

CONFLICT OF LAWS ASPECTS OF SAME-SEX RELATIONSHIPS IN AFRICA: A
COMPARATIVE STUDY

by

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Submitted in partial fulfillment of the requirements for the degree of Master of Laws

at

Dalhousie University
Halifax, Nova Scotia
July 2015

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DEDICATION

This thesis is dedicated to my mother, the late Mary Adjei, of Asokore-Ashanti, Ghana.
Maame, you would forever be remembered.

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ABSTRACT

Same-sex relationships will likely be in violation of the laws of most African countries. In Nigeria, Ghana and Kenya, a same-sex relationship is either explicitly prohibited or there is legislation which can be interpreted to prohibit the union. However, the growing trend of the institutionalization of same-sex marriage around the world means that even countries that do not domestically recognize same-sex relationships may be confronted with the challenge of dealing with it in a conflict of laws context. The discussion shows that the strict application of the rule of non-recognition, where the court gives no legal effect to a foreign same-sex union, is unworkable and lead to arbitrary and unfair results. African courts should use the incident approach to differentiate between cases where the parties seek adversarial court procedures, such as those dividing marital property, from those which seek to legitimize the union.

ACKNOWLEDGMENTS

I feel a deep sense of gratitude to my supervisor, Professor Vaughan Black, for his dedication, diligence and directions during the course of my research. I am also grateful to Professor Elizabeth Hughes for accepting to second read this thesis. My sincere appreciation also goes to Professor Elaine Craig for agreeing to act as examiner.

This thesis would not have been possible without the generous financial support I received from the Schulich Leadership Scholarship and the Faculty of Graduate Studies Award. To them I say thank you for making my dream come true. I am also grateful to all the staff and faculty of the Schulich School of Law, Dalhousie University, especially, Mr. David Dzidzornu.

I am most grateful to Professor Richard Oppong of Thompson Rivers University, Faculty of Law who always encouraged and supported me. I also appreciate the help and support I received from Sarah MacDonald of the Community Services Department, Halifax, Nova Scotia. To the many people who have helped in diverse ways in making this thesis a reality, I say: thank you!

CHAPTER ONE: INTRODUCTION

1. Problem Overview

There have been varied views on same-sex relationships in Africa. The debate has focused on whether particular states should or should not recognize same-sex relationships. While some view same-sex relationships as un-African, others believe such relationships existed among some indigenous African tribes. In countries such as Uganda, Ghana, Kenya and Zimbabwe, calls have been made for same-sex relationships to be explicitly banned. Indeed, the current trend of legislation and public abhorrence of homosexual activity does not reveal the acceptance of same-sex relationships in most African countries.¹

However, an important but often ignored aspect of the debate is how such relationships should be handled by the conflict of laws regimes in African countries. Will a same-sex marriage celebrated in Canada be recognized in Ghana? Will the children of a same-sex Nigerian couple who reside in UK be allowed to inherit their parent's estate in Nigeria? Can an American same-sex couple adopt a child residing in Nigeria? The objective of this research is to find answers to the cross-border legal questions about same-sex relationships. Indeed, the nature of conflict of laws is such that even countries that do not formally allow institutionalization of same-sex relationships may be confronted with the challenge of dealing with it in a conflict of laws situation.

¹ Recently, Nigeria and Uganda enacted anti-same-sex laws (see Nigeria: *Same-sex Marriage (Prohibition) Act, 2014* and Uganda: *The Anti-Homosexuality Act, 2014*). President Yahya Jammeh of Gambia has also been quoted to have stated that his government “will fight these vermin called homosexuals or gays the same way we are fighting malaria-causing mosquitoes; if not more aggressively” (see Satang Nabaneh, “Crusade to root out Homosexuality like Malaria” *AfricLaw*. 7 April, 2014 online: <http://africlaw.com/tag/president-yahya-jamme/>).

Alongside the attempts to criminalize same-sex relationships, there have been some moves to positively acknowledge such unions. For example, in May 2012, Malawi's new President, Joyce Banda, expressed her intention to scrap laws criminalizing homosexuality.² In South Africa, civil unions in the form of marriage or civil partnerships are permitted by law.³

Given the dearth of scholarship on this issue, this thesis aims to provide an authoritative treatment of the subject in Africa. Legislation and case-law in Africa have dealt with the conflict of laws aspects of same-sex relationships only in passing, if at all. The law in some African countries defines marriage as "the voluntary union of a man and a woman intended to last for their joint lives".⁴ In many countries, marriage is not expressly defined by statute. However, it can be argued that on a true and proper interpretation of the relevant statutes, they envisage only relationships between a man and a woman. The definition of marriage as a union between a man and a woman dictates that same-sex relationships will not be recognized as marriage, and, accordingly, the parties to such a union would not be entitled to any of the benefits/obligations that come with marriage. The question is whether states that do not domestically recognize same-sex marriage will give effect to it in a conflict of laws sense when such unions are celebrated abroad.

Contrary to the position taken in many African countries, in South Africa, civil unions solemnized either as a marriage or civil partnerships are recognized. In 2006,

² "Malawi to Overturn Homosexual Ban, Joyce Banda Says", BBC NEWS (May 18, 2012), Online: <<http://www.bbc.co.uk/news/world-africa-18118350>>.

³*Civil Unions Act, 2006* (Act No. 17).

⁴ See for examples, Sierra Leone: *Matrimonial Causes Act, 1950* s. 2; Kenya: *The Matrimonial Causes Act, 1941* (Chapter 152) s. 2; Tanzania: *Law of Marriage Act, 1971* (No. 5) s. 9(1).

South Africa enacted the *Civil Union Act, 2006*, after a series of judicial decisions which challenged the non-recognition of same-sex relationships.⁵ The objective of the act is to regulate the solemnization and registration of civil unions, by way of either a marriage or a civil partnership, and to provide for the legal consequences of the solemnization and registration of civil unions. The act does not deal directly with the legal consequences of marriage. Article 13 of the act provides that the legal consequences of a marriage contemplated in the *Marriage Act, 1961*⁶ apply with such changes as may be required by the context of a civil union. The Act also provides that, with the exception of the *Marriage Act* and *Customary Marriages Act, 1998*,⁷ any reference to marriage in any other law includes a civil union, and husband, wife or spouse in any other law includes a civil union partner.

The position in South Africa may be contrasted with that in Zambia, and that proposed in Nigeria. In Zambia, a marriage between persons of the same-sex is void. Under section 27(1)(c) of the *Matrimonial Causes Act, 2007*⁸ a marriage shall be void if the parties to the marriage are of the same-sex. This is perhaps the clearest prohibition on same-sex marriage in Africa. In 2014, a significant statute was also passed in Nigeria to prohibit same-sex marriage: the *Same-sex Marriage (Prohibition) Act, 2014*. The tenor of the act left no doubt as to the intention of its framers. Significantly, from a conflict of laws perspective, it deals with both the celebration and recognition of same-sex

⁵*Minister of Home Affairs v. Fourie* 2006 (1) S.A. 524; *National Coalition for Gay and Lesbian Equality v. The Minister of Justice* 1999 (1) SA 6; *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) S.A. 1. See generally Pierre De Vos, “A Judicial Revolution? The Court-Led Achievement of Same-Sex Marriage in South Africa” (2008) 4 *Utrecht Law Review* 161.

⁶Act 25.

⁷Act 120.

⁸No. 20 of 2007.

marriages. Under section 1 of the Act a marriage contract or civil union entered into between persons of the same-sex is prohibited. A marriage contract or civil union entered into between persons of the same-sex is invalid and illegal, and the parties shall not be recognized as entitled to the benefits of a valid marriage. Also a marriage contract or civil union entered into between persons of the same-sex by virtue of a certificate issued by a foreign country shall be void in Nigeria, and any benefits accruing by virtue of the certificate shall not be enforced by any court of law in Nigeria. Finally, under article 3 of the Act, only marriages contracted between a man and a woman shall be recognized as valid in Nigeria.

The above reveals an unsettled state of law and contrasting approaches to the issue of the conflict of laws aspects of same-sex relationships in Africa. In light of the increasing pressures to accommodate such relationships, and the inevitability of the conflict of laws regime in Africa being invited to resolve issues involving them, this thesis addresses the following novel questions:

- What has been the approach of African conflict of laws regimes to what, for want of a better phrase, may be described as non-traditional types of adult sexual relationships?
- Which aspects of African conflict of laws regimes may be directly engaged by same-sex relationship issues and to what extent are the regimes ready to address those issues?
- What has been the approach of Western conflict of laws systems, including those of Canada and the UK, to the conflict of laws aspects of same-sex relationships,

and are there any lessons African countries may find useful in the West's approaches?

The fact the same-sex relationship may be unrecognised and that conflict of laws issues associated with it may be unaddressed, can lead to many social ills. Conflict scholars are all too familiar with the problem of limping marriages. With the world gradually but surely moving towards accepting and institutionalizing same-sex relationships, the need to address all the attendant legal issues, including conflict of laws issues, is clearly of supreme importance. Canada and the United Kingdom are among the few countries that recognize same-sex marriage under legislation. In addition to the recognition of same-sex unions, these two countries have moved from the position of blanket non-recognition of other "odious foreign marriage"⁹ considered a violation of the UK's and Canada's laws, to granting recognition in specific instances. This thesis explores how the private international law issues generated by these unions are variously resolved, and the extent to which the approaches in these two countries may be useful to English-speaking African countries which are facing similar situations. Drawing on the jurisprudence in the two countries, this thesis argues that the approaches used in the UK and Canada to recognize certain foreign unions that are not allowed in their jurisdictions may be used when English-speaking African countries are faced with similar problems in relation to same-sex marriage.

This thesis is organized into five chapters. This chapter provides the introduction. Chapter two focuses on the nature of marriage and other forms of adult relationship in

⁹See in general L. Lynn Hogue, "Examining a Strand of the Public Policy Exception with Constitutional Underpinnings: How the 'Foreign Marriage Recognition Exception' Affects the Interjurisdictional Recognition of Same-sex "Marriage" (2005) 38 Creighton Law Review 449 at 453.

English-speaking Africa. It explores what constitutes marriage in these countries and the various “deviations” from the traditional form of marriage (i.e. the union between one man and one woman) that are allowed, especially in legislation. Chapter two also identifies the common private international law issues that arise within the context of marriage and how they are commonly resolved in these countries.

Chapter three explores how the private international law issues generated by same-sex marriage and other forms of foreign unions that are not domestically recognized in the United Kingdom and Canada are addressed in these two jurisdictions. Both are leading common law jurisdictions, and legislation and case law, especially from the UK, have very strong persuasive weight in English-speaking Africa. The goal is to explore the various ways in which the issues are resolved and the extent to which the approaches in the two countries may be useful to English-speaking African countries when they are faced with similar situations.

Chapter four focuses on the English-speaking African countries that have little or no experience with same-sex marriage, in the sense that there is no legislation on the subject (e.g. Ghana), recent legislation on the subject (Nigeria), or contemplation of legislation on the subject. Using the analyses in chapter three as the context, this chapter explores how these countries can approach the various private international law issues that may come their way regarding same-sex marriage, irrespective of whether there is an express legislation on the subject. The chapter uses hypothetical case scenarios, proffers solutions to those scenarios and assesses the merits of those solutions.

Finally, Chapter five provides a conclusion. It argues that a rule of blanket non-recognition of same-sex marriage will lead to unfair and unjust results.

CHAPTER TWO: HETEROSEXUAL MARRIAGES IN AFRICA AND CONFLICT OF LAWS PERSPECTIVE

1. Introduction

African countries are characterized by mixed legal systems. The sources of law in most English-speaking Africa countries are made up of domestic legislation and the English common law. Decisions of English courts thus have a real persuasive effect in most English-speaking African countries. The francophone countries are characterised with the codification system from French. Both systems reflect the influence of colonization of most of the African countries. In addition to this foreign influence, it is not surprising to find individuals in one country governed by a host of different personal laws. This mixed system is particularly evident in regard to marriage. In most African countries marriage can be categorized into three types: statutory marriage (civil marriage), customary marriage and religious marriage. The co-existence of seemingly equal legal systems in one legal sphere provides the avenue for residents to contract marriage under any of these systems. However, the marriage must satisfy the requirements under the applicable law or custom for it to be valid. While the state regulates marriage in each jurisdiction, the extent of state involvement varies from one jurisdiction to another and from one form of marriage to another. Civil marriages are mostly celebrated under statutory laws, while customary marriages are celebrated and regulated under the custom and practices of each community. The co-existence of different forms of marriage creates a complex web of legal issues from a conflict of laws perspective.

This chapter focuses on the nature of marriage and other forms of adult relationships in selected English-speaking African countries.¹⁰The focus of this chapter will be to discuss the different forms of marriage, namely, civil marriage, customary marriage and religious marriage, using specific examples chosen Anglophonic Africa. It explores what constitutes marriage in these countries and the various “deviations” from the traditional forms of marriage (i.e., the union between one man and one woman) that are allowed, especially under legislation. For example, in some of the countries under study, “woman-to-woman” marriage is allowed, whereas in other countries, same-sex marriage is prohibited. The scope of the union may also vary (e.g., cohabitation and common law partnerships). The chapter also identifies the common private international law issues which arise within the context of marriage and how they are commonly resolved in these countries.

The chapter has 4 sections. Section 1 discusses the different forms of marriage in Ghana, Kenya, Nigeria and South Africa. This section provides an overview of the institution of marriage as understood in the context of the countries under study. Essentially, the section explores the concept of marriage in the countries under study. Section two also provides how the conflict of laws issues relating to marriage are resolved in these jurisdictions. The section also identifies the internal and international conflict of laws issues which may arise from the co-existence of different marriage systems and how they are resolved. Given that woman-to-woman marriage is not common among the countries under study, the institution of woman-to-woman marriage and the conflict of laws issues relating to this is separately evaluated in section 3. Section

¹⁰ Ghana, Nigeria, Kenya, South Africa, Uganda and Zambia. These countries are representative of all the regions in African south of the Sahara – west, east and south. Also, it is easy to access materials on these countries.

4 concludes that the approach adopted by English-speaking African countries to recognize certain marriages deviating from the traditional definition of marriage may be used to recognize foreign same-sex marriages.

2. Types of Traditional Marriage

2.1 Civil Marriage in Africa

Civil marriages in Africa share a lot of similarities with the institution of marriage in jurisdictions like the United Kingdom and Canada.¹¹ The definition of marriage in most English-speaking African countries is not different from that of the UK and Canada. In most legislation, marriage is considered the union of one man and one woman for life to the exclusion of all others. This is understandable, given that civil marriage is regulated under the received laws of most African countries. Common law in most Anglophone African countries comprises the doctrine of equity and judicial decisions from the UK. In addition, most English-speaking African countries have in place prohibited degrees of marriage legislation similar to that of the UK and Canada. The next section looks at the nature of marriage in English-speaking African countries in the context of civil marriage. Emphasis is placed on capacity and nature of marriage – gender of the parties, age, and the nature of the relationship between the prospective couples.

¹¹ However, unlike the United Kingdom and Canada, civil marriage has not traditionally been viewed as what constitutes a marriage relationship in the countries under study. In Ghana, Nigeria, Kenya, South Africa, Uganda and Zambia, customary marriages have existed prior to the introduction of civil marriages. With the introduction of civil marriage, people can choose which legal system, the statutory or the customary law, that should apply to them.

2.1.1 Capacity and Nature of civil marriage

2.1.1.1 Gender of parties and nature of marriage

Civil marriages are strictly monogamous and, in most countries, they may only be contracted by opposite-sex couples. A civil marriage must comply with the appropriate legislation and the existing common law. While some countries define marriage in their legislation, in most cases marriage is not defined under family law statutes in Africa. In Kenya, “marriage” is defined as the voluntary union of one man and one woman for life to the exclusion of all others.¹² Marriage is also defined via a heterosexual lens in Tanzania¹³ and other countries.¹⁴ Where marriage is not specifically defined, an analysis of the marriage formula in various statutes reveals that what is envisaged is a union between a man and a woman. In most Anglophone countries, pronouncement of a couple as man and wife is the marriage formula administered by marriage registration officers. In Ghana, after the solemnization of the marriage, the registrar of marriages is to address the parties as man and wife and the parties are to attest by signing their names as man and wife.¹⁵ This is also the position in Nigeria, where the parties are to be pronounced as husband and wife.¹⁶ In South Africa this marriage formula was challenged in the case of *Minister of Home Affairs v. Fourie*.¹⁷ The court accepted the argument that the marriage formula envisaged is a union between a man and a woman and was thus discriminatory

¹² Kenya: *Matrimonial Causes Act, 1941*, s. 2. Section 2 of the Kenya *Marriage Act* also interprets “spouse” to mean a husband or wife.

¹³ Tanzania’s *Law of Marriage Act, 1971* defines marriage to mean the voluntary union of a man and a woman, intended to last for their joint lives. See in general Tanzania: *The Law of Marriage Act, 1971*, s 9.

¹⁴ In Uganda marriage is not explicitly defined to mean a union between a man and a woman, however, the marriage formula under *The Marriage Act* contemplates a union between a “man and wife. See generally Uganda: *The Marriage Act, 1904* (Chapter 251), ss 20-30.

¹⁵ See Ghana: *Marriage Ordinance, 1951*(CAP 125) s 36.

¹⁶ Nigeria: *Marriage Act, 1990* (Chapter 218), s 27.

¹⁷ 2006 (1) SA 524.

against same-sex couples. However, most Anglophone African countries have the common law definition of marriage in the context of civil marriage.¹⁸

It must be mentioned that a man already involved in a customary marriage cannot conclude a civil marriage with another woman.¹⁹ So, where one party was already married under customary law, the High Court in Ghana held that the presumption of the continuance of the customary marriage was so strong that in the absence of any evidence in rebuttal, the purported civil marriage under the Ordinance was null and void and of no effect.²⁰ In Nigeria, a civil marriage cannot be entered into where either of the parties thereto at the time of the celebration of the marriage is married under customary law to any person other than the person with whom the marriage is had.²¹ The first marriage must be dissolved before another civil marriage can be entered into.²²

However, it should be mentioned that parties are allowed to convert an existing customary marriage to a monogamous marriage.²³ In one case in which the parties married in the Catholic Church before a marriage officer appointed under Ghana's *Marriage Ordinance* and in the sight of witnesses, the court held that each and both of them, by that ceremony, changed their status as man and wife under customary law for that of husband and wife under the *Marriage Ordinance*, a completely new union which could confer obligations, rights, and privileges totally different from those under

¹⁸ In *Hyde v. Hyde*, (1866) LR 1 P&D 130 Lord Penzance emphasized the heterosexual character of marriage and also the fact that the union should be for one man and one woman to the exclusion of all others.

¹⁹ However, in Kenya, the court of appeal in the case of *Irene Njeri Macharia v. Magret Wairimu Jomo & Another*, Civil Appeal No.134 of 1994 ruled that under the provisions of s.3 (5) of the *Law of Succession Act, 1984* (CAP 160) a marriage under customary law will be recognized even if there was another monogamous marriage where polygamous marriage are allowed.

²⁰ *Genfi II v. Genfi II*, [1964] GLR 548- 551.

²¹ See, *supra* note 16, s 33. See also CAP 125, *supra* note 15, s 31.

²² There is legislation which allows spouses of a customary marriage to convert their marriage into a civil marriage.

²³ See South Africa: *Recognition of Customary Marriages Act, 1998* (Act 120) s 10.

customary law marriage.²⁴ A successful conversion of a customary marriage to a monogamous marriage constitutes a renunciation of the rights, obligations and privileges under customary law and the parties cannot again claim the benefit of the provisions of customary law. However, there are no provisions regarding whether a civil marriage may be converted to customary marriage.²⁵ The only avenue for the party wishing to marry under customary law after successfully contracting a civil marriage may be to divorce under the civil marriage and re-marry under customary law.

2.1.1.2 Age

There are differences in terms of the ages at which parties may contract marriage. The age requirement differs from one jurisdiction to another.²⁶ In Kenya, a person shall not marry unless that person is at least eighteen years old.²⁷ In Ghana, the *Marriage Ordinance, 1951*²⁸ does not specify the marriageable age. However, for the purposes of the Ghana's *Children's Act*,²⁹ a person below the age of eighteen is considered a child³⁰ Also, consent may form part of the essential requirements of marriage where either party to the marriage is a minor. In some jurisdictions, consent from the parents of a child may

²⁴*Graham v. Graham*, [1965] GLR 407-418.

²⁵ See at Gugulethu Nkosi "Indigenous African marriage and same-sex partnerships: Conflicts and controversies" (2007) 2:2 International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity 203.

²⁶ Under the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964, state parties are to specify a minimum age for marriage. However, the provision must completely eliminate child marriages and the betrothal of young girls before the age of puberty (see *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 1964, Article 2).

²⁷ Kenya: *The Marriage Act, 2014* (Act No. 4) s 4.

²⁸ CAP 125.

²⁹ Ghana: *The Children's Act, 1998* (Act 560).

³⁰*Ibid*, s 1.

be required where the child is below the marriageable age.³¹ Like the limitation on the age of marriage, the provisions on parental consent are instituted to protect minor children from early marriage. In Nigeria, if either party to an intended marriage is under twenty-one years of age, the written consent of the father and/or the mother must be produced and annexed to the affidavit before a license can be granted or a certificate issued for the marriage.³² The issue whether parental consent is necessary for the celebration of a valid statutory marriage in Nigeria arose in the case of *Agbo v. Vudo*.³³

The facts as reported were that

[t]he plaintiff contracted a statutory marriage with his wife. He later petitioned the court for dissolution of the marriage on the ground of his wife's adultery with a correspondent. The correspondent contended that the wife was minor at the time the marriage was celebrated, and that no valid marriage existed between the applicant and his wife, which the court might dissolve. It was held that notwithstanding the absence of parental consent the marriage was valid under S. 33 (3) of the *Marriage Act*.³⁴

It is, however, an offence for someone knowing that the written consent has not been obtained to marry or assist or procure any other person to marry a minor under the age of twenty-one years.³⁵ In South Africa, a marriage may be dissolved on the ground of want of consent if an application is made by a parent or guardian of the minor before he attains majority.³⁶

³¹ CAP 125, *supra* note 15, ss 27-29.

³² See, *supra* note 16, s 18.

³³ (1947) 18 NLR 152.

³⁴ Intergovernmentalmarriagereg, The Legal Frame Work of the Statutory Marriage, online: <<http://intergovernmentalmarriagereg.org/Nigeria/general/2-uncategorised/15-lectures-ref-2012tw-04>>.

³⁵ See, *supra* note 16, s 48.

³⁶ South Africa: *Marriage Act, 1961*, s 24A.

2.1.1.3 The nature of the relationship between the prospective couples

In some cases, persons falling within a certain category may be prevented from marrying each other. These persons are commonly said to fall within the prohibited degrees of affinity or consanguinity. This functions to limit intermarrying between two closely-related relatives. While some of these unions are limited for moral reasons, others have a scientific undertone. For example, it has been emphasized that multiplication of the same blood by in-and-in marrying incontestably leads in the aggregate to the physical and mental depravation of the offspring.³⁷ Also, some of these limitations are meant to prevent sexual rivalry in the family and to protect the children, for whom this situation might be confusing and disturbing.³⁸

However, the degree of prohibition varies from country to country. In Kenya, a person cannot marry that person's grandparent, parent, child, grandchild, sister, brother, cousin, great aunt, great uncle, aunt, uncle, niece, nephew, great niece or great nephew.³⁹ In addition, a person cannot marry a person whom that person has adopted or by whom that person has been adopted. This seems to be the position in Nigeria where marriage of a man is prohibited if the woman is, or has been his ancestress, descendant, sister, father's sister, mother's sister, brother's daughter, sister's daughter, wife's mother, wife's grandmother, wife's daughter, son's wife, etc.⁴⁰ However, unlike Kenya, Nigeria makes provisions for two persons who are within the prohibited degrees of affinity to marry

³⁷ See generally Ottenheimer Martin, *Forbidden Relatives: The American Myth of Cousin Marriage* (Illinois: University of Illinois, 1996).

³⁸ Jens M. Scherpe, "Should There Be Degrees in Prohibited Degrees?" (2006) 65:1 Cambridge Law Journal 32 at 33-34.

³⁹ *Supra* note 27, s 10.

⁴⁰ See generally, Nigeria, *Matrimonial Causes Act 1990*, Schedule 1.

each other on an application to court.⁴¹ However, nowhere in Nigeria's *Matrimonial Causes Act* is the phrase "exceptional circumstances" defined. It may be said that these are situations where the circumstances of the particular case are so exceptional as to justify the applicants marrying one another.⁴² Ghana has no specific rules on prohibited degrees but, in general, a marriage may not be lawfully celebrated which if celebrated in England, would be null and void on the ground of kindred or affinity.⁴³ This essentially means that no person shall marry another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption. The position in Ghana requires some clarity. One question which may be asked is whether changes in the category of person under the prohibited degrees in the UK equally applies to Ghana? This is important given that in the UK, a marriage may now be solemnized between a man and a woman who is the daughter or grand-daughter of a former spouse of his (whether the former spouse is living or not) or who is the former spouse of his father or grandfather (whether his father or grandfather is living or not).⁴⁴

2.2 Customary Marriage

Customary marriage in Africa varies widely between countries and between the many thousands of ethnic groups and cultures. Unlike statutory marriage, there seems to be no common standard in regard to the celebration and regulation of customary marriage in Africa. What may seem to be common in most Anglophone African countries is the recognition of the polygamous nature of customary marriages. In most jurisdictions

⁴¹Nigeria, *Matrimonial Causes Act of 1990*, s 4. However, in Kenya the marriage of a person with that person's cousin does not apply to persons who profess the Islamic faith (*supra* note 18, s 10(4)).

⁴²Nigeria, *Matrimonial Causes Act, 1990*, s 4.

⁴³ See, *supra* note 15, s 42.

⁴⁴ See generally, UK, *Marriage (Prohibited Degrees of Relationship) Act*, c 16, 1986.

customary marriage has been defined to be potentially polygamous. The fact that a man married under customary law decides to stay only with one wife does not change the customary union into a monogamous marriage. In addition to polygamous marriage, there are other forms of customary unions in Africa. These unions have existed prior to the introduction of monogamous marriage in Africa. In this section, the different forms of customary marriage in Africa are considered.

Polygamy may be defined as the state of marriage to two spouses. However, this definition is limited to the situation where a man is married to more than one wife at a time. Polygamy is prominent in many African countries.⁴⁵ A polygamous marriage serves as an opportunity to mobilize labor and, therefore, to establish a wealth-creating enterprise. Most religious marriages, like Islamic marriage, are polygamous in nature (and such unions are later considered under religious marriages). In most instances, customary marriage in Africa and polygamous marriage have been used interchangeably. It is not surprising to hear people referring to customary African marriage as polygamous marriage. It is, however, worth noting that polygamous marriage is an aspect of customary African marriage.

In most English-speaking African countries, there seems to be an option for domiciled inhabitants to contract valid polygamous marriages where they are governed by customary law. Polygamous marriage under customary law is a lawful marriage recognized by the laws of Ghana.⁴⁶ In Ghana, where a marriage has been contracted

⁴⁵See James Fenske, "Africa Polygamy: Past and Present", *VOX* 09 November, 2013 online: <<http://www.voxeu.org/article/african-polygamy-past-and-present>>.

⁴⁶ Ghana, *Marriage Act, 1884-1985* (CAP 127).

under customary law, either party to the marriage or both parties may apply in writing to the Registrar of Marriages for the customary marriage to be registered.⁴⁷ However, the registration of a customary marriage only gives it evidential value. In South Africa, it has been held that, non-registration or failure to register a valid customary marriage does not affect its validity.⁴⁸

Unlike civil marriages, the existence of a customary marriage is not a bar to the man marrying another woman. A man may enter into any number of marriages, provided that the subsequent marriage is otherwise valid. However, it seems that in South Africa, a man cannot just decide on his own to take a second wife without consulting the relevant stakeholders, including the wife concerned.⁴⁹ This is to make sure that the first wife is not prejudiced by the arrangement. However, in *Mayelane v Ngwenyama*,⁵⁰ the Constitutional Court of South Africa held that the consent of a first wife was not necessary for the validity of her husband's subsequent customary marriage.

One common type of customary marriage in Africa involves unions between close relatives. Some of these unions may fall under the prohibited degrees of marriage in most American and European countries. Marriage between relatives may also involve people already related from previous marriages. A man may marry his wife's brother's daughter (his niece-in-law). Although these unions are permitted in some African countries, the extent of recognition of some of these unions are not uniform. A marriage may be

⁴⁷*Ibid*, s 2.

⁴⁸ See *Kambule v Master of the High Court and Others*, [2007] ZAECHC 2; [2007] 4 All SA 898.

⁴⁹*Supra* note 23, s 7(6) & (8).

⁵⁰*Mayelane v Ngwenyama and Another*, [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).

lawfully celebrated in Ghana between a man and the sister or niece of his deceased wife.⁵¹ In Nigeria, the marriage of a man is prohibited if the woman is, or has been his wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, sister mother's sister, father's sister, etc.⁵² In Kenya, it is prohibited for a person to marry that person's grandparent, parent, child, grandchild, sister, brother, cousin, great aunt, great uncle, aunt, uncle, niece, nephew, great niece or great nephew.⁵³ These prohibitions, however, relate to Christian or civil marriages, but the prohibition of the marriage of a person with that person's cousin does not apply to persons who profess the Islamic faith.⁵⁴

2.3 Common Law or Presumptive Marriages

The concept of “presumption of marriage/ common law marriage” is not new in African customary law.⁵⁵ Presumption marriages in Africa are not significantly different from the English common law marriage arising from cohabitation. The significant difference between the common law presumption of marriage as practiced in Africa is the capacity of the man to contract another marriage while the presumed marriage subsists. Unlike under the English common law marriage it is debatable whether a common law marriage as understood in Africa constitutes a bar for the man to enter into another

⁵¹CAP 127, *supra* note 46, s 42.

⁵² See generally section 3 and the First Schedule to Nigeria's *Matrimonial Causes Act, 1990*, for an exhaustive list of the Prohibited Degrees of Consanguinity and Affinity.

⁵³*Supra* note 27 s 10.

⁵⁴*Ibid*, s 10(4).

⁵⁵“Common law marriage” is used here as a euphemism for unmarried cohabitation. For a robust discussion on common law marriages as it existed under the English common law see in general Peter Stone, *The Conflict of Laws* (New York: Longman Publishing, 1995) at 46-49.

marriage with another person. Like many customary marriages, a presumptive marriage is potentially polygamous. The Kenya Court of Appeal has stated that

before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.⁵⁶

In essence, a stable permanent relationship between two persons of the opposite sex who had not been married to each other, but, nevertheless, lived a life akin to that of husband and wife is accorded the same status as marriage. In most of the countries under study, there are no specific laws regulating presumptive marriages. Common law marriages usually come up only in cases of inheritance when one of the parties has passed away and the other wants to partake in the estate or the termination of a relationship. To achieve this status, there must be evidence illustrating that the relationship is of a permanent nature. In a claim for succession in the case of *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* the courts found that the deceased cohabited with the respondent from 1984 to 1994; the relationship gave rise to one child; the respondent brought the two children whom she had given birth to with another man to the matrimonial home to which the deceased never objected; and other family members of the deceased, including his mother and brother, accepted the respondent as the deceased's wife and recognized her as such both during the advertisement for and at the deceased's burial. The court concluded that the evidence was enough for a marriage to be presumed between the deceased and the respondent.⁵⁷ The court presumed the existence of a marriage due to lengthy cohabitation and circumstances

⁵⁶ See *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another*, [2009] eKLR.

⁵⁷ *Ibid.*

showing that although there was no formal marriage, the parties intended to live and act together as husband and wife.⁵⁸

2.4 Religious Marriage in Africa

While Muslim marriage⁵⁹ and Hindu marriage are mostly considered under religious marriage, Christian marriage and traditional marriage have respectively been categorized under civil marriage and traditional marriage. A religious marriage must comply with the marriage requirements of the particular religion to be considered valid. In Ghana, a marriage by a Mohammedan, according to Mohammedan law, is at its very best a marriage by customary law, unless the marriage has been registered under the Ordinance.⁶⁰ It is the registration of the marriage which confers statutory validity on the marriage. In South Africa, a Muslim marriage is invalid unless it is registered as a civil marriage under the provisions of the Marriage Act, 1961.⁶¹ Until recently, South Africa held on to the position that Muslim marriages are contrary to public policy. In *Ismael v. Ismael*,⁶² the court held that Muslim marriage is contrary to the principles of public policy owing to the fact that it does not prohibit polygamy. This position is, however, debatable, given that customary marriage is potentially polygamous in South Africa.⁶³

⁵⁸ See also *J M M v EGM*, [2014] eKLR.

⁵⁹ In Africa Muslim marriage is variously referred to as Islamic marriage, Mohammedan marriage, Muslim marriage etc.

⁶⁰ See Ghana, *Marriage of Mohammedans Ordinance*, Cap. 129 (1951 Rev.) ss 5, 10. See also *Kwakyie v. Tuba and Others*, [1961] GLR 720-725, *Brimah, Cobsold v. Asana*, [1962] 1 GLR 118-120 and *Barake v. Barake*, [1993-94] 1 GLR 635—668.

⁶¹ Act 25.

⁶² 1983 (1) SA 1006.

⁶³ See generally Amandus Reuter, *Native Marriages in South Africa: According to Law and Custom* (Münster [Ger.]: Aschendorff, 1963).

The Constitutional Court in the recent case of *Daniels v Campbell NO and Others*⁶⁴ set aside the High Court order which declared that marriages by Muslim rites have not been recognized by South African courts as valid marriages because such marriages are potentially polygamous and hence contrary to public policy (whether or not the actual union is in fact monogamous). The Constitutional Court ruled that a spouse in an Islamic marriage was entitled to be regarded as a spouse for the purposes of intestate inheritance.⁶⁵

Kenya's Constitution grants jurisdiction to the Kadhi court to determine questions of Muslim Law relating to personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim religion.⁶⁶ In most jurisdictions, Mohammedan marriage is potentially polygamous.⁶⁷ A man may marry more than one wife with or without the consent of the first wife.

In terms of Hindu marriage, South African Hindu marriage is regulated under statutes. In Kenya, "Hindu" means a person who is a Hindu by religion in any form (including a Virashaiva, a Lingayat and a follower of the Brahmo, Prarthana or Arya Samaj) or a person who is a Buddhist of Indian origin, a Jain or a Sikh by religion.⁶⁸ Unlike Mohammedan marriage, the institution of Hindu marriage is not well developed in Africa. In South Africa, it has been stated that polygamy is the sole obstacle to the

⁶⁴ 2004 (5) SA 331.

⁶⁵ *Ibid.*

⁶⁶ *Constitution of Kenya, 2010*, Article 170.

⁶⁷ In Surah An Nisa: Ayah: 3 states that "If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice". In Kenya, a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous (see *supra* note 27, s 6(3)).

⁶⁸ See, *supra* note 27, s 2.

recognition of Hindu marriages.⁶⁹ The courts have stated that Hindu marriage is monogamous in character.⁷⁰

3. Conflict of laws Issues in Statutory, Customary, Common law and Religious Marriages

It is trite that states have the right to determine what happens within their borders. This sovereign right includes matters relating to the legal recognition of marriages.⁷¹ In general, the conflict of laws approach to the recognition of marriage in Africa has been that in order for a foreign marriage to be recognized, the marriage must satisfy both the formal requirements of the place where the marriage was celebrated and the essential requirements of the laws of the domicile of the parties involved. Most Anglophone African countries apply the *lex loci celebrationis* to determine whether the marriage is formally valid, and the *lex domicilii* as to whether the parties had the capacity to marry under the laws of their respective pre-nuptial domicile.⁷² However, the application of the principle is subject to the public policy of the forum – policy in relation to age and degree of consanguinity, etc.

In a claim for succession under Ghana's *Marriage Ordinance*, the High Court in Ghana concluded that the marriage entered into between the applicant and the deceased was a customary marriage and not one under the Ordinance. Applying the *lex loci*

⁶⁹ Lesale Mofokeng, *Legal Pluralism in South Africa: Aspects of Africa Customary, Muslim and Hindu Family Law* (Pretoria: Van Schaik, 2009) at 33.

⁷⁰ See in general, *S v. Vengesamy*, 1972 (4) SA 351; *Seedat's Executors v The Master (Natal)*, 1917 AD 302.

⁷¹ "Recognition of marriage" is used here in terms of one African country giving legal validity to the marriage entered into in another African country.

⁷² See generally, Richard F. Oppong, *Private international Law in Commonwealth Africa* (Cambridge: University Press, 2013).

celebrationis, the court accepted the argument of the defendant that the forms and ceremonies for the marriage entered into, evidenced marriage under Togo customary law.⁷³ In Nigeria, a foreign marriage is not valid if the purported marriage is not valid under the law of the place where the marriage has taken place.⁷⁴ The provision places emphasis on the place where the marriage was solemnized. However, South Africa applies the *lex loci celebrationis* to determine both the essential and the formal requirements of marriage.⁷⁵ In essence, the validity of a foreign marriage is determined under the place where the marriage was celebrated. In *Chitima v. RAF*,⁷⁶ the High Court of South Africa held that the validity of a foreign marriage celebrated in Zimbabwe should be determined by Zimbabwean law. Oppong argues, however, that “this position is not free from doubt since there are cases which appear to suggest that the essential validity of marriage is regulated by domicile”.⁷⁷

Given that monogamous marriage is accepted by many African countries, there seems to be no contention as to the recognition of such marriages by any forum court. If parties had capacity to marry under their respective domiciles, the marriage would typically be recognized. Thus, a civil marriage, valid under the respective domiciles of the parties and the place of celebration will generally, be recognized as valid in most African countries.

⁷³*In Re Canfor (Decd.); Canfor v Kpodo*, [1968] GLR 177-184. See also *Davies v Randall and Another*, [1962] 1 GLR 1-4.

⁷⁴ Nigeria: *Matrimonial Causes Act, 1990*, s 3(1)(c).

⁷⁵ *Chitima v RAF*, [2012] 2 All SA 632.

⁷⁶ [2012] 2 All SA 632. This principle is also applied in the recognition of civil partnerships from foreign countries. In *AC v CS*, 2011 2 SA 360 (WCC), the court applied the *lex loci celebrationis* to the recognition in South Africa of a civil partnership registered in the United Kingdom under the *Civil Partnership Act, 2004*.

⁷⁷ Oppong, *supra* note 72 at 184.

There are, however, exceptions regarding marriages involving minors. Where the policy of the forum court prohibits marriage involving minors, the question arises whether such a marriage which was validly entered into in one country will be recognized in the forum country.⁷⁸ This situation may, however, be assessed on a case-by-case basis, and the court will take into account whether injustice will be caused if the marriage is not recognized.⁷⁹ The court may also adopt the same approach in cases falling under consent.

Another potential conflict of laws situation will be marriages falling under the prohibited degrees. It is debatable whether marriages falling under these prohibited degrees may be accorded recognition in other jurisdictions. In the context of civil marriage, most African countries follow the common law prohibition of marriage between relatives. Ghana family law policy prohibits marriage between a man, his sister, mother and daughter. Kenyan law prohibits any marriage between a person and that person's grandparent, parent, child, grandchild, sister, brother, cousin, great aunt, great uncle, aunt, uncle, niece, nephew, great niece or great nephew.⁸⁰ However, Nigeria allows some of these unions in limited circumstances.⁸¹ How will a Kenyan court treat a marriage between a man and his mother's brother's daughter? These and many other questions may be encountered under the plurality of the prohibited degrees in Africa. It

⁷⁸It has been mentioned that in most parts of northern Nigeria it is permissible for a man to marry a child as young as the age of 9 as long as sexual relations with her is postponed until she has attained puberty (see Ine Nnadi, "Early Marriage: A Gender-Based Violence and A Violation of Women's Human Rights in Nigeria" (2014) 7:3 Journal of Politics and Law 35 at 36.

⁷⁹In the English case of *Alhaji Mohammed v Knott*. (1969) 1 Q. B. 1 the High Court refused to recognize as valid a marriage celebrated between two Muslims in Nigeria on the grounds that the marriage was polygamous and the wife was below the age of marriage in England. On appeal, the Court of Queen's Bench per Parker CJ ruled that the marriage would be recognised by the English court as a valid marriage giving the wife the status of wife. The court reasoned that the marriage was a valid marriage according to Moslem law of the domicile. However, Murphy has argued that although the marriage of the 13-year-old in this case was recognized, it is clear from Parker CJ's judgment that the court reserved the right in other cases to refuse recognition. See John Murphy, "Rationality and Cultural Pluralism in the Non-recognition of Foreign Marriages" (2000) 49 Int'l & Comp. L.Q. 643 at 653.

⁸⁰ See, *supra* note 27, s 10.

⁸¹ See, *supra* note 74, s 4.

may be stated that the non-recognition of these unions may still hold on grounds of public policy. However, the context of a particular case may shape the outcome for the courts to recognize some of these unions for specific purposes.⁸²

As discussed above, polygamy is recognized as an institution of marriage in many African countries. This makes the recognition of foreign polygamous marriage less contentious in Africa.⁸³ In the context of conflict of laws, there is a favorable attitude towards polygamy in Africa. Many African countries domestically recognize polygamy as a form of marriage. It seems where the marriage satisfies both the laws and customs of the jurisdiction where the marriage was celebrated, the marriage will be recognized as valid in the forum country. However, the forum court must be satisfied that the marriage has been validly contracted under the custom of a particular group. This is a matter of fact to be proved by the party relying on the existence of the marriage.⁸⁴

When considering whether the marriage has been validly contracted, the court may take into account issues such as prior consent of both spouses.⁸⁵ This will usually be

⁸² In *Cheni v Cheni* the English court upheld the validity of a foreign marriage although the parties were under the prohibited degree of consanguinity-the wife being a niece of the husband. The court reasoned that the marriage was not so offensive to the conscience of the English court that it should refuse to recognize and give effect to the proper foreign law. To withhold recognition was to disregard the views of many civilised countries by whose laws these marriages are permissible (see in general *Cheni v Cheni* [1963] 2 W.L.R 17). This consideration is instructive in deciding whether a valid foreign marriage should be given recognition.

⁸³ It is worth mentioning that historically a common law court had no jurisdiction to recognize polygamous marriages. See *Sowa v Sowa*, [1961] 1 All E.R. 687. In the South Africa case of *Seedat v. The Master*, 1917 A.D. 302, it was held that South African law will not recognize a polygamous marriage for any purpose. The basis of the decision in *Seedat's* case was that it was contrary to public policy to recognize a polygamous marriage. But later cases showed a change in public policy in that regard and the courts came to realize that recognition of a polygamous union for some purposes is necessary. See also W. T. McClain, "Recognition of Polygamous and Potentially Polygamous Marriages and Conflict of Laws" (1962) 6:1 Journal of African Law 54.

⁸⁴ In Ghana, for example, foreign law is a question of fact. See generally *Evidence Decree, 1975* (NRCD 323), s 1.

⁸⁵ The question of consent required in African customary marriage raises two distinct problems, namely the consent of the parents and that of the spouses themselves. This position is born from the conception that the

the case where the forum state's public policy prohibits forced marriages. In Kenya, a decree of nullity of marriage may be made if the consent of either party has not been freely given.⁸⁶ In such a case, notwithstanding that the marriage may have been validly contracted under the *lex loci celebrationis*, the court may nevertheless refuse recognition. In addition, the court may take into account the respective ages of the parties. This is to satisfy the court that neither party is a minor. This may, however, be contentious where the marriageable age of the forum state differs from that of the place where the marriage was celebrated. In this case, it is debatable whether the forum court can rely on its own laws to nullify a marriage sanctioned by another state.

It can be concluded that given the prevalence and acceptance of polygamous unions in the legislation of most African states, the recognition of such unions across borders may not create any problem from a conflict of laws perspective.

The question whether a court will recognize a marriage from another jurisdiction between relatives is not well settled in Africa. The reason may come from the differences in the relationships falling under the prohibited degrees in various countries. The existence of plurality in customary practices under prohibited degrees of marriage presents conflict of laws problems. This may be attributed to the fact that most statutes provide for the application of the customary law that prevails within the area of the jurisdiction of the court. In many towns in Ghana, for example, there are several systems of customary law which may be followed by members. This may give rise to internal

system of customary marriage in Africa is not just a union of 'this man' and 'this woman': it is a union of the family of 'this man and 'this woman' (see generally Kwame Opoku, *The Law Of Marriage In Ghana: A Study of Legal Pluralism* the family of 'this man and this woman' . See generally Kwame Opoku, *The Law of Marriage in Ghana: A Study of Legal Pluralism* (Frankfurt: A. Metzner, 1976). See also *Yaotey v Quaye*, [1961] GLR 573-584.

⁸⁶ See, *supra* note 27, s 11(1)(e).

conflict of laws.⁸⁷ Thus, a conflict of laws situation could even arise domestically between two communities in Ghana where the court may have applied the custom of one community to determine the validity of a marriage celebrated under that custom. While some states prohibit certain unions in their legislation, primarily for civil marriages, whether two parties can enter into a valid marriage under customary law is left to the customs and practices of the particular community. In South Africa, prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.⁸⁸*The Customary Marriage and Divorce (Registration) Law, 1985*⁸⁹ in Ghana also makes no provision for which relationships under the prohibited degrees cannot be registered under the Law. The result is that, while certain unions are allowed in some countries, the same unions may be prohibited in another country. For instance, in some parts of Ghana, customary law allows a man to enter into a valid marriage with his wife's sister, whereas such unions are prohibited in Kenya.

Unlike places such as Canada and the United States, where presumptive marriage/cohabitation is well regulated under the family law system, the institution of cohabitation has not been given the needed attention in the countries under

⁸⁷ Internal conflict of laws may arise in situations where there exists a plural regime in one legal system such that the country recognizes the operation of a variety of local personal laws. In *King & Another v. Elliot & Another*, [1972] 1 GLR 54-59, the issue was which law should govern the succession to the deceased property; that is, whether Fanti customary law or some other law governed the question of succession. The court found that although the deceased spent some part of her life living in the Central Region she was not subject to the Fanti customary law. It was decided, accordingly, that the applicable law was not Fanti customary law but the English common law as it stood in 1874. The case illustrates the internal conflict of laws situation where individuals under one legal system may be subject to a different personal law. In such a case it is not only the laws of the country that applies to the person but the court also takes into account the different personal laws among the residents. Unlike internal conflict of laws, international conflict of laws mainly deals with issues across borders. In the case of succession, the question is which country's legal system applies to the issue of succession.

⁸⁸ See generally, *supra* note 23.

⁸⁹ PNDCL 112.

study.⁹⁰ Whether a marriage can be presumed is a question of fact to be proven by the party asserting the existence of the marriage. This is because no registration occurs in the establishment of a common law marriage. The presumption does not depend on the law or system of marriage in a particular community. In essence, a party seeking to rely on a presumptive marriage will have to establish by the preponderance of evidence that such a marriage exists. This assumes constant cohabitation and a general reputation as spouses. From a conflict of laws perspective, it seems a court may recognize a presumptive marriage if such a marriage has been established by the court of the parties' domicile and place of celebration. However, as with any other marriage, recognition of a common law marriage may be refused if the marriage is viewed as conflicting with strong public policy in the forum state. As well, a marriage cannot be presumed in favor of any party in a relationship in which one of them is married under statute.⁹¹ Presumption marriages are mostly in cases where parties do not lack capacity to marry.

As noted above, religious marriage is accepted in most African communities. The domestic recognition of this sort of marriage by most African states makes the conflict of laws aspect of religious marriages less contentious. A marriage valid under the particular religion in terms of formality and meeting the essential requirements will be recognized by the forum state. There is no apparent reason why religious marriages may not be recognized by a forum court. One issue that may, however, arise is where the forum state does not domestically recognize the polygamous nature of such marriage. In South Africa, for example, plural marriages formed under religious law (e.g., Hindu, Muslim)

⁹⁰ See generally, Göran Lind, *Common Law Marriage: A Legal Institution for Cohabitation* (Oxford: Oxford University Press, 2008).

⁹¹ In the Texas case of *Guidry v. McZeal*, [1986] 487 So.2d 780, the parties had visited and stayed 8 months in Texas. A common law marriage could not be established, as the man during the period of the stay was married to another woman.

are not accepted. However, considering the application of the conflict of laws rules in South Africa the courts are likely to give effect to the consequences of a religious marriage celebrated outside South Africa.

4. Woman-to-woman marriage

The institution of woman-to-woman marriage is not well acknowledged in Africa. However, it has been said that woman-to-woman marriage is widespread in African patrilineal societies, although the way it functions varies from society to society.⁹² In the context of same-sex marriage, “woman-to-woman marriage” deserves attention because of its semblance to lesbianism. This may suggest that same-sex union is, in actuality, not new in Africa. According to Katakami, woman-to-woman marriage refers to a woman who takes on the legal and social roles of husband and father by marrying another woman in accordance with the approved rules and ceremonies of her society.⁹³ In this type of marriage a female takes another female as her “wife”. She performs all the necessary customary rights and ceremonies associated with a valid marriage in her community and stands in the position of a husband to the wife. Woman-to-woman marriage may involve a surrogate female who takes the position of a male solely for the purposes of providing offspring for the male’s family. This is commonly used in kinship situations. The purpose of a union such as this is to provide a male heir.⁹⁴ In describing the institution of woman-to-woman marriage as it relates to the Nandi people of Kenya, Cotran emphasized that

⁹² See Regine Smith Oboler, “Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya” (1980) 19:1 *Ethnology* 69.

⁹³ See generally Hidetoshi Katakami, “Female Husbands and the House-property Complex: Re-examination of the two guiding concepts in the literature on Woman-marriage”(1998) 1998:52 *Journal of African Studies* 51.

⁹⁴ Oboler, *supra* note 92.

a woman past the age of [among the Nandi and Kipsigis] child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband.⁹⁵

A review of the various customary marriages indicates that woman-to-woman marriage is prominent in certain communities in Kenya. There, woman-to-woman marriage is predominant among the Nandi. It is also celebrated under Kikuyu customary marriage laws. It has been mentioned that among the Nandi, a female husband should always be a woman of advanced age who has failed to bear a son.⁹⁶ It has already been mentioned one essential purpose of the union is to provide an heir. In a claim for succession, the court found the existence of a woman-to-woman marriage between the petitioner and the deceased under the Nandi custom and, accordingly, held that the petitioner was a "wife", and that by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance right, prior to anyone else.⁹⁷ The court, in coming to this conclusion, was satisfied that the necessary conditions for the existence of a woman-to-woman marriage as it pertained in the Nandi custom was completed.

⁹⁵ Eugene Cotran, *The Law of Marriage and Divorce*, vol 1 (London: Sweet & Maxwell, 1968) at 117.

⁹⁶ See generally, B. Oomen, "Traditional woman-to-woman marriages, and the Recognition of Customary Marriages Act" (2000) 63:2 *Journal of Contemporary Roman-Dutch Law* 274.

⁹⁷ In *the Matter of the Estate of Cherotich Kimong'ony Kibserea (Deceased)*, Succession Cause No. 212 of 2010 (High Court, Kenya, 2011).

The practice is also stated to be common among the Lovedu tribe in South Africa.⁹⁸ However, unlike the institution of woman-to-woman marriage practice among the Nandi people, Krige has emphasized that the essential feature of woman-to-woman marriage among the Lovedu tribe is that the institution is not the privilege of those who have acquired wealth by their own efforts, but the institution is within the reach of any woman in certain fortuitous circumstance.⁹⁹ In other words, woman-to-woman marriage is not practiced among only woman past the age of child bearing and who has no sons. Circumstances such the need to raise an heir for a political position, woman-to-woman marriage as an investment of wealth earned by women, arrangements in case of barrenness, and the queen's wives are some of the instances that may call for a woman-to-woman marriage.¹⁰⁰ However, in many cases, the need for woman-to-woman marriage is for the wife to bear children for the female husband.¹⁰¹ This is achieved by the barren woman marrying another woman for the husband. Cadigan has also mentioned that, the institution of woman-to-woman-to-woman marriage is a strategy that women use to further their social and economic position in the society.¹⁰²

In Nigeria, a court has ruled that where there is proof that a custom permits marriage of a woman to another woman, such custom must be regarded as repugnant by virtue of the proviso to the section 14(3) of the *Evidence Act*, and ought not to be upheld

⁹⁸ See generally, Beth Greene, "The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis" (1998) 37:4 *Ethnology* 395.

⁹⁹ Eileen Jensen Krige, "Woman-Marriage, With Special Reference to the Lovedu-Its Significance for the Definition of Marriage" (1974) 44:1 *Journal of the International African Institute* 11 at 15.

¹⁰⁰ *Ibid* at 17-21.

¹⁰¹ See in general, R. Jean Cadigan, "Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa" (1998) 29:1 *Journal of Comparative Family Studies* 89.

¹⁰² *Ibid*.

by the court.¹⁰³ The court used the woman-to-woman marriage here to refer to “woman-to-woman” marriage analogous to lesbianism. However, in the opinion of the court, where a “woman-to-woman” marriage is not a marriage between two women, rather, one woman, due to the fact that she was barren, had procured another woman for her husband as a wife, such arrangement is not caught by the proviso to section 14(3), and is not contrary to public policy.¹⁰⁴

The position taken by the Nigerian court clearly differentiates woman-to-woman marriage, as practiced in some African countries, from lesbianism. It is apparent from the court’s decision that the absence of sexual satisfaction in woman-to woman marriage is a key consideration in holding the union valid. Where the union is akin to lesbianism the court may find such a relationship contrary to the system of jurisprudence practiced in most African countries.¹⁰⁵ In this case, the court accepted as a valid custom that if a woman has no issue she can marry another woman for her husband; any issue from the said married woman would be regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance.¹⁰⁶

Notwithstanding the foregoing account of woman-to-woman marriage under these customs, the institution of woman-to-woman marriage has not been given the attention it warrants and is still not entirely understood.¹⁰⁷ It is arguable whether “foreigners” are entitled to enter into such a marriage. Essentially, the marriage must meet the

¹⁰³ *Eugene Meribe v. Joshua C Egwu*, [1976] 1 NLR [Part 1] 266.

¹⁰⁴ *Ibid.*

¹⁰⁵ For a robust critique of this decision see C. O. Akpamgbo, “A ‘Woman to Woman’ Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles” (1977) 9:14 *The Journal of Legal Pluralism and Unofficial Law* 87.

¹⁰⁶ *Ibid* at 89.

¹⁰⁷ Krige, *supra* note 99.

requirements of the customs and practices of the particular community for it to be valid. In *Eliud Maina Mwangi v Margaret Wanjiru Gachangi*,¹⁰⁸ the Court of Appeal in Nairobi overturned the decision of the High Court which held that the respondent was the wife of the deceased. In the opinion of the court, the marriage did not satisfy the essential requirements of the Kikuyu customary law under which the marriage was purported to have been celebrated. In *Millicent Njeri Mbugua v Alice Wambui Wainaina*, Hon. M.S.A. Makhandia, J observed that for a woman-to-woman marriage to be valid, the husband of the woman marrying another must have died; the woman marrying must have been left childless by her deceased husband; she must be past child bearing; the said woman or widow must pay *ruracio* to the family of the woman she is marrying; and she must subsequently arrange for a man from her deceased husband's age group to have intercourse with her wife.¹⁰⁹

The concept of woman-to-woman marriage seems to suggest that the idea of same-sex marriage may not be entirely new, at least, to some African countries. Its semblance to lesbianism is well illustrated where a female takes another female as her "wife" and performs all the necessary customary rights and ceremonies associated with a valid marriage in her community. The significant difference maybe the absence of sexual relations for the two women concerned in woman-to-woman marriage. However, given the limited information on woman-to-woman marriage in Africa, its place in the customary marriage setting is uncertain. It appears to be limited to only certain tribes, so it is debatable whether a foreigner can enter into such a marriage, in Kenya, for example. It is, however, evident that the practice is recognized and accepted in jurisdictions like

¹⁰⁸ [2013] eKLR. .

¹⁰⁹ *Millicent Njeri Mbugua v Alice Wambui Wainaina*, [2008] e KLR.

South Africa and Kenya. The question is how these relationships will be recognized by other African countries.

Supposing a Ghanaian goes through a woman-to-woman marriage with her partner in Kenya, what would be the Ghanaian courts' reaction to such a union? Can a woman married under such a custom be charged with bigamy if, while the woman-to-woman marriage subsists, she subsequently contracts another marriage in Ghana? Is one to accept that once the marriage is valid under Kenyan law, being the place of celebration of the marriage, then the marriage should be recognized? These may be difficult arguments to settle, given that Ghana does not explicitly bar woman-to-woman marriage. However, from a conflict of law perspective, it seems jurisdictions where such relationships are not domestically recognized may refuse recognition on grounds of public policy. That is, the marriage is not recognized by the *lex fori*. In Ghana, for example, marriage, whether customary marriage, civil, or Mohammedan, is viewed from a heterosexual perspective.¹¹⁰ It is debatable whether Ghana will apply the same conflict of laws rules, the *lex loci celebrationis* and the *lex domicilii*, to recognize a woman-to-woman marriage celebrated in another country. In essence, a woman-to-woman marriage considered valid under the laws of the place where it was celebrated may still not be recognized in jurisdictions where woman-to-woman marriage is not domestically regulated. But where the non-recognition of such marriage will cause injustice, the court may base upon on public policy and natural justice to recognize it.¹¹¹

¹¹⁰ See generally the Ghana's CAP 127, *supra* note 46.

¹¹¹*In re Kariyavoulas (Deceased); Donkor v. Greek Consul-General*, [1973] 2 GLR 52.

It may be mentioned that jurisdictions like South Africa and Kenya¹¹² may recognize such relationships from other countries, given that woman-to-woman marriage is domestically recognized under the customary laws of these states. This position explains that where a union is domestically recognized by the forum country, the courts are not reluctant to grant recognition to similar unions from other countries. However, a conflict of laws problem arises when the state within which a remedy is sought does not have laws regulating such relationships.

5. Conclusion

The institution of marriage in Africa is diversely practiced among the African countries. While the civil/statutory marriage is common among most English-speaking African countries and seems regulated along the English understanding of marriage, the extent of recognition and regulation of other domestic unions, such as marriage between relatives, Muslim marriage, polygamy and woman-to-woman marriage, differ from one country to another. This raises a private international law issue as to how such unions not domestically recognized in a host country will be treated in that jurisdiction. However, the fact that the marriage is between a man and a woman is critical and may be enough ground for the host country to recognize such unions where the essential and the formal requirements of the marriage are satisfied. As evident from the discussion, with the exception of woman-to-woman marriage which contemplates a union between two women, all other domestic unions have a heterosexual character and, accordingly,

¹¹² Greene, *supra* note 98.

envisage a relationship between a man and a woman. It is debatable whether the same recognition would be given to unions that are between the same genders.

The next chapter examines how same-sex marriage and other domestic unions that are prohibited and not domestically recognized in Canada and the UK are treated from a conflict of law perspective. The discussion serves as the springboard and a comparative lens for examining how the conflict of laws aspects of such unions are or would be treated in Africa in Chapter Four.

CHAPTER THREE: THE CONFLICT OF LAWS ASPECTS OF NON-TRADITIONAL MARRIAGE IN CANADA AND THE UK

1. Introduction

Canada and the United Kingdom are among the few countries that recognize same-sex marriage under their legislation. This is significant, given that studies have shown limited support for the recognition of such unions in many jurisdictions. In Canada, the *Civil Marriage Act*,¹¹³ grants legal status to same-sex couples who marry under the Act. The same can be said about UK. Its *Marriage (Same-sex Couples) Act, 2013*,¹¹⁴ legalises same-sex marriage celebrated in the UK.

Same-sex marriage in these two countries now has the same legal status as heterosexual marriage. This has placed same-sex and heterosexual couples in the same position in both jurisdictions. In addition to the recognition of same-sex unions, these two countries have moved from the position of blanket non-recognition of other “non-traditional” forms of marriage to granting recognition in specific instances. Hitherto, both Canada and UK were characterised by a total rejection of the idea of polygamy and other relationships falling under the marriage prohibited degrees; a rejection based on the impossibility of such unions being considered as marriage in both jurisdictions. However, there is a growing benevolence of the English and Canadian courts toward the recognition of polygamous marriages and other forms of domestic unions.

This chapter explores how private international law issues generated by same-sex marriage and other ‘non-traditional’ foreign marriages are addressed in UK and Canada. Both countries are common law jurisdictions, and legislation and case law, especially in

¹¹³ SC 2005 (c 33).

¹¹⁴ c 30.

the UK, have very strong persuasive weight in English-speaking African countries. The goal is to examine how the private international law issues generated by these unions are resolved, the various ways of resolving them and the extent to which the approaches in these two countries may be useful to English-speaking African countries which are facing similar situations.

The chapter is divided into 3 sections. Section 1 examines the recognition of non-traditional forms of marriage in UK and Canada before the *Marriage (Same-sex Couples) Act* and *Civil Marriage Act*. This will provide a general overview of what had hitherto been the definition of marriage in these two jurisdictions and how the courts have dealt with the recognition of foreign unions that are not domestically recognized in the two countries. Section 2 and 3, respectively, examines the approaches adopted by Canada and UK to resolve the conflict of laws issues which arise from same-sex marriage. This will form a basis for the recommendations of approaches that may be useful to English-speaking African countries where same-sex marriage is not legally recognized.

2. Recognition of “Non Traditional Marriage” in Canada and UK: A Conflict of Laws Perspective

The institution of marriage is fundamental to the legal system of many countries. In Canada, legislative jurisdiction over marriage and divorce is shared by the federal and the provincial government. This is different from the practice in the United Kingdom where legislative authority over contracting and the incidents of marriage is unitarily regulated by the central government. In Canada, section 91(22) of the *Constitution Act*,

1867¹¹⁵ vests exclusive right in the Parliament of Canada in all matters relating to marriage and divorce. The provinces have legislative jurisdiction over the solemnisation of marriage.¹¹⁶ This distribution means that the essential requirements of marriage relating to capacity to marry is in the domain of the federal government, while matters considered under the formal requirements are regulated under provincial legislation.¹¹⁷ However, while provincial governments cannot legislate on capacity, the courts have interpreted the provincial solemnisation jurisdiction to include regulating the minimum age for the issuance of a marriage license or solemnisation in the provinces.¹¹⁸ In circumstances where there is conflict between valid federal and valid provincial legislation, the principle has been that federal legislation takes priority and supersedes provincial legislation.¹¹⁹ But in the area of divorce, federal legislation has been applied uniformly throughout the country.¹²⁰ In addition, the courts have extended the federal divorce power to include child, spousal support and custody issues ancillary to divorce.¹²¹

In the UK, marriage is unitarily regulated under the general laws of the country. That is, both the essential and formal requirements of marriage are regulated under the a unitary system. Before the enactment of the *Civil Marriage Act* and the *Marriage (Same-sex Couples) Act*, both Canada and UK considered marriage as the voluntary union for life of one man and one woman to the exclusion of all others.¹²² This was in tandem with

¹¹⁵ 30 & 31 Vict, c 3.

¹¹⁶ *Ibid*, s 92(12).

¹¹⁷ See generally Vaughan Black, “Choice of Law and Territorial Jurisdiction of Courts in Family Matters” (2013) 32 Canadian Fam. L.Q.53.

¹¹⁸ See *Hobson v Gray*, [1958] 25 W.W.R 82.

¹¹⁹ However, *In Re Marriage Legislation in Canada*, 1912 A.C 880, the Privy Council expressed the opinion that “solemnization of marriage” was an exception carved out of the federal power over “marriage” and that federal legislation cannot override valid provincial legislation.

¹²⁰ See generally the *Divorce Act*, RSC 1985, c 3.

¹²¹ Matrimonial property is governed by provincial legislation.

¹²² “Spouse” was defined to mean one of the opposite sex.

the common law definition of marriage given in *Hyde v. Hyde*.¹²³ In this case, Lord Penzance emphasized the heterosexual character of marriage and also the fact that any institution that acts contrary to the “one man, one woman” rule was in fact not a marriage in the Christian sense. In both Canada and UK, this proposition has been applied to domestic marriages and also to the recognition of foreign marriages.¹²⁴

It is trite that states have the right to determine what will happen within their borders. This sovereign right includes matters relating to the legal recognition of marriages. The validity of marriages celebrated in a country is determined under the laws of that country, including its private international law. In general, recognition of marriage celebrated domestically by individuals domiciled in the forum country are rarely matters of contention before domestic courts. The marriage must meet both the formal and essential requirements of the family law of the particular state for it to be valid.¹²⁵ In both Canada and the UK, domestic relationships, like polygamy, incest and relationships falling under the prohibited degrees, have long been prohibited¹²⁶ under various rules, and any purported marriage in violation of these prohibitions was considered void and of no legal effect.

Although there seems to be no contention in regard to the validity of marriages which are domestically celebrated, the case is different with recognition of foreign

¹²³ (1866) LR 1 P&D 130.

¹²⁴ See generally *Lim v Lim*, [1948] 2 DLR 353, 1 WWR 298; *Sara v Sara*, [1962], 31 DLR (2d) 566, 38 WWR 143; *Peters v Murray*, [2006] OJ No 4871, 153 ACWS (3d) 913.

¹²⁵ In Canada, this requires compliance with both federal and provincial provisions.

¹²⁶ At present, domestic recognition of polygamous marriage in Canada is still a matter of contention. A proponent of the recognition of polygamous marriage has advanced the argument that it is not the role of the state to choose which relationships are permissible by law and which are not. Strassberg, for example, has argued that “it is not the role of the state to choose which relationships are permissible by law and which are not; rather, the role of the state is to protect the members of these relationships when relief is needed”(see Maura I. Strassberg, "The Challenge of Post-Modem Polygamy: Considering Polyamory" (2003) 31 *Capital U. L. Rev.* 439, reported in Amy J. Kaufman, “Polygamous marriages in Canada” (2005) 21 *Canadian Journal of Family law* 215 at 329).

marriages. In this case the courts give effects to status or legal obligations created by a foreign marriage. In general, the conflict of laws approach to the recognition of marriage in both Canada and the UK have been that in order for a foreign marriage to be recognized, the marriage must satisfy both the formal requirement of the place where the marriage was celebrated, and the essential requirement of the laws of the domicile of the parties involved.¹²⁷ The *lex loci celebrationis* is applied to determine whether the marriage is formally valid, and the *lex domicilii* is applied to determine whether the parties had the capacity to marry under the laws of their respective pre-nuptial domicile. In essence, a marriage valid under the respective domiciles of the parties and the place of celebration will be recognized as valid in the forum country. However, strict application of the rule has mainly been in respect to marriages falling under the traditional definition of marriage set out in *Hyde v. Hyde*, namely, that in addition to the marriage meeting the essential and formal requirements of the respective pre-nuptial domicile of the respective parties, it must be between a man and a woman and must be monogamous. In addition, the marriage must not fall within any of the degrees of consanguinity and affinity prohibiting marriage.

In both Canada and UK, different approaches were used when the marriage under consideration fell outside the traditional definition of marriage established in *Hyde v. Hyde*.¹²⁸

¹²⁷ In the US, the formal and essential validity of marriage are both determined under the laws of the *lex loci celebrationis*.

¹²⁸ For Canada, see, for example, *Azam v. Jan* 2013 ABQB 301.

2.1 Canada's Approach to the Recognition of Non-Traditional Marriage

Canada has historically adopted different approaches towards the recognition of non-traditional marriages. Canadian courts, for instance, routinely applied the *lex loci celebrationis* and the *lex domicilii* to traditional marriages of one man and one woman. However, they were reluctant to adopt the same approach in to recognize polygamous marriages,¹²⁹ that is, Canadian courts refused to recognise a polygamous marriage even when it had been validly contracted under both the *lex loci celebrationis* and the *lex domicilii* rules.¹³⁰ In *Lim v Lim*,¹³¹ a Chinese domiciled in China entered into a polygamous marriage with two women. The marriage was legal under Chinese law. The man subsequently immigrated with the second wife to Canada. In an application for maintenance by the second wife upon the husband's desertion, the court declined jurisdiction on the basis that neither party in a polygamous marriage was entitled to a relief from a Canadian court. Essentially, the marriage was not recognized by the laws of Canada.¹³²

It is debatable whether *Lim v Lim* was a good decision even at the time it was made. Before that decision, the British Columbia court in *Yew v Attorney General of British Columbia*¹³³ had, on similar facts, recognized two wives of polygamous marriages as wives for all purposes of the *Succession Duty Act*. Although Coady J. in *Lim* referred to *Yew*, he recognized that the *Yew* case only accepted that it was the status enjoyed by both wives of the deceased resident in China that's must be recognized by the British

¹²⁹ Amy J. Kaufman, "Polygamous marriages in Canada" (2005) 21 Canadian Journal of Family Law 215 at 320.

¹³⁰ See, in general, *Tse v Minister of Employment & Immigration*, [1983] 2 F.C. 308; and *Ali v Canada Minister of Citizenship & Immigration*, [1998] F.C.J No 468.

¹³¹ [1948] 2 D.L.R. 353; 1 W.W.R. 298.

¹³² *Ibid.*

¹³³ [1924] 1 D.L.R. 1166, 33 B.C.R. 109.

Columbia Courts in the disposition of his estate. However, the judge concluded that he was bound by *Hyde v Hyde* and, accordingly, refused to recognize the marriage. It is evident the unjust result that flowed when the rule in *Hyde v Hyde* is followed in all its strictness. Essentially, the wife to a foreign marriage is refused the right to enforce a remedy to which, under Canadian law a wife is entitled by reason of the marriage contract.¹³⁴

The legislative attitude was not only to proscribe polygamous marriage but to make it a crime for any person who enters into it. Although the criminal sanction applies to individuals domiciled in Canada, it made it difficult for the court to recognize as valid a foreign union which is criminalized in the jurisdiction.¹³⁵

The rule of blanket non-recognition was criticized, but the non-recognition of such marriages was defended on public policy grounds, and also on the grounds that such marriages were not recognized according to the *lex fori*.¹³⁶ Essentially, such marriages would not have been valid if celebrated in Canada. This led to the limping marriage phenomenon where marriages validly accepted in the parties' domicile were not recognized as valid in Canada, leaving a party with no relief.¹³⁷ Blanket non-recognition

¹³⁴ See *Re Hassan and Hassan*, [1976] 12 OR (2d) 432;69 DLR (3d) 224;28 RFL 121.

¹³⁵ See *Criminal Code*, RSC 1985, c C-46, s 293. The British Columbia Supreme Court has ruled that the ban on polygamy does not violate the *Charter of Rights and Freedoms* (*Reference re: Section 293 of the Criminal Code of Canada*, [2011] BCSC 1588). Also the Alberta Court of Appeal stated in *Nafie v Badawy*, [2015] ABCA 36, that a court may refuse to recognize a foreign marriage on grounds of public policy even if that marriage is valid where it is celebrated. One such public policy ground is polygamy. Accordingly, even if the marriage is valid where celebrated, Alberta may not recognise it as valid.

¹³⁶ Kaufman has mentioned that though under section 293 of the *Criminal Code*, polygamous marriage is illegal in Canada, authorities are reluctant to prosecute under the section for fear that it will be struck down on *Charter* grounds; making the courts rely on the public policy approach to refuse recognition. The argument put forward to refuse recognition is that polygamous marriages maintain and deepens inequality between sexes. In short, polygamy is seen as an institution that discriminates against women (see generally *Kaufman*, *supra* note 129).

¹³⁷ The non-recognition of polygamous marriages had the effect on immigration officers refusing applicants' entry to Canada on the suspicion that an applicant will practice polygamy in Canada (see *Ali v Canada (Minister of Citizenship and Immigration)*, *supra* note 130).

of other domestic unions like incest was also defended on the same public policy grounds.

2.2 UK's Approach to the Recognition of Non-Traditional Marriage

UK has long refused recognition of foreign domestic unions falling outside the definition of marriage established in *Hyde*. Subsequent to *Hyde*, the English court in *Re Bethell*¹³⁸ refused to recognize a marriage celebrated in South Africa under the Baralong custom between a man domiciled in the UK and a member of the Baralong tribe. Baralong custom allows polygamy. The traditional conflict of laws position in English law was that a marriage that is good by the law of one country must be held good in all others where the question of its validity arises. However, this position was applicable only to marriages falling under the rule in *Hyde v Hyde*.¹³⁹ In *Re Bethell*, it was reasoned no marriage existed and the rule could not be applied. In essence, the court gave effect to the proposition by Lord Penzance in *Hyde* that the union was in fact not a marriage in the Christian sense and, therefore, refused to recognise it.¹⁴⁰

The judgment in *Re Bethell* represents the distinction between Christian marriage and other unions. In essence, the status created by the union was not the status of a

¹³⁸ (1888) 38 Ch D 220

¹³⁹*Ibid*, at 233. See also C.A. Esplugues, "Legal Recognition of Polygamous Marriages" (1984), 17 Comp. Int'l L. J. S. Afr. 302 at 304.

¹⁴⁰ UK policy on non-traditional marriages is also evident in the country's immigration rules. The UK has long refused to issue immigration visas to women who are in actual polygamous relationships (see *R v Immigration Appeal Tribunal, ex parte Hasna Begum*, [1995] Imm AR 249; *R v Secretary of State for the Home Department, ex parte Laily Begum*, [1996] Imm AR 582). In *SG (Child of Polygamous Marriage: Nepal)*, [2012] UKUT 265 (IAC); [2012] Imm. A.R. 939 (UT (IAC)) the court explains that there is a legitimate aim in excluding from admission to the United Kingdom, a woman who is a party to an actual polygamous marriage and that aim justifies the indirect effect of that exclusion on the child of such a marriage. In that case, it will be more difficult for the child to satisfy the immigration rules relating to sole responsibility and circumstances making exclusion of the child undesirable.

married person not a husband or wife. Although the decision may be criticised for the fact that it failed to recognize a status validly conferred on the parties by a foreign law, a strict application of the *lex domicile* rule supports the court's decision. Under English law, the man did not have the capacity to enter into the polygamous marriage.

In matrimonial cases, the English courts declined jurisdiction to dissolve even a potentially polygamous marriage where the parties were subject to foreign law. In *Sowa v. Sowa*,¹⁴¹ the court declined jurisdiction in a suit for separation and maintenance. Before assuming jurisdiction in any matrimonial case the first issue for consideration was whether the marriage falls under the principles established in *Hyde v. Hyde*.¹⁴² In *Sowa*, the court declined to consider whether the husband had a duty to maintain his "wife" and infant child on the basis that the marriage was celebrated under a polygamous law in Ghana. In essence, the court viewed the issue of maintenance of the dependents as necessarily geared to and dependent on jurisdiction in matrimonial causes.

2.3 Trend towards the recognition of non-traditional marriages in Canada and UK

The position of non-recognition of certain marriages in both the UK and Canada resulted in unfair and unjust outcome. In some cases, a spouse to a foreign marriage is left without a remedy and may be tied to a relationship which existed only by name. However, later judicial decisions in both jurisdictions gave indication that the previous position of total non-recognition of certain marriages may be less strictly applied. The

¹⁴¹ [1961] 1 All E.R. 687.

¹⁴² In *Bellinger v Bellinger* (Lord Chancellor Intervening), [2003] 2 AC 467 at 480 para 46 Lord Nicholls stated that "Marriage is an institution, or a relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex."

attitude towards polygamy changed considerably. The courts abandoned the strict application of the monogamous character of marriage and recognised several effects of such marriages. The context of each case started to profoundly shape the outcome. In *Radwan v. Radwan(No.2)*¹⁴³ Cumming-Bruce J emphasized that

[I]t is an over-simplification of the common law to assume that the same test ... applies to every kind of incapacity, non-age, affinity, prohibition of monogamous contract by virtue of an existing spouse and the capacity for polygamy. Different public and social factors are relevant to each of these.¹⁴⁴

Each case was treated on its own merits. In this regard, spouses who had lawfully contracted a foreign marriage in accordance with their personal law had the marriage recognized for specific purposes.

In *Cheni v. Cheni*,¹⁴⁵ the court assumed jurisdiction in a marriage celebrated in Egypt that was not recognized under English domestic law. The parties were within the prohibited degree of consanguinity-the wife being a niece of the husband. The English court assumed jurisdiction and upheld the validity of the marriage, though it was against English policy. In the opinion of Sir Jocelyn Simon, P, the true test in withholding recognition on the ground of public policy was “whether the marriage is so offensive to the conscience of the English court that it should refuse to recognize and give effect to the proper foreign law. In deciding that question, the court will seek to exercise common sense, good manners, and *reasonable tolerance*”.¹⁴⁶ To withhold recognition was to

¹⁴³ [1972] 3 All E.R. 1026.

¹⁴⁴*Ibid*, at 1037.

¹⁴⁵ [1963] 2 W.L.R 17.

¹⁴⁶*Ibid*.

disregard the views of many civilised countries by whose laws these marriages are permissible. These considerations are instructive in deciding whether a valid foreign marriage should be given recognition. It is also worth mentioning that, from the facts of the case, the marriage at the time of the suit had become monogamous, and accordingly, favored the court to assume jurisdiction. The court recognized that the acquisition of an English domicile of choice changed the character of a potentially polygamous marriage and gave the English Courts jurisdiction. This differentiated it from *Sowa* where the parties' potential polygamous marriage still subsisted at the time the relief was sought.¹⁴⁷

The concept of change in domicile and the acquisition of a new status have been applied in a number of cases where it is evident that a party is relying on the polygamous status to defeat a claim. In *Haussain v Haussain*,¹⁴⁸ the husband tried to rely on the polygamous nature of his marriage to defeat the wife's claim for a decree of judicial separation. He denied that he was married under English law since her marriage was potentially polygamous under Pakistan law – the place of celebration of the marriage. The Court, however, found that the acquisition of English domiciliary changed the marriage into a monogamous one.

A review of the cases illustrates some degree of inconsistency in the decisions of the courts. This is because the courts seem to apply different conflict of laws rules in the recognition/non-recognition of foreign marriages. In one breath, the court seems to rely on the pre-nuptial domicile of the parties to assume jurisdiction, while in another, the

¹⁴⁷ See generally P. R. H. Webb, "Potentially Polygamous Marriages and Capacity to Marry (Based on *Cheni (Orse. Rodriguez) v. Cheni*)" (1963) 12:2 International and Comparative Law Quarterly 672.

¹⁴⁸ [1982] 1 All ER 369.

court declines jurisdiction on the basis that the marriage was potentially polygamous under the laws of the place of celebration. This created uncertainty as to when an English court may recognize a foreign marriage falling outside the traditional definition of marriage.

The cases above illustrate a departure by English courts towards a benevolent approach to the recognition of other forms of union that were not domestically recognized in the UK. It is not certain what accounted for the change in judicial attitude except for Esplugues's view that the shift in attitude was justified by the important process of migration in England.¹⁴⁹ He also mentioned that receptivity to polygamy was a consequence of the same alteration in the concepts of morality that society shares, and the modification of the role that family and marriage play in it.¹⁵⁰ Essentially, there was a change in attitude as to what traditionally have been considered marriage under English law. In Esplugues's opinion, it was not possible to deny recognition to polygamous marriages when "de facto unions" were allowed effect for certain purposes.¹⁵¹ It is also evident from the cases that the English courts departed from blanket non-recognition of certain domestic unions towards the characterization of such unions. The subtle distinction between matrimonial causes and other matters enabled the court, to decide whether to grant relief in particular cases. This does not mean that these prohibited unions have become legally respectable in England. It is simply that the courts extend

¹⁴⁹ Esplugues supports his assertion with the fact that England has a fairly large resident Asian community whose personal laws recognize polygamy. In addition, it was not possible to deny recognition to polygamous marriages when "de facto unions" were allowed effects for certain purposes. See Esplugues, *supra* note 27 at 306.

¹⁵⁰ *Supra* note 27.

¹⁵¹ *Supra* note 27 at 306.

recognition to deal with specific claims involved.¹⁵² Essentially, the courts distinguished between the validity of a marriage and its effects. This way, they were able to give effect to incidents of some domestic unions which were not domestically recognized, although the recognition did not modify the monogamous character of marriage in England.

It is also worth mentioning that before the decision in *Haussain*, parliament had granted jurisdiction to English courts to adjudicate cases of polygamy, putting to rest the issue whether an English court could exercise jurisdiction in a polygamous marriage. This was regulated under the *Matrimonial Proceedings (Polygamous Marriages) Act, 1972*.¹⁵³ Under the Act, a court in England was not to be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason that the marriage in question was entered into under a law which permits polygamy.¹⁵⁴ Essentially, the Act permitted courts in the United Kingdom to grant matrimonial relief in respect to polygamous marriages.¹⁵⁵ The Act, however, did not grant recognition to domestic polygamous relationships celebrated in the UK.¹⁵⁶ A party domiciled in the UK cannot enter into a polygamous marriage even if the marriage is contracted outside. Such marriage is void and has no legal effect in the UK. Thus, UK domiciliaries could not take advantage of the Act to contract a valid polygamous marriage outside the UK. Essentially, the Act represented legislative benevolence towards the recognition of polygamous marriages celebrated by foreign individuals.

¹⁵² In a different but related context, see Andrews Koppleman, *Same-sex, Different States: When Same-Sex Marriages Cross State Lines* (New Haven: Yale University Press, 2006).

¹⁵³ Repealed by *Matrimonial Causes Act, 1973* (c 18) s 54(1) Schedule 3.

¹⁵⁴ *Matrimonial Proceedings (Polygamous Marriages) Act, 1972*, s 2.

¹⁵⁵ *Ibid*, s 4.

¹⁵⁶ The *Matrimonial Proceedings (Polygamous Marriages) Act* is still part of the laws of the UK with only the provisions of sections 1 and 4 repealed by *Matrimonial Causes Act, 1973* (c 18) s 54(1), Schedule 3.

From a conflict of laws perspective, the approach to the recognition of foreign domestic unions in the UK is not significantly different from that of Canada. However, in Canada, the courts, compared with Parliament, seem to be more benevolent to the recognition of polygamy.¹⁵⁷ The courts look into the facts of each case to ascertain whether a particular remedy should be applied.¹⁵⁸

At present, Canada seems to apply the same recognition test for traditional marriages as for non-traditional foreign marriages. If parties had the capacity to marry under their respective domiciles, the marriage would typically be recognized in Canada even if the celebration of such a marriage would not be permitted in Canada.¹⁵⁹ A polygamous marriage valid under both the *lex loci celebrations* and the *lex domicilii* principles will be recognized as valid. It is not certain what the basis for the change in position is, but it seems the courts have recognized the injustice that may occur from blanket non-recognition. In *Azam v Jan*, the court acknowledged that in the interest of public policy, it should take jurisdiction over valid and invalid foreign polygamous marriages. In the decision of the court, the *Hyde* decision of 1866 is outdated and no longer reflects Canadian realities.¹⁶⁰ This indicates a progressive realization by the court

¹⁵⁷ In Canada polygamy is covered under the *Criminal Code* and *Zero Tolerance for Barbaric Cultural Practices Act*, (S.C 2015, c 29). It is provided that a permanent resident or a foreign national is inadmissible on grounds of practicing polygamy if they are or will be practicing polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national. In addition, no person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order (see in general *Zero Tolerance for Barbaric Cultural Practices Act*, ss 2, 4.

¹⁵⁸ *Yew v Attorney-general of British Columbia* (1924), 33 B.C.R. 109.

¹⁵⁹ The exception may be in relation to parties falling under the prohibited degree of consanguinity (see generally the *Marriage (Prohibited Degrees) Act, 1990*, c 46.

¹⁶⁰ *Azam*, *supra* note 128 at 44.

that blanket non-recognition of some foreign unions would leave parties without recourse, and this would invariably exclude some immigrant families from rights accorded to other Canadians in their marriages. Bailey, for example, has suggested that women in foreign polygamous marriages are likely to suffer if the remedies of divorce and annulment are not available to them.¹⁶¹

In *Azam*, the court exercised jurisdiction over a foreign polygamous marriage by acknowledging the marriage for the limited purpose of providing an adequate remedy, although the court was satisfied that whatever its foreign legality, it is invalid in Canada.¹⁶² In granting an order of annulment, the court observed that the purported marriage between the applicant and the respondent was *void ab initio* since the marriage did not satisfy the essential requirement relating to the capacity of the man entering into another marriage.¹⁶³ Despite the fact that the marriage was valid under the *lex loci celebrationis* rule, the man being a Canadian domicile, lacked the capacity to enter into another marriage while his first marriage subsisted. This position taken by the court endorsed the traditional conflict of laws approach to the recognition of foreign marriages in Canada, that the marriage must be both formally and essentially valid. In this case, the marriage was valid under Pakistan law where it was celebrated, but void under Canadian law where the man was domiciled. It must also be mentioned that, the court would have come to the same conclusion if it had applied the pre-nuptial rule, since Mr. Jan lacked

¹⁶¹ Martha Bailey et al, "Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada", in *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy and Research Reports* (Ottawa: Status of Women Canada, 2005) at 11-12.

¹⁶² In arriving at this decision, the court applied the traditional approach to Canadian conflict of laws in respect of marriage.

¹⁶³ *Azam*, *supra* note 128 at 57.

the legal capacity in Canada for his subsequent marriage by virtue of his previous subsisting marriage.¹⁶⁴

It is still debatable whether a Canadian court can statutorily exercise divorce jurisdiction over a foreign polygamous marriage. Some have suggested that the definition of “spouse” under the *Divorce Act*,¹⁶⁵ precludes its application to valid foreign polygamous marriages (“spouse” means either of two persons who are married to each other).¹⁶⁶ However, Bielby J.A has emphasized that the definition of “spouse” in s. 2(1) of the *Divorce Act* arguably does not compel the conclusion that polygamous marriages are not recognized. In his opinion, the section may merely indicate that the two (and only two) parties to the litigation must be the parties to the marriage even though one of them may also be a party to another marriage.¹⁶⁷

In addition to the courts exercising jurisdiction over foreign polygamous marriages, the courts now recognize the validity of foreign polygamous marriages for other specific purposes, such as inheritance. In *Tse v. Minister of Employment and Immigration*,¹⁶⁸ Urie J.A. stated that polygamous marriages valid in the country where they were entered into and where the parties were domiciled would be recognized as valid by Canadian Courts. However, the recognition does not confer on such relationships all the rights associated with monogamous marriage in Canada. In *Yew v. Attorney-General of British Columbia*, the court recognized both wives of a polygamous marriage as wives for the purpose of succession; this was however a limited recognition.¹⁶⁹ In

¹⁶⁴ The “pre-nuptial domicile” rule recognizes the community in which the parties plan to live as husband and wife as the one primarily interested in the validity of their marriage.

¹⁶⁵ RSC 1985, c 3.

¹⁶⁶ *Ibid*, s 2(1). See also *Kaufman*, *supra* note 129 at 333.

¹⁶⁷ *Azam v Jan*, 2012 ABCA 197, at 20.

¹⁶⁸ [1983] 2 F.C. 308 at 311.

¹⁶⁹ See, *supra* note 158.

Bolentiru v Radulescu,¹⁷⁰ the Ontario Superior Court granted a decree of annulment in respect of a marriage celebrated in Bucharest, Romania, between the plaintiff and the defendant. The court found that the defendant was already in a validly subsisting marriage at the time that he and the plaintiff were married. The court further granted the plaintiff compensatory and general damages for work done by the plaintiff and for false representation of the defendant.

Thus, Canadian courts are now ready to grant ancillary relief even where a polygamous marriage has been held void. In addition to judicial intervention, some provincial legislation also extends aspects of relief to parties in an actively polygamous marriage. For example, the Alberta *Family Law Act*¹⁷¹ provides an adult interdependent partner support.¹⁷² In Ontario, a person in a polygamous marriage is considered a “spouse” and may claim matrimonial relief if the marriage was celebrated in a jurisdiction that recognizes it as valid.¹⁷³ In *Hicks v Gallardo*, the Ontario Court of Appeal interpreted section 1 of the Ontario *Family Law Act* to include parties who have undergone a marriage ceremony or event in good faith but did not have the capacity to enter into the marriage (e.g. by reason of prohibited degrees of consanguinity), and parties to a voidable marriage, as well as spouses to a polygamous marriage if the marriage was celebrated in a jurisdiction that recognizes such unions as legally valid.¹⁷⁴ These decisions clearly represent a shift from the previous position of blanket non-recognition to a more benevolent approach.

¹⁷⁰[2004] OTC 698.

¹⁷¹ SA 2003, c F-4.5.

¹⁷² Under the Act “marriage” includes a void marriage and a voidable marriage and “spouse” includes a former spouse and a party to a marriage.

¹⁷³ Ontario, *Family Law Act*, RSO 1990, c F. 3, s1 (2); Ontario, *Succession Law Reform Act*, RSO 1990, c S. 26, s 1(2).

¹⁷⁴*Hicks v Gallardo*, [2013] ONSC 129 at 29.

In recognizing polygamous marriage, Canadian courts have emphasized that a potentially polygamous marriage could be converted into a monogamous marriage if the parties actually live monogamously and changed their domicile to a country where polygamy is outlawed.¹⁷⁵ In *Sara v Sara*,¹⁷⁶ a potentially polygamous marriage celebrated between nationals of India was held to be converted to a monogamous marriage. Although the court acknowledged that the marriage under Indian law was potentially polygamous, it reasoned that by virtue of the change in domicile to Canada, the parties had abandoned their polygamous status. The position taken by the courts in *Sara* reflects upon the fact that the parties although in a potentially polygamous marriage, had lived a monogamous life. It is debatable whether the same conclusion would have been reached if after change in domicile, the husband was still in a polygamous union. It is not always the case that a change in domicile may affect the status of a party. In *Azam v. Jan*, the court found that although the husband acquired domicile in Canada, he was still in a polygamous marriage. Mr. Jan remained in his marriage with another woman and continued to reside with her and his child while his purported marriage with Ms. Azam subsisted.

It is debatable whether marriages falling under the prohibited degree may also be accorded some recognition. Canadian family law policy has been against unions between a man, his sister, mother and daughter. Almost certainly the blanket non-recognition of these unions may still be upheld on grounds of public policy.¹⁷⁷

¹⁷⁵ See *Re Hassan*, *supra* note 22.

¹⁷⁶[1962], 31 DLR (2d) 566, 38 WWR 143.

¹⁷⁷ It seems that in England, different considerations may be applied where the essential requirements of the marriage such as capacity and consent, are absent. In *Westminster City Council v C and Others* (2009) 2 WLR 185 the English court refused to recognize a marriage under Bangladesh and Shariah law for the reason that one of the parties lacked consent and capacity to enter into the marriage. They distinguished

It is also worth mentioning that the giving of legal recognition to “void marriages” is not endemic only to the UK and Canada. In Africa, the courts have long developed exceptions to the common law rule that a void marriage has no legal consequences.¹⁷⁸ For example, the South African law of putative marriage refers to the specific instances where a void marriage is visited with limited legal consequences despite its invalidity.¹⁷⁹ It is trite that a subsisting civil marriage constitutes a bar to any of the parties to the marriage entering into another marriage while the civil marriage had not been dissolved. Any purported second marriage is consequently bigamous and of no legal effect.¹⁸⁰ Bigamy is thus a ground for absolute nullity of the second marriage. However, the rationale behind the concept of putative marriage is to mitigate the harshness of blanket non-recognition of such a marriage to one spouse, and more particularly, to mitigate the harsh effects non-recognition will have on the children born of the union.¹⁸¹ These issues mostly arise in property distribution and inheritance. Essentially, the putative marriage concept allows the putative spouse limited rights as a lawful spouse, with the result that upon divorce or the death intestate of one spouse, the other acquires a portion of the deceased spouse’s estate on the basis of the principle of

Cheni v Cheni and held that the marriage was sufficiently offensive to the conscience of the English court that it should refuse to recognize it.

¹⁷⁸ Under the common law, a marriage that is null and void ab initio produces none of the legal incidents of marriage. See H. R. Hahlo, *The South African Law of Husband and Wife* 4ed (Cape Town: Juta, 1975) at 487. See also *Ex parte Oxtun*, 1948 (1) SA 1011.

¹⁷⁹ Bradley S. Smith, “Rethinking the Application of the Putative Spouse Doctrine in South African Matrimonial Property Law” (2010) 24 *Int'l J.L. Pol'y & Fam.* 267 at 270.

¹⁸⁰ In Ghana this proposition was applied in questions of legitimacy or illegitimacy of a child. A man cannot contract a valid marriage under the Marriage Ordinance while his marriage under customary law subsists, nor can he contract a valid marriage under customary law during the continuance of a marriage he has contracted under the Ordinance. Any marriage which a man purports to contract by customary law while the marriage under the Ordinance subsists is null and void, and any children of that relationship are considered illegitimate and are not allowed to share in the estate of the man (see, *Coleman v Shang*, [1959] GLR 390-409).

¹⁸¹ It must be emphasized that *bona fides* on the part of at least one spouse was required for a marriage to be putative.

equity.¹⁸² The concept allows the *bona fide* spouse to enforce his or her rights of property to which he or she would have been entitled had the marriage been valid. In the case of intestacy, Hahlo has asserted that the wife in good faith succeeds to his partner if the latter dies intestate.¹⁸³ In *Mograbi v Mograbi*,¹⁸⁴ the parties went through a form of marriage which they both thought was binding, but which was legally invalid. The court awarded the plaintiff a share of the estate on the evidence that the plaintiff contributed to the acquisition of the estate. Without this benevolent approach, the putative wife may be without a remedy.¹⁸⁵

In addition to judicial interventions catering to the interest of the putative spouse, African courts give legal recognition to children born out of wedlock or within void marriages. Historically, legitimacy was very significant for purposes of succession and inheritance. Hitherto, children born out of wedlock or outside a valid subsisting marriage were considered illegitimate and not entitled to share in the “father’s” estate. The common law rule stated by Heathcote A.J was that “those who are born of a union which is entirely odious, and therefore prohibited shall not be called natural children and no indulgence whatever shall be extended to them”.¹⁸⁶ Accordingly, such children could not inherit intestate from their fathers. In the Ghana case of *Coleman v Shang*,¹⁸⁷ the deceased first married a woman (Adeline) according to native custom and had children

¹⁸² See generally, Smith, *supra* note 179.

¹⁸³ Hahlo, *supra* note 178 at 497.

¹⁸⁴ 1921 AD 275.

¹⁸⁵ In a different but related context, the South African court extended legal recognition to some consequences of an Islamic marriage although no statutory recognition was available. In *Hoosain v. Dangor*, [2010] 2 All SA 55 the husband contended that his marriage was not valid in terms of South African law and that the court cannot order for maintenance *pendent lite*. The court referred to section 15(3) of the South African Constitution which allows for statutory recognition of other religious laws and accordingly ruled that until statutory recognition is given, the court will do justice by giving limited recognition to the incidents of Muslim marriages.

¹⁸⁶ *Frans v. Paschke*, (2007) NAHC 49 at 50.

¹⁸⁷ (1959) GLR 390-409

by her. He later divorced Adeline and married the plaintiff's mother (Wilhelmina) under the *Marriage Ordinance* and had five children by her of whom the plaintiff was the sole survivor. While the marriage with Wilhelmina was still subsisting, the deceased lived and cohabited with the defendant and had 10 children by her. The relationship with the defendant was consequently adulterous and unlawful under the existing law. Upon the death intestate of the deceased, the issue *inter alia*, was whether the 10 children born during the subsistence of the marriage under the *Marriage Ordinance* could share in the estate of the father.

The court held that the ten children were illegitimate and not entitled to share in the deceased's estate. The court affirmed the rule that an extra-marital child was not recognized as having any legal relationship with his or her father but only with his or her mother.¹⁸⁸

The decision in *Coleman* can be criticized as harsh and contrary to the principles of justice. Essentially, the sins of the father who committed the adultery was inflicted upon the children. To deny the children a share in the estate of the father by reason of the illegitimate relationship between their mother and the father inflicts on them a burden or disadvantage which they did not create. This is more so when they did not have the opportunity to choose their own father. However, as Oppong has rightly argued, at present, the distinction between legitimate and illegitimate children has become largely insignificant – judicial decisions, constitutional and statutory provisions have watered

¹⁸⁸ See *Green v Fitzgerald and Others*, [1914] AD 88 at 99. See also the full discussion in Van Heerden et al (eds) *Boberg's Law of Persons and the Family* 2nd (Kenwyn: Juta & Co., Ltd, 1999).

down the legal significance of the distinction.¹⁸⁹ In the cases of *In Re Asante (Decd.)*; *Asante and Another V. Owusu*,¹⁹⁰ the Court of Appeal per Essien J.A reiterated the position that “a child had by a man with whichever woman, she being a concubine or girlfriend or mistress, once accepted by the man as his child is recognized by law as his child and this child is entitled to a portion of his estate.”¹⁹¹ This position is supported by the judgment of Heathcote A.J in *Frans v. Paschke* where he stated that the rule that an illegitimate child cannot inherit intestate from his father was discriminatory and inconsistent with the Namibian constitutional provision that every child shall be known and cared for by both parents.¹⁹² These provisions are meant to cater for children who will be disadvantaged by the strict application of the common law rule on illegitimacy.

As Hahlo has rightly noted, unlike other areas of the law, there are no discretionary powers under which the court may declare an invalid marriage to be valid.¹⁹³ However, the plausible conclusion that can be drawn from the above is that courts are ready to extend limited recognition to apparently void unions where to deny such recognition will lead to great hardship and injustice. In recognizing the rights of both the putative spouse and the “illegitimate child” to share in the estate of the deceased spouse and father respectively, the courts did not sanction or warrant the invalid union, but considered the incidents of inheritance and succession as separate from the marriage.

¹⁸⁹ See Oppong, *supra* note 72.

¹⁹⁰[1992] 1 GLR 119–129.

¹⁹¹*Ibid* at 126. See also *Constitution of the Republic of Ghana 1992*, art. 28(1)(b); and the *Children’s Act 1998*, s. 7. Both provide that ‘every child, whether or not born in wedlock shall be entitled to reasonable provision out of the estate of its parents’. The *Intestate Succession Law* of Ghana defines child to include “a natural child, a person adopted under any enactment for the time being in force or under customary law relating to adoption and any person recognized by the person in question as his child or recognized by law to be the child of such person” (see Ghana: *Intestate Succession Law, 1985* (P.N.D.C.L. 111), s 18).

¹⁹² See *Frans*, *supra* note 186. See Namibia Constitution, Article 15(1).

¹⁹³ Hahlo, *supra* note 178 at 488

3. Conclusion

As far as the “domestic” law is concerned, polygamous marriages celebrated in England and Canada are void ab initio and would not be recognized. This extends to polygamous marriages contracted outside jurisdiction by individuals domiciled in Canada or UK. Attempting to enter into such a marriage could lead to criminal charges in both jurisdictions. On the contrary, unions which are not recognized within the two jurisdictions are given recognition when entered into by foreign nationals, although the recognition may be for specific purposes. The courts by this approach, are able to resolve some injustices that may occur from blanket non-recognition of such unions. This approach taken by the UK and Canada is a classic illustration of how states may deal with the recognition of foreign unions that are not allowed within/under their jurisdictions.

The next section considers the conflict of laws aspect of same-sex marriage in Canada and the United Kingdom.

4. Recognition of Same-sex Marriage in Canada

4.1 Domestic recognition of same-sex marriage in Canada

The current legislative framework under which same-sex marriage in Canada is regulated is the *Civil Marriage Act*.¹⁹⁴ The enactment of the *Civil Marriage Act* follows a plethora of judicial decisions that invalidated the heterosexual requirement for civil marriage in Canada. The Act extends the capacity to marry to same-sex couples. It

¹⁹⁴ C 33.

includes some consequential amendments to many statutes and a redefinition of the word “spouse” to mean “either of two persons who are married to each other”.¹⁹⁵

For civil purposes, marriage is defined as the lawful union of two persons to the exclusion of all others.¹⁹⁶ This definition is in line with court decisions which said that the common law definition of marriage was discriminatory against same-sex couples. Essentially, the Act recognizes the right of same-sex partners to civil marriage. A marriage is not void or voidable by reason only that the spouses are of the same-sex.¹⁹⁷ This places same-sex couples and heterosexual couples in the same legal position in Canada. Unlike under the previous regime where same-sex couples were granted only the right to enter into domestic civil partnerships, the *Civil Marriage Act* grants legal status to same-sex couples who marry under the Act.

In line with religious concern, about the drafting of the Act, the *Civil Marriage Act* acknowledges and recognizes freedom of religion and belief. Religious leaders are not obligated to celebrate a same-sex marriage if it is against their religious beliefs. There is no criminal or regulatory sanction for any religious leader who refuses to perform a same-sex marriage. This issue was considered during the promulgation of the Act. Religious leaders wanted to be sure that refusal to recognize such unions would not lead to prosecution. Thus, section 3 of the Act clarifies that “officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious

¹⁹⁵*Supra* note 120, s 3.

¹⁹⁶*Supra* note 113, s 2.

¹⁹⁷*Supra* note 113, s 4.

beliefs”.¹⁹⁸ This supports the freedom of conscience and belief guaranteed in the *Canadian Charter*.

Section 5 of the *Civil Marriage Act* settles one area of conflict of laws in respect to marriages celebrated in Canada by parties who have their respective domicile in another country. It is provided that

a marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not at the time of the marriage have the capacity to enter into it under the law of their respective state of domicile.¹⁹⁹

This provision is significant since Canada does not require residency to be an essential requirement for the celebration of marriage in Canada. The provision makes Canada a “safe-haven” for many gay and lesbian couples.²⁰⁰ Essentially, gay and lesbian couples can migrate to Canada with the express purpose of having their marriage celebrated there. The law recognizes such marriages as valid and there is no requirement of proof that the parties reside in Canada. The provision raises important conflict of laws issues in terms of recognition of such marriages by the parties’ respective countries of domicile. The provision does not address migratory or evasive marriages.²⁰¹ It is arguable whether such marriages may be recognized by the country of domicile of the parties. The potential of this provision creating absurd results is imminent. Parties who have had their

¹⁹⁸*Supra* note 113, s 3. See also Rex Ahdar, “Solemnisation of same-sex marriage and religious freedom” (2014) *Ecclesiastical Law Journal* 1.

¹⁹⁹*Supra* note 113, s 5.

²⁰⁰ In June 2014, Canada organised a mass gay and lesbian wedding for couples irrespective of their domicile. See generally Diana Mehta, “First mass gay wedding in Canada draws couples from around the world”, *Canada Press* 27 June 2014 online: <http://news.nationalpost.com/2014/06/27/first-mass-gay-wedding-in-canada-draws-couples-from-around-the-world/>.

²⁰¹ Koppelman defines “evasive marriage” as cases in which parties have traveled out of their home state for the express purpose of evading that state’s prohibition of their marriage and thereafter immediately returned home”. See, Andrews Koppelman, *Same-sex, Different States: When Same-Sex Marriages Cross State Lines* (New Haven: Yale University Press, 2006) at 101.

marriages celebrated in Canada, may upon returning home find that the marriage is not recognized. This is the limping marriage phenomenon.

Another debatable provision of the *Civil Marriage Act* is section 7. Before the Amendment of the Civil Marriage Act, divorce jurisdiction under the *Civil Marriage Act* was regulated under the *Divorce Act*.²⁰² A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.²⁰³

Essentially, the *Civil Marriage Act* made residency a requirement for Canadian courts to exercise divorce jurisdiction involving both residents and non-residents. In the context of equality, the provision set up the same regime for both same-sex couples and heterosexual couples. Also from a private international law perspective, the rule provides clarity regarding the basis for the exercise of divorce jurisdiction in Canada. However, the provision had the effect of creating absurd results where non-domiciled and non-resident same-sex couples who had their marriages celebrated in Canada were unable to obtain divorce in their home countries or elsewhere.²⁰⁴ These are mainly cases where the laws in the place of their respective domiciles do not recognize same-sex marriages. This same-sex couple, even though validly married in Canada, could not obtain a divorce in Canada because they were unable to meet the one-year residency jurisdictional requirement. They were thus left in a legal limbo: they could not obtain divorce in their

²⁰² The *Civil Marriage Act* originally related only to marriage.

²⁰³ RSC 1985, c 3 (2nd Supp), s 3.

²⁰⁴ Although the same argument could be made for opposite sex couples it is worth noting that the recognition of heterosexual marriages from a conflict of laws perspective has not been a matter of much contention. In most cases the courts will recognize the marriage if it is valid under both the *lex loci celebrationis* and the *lex domicilii* rules.

country of domicile because their marriage was unrecognized, and they could not obtain divorce in Canada because they did not live in Canada.

In 2012, the government introduced Bill, Bill C-32, the *Civil Marriage of Non-Residents Act*, to amend the divorce regime for non-residents. The bill divided the Act into two parts and created a section for the “Dissolution of Marriage for Non-Resident Spouses”. The amendment makes all marriages of non-resident couples that were performed in Canada valid under Canadian law, therefore allowing these couples to end their marriage if they cannot get a divorce in their home country. Section 7 of the Act now provides a new legal process for non-residents who married in Canada to dissolve their marriage in Canada if they are unable to seek divorce under the law of their home country because their marriage is not recognized there. The current regime is different from the one applicable to same and opposite sex spouses residing in Canada which is governed by the *Divorce Act*.

Some have argued that this new remedial provision creates more problems than it solves.²⁰⁵ Just like section 5, the new amendment to section 7 has the potential to create absurdity from a conflict of laws perspective. It is arguable how the rights and obligations created under a divorce order in Canada may be recognized by the respective domicile of the parties. Bornheim, for example, has rightly noted that the two provisions “go too far because they apply Canadian law even though there is minimal territorial connection with Canada, thus furthering the problem of limping relationships.”²⁰⁶ Several collateral issues of divorce, especially corollary relief, like the division of the matrimonial property, may

²⁰⁵ See generally Jean Gabriel Castel & Matthew E. Castel, “The Marriage and Divorce in Canada of Non Domiciled and Non-Resident Persons” (2012) 31:3 Canadian Family Law Quarterly 297.

²⁰⁶ See Jan J. Bornheim, “Same-sex marriages in Canadian Private International Law” (2013-2013) 51:1 Alta. L. Rev. 77 at 80.

be difficult to enforce in the country of domicile where the courts refuse jurisdiction. The end result is to leave the parties with orders which cannot be enforced.

In summary, the *Civil Marriage Act* has addressed the issue of same-sex marriage in Canada. Gay and lesbian couples may now legally have the status of marriage conferred on them with all attendant effects. This has placed same-sex marriage on a parallel legal footing with heterosexual marriage. However, although the country may not have problems in respect of same-sex marriages celebrated in Canada by individuals domiciled in Canada, the non-requirement of residence for the purposes of marriage and divorce may create some impractical results from a conflict of laws perspective.

4.2 Private International Law Aspects of Same-sex Marriage in Canada

From a conflict of laws perspective, the question whether individuals domiciled in Canada have capacity to enter into a foreign same-sex marriage and, consequently, whether such a relationship can be recognized in Canada has been settled by the recognition of same-sex marriage in Canada. Given the domestic recognition of same-sex marriage in Canada, individuals domiciled in Canada are able to enter into foreign same-sex marriage and this marriage will be recognized in Canada so far as the marriage is valid as required by the form. This is because Canada applies the *lex domicilli* to determine the legality of such marriage, and the *lex loci celebrationis* in respect to the form of the marriage.

In terms of same-sex marriage recognition, another aspect in the context of private international law is the treatment in Canadian courts of same-sex foreign unions entered into by foreign domiciles. In this case, Canadian courts give effect to status or

legal obligations created by a foreign same-sex marriage. A case in point is *Hicks v Gallardo*. Hicks involved a civil partnership between the appellant, Mr. Gallardo and the respondent, Mr. Hincks, celebrated in the UK under the *Civil Partnership Act 2004 (UK)*. As a same-sex couple, they were not permitted to marry in the United Kingdom.²⁰⁷ The civil partnership regime then in existence operated as a separate but equal system exclusive to same-sex couples and was the legal equivalent of marriage under UK law. The couple, after the civil union, moved to Ontario where they lived for a year before they separated. The respondent later brought an application in the Superior Court of Ontario seeking divorce and other relief pursuant to the provisions of the *Divorce Act*,²⁰⁸ and the *Family Law Act*.²⁰⁹ The issue, inter alia, was whether the parties were considered to be spouses under the *Divorce Act*²¹⁰ and the *Family Law Act*. In other words, whether the court can recognize the parties as spouse in terms of the *Divorce Act* and the *Family Law Act*. The Superior Court agreed with the conclusion of the trial court that the parties were “spouses” as defined by the *Divorce Act* and s. 1 of the *Family Law Act*.

The court placed emphasis on section 1 of the *Family Law Act* which makes provision, among others, for parties to relationships that are both formally and functionally equivalent to marriage. Essentially, the UK *Civil Partnership Act* provided a legal regime for same-sex couples equivalent to marriage. The Court reasoned that any other interpretation of the legislation would result in an anomalous situation where parties to marriages that are not legal in Canada, such as polygamous marriages, can be considered spouses but parties to same-sex marriages, which are legal in Canada, cannot

²⁰⁷ At present the UK recognizes same-sex marriage under the *Marriage (Same-sex Couples) Act*. Marriage between same-sex couples now has the same legal status as marriage celebrated between heterosexuals.

²⁰⁸ R.S.C. 1985, c 3.

²⁰⁹ R.S.O. 1990, c F.3.

²¹⁰ R.S.C. 1985, c 3.

be considered spouses. In essence, the court was ready to grant the parties relief under the *Divorce Act* and *Family Law Act*, although on a strict interpretation of the legislation, the parties' civil partnership was not marriage. The decision in *Hincks* illustrates the fact that the court was prepared to characterize the relationship as equivalent to a marriage under Ontario law, the *lex fori*. Essentially, the requirement is for the court to be satisfied that the marriage/union is formally recognized under the laws of the place of celebration. The objective is to treat couples who have lawfully entered into same-sex marriage or marriage-like relationships in other states as the equivalent of being married in Canada. In this case, the civil partnership was valid under the UK *Civil Partnership Act*.

Given the domestic recognition of same-sex marriage in Canada, it is suggested that Canadian courts will recognize the validity of same-sex marriage or legally recognized registered partnerships that are entered into in other jurisdictions if the relationship certifies both the *lex celebrationis* and the *lex domicilii* rule.²¹¹ This avoids the “limping marriage” effect where same-sex marriage recognized in one jurisdiction may not be recognized in other jurisdictions. It must, however, be mentioned that the strict application of the *lex domicilii* and the *lex loci celebrationis* rules may prevent parties from having capacity to contract a valid same-sex marriage or may be an obstacle to a recognition of this marriage. However, the Canadian courts have recognized same-sex marriage even where the parties lack the capacity to enter into such a marriage under their respective domicile.

²¹¹ One issue that may arise is whether in the light of the fact that Canada recognizes same-sex marriages, public policy may be used to uphold same-sex marriages celebrated abroad by persons domiciled in Canada where the marriage is invalid under the laws of the place of celebration. *A* and *B* domiciled and nationals of Canada marry in South Africa and return to Canada. Can the marriage be recognized as valid in Canada? It is suggested that in such a case Canada may adopt the same approach to the recognition of certain domestic unions which are not recognized in Canada and recognize the effects of the union.

The case of *V & L v. Attorney General of Canada*²¹² illustrates the potential absurdity that may occur from a strict application of the traditional conflict of laws rules relating to marriage, and how Canadian courts have resolved the apparent absurdity that may occur from the strict application of the *lex domicilii* principle. A lesbian couple, one domiciled in England and the other domiciled in Florida, married in Canada in 2005 and separated in 2009. At the time of their marriage, neither had the capacity to enter into the same-sex marriage because England and Florida did not recognize same-sex marriage at the time. The issue brought to the court was whether a Canadian court had jurisdiction in an application for divorce. The Attorney General of Canada argued, inter alia, that the Superior Court of Ontario did not have jurisdiction to grant the applicants divorce because under principles of private international law which is respected in Canada, the applicants were not legally married under Canadian Law. In essence, the status of being married is a requirement for divorce. Since at the time of the marriage, the parties lacked the capacity to get married, the marriage was void and a divorce was impossible.²¹³ From a private international law perspective the Attorney general correctly stated the traditional conflict of laws position in Canada that for a marriage to be legally valid under Canadian law, the parties must satisfy both the requirements of the law of the place where the marriage is celebrated (the *lex loci celebrationis*) with regard to the formal requirements and the requirement of the law of domicile of the couple with regard to their legal capacity to marry one another. In this case neither party had the legal capacity to marry a person of the same-sex under their respective domicile Florida and England.

²¹² (05 April 2011), Ottawa 11/367893 (Ont Superior Court).

²¹³ Bornheim, *supra* note 206 at 80.

The court, however, granted the applicants a constitutional exemption to allow the applicant a divorce in Canada. In coming to this decision, the court acknowledged that the willingness of the Canadian government to grant the Joint Applicants' marriage but to deny them any access to a legal divorce leaves them entirely without recourse. In the opinion of the Court, it was legally and procedurally unfair for a government to grant the right to marry, to perform such marriages and to then leave the Joint Applicants with absolutely no remedy.

Essentially, the court in the *V & L* case appreciated the traditional conflict of laws position in Canada but found that the strict application of the rule will be unfair in the context of the applicants' case. Although England will not grant L divorce, her marriage to V prevented her from entering into a civil partnership in England. A strict application of the conflict of laws rule would mean that *V & L* would continue to live under a relationship which has evidently broken down beyond reconciliation. Given the current legislation on the dissolution of marriage for non-resident spouses, Canada has again solved a potential conflict of laws issue that may arise from same-sex marriages celebrated in Canada by non-resident individuals.

An equally important aspect of the recognition of same-sex marriage is the issue of inheritance and recognition of foreign adoption orders. The next two sections consider the conflict of laws aspect relating to inheritance and adoption in a same-sex relationship context.

4.3 Inheritance/Succession

A conflict of laws issue which arises in same-sex marriage is succession. Does a surviving partner have the right to inherit the estate of a partner who is deceased? In most jurisdictions, succession is based on the concept of family. In general, under Canadian laws, marriage or adoption may create this formal legal link.²¹⁴ Given the domestic recognition of same-sex marriage in Canada, a surviving same-sex spouse will be entitled to inherit his/her deceased spouse's estate upon the latter dying intestate. This places same-sex couples in the same position with heterosexual couples. The issue is whether the same recognition will be given to a foreign same-sex surviving spouse. In general, where a marital relationship is established, the court will recognize the right of the surviving same-sex spouse to inherit the estate of his/her deceased spouse. A state that recognizes the spousal rights of a same-sex couple will invariably give recognition to similar rights or benefits from other states or countries.²¹⁵ Essentially, proof of the existence of the relationship by the surviving spouse will entitle the surviving spouse to inherit the estate of the deceased.²¹⁶

4.4 Adoption

One issue of intestacy is the right of an adopted child to inherit his/her adoptive parents' properties. This issue has become necessary because of the structural changes in

²¹⁴ See generally Alberta: *Wills and Succession Act*, SA 2010, c W-12.2; British Columbia: *Wills, Estates and Succession Act*, SBC 2009, c 13; *Intestate Succession Act*, R.S., c. 236, s 1.

²¹⁵ See Symeon C. Symeonides, "Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey" (2015) 63 AM. J. COMP. L. at 71.

²¹⁶ See generally Alberta's *Family Law Act*; Ontario, *Family Law Act*, s 1 (2); Ontario, *Succession Law Reform Act*, s 1(2).

the concept of family.²¹⁷ What rights, if any, does an adopted child have over his/her deceased same-sex parents' properties? In Canada, adoption and child welfare fall under provincial jurisdiction. Each province has its own laws and regulations. In Nova Scotia, for instance, a person may adopt a person younger than the adopter.²¹⁸ In British Columbia, an adult or two adults jointly may apply to the court to adopt a child.²¹⁹ In general, same-sex couples are entitled to apply for an adoption order under both federal and provincial legislations. Statutes that previously denied same-sex couples the right of adoption of a child have been declared unconstitutional.²²⁰ This helps same-sex couples to create family unions that include children either from a pre-existing heterosexual relationship, or children born during the same-sex relationship. This indicates a significant change in the concept of family which has hitherto been premised on affinity and consanguinity.²²¹

An adoption order has the effect of permanently severing the ties of the adopted child from his/her biological parents and placing new rights and responsibilities onto the adoptive parents.²²² In essence, unless expressly provided, the adopted child cannot inherit from his/her biological parents upon their death intestate. The adopted person becomes the child of the adoptive parents and the adoptive parents become the parents of the adopted child, as if the adopted child had been born in lawful wedlock to the adoptive

²¹⁷ See generally Susan N. Gary, "Adapting Intestacy Laws to Changing Families" (2000) 18:1 Law and Inequality 1.

²¹⁸ Nova Scotia, *Children and Family Services Act*, SNS 1990, c 5, s 72(1).

²¹⁹ British Columbia, *Adoption Act*, RSBC 1996, c 5, s 29. It has been mentioned that British Columbia is second province after Quebec to amend its legislation to effectively permit adoption of a child by same-sex couples (see Donald G Casswell, "Any Two Persons in Lotusland, British Columbia" in Robert Wintemute and Mads Andenæs ed, *Legal Recognition of Same-sex Partnership: A study of National European and International Law* (Oxford, Hart Publishing, 2001) at 228.

²²⁰ See for example *Re K. & B* [1995] 125 D.L.R.

²²¹ Same-sex couples' rights to adopt is beneficial to male couples who are less capable to benefit from advances in assisted reproductive technologies than families with at least one female.

²²² See generally Alberta: *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 72.

parents.²²³ This creates a new set of rights in the adopted child vis-a-vis his/her adoptive parents. These include the right of the adopted child to inherit his/her adoptive parents' properties. Under the Nova Scotia *Children and Family Services Act*, for example, in any enactment, conveyance, trust, settlement, devise, bequest or other instrument, "child" or "issue" or the equivalent of either includes an adopted child.²²⁴ Thus unless the contrary is stated, a reference to a person described in terms of their relationship by blood to another person includes an adopted child. This places the adopted child in the same position as any biological child born to the adoptive parents.

From a conflict of laws perspective, the fact that Canada does not discriminate between heterosexual and homosexual adoption is significant for the purposes of succession. Can a foreign adopted child inherit from his or her same-sex adoptive parents? Given the domestic recognition of the rights of the adopted child of a same-sex couple to inherit from his or her parents, it may be concluded that a Canadian court may recognize an adoption order from a foreign court.²²⁵ In other words, Canadian courts will give effect to an adoption order and the effect that flows from it if it complies with the laws of the place where it was ordered.²²⁶ However, the position may be different in jurisdictions that do not recognize domestic partnerships or same-sex marriages. Whatever the case, to withhold this benefit and protection from these children would leave them in a vulnerable and unjust position. More so when the child, at the time of the adoption, had no control over who his or her parents were.²²⁷

²²³ Nova Scotia, *Children and Family Services Act*, SNS 1990, c 5, s 80.

²²⁴ *Ibid*, s 80(4).

²²⁵ See Canada, Citizenship and Immigration Canada, "International Adoption and the Immigration Process" (Ottawa: CIC, 2000) at 7.

²²⁶ See generally Carissa Trast, "You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples are Entitled to Inheritance Rights from Both Their Parents" (2006) 35:2 Hofstra Law Review 857.

²²⁷ *Ibid*.

In sum, the right of an adopted child to inherit from his or her adoptive parents is inherent to the adoption, irrespective of the place of adoption or the status of the adoptive parents. The fact that a state does not recognize the legal relationship between the adoptive parents is not enough grounds to disinherit the child from succeeding to his/her adoptive parents' properties.

5. Recognition of Same-sex Marriage in the United Kingdom

The United Kingdom is among the few countries which recognize same-sex marriage under its *Marriage (Same-sex Couples) Act*. Before the enactment of this statute, the UK had in place a civil partnership regime that allowed same-sex couples to enter into domestic partnerships recognized under UK law. The enactment of the *Marriage (Same-sex Couples) Act* now enables individuals who are domiciled in the UK to enter into same-sex marriages in the UK with all the benefits associated with marriage. The domestic recognition of same-sex marriage presents a conflict of laws issue as to how the UK courts will treat a same-sex marriage entered into by parties domiciled outside the UK.

This section provides a brief overview of the domestic regulations of same-sex marriage in the UK. It looks at the conflict of laws issues that are generated from this recognition and how they are resolved

5.1 Domestic recognition of same-sex marriage in the United Kingdom

Before the enactment of the *Marriage (Same-sex Couples) Act*, same-sex marriage in the UK was regulated under the *Civil Partnership Act*. However, the *Civil*

Partnership Act only enabled same-sex couples to enter into civil partnership, though it provided exactly the same benefits as offered to a heterosexual marriage.²²⁸ Same-sex couples were openly able to enjoy rights, greater equality, acceptance and the social recognition given to heterosexual couples, but the status of marriage was not available to homosexual individuals. Same-sex couples were not entitled to call each other “husband” or “wife” for legal purposes. The *Civil Partnership Act* created what is termed “a separate but equal regime for same-sex couples”. This was in line with the *Matrimonial Causes Act, 1973*, which provided that a marriage is void if the parties are not respectively male and female.²²⁹ These provisions reflected the heterosexual nature of marriage in UK at the time.

Same-sex marriage is presently regulated under the *Marriage (Same-sex Couples) Act*. The Act provides for the legal recognition of same-sex couples. In essence, marriage has the same effect in relation to same-sex couples as it has in relation to heterosexual couples.²³⁰

Like the Canadian *Civil Marriage Act*, there is no compulsion to solemnize a same-sex marriage. Essentially, a person does not contravene a provision of the Act if they do not consent to a marriage being conducted solely for it being a marriage of a same-sex couple. These provisions are meant to protect religious leaders who may refuse to solemnize a same-sex marriage on grounds of religious belief.²³¹

²²⁸ Civil partnership is limited to same-sex couples.

²²⁹ *Supra* note 153, s 11.

²³⁰ *Supra* note 114, s 11.

²³¹ Ahdar, *supra* note 198.

The Act enables civil partners to convert their civil partnership into marriage.²³² But this does not change the nature of civil partnership; it still remains open to same-sex couples. This means that same-sex couples in the UK have the choice to marry under the *Marriage (Same-sex Couples) Act* or register as civil partnerships.

There are also provisions for overseas marriage which enables United Kingdom nationals to marry in prescribed countries or territories outside the United Kingdom.

In summary, The *Marriage (Same-sex Couples) Act* grants same-sex couples the status of marriage in the UK. Individuals domiciled in the UK have the legal capacity to enter into same-sex marriages and such unions will be recognized in the UK. A state that recognizes same-sex marriage will typically recognize a foreign same-sex marriage. The next section looks at the private international law aspects of same-sex marriage in the UK.

5.2 Private International Law Aspects of Same-sex Marriage in the UK

Before the enactment of the *Marriage (Same-sex Couples) Act*, the UK had in place legislative provisions that regulated the private international law aspects of a same-sex marriage. Although the UK did not domestically recognize same-sex marriages, legislative provisions were put in place for the recognition of foreign same-sex marriages. In the context of conflict of laws, the *Civil Partnership Act* provided a regime where same-sex couples married in a foreign country will be recognized under the *Civil Partnership Act*. The recognition of a foreign marriage was regulated under the *Civil Partnership (Treatment of Overseas Relationships) Order 2005* (SI 2005/3042). The

²³²*Supra* note 114, s 9.

Order created a regime where foreign same-sex marriage would be recognized in the UK, although there was no domestic recognition of same-sex marriage in the UK. This made it possible for same-sex couples to have their foreign marriages registered without the need to re-register under the *Civil Partnership Act*. In essence, the order provided relief for foreign same-sex couples. Although the legal status of marriage was not available to same-sex couples, the relief under the *Civil Partnership Act* was essentially the same as that accorded to heterosexual couples. The rule was that if same-sex marriage was recognized at the place of celebration and the respective domicile of the parties, then it would be recognized as a civil partnership for the purpose of UK law. This was because the UK characterized the foreign same-sex marriage as a civil partnership under the *Civil Partnership Act*.

*Wilkinson v Kitzinger*²³³ illustrates the treatment of foreign same-sex marriage, in the UK under the *Civil Partnership Act*. *Wilkinson* involved a claim by the petitioners that their same-sex marriage celebrated in Canada should be recognized as such in England. The parties, both domiciled in the UK, were married in a civil marriage ceremony at the Office of the Marriage Commissioner in Vancouver, British Columbia, Canada in 2003. The parties subsequently moved to the UK and sought a declaration that the marriage was a recognized marriage pursuant to s.55 of the *Family Law Act* 1996. Under the UK *Civil Partnership Act*, a foreign/overseas same-sex marriage will automatically be recognized as a civil partnership without the parties having to register it again. Thus, the law only recognizes a civil partnership where a civil marriage has been validly contracted abroad. The Petitioner argued that, in denying her and the first Respondent the name and formal status of marriage and "downgrading" her Canadian

²³³ [2006] EWHC 2022.

marriage to the status of a civil partnership, the impact of the measure upon her is hurt, humiliation, frustration and outrage. However, the court relied on its private international law rules and emphasized that legal capacity to marry is judged according to the laws of the parties' domicile. Since under the English law same-sex marriage was not recognized, the parties, being English domiciliaries did not have the legal capacity to enter into the same-sex marriage in Canada. In conclusion, the court relied on section 11 of the *Matrimonial Causes Act* which provided that "A marriage celebrated after 30 July 1971 shall be void on the following grounds,

(c) That the parties are not respectively male and female"²³⁴

In essence, English law recognized only marriages celebrated between the opposite sexes. The court cited with approval the decision of the House of Lords in *Mette v Mette*²³⁵ and *Brooks v Brooks*,²³⁶ that where a person of English domicile purports to marry in another jurisdiction, but the parties lack capacity to marry in English law, the marriage is not recognized in England.

Although *Wilkinson* may have created "hurt, humiliation, frustration and outrage", as the petitioners argued, the decision reached by the court was accurate from a conflict of laws perspective. For the marriage to be valid, it must be both formally and essentially valid. However, the parties were not without a remedy. As already said, the *Civil Partnership Act* created a regime analogous to a marriage with benefits similar to a legal marriage. Thus, although in a legal sense the parties' foreign marriage was not recognized as "marriage" in the legal sense, they were entitled to all the reliefs provided to civil partners under the *Civil Partnership Act*.

²³⁴*Supra* note 153, s 11.

²³⁵ [1859] 1 Sw & Tr 416.

²³⁶ [1861] 9 HL Cas 193.

At present, a marriage under the law of any country or territory outside the United Kingdom is no longer denied recognition under the law of England only because it is the marriage of a same-sex couple. In essence, the rules applicable to the recognition of heterosexual marriages are equally applied to the recognition of foreign same-sex marriages.

The domestic recognition of same-sex marriage in the UK will typically lead to recognizing a foreign same-sex marriage. As Symeonides rightly stated, “a state that allows same-sex marriages within its territory has no legitimate public policy reason to deny recognition to similar marriages or unions from other states or countries”.²³⁷ However, the conflict of laws rule applied in *Wilkinson* may still apply to determine whether the parties to a same-sex marriage had the capacity to enter into the marriage. In addition, other incidents of a foreign same-sex marriage will be equally recognized in the UK.

6. Conclusion

It is apparent that the public policy exception has not always led to the non-recognition of certain foreign unions that are considered to violate the laws of the UK and Canada. This is a sharp departure from the former position in the two countries where an English court or a Canadian court would refuse to recognize a foreign marriage which is deemed to be repugnant to the laws and public policy of the two countries, even when the formal and essential validity of the marriage is beyond question. However, at present, marriages dissimilar to that practiced in the UK and Canada, such as polygamy and

²³⁷ Symeonides, *supra* note 215 at 71.

incestuous unions which are apparently considered repugnant and odious in the two countries are given recognition in both, although citizens and individuals domiciled in the two countries are not allowed to enter into such unions. The approach has been to distinguish cases that establish the validity of the union and appear to establish acceptance of the marriage, from incidental issues between the parties. This approach is also evident in Africa in the area of putative marriage and children born of unions which are void. In all these cases, there is a recognition that there are many incidents of marriage beyond the lawfulness or otherwise of the marriage. Thus, the courts are ready to recognize a foreign union which is not domestically recognized in the country so long as the recognition is not to eulogize or legitimize the marriage.

CHAPTER FOUR: THE CONFLICT OF LAWS ASPECTS OF SAME-SEX MARRIAGE IN THE AFRICAN MARRIAGE SYSTEM

1. Introduction

In most African countries, same-sex relationships are seen as un-African or are simply unaccepted. The family structures in Africa support heterosexual marriage, as African culture places a high level of importance on marriage and child bearing.²³⁸ It is debatable whether this same value can be placed on a marriage between people of the same-sex because “they cannot procreate”. Even so, same-sex relationships continue to exist in Africa. Kenya, Nigeria and South Africa are some of the countries which accept certain same-sex marriages under custom.²³⁹ Among the Kukatus ethnic group in Kenya, for instance, woman-to-woman marriages are common.

Notwithstanding the glimpses of evidence, the trend of anti-same-sex legislation in some African countries depicts a blanket non-recognition of same-sex unions. An important but often ignored aspect of the debate of same-sex marriage is how such relationships should be handled by the conflict of laws regimes in African countries. Indeed, the nature of conflict of laws is such that even countries which do not formally

²³⁸ Kyalo, for example, says that marriage in Africa is geared towards procreation and promotion of life. Kyalo cites with approval the observation of Eric O. Ayisi, *An Introduction to The Study of African Culture* (Nairobi: East African Publishers, 1997) that marriage is a means by which a man and woman come together to form a union for the purpose of procreation. He stressed further that African marriages are effected for just this purpose and therefore a childless marriage ceases to be meaningful in this context (see Paul Kyalo, “A Reflection on the African Traditional Values of Marriage and Sexuality” 2012) 1:2 *International Journal of Academic Research in Progressive Education and Development* 211 at 211-213. This may explain why polygamy is well established in most African countries.

²³⁹ See in general, Hidetoshi Katakami, “Female Husbands and the House-property Complex: Re-examination of the two guiding concepts in the literature on Woman-marriage”(1998) 1998:52 *Journal of African Studies* 51; See Regine Smith Oboler, “Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya” (1980) 19:1 *Ethnology* 69; See generally B. Oomen, “Traditional woman-to-woman marriages, and the Recognition of Customary Marriages Act” (2000) 63:2 *Journal of Contemporary Roman-Dutch Law* 274; See generally Beth Greene, “The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis” (1998) 37:4 *Ethnology* 395; See Eileen Jensen Krige, “Woman-Marriage, With Special Reference to the Lovedu-Its Significance for the Definition of Marriage” (1974) 44:1 *Journal of the International African Institute* 11.

allow the institutionalization of same-sex relationships may have to deal with it in a conflict of laws sense.

This chapter focuses on English-speaking African countries which have little to no experience with same-sex marriage. In some African countries there is no current legislation on the subject (e.g. Ghana), others have enacted legislation on the subject (e.g. Nigeria, Zambia) and some countries are contemplating legislation on the subject. From the backdrop of chapters three and four, this chapter explores how these countries may approach the various private international law issues which may arise before their courts in respect to same-sex unions, whether there is legislation on the subject or not. The chapter uses hypothetical case scenarios, proffers solutions to those scenarios and assesses the merits of those solutions.

2. Same-sex Relationships in the African Context

The acceptance/recognition of gay and lesbian rights has recently received a considerable amount of attention in many African countries. Opposition to same-sex relationships in Africa is founded on many complex grounds, including a mixture of religious, cultural, political and anti-colonial sentiments.²⁴⁰ However, while some view same-sex relationships as un-African, there are others who believe they existed among some indigenous African tribes. Indeed, it has been argued that same-sex relationships, in

²⁴⁰ Interestingly, there appears to be a customary practice in some African countries which allows a woman to marry another woman. As recently, as 2011, such a marriage was recognized by the Kenyan High Court for the purposes of inheritance in *the Matter of the Estate of Cherotich Kimong'ony Kibsera (Deceased)*, Succession Cause No. 212 of 2010 (High Court, Kenya, 2011). Justice Jackson Ojwang found that, in the Nandi culture, a childless woman could marry another woman to bear children for her and the children would be considered to belong to the childless woman. This was an established family institution in Nandi customary law, and such traditional practices were aspects of culture that were protected under Article 11 (1) of the 2010 Constitution.

one form or another, have always existed in Africa. Murray and Roscoe have mentioned that in their opinion, “homosexuality being absent or incidental to Africa is just a myth created about Africa by Europeans”.²⁴¹ In their book, *Boy-Wives and Female Husbands: Studies of African Homosexuality*, they present anthropological evidence showing instances of homosexuality in many parts of Africa. Davidson, for example, gives an account of a 1958 visit to a Dakar boy brothel. He asserted that Dakar was the “gay” city of West Africa. Gaudio emphasized the presence of male lesbians and other queer notions in some Hausa communities in Nigeria. One thing that these authors have overlooked are the issues of regulation regarding such relationships at the time. The pertinent question is whether such relationships were sanctioned by law. Was the practice overtly carried out so that people comfortably identified themselves as being in such relationships? These questions are germane to understanding the attitude of Africans towards homosexuals.

Indeed, notwithstanding these historical examples, it can be asserted that the normative social imperative to marrying and procreation is considered fundamental in many African communities.²⁴² Most African countries spend a great deal of time painting marriage as an institution built around procreation. In some jurisdictions, barrenness and sterility are a ground for divorce.²⁴³ The issue of procreation thus seems to override any affinities of “would-be homosexuals” in Africa. This is supported by the many

²⁴¹ See generally Stephen O. Murray and Will Roscoe eds, *Boy-wives and female husbands: studies in African homosexualities* (New York: St. Martin's Press, 1998).

²⁴² See in general Kyalo, *supra* note 238; Ayisi, *supra* note 238.

²⁴³ See Ghana: *Matrimonial Causes Act, 1971*, s 41(3) (c). It is difficult to argue that having children has much of anything to do with marriage. As was correctly pointed out by the South African Constitutional Court in *Fourie*, limiting the State's interest in marriage to its "procreative potential" ... is "deeply demeaning" to married couples who cannot or choose not to have children (*Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 at 558).

polygamous systems among most African countries. In most African cultures, inheritance is based on blood relations and an adopted child cannot become a chief. Africans are conservative and the socialization process reinforces the perception that persons in same-sex relationships are deviants. Even where same-sex relationships have been alleged to have existed, people engaging in the act could not be open about it.²⁴⁴ In some cases, native custom dictated punishment for attempted sodomy.²⁴⁵ In addition, the overtly homophobic attitudes and policies of many African states cast doubt on the acceptance of homosexuality in Africa. The current trend of legislation and public abhorrence of homosexual activity does not portray the acceptance of homosexuality in most African countries.

3. Same-sex regulation in Africa

The recognition of same-sex marriage in Africa has been fueled, particularly, by the many anti-same-sex legislations enacted by some African countries. While some states explicitly prohibit homosexuality and other forms of same-sex unions, others lack any express prohibition on homosexual activity but have statutes that establish de facto criminalization/prohibition of gay and lesbian activities.²⁴⁶ The legislative attitudes of most African countries portray gay and lesbian rights as domestically unrecognized.

²⁴⁴ Marc Eprecht, "Homosexual 'Crime' in Early Colonial Zimbabwe" in Stephen O. Murray & Will Roscoe, eds, *Boy-wives and female husbands: studies in African Homosexualities* (New York: St. Martin's Press, 1998) at 197-221.

²⁴⁵ *Ibid* at 197.

²⁴⁶ In Ghana, a person who has unnatural carnal knowledge of another person commits a misdemeanor. "Unnatural carnal knowledge" is defined to involve sexual intercourse with a person in an unnatural manner (see Ghana: *Criminal Act, 1960* (Act 29), ss. 99 and 104. See also South Sudan: *Penal Code Act, 2008* (No. 9), s. 248).

From a conflict of laws perspective, this also raises the issue whether any recognition will be given to rights and obligations conferred on same-sex couples by foreign laws.

Domestically, the recognition of homosexual rights has received an unwelcome attitude from most African countries. It is known that homosexuality is illegal in thirty-five African countries, and six additional countries have banned male homosexual activity.²⁴⁷ There are only fifteen African countries that have not explicitly barred homosexuality by law. These are Burkina Faso, Cape Verde, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Rwanda, Madagascar, the Central African Republic, Chad, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Republic of the Congo, Mozambique.²⁴⁸ In Nigeria, Zambia, Gambia and Uganda, same-sex marriage/union is explicitly prohibited.²⁴⁹ Essentially, South Africa is the only African country which currently allows same-sex marriage under its *Civil Union Act, 2006*.

Going through the length and breadth of the various anti-homosexual statutes in Africa, it is not difficult to see public hostility towards homosexuality. The law on the matter reflects the revulsion felt by the majority of people in Africa. This revulsion and disdain for homosexual activity is reflected in a number of statutes. In 2009, Uganda proposed to increase criminal penalties not just for those who engage in homosexual acts, but also to criminalize activities in civil society that "aid and abet" homosexuality.²⁵⁰ This proposal had significant social and political consequences both inside and outside of Uganda. The World Bank, for instance, postponed a \$90 million loan to Uganda's health

²⁴⁷ Adam J. Kretz, "From "Kill the Gays" to "Kill the Gay Rights Movement": The Future of Homosexuality Legislation in Africa" (2013) 11:2 *Northwestern Journal of International Human Rights* 207 at 210.

²⁴⁸ *Ibid* at 210.

²⁴⁹ In addition, there are countries which have legislation which could be interpreted as prohibiting same-sex marriage. See in general Kenya, *The Marriage Act, 2014*, Ghana: *Marriage Act, 1884-1985*(CAP 127).

²⁵⁰ Uganda, *The Anti-Homosexuality Act, 2014*.

system.²⁵¹ Although the bill was initially suspended, the government passed into law the *Uganda Anti-Homosexuality Act* in 2014.²⁵² Under the Act, a person was deemed to have committed an offence if:

- (a) he penetrates the anus or mouth of another person of the same-sex with his penis or any other sexual contraption;
- (b) he or she uses any object or sexual contraption to penetrate or stimulate the sexual organ of a person of the same-sex;
- (c) he or she touches another person with the intention of committing the act of homosexuality.²⁵³

The definition of homosexuality thus covered physical sexual activity that did not just necessarily culminate in intercourse, but encompassed anything which may include the touching of another's penis or anus.²⁵⁴ The Act also made room for the persecution of anyone who was deemed to have sexual affection or expresses interest in a person of the same-sex.²⁵⁵ It included the prohibition of same-sex marriage.²⁵⁶ The Act allowed those convicted of homosexuality to be imprisoned for life.²⁵⁷ Although the Ugandan Constitutional Court has declared the Act unconstitutional,²⁵⁸ the public support that welcomed the Act reflects the attitude of most Ugandans, and Africans as a whole, towards homosexuality.

²⁵¹ The position taken by the World Bank was criticized by many, with some political figures describing it as "bullying mentality". The late President of Ghana, Prof. Atta Mills, was quoted as saying that he "will never initiate or support any attempt to legalize homosexuality in Ghana,"(Ghana Refuses to Grant Gays' Rights Despite Aid Threat, BBC AFRICA (Nov. 2, 2011) <http://www.bbc.com/news/world-africa-15558769>).

²⁵² The Constitutional Court of Uganda declared the Anti-Homosexuality Act as unconstitutional. However, the Court based its decision on the fact that the law was not properly passed due to the absence of quorum in parliament at the time of its passage. It is still uncertain whether the content of the Act violates the human rights provisions of the Ugandan Constitution (see in general *J Oloka. Onyango & Others v Attorney General*, Constitutional Petition NO. 08 of 2014)

²⁵³ *Supra* note 250, s 2.

²⁵⁴ *Supra* note 250, s 1.

²⁵⁵ *Supra* note 250, s 2(2).

²⁵⁶ *Supra* note 250, s 12.

²⁵⁷ *Supra* note 250, s 2(2).

²⁵⁸ See *J Oloka. Onyango & Others v Attorney General*, Constitutional Petition NO. 08 of 2014. See also CBC, Uganda's President Signs Controversial Anti-Gay Bill Into Law online: <<http://www.cbc.ca/strombo/news/ugandas-president-signs-controversial-anti-gay-bill-into-law>>.

Nigeria recently enacted the *Same-sex Marriage (Prohibition) Act*, 2013. The Act prohibits a marriage contract or civil union entered into between persons of the same-sex, solemnization of same, and for related matters. It is expressly stated that only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.²⁵⁹ The Act not only prohibits same-sex marriage, it also makes it an offence for the registration of gay clubs, societies and organizations, their sustenance, processions and meetings.²⁶⁰ The position in Nigeria and Uganda reflects the legislative sentiment towards gay and lesbian rights in Africa. In addition to these two countries, Tanzania also allows for life imprisonment of an individual who is convicted of same-sex activity.²⁶¹ In Zambia, a marriage between persons of the same-sex is void. Under section 27(1)(c) of the *Matrimonial Causes Act*, 2007, a marriage shall be void if the parties to the marriage are of the same-sex.²⁶²

In addition to these explicit prohibitions, some states have put legislation in place which could be interpreted to constitute de facto prohibition against recognition of gay and lesbian rights. In Ghana, for example, unnatural carnal knowledge is a criminal offence; even if the act is between consenting adults.²⁶³ While the country's Criminal Act does not explicitly say that homosexuality is illegal, it seems the section can be interpreted to include homosexuality.

As well, Kenya's Penal Code criminalizes sodomy. Under this Code, a "person who ... has carnal knowledge of any person against the order of nature ... or permits a

²⁵⁹Nigeria: *Same-sex Marriage (Prohibition) Act*, 2013, s 3.

²⁶⁰*Ibid*, ss 4, 5.

²⁶¹ Tanzania, *Sexual Offences Special Provisions Act*, 1998, sec. 154(1)(c).

²⁶² Zambia, *The Matrimonial Causes Act* 2007, s 27(1)(c).

²⁶³ Unnatural carnal Knowledge is defined as "sexual intercourse with a person in an unnatural manner or with an animal" (see, generally, *Criminal Act*, 1960 (ACT 29), s 104).

male person to have carnal knowledge of him or her against the order of nature” commits a felony, punishable on conviction by a fourteen year prison term.²⁶⁴ The phrase “against the order of nature” has been defined as “sexual intercourse or copulation between man or woman of the same-sex, or either of them with a beast”.²⁶⁵ It is also termed “buggery”, a crime against nature, an abominable and detestable crime against nature, an unspeakable crime.²⁶⁶ Although there is no express mention of homosexuality in the Act, the courts have interpreted the phrase “against the order of nature” to imply the prohibition of homosexual activities.²⁶⁷

Alongside the criminalization of homosexual activities are statutes which expressly define marriage as a union between a man and a woman- which then implicitly excludes same-sex unions. In Kenya, marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union.²⁶⁸ The language of the Kenyan Marriage Act almost exactly mirrors the anti-same-sex laws enacted in Nigeria.²⁶⁹

It is important to mention that while attempts are being made to criminalize same-sex relationships, there have been some movement towards positively receiving them. For example, in May 2012, Malawi’s new President, Joyce Banda, expressed her intention to scrap the laws criminalizing homosexuality.²⁷⁰ Also, some states legalize

²⁶⁴ Kenya, *Penal Code of 1930*, s 162.

²⁶⁵ *Ali Abdi Shabura v Republic* [2012] eKLR.

²⁶⁶ *Ibid.*

²⁶⁷ Section 148 of the *Penal Code, 1991* of Sudan also states that: any man who inserts his penis or its equivalent into a woman’s or a man’s anus or permits another man to insert his penis or its equivalent in his anus is said to have committed sodomy... and shall be punished with flogging by one hundred lashes and he shall also be liable to five years’ imprisonment.

²⁶⁸ Kenya, *The Marriage Act, 2014*, s 3.

²⁶⁹ Section 3 of Nigeria’s *Same-sex Marriage (Prohibition) Act*, provides that only marriage contracted between a man and a woman shall be recognized as valid in Nigeria.

²⁷⁰ See, Malawi to Overturn Homosexual Ban, Joyce Banda Says, BBC NEWS (May 18, 2012), <http://www.bbc.co.uk/news/world-africa-18118350>.

same-sex sexual activity between two women.²⁷¹ In South Africa, civil unions in the form of marriage or civil partnerships are permitted by law. The co-existence of these different regimes creates a complex web of legal issues from a conflict of laws perspective. It is debatable whether the current laws in some African states seek to invalidate even the rights and obligations that are recognized by other countries. Nigeria explicitly prohibits recognition of foreign same-sex marriage even if the marriage has been validly contracted under a foreign law.²⁷² However, other African countries have statutes that are purely domestic and do not address international same-sex relationship cases. It can, however, be argued that the domestic law reflects domestic public policy which may become relevant in international cases.

4. Conflict of Laws Aspects of same-sex marriage in Africa

The debate for the recognition of same-sex marriage in Africa has mainly focused on whether particular states should or should not recognize such relationships. One of the major issues which have been ignored is the conflict of laws which arise from the recognition/non-recognition of such unions. That is, how should such relationships be handled in cross-border situations? For example, will a same-sex marriage that had been celebrated in Canada be recognized in Ghana? Will the adopted child of a Nigerian same-sex couple who resides in the UK be allowed to inherit their parent's estate in Nigeria? Can an American same-sex couple adopt from Malawi?

In Nigeria, a marriage contract or civil union entered into between persons of the same-sex by virtue of a certificate issued by a foreign country is void, and “*any benefit*

²⁷¹ In Kenya, woman-to-woman marriage is recognized among the Naadi people and also celebrated under Kikuyu customary marriages laws. The practice is also recognized among the Lovedu tribe in South Africa.

²⁷² *Supra* note 259, s 1(2).

accruing there-from by virtue of the certificate shall not be enforced by any court of law".²⁷³ Nigeria seems to be the first country on the African continent to enact anti-same-sex legislation having extra-territorial effects. Given the prevalence of anti-same-sex statutes in Africa, the question is whether these provisions create a blanket non-recognition of gay and lesbian rights. Indeed, the nature of conflict of laws is such that even countries that do not formally allow institutionalization of same-sex relationships may be confronted with the challenge of dealing with it in a conflict of laws scenarios.

The next subsections look at various conflict of laws issues which may arise from the recognition/non-recognition of same-sex marriage in Africa and how these countries may approach the various private international law issues that may arise before their courts in respect to same-sex unions, irrespective of whether there is legislation on the subject. In trying to proffer solutions to the problems identified, the section will draw on comparative legislation and jurisprudence from the UK, South Africa and Canada – three countries that have addressed some of the issues and which were examined in Chapters Three and Four.

4.1 Succession/Inheritance

Let us consider the following scenario: a Ugandan national *A* domiciled in Canada, enters into a civil same-sex marriage in Canada with *B*, a Ghanaian resident in Canada. Upon the intestacy of *A*, how will the Ugandan court devolve the properties of *A* situated in Uganda?

²⁷³*Supra* note 259, s 1(2). The Act further provides that “only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria” (section 3).

In the case above, the kind of blanket rule of non-recognition, analogous to that proposed under section 1(2) of *Nigeria Same-sex Marriage (Prohibition) Act*, is illogical and may create unfair results. In Uganda, the choice of law rule in cases involving succession is that immovable properties are governed by the law of the place where the properties are situated, and the laws of place of domicile of the deceased governs the movables.²⁷⁴ Thus, succession to the immovable property in Uganda of a person deceased is regulated by the law of Uganda, wherever that person may have had his or her domicile at the time of his or her death.²⁷⁵

In Nigeria, it has been stated that the *lex situs* i.e. law of Nigeria, including its conflict of laws rules governs succession to immovables.²⁷⁶ In the Ghana case of *Youhana v. Abboud*²⁷⁷ where two Lebanese, domiciled in Lebanon, died intestate leaving immovable properties in Ghana, the court held that the devolution of the properties should be governed by the *lex situs*. In the scenario given, *B* must not only prove the existence of a valid marriage between him and *A*, but must also prove that *he* qualified as a spouse under the applicable law. Under the intestate succession law of Uganda, a “husband” means a person who at the time of the intestate’s death was (i) validly married to the deceased according to the laws of Uganda; or (ii) *married to the deceased in another country by a marriage recognized as valid by any foreign law under which the marriage was celebrated*.²⁷⁸ Thus, the burden on *B* is to prove that the marriage to *A* was valid under the laws of Canada. Given that *B*’s relationship with *A* is recognized under

²⁷⁴ Oppong, *supra* note 72 at 294.

²⁷⁵ *Succession Act, 1906* (Chapter 162), s 4.

²⁷⁶ Oppong, *supra* note 72 at 290-295.

²⁷⁷ [1974] 2 GLR 201.

²⁷⁸ *Supra* note 275, s 2.

Canadian law as valid, the question arises whether the court will recognize the relationship of *A* and *B*, notwithstanding that Uganda prohibits same-sex marriage.

A strict interpretation of Uganda's *Succession Act* will thus entitle *B* to inherit *A*'s properties since the Canadian marriage is "a marriage recognized as valid by the foreign law under which the marriage was celebrated". Any other interpretation will make the current provision under the *Succession Act* inconsistent with the *Anti-Homosexuality Act, 2014*. Until the legislature clarifies what constitutes "foreign marriage" under the *Succession Act*, arguments can be made that the courts may recognize foreign same-sex marriages for the purposes of succession where any such marriage has been validly celebrated under the foreign law. Any other interpretation of the section to deny recognition of a foreign same-sex marriage will not only create absurdity, but will also lead to injustice in light of the couple having acquired property together.²⁷⁹

Such absurdity and injustice was evident during the era of blanket non-recognition of certain domestic unions by the common law courts. As has already been mentioned, under common law, a marriage that is void *ab initio* produces none of the legal incidents of marriage and the parties do not succeed to each other *ab intestato*.²⁸⁰ Essentially, a void marriage has no legal effect on the parties and can be treated as never having existed. However, issues relating to the recognition of "invalid" marriages for the

²⁷⁹ Under section 32 if there is no person existing or reasonably ascertainable entitled to take any part of the property of an intestate, that part or the whole, as the case may be, shall belong to the State.

²⁸⁰ Hahlo, *supra* note 178 at 487.

purposes of an incidental remedy have been addressed in jurisdictions like the UK and Canada, and also under different concepts such as that of the putative marriage.

In regard to same-sex marriage, Hammerle has emphasized that the reasoning used by courts to recognize "invalid" marriages can be extended by analogy to include same-sex marriages or civil unions for purposes of intestacy.²⁸¹ This has been the solution proffered in Canada and the UK to recognize unions that would be invalid if celebrated in the two jurisdictions. In *Cheni v. Cheni* and *Haussain v Haussain* the English courts respectively assumed jurisdiction in a union falling under the prohibited degree of consanguinity and a polygamous marriage. In addition, the *Matrimonial Proceedings (Polygamous Marriages) Act, 1972*, represents a benevolent approach towards the recognition of polygamous marriages celebrated by foreign individuals but such unions are considered to be domestically invalid in the UK. This is to provide remedy in cases where the blanket non-recognition of such unions will lead to unjust results. In *Haussain*, for example, the court did not allow the husband to rely on the polygamous nature of his marriage to defeat the claim for a decree of judicial separation. In the Canadian case of *Azam v Jan*,²⁸² the court took jurisdiction over a foreign polygamous marriage on public policy grounds.²⁸³ It acknowledged the marriage for the limited purpose of providing an adequate remedy although the court was satisfied that whatever its foreign legality, it is invalid in Canada.

²⁸¹ Christine A. Hammerle, "Free Will to Will? A Case For The Recognition of Intestacy Rights for Survivors to A Same-Sex Marriage or Civil Union" (2005-2006)104:7 Michigan Law Review 1763 at 1773.

²⁸²*Azam v. Jan* 2013 ABQB 301 at para 59.

²⁸³In the opinion of Bielby, J.A "taking jurisdiction to grant a divorce of an actively polygamous marriage does not logically compel the recognition of polygamous marriages entered into in Canada or other jurisdictions in which they are illegal, nor mandate the expansion of Canadian immigration law or policy to admit parties to such marriages as immigrants to Canada" (see *Azam v Jan*, 2012 ABCA 197 at para 23).

The issue of succession has been one of the many areas a Canadian or UK court may recognize as valid, a union which cannot be entered into in the two countries. *In Yew v. Attorney-General of British Columbia*,²⁸⁴ the court recognized both wives of a polygamous marriage and held that they are entitled to the benefits extended to wives under the *Succession Duty Act*.²⁸⁵ The non-recognition of the marriage would have meant that the testator's two wives, admittedly lawfully married in China to the testator and throughout his life, would have been without a remedy.²⁸⁶ As McPhillips J.A. rightly noted, this would be contrary to natural justice.²⁸⁷

In addition to judicial intervention to remedy the injustice that result from blanket non-recognition, provincial legislation has also provided remedy to cure such results that may flow from situations like in the scenario above.²⁸⁸ For example, the Ontario *Family Law Act*²⁸⁹ has been interpreted to include parties who have undergone a marriage ceremony or event in good faith but did not have the capacity to enter into the marriage (e.g. by reason of prohibited degrees of consanguinity) and, parties to a voidable marriage, as well as spouses to a polygamous marriage.²⁹⁰ In the context of same-sex marriage and from an African perspective, this will include the extension of family law benefits to same-sex couples as pertained to heterosexual couples. In South Africa it has

²⁸⁴ [1923] 33 B.C.R. 109.

²⁸⁵ [1911] Cap. 21i, R.S.B.C.

²⁸⁶ The “incident of marriage approach” has also been used in a number of US cases to grant benefit of inheritance through intestacy as a single, recognizable incident of marriage although the recognition of the marriage was prohibited under State laws. It has been stated that in *Miller v. Lucks*, 36 So, 2d 140 (Miss, 1948), the court recognized intestacy rights for an interracial marriage for the limited purpose of allowing the surviving spouse to inherit property, despite a general refusal to recognize interracial marriages. Also, the court in *Inre Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) recognized intestacy rights for an unlawful polygamous marriage. See in general Hammerle, *supra* note 44 at 1775-1778.

²⁸⁷ *Yew v. Attorney-General of British Columbia* at 137.

²⁸⁸ Alberta, *Family Law Act*, SA 2003, c F-4.5.

²⁸⁹ RSO 1990, c F.3.

²⁹⁰ *Hicks v Gallardo*, 2013 ONSC 129.

been held that the word “marriage” in s 3 of the *Divorce Act* must be read to include registered foreign same-sex marriages or civil unions/partnerships which are lawful in the country in which they are concluded.²⁹¹ In essence, any ancillary or *pendente lite* relief contemplated under the *Divorce Act* is available to same-sex partners.²⁹² It must, however, be mentioned that the extension of such benefits to couples involved in an invalid marriage does not confer on individuals domiciled in the country the right to enter into such unions. The recognition is for the limited purpose under the Act.

Ideally, universal recognition of same-sex marriage will avoid the conflict of laws aspect of succession as it relates to such marriages. However, the public policy of countries differ significantly. Short of recognition, English-speaking African countries can recognize such relationships when the question has to do with inheritance. In this case, the court is not being called upon to recognize or sanction the relationship during the lives of the parties.²⁹³ The recognition is for the limited purpose of inheritance.

4.2 Adoption

In a different scenario, *A*, a Ghanaian national domiciled in Canada, enters into a civil union in South Africa with *B*, a Nigerian resident of Canada. The couple adopts *C* as their son under South Africa’s adoption laws. Upon the death intestate of *A* and *B*, how

²⁹¹ *AS v CS*, 2011 (2) SA 360 at 371.

²⁹² Before the enactment of the *Civil Union Act* the Constitutional Court has held in the case of *Gory v Kolver and Others*, 2007 (4) SA 97, that partners in a permanent same-sex life partnership should be regarded as “spouses” for intestate succession purposes.

²⁹³ Where only the question of inheritance/succession is involved, it is debatable if a country’s ‘public policy’ is affected.

will the courts in Nigeria treat *C* for the purposes of the devolution of *A*'s properties in Nigeria?

This scenario illustrates the cross-border issues which may arise from international adoption. In jurisdictions like Nigeria where same-sex marriage is expressly prohibited and gay and lesbians rights curtailed, it can be argued that gays and lesbians do not have the right to adopt a child by reason of their sexual orientation.²⁹⁴ Other jurisdictions provide equal adoption regimes for both same-sex couples and heterosexual couples. The South African *Children's Act* provides for adoption of a child by partners in a permanent domestic life partnership or whose permanent domestic life-partner is the parent of the child.²⁹⁵ In general, an adoption order confers full parental responsibilities and rights in respect to the adopted child onto the adoptive parent. Under the *Children's Act* of South Africa, the adopted child, for all purposes, is regarded as the child of the adoptive parent, and an adoptive parent is, for all purposes, regarded as the parent of the adopted child.²⁹⁶

Thus, in the case above, *C* is treated, for all purposes, as the child of *A* and *B* in South Africa.²⁹⁷ In Kenya, an adoption order made by any court of competent jurisdiction shall be recognized by its courts.²⁹⁸ Given that Kenya is also party to the *Hague Convention on the Protection of Children and Co-Operation in Respect of Inter-Country Adoption, 1993*, it is debatable whether Kenya can use the non-recognition of same-sex

²⁹⁴ Nigeria's *Child's Rights Act of 2003* provides that an adoption order may be in favor of a married couple, a married person or a single person. However, in all cases, the adopter or adopters shall be persons found to be suitable to adopt the child in question by the appropriate investigating officers (see *Child's Rights Act 2003*, s 129).

²⁹⁵ See generally the South Africa, *Children's Act, 2005*, (Act No. 38 of 2005) s 231.

²⁹⁶ *Ibid*, s 242(2)(a) & (3).

²⁹⁷ South Africa is party to the *Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993*.

²⁹⁸ Kenya, *Children Act, 2001*, (Chapter 141) s 176.

unions to refuse the incident of adoption that may flow from such a union. Although it is not explicitly stated in the adoption laws of Nigeria that same-sex persons may not adopt, the many laws in Nigeria that criminalize same-sex activities may support the assertion that the country does not recognize the rights of homosexuals to adopt, and by extension same-sex couples.²⁹⁹ The question arises whether the courts will recognize *C* as the legitimate child of *A* and *B* for the purposes of succession.

Nigerian adoption laws vary from state to state. In general, there is a combination of residency and age requirements, as well as the requirement of married couples to adopt jointly. Most of the legislation in the various states deals with domestic adoption. At present, no Nigerian legislation deals with the private international law issues which could potentially arise in adoption proceedings.³⁰⁰ As Oppong rightly noted, this is remarkable, since there are a number of issues that may arise where it may be necessary for a court to decide whether or not to recognize a foreign adoption order.³⁰¹ The determination of the rights of an adopted child to inherit from his adoptive parents squarely falls into one of these issues. In the absence of a statutory regime for recognising foreign adoption orders, it is doubtful whether Nigeria will apply the English common law rule on the recognition of foreign adoption in the context of same-sex couples.³⁰² Essentially, this will give *C* the status of a child and the right to inherit to the properties of *A* and *B*. The blanket rule of non-recognition, analogous to that proposed under section

²⁹⁹See, for example, *Child's Right Act, 2003*, (CAP 2003) s 129 (d). But see also the Nigerian *Criminal Code, 1990* (Chapter 77) s 217 and the *Same-sex Marriage (Prohibition) Act*.

³⁰⁰Nigeria is not party to the *Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993*.

³⁰¹ Oppong, *supra* note 72 at 231.

³⁰² Under common law, a foreign adoption is entitled to recognition if the adopting parents were, at the time of the adoption, domiciled in the country where the adoption was effected. In *Re Valentine's Settlement*, [1965] 1 Ch 831 the Court of Appeal refused to recognize a South African adoption on the basis that at the time the adoptive father was resident in Southern Rhodesia. It was stated that questions of status were dependent on domicile.

1(2) of the *Same-sex Marriage (Prohibition) Act*, 2013, will be irrational and may create unjust results. These are practical issues which should be of concern to African nations contemplating the recognition/non-recognition of same-sex marriage. In the absence of any legislation, Oppong has recommended that, generally, an adoption order made in a jurisdiction where the child was resident, a national or domiciled should be recognized.³⁰³ Though this seems to cover every situation, it appears Oppong did not consider the issues which could potentially arise from cross-border adoption relating to homosexuality and the new trend of legislation recommending blanket non-recognition of homosexual rights in Africa. This notwithstanding, the position recommended by Oppong could be generally applied to adoption involving both opposite sex and same-sex couples.³⁰⁴ The best interest of the child should be paramount in all adoption-related decisions and the fact that the child “did not have the will to choose his/her own parents” should not be ignored.³⁰⁵ In Canada, it has been said that the courts will give effect to an adoption order and the effect that flows from it if it complies with the laws of the place in which it was ordered.³⁰⁶ This will ensure that the adoption orders which are considered valid in the originating state (the state where the order was made) are recognized in all countries.

Related to the issue of adoption is the legitimacy of the children of same-sex marriages, especially lesbians. What is the legal status of children raised by same-sex couples? Are these children legitimate or illegitimate? Which law determines the legitimacy of such children?

³⁰³ Oppong, *supra* note 72.

³⁰⁴ In *Re Valentine's Settlement*, [1965] 1 Ch 831 Lord Denning reasoned that in the interest of comity of nations, an adoption order made by another country should be recognized when the adopting parents are domiciled there and the child is resident there.

³⁰⁵ Carissa Trast, “You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples are Entitled to Inheritance Rights from Both Their Parents” (2006) 35:2 Hofstra Law Review 857.

³⁰⁶ See Canada, Citizenship and Immigration Canada, “International Adoption and the Immigration Process” (Ottawa: CIC, 2000) at 7.

The legitimacy of the children that may come out of a same-sex marriage has not received much attention in most English-speaking African countries. In Nigeria the legitimacy or illegitimacy of a child is determined by the laws of the country in which its parents are domiciled at the time of the child's birth.³⁰⁷ This also seems to be the position in Ghana, Kenya and South Africa, where the courts of domicile of the child or the domicile of the applicant have jurisdiction to declare whether a child is legitimate.³⁰⁸ It is debatable whether the use of the word "parents" covers same-sex couples. The fact that some of these children may not be biologically related to their parents raises the question whether such children are legitimate to inherit from the "other parent"? In a case where *A* is the life partner of *B* and *C* is the biological child of only *B*, and not *A*, the question is whether *C* can inherit from *A* on the death intestate of *A*. In this case, unless there is a formal adoption, *A* is a legal stranger to *C* and *C* has no right to inherit from the non-biological parent, *A*.³⁰⁹ Going by the conflict of laws rules which have been used to determine the issue of legitimacy of children as applied in Nigeria, Ghana and Kenya, *C* would be considered an illegitimate child if the parents are domiciled in any of above countries. This is more so given the blanket non-recognition of same-sex relationships as proposed in these countries. The non-recognition of this relationship will mean that *C* would be denied the right to inherit from *A* irrespective of the fact that *A* would probably have expected *C* to recover from her estate. However, as Trast rightly said "children born to same-sex parents should not suffer legal disadvantages simply because society may not

³⁰⁷ *Bamgbose v Daniel*, [1952-5] 14 WACA 111. Also stated in Oppong, *supra* note 72 at 246.

³⁰⁸ Oppong, *supra* note 72 at 245-251.

³⁰⁹ Trast, *supra* note 226 at 859.

approve of their parents' way of life. To withhold this benefit and protection from these children leaves them in a vulnerable and unjust position".³¹⁰

4.3 Re-marriage

Another area where the strict application of blanket non-recognition of same-sex marriage may lead to absurdity and unjust results is of re-marriage.³¹¹ *A*, a Ghanaian domiciled in Ghana enters into a same-sex marriage in Canada with *B*, a Canadian domiciled. *A* subsequently visits Ghana and purports to enter into a civil marriage with *C*. Can *B* (or anyone) enter a caveat to stop the marriage on the basis that he is already married to *A* under the *Civil Marriage Act* of Canada? If the marriage is entered into, can *A* be charged with the offence of bigamy?

In Ghana a marriage is invalid when either of the parties, at the time of the celebration of the marriage, is married under an applicable law to a person other than the

³¹⁰ See in general *Trast*, *supra* note 226.

³¹¹ Related to the issue of re-marriage is whether an African court will decline jurisdiction in a divorce petition even when the parties satisfy the requirements of the country's divorce regime. Will a Ghanaian court decline jurisdiction to grant divorce in respect to a same-sex marriage celebrated between two Ghanaians in Canada even though the requirements for jurisdiction in matrimonial actions under the *Matrimonial Causes Act* have been satisfied? Under section 31 of Ghana's *Matrimonial Causes Act*, a court may exercise divorce jurisdiction where either party to the marriage (a) is a citizen of Ghana; or (b) is domiciled in Ghana; or (c) has been ordinarily a resident in Ghana for at least three years immediately preceding the commencement of the proceedings (Ghana: *Matrimonial Causes Act, 1971* (ACT 367), s 31). These provisions are not framed in terms of gender and it is debatable whether the court can refuse jurisdiction on the basis of the character of the marriage. If yes, what would be the legal basis? As was emphasized by the Ontario Superior Court in *V & L v. Attorney General of Canada* (05 April 2011), Ottawa 11/367893 (Ont Superior Court) marriage and divorce is a central component of the freedom to live life with the mate of one's choice. A declination of jurisdiction will mean that the parties are prevented from severing the legal and psychological bonds of marriage in a way that other couples routinely take for granted. In such a case, the court has to re-characterize the marriage as a valid marriage under the laws of Ghana and assume jurisdiction.

person with whom the marriage is celebrated.³¹² This also seems to be the position in Kenya where a union is not a marriage if at the time of the making of the union either party is incompetent to marry by reason of a subsisting marriage.³¹³ Essentially, under most marriage laws in Africa, a marriage is not valid when either of the parties thereto at the time of the celebration of such marriage is “married” to another person.³¹⁴ Thus, the subsistence of a valid marriage constitutes a valid impediment against any of the parties’ to contract another marriage.

In *re Clara Sackitey*,³¹⁵ the Ghanaian court found that the applicant and the respondent were validly married under customary law. Under the circumstances, the court held that until the first marriage is dissolved, the respondent cannot validly marry any other woman under the provisions of the Marriage Ordinance except the applicant. The position is also supported by the Ghana Court of Appeal case of *Ruth Arthur v John Hector Ansah & Naomi Owusu*,³¹⁶ where it was held that the Ordinance Marriage celebrated between the first and second defendants was unlawful and of no effect in the light of the existing customary marriage subsisting between the plaintiff and first defendant which has not been dissolved. It can be inferred from the cases that the invalidity of the second marriage arose from the subsistence of the previous marriage and hence the validity of the previous marriage. In *re Clara Sackitey*, the court allowed the applicant to caveat against the celebration of the ordinance marriage because of the existence of a valid customary marriage between the applicant and the respondent.

³¹² Ghana: *Marriage Act, 1884-1985*, s 74.

³¹³ *Supra* note 268, s 11(1)c.

³¹⁴ See generally *Marriage Act, 1990* (Chapter 218), ss 33, 39.

³¹⁵ *Re Caveat By Clara Sackitey: Re Marriage Ordinance, CAP 127*, [1962] 1 GLR 180.

³¹⁶ [31/7/2003] Civil Appeal NO. 62/2002.

However, where the purported first marriage was void, the validity of the subsequent marriage cannot be questioned on the basis of the void marriage. In the Kenyan case of *H N N v M N & Another*,³¹⁷ the appellant averred that her marriage with the first respondent was valid and still subsisted, and that the first respondent could not lawfully undergo a church wedding with the second respondent whilst the first marriage still subsisted. The court, however, found on evidence that there was no valid marriage between the appellant and the first respondent to constitute a bar to the respondent entering into another marriage.³¹⁸ Accordingly, the first respondent had the capacity to perform the marriage ceremony with the second respondent.

In Ghana, a person who, knowing that a marriage subsists between him/her and any person, goes through the ceremony of marriage, whether in Ghana or elsewhere, with some other person commits the offence of bigamy.³¹⁹ This provision suggests that the previous marriage must be valid in order for the offence of bigamy to be committed.³²⁰ In Nigeria, it is an offence punishable by five years' imprisonment for a person to go through a ceremony of marriage with a person whom he or she knows to be married to another person.³²¹ The offence of bigamy is thus founded on the issue whether there was a prior subsisting marriage between one of the parties and a third person.

³¹⁷ [2009] eKLR.

³¹⁸ *H N N v M N & Another*, [2009] eKLR.

³¹⁹ Ghana, *Criminal Code, 1960* (Act 29), ss 262-263. Section 264 also makes it an offence for any person who, being unmarried, goes through the ceremony of marriage, whether in Ghana or elsewhere, with a person whom he or she knows to be married to another person.

³²⁰ It must, however, be stated that the subsequent marriage contracted under customary law will not constitute bigamy if the first marriage had also been contracted under customary law. Under section 265 of the *Criminal Code* a person is not guilty of bigamy if the marriage in respect of which the act was committed, and the former marriage, were both contracts under customary law.

³²¹ *Supra* note 314, s 39.

From the scenario above, *B* must prove that there was a valid marriage between him and *A*, and that the said marriage still subsists. In the context of Nigeria, *B*'s marriage to *A* under the *Civil Marriage Act* is invalid. The *Same-sex Marriage (Prohibition) Act*, does not recognize the said marriage for any purpose. A strict application of the Act will mean that *B* has no capacity to file a caveat against the proposed marriage between *A* and *C*, since in the eyes of the law, *A* has not entered into any marriage.³²² That is, in this particular case, there is a prior subsisting marriage according to Canadian law, but according to the conflict of laws and domestic laws of Nigeria, there is no such prior marriage. *A fortiori*, *A* cannot be charged with the offence of bigamy since the previous marriage for which the offence is determined is held to be invalid.

Similarly, in a country like Kenya where marriage is defined as a union between a man and a woman, it seems the capacity of *A* to enter into a subsequent marriage cannot be questioned on the basis of the Canadian marriage. In this case *A*, can argue that the same-sex marriage was not regarded as marriage in Kenya, and that he was, therefore, legally, a single person. The effect of the blanket non-recognition of *A*'s marriage to *B* is that the civil marriage will still subsist under Canadian conflict of laws and the second marriage between *A* and *C* will be void. The converse will be the position in Nigeria the second marriage between *A* and *C* will be valid and the civil marriage between *A* and *B* will be void. This is more so since Nigeria will not recognize the Canadian marriage and, thus, will not grant divorce.³²³ Thus, from a conflict of laws perspective, *A* would be

³²² In a different but related context see *HNN v MN & Another*, *supra* note 318.

³²³ It is debatable whether it can be argued that the first marriage is automatically terminated the moment the second is celebrated. This seems to be the position adopted in South Africa internal conflict of laws in

validly married under two laws. But while *A* may be charged with bigamy under the laws of Canada, he may lawfully contract a valid marriage in Ghana, Nigeria and Kenya. As Koppelman has rightly noted, the position in Ghana, Nigeria and Kenya will lead to the situation where

People in same-sex marriages could desert their dependents with impunity and, by crossing a border, free themselves of all obligations of marital property. They could even marry other people without telling those people about their still-existing marriages.³²⁴

In contrast to the positions in Ghana, Nigeria and Kenya, in South Africa civil marriage is recognized. In this case, *B* can raise an objection to any proposed marriage between *A* and any other person on the basis that his marriage with *A* is valid and still subsists.³²⁵ The Canadian marriage will thus constitute a legal impediment to *A*'s subsequent marriage to any other person. This will prevent the situation where *A* can be validly married under two separate legal regimes. However, the South African regime will also provide an avenue for *A* to divorce *B* if *A* intends to marry *C*. In *AS v CS*, the court concluded that a same-sex marriage or same-sex civil union is capable of dissolution under section 3 of the *Divorce Act, 1979*.³²⁶ As has already been mentioned, the word "marriage" in section 3 of the *Divorce Act* has been interpreted to include registered foreign same-sex marriages or civil unions/partnerships which are lawful in the country in which they are concluded.³²⁷ These provisions provide an avenue for *A*'s

the context of polygamous marriage. It has been mentioned that the polygamous marriage is ipso facto dissolved where either party in a potentially polygamous marriage under customary law subsequently concludes a monogamous marriage with someone else (under Roman-Dutch law)(see T. C. Hartley, "Bigamy in the Conflict of Laws" (1967)16 Int'l & Comp. L.Q. 680 at 693).

³²⁴ Koppelman, *supra* note 201 at xiii.

³²⁵ South Africa, *Marriage Act, 1961*, s 23.

³²⁶ *AS v CS* 2011 (2) SA 360 at 366.

³²⁷ *Ibid* at 371.

marriage under the *Civil Marriage Act* to be divorced in South Africa under the *Divorce Act, 1979*.

These cases illustrate possible conflict of laws issues which may arise from the recognition/non-recognition of same-sex marriage in the context of re-marriage. The cases illustrate that a refusal to recognize a same-sex marriage could cause substantial hardship and injustice to individuals. A rule of blanket non-recognition has the consequence of leading to multiple marriages, and a situation where a valid same-sex marriage produces no legal effect when one party crosses to a state that does not recognize such unions. In countries where a blanket rule of non-recognition of practicing same-sex persons' rights exist, this level of injustice may occur unless the courts are ready to recognize the marriage for limited purposes, while still refusing to recognize the relationship in other contexts.

4.4 Jurisdiction

One area in which blanket non-recognition of same-sex marriage will lead to an unjustifiable result is in the exercise of jurisdiction in matrimonial causes. For example, *A*, a Ghanaian national domiciled in Nigeria, enters into a civil marriage with *B*, a national of South Africa. *A* later deserts *B* and settles in his country of domicile, Nigeria. Can *B* petition a court in Nigeria or Ghana for divorce? Alternatively, can *A* institute matrimonial proceedings in Nigeria or Ghana for a decree of nullity of the marriage?

Whether a court has jurisdiction, or, alternatively, can assume jurisdiction over matrimonial causes is tied to the legal system of each country. Matrimonial actions may arise in cases of divorce, nullity of marriage, judicial separation, presumption of death

and dissolution of marriage. In general, the court exercising jurisdiction must have a connection to the parties of the action. In most cases, the primary question is whether or not the parties have connection with the territorial area over which the court has exercised its jurisdiction. Factors such as domicile, nationality and residency are some of the main considerations that are involved in determining the issue. In Ghana, the connecting factors in matrimonial causes are determined under section 31 of the *Matrimonial Causes Act*. A court may have jurisdiction when either party to the marriage is a citizen of Ghana, domiciled in Ghana or has been ordinarily a resident in Ghana for at least three years immediately preceding the commencement of the proceedings.³²⁸ Essentially, a party must be able to establish one of these connecting factors for the courts to accept jurisdiction.

The position in Ghana is similar to the regime in South Africa. In South Africa, a court can exercise divorce jurisdiction if either of the parties are domiciled in the area of the court on the date of which the action is instituted, or is ordinarily a resident in the area of jurisdiction of the court on the said date, or has been ordinarily a resident in South Africa for a period of not less than one year immediately prior to that date.³²⁹ Significantly, the fact that one of the parties is a national of South Africa cannot, on its own, confer jurisdiction upon the court. This is contrary to the position in Ghana where nationality is considered to be a factor allowing the court to exercise matrimonial jurisdiction over the parties. A South African court may exercise matrimonial jurisdiction

³²⁸*Supra* note 311, s 31.

³²⁹ South African, *Divorce Act 1979*, s. 2(1). It is worth mentioning that in South Africa, different rules apply with regard to other matrimonial proceedings aside from divorce, which is treated separately. In regards to a nullity suit, for example, it has been argued that the plaintiff may bring his action in any court he pleases. However, a court competent to hear a divorce case, at the same time, may hear other ancillary matters flowing from the divorce (see Hahlo, *supra* note 178 at 560-561).

over a foreign national domiciled in the country while refusing jurisdiction over one of its own nationals on the grounds that the person is not domiciled in or is a resident of the Republic. This is also the case in Nigeria, where proceedings for a decree of dissolution of marriage, judicial separation, nullity, restitution of conjugal rights, and jactitation of marriage may only be instituted by a person domiciled in Nigeria.³³⁰ The issue of domicile is thus a vital and germane condition allowing for the court to exercise jurisdiction.³³¹ The fact that one of the parties to the proceedings is a resident of Nigeria, or a national of the country does not, in and of itself, provide a basis for the courts to exercise jurisdiction in matrimonial proceedings. However, in Kenya, domicile and residency are the main connecting factors, albeit, jurisdiction is exercised mainly in accordance with the law applied in matrimonial proceedings in the High Court in England.³³²

Indeed, the use of domicile as a factor in matrimonial proceedings is one of the many influences that the English common law left in English-speaking African countries.³³³ Historically, under the common law, domicile was the main factor allowing a court to exercise jurisdiction in matrimonial proceedings.³³⁴ However, the common law position has been that the wife followed the husband's domicile and in cases of an application for divorce, the court which has jurisdiction is that of which the husband was

³³⁰ Nigeria: *Matrimonial Causes Act, 1990*, s. 2(2).

³³¹ See generally *Omtunda v Omtunda* [2001] 9 NWLR 252.

³³² *Matrimonial Causes Act, 1941*, ss 3, 4.

³³³ Indeed, in Kenya, jurisdiction under the *Matrimonial Causes Act* is to be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England (*Matrimonial Causes Act, 1941*, s 3).

³³⁴ See A. V. Dicey & J. H. C Morris, *Dicey and Morris on Conflict of Laws*, 13th ed vol 1 (London : Sweet & Maxwell, 200) at 107- 146.

domiciled at the time the action was instituted.³³⁵ The domicile of a married woman was thus tied to that of his husband.³³⁶ One problem with the wife's domicile of dependency arose when the husband deserted her after the marriage and resides abroad.³³⁷ In this case, the strict application of the rule meant that the wife is unable to institute divorce proceedings in another jurisdiction. Instead, she must commence the proceedings in the jurisdiction in which the husband is domiciled. The effect was that a deserted wife would have remained bound to a marriage existing only in name. The rule was deemed discriminatory and combined with the potential injustices and hardships it may create, it

³³⁵ See South Africa: *Matrimonial Causes Jurisdiction Act, 1939* (Act 22). See also E Schoeman, "The Abolition of the Wife's Domicile of Dependency: A Lesson in History" (1995) 58 TSAR 488 at 489.

³³⁶ This common law position has been amended in a number of countries. For example in Ghana, for the purposes of jurisdiction under the *Matrimonial Causes Act*, the domicile of a married woman is determined as if the woman was above the age of twenty-one and not married (*Matrimonial Causes Act*, s 32)

³³⁷ It is worth mentioning that the common law rule of domicile of dependency has not been abolished in its entirety in some English-speaking African countries. In South Africa, for example, the proprietary rights of spouses and all their property, are governed by the laws of the husbands' domicile at the time of the marriage. See generally Harry Silberberg, "The determination of matrimonial property rights and the doctrine of immutability in the conflict of laws" (1973) 6:3 Comp. & Int'l L.J. S. Afr. 323. In *Frankel's Estate v. The Master*, [1950] 1 S.A.L.R. 220, the sole issue was which law governed the proprietary consequences of the marriage - the matrimonial domicile or another domicile which the husband intends to acquire immediately or within a reasonable time after his marriage. The Appellate Division of the Supreme Court of South Africa decided in favor of the former, that, in the absence of express contract, the law of the domicile of the husband at the time of the marriage governs the matrimonial property. One advantage to these governing laws is the absolute certainty in every case as the ruling is consistently the same. Simply put, the laws of the husband's domicile at the time of marriage are the laws which stand (See James H. George, "Matrimonial Domicile" (1950) 13 Mod. L. Rev. 883-884). However, many have questioned the propriety of the common law rule. In *Sadiku v Sadiku* (30498/06 (26-01-2007) (Unreported) Van Rooyen AJ questioned whether the categorical application of the *lex domicillii* of the husband is still acceptable within a gender equal society, such as South Africa. It has also been mentioned that the rule on a formal or abstract level, constitutes discrimination on the basis of gender, contrary to section 9(3) of the *Constitution of the Republic of South Africa*. In general see Jan L Neels & Marlene Wethmar-Lemmer, "Constitutional Values And The Proprietary Consequences Of Marriage In Private International Law- Introducing The *Lax Causae Proprietis Matrimonii*" (2008) 3 TSAR 587. From the perspective of conflict of laws, the common law rule will lead to absurd results and great anomaly if strictly applied in the context of same-sex marriages. How does one determine the domicile of same-sex partnerships? As has been mentioned, in heterosexual common law partnerships the wife takes on the domicile of the husband in marriage. How does the common law rule determine "the husband" in the same-sex context? In a same-sex marriage it is impossible to determine who the "husband" is and accordingly which legal system will regulate the proprietary consequences of the marriage. Given that marriage is defined as the lawful and voluntary union of two persons with no reference to wife (or husband), it is debatable whether the common law provision on the "wife's domicile of dependency" can still be applied without apparent absurdity. Aside from the arguments of equality and discrimination, it is evident that the common law rule concerning the husband's domicile at the time of the marriage needs critical reform if South Africa is to deal with property issues which may arise from the recognition of foreign same-sex marriages.

explains the basis for additional grounds of jurisdiction or departure from the common law rules on the exercise of matrimonial jurisdiction.³³⁸

Accordingly, it can be seen that although there are differences in the provisions of the countries as to which factors may connect a party to one country enabling the court to exercise jurisdiction, one clear factor, however, is that one of the parties having a connection to the country may be grounds enough for the court to assume jurisdiction.

Although the issues of domicile and residency are arguably the two most contentious factors in the determination of jurisdiction in matrimonial causes, an exercise to analyze the determination of these two factors would be far beyond the scope of this section.³³⁹ Suffice it to say that residency and domicile are two perfectly distinct components, and long residency per se, although relevant, is rarely a deciding factor in determining domicile for the purposes of matrimonial proceedings.³⁴⁰ The fact that a Lebanese national with a Lebanese domicile of origin lived and worked in Ghana for 23 years, had property in Ghana, had applied for Ghanaian citizenship, had applied for Ghanaian nationality for his son, and it was his intention that his son should take over his business in Ghana, were still not grounds enough for him to acquire a Ghanaian domicile of choice.³⁴¹ A mere statement of intention to live in one country, without any supporting evidence of an intention to stay permanently, will not justify the acquisition of a new domicile of choice.³⁴²

³³⁸*Hahlo, supra* note 178 at 544.

³³⁹ Nationality is a question of law but whether a person has acquired a domicile of choice or is a resident of a particular jurisdiction are questions of fact and are dependent upon the intention of the party.

³⁴⁰ See *Abu-Jaudeh v. Abu-Jaudeh*, [1972] 2 GLR 444.

³⁴¹*Ibid.*

³⁴² See *Amponsah v. Amponsah*, [1997-1998] 1 GLR 43.

As is apparent from the above, the court, in exercising jurisdiction, does not consider the merits or otherwise of the cases. That is, jurisdiction over the subject matter is significantly different from whether the court has jurisdiction over the parties.³⁴³ The issue of matrimonial jurisdiction is basically whether one of the factors has been established so the parties over whom jurisdiction are exercised is deemed to be connected to the court which is assuming jurisdiction over them. In each case, the connecting factor must be established as condition precedent to confer jurisdiction on the court. In *Schiratti v. Schiratti*, the High Court in Nairobi refused to hear a petition for divorce filed by an Italian national who claimed to be domiciled in Kenya. In the considered opinion of the court, the petitioner failed to establish that he is domiciled in Kenya.³⁴⁴ However, whether a court may withhold jurisdiction on the basis of the subject matter regardless of the fact that there is a real and substantial connection to the parties has yet to be explored.³⁴⁵

In the context of conflict of laws, and from the perspective of same-sex marriage, the provisions discussed on the exercise of matrimonial jurisdiction are instructive since they are not framed in terms of gender. In the scenario above, the burden placed upon the party who seeks to confer jurisdiction on the court is to establish that one of the parties is connected to the court on grounds of one or more of the connecting factors. In this case, matrimonial proceedings for nullity or divorce may be commenced in a Nigerian court,

³⁴³ Subject matter jurisdiction refers to the power of the court to hear the case, and the power to render a judgment on the merits and to grant relief (see generally Robert E. Oliphant, “Jurisdiction in Family Law Matters: The Minnesota Perspective” (2003) 30 WM. Mitchell L. Rev. 557 at 559-60.

³⁴⁴ *Schiratti v. Schiratti*, [1976-1980] 1 KLR 870.

³⁴⁵ In the US, for example, it has been mentioned that courts in jurisdictions where same-sex marriage is prohibited have refused to grant divorce to same-sex couples on the ground that the court lacks subject-matter jurisdiction to hear the matter (see Judith M Stinson, “The Right To (Same-Sex) Divorce” (2011-2012) 62 Case W. Res. L. Rev. 447). See also Mary Patricia Byrn & Morgan L. Holcomb, “Wedlocked” (2012-2013) 67:1 U. Miami L. Rev. 1.

where *A* is domiciled, or a Ghanaian court, where *A* is a national. This position is supported by section 31 of the *Matrimonial Causes Act* of Ghana and section 2(2) of the *Matrimonial Causes Act* of Nigeria. This should be the position, regardless of whether the two states either permit or, adversely, do not recognize same-sex marriages. The court should be able to exercise jurisdiction over the parties to declare the marriage void or a nullity. This is the case so far as the party is able to establish the prerequisites for the court to exercise jurisdiction.

In the context of exercising jurisdiction over foreign polygamous marriages, Bielby J. has observed, obiter, in *Azam v Jan*, that even if the courts cannot terminate (*i.e.* by divorce) such a marriage, it is difficult to understand why a court should not be able to grant a declaration that an actively polygamous marriage is not recognized under Canadian law, including a declaration that it is a nullity here (if that were the law).³⁴⁶ In his opinion, if the courts clearly have jurisdiction to terminate foreign (monogamous) marriages, why should they not be able to terminate “*all valid foreign marriages*” if the parties otherwise meet the Canadian residential and other prerequisites to divorce?³⁴⁷ The plausible inference from Bielby J’s observation is that the court is clothed with jurisdiction in matrimonial causes so far as the prerequisites for exercising jurisdiction are satisfied. Indeed, the fact that the foreign marriage in question is not recognized in Canada is not grounds for the courts to refuse jurisdiction.³⁴⁸ These observations are very instructive in matrimonial causes involving same-sex couples who seek relief in a state which does not recognize same-sex marriages.

³⁴⁶ *Supra* note 167 at para 24.

³⁴⁷ *Supra* note 167 at para 18.

³⁴⁸ This position was affirmed on appeal in *Azam v. Jan*, 2013 ABQB 301 at para 37.

As with the case of matrimonial causes in polygamous marriages, matrimonial proceedings involving same-sex couples terminate the familial relationship rather than create one. By petitioning for divorce or nullity of their marriage, the parties are not seeking recognition as a married couple. In essence, the court is not invited to legalize or endorse the same-sex marriage, but to discontinue and determine the void marriage. In *Christiansen v. Christiansen*,³⁴⁹ the Supreme Court of Wyoming in the United States considered a divorce petition resulting from a Canadian same-sex marriage. The district court had earlier ruled that the court cannot exercise jurisdiction over the petition because the Wyoming court had no subject-matter jurisdiction over the case (the State of Wyoming does not recognize same-sex marriage). Reversing the district court's dismissal of the divorce petition, and holding that the Wyoming court had jurisdiction over the case, the Supreme Court reasoned that

recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.³⁵⁰

The instructive reasoning behind the Supreme Court's decision was that the law and policy of the State of Wyoming prohibiting the celebration and recognition of same-sex marriage is not undermined or impaired where in a matrimonial proceeding involving same-sex couples, the parties only seek a dissolution of the marriage rather than enforcement or acceptance of the union. *Christiansen* provides insights for courts

³⁴⁹ (2011) 253 P.3d 153, 157.

³⁵⁰ *Christiansen v. Christiansen* (2011) 253 P.3d 153 at 156, reported in Judith M Stinson, "The Right to (Same-Sex) Divorce" (2011-2012) 62:2 Case W. Res. L. Rev. 447 at 464.

considering whether to exercise jurisdiction in matrimonial proceedings involving same-sex marriage where the state prohibits such marriages. A voidable marriage may be dissolved or declared a nullity without recognizing the marriage as valid, or, the court may recognize the marriage for the limited purpose of granting the matrimonial relief.³⁵¹ Neither approach requires the court to rule, or even opine upon the validity of the marriage before it.³⁵² Byrn and Holcomb rightly note that in putative spouse cases, divorce and nullity are the available remedies to parties who have entered their marriage in good faith even though the marriage is technically void.³⁵³ In doing so, the court need not recognize the marriage as valid. This principle could be equally applied in matrimonial proceedings where a same-sex couple seeks nullity of his or her foreign marriage. Without this, the parties will be tied to a marriage which apparently does not exist.

In sum, it is submitted that parties to a same-sex marriage should be entitled to commence matrimonial proceedings in any jurisdiction, provided the requirements for the court to accept jurisdiction are met. There seems to be no reason for refusing this relief in the case of a valid foreign same-sex marriage where the parties have satisfied the requirements for the court to exercise jurisdiction over them. The courts should have the ability to differentiate between cases which seek to establish the validity of the marriage, and those merely requesting matrimonial relief. Exercising jurisdiction over same-sex marriages for the purposes of matrimonial relief does not necessarily imply the legitimization or condonation of the practice of same-sex relationships in those countries.

³⁵¹ See generally Barbara J. Cox, "Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships" (2004) 13 *Widener L.J.* 699 at 729-746.

³⁵² See Byrn & Holcomb, *supra* 345 at 19.

³⁵³ See Byrn & Holcomb, *supra* 345 at 20.

5. Conclusion

The foregoing discussion shows that same-sex relationships will likely be held violative of the laws in many English-speaking African countries. In Nigeria, Ghana and Kenya, the definition of marriage envisages a union between a man and a woman. There seems to be a great deal of hostility in African countries towards same-sex relationships. This is evident from the trend in anti-same-sex legislation in the region. The resentment and hostility is similar to the attitude toward polygamy and incestuous marriages in Canada and the UK. Indeed, in Canada, polygamy is counted among barbarous acts, and the country has recently reaffirmed its resentment against polygamous unions by putting it under the *Zero Tolerance for Barbaric Cultural Practices Act*.³⁵⁴ Thus, aside the *Criminal Code* of Canada making polygamy a crime, the *Zero Tolerance for Barbaric Cultural Practices Act*, reinforces the hostility of Canada towards polygamy. However, Canadian courts have, in conflict of laws situation, always dealt with marriages that are prohibited in the jurisdiction. The fact that unions, like polygamy, are not domestically recognized in Canada has not deterred or stopped the Canadian courts from exercising jurisdiction over such relationships where the parties satisfy the jurisdictional requirements for matrimonial causes.

With the world gradually but surely moving towards accepting and institutionalizing same-sex relationships, African countries must be ready to deal with the conflict of law issues that may potentially arise from the recognition or non-recognition of these unions. As observed above, countries where same-sex marriages are explicitly prohibited may still be faced with having to deal with it in a conflict of laws context.

³⁵⁴S.C. 2015, c. 29. The Act received royal assent on 18th June, 2015, however, it is worth mentioning that it does not come into force until cabinet proclaims it.

Matrimonial proceedings and cases relating to the incidents of foreign same-sex marriages may still have to be litigated in some countries where there is blanket non-recognition of this marriage. Blanket non-recognition will, in some cases, not only lead to unfair results, but will be inconsistent with justice and equity. In general, African courts should be able to use the incidental approach to differentiate between cases which seek to legitimize the relationship in the country and those that merely seek to ask for incidental relief. This approach will remedy the harshness and injustice that a blanket non-recognition of the relationship will have on the parties.

CHAPTER FIVE: CONCLUSION

1. Overview

This thesis has assessed the cross-border legal questions posed by same-sex relationships in the context of the relevant regulatory/legislative regimes of English-speaking African countries, specifically, Nigeria, Ghana, Kenya and South Africa. The thesis examined how the conflict of laws issues generated by unions which are not domestically recognized in the host state, and are explicitly prohibited in some jurisdictions, have been resolved. The discussion established that same-sex relationships will likely be held to violate the marriage laws of most African countries.³⁵⁵ In most African countries, there is a great deal of hostility, resentment and prejudice towards homosexual relationships, and this has resulted in the passing of statutes prohibiting homosexual acts, and reaffirming the "one man, one woman" marriage statutes.³⁵⁶ Indeed, in countries such as Nigeria, Ghana and Kenya, same-sex relationships are either explicitly prohibited, or there is legislation which can be interpreted to prohibit such unions.

Domestic unions like polygamy, marriage between relatives, and Muslim marriages appear to be treated differently in each jurisdiction, and it is apparent that in Africa, these relationships would be recognized in another country if the essential and formal requirements of the marriage are satisfied. Invariably, the most important consideration is that the union is between opposite sexes. As well, notwithstanding the differences in each jurisdiction, these unions are common among the countries under

³⁵⁵ One significant aspect in the discussion of same-sex marriage in Africa is the moral disagreement over same-sex relationships and the question whether homosexuality is (or should be) an accepted practice. However, the subject is beyond the scope of this thesis and may form the basis of a future study.

³⁵⁶ In *Hyde v. Hyde*, (1866) LR 1 P&D 130 marriage was considered the voluntary union for life of one man and one woman to the exclusion of all others.

study. But this is not the case in regard to same-sex marriage. Statutes such as the Nigeria's *Same-sex Marriage (Prohibition) Act* explicitly provide that a same-sex marriage entered into between persons of the same gender in a foreign country shall be void in Nigeria, and any benefits accruing by virtue of the marriage shall not be enforced by any court of law in Nigeria.³⁵⁷ This rule of blanket non-recognition of foreign same-sex unions means that even the incidents of such relationships would not be given any legal effect in the host country.

Contrary to the position in most English-speaking African countries, there is growing inclination towards the recognition of same-sex relationships across the globe and this is likely to grow in the near future.³⁵⁸ This trend means that African states that do not domestically recognize same-sex relationships may, nevertheless, be confronted with them in one way or another in a conflict of laws context. Koppelman argues that if each state could confine same-sex relationships within its borders, so that, for instance, a same-sex marriage stays in the country where it was entered into, and other states do not have anything to do with such relationships, then no conflict of laws issues will arise.³⁵⁹ However, it is virtually impossible for such a state of affairs to exist. The consequence of cross-border mobility, change of residency after marriage, inter-country adoption, and the fact that same-sex couples may own property outside the jurisdiction where the marriage was celebrated, are predominant. The cross-border issues are also exacerbated by the fact that the personal laws of the proposed same-sex couples, in some countries, are not given

³⁵⁷ Nigeria: *Same-sex Marriage (Prohibition) Act*, s 1.

³⁵⁸ At present, there are 15 countries that allow same-sex marriage and two countries where same-sex marriage is legal in some jurisdictions (see Pew Research Religion and Public Life Project, (2013) *Gay Marriage Around the World* : <<http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/>>).

³⁵⁹ Koppelman, *supra* not 201.

paramount consideration. Whether the parties can enter into a same-sex marriage under the applicable choice-of-law rule is seldom raised in the state of celebration of the marriage.³⁶⁰ In most cases, whether the intended marriage will be recognized outside of the place of celebration is not questioned before the celebration, and some legal systems disregard the national law of the spouse or the law of the state of their habitual residence.³⁶¹ It was noted that in Canada, for example, the fact that the laws of the place of domicile of an individual prohibit same-sex relationships, or whether a party to the marriage is a national of a country whose laws prohibit same-sex unions does not constitute a bar against the individuals seeking to celebrate their same-sex marriage in Canada. This means that individuals from countries where same-sex marriage is prohibited would be free to enter into such unions in Canada without recourse to their personal law. From a conflict of laws perspective, the fact that domicile or nationality is not an essential requirement to the celebration of a same-sex marriage in some jurisdictions raises the question whether such a marriage will be recognized outside the country in which the union was entered into.

The above reinforces the inevitable, that that even countries which do not domestically recognize same-sex relationships would have to find answers to the conflict of laws questions that such marriages would bring up for their consideration and adjudication. The possibility or reality of these cross-border issues means that laws which preclude giving "any legal effect" to same-sex relationships will, in some cases, lead to arbitrary and unjustifiable results.

³⁶⁰ See generally Daniele Gallo et al, eds *Same-Sex Couples Before National, Supranational And International Jurisdictions*(Berlin: Springer, 2013) at 359.

³⁶¹ Giacomo Biagioni, "On Recognition of Foreign Same-Sex Marriages and Partnerships" in Daniele Gallo et al (eds) *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2013) at 363. See also Art. 46(2) of the Belgian Code of Private International Law

The injustices which may occur in some situations where the strict non-recognition is applied were addressed in Chapter Four. It was argued there that, first, in the case of inheritance, an adopted child may be refused the right to succession to his or her adopted same-sex parents' property, notwithstanding that the parents considered him/her as their child during their lifetimes. Second, a same-sex spouse would not be able to inherit or succeed to the other spouse's property in jurisdictions where a blanket rule of non-recognition exists, should the latter die intestate. In Nigeria, for example, this will be the position since the law does not recognize the legal effect of the marriage, and accordingly, the surviving spouse cannot establish his or her status as a spouse to benefit from the estate of the deceased. Third, a same-sex couple who relocate to a jurisdiction which applies a blanket rule of non-recognition of same-sex unions, may enter into another marriage without recourse to the existing same-sex marriage, and the spouse under the same-sex marriage cannot enforce the existence of the union in the host country. This is so, since the host state does not recognize a marriage having ever existed between the putative husband and another person. Finally, same-sex couples seeking nullity or divorce of their marriage may be refused jurisdiction even where they have satisfied the requirements for the court to exercise jurisdiction over them. These situations are all apparent where the courts refuse to give any legal effect to a foreign same-sex union.

The absurd results and injustice consequent to the application of the rule non-recognition also existed in jurisdictions like Canada and the UK when their courts refused to recognize certain domestic unions such as polygamy. The discussion in chapter 3 evidences this. But it also establishes that both Canada and the UK later departed from

not according any legal effect to domestic unions like polygamy, and began to assume jurisdiction for purposes of curing the mischief and injustices occasioned by non-recognition. The UK and Canadian courts chose to distinguish between cases which seek to legitimize the union, from those which seek incidental relief. This way, they were able to give effect to the consequences of a marriage that is not otherwise domestically recognized in the two jurisdictions without legitimizing them. They have reasoned that exercising jurisdiction over such prohibited unions does not infringe their public policies which do not recognize the unions. Indeed, the fact that the marriage took place in another country is part of the reason why public policy does not intervene.³⁶²

Koppelman, says that unions that are not domestically recognized in these states by reason of their public policies– such as interracial marriage, incest and polygamy – have, nevertheless, been given limited recognition for the purpose of proceedings to enforce incidents flowing from them without legitimizing them. He argues that a similar approach is the best way to find a truce in the war over same-sex marriage.³⁶³ Although Koppelman deals with the recognition of same-sex marriage in the US, his account of the situation and the solution he offers fits into the context of Africa.³⁶⁴ This approach,

³⁶² See Martha Bailey et al, “Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada” (2008-2009) 25 Nat'l J. Const. L. 83 at 92.

³⁶³ See in general, *Koppelman*, *supra* note 201.

³⁶⁴ It is worth mentioning that Koppelman’s account of same-sex marriage reflects the previous position in the US where same-sex marriage was illegal and prohibited in certain states. However, it has been reported that since June 2013, in *United States v. Windsor* (2013) 133 S.Ct. 2675 when the Supreme Court struck down as unconstitutional Section 3 of the *Defense of Marriage Act* (DOMA), federal and state courts have issued 56 rulings striking down as unconstitutional, state prohibitions of same-sex marriages in 26 states. By the end of 2014, 35 states and the District of Columbia had legalized same-sex marriages (Symeonides, *supra* note 215 at 69-71).

At present, the Supreme Court has ruled that marriage is a constitutional right for all. See *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al* (26 June 2015) 14/556 (Supreme Court of the United States), online: <http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf>. The decision means that a man or woman can marry same-sex in all state when hitherto happened in just 35 states in the US. From a conflict of laws perspective same-sex couples from jurisdictions where same-sex

together with aspects of the Canadian and UK regimes which effectively recognise domestic unions otherwise prohibited in the two jurisdictions, offer some lessons for English-speaking African countries that may choose to adapt them.

The next section looks at some lessons that English-speaking African countries may learn from Canada and the UK to deal with the cross-border issues that may arise from same-sex marriages.

2. Lessons for English-speaking Africa from Canada and the UK

Canada and the UK have been able to effectively resolve the conflict of laws issues which arise from foreign unions that are domestically prohibited in the two jurisdictions. In both countries, this has been done through legislation and judicial intervention. Until recently, most family law legislation in Africa viewed marriage from a heterosexual perspective, and gave little to no attention to the recognition of same-sex marriage. Chapter four demonstrated that recent legislation on the subject portrays a movement towards entirely prohibiting same-sex relationships in most jurisdictions, with little to no attention to the cross-border issues arising from such unions. At present, it is not clear how African courts will deal with the cross-border issues that may arise from the recognition/non-recognition of same-sex marriage. The absence of judicial decisions in Africa on this makes it a challenge to predict what a court will do when faced with the conflict of laws aspects of same-sex marriage.

African courts can learn from Canada and the UK. However, specific conditions, such as their political, geographical, cultural and social context, require that they

marriage has been celebrated will now have their union recognised when they move from the state where the marriage was performed to another state.

contemplate solutions that may not be found in Canada and the UK. From the analysis, however, it is suggested that the following lessons be adopted by English-speaking African countries for their private international law approaches to cases involving same-sex relationships celebrated abroad.

First, African courts should have the authority to entertain same-sex marriages where the parties satisfy the requirements for the court to assume jurisdiction. In general, persons who want to know whether they are married or single should be given broad access to the courts to get an answer.³⁶⁵ As discussed, for instance, under Ontario's *Rules of Civil Procedure*,³⁶⁶ a party seeking a declaration of nullity of his/her marriage need not show affiliation between the forum and the facts giving rise to the cause of action, although in practice, one of the parties may be connected to the forum court by reason of one or more of the grounds required for the court to exercise jurisdiction over the parties.³⁶⁷ In the context of same-sex marriage, and with specific reference to English-speaking African countries, this example means that the fact that the same-sex union was entered into in another jurisdiction is not enough consideration for the court to refuse jurisdiction. Essentially, that one of the parties is connected to the forum court is enough ground for the court to exercise jurisdiction.

Second, the courts should use the incident approach to differentiate between cases where the parties seek adversarial court procedures, such as those dividing marital property, from those which seek to legitimize the union. Marriage creates different rights. In dealing with the subject matter, the court should take into account the context of each

³⁶⁵ In a different but related context see Vaughan Black, "Choice of Law and Territorial Jurisdiction of Courts in Family Matters" (2013) 32:1 C.F.L.Q 53 at 68.

³⁶⁶ RRO 1990, Reg 194.

³⁶⁷ *Ibid.*

case. Where the parties solely seek matrimonial relief, recognition of same-sex marriage for this adversarial procedure would not imply endorsement of the union or behaviors associated with the practice.

In countries where same-sex marriage is domestically recognized, the following lessons could be legislated for application. First, authorities should not celebrate a same-sex marriage between two persons if the personal law of one (or both) do not allow same-sex marriage. This will limit the limping marriage phenomenon, where a marriage that is valid under one law would not be recognized in another jurisdiction. This position is reflected by Belgium where only couples from countries with the freedom to enter into a same-sex marriage under their personal law can be married under Belgian law.³⁶⁸ In countries where same-sex marriage is legal, citizens of other countries who are residents in those jurisdictions should not be allowed to enter into a same-sex marriage without recourse to the law of the country of their nationality or domicile.³⁶⁹

Related to the above is that states which perform same-sex marriages should provide a forum for matrimonial actions arising from such marriages. In Canada, and in states such as California, Delaware, Illinois, and Oregon, legislation allows couples who celebrate their same-sex marriage in these jurisdictions to dissolve them in that state, even if the only connecting factor to the jurisdiction is that it is the place of marriage.³⁷⁰ As the court rightly noted in *V & L v. Attorney General of Canada*, a country that allows

³⁶⁸See Aude Fiorini, “New Belgium Law on Same-sex Marriage and Its Pii Implications” (2003) 52 Int'l & Comp. L.Q. 1039 at 1047.

³⁶⁹ See O. A. Odiase-Alegimenlen & Jacob O. Garuba, “Same-sex Marriage: Nigeria at the Middle of Western Politics” (2014) 3:1 Oromia Law Journal 260 at 288.

³⁷⁰ See Nick Tarasen, “Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration” (2011) 78 U. Chi. L. Rev. 1585 at 1603.

foreigners to celebrate their same-sex marriage in the jurisdiction cannot later claim to have no responsibility to them.³⁷¹

3. Final Remarks

The discussion of the conflict of laws issues that may arise from the non-recognition of same-sex marriage in selected English-speaking African countries has shown that the strict application of the rule of non-recognition, where the court gives no legal effect to a foreign same-sex union, is unworkable and leads to arbitrary and unfair results. It is admitted that the recommendations offered to deal with this problems may not be fool-proof. However, it is possible that their application will enable English-speaking African countries to effectively begin to come to terms with the cross-border issues that may arise from same-sex relationships whose incidents find presence or repercussions within their jurisdiction.

³⁷¹*V & L v. Attorney General of Canada* (05 April 2011), Ottawa 11/367893 (Ont Superior Court) at para 76.

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