there has been little awareness of the historical and ethnographic evidence about same sex practices and sexualities.¹³⁶ Although most African countries historically did place an emphasis on heterosexual relationships and marriages there was still the presence of ‘pseudohomosexualities’¹³⁷ and alternative sexual practices. These were placed within the boundaries of rituals, sacred practices or even secret spaces and designated social roles. Societies in the past also had ways and means of

¹²⁹ Epprecht (note 127) p. 13

¹³⁰ Epprecht (note 125) p. 188.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Epprecht (note 125) p. 189.

¹³⁵ Epprecht, M., *The Unsayings of Indigenous Homosexualities in Zimbabwe: Mapping a blind spot in an African Masculinity* (Harare, Zimbabwe: Gay and Lesbians of Zimbabwe (GALZ) , 2008 p. 14

¹³⁶ Epprecht, Marc. (2008) ‘Heterosexual Africa?: The History of an Idea from the Age of Exploration to the Age of AIDS’. Ohio University Press. p. 8

¹³⁷ Epprecht, M (note 135) p.9

explaining why people did not fit into the heterosexual marital ideas and norms. Thus people who engaged in ‘homosexual’¹³⁸ behaviour were known to exist. Many African languages have words that speak to the practices surrounding alternative sexualities or serve as an indicator to their presence. For example ‘kuchu’ is used within the East African region, ‘maotoane’ in Sesotho and ‘nkoshana’ in isiZulu. Despite the negative connotations of these words in today’s context the words are evidence of the existence of homosexuality in traditional cultures as the words can be traced back at least 100 years.¹³⁹

Practices that could be termed homosexual in nature were used for a variety of social and religious reasons. It was documented that in 1558 ‘[there had been evidence of] unnatural damnation to be esteemed amongst the Kongo’.¹⁴⁰ This term (unnatural damnation) had been utilised at the time as a euphemism for male-male sex. There had also been evidence produced by Jean Baptiste Labat that stated in Angola there was a caste of cross-dressing male diviners whose leader ‘made an honour of being called the Grand Mother’.¹⁴¹ Evidence by lesbian anthropologists also suggests that there were erotic relations between African women within the realms of spiritual mediumship or divination. This also spread to the practices pertaining to experimentation and sexual play.¹⁴² It must be noted that little is said about the erotic nature of these practices within the studies produced by colonial scholars despite the presence of an erotic element in some cases.

Despite the increasing evidence gathered that there were, in fact, instances of homosexuality amongst Africans a collective silence (within such fields as anthropology as well as within political realm) ensued on the matter. This silence cloaked the period between early accounts (those given by social anthropologists during period stemming from the 16th Century) and modern day studies of sexuality as witnessed in the 20th Century, a period spanning roughly three centuries.¹⁴³ It was in 1983 (and subsequently in 1991) that ‘hidden homosexuality’ was first flagged as an important research question.¹⁴⁴ This discontinuity between the past accounts and the present day was cited by some as evidence that homosexuality was not present within the African continent until it was ‘introduced’ by white settlers and furthered

¹³⁸ It must be noted that the term ‘homosexual’ pertains to actions relating to same sex sexual practices.

¹³⁹ Epprecht (note 127) p. 3

¹⁴⁰ Epprecht (note 125) p. 189

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Epprecht (note 125) p. 188

by the era of globalisation. What must be noted, however, is that the silence did not exist in African but within European and American spaces. Within these spaces the idea of the existence of homosexual practices within societies was forced out of popular memory. This silence was punctured only by the emergence of scientific sounding arguments that shunned repressed and despised homosexuality ‘out of existence’.¹⁴⁵

2.4.3 *The repercussions of ‘imported homophobia’*

Due to this denialism, and resounding the silence on the issues pertaining to sexuality, the idea that homosexuality is un-African¹⁴⁶ has gained increasing importance as an aspect of African identity. There continues to be a belief that homosexuality is a practice and a disease that essentially ‘came on a boat’, brought to African shores by moral-less settlers from Europe and other regions. As was stated previously all alternative sexualities are seen, within Africa, as being homosexual in nature (a view which again must be emphasised as being erroneous). This is a sentiment which has been mirrored in policy, legislation and even in acts of violence. It is progressively becoming the cry of many within the continent that homosexuality is not in keeping with African values. However, gender theorists and historians state that this view does not stem from African values, but rather is rooted in colonial ideologies, being a direct product of the work of anthropologists, missionaries and law makers during colonisation.¹⁴⁷

More than half of the world’s laws that criminalise homosexuality are relics of British colonial rule and stem from the Victorian ‘moral values’ held at the time.¹⁴⁸ Anti-homosexuality laws in countries ranging from India to Uganda, from Nigeria to Papua New Guinea derive from a single law on homosexual conduct that British colonial rulers imposed on India in 1860.¹⁴⁹ The notions born by social anthropologists and missionaries, although damaging enough in themselves for modern ideas of African sexuality, were intensified and solidified by the presence of anti-homosexuality legislation. These laws now form the basis

¹⁴⁵Epprecht (note 125) p. 189 .

¹⁴⁶ Oloruntoba-Oju , T., *A name my mother did not call me: Queer contestations in African Sexualities*, (Nigeria: Nordic Africa Institute, University of Ilorin, 2011).

¹⁴⁷ Epprecht (note 125) p. 186 .

¹⁴⁸ Human Rights Watch, ‘Sodomy’ Laws Show Survival of Colonial Injustice’ *Human Rights Watch*

<http://www.hrw.org/news/2008/12/17/sodomy-laws-show-survival-colonial-injustice> (accessed, 21 October, 2012).

¹⁴⁹ Cowell, F., ‘Colonial Sodomy: Homophobic Threat within Common Law’ *Consultancy Africa Intelligence*, http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=472:colonial-sodomy-homophobic-threat-within-common-law&catid=91:rights-in-focus&Itemid=296 (accessed, 21 October 2012).

for the legal and formal persecution of LGBTI persons within the continent. The legal implications of colonial homophobia (in the form of anti-sodomy laws and societal attitudes) are ones that have prevailed as much as the social implications of the colonial ideas that ‘homosexuality is un-African’ as both have worked together to create a dangerous environment for members of the LGBTI community on the continent. It is, arguably, thus homophobia and not homosexuality that was imported into Africa.

2.4.4 ‘Homosexuality rights are not human rights’: A modern afro-centric view of homosexuality.

Despite increasing visibility of members of the LGBTI community within African countries there are many who continue to argue that this phenomenon is not African – a matter which continues to form the basis for a heated debate.¹⁵⁰ The academic realm is no different. Until recently, due to the idea of homosexuality as ‘un-African’, African studies had avoided research on the topic.¹⁵¹ Deborah Amory argues that this sentiment is best encapsulated in the ‘recurring and insistent refrain that ‘there is no homosexuality in Africa’¹⁵² hence there is no need to research it. This is a mantra that is uttered by politicians, scholars and lay people all who labour under the misconception that homosexuality is a ‘Western perversion’ which is imposed by developed countries.¹⁵³ Alternative sexualities, in themselves, are seen as threat to the morals and values of black Africans.¹⁵⁴ Homosexuality is argued by many as a means of imposing Western imperialism.

Many Africans believe that the ‘homosexual lifestyle’ is one that scarcely exists in Africa. Where it is acknowledged it is primarily seen as an exotic, white phenomenon that is not a real reflection of Africans or their way of life.¹⁵⁵ An example of this thinking is in Zimbabwe where many black Zimbabweans believe that homosexuality was brought by white settlers and is now being mainly propagated by the West.¹⁵⁶ It is believed by many to be a foreign

¹⁵⁰African Activist, ‘BBC Debate on "Is homosexuality un-African?" Deeply Emotional’ *African Activist.org*, <http://www.africanactivist.org/2011/02/bbc-debate-on-is-homosexuality-un.html>. (accessed 20 February, 2012).

¹⁵¹ Amory (note 8) p. 5.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Epprecht (note 127) p. 3.

¹⁵⁵ Epprecht, (note 135) p.g 5.

¹⁵⁶ Epprecht (note 135) p.g

disease that although brought by settlers is now proliferated by “white ambassadors and tourists”.¹⁵⁷

This theme has been continued by prominent academic and political figures within African political thought. Political philosophers such as Frantz Fanon arguing that that such things as Colonisation were to blame for the ‘emasculatation’ of men which ‘led to homosexuality’.¹⁵⁸ Colonisation allowed ‘white settlers to abuse their power and strength’ and in turn corrupt the African way of life. If this train of thought is to be believed then today’s fight against homosexuality is the fight against the continued subjugation of the African people, reclamation of masculinity and the protection of women from sexual and moral corruption.¹⁵⁹ Despite there being some grain of truth in this (there had been an emasculatation of men during the colonial period) there is still evidence that within African culture sexual practices between males or between females was present and in some cases even sacred and honoured long before Europeans arrived.¹⁶⁰

Alternative sexualities, and in turn LGBTI rights, appear to meet far more opposition on the African continent than other human rights such as those of the rights of the child and women. The reason given for this is that this opposition is due in part to the fact that alternative sexualities pose a greater threat on cultural values than other types of rights and is seen in itself as a ‘disorder’ that afflicts individuals.¹⁶¹ Alternative sexualities are seen as concealing a ‘moral and sexual panic’ (or a greater underlying crisis of morality and sexuality) that is externalised as an acute psychiatric and security emergency.¹⁶² This is coupled with the fact that it threatens core values such as those that place a high emphasis on family as envisioned in heteronormative terms. Alternative sexualities pose a greater challenge to ideas of masculinity and femininity which inform the core of these traditional values. Alternative sexualities are seen to be further out of the realm of what is ‘African’ than other rights as a deviation from traditional hegemonic constructions of masculinity and femininity are seen as unacceptable.¹⁶³ Alternative sexualities are seen to greatly distort the roles that women and

¹⁵⁷ Ibid.

¹⁵⁸ Epprecht (note 134) p. 14.

¹⁵⁹ Mwangi, E. M., *Africa writes back to self: Metafiction, Gender, Sexuality* (Albany: State University of New York Press, 2009) p.g 65.

¹⁶⁰ Epprecht (note 127) p. 24.

¹⁶¹ Reddy, V., ‘Homophobia, Human rights and Gay and Lesbian Equality in Africa’, *Agenda*, No. 50 (African Feminisms One) (2001) pp. 83-87, p. 83.

¹⁶² Ibid.

¹⁶³ Ibid.

men play within society, which in turn is a direct threat to the way in which these societies operate. Other rights such as women's rights and the rights of children for example are not seen to have as adverse an effect on the fabric of society. LGBTI rights are seen to affect society far more than a host of other rights which have entered the African realm and is thus more intolerable.

2.4.5 Treatment of Homosexuals in modern day Africa

Homosexuality remains illegal in many African countries, a fact which has drawn both local and international criticism.¹⁶⁴ The situation faced by persons within the LGBTI community in Africa has grown increasingly dangerous and has culminated in a call from United Nations chief to cull the wide spread violence.¹⁶⁵ 'Anti-gay' sentiments are heard even within the highest echelons of governance and have been said to harden people's negative attitudes towards homosexuality and same sex relations.¹⁶⁶ Within the continent the victimisation of homosexuals has not only been restricted to the corridors of political power but is witnessed within religious entities as well, two entities that are often closely linked within the realm of politics. Within Nigeria Islamic scholar Malam Abdulkadir Apaokagi called for the death penalty for LGBTI persons as they were 'perverts' and did not deserve to exist with 'right thinking people'.¹⁶⁷

This belief that homosexuality is a perversion of the African way of life has led to acts of violence against LGBTI persons.¹⁶⁸ Evidence has pointed to the increased victimization of LGBTI citizens within many African societies with many cases of people being persecuted on the basis of their sexual orientation and practices.¹⁶⁹ The belief that these practices are not African has formed the basis for rhetoric, by both the church and state in various countries, that homosexuals should be expunged from the 'body politic' and there should be a return to traditional family values.¹⁷⁰ Various moral leaders have come out in opposition to

¹⁶⁴ BBC, 'African Union: Ban Ki Moon urges respect for gay rights' accessed, 12 February, 2012. *BBC* (2012) <http://www.bbc.co.uk/news/world-africa-16780079>.

¹⁶⁵ *Ibid.*

¹⁶⁶ Epprecht (note 127) p. 4.

¹⁶⁷ Girao, M. T., 'UN Chief urges for LGBTI rights in Africa as continent faces wave of discrimination' *Bikamasyr.com* (2012). <http://www.bikyamasr.com/55401/un-chief-urges-for-LGBTI-rights-in-africa-as-continent-faces-wave-of-discrimination/> (accessed, 12 February, 2012).

¹⁶⁸ Amory (note 8) p. 5.

¹⁶⁹ *Ibid.*

¹⁷⁰ Epprecht (note 134) p. 632.

homosexuality – one example being the Archbishop of the Church of Nigeria who in 2003 termed homosexuality a ‘satanic attack’ on his church and a form of slavery.¹⁷¹

Many top politicians have spoken out vehemently against LGBTI rights within Africa. Robert Mugabe who has often been quoted as saying homosexuals were ‘worse than dogs and pigs’, ‘gangsters’ and ‘an abomination, a rottenness of culture.’¹⁷² Most recently at his 88th birthday party Robert Mugabe lashed out at homosexuals at a mass rally stating that ‘nature was nature, it has created male and female’ urging voters to reject gay rights in the Constitution.¹⁷³ Mugabe’s sentiments have been echoed by other African leaders in countries such as Namibia, Kenya and Zambia.¹⁷⁴ The Minister of Home Affairs in Namibia urged police recruits to ‘arrest on sight gays and lesbians and eliminate them from the face of Namibia’.¹⁷⁵

Despite the idea that the problems faced by LGBTI community within Africa are generally very similar between the countries one does have to point out that there are some nuanced differences. These differences are seen in the way LGBTI persons are treated by both the state and society. One example that can be given in this regard is the differences in protection and criminalisation. Amongst the various African countries being a gay man is outlawed in more countries than being a lesbian is.¹⁷⁶ In some countries there is no specific law against same sex practices whereas in other countries there are specific anti-sodomy laws.¹⁷⁷ Within the spectrum of anti-homosexuality legislation there are some countries that seek to drive for a reformation of anti-homosexuality legislation whilst others remain with the anti-sodomy laws handed down from the colonial powers.¹⁷⁸

Even within societies one experiences differences in the treatment of homosexuals. The phenomenon of ‘corrective rape’ experienced by lesbians is said to be unique to South

¹⁷¹ Epprecht (note 127) p. 4.

¹⁷² Epprecht (note 127) p. 3.

¹⁷³ AFP, ‘Robert Mugabe blasts gays, foreigners at 88th birthday bash’ *The Times of India*, http://articles.timesofindia.indiatimes.com/2012-02-25/rest-of-world/31100509_1_gay-rights-zimbabwe-s-president-robert-mugabe. (accessed 12 February, 2012)

¹⁷⁴ Epprecht (note 127) p. 4.

¹⁷⁵ Ibid.

¹⁷⁶ IOL, ‘Homosexuality still illegal in most countries’ *IOL.com* <http://www.iol.co.za/news/africa/homosexuality-still-illegal-in-most-countries-1.414685> (accessed, 23 January, 2013).

¹⁷⁷ McKenzie, D., Uganda lawmakers to vote on anti-gay law *CNN* (2012)

<http://edition.cnn.com/2012/11/23/world/africa/uganda-anti-gay-vote/index.html>. (accessed 1 November 2012).

¹⁷⁸ Cowell (note 145)

Africa¹⁷⁹ whereas in some countries the main target is homosexual men whilst in others there are relatively low levels of violence.¹⁸⁰ It is important to be cognisant of these nuances despite the idea that LGBTI persons face a similar situation all over the continent. The differences within various contexts remain important despite the slight nature of the differences. As this dissertation argues that one must understand context in order to understand how a norm with it, it would be fool hardy to ignore these slight variances. To treat the continent as homogenous would detract from the purpose of this study (namely to show that differences within nation states are important). Despite discussing the situation on the continent as a whole within the study one must remain cognisant of the varying situations.

2.4.6 Homosexuality as 'Un- African': Understanding the LGBTI norm in an African locale

When considering the reaction to the call for the protection of LGBTI rights in Africa and the obstacles that the norm faces one must perhaps refer back to the question asked by Acharya, why do norms take hold in some locales and not others? In the case of the African continent the fight against LGBTI rights is seen most clearly in religious and political rhetoric. In March 2012 some African countries, alongside some Arabic countries, made their position clear on the issues of LGBTI rights when they walked out of a debate about violence against LGBTI persons during a Geneva based United Nations Human Rights Council.¹⁸¹ Ambassador Fode Seck of Senegal, as leader of the Africa group at the council, argued that LGBTI rights are not part of global human rights. He stated that:

“We categorically reject all attempts to hijack the international human rights system by imposing social concepts or norms, in particular certain behaviours, that have no legal grounds in the human rights debate. Such an initiative would be perceived as a flagrant disrespect for the universality of human rights.”

For most African countries the protection of LGBTI rights is not a priority with many nation states instead seeking to further anti-homosexuality legislation rather than promote protection. Within Africa there is said to be an ‘invisible presence of homosexuality’ with the dominant narrative being that Africans are by nature heterosexual, which discounts the past

¹⁷⁹ Fihlani, P., ‘South African Lesbians Fear Corrective Rape’ (2011) *BBC* accessed, 15 January 2012. <http://www.bbc.co.uk/news/world-africa-13908662>.

¹⁸⁰ Taylor, D., ‘Africa’s Gays Say They’re ‘Under Siege’ *Washington Times* (2011)

<http://www.voanews.com/content/africas-gays-say-theyre-under-siege--115100674/159757.html> (accessed 23 March 2013).

¹⁸¹ Sambira (note 65).

practices within the continent.¹⁸² As is said before homosexuality is seen by many as a means of imposing Western imperialism with the notion having emerged over the years that homosexuality was in fact a product of colonialism and the practices of colonial settlers. Furthermore many African countries continue to criminalise homosexuality with laws that date back to the colonial period.¹⁸³ This is the climate in which the LGBTI norm seeks to operate, meaning norm diffusion can sometimes fail to occur despite going through the requisite stages. The dire reality faced by members of the LGBTI community (and the rejection of the idea of rights based on sexuality) shows that human rights are not always as ‘universally accepted’ as some norm diffusion models would have one think. Herein lies the basis for the critique of the norm diffusion model. The critique is that context plays a role and will interact with a norm in a particular way, a fact which the model does not engage with.

2.4.8 Summary

The chapter sought to show how human rights came to occupy the international space they currently enjoy. Human rights, in their modern form, were born in a post war context and have continued to grow in times of peace with the help of the United Nations system. The framework has eventually grown to include the rights of various minority groups including those of sexual minorities. The LGBTI norm has experienced its own progression having undergone its own conceptualisation and definition process to eventually gain prominence on the international stage. The chapter also sought to showcase the human rights situation in a more specific region, namely Africa. The African continent contains various mechanisms, instruments, actors and ailments all of which come into play when it comes to the understanding human rights within the region.

The chapter finally sought to give an overview of the situation facing human rights, focusing in on the lack of protection of LGBTI rights within the region. Human rights are covered in the shadows of institutional weakness, cultural impediments, a lack of political will, ineffective processes and underutilised mechanisms and instruments. Various rights are under threat due to these issues and no right comes under threat more than those of LGBTI persons which have no protection at all within the African Human Rights Framework. Africa has a long history of homophobia (which is ironically coupled with an even longer history of alternative sexualities) which has culminated in violence and discrimination on the continent.

¹⁸² Epprecht (note 141) p. 5.

¹⁸³ Sambira (note 65).

This has been the main impediment in terms of the diffusion of the LGBTI norm. However in order to understand impediments to norm diffusion one must first understand the model. The dissertation shall now seek to outline the three stages of norm diffusion and how they can be related to the LGBTI norm.

Chapter Three: the norm life cycle and LGBTI rights

Various theorists have looked at how movement on the international human rights front has affected the domestic as they continue to explore the notion of the diffusion of norms and principled ideas.¹⁸⁴ They have sought to explore ways in which states have internalized and implemented domestically the norms that seem to have taken hold internationally.¹⁸⁵ The main framework on which in the field has been built is that developed by Finnemore and Sikkink which outlines the three stages of norm diffusion: the emergence of a norm, the cascade of a norm and the internalisation of a norm.

3.1 The stages of norm diffusion

3.1.1 Stage one: origins or emergence of norms

Within the study of norm diffusion little work has been done on the origins of norms.¹⁸⁶ With the use of case studies Finnemore and Sikkink have identified two elements that are central to the success of the creation of new norms. These are norm entrepreneurs and the organisational platforms from which these entrepreneurs act.¹⁸⁷ Norm entrepreneurs are seen as the architects of the norms which the two argue 'are not built from thin air'.¹⁸⁸ Finnemore and Sikkink describe norm entrepreneurs as critical as they call attention to a matter. This is done by using language that names and frames various issues allowing for an emergence in a highly contested normative space that finds them in contestation with other norms and perceptions of interests. Efforts to promote norms are seen in light of the level of 'appropriateness' that was set by previous norms, therefore some engage in 'inappropriate behaviour' to challenge these norms.¹⁸⁹

Organisational platforms are the stage on which norm entrepreneurs pursue their interests. Some of these platforms are designed especially to promote certain norms whilst others are part of a larger transnational advocacy network of which NGOs become a part.¹⁹⁰ One prominent feature of these organisations is their use of expertise and information to change

¹⁸⁴ Risse and Sikkink (note 31) p. 4.

¹⁸⁵ Risse and Sikkink (note 31) p. 3.

¹⁸⁶ Finnemore and Sikkink (note 9) p. 896.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Finnemore and Sikkink (note 9) p. 897.

¹⁹⁰ Finnemore and Sikkink (note 9) p. 899.

the behaviour of other actors.¹⁹¹ Finnemore and Sikkink argue that an important feature of modern organisations (and an important source of influence) is their use of expertise and information in this way.

If one is to apply these concepts of norm entrepreneurs and organisational platforms to the realm of LGBTI rights one is able to analyse the role of players such as LGBTI activists and entities such as the Human Rights Commission as well as various international courts. In her work Kollman identifies a ‘human rights orientated transnational network of LGBTI activists’¹⁹² who managed to influence political elites in various key states. These activists, who played the role of norm entrepreneurs, utilised various organisational platforms such as the United Nations. In 1992 the first openly homosexual person spoke at the United National Human Rights Forum ‘amidst openly hostile remarks’.¹⁹³ The speaker pointed out that LGBTI persons were completely unrepresented in the work done by the United Nations. Organisations representing LGBTI persons were first accredited to a United Nations meeting in July 1993, the Vienna Conference on Human Rights, in which three organisations participated.¹⁹⁴ Furthering the foundation built on this, the first LGBTI organisation to gain consultative status on the Economic and Social Council was the International Lesbian and Gay Association (ILGA).¹⁹⁵ This consultative status was initially questioned by the United States and the organisation was eventually suspended pending a review of its member organisations and LGBTI issues continued to remain outside the realm of the United Nations agenda, an issue which was later rectified.

The United Nations, as an organisational platform, plays a key role in diffusing the LGBTI norm and is one of the platforms on which LGBTI activism takes place within the international realm. The organisation as a whole, as well its various bodies and spokes people, have called for the protection of LGBTI rights and an end to the violence faced by LGBTI persons. The United Nations had made official calls to governments to repeal discriminatory and harmful laws, targeting prolific ‘norm breakers’ such as those within

¹⁹¹ Ibid.

¹⁹² Kollman (note 58)p. 329.

¹⁹³ Saunders, D., ‘Getting Lesbian and Gay Issues on the International Human Rights Agenda’ *Human Rights Quarterly*, Vol. 18, No. 1 (1996) pp. 67-106, p. 67.

¹⁹⁴ Saunders (note 193) p. 68.

¹⁹⁵ Ibid.

Africa.¹⁹⁶ The body has made calls for governments to protect members of the LGBTI community as homophobic and transphobic violence has been recorded in all regions. Navi Pillay, the UN's High Commissioner for Human Rights, stated that 'governments should also outlaw all forms of abuse based on sexual orientation and set the same age of consent for heterosexual and homosexual activity'.¹⁹⁷ The first official statement issued by the body on the matter was in December 2011 in the form of a call for the protection of sexual minorities facing high levels of street violence as well as more organised abuse.¹⁹⁸ Hillary Clinton, in her capacity as the Secretary of State of the United States, made a speech to diplomats in Geneva and compared the struggle for LGBTI rights to the journey of rights such as women's rights and racial equality.

During the period the organisation also released its first report on human rights in reference to LGBTI persons. This report formed the precursor to the official call to end LGBTI violence. The report outlined the situation of LGBTI persons highlighting the killings, hate-motivated violence, torture, detention, criminalization and discrimination in jobs, health care and education faced by persons due to their sexual orientation.¹⁹⁹ The report stated the violence against LGBTI persons was especially vicious as compared to other types of bias-based crimes. The Committee on Economic Social and Cultural Rights, whose role it is to monitor the implementation of the International Covenant on Economic Social and Cultural Rights recognised sexual orientation and disability, among others, as prohibited grounds for discrimination under the Covenant.²⁰⁰ One witnesses the expertise and knowledge that the United Nations has in terms of the interpretation and implementation of rights being utilised in the case of LGBTI rights. The expert interpretation of provisions within international law allowed for the broadening of the Covenants scope of protection despite not explicitly protecting LGBTI rights.

International Courts can also be identified as organisational platforms. A number of cases moved key states towards the protection of LGBTI rights by giving rulings against the

¹⁹⁶ Aljazeera, 'UN calls for protection of gay rights' *Aljazeera* (Dec, 2011), <http://www.aljazeera.com/news/americas/2011/12/20111215191244754908.html>.(accessed 4 December 2012).

¹⁹⁷ Ibid.

¹⁹⁸ Reuters, 'U.N. calls for protecting gay rights worldwide' *Reuters* (Dec, 2011) accessed, 19 July 2012. <http://www.reuters.com/article/2011/12/15/us-rights-un-sexual-idUSTRE7BE1NW20111215>.

¹⁹⁹ United Nations, 'UN issues first report on Human Rights of gay and lesbian people' UN News Centre (2011) <http://www.un.org/apps/news/story.asp?NewsID=40743#.UL2lomFDvMQ> (accessed 4 December 2012).

²⁰⁰ Chilemba, E., 'Malawi: Will Banda Fight for Gay Rights?' *All Africa.com* (2012) <http://allafrica.com/stories/201210031151.html>.(accessed 16 October 2012).

discrimination of LGBTI persons by governments. Cases such as the United Nations Human Rights Committee's *Toonen v. Australia*²⁰¹ and the European Human rights Court's *Dudgeon v. the United Kingdom*²⁰² showcased to governments how discrimination against LGBTI persons was in contravention of various international principles such as the right to privacy and equality. The European Court in a number of cases had ruled the discrimination against LGBTI persons a general violation of Human rights.²⁰³ In the *Dudgeon* case it was stated that 'in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.'²⁰⁴ This showcased the growing consensus and changing mind set within the European context as some European nations emerged as norm leaders within the realm of LGBTI rights.

3.1.1.1 Reaching the tipping point

For an emergent norm to reach the second stage it must become institutionalised in a specific set of international rules and international organisations.²⁰⁵ Since 1948 various norms have been institutionalised in international law in the rules of multilateral organisations and bilateral foreign policies. After norm entrepreneurs have persuaded a critical amount of states to become norm leaders and promote new norms the norms reach a tipping point.²⁰⁶ One should note that there is no theoretical framework for *why* tipping happens or providing a criteria for why, where and when tipping happens. It is noted that there are some who argue that some states are more important in terms of the diffusion of a norm than others. Finnemore and Sikkink argue that what constitutes a critical state will vary from issues to issues.²⁰⁷

In terms of the LGBTI rights norm entrepreneurs such the European Courts and international organisations such as the United Nations managed to convince certain states to become norm leaders. In the mid-1980s no European country provided explicit legal recognition of LGBTI

²⁰¹ Human Rights Committee (note 55).

²⁰² Endsjo (note 49) p. 104.

²⁰³ Ibid.

²⁰⁴ Endsjo (note 49).

²⁰⁵ Finnemore and Sikkink (note 9) p. 900.

²⁰⁶ Finnemore and Sikkink (note 9) p. 901.

²⁰⁷ Ibid.

persons however by mid-2009 sixteen European countries had legalised their unions.²⁰⁸ Kollman states that it ‘represents one of the most dramatic cases of policy convergence in recent history’.²⁰⁹ European countries are said to be at the forefront of solidifying LGBTI rights. This is a manifestation of the first stage of the norm life cycle as one is able to witness norm entrepreneurs bringing the emergence of norm leaders from the ranks of states whom had previously violated LGBTI rights. Advocacy within international courts as well as organisations within the United Nations meant that these states begun to change their policies and eventually emerge as the promoters of these rights. Prior to the emergence of norm leaders and entrepreneurs the stigmatization of LGBTI people had occurred in many parts of the world with many countries criminalising same sex practices. It had been widely believed that countries would block action to have LGBTI rights protected however an increasing number of countries have recognised the protection of these rights allowing the norm to approach the moment in which it cascaded.

3.1.2 Stage Two: cascade of a norm

Once the tipping point occurs a new dynamic is said to take over as an increasing number of countries rapidly adopt the new norm.²¹⁰ The argument is that at this point international pressures for change become more important than domestic ones.²¹¹ Finnemore and Sikkink argue that the primary mechanism for promoting norm cascades is ‘an active process of international socialization’ which seeks to induce norm breakers to become norm followers.²¹² The two argue against it being a passive process stating that it is a process that could involve diplomatic praise or censure (either bilateral or multilateral), reinforced with material sanctions or incentives.²¹³ Networks of norm entrepreneurs and international organisations augment the pressure placed by norm takers by targeting certain actors to adopt new policies and laws.²¹⁴ The reason socialization is said to work is tied into the identities of states as members of the international community.²¹⁵ The two theorists argue that state identity fundamentally shapes state behaviour as they seek to gain the acceptance that comes with having a certain identity. James Ferguson argues that ‘one’s identity is as a member of a

²⁰⁸ Fernandez (note 3) p. 3.

²⁰⁹ Ibid.

²¹⁰ Finnemore and Sikkink (note 9) p. 902.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

particular social category, and part of the definition of that category is that all members follow certain norms.²¹⁶ Thus, in order to be part of ‘the club’ one must adhere to the rules.

What occurs at the tipping point is that enough states and critical states endorse the emergent norm which causes a redefinition of what is considered appropriate behaviour.²¹⁷ There are implications to being labelled a ‘rogue state’²¹⁸ as it means a loss of reputation, credibility and trust.²¹⁹ States embrace certain norms in order to show that they have ‘adapted to a certain environment’ and now they ‘belong.’²²⁰ Social norms are thus sustained, in part, by feelings of ‘embarrassment, anxiety, guilt and shame’²²¹ that come with breaking away from these norms. Finnemore and Sikkink argue that state leaders conform to norms in order not to elicit disapproval from within the community of states, a notion based on research done on the power of conformity within individuals.²²² The two do however, stress that it is difficult to generalize the research on esteem that is conducted on individual behaviour to the state level. Despite this caveat norm leaders do often target individual leaders for criticism. It is argued that, within the area of human rights, states are beginning to care deeply about their image and how they are perceived (i.e. whether or not they are perceived as human rights violators).²²³

Conformity and esteem involve countries proving that they have adapted to the social environment and that they now ‘belong’.²²⁴ The need to gain or defend one’s pride can be seen as an explanation for the diffusion of a norm. States in today’s global village seek to embody ‘liberal norms’ as being part of the group of liberal states comes with a certain level of esteem.²²⁵ Finnemore and Sikkink thus argue that state leaders conform to norms in order to avoid the disapproval that comes with violation.

3.1.2.1 Naming and Shaming: turning ‘Norm Breakers’ into ‘Norm Takers’

Two prominent cases of the attempts to convert norm breakers into norm takers are those involving the United Kingdom and the United States who during 2011 pledged to cut funding

²¹⁶ Ibid.

²¹⁷ Finnemore and Sikkink (note 9) p. 903.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Finnemore and Sikkink (note 9) p. 903.

²²² Finnemore and Sikkink (note 9) p. 904.

²²³ Ibid.

²²⁴ Finnemore and Sikkink (note 9) p. 903.

²²⁵ Finnemore and Sikkink (note 9) p. 904.

to countries which refused to protect LGBTI rights. Africa has been singled out as a region that is an especially hostile environment for LGBTI persons both formally and informally.²²⁶ Norm leaders, such as the United Kingdom and the United States, have in turn taken active steps to spread the notion of the protection of LGBTI rights. This was most prominently witnessed during the period November to December 2011. This had been done through the material means, namely the threat of the withdrawal of foreign aid.

In 2011 the United Kingdom threatened to suspend aid to Uganda over their ‘Anti-Gay Bill’,²²⁷ whilst sending the message to other countries that they may face the same sanctions if the bans on homosexuality were not lifted.²²⁸ The Office of the Prime Minister stated that the threat to suspend aid had been made in the context of the British government’s efforts to protect human rights around the world.²²⁹ In a statement released, the Office said that ‘the UK Government is at the forefront of work to promote human rights around the world, and regularly criticises governments which violate those rights’.²³⁰ The United States has called for the protection of LGBTI rights stating that ‘gay rights are human rights, and human rights are gay rights, once and for all.’²³¹ Since 2009 Hilary Clinton has directed the Department of State to champion a comprehensive human rights agenda, one ‘that includes the protection of the human rights of lesbian, gay, bisexual and transgender (LGBTI) people.’²³² President Barack Obama in 2011 gave the directive to government agencies that it should be ensured that US Diplomacy and foreign assistance promoted LGBTI rights and fought discrimination.²³³

The Department was mandated to use its ‘full arsenal of diplomatic and developmental tools in order to move towards the end of violence and discrimination of LGBTI people worldwide’.²³⁴ This is the first time the United States has formed a strategy to battle the discrimination of LGBTI human rights abuses as a presidential memo instructed agencies to

²²⁶ BBC (note 163).

²²⁷ The Anti-Homosexuality Bill Memorandum, (2009). <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>. (accessed 21 October 2012).

²²⁸ Wanambwa (note 5).

²²⁹ Fox979online (note 6).

²³⁰ Ibid.

²³¹ United States Department of State, ‘Africa: State Department Fact Sheet - Promoting Human rights of LGBTI People’ (Dec, 2011) <http://allafrica.com/stories/201112071000.html>. (accessed, 29 May 2012).

²³² Ibid.

²³³ Aljazeera (note 196).

²³⁴ United States, Department of State (note 218).

utilize foreign aid to promote gay rights.²³⁵ President Obama went on record stating that the ‘struggle to end discrimination against lesbian, gay, bisexual and transgender persons was central to America's commitment to promoting human rights’.²³⁶ US agencies were specifically instructed to fight the criminalisation of LGBTI status or conduct overseas whilst being instructed to also protect vulnerable LGBTI refugees and asylum seekers, and engage international organisations.²³⁷ Norm leaders have, through the use of international agencies and material sanctions, attempted to convert the norm breakers into norm takers. The next step is for these norms to become a part of the identity of the norm breakers through the means of internalization.

3.1.2.2 LGBTI norm cascade: No place in Africa

Countries within the continent have taken a stand against Western threats to reduce foreign aid in the name of LGBTI rights. Recent decisions by the United States and the United Kingdom, instead of furthering the LGBTI norm, had unintended consequences on the African continent with some arguing that the actions of these norm leaders has made the situation *worse* for LGBTI persons on the continent.²³⁸ The argument for many who seek to uphold the rights within the continent argue that the situation has in fact worsened with hostility being on the increase. Tying aid to LGBTI rights has had religious leaders and state leaders up in arms; spurring the societies they lead on.²³⁹ What has in fact happened is many civil society leaders have shown increased homophobia and state leaders have been seen to call for a tightening of laws against same sex acts and marriage.²⁴⁰ Ugandan officials have gone on record stating that the country “would continue to co-operate with the US on security and other issues”, but added: “If they are childish enough to take away aid, we'll see what we do [in response].”²⁴¹

The Council of African Apostles (CAA) called for the withdrawal of the statements made by the United States and the United Kingdom. They stated that the aid should not be tied to

²³⁵ McVeigh, K., ‘Obama tells US officials to use overseas aid to promote gay rights’, *The Guardian* (Dec 2011) <http://www.guardian.co.uk/world/2011/dec/06/us-overseas-aid-human-rights>. (accessed, 27 January, 2011).

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Sambira (note 65).

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Farouk, C., ‘Gay Rights: Africa, The New Frontier’ (2011) <http://www.bbc.co.uk/news/world-africa-16780079> (accessed, 10 May, 2012).

“morals, principles and/or religious beliefs”.²⁴² The Council said that it was “morally irresponsible of Western powers to attach the adoption of 'gay rights' to development support. Such positions affirm the long-held beliefs that the West does not relate with Africa on a basis of equality”.²⁴³ Uganda revived a controversial ‘Anti-Gay Bill’ and, mirroring the actions of Nigeria, passed a bill that punished same sex unions with 14 years in prison.²⁴⁴ The Bill also punishes those who aid and abet such a union. In Egypt the push by the United States and the United Kingdom for LGBTI rights was rejected by all political parties.²⁴⁵ Despite the threats of Western countries to withdraw aid, sentiments such as these still exist within the countries. British Prime Minister David Cameron has admitted that despite the action taken, ‘deep prejudices’ in some countries would mean that the problem would continue to prevail.²⁴⁶

This is the context in which the push for LGBTI rights operates and is the situation that must be understood when looking and speaking of the diffusion of a norm. The argument by many who seek to uphold the rights within the continent is that the situation has in fact worsened with hostility subsequently being on the increase. Herein lies the issue of context and understanding as one must look to why the LGBTI rights norm has not been spread despite the threats issued by Western countries. This ties in with the argument, placed forth by various theorists, that there is a need to look to the ‘norm takers’ as well as the ‘norm givers’. Although various human rights face a sometimes depressing reality in terms of implementation the rights of LGBTI persons are ones that arguably face the most precarious situation of all. This has led Western governments to embark on an initiative to have their African counterparts protect LGBTI rights within the both social and cultural rights. The manifestation of this can be witnessed in the Malawian response to the initiative to diffuse the sub-norm of LGBTI rights.

3.1.3 Stage Three: Internalization of a norm

The final stage in the norm life cycle is that of internalization. This is a period in which norms may become so widely accepted that they are internalized by actors and begin to

²⁴² Sambira (note 65).

²⁴³ Ibid.

²⁴⁴ Sambira (note 65).

²⁴⁵ Farouk (note 241).

²⁴⁶ The Guardian, ‘Countries that ban homosexuality risk losing aid, warns David Cameron’ *Guardian.co.uk*
<http://www.guardian.co.uk/politics/2011/oct/30/ban-homosexuality-lose-aid-cameron>. (accessed, 22 September, 2012).

embody a 'taken-for granted' quality.²⁴⁷ This makes conformance to the norm almost automatic and makes these norms extremely powerful and difficult to discern. The study does identify that there are certain Western norms that have been taken for granted such as market exchange, sovereignty and (one that sometimes fails to translate in the African ideals of community) individualism.²⁴⁸ Academics have, thus, chosen to puzzle over the similarities or 'isomorphism'²⁴⁹ among states and societies.

There have, also been various powerful mechanisms which have sought to further the internalization of norms, including the professional sphere which has been identified as a powerful agent that internalizes norms amongst members.²⁵⁰ This is a notion that is applied to those in international organisations and state bureaucracies. As they become more professionalized they begin to produce policy that reflects the normative basis of the professions that staff decision making agencies.²⁵¹

3.1.3.1 Laws and People: A chasm between formal internalization and societal internalization

Although the aforementioned tools can be utilised to bring about internalisation there is seldom a distinction between formal internalisation and societal internalisation. Marsh and Payne have argued, quite rightly, that the spread of human rights around the world entails far more than getting a larger number of states to sign the various treaties and incorporate the rights into their legal systems.²⁵² The efficacy of human rights policies have long been debated, from the policy making and activist realm to the academic sphere. Activists and policy makers have questioned how effective these policies are if time has not been taken to engage with systematic study and analysis of the societal impact on change.²⁵³ Thomas Risse and Kathryn Sikkink have argued that the ability for a human rights norm to be implemented is affected by the presence (or lack thereof) of the requisite political systems that allow for the rule of law.²⁵⁴ There is an element or measure of political transformation that is needed which can be regarded as part of the liberalization process. In their work *The Power of*

²⁴⁷ Finnemore and Sikkink (note 9) p. 904.

²⁴⁸ Ibid.

²⁴⁹ Finnemore and Sikkink (note 9) p. 905.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Marsh and Payne (note 11) p.665.

²⁵³ Risse and Sikkink (note 31) p. 4.

²⁵⁴ Risse and Sikkink (note 31) p. 3.

Human Rights: Institutional Norms and Domestic Change the two authors lay out the theoretical framework for norm socialization identifying the three stages of socialization as being (1) “adaptation and strategic bargaining;” (2) moral consciousness raising, argumentation, and persuasion; and (3) “institutionalization and habitualization.”²⁵⁵ The model works on the assumption that a norm has been spread and accepted once a government adjusts their behaviour in order to win favour in the international realm without necessarily believing in the validity of the norms.²⁵⁶ This may not necessarily be the case as often there is a chasm between formal legal acceptance and societal acceptance.

The examination of some rights functioning within the African context reveals that the formal (legal) acceptance of rights is not always married to societal acceptance. African states have committed themselves to an array of significant gender-based mechanisms such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Millennium Development Goals (MDGs) and the Beijing Platform For Action (BPfA) of 1995 on an international level.²⁵⁷ On a more regional level they are committed to treaties such as the African Union’s Solemn Declaration on Gender Equality in Africa and the New Partnership for Africa’s Development (NEPAD).²⁵⁸ These policy frameworks and conventions commit governments to address issues of gender equality within the region as well as furthering the notion of women’s empowerment.²⁵⁹

Despite the enthusiastic promises and commitments of governments the situation for women within many parts of the continent shows little improvement in many respects.²⁶⁰ It has also been identified that in some cases the situation has actually worsened, which in itself is also a concern. This indicates a chasm between formal acceptance and societal acceptance. Those who point this out argue that the root of the problem lies in the lack of political will on the part of governments to implement commitments to gender equality as well as disregard for these rights within the private homes of citizens.²⁶¹ Many of the most serious violations of

²⁵⁵ Ibid.

²⁵⁶ Marsh and Payne (note 11) p.668.

²⁵⁷ Musa (note 70) p. 24.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Musa (note 70) p. 25.

²⁶¹ Ibid.

women's rights occur within the private sphere and the dangers experienced within this realm are reinforced by various traditional norms and values.²⁶²

This tension is reinforced even in terms of regional rights protection as the African Charter states that every African may 'freely take part in the cultural life of *his* community'.²⁶³ The only specific reference to women's rights in the African Charter is a clause concerning the family and upholding of tradition. The Charter has been interpreted in order to uphold and protect customary religious laws that often violate women's rights, rights that ensure equality and non-discrimination. These cultural and traditional practices (which operate primarily within the private sphere) continue to hold back the progression of women's rights. In terms of implementation on international protocols again it must be stressed that further ratifications and protocols are hindered by political will. Many countries' gender machineries are weak and lack adequate authority, capacity, human resources and funding.²⁶⁴ Women's ability to access their rights and justice is further inhibited by illiteracy and ignorance of their rights and how to access them.

The situation is much the same for children's rights as statistics have shown that sub-Saharan Africa has the highest child labour rate in the world with approximately 80 million children working.²⁶⁵ The adoption of the Convention of the Rights of the Child signalled the commencement of the commitment of states to protect the rights of children, a commitment that was mirrored by African countries in the form of the African Charter on the Rights and Welfare of the Child.²⁶⁶ Despite the formidable characteristics of the Charter a challenge faced by activists within the continent is the gulf between law and implementation.²⁶⁷ There is a vast difference between the provisions of the Charter and the reality faced by millions of children on the continent.²⁶⁸ The situation shows the void between the legal instruments and social acceptance as although there are mechanisms in place there is still a lack of adherence within the social realm.

²⁶² Musa (note 70) p. 28.

²⁶³ Musa (note 70) p. 29.

²⁶⁴ Musa (note 70) p. 31.

²⁶⁵ Mindzie, M.A., 'Regional Protection of Child's Rights in Africa' *Africa's long road to rights* ed. Hakima Abbas, (Oxford, UK: Fahamu Books, 2008), 188. p. 50.

²⁶⁶ Olowu (note 101) p. 127

²⁶⁷ Olowu (note 101) p. 133

²⁶⁸ Olowu (note 101) p. 133.

If one is to extend this idea to the LGBTI norm one can predict that a lack of social acceptance would mean formal legal protection would function in a context of discrimination and violence. The situation faced by women and children on the continent allows for some clairvoyance on the matter. One is able to forecast that the formal acceptance of LGBTI rights, in the form of legal instruments, that is not coupled with a societal acceptance can be detrimental for the LGBTI rights norm as persons who fall under this banner would continue to face instances of discrimination and violence.

The notion of merely getting states 'on board' with a norm without the support of society is moot. The disconnection between the formal protection of LGBTI rights and societal adherence to the norm can be witnessed in the only African country that protects these rights: South Africa. South Africa has one of the most lauded constitutions in the world which itself forms the basis for many precedent-setting judgments and laws that serve to protect persons from sexual discrimination.²⁶⁹ Despite this the country exhibits high levels of violence against persons within the LGBTI community.²⁷⁰ A prime example of this violence is occurrence of 'corrective rape', which entails men raping lesbian women in order to 'cure' them of their sexuality.²⁷¹ It is estimated that 500 lesbians are victims of corrective rape every year, with many more cases going unreported.²⁷² Over 80% of these instances are black lesbians.

There have also been accounts of gay men facing physical abuse and South Africa is said to have, arguably, some of the highest levels of violence against LGBTI persons. An example of the heightened levels of violence is the beheading of 23-year-old Thapelo Makhulte, who identified as both transsexual and gay.²⁷³ An official statement from the LGBTI organisation Legbo said that the man had had argument with his attackers 'regarding his sexuality'.²⁷⁴

²⁶⁹Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (Dec, 2005); South African History Online 'Why protect the rights of gays and lesbians?' and *South African History Online* <http://www.sahistory.org.za/topic/why-protect-rights-gays-and-lesbians> (accessed, 3 February, 2012).

²⁷⁰ Smith, D., 'South Africa gay rights activists warn of homophobic attacks after murder' *The Guardian* (2011) <http://www.guardian.co.uk/world/2011/may/03/south-africa-homophobic-attacksn>. (accessed, 13 July 2012).

²⁷¹Fihlani (note 179).

²⁷² Di Silvio, L., 'Correcting Corrective Rape: Carmichele and Developing South Africa's Affirmative Obligations to Prevent Violence Against Women' *Georgetown Law Journal* Vol. 99 (2009) pp. 1469-515.

²⁷³ Staff Writer, 'Gay man beheaded in Northern Cape' *Mamba Online* (2012)

<http://www.back2stonewall.com/2012/06/south-african-trans-gay-identifying-man-attacked-beheaded-gay.html>. (accessed 6 February 2013).

²⁷⁴ Ibid.

Instances of societal violence such as this remain, despite the fact that there are various laws protecting LGBTI persons. This speaks to the need to understand the context and work to change the societal context and not merely the legal instruments that govern the private sphere. A norm needs to be understood in terms of the state and society which forms. Understanding how a norm interacts with the local is, thus, imperative.

Summary

The norm life cycle provides a good basis to analyse the diffusion of a norm, allowing for the identification of various actors and actions that pertain to furthering a norm. The three stages allow for those studying a norm to track it as it moves through the international arena. However, the model falls short as when looking to a norm entering the domestic realm during internalization stage. It fails to look below the state level to assess whether a norm is truly internalized and accepted within the domestic realm and therefore truly diffused. It is at this point that the critique of norm diffusion should be introduced. Through the lens provided by the case study of Malawi the critique of the norm diffusion model (namely the lack of lens that looks to the local context) will be presented.

Chapter Four: A critique of norm diffusion and the ‘African Experience’.

4.1 Norm diffusion model critique: The lack of local lens

As is stated before the diffusion of the LGBTI norm has met its fair share of trouble within the internalization stage, especially within the African continent. This is due, in great part, to the presumption that, as a spin-off of various human rights, it would be universally accepted with little consideration given to local context. Some theorists studying norm diffusion have sought to look at the local conditions that allow for the infusion of these rights within the domestic realm with a host of arguments being placed forward.

4.1.1 LGBTI: A ‘Western’ norm in an African context

The African continent has had an extremely adverse reaction to what they see as an imposition of ‘Western values’ in the form of LGBTI rights. African countries were reported to be ‘fuming’ after being told by Western leaders such as UK Prime Minister David Cameron that their administration would slash aid to African countries with poor records on LGBTI rights.²⁷⁵ Editorials and newspaper articles emerged from various African countries including Nigeria and Uganda stating that the Prime Minister had ‘pushed the wrong buttons’ and had that he had touched a raw nerve by calling for the protection of these [LGBTI] rights.²⁷⁶ Western countries have often been accused by many anti-homosexuality protestors of attempting to impose unnatural sexual practices on Africans and it has been argued that the statements of various Western leaders have played right into the hands of these critics.²⁷⁷

This controversy has aroused nationalist sentiments amongst those who have anti - homosexual sentiments with some calling the bluff of the norm leaders. Throughout the continent there have even been calls for Africa to ‘shun’ Western Aid.²⁷⁸ Some articles have even gone as far as to suggest that Prime Minister Cameron’s empathy to words LGBTI persons may in fact be a ‘fellow-feeling’,²⁷⁹ with the Prime Minister could relate as, he too,

²⁷⁵ All Africa ‘Africa Fumes Over UK PM’s Aid Cut Threat on Gays’ *All Africa.com*, <http://allafrica.com/view/group/main/main/id/00014520.html>. (accessed 3 February, 2012).

²⁷⁶ Editorial, ‘Uganda: UK’s Cameron Touched Wrong Button On Gays’ *AllAfrica.com* <http://allafrica.com/stories/201111080422.html>. (accessed, 2 February, 2012).

²⁷⁷ Ibid.

²⁷⁸ Moyo, T., ‘Africa must shun Western Aid’ *All Africa* (Nov 2011) <http://allafrica.com/stories/201111070159.html>. (accessed 2 February 2012).

²⁷⁹ Nda-Isaiah, S., ‘Nigeria: Did the prime Minister really say that?’ *All Africa* (Nov, 2011) <http://allafrica.com/stories/201111071032.html>. (accessed, 3 February, 2012).

was a homosexual. These articles go on to state that it is fitting that homosexuality remains a crime within Africa and that to introduce homosexual ideas would mean having a twisted idea of democracy. In his article Sam Nda-Isaiah stated that one of the best laws to emerge from Nigeria was criminalizing being an abettor or a witness to same sex marriage.²⁸⁰ Another article termed Mr Cameron's remarks as being based on 'failed racist theories' and stated that the comments showed his blatant disregard for other's beliefs and religions.²⁸¹ The author went on to state that it did not matter if aid was withdrawn, African countries should not accept homosexual practices as they were strictly forbidden within all religions. It has even been argued that 'This is a brazen continuation of their previous forays during slavery and colonialism to ideologically and physically subjugate Africans for their own benefit.'²⁸² There have also been examples of heads of states condemning the remarks. President Robert Mugabe was quoted as stating that the Prime Minister's support for homosexuals was 'satanic' and the Prime Minister could cut aid to the country if he so wished.²⁸³

These remarks reflect the mind set of many Africans and showcase the biggest impediment to the spread of LGBTI rights as a norm. Unlike norms such as democracy and market freedom, alternative sexualities are seen as distinctly 'un-African' and any deviation from heteronormativity is seen as a direct threat to African values. Although the norm enjoying international support from organisations and norm leaders it has met distinct challenges at the internalization stage, a fact which forms the basis for the critique of the model. One must look at the 'dogs that don't bark' and what it is that makes this the case. One can see that, in terms of the LGBTI norm, African countries have not felt the need to join the ranks.

4.1.2 The failings of the norm diffusion model

Although the framework given by Finnemore and Sikkink provides a good foundation to track the LGBTI rights norm it does, like all theoretical frameworks, have some limitations.²⁸⁴ There are instances in which the processes of norm diffusion were not successful when disseminating a norm into a particular country or group of countries. The

²⁸⁰ Nda-Isaiah (note 279).

²⁸¹ Moyo (note 278).

²⁸² Ibid.

²⁸³ Laing, A., 'Mugabe calls David Cameron 'satanic' for backing gay rights' *Telegraph*.

www.telegraph.co.uk/news/politics/david-cameron/8912132/Mugabe-calls-David-Cameron-satanic-for-backing-gay-rights.html (accessed, 5 February, 2012).

²⁸⁴ Finnemore., M., 'Norms, culture, and world politics: insights from sociology's institutionalism 'Institutionalism' *International Organisation*, Vol. 50 No. 2 (1996) pp. 325-47, p. 343

problem is that the norm life cycle, as is outlined in the previous chapter, places a great deal of emphasis and focus on the automatic acceptance of states, seeing them as homogenous. There is a tendency to accept the idea of a unitary state which is then coupled with a focus only on the elite. This has led to what Laura Landolt argues to be an inaccurate account and analysis of norm diffusion.²⁸⁵ The question of why norms are accepted in some places and not others is one that has challenged scholars such as Thomas Risse, Stephen C. Ropp, Kathryn Sikkink to pay increasing attention to ‘the causal mechanism and processes by which...ideas are spread’²⁸⁶.

The critique can be furthered by looking at theorists who argue for a localized nature to the implementation of human rights norms. Marsh and Payne argue that human rights norms have been spread when a *society* accepts these norms and they become embedded into the fabric of that society’s legal code and culture.²⁸⁷ They argue that this is the only way in which human rights protection will be guaranteed. A framework set by Risse, Ropp and Sikkink operates through five phases which are termed the “spiral model” of human rights change: (1) repression and activation of international-transnational networks; (2) denial by the oppressing state; (3) tactical concessions by the oppressor; (4) prescriptive status, including the signing of treaties; and finally (5) rule consistent behaviour.²⁸⁸ Marsh and Payne however argue that these stages are far too teleological with some countries managing to reach the fifth phase without going through the other four. This is done largely through the avenue of domestic sources of human rights movements, showing a more localized element.²⁸⁹

A critique of the model given by Risse and Sikkink is that it is based on the ‘grand supposition that the norms within the [Universal Declaration of Human Rights] are valid moral norms...worthy of implementation’²⁹⁰ allowing for their translation into any context. In this case there is the problem of ‘cultural homogenization’ in which Marsh and Payne argue that the model implies ‘the inevitable outcome of the argumentation and persuasion process is that societies will buy into the universality of human rights as originally conceived by the

²⁸⁵ Landolt, L., ‘(Mis)constructing the Third World? Constructivist analysis of norm diffusion’, *Third World Quarterly* Vol. 25 No 3. (2004) pp. 579-591, p. 579.

²⁸⁶ Acharya (note 22) p. 240.

²⁸⁷ Marsh and Payne (note 11) p. 666.

²⁸⁸ Risse and Sikkink (note 31) p. 3.

²⁸⁹ Marsh and Payne (note 11) p.668.

²⁹⁰ Marsh and Payne (note 11) p.669.

West'.²⁹¹ This does not leave room for other societies to reconceptualise the various human rights that are being diffused allowing for an articulation of their own understanding. This could either hinder or stop the flow of certain human rights if certain local factors are not taken into consideration. This is seen acutely in the case of LGBTI rights within Africa. The resistance, by both local and international agents, to the spread (as conceptualised in the internalization process) of LGBTI rights should be analysed and understood in light of the African context. The diffusion of LGBTI norms needs to be understood in light of this critique especially in terms of the African context.

4.1.3 The critiques outlined

Critique one: Focus on hard cases on moral transformation

When one looks at the spread of norms, one is able to identify a pattern in which human rights and other 'noble norms' manage to overcome local beliefs. Finnemore and Sikkink, in their study of this stage, focus on norms that are seemingly incorporated with no real resistance or without distinction of societal and formal internalisation.²⁹² This allows for the idea that all 'good' norms seemingly take on a neutral 'easy to swallow' nature and are thus easily incorporated into nation states. Acharya states that the constructivist thought has tended to focus on 'hard' cases of moral transformation in which 'good global norms prevail over the bad local beliefs and norms'.²⁹³ This however is not always the case as international norms do not always automatically triumph over local customs and beliefs.

Acharya argues that the reason for some norms not taking hold is that those contending with norm diffusion do not take into account the fact that local norms form part of a normative order. The argument against this notion is that not all norms will spread as easily as others and one must understand why there are some 'fish who do not bite' when a norm is dangled in front of them. The LGBTI rights norm within Africa is just such a norm. The idea is simply that 'bad' local norms are displaced by 'good' international norms not considering the fact there may already be a normative order that will not marry well with the one that is imported from the international order. This ties into Marsh and Payne's argument against the overarching idea that norms that are encapsulated within the Universal Declaration of Human

²⁹¹ Ibid.

²⁹² Marsh and Payne (note 11) p. 669.

²⁹³ Acharya (note 22) p. 239.

Rights have an intrinsic validity making them worthy of implementation²⁹⁴ and can thus be imposed on any context. This links to issues of ‘cultural homogenization’ in which societies are seen to automatically buy into human rights as they are conceptualised within the West, as seen in the model given by Finnemore and Sikkink.²⁹⁵

Rights within the Universal Declaration of Human Rights do not always have the impact within the African context that those who advocate for them would have hoped, a fact which can be seen in the case of women and children’s rights. Although there is an implied ‘universality’ and, arguably, an inherent good contained within these rights they are not always protected within certain realms and regions. This brings about the thought that there is a need in some cases to reconstruct and reconceptualise a ‘foreign’ norm in order to allow it into the national context.²⁹⁶ This furthers the idea that there is a great need to look at how a local setting allows for a norm to grow and spread or even prohibits the spread of a norm. The mere idea that they are accepted ‘universally’ (in their current form) does not ensure that they will enjoy the same protection within the borders of various states when having to contend with various cultural, traditional, political and societal factors. Human rights are not alien to Africa, with rights being centred around ideas of community and mutual respect, however the argument of ‘alien rights’ centres around the *form* in which these rights enter the African context. It is the lack of fit, in this sense, that causes the clash with local factors and not the idea of ‘rights’ in themselves.

Critique two: An over emphasis on the role of the norm leaders

The focus on norm leaders can be identified as another hole within the norm diffusion framework. The diffusion of a norm is dependent on convincing ‘critical states’ to become norm leaders and thus places the power of diffusing the norm in their hands.²⁹⁷ In their work Finnemore and Sikkink argue that ‘some states are critical to the adoption of a norm’²⁹⁸ labelling them ‘critical states’ needed for diffusion. They continue by stating that once a critical mass of states has become norm leaders the norm has reached ‘tipping point’²⁹⁹ and this is often the case when one third of states adopt a norm. This is then the point in which a

²⁹⁴ Marsh and Payne (note 11) p.669.

²⁹⁵ Ibid.

²⁹⁶ Acharya (note 22) p. 239.

²⁹⁷ Finnemore and Sikkink (note 9) p. 895.

²⁹⁸ Finnemore and Sikkink (note 9) p. 901.

²⁹⁹ Ibid.

norm ‘cascades’. Although Finnemore and Sikkink note that little normative change happens without significant domestic movements supporting the change³⁰⁰ they fail to explore this notion further, choosing to look at why there may be a lack of such domestic movements. The relationship between the norm leaders and other states is based on the fact that these states eventually ‘bring around’ the other states, turning them from norm breakers to norm followers. This in turn leaves most of the agency to the norm leaders. The question is then posed what of the ‘norm takers’?

The approach assumes that Western norms such as liberal democracy, free markets and human rights diffuse amongst states by means of an independent international social structure rather than being projected from a domestic level.³⁰¹ This is tied to the idea that liberal norms are by and large a positive entity on the international level and thus that the West only promotes liberal and progressive norms. Jeffery Checkel argues against the idea of inherent positivity stating that the same norm can have a dramatic constitutive impact in one state but fail to do so in others.³⁰² One can argue that the answer lies in looking at the domestic level and the need to measure according to the ability for society as a whole to accept the rights. One cannot have a proper analysis of diffusion if one only looks at those who choose to diffuse a norm and not those who are having the norm ‘delivered’ to them. Looking purely at norm leaders does not take into cognisance the fact that some norms will fail to take hold in a certain context but find success in another. The ‘grand supposition’ leaves the literature underdeveloped in explaining differences.

Critique three: ‘Below the elite’- Looking at the locals players within norm diffusion

The third shortcoming of the literature is in its elite-centric focus. The approach tends to be elite focused looking mainly to the socialisation of these elites whilst largely discarding or downplaying domestic material factors and political process. All this, Landolt argues, means that constructivists are unable to fully explain why some instances of norm diffusion are successful whilst others fail.³⁰³ This leads to the question of how and why certain international norms are successfully promoted, diffused and adopted by states whilst others are not quite so lucky. Landolt argues that there is a need to look under the elite. She argues

³⁰⁰ Finnemore and Sikkink (note 9) p. 902.

³⁰¹ Landolt (note 285) p. 580.

³⁰² Checkel (note 12) p. 85.

³⁰³ Landolt (note 285) p. 581.

that due to the primary focus on elites there is a downplaying of domestic material factors and political processes, causing states to resemble unitary actors and appear ‘disembodied’.³⁰⁴ This implies that all norms can be spread in a similar manner, thus prohibiting the development of the idea of local context. This all leads to an exaggeration of norm adherence.³⁰⁵ The notion that all states are ‘unitary’ drives us back to the question ‘why in some locales and not others?’ The ability for the framework to provide an answer to this question is left wanting, if not non-existent. Landolt argues that this leaves constructivists unable to explain even the successful cases of norm diffusion let alone the unsuccessful ones.³⁰⁶

As a response to this gap is that in order to impact real change in terms of the norms one must change the preferences and interests of domestic agents such as groups or individuals.³⁰⁷ One is unable to bring about LGBTI rights within the continent basing success only on the acceptance of the human rights sub-norm by the state through legislation or international conventions. Current models leave a great gulf between formal ratification and incorporation of human rights norms into domestic law and ‘deep and internalized support for human rights norms’ within civil society.³⁰⁸ There is a need to look at the role of local agents within the diffusion process.³⁰⁹ The central roles played by actors such as religious leaders and high profile individuals within the realm of African politics and society is a factor that cannot be ignored. The issue of LGBTI rights has seen many actors from outside the state play key roles in the debate surrounding LGBTI rights. Within Africa various politicians, religious figures and average citizens have often aired strong views on the matter.³¹⁰ These entities have often played a key role within the political social realm despite being outside the official structures of the state.

Summary

The critique of the norm life cycle can be identified as being three-fold: its focus on norm leaders, its focus on the elite, and the inference that all human rights enshrined in the Universal Declaration of Human Rights contain and inherent goodness. The three areas of

³⁰⁴ Landolt (note 285) p.588.

³⁰⁵ Landolt (note 285) p.585.

³⁰⁶ Landolt (note 285) p.581.

³⁰⁷ Checkel (note 12) p. 87.

³⁰⁸ Landolt (note 285) p.588.

³⁰⁹ Acharya (note 22) p. 243.

³¹⁰ African Activist (note 149).

the critique operate on various levels looking at the effect and interaction of norms on an international level, a state level and a societal level. The critique that focuses on the lens of norm leaders provides a critique at the international level whilst the idea of the elite speaks to a critique at state level. The idea of the universal good of a norm speaks to its interaction with a society and how this inherent good may not always be present. All of this shows that there is a need for the extension of the framework to take into account local factors that may seek to hinder the progression of a norm and move the focus from the norm leaders to the norm takers. The idea that 'universally good' local norms will easily enter the domestic realm is challenged when one looks at LGBTI rights in Africa, and more specifically Malawi. One needs only look within the borders of the African nature to witness the need for a local lens in terms of norm diffusion. If one is to understand how a norm manoeuvres on the international stage with the aid of norm diffusion then one must look at the domestic realm and the possible obstacles it may pose. Malawi provides a good case study in which to do that.

Chapter Five: Malawi, LGBTI rights and the importance of local understanding

Malawi falls within the ranks of those dissenters which have failed to internalise the LGBTI norm. . International organisations (such as Amnesty International and the United Nations) and states alike have called for Malawi to recognize the rights of sexual minorities and for the end of violence and discrimination against LGBTI persons within Malawi.³¹¹ However same sex practices are still seen as detestable by the majority of Malawian people.³¹² Within Malawi members of the LGBTI community face arrest and beatings by members of law enforcement as well as extended periods of detention.³¹³ LGBTI rights groups have increasingly been forced underground and are unable to help members of their own community as they too fear of persecution by those in power. Those within the political realm incite violence against LGBTI persons through expressing various inflammatory sentiments which have incited members of society towards violence. The media has also taken a central role in stirring up homophobic attitudes within the country with various media outlets (such as newspapers) speaking out against homosexuality.³¹⁴

Malawi is one of the countries that had been threatened with the withdrawal of foreign aid and with 40 per cent of the national budget coming from this source this is no small threat.³¹⁵ However, the African state remained adamant that the legalisation of same sex practices was not something that was a part of their national identity as various factions within society, from religious factions to ‘the man on the street’ supported the notion that ‘homosexuality’ needed to be condemned. In 2010 two homosexual men were given the maximum sentence (14 years in prison with hard labour) for the committing the crime of ‘gross indecency and

³¹¹ IGLHRC, ‘Malawi: End Arrests and Discrimination Against LGBTI People’ *International Gay and Lesbian Human Rights Commission* <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/1069.html>. (accessed, 16 October, 2012).

³¹² Bearek, B., ‘Gay Couple in Malawi get maximum sentence of 14 years in prison’ *NY Times* <http://query.nytimes.com/gst/fullpage.html?res=9F07E3DD1131F932A15756C0A9669D8B63&ref=malawi>. (accessed, 16 October, 2012).

³¹³ Vijayarasa, M., ‘Hate Crimes Rise as Homophobia Spreads Across Africa’ (2010) <http://www.rhrealitycheck.org/blog/2010/02/22/hate-crimes-rise-homophobia-spreads-across-africa> (accessed 29 May 2012)

³¹⁴ Gondwe, G., ‘Malawi: Malawi’s homophobic challenges’, *Gender Links* (2012) <http://www.genderlinks.org.za/article/malawi-malawis-homophobic-challenges-2012-06-06> (accessed, 3 November, 2012.)

³¹⁵ Bearek (note 312)

unnatural acts' after holding a *chinkhoswe* (engagement ceremony) in a lodge in Blantyre.³¹⁶ Steven Monjeza, 26, and Tiwonge Chimbalanga, 20, had been in jail since they were arrested in December of 2009 after holding an engagement ceremony. Crowds gathered to witness the sentencing and the nation's clergy united in condemning the gay couple. Reverend Felix Zalimba, pastor of the All for Jesus Church in Blantyre stated that 'God calls homosexuality an abomination, which is greater than a simple sin.'³¹⁷ Following international outcry the two men were eventually pardoned however ex-President Bingu wa Mutharika, stated that it had been on 'humanitarian grounds only'. He argued that that the two men had committed a crime against 'our culture, against our religion, and against our laws'.³¹⁸ This incident indicated that homophobic sentiment is fuelled by both members of the state and civil society.³¹⁹

There have been some who have identified that the threat to cut aid to African countries has in actual fact caused a *rise* in homophobia rather than the internalisation of the LGBTI norm.³²⁰ Rachel Crook, writing on the causes of homophobia, proposes that statements by Western nations could create '[a] real risk of a serious backlash against LGBTI people'.³²¹ She continues to argue that the divergent reactions by nation states in international forums to the statements by both United States and United Kingdom officials demonstrated 'the vital importance of understanding the historical, political, and religious barriers that give rise human rights violations.'³²² For this reason one must seek to understand the importance of looking at the local, both in terms of the African context in general as well as the need for support by a state's society.

Malawi proves a prime example. The African nation has been in the limelight in terms of LGBTI rights a number of times as it initially faced condemnation over the sentencing of Steven Monjeza and Tiwonge Chimbalanga to 14 years in prison and then more recently on the contentious matter of the repealing of anti-homosexuality laws in the country.³²³ Norm

³¹⁶ BBC, 'Malawi gay couple get maximum sentence of 14 years' *BBC* (2010), <http://www.bbc.co.uk/news/10130240> (accessed 15 October, 2012).

³¹⁷ Bearek (note 312)

³¹⁸ BBC (note 316)

³¹⁹ Sambira (note 65).

³²⁰ Bearek (note 312).

³²¹ Crook, R., 'The sources of global homophobia', *Inclusive Democracy*, <http://www.opendemocracy.net/5050/rachael-crook/sources-of-global-homophobia>. (accessed, 6 February 2013).

³²² *Ibid.*

³²³ Peralta, E., 'President Of Malawi Vows To Overturn Gay Ban' *NPR.org* (May, 2012) <http://www.npr.org/blogs/thetwo-way/2012/05/18/153017460/president-of-malawi-vows-to-overturn-gay-ban>. (accessed, 16 October, 2012.).

leaders have stated that there would be a withdrawal of funds from those who do not protect LGBTI rights and Malawi is one of the countries to be threatened by such action. However official statements from within the country have outlined that Malawi would not cower to the “indignation of donors” who need to understand the “the culture and traditions of Malawi”³²⁴ which see the issue of alternative sexualities as taboo.

One is able to identify how the critique of norm diffusion comes into play in the Malawian context. One encounters the initial denial of rights, followed by perceived elite acceptance of the LGBTI norm (as a result of the threat of sanctions) which is then met by a lack of internalization as the society. One can mark the success of the Finnemore and Sikkink framework at taking the norm to the elite level however the framework falls short when it fails to understand what occurs at the local level. Although the international position on LGBTI rights is clear the Malawian context is a confusing mix of “public, donor-friendly rhetoric and voter friendly in action”.³²⁵

5.1 Phase one: Malawi and the rejection of the LGBTI norm- homophobia within the country

Malawi has long been a part of the ranks of African nations which have sought to criminalise homosexuality with LGBTI persons being jailed as recently as 2010. Within the nation state the Penal Code criminalises sodomy and sexual activities between two males and by extension two females.³²⁶ The law does not prohibit homosexuality *per se* but does allow for it to be labelled as indecent or as ‘conduct likely to cause a breach of the peace’ which is a criminal offence.³²⁷ An example of the penal code at work was the sentencing of two gay men for the maximum 14 years for what were termed ‘unnatural acts and gross indecency.’³²⁸

Despite the sentence being criticised by human rights organisations around the world the presiding judge, Magistrate Nyakwawa Usiwa Usiwa, remained adamant in his judgment, mirroring the steel hard resolve that those within African states have on the issue of homosexuality. In his judgment he stated that ‘I do not believe Malawi is ready at this point in time to see its sons getting married to other sons, or cohabitating, or conducting

³²⁴ Bearek (note 312).

³²⁵ Chilemba (note 200).

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Bearek (note 312).

engagement ceremonies.³²⁹ This particular judicial hearing drew a great crowd which formed, not to protest the sentencing, but to laud it and ridicule the couple. The couple had even been denied bail during their hearings as there had been the fear that “the public would be hostile towards them.”³³⁰ The judgment was criticised by norm leaders such as the United States who were said to be ‘disappointed’³³¹ in the judgment and State Department spokesman Philip Crowley called for the decriminalization of sexual orientation and gender identity within Malawi. The sentencing is a prime example of the mind-set that forms the thinking behind homosexuality within the Malawian context. This stance continued to remain despite the fact that Malawi was condemned on the international stage for its laws and the treatment of LGBTI people within the continent.

5.2 Phase two: The move to protect LGBTI rights in Malawi and the political elite

The harsh treatment of homosexuals within Malawi has led to mounting pressure on the African nation. This conduct is said to violate Malawi’s international human rights commitments including the right to privacy and non-discrimination that the International Covenant on Civil and Political Rights guarantees to all regardless of sexual orientation, as well as the rights to equality, dignity, security and life in the African Charter on Human and Peoples' Rights (Articles 3-6).³³² Malawi is also a state party to the International Covenant on Economic Social and Cultural Rights which, through the interpretation given by the Committee on Economic Social and Cultural Rights, protects the rights of LGBTI persons by expressly protecting various other rights such as the right to privacy.³³³ The Committee had also recognised sexual orientation as a prohibited ground for discrimination.

In what could be seen as an attempt to honour multilateral agreements and garner international support, President Joyce Banda, in 2012, stated that she sought to overturn the laws criminalising homosexuality. This would have made Malawi the first African country to do so since South Africa decriminalised same sex practices in 1994.³³⁴ This move differentiated her from her predecessor who had, through various policies, managed to

³²⁹ Bearek (note 312).

³³⁰ Ibid.

³³¹ Ibid.

³³² IGLHRC (note 311).

³³³ Chilemba (note 200).

³³⁴ BBC (note 14).

alienate international donors.³³⁵ Her actions followed the threat from certain Western countries that they would cut off aid to states that did not recognise LGBTI rights. In December of 2011 the United States had stated that countries that did not recognize LGBTI rights could face aid cuts.³³⁶ President Banda had, since taking office, reversed several of her predecessors policies in a bid to win back the favour of international funders and the decriminalisation of homosexuality could be equated as another means by which Malawi sought to win back favour.³³⁷

The acceptance of the LGBTI norm was part of an array of tools that were used to regain the favour of international donors such as the International Monetary Fund.³³⁸ In her first state of the nation address Banda had stated that “some laws which were duly passed by the August House... will be repealed as a matter of urgency. These include the provisions regarding indecent practices and unnatural acts.”³³⁹ The President was said to have the support of many of her Members of Parliament (MPs) allowing for the necessary political climate amongst the elite to have the law overturned. The move was said to please key donors and garner international attention and praise but unfortunately found few backers within Malawi.³⁴⁰

The move by the political elite, and more specifically President Banda, operates within the framework explained within the second phase of the norm life cycle in which ‘norm leaders’ begin to make ‘norm breakers’ into ‘norm followers’. Although the LGBTI norm was rejected within the Malawian context, through “an active process of international socialization”³⁴¹ a state was ‘persuaded’ to possibly allow the norm to form a part of national identity. Utilising the framework one could argue that norm entrepreneurs (through social pressure of organisations such as the United Nations and LGBTI international organisations such as International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)³⁴²) and norm leaders (through the use of material sanctions) had managed to diffuse the norm to Malawi, which until that point had been a ‘norm breaker’.

³³⁵ Chilemba (note 200).

³³⁶ Peralta (note 323).

³³⁷ BBC (note 14).

³³⁸ Stinger, D., ‘Malawi unlikely to axe anti-gay laws’ *Associated Press* (Sept, 2012)

http://www.google.com/hostednews/ap/article/ALeqM5hAa_GfE1aQ99FMF76Z9GRcij__HA?docId=2ed04179dade4f79bb c7994838f41200 (accessed, 16 October, 2012.).

³³⁹ BBC (note 14).

³⁴⁰ Chilemba (note 200).

³⁴¹ Finnemore and Sikkink (note 9) p. 902.

³⁴² International Lesbian, Gay, Bisexual, Trans and Intersex Association <http://ilga.org/> (accessed 25 June 2012.).

There is the possible argument that there had been an effective diffusion of the LGBTI norm if one is to look to President Banda's own words. She stated that "you cannot stop the tide... The end of stigma, discrimination and criminalization of homosexuality in Africa is only a matter of time. Like minority and disabled rights, they will move forward".³⁴³ This rhetoric however was only witnessed at the level of the political elite which is one of the criticisms of the norm life cycle framework. The problem in terms of internalization comes at the societal level and whether society as a *whole* has chosen to accept the norm. In the case of Malawi we see the fact that society rejects the norm, a great impediment to the final stage of the norm life cycle, despite elite acceptance. Although there was seeming acceptance of the norm at the elite level the backlash seems to have meant that little has been done in terms of actually repealing the laws.

5.3 Phase three: A societal rejection and the failure of norm diffusion model

Despite the political elite supporting the move, the attempt to overturn laws criminalising homosexual behaviour remained unpopular amongst religious factions and the wider conservative population.³⁴⁴ One need only look at the comments on the national newspaper website to gauge the reaction to the move by people in Malawi. Malawians on the ground have criticised the government of "robbing people of their morals and values and...putting Malawi up for sale"³⁴⁵ whilst others have said that the president should consult chiefs and churches lest she lose votes.³⁴⁶ Some have stated that the forefathers of the country never engaged in this "evil form of living"³⁴⁷ and that those who called for the LGBTI rights to be protected were not Malawian and criticised President Banda of having "no idea what being Malawian is about".³⁴⁸ The media, too, have added their voices to those of dissent by stating "the president will lose support if she repeals the law on homosexuality. Does our president belong here, or to Britain or America?"³⁴⁹ The media can often be witnessed producing material that speaks out against the president Banda's proposal to repeal anti-homosexual legislation. Most Malawians are far away from accepting homosexuality and are in thrall to

³⁴³ Sambira (note 65).

³⁴⁴ BBC (note 316).

³⁴⁵ Malawi Voice, 'Malawi to overturn homosexual ban, says Joyce Banda' *Malawi Voice* <http://www.malawivoice.com/2012/05/18/malawi-to-overturn-homosexual-ban-joyce-banda-says-65480/>. (accessed, 12 December, 2012).

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Gondwe (note 314).

the views of religious and traditional leaders who exhibit high levels of homophobia.³⁵⁰ There are many within the public sphere who have called for a referendum on the issue, whilst others have said that only selected rights can be protected but not those relating to marriage.³⁵¹

This wave of disapproval emanating from within Malawi had caused some to question whether the president would remain true to her pledge to review the anti-homosexuality laws.³⁵² Following the criticism, Banda showed her adherence to the stance of her people when she said in a press briefing, “even if it were tabled for debate, I will not force MPs to pass it. If the people of Malawi do not want same sex marriages, MPs will not pass the law.”³⁵³ Inaction and hesitation can be witnessed in the fact that the administration is yet to draft bill let alone table it before Parliament.³⁵⁴ Some have identified the lack of public enthusiasm as one of the key reasons there has been a lack of urgency in terms of tackling the matter, despite the pronouncements by Banda in early in 2012.³⁵⁵ It is stated that after the public reaction Banda’s public enthusiasm for the decriminalisation of homosexuality greatly cooled.³⁵⁶ This seems to have shown what many have argued, that Banda is unlikely to take a potentially fatal gamble making the ‘unpopular’ decision to repeal anti-homosexuality laws and recognize LGBTI rights.³⁵⁷ This sea of disapproval has caused Banda to renege on her promise to repeal anti-homosexual laws. She has, since her previous problems, gone on record as saying that Malawi was not ready to repeal the laws which criminalised homosexuality.³⁵⁸

Banda stated that a national debate had shown a lack of support for the move. She went on to say, whilst addressing a New York audience following a United Nations National Assembly appearance, that as a leader she had ‘no right to influence how people feel’.³⁵⁹ Banda argued that where Africa was now, in terms of LGBTI rights, was where the United

³⁵⁰ Chilemba (note 200).

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Gondwe (note 314).

³⁵⁴ Chilemba (note 200).

³⁵⁵ Ibid.

³⁵⁶ Stinger (note 338).

³⁵⁷ Chilemba (note 200).

³⁵⁸ Potts, A., ‘Malawi backs down on legalizing gay acts’ (Sept, 2012) <http://www.gaystarnews.com/article/malawi-backs-down-decriminalization-pledge290912>. (accessed, 16 October 2012).

³⁵⁹ Stinger (note 338).

States and European countries had been about 100 years ago,³⁶⁰ proposing that Africa was simply not ready to accept the LGBTI norm as a society, despite supposed political will at the elite level. Banda had hoped that her term in office would hail the repealing of the nation's indecency and unnatural acts legislation as part of its legacy. She stated that despite wanting to repeal the laws, pushing reforms too far may, instead of providing a safer environment for LGBTI people, insight violence.³⁶¹ Africa had seen homosexuals killed in many countries and the reason had been that the societies within those countries "had simply not been ready".³⁶² She urged that Malawians be allowed to have a national debate on the matter in "their own time" and without international pressure.³⁶³

5.4 Norm diffusion and context: insights to be drawn

Looking at the Malawian situation as it plays out on the ground one can put forth the argument that norm diffusion needs to be reconceptualised to include a contextual dimension. Norms need to be allowed to mature in a way befitting of the locale in which they operate. Marsh and Payne hold that a norm can only be said to have truly diffused once society has accepted the norm.³⁶⁴ Within Malawi the norm of LGBTI rights has not been incorporated into a country's legal and cultural code which theorists argue is necessary to complete norm diffusion. Malawian people can be said to be simply unready for the presence of the LGBTI norm, a societal impediment not identified within the norm diffusion model. Despite international backing and supposed elite acceptance the diffusion of the LGBTI norm has not been completed within the Malawian context as the society has fought the diffusion. This has seen the possibility of protection of LGBTI rights go from non-existent, to a great possibility (with the aid of norm diffusion) and back to non-existent when met with the obstacles on the societal level. President Banda, as the key political player within the state, identified just such an impediment by stating that her country was simply not ready to recognize LGBTI rights.³⁶⁵ She warned that forcing the nation could have a backlash.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Stinger (note 338).

³⁶⁴ Marsh and Payne (note 11) p.666.

³⁶⁵ Associated Press, 'Malawi not ready to legalise homosexuality-JB' *Capital Radio Malawi* (Oct, 2012)

<http://www.capitalradiomalawi.com/index.php/component/k2/item/859-malawi-not-ready-to-legalise-homosexuality-jb>. (accessed, 29 October, 2012.).

Cultural predilections and deeply ingrained beliefs in the importance of existing institutions sanctified by popular belief are not easy to displace without incurring some political and social costs.³⁶⁶ To put it simply, reform cannot happen without societal consent signified by a change in mind-set lest there be political costs for leaders and societal costs in general. It is this step in the norm diffusion that previous models have not taken into account: how the norm has entrenched itself at a societal level.

The Malawian experience showcases the critiques of the norm diffusion cycle as it is a prime example of how a focus on norm leaders (the United States and the United Kingdom) as well as elites (Banda and her parliament) does not tell the whole story of how a norm is diffused. Although it gives a good account on the international stage it falls short when examining whether a norm has *truly* diffused, it does not show how well it has been incorporated into the society within which it will function. Although Malawi had accepted the LGBTI norm at the state level complete diffusion could not, arguably, have happened due to the rejection by the Malawian people. This rejection eventually led to withdrawal of possible protection of LGBTI rights (signalling adherence to the LGBTI norm) by the previously supportive political elite.

The issue of rejection also ties into the idea of the universal acceptance of human rights by all who encounter them. These rights will not always be accepted in their imported form as they shall meet local norms that form part of a normative order which they must then contend with. The diffusion of norms, especially in the case of LGBTI rights, does not take into account a possible normative local order. Within the African context, and more specifically Malawi, there is a hierarchy of norms which includes various values relating to marriage and family. Other factors to take into account within the normative order are religious, cultural and traditional values which in many cases are held in high esteem. The spread of the LGBTI norm is an example of a norm that does not only not find fit within the local order, but threatens it. Alternative sexualities are seen as a threat to traditional family values³⁶⁷ and what is often termed 'homosexuality' (alternative sexualities) is seen as perversion of the African way of life and as something that needs to be expunged.³⁶⁸

³⁶⁶ Acharya (note 22) p. 246.

³⁶⁷ Epprecht (note 134) p. 632.

³⁶⁸ Amory (note 8) p. 5.

The Malawian case provides evidence for the argument for the need to move to a new theoretical framework that looks to the local. It showcases the need for the re-conceptualization that critics call for. As Checkel argues, there is a need to identify a ‘cultural match’³⁶⁹ and to bring about a sociological and cultural element to the study of norm diffusion. If those who seek to spread a certain norm (especially contentious ones) there is a need to see how the norm can be packaged to fit a local context. As is the case with the LGBTI norm it is already seen as ‘un-African’ and as a Western idea causing it to be ‘dead on arrival’ as it were. It is seen as having no place within the local normative order. The understanding of the diffusion of the norm from an African/Malawian context would aid in true norm diffusion to echo the words of Banda that Malawi must deal with the debate in their own way. Acharya’s call for localization comes into play as there is a need to give back agency to the norm takers and ask ‘why is it that this norm does not/would not work?’

This dissertation endorses his argument that a norm must be infused with the characteristics of a particular place³⁷⁰ lest it be seen as foreign and is, in turn, rejected as was seen in the case of LGBTI rights in Malawi. The global community is not homogenous and the differences must be taken into account if the study and practice of norm diffusion is to truly be successful. There is a need for local agents to reconstruct norms in order to be able to marry them to existing local beliefs and practices.³⁷¹ The argument can be placed forward that Banda and those attempting to diffuse the norm did not seek to do this and hence the failure of the norm to internalize. As a local agent pushing for a norm she did not repackage it for the Malawian context simply importing it in its ‘Western form’. This led to the backlash and brought about criticisms that the president did not understand the Malawian people. The argument then stands that there is a need to repackage LGBTI rights to fit the African context as a great deal of the backlash in this regard is that it is that homosexuality is not African and goes against what it is to be African/Malawian. If norm diffusion is to happen it cannot come in a ‘Western’ guise but must find a way to marry itself to the existing context.

Malawi provides a glaring example of the need to re-conceptualise the way in which we see norm diffusion and shows the need to look toward the inclusion of a local lens. The norm has imitated a pendulum swinging back and forth between acceptance and rejection and one is able to identify local factors as playing a key role in this occurring. Rather than simply being

³⁶⁹ Checkel (note 12) p. 86.

³⁷⁰ Acharya (note 22) p. 245.

³⁷¹ Acharya (note 22) p. 241.

downloaded into the Malawian society the LGBTI norm has met great resistance which has essentially pushed the norm back out into the international realm from whence it came. When one considers the situation faced in Malawi the question arises: ‘where to from here?’ There are various questions that one must tackle if one is to truly answer that question and this dissertation seeks to conclude and identify some possible paths that can be taken in truly analysing and facilitating norm diffusion from the international to the domestic sphere.

5.5 An international norm working in a local setting: The move towards a new model

Looking at the problem posed by the African continent, as exemplified by Malawi, the question then stands, where do we go from here? Scholars have begun to ask how global norms affect and constitute particular domestic agents be they states, groups or individuals.³⁷² The current models are based on the successful cases of diffusion failing to take into account the ‘dogs who don’t bark’³⁷³ and biased towards the outside-in structural explanation, focusing on how norm leaders convert norm breakers to become norm-followers.³⁷⁴ It has failed to see the importance of the norm takers’ populations’ characteristics. There is very little understanding that the “nature of the adoption environment is central to the diffusion process”³⁷⁵. Checkel argues that diffusion research can be aided by returning agency and social context through two developments. One development would be to add a sociological and cultural element to prevailing diffusion norms.³⁷⁶ There is a need to explore the level of ‘cultural match’ between global norms and domestic practice as it plays a great role in determining the pattern and degree of diffusion.³⁷⁷

The lack of means by which ‘norm takers’ are examined is one that has been raised as a weakness within the literature. There is a call for a development in the literature which would address the issue of the role of agency in the norm taker states.³⁷⁸ Theorists such as Acharya seek to contribute to the literature by proposing frameworks that look at ‘norm takers’.³⁷⁹ According to Checkel there is a great need to look at how the norm takers’ ‘experience,

³⁷² Checkel (note 12) p. 85.

³⁷³ Checkel (note 12) p. 86.

³⁷⁴ Ibid.

³⁷⁵ Checkel (note 12) p. 86.

³⁷⁶ Checkel (note 12) p. 86.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Acharya (note 22) p. 240.

norms, values and intentions' come into play.³⁸⁰ Acharya too argues that there is a need to add to the literature by stressing the agency role of norm takers through the process of 'localization'.³⁸¹ He states that to localize something is 'to invest it with the characteristics of a particular place'.³⁸² Thus within this definition he describes localization as the active construction of foreign ideas by local actors.³⁸³ There is abundant evidence that if one is to look at the diffusion of a norm within a country one must consider the social and cultural characteristics within a country. There is a need for literature on norm diffusion to take into account the local dimension of norm diffusion, taking a step away from the 'norm takers' lens and work a way to understanding how norms can be spread. This re-conceptualisation will aid towards allowing for players, both on the international stage and the ground, to understand and gather the tools needed to spread certain norms, such as LGBTI rights, in a way that will lead to actual local change.

5.5.1 The localization of a norm: Contending with context

The need to look into the domestic realm is linked to the fact that historically constructed domestic identity norms are able to create barriers to an agent learning from systematic norms.³⁸⁴ Landolt, also argues, that a constructivist analysis obscures the important context of wider on going struggles between the North and South.³⁸⁵ These barriers need to be seen in terms of the individuals and groups within a society. One must question if there are historically constructed norms that create boundaries that disallow the spread of norms.

A 'cultural match' between international norms and domestic practices is central to understanding to what extent a norm shall be diffused. Finnemore and Sikkink argue that there is a danger in approaches that see global social structures as existing and having powerful effects in that these approaches often forget that there is local variation in the reaction to these norms.³⁸⁶ They begin to treat international norms as a global 'oobleck'³⁸⁷ that encompasses the entire planet and homogenizes the various countries.³⁸⁸ The first wave of scholarship spoke to moral cosmopolitanism which held that the norms being promulgated

³⁸⁰ Checkel (note 12) p. 86.

³⁸¹ Acharya (note 22) p. 240.

³⁸² Acharya (note 22) p. 245.

³⁸³ Acharya (note 22) p. 245.

³⁸⁴ Acharya (note 22) p. 243.

³⁸⁵ Landolt (note 285) p. 581.

³⁸⁶ Finnemore and Sikkink (note 9) p. 397.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

were 'universal'.³⁸⁹ This led to two tendencies (which Acharya terms 'unfortunate'. The first is the belief that norms that make a universalistic claim about what is good are more desirable and more likely to prevail than norms that are more linked to a particular local. The second is the view of norm diffusion of as a process of teaching through transnational agency.³⁹⁰

Acharya writes on the localization of norms and argues that this, and not wholesale acceptance or rejection of a norm, is the key to settling most normative contestation.³⁹¹ His argument states that the level of norm acceptance varies according to the different abilities of local agents to reconstruct the norms to ensure a fit with prior existing local norms.³⁹² He seeks to place emphasis on the process in which norm takers build congruence between transnational norms and local beliefs and practices.³⁹³ 'Foreign' norms are incorporated with local norms in order. Checkel argues that norm diffusion is more rapid when the foreign norm speaks to or is more convergent with domestic norms.³⁹⁴ This approach gives agency back to the norm takers whilst also bringing in the notion of the need to explore and look into local practices and culture. It offers an analysis of the situation below the state level and an ability to assess in what ways there can be reconciliation between foreign norms and local norms.

³⁸⁹ Acharya (note 22) p. 242.

³⁹⁰ Ibid.

³⁹¹ Acharya (note 22) p. 239.

³⁹² Ibid.

³⁹³ Acharya (note 22) p. 241.

³⁹⁴ Acharya (note 22) p. 243.

Chapter Six: Conclusion and recommendations

The progression of human rights has come a long way from its more informal roots to what can be termed a global Human Rights Regime. This framework has increasingly recognized the rights of various groups and minorities and now it is arguably the turn of sexual minorities. The human rights framework has increasingly recognised the rights of LGBTI persons which has led to various nations incorporating domestic regulations that seek to protect sexual minorities from discrimination. The attempt to diffuse the LGBTI norm is a contentious one and the topic of LGBTI rights is one that inspires social attention in today's world.³⁹⁵ Within Africa there are various mechanisms that seek to protect human rights, both on the national and regional levels. Although the presence of these mechanisms and their creation should be lauded they are often termed ineffective in ensuring the rights they seek to defend. Various stakeholders often argue that the mechanisms are toothless and fruitless in shielding people from violations within the domestic realms they operate. Human rights litigation remains weak, governments lack political will and activists often operate within hostile environments. Several rights come increasingly under threat as factors such as tradition, war and poverty come into play. Rights such as women's rights and children's rights are at risk and the most endangered of all remains the rights of sexual minorities.

In African countries the discrimination against LGBTI persons has a long history with the roots being traced back to colonisation. The situation for those within these communities is one riddled with discrimination, violence and in some extreme cases, death. The attack on LGBTI persons comes from both the public and private sphere. The LGBTI norm has arguably barely begun to take hold within the African sphere with one witnessing only pockets of positive change coupled with tidal waves of negative reactions. The norm is far from being internalised on the African continent, despite having gone through the various stages of the norm life cycle. The three stages of norm diffusion, as outlined by Finnemore and Sikkink, provide a helpful road map for tracking the progression of the LGBTI norm but however fail to note that the act of ignoring the differences within the states may hinder the diffusion of a norm. This causes the model to fall short. The critique is thus based in the need to look at the local context, to look behind the proverbial curtain that is 'the state' and explore

³⁹⁵Thomas, L. and Levin, M., *Sexual Orientation and Human Rights* (Lanham, United States, Rowman & Littlefield Publishers, 1999) p. vii

the workings inside in terms of the way in which the society identifies itself and functions in relation to the norm.

The fact that the norm based on sexual orientation has not managed to penetrate the continent has meant that a group within society live in fear of discrimination, violence or worse. The lack of protection of the rights of sexual minorities speaks to a reality that is not only true for these rights but the other human rights. Within Africa the continuous violation of certain human rights continues, which signifies that there is a problem in terms of the internalisation of norms. This, in turn, speaks to a need to identify why a certain context is not conducive to a certain norm. To properly understand this phenomena one must contend with the idea of differences in context. It is no longer feasible to speak to the 'universal good' of norms and merely assume that they shall be incorporated into a domestic realm as they are celebrated on the international realm. This is clearly seen in the case of LGBTI rights and the African continent. Africa has been seen to repeatedly reject pressure from the international community to protect these rights.

The threat to withdraw aid (made by norm leaders such as the United States and United Kingdom) remains a contentious issue as it brings into play cultural and societal differences, accusations of a lack of understanding of African values and imperialism. LGBTI rights continue to be a stage on which political, religious, historical and legal battles are fought in the name of what constitutes a legitimate sexual and emotional relationship and what does not. It is on this ticket that both pro- and anti-LGBTI advocates argue for their various beliefs and Africa has become the battle field on which this war has been fought. Players of the international stage have sought to make African countries relinquish their stance against homosexuality and the pressure these players have exerted has been met with an adverse reaction from African states and societies alike. The tension that ensues speaks to the need for a far greater understanding of the context within which rights operate and a conscious move away from the view of the world as homogenous and hungry for any and all human rights as promulgated by key players. Africa, with its rich history, deeply rooted culture and array of traditions, poses as the poster child for the need for such a move.

This study has sought to add to the growing symphony of voices that call for the development of the existing framework to take into account these local differences and augment understanding with ideas of formulated from an observation of context. The study seeks to

speak to the idea of variance, be it nuanced or great. Only through understanding the context is one able to properly speak to the internalisation of a norm. Only once a norm has been properly internalised (by being accepted within a society) can it truly affect a society. To place this within the realm of human rights and more importantly LGBTI rights, these rights can only be truly protected and respected once those in society see them as being worthy of respect and protection. If a society rejects a right, the protection it gives will be negligible no matter how many official instruments there are that formalise its protection. If women's rights are not respected within society, violence against women will continue no matter how many laws and policies are in place. If African people do not accept the LGBTI norm within their society as individuals, sexual minorities will continue to face violence and persecution even if there are Constitutions and courts of law to protect them. The issue of context is one that holds true for all norms, no matter their nature. If those on the ground do not adhere to that norm then it is merely notion, a cognitive process that has no bearing on those who it is meant to govern.

Taking this into consideration it is important to interact with a nation state at the societal level and engage with the issues that may be faced there when it comes to the internalisation of a norm. This must be done in order to truly analyse to what extent a norm has been internalised. It is within the individual that a norm truly manifests itself thus to look only at the state and international level will limit analysis of diffusion and determination of whether it has occurred or not.

The critique against the current model of norm diffusion model holds on three fronts. These include the fact that there is too much of a focus on hard cases, an over emphasis on the central role of elites, and the need to look below the state level. If one is to look at the progression of LGBTI rights purely from the view given by the norm life cycle model one would not stop to consider that the rights of sexual minorities may not be internalised as easily as one may think. One would only be able to see that the norm had moved through the first two stages and was beginning the transition into the third. It would be difficult to identify the pending obstacles that are embodied in the thoughts of many Africans that argue that LGBTI rights are 'foreign' and 'un-African'. The hindrances these notions pose need to be explored if there is to be true understand the diffusion of the LGBTI norm as well as norm diffusion in general. The importance of local context and being cognisant of the effect it has on the diffusion of a norm is imperative in understanding and aiding the internalisation of a

norm. South Africa has laws protecting LGBTI persons yet corrective rape is an increasingly wide spread phenomenon. There are scores of women within the LGBTI community who fall victim to this.³⁹⁶ Merely understanding state level and ceasing to ‘peek behind the curtain’ provides for an under developed observation of the movement of a norm. The African experience, and more specifically the Malawian experience, provides one with a lens as to how this under development can be manifested and can take away from an analysis of norm diffusion.

Through the lens provided by Malawi the study aimed to show the importance of understanding the context of a region or country when attempting to explain the diffusion of certain norms. The obstacles faced by the LGBTI norm within Malawi provide a lens with which we can view the inadequacies of the norm diffusion model. They illustrate the need for one to understand what is in the hearts and minds of people within society. One needs to understand the local context in terms of identity, beliefs and values and look beyond the state, beyond the norm leaders and beyond the notion that there shall merely be an acceptance of what are seen as ‘good norms’. It shows that one needs to look to the social order in which the norm operates and what possible hindrances (or acts catalysts) may come into play in the diffusion of a norm. Malawi’s deviation from the model confirms that there is a need to properly understand the inner workings of a state and move away from ideas of homogeneity. It is best to be cognisant of the ‘dogs that don’t bark’ and question why this is the case.

The LGBTI norm’s interaction with the Malawian context could form the basis for further study into what could possibly halt or promote the diffusion of a norm, particularly a human rights norm. It would allow for increased understanding of how to effectively advocate for human rights protection, and in particular LGBTI rights protection, both within the realms of academia and activism. If one is able to understand why there is a problem with the norms concerning certain rights at the internalization stage then one is able to find remedies to these problems.

6.1 Further study

A study of norms that takes into account a local dimension entails a great number of facets that would require much further study than was allowed within the dimensions of this dissertation. The identification of the possible hindrance of local beliefs and customs

³⁹⁶ Di Silvio (note 259).

provides the basis for the exploration on *how* these problems are to be overcome. The continuation of this study could take on a more historical note by seeking to understand how the continent came to effectively oppose homosexuality. As is tackled briefly within this dissertation, the history of Africa contains many instances of homosexual practices within societies for various reasons ranging spiritual and social practices. Although it would be far outside the scope of this study an exploration of the various reasons could provide insight into the psychological and societal shift that societies often experience whilst shining further light on the adverse reaction African peoples have to homosexuality. The study could provide a historical-psychological analysis of how various factors can affect the way in which a society views itself and what it sees are forming part of its identity and what does not. Although it fell outside the scope of this dissertation's study the historical rise of homophobia and the political, social and legal context in which it happened would provide a more in-depth look at homophobia on the continent and how to tackle it as a social ill would need a deeper understanding of the roots which a study of this nature would go a long way to providing further insight into weaknesses in the analysis of norm diffusion.

To study the historical roots of alternative sexualities and homophobia within the continent would possibly lead one to come into contact with ideas of customs and beliefs found within African culture. The true effect of this on ideas of identity and, in turn, the role sexuality plays within the African context was also an area of exploration that fell outside the scope of this dissertation. Despite this it would have served to provide much needed insight into the understanding of LGBTI rights in Africa.

To explore the connection and contention between ideas of culture, beliefs, tradition and the 'African Identity' and homosexuality would involve a historical study as well as a look at these notions in their current context. This would allow one to attempt to map the transition from the acceptance and practice of homosexuality to something that is shunned as being completely and utterly 'un-African', with its very presence on the continent being denied. An understanding of this progression as well as the interplay between the two would aid those who seek to 'prove' the presence of homosexuality in Africa as well as to show that it is not something that should be shunned. It would allow for those who advocate for LGBTI rights to properly overcome the obstacles presented by culture, beliefs and tradition by understanding how they come into play within the African context. It will answer questions

of ‘why does homosexuality illicit this societal reaction?’, ‘how far do these aspects of society inform people’s homophobic thoughts’, how can these thoughts be changed?’ and ‘how can one marry these [various] beliefs with LGBTI rights?’ All questions which, unfortunately, fall outside the scope of this study.

All these areas of study would aid in informing the work done by lawmakers, activists and scholars but to name a few of the groups who seek to understand the rise of LGBTI rights within the continent as these rights continue to take centre stage time and time again be it in a negative or positive light. All this will go a long way to informing means of ensuring the norm is well and truly diffused and internalized and not merely confined to the law books of nation states whilst having little to no impact on those who those laws seek to govern. Taking into account these various possible areas of exploration, and in turn what one stands to learn from them, one is able to start asking the question how can the norm be reconfigured to fit a particular context.

Understanding that there is a historical, social and cultural aspect will allow for those seeking to further ideas pertaining to a norm and convert an ‘alien’ norm and make it fit a context. The ways in which such a feat would be achieved would incorporate a multi-disciplinary approach due to the various considerations that would need to take place. For a norm to be accepted truly by society there would need to be a means by which those who form part of that society identify with the norm. This would mean that those seeking to aid in the diffusion of a norm would need to make the idea of the norm accessible to people on the ground. This would involve the work of activists, academics as well as entities within the public sphere. To bolster a historical and cultural study, a study of civil society could also be conducted in order to conceptualise the role that they could play in terms of norm internalisation. This study could include instances of best practice as well as instances that have not been successful.

Various actors would need to collaborate to create a cognitive environment in which people can see themselves functioning within the order created by the norm and as opposed to being removed from it. What would be needed would be a strategy crafted by various stakeholders hailing from various fields of expertise pertaining to societal interactions. This is a notion that

should be explored but falls outside the scope of this study which seeks only to identify a pressing need for reconceptualisation.

For rights to be truly protected there is a need to adhere to principles of human rights within the private sphere in conjunction with the public sphere. Merely having a right protected within the corridors of power does not instantaneously mean that they are being protected behind the closed doors that make up the private realm. What must be central for those fighting for any form of rights is to make sure that what is internalized at state level is internalized in the hearts and minds of those who interact with the rights, both those who are guarded by the rights and those who could possibly infringe on them. It means very little if a country has gender sensitive laws and policies if men within society continue to rape and beat women. Advocating for laws that protect the rights of LGBTI people does not culminate in success when a government passes 'gay-friendly' laws but when the person on the street does not shout obscenities at a lesbian or resort to violence when encountering a gay couple. There is the hope held by some that homosexuality will one day be seen in a less damning light. Disability used to be viewed in much the same light with persons with disabilities seen as needing to be 'healed' or 'delivered',³⁹⁷ now persons with disabilities are viewed in a different way, and the hope holds true for those living within the LGBTI community.³⁹⁸

³⁹⁷ Chilemba (note 200).

³⁹⁸ Ibid.

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