

**Assessing the human rights implications of the Nigerian law dealing with
sexual orientation**

By

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Declaration

I declare that this thesis, which I hereby submit for the degree of Doctor of Laws at University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.

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Dedication

To all sexual minorities in Nigeria who are victims of Nigeria's homophobic legislation.

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[w]hen special people touch our lives, then suddenly, we see how beautiful and wonderful our world can really be. They show us that our special hopes and dreams can take us far by helping us look inward and believe in who we are. When special people touch our lives, they teach us how to live.

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Abstract

The 21st century has witnessed a radical change in the status of sexual minorities, the world over, with this change having a profound impact in the global North, in particular. A series of landmark United Nations, regional and national court decisions, inspired by the increasing effective lesbian, gay, bisexual, transsexual (LGBT) lobby, are progressively announcing the end of institutionalised discrimination which had been the lot of homosexual persons for centuries in many part of the world. However, while there has been a statutory shift towards the welcoming of homosexual persons in the West and in parts of Latin America, thus gradually recognising the injustice synonymous with discrimination on the basis of sexual orientation, African states remain less likely to respect homosexual persons' rights.

The Nigerian LGBT experience exemplifies the regressive position in many African states. Not only have laws been enacted that criminalise homosexuality in Nigeria; existing laws have in 2014 been strengthened by newer, ever more stringent anti-homosexuality legislation. The most notable anti-homosexuality law is the Same-Sex Marriage (Prohibition) Act, (SSMPA) 2013, signed into law in January 2014 by then President Goodluck Jonathan. Unlike the anti-sodomy provisions in the criminal and penal codes inherited from the British colonial rulers and the provisions of the Sharia legal codes in operation in some of the states of northern Nigeria, the controversial SSMPA explicitly criminalises same-sex marriage and goes further by also criminalising broader categories of homosexual related conduct throughout the territory of Nigeria.

This thesis argues that Nigerian laws criminalising consensual adult homosexual conduct *prima facie* violate the human rights provision of the Nigerian Constitution and Nigeria's international law obligations. The thesis takes a holistic view of the major cultural, religious and moral arguments proposed by opponents of sexual minority rights in their efforts to justify the continued discrimination of homosexual persons and same-sex consensual sexual conduct in Nigeria. The study aims to contest the validity of these

arguments by presenting a case for the decriminalisation of homosexual acts in Nigeria through such instruments as judicial intervention, legislative enactment, executive action and sexual minorities' rights activism. This study highlights the fact that people do not choose their sexual orientation and that consensual adult homosexual conduct is no more inherently harmful to others than heterosexual acts. Contrary to the widespread belief in Nigeria that consensual adult homosexual conduct is based on imported Western values, this study underlines that homosexuality has been an undeniable fact of human existence predating colonialism – also in what today is Nigeria. In this regard, by demonstrating the surprising tolerance toward homosexuals in pre-colonial Idomaland, this study further confirms the notion that consensual adult homosexual conduct is not a Western import. In the process, this study sheds new light on pre-colonial attitudes to homosexuality in Idomaland, North Central Nigeria, where no prior field research has been conducted.

The study further discredits the religious objection to consensual adult homosexual conduct by adopting a contextual reading of Islam and Christianity, the two dominant religions in Nigeria, thus allowing for the co-existence of religious beliefs and the protection of sexual minorities. This study affirms that the moral objection to consensual adult homosexual acts fails for the very reason that such practices do not cause harm to either society or other individuals.

This study fits Isaiah Berlin's conception of liberty as individual autonomy into the argument for the liberalisation of Nigerian sexual minorities' environment. The application of Berlin's concept of negative liberty to the Nigerian homosexual environment supports the affirmation of sexual minority rights as fundamental human rights.

Key words: sexual minorities, Nigeria, sexual orientation, homosexuality, decriminalisation, sodomy, human rights, gay, lesbian, bisexuals, international human rights law, religion, culture

List of abbreviations

AAICJ	American Association of International Commission of Jurists
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ADRMC	American Declaration of Rights and Duties of Man
AFA	Armed Force Act
AHRLJ	<i>African Human Rights Law Journal</i>
AHRLR	African Human Rights Law Report
ATR	African Traditional Religion
AU	African Union
CAL	Coalition of African Lesbians
CAN	Christian Association of Nigeria
CAT	Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment
CCA	Criminal Code Act
CFRN	Constitution of the Federal Republic of Nigeria
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CLLS	Criminal Law of Lagos State
DPP	Department of Public Prosecution
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
FBC	Finnish Broadcasting Company
FCT	Federal Capital Territory
FREPR	Fundamental Rights Enforcement Procedure Rules
GALZ	Gay and Lesbians of Zimbabwe
GASA	Gay Association of South Africa

GLOW	Gay and Lesbian Organisation of the Witwatersrand
HRC	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGA	International Lesbian and Gay Alliance
IGLHRC	International Gay and Lesbian Human Rights Commission
IPC	Indian Penal Code
JNI	Jama'atul Nasril Islam
JSC	Justice of the Supreme Court
KHRC	Kenyan Human Rights Commission
LAGO	Lesbian and Gays against Oppression
LEGABIBO	Lesbians, Gays and Bisexuals of Botswana
OAS	Organisation of American States
OAU	Organisation of African Unity
PCA	Penal Code Act
SETA	Organisation for Sexual Equality
SSMPA	Same-Sex Marriage (Prohibition) Act
TCC	Tasmanian Criminal Code
UDHR	Universal Declaration of Human Rights
UDF	United Democratic Fund
UN	United Nations
UNHRC	United National Human Rights Committee
UPR	Universal Periodic Review
VRB	Veterans Reviews Board
WHO	World Health Organisation

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Gunme & Ors v Cameroon (2009) AHRLR 72 (ACHPR 1995)

Handyside v UK Application No 5493/72 (1996) European Court of Human Rights)

Hertzberg v Finland Communication No 61/1979/UN Doc CCPR/C/OP/I

JK v Canada Communication No 562/2013 (UN Human Rights Committee)

Joslin v New Zealand Communication No. 902/1999 UN Doc A/57/40/214 (2002)

Karner v Austria Application No 40016/89 (UN Human Rights Committee)

Katangese Peoples' Congress v Zaire (2000) AHRLR 72 (ACHPR 1995)

Koraou v Niger (2008) AHRLR 131 (ECOWAS 2007)

L and V v Austria Application No 39392/98 European Court of Human Rights)

Manneh v The Gambia (2008) AHRLR 17 (ECOWAS 2008)

Modinos v Cyprus Application No 15070/89 European Court of Human Rights)

Rees v UK Application No 9532/81 (1986) European Court of Human Rights)

Social and Economic Rights Centre (SERAC) & Anor v Nigeria (2001) AHRLR (ACHPR 2001)

Toonen v Australia Communication No 488/1992/UN Doc CCPR/C/50/D/488/1992/ (1994)

William Curzon v Zimbabwe (2000) AHRLR 335 (ACHRR) (1995)

X v Colombia Communication No 1361/2005 (UN Human Rights Committee)

Young v Australia Communication No 941/2000 UN Doc CCPR/C/78/D/9411 2000 (2003)

Zimbabwe Human Rights NGO Forum v Zimbabwe (2005) AHRLR 128 (ACHPR 2005)

Chapter 1: Introduction to the study

1.1 Background to the thesis

‘Man was born free, and is everywhere in chains’.¹ This famous assertion of the French philosopher Jean-Jacques Rousseau does not only apply to human rights violation in general, but also specifically to the rights abuses of sexual minorities. In an age in which sexual minorities are gaining global recognition,² a disproportionately large section of the African continent is still strongly opposed to sexual minorities even just making themselves visible.³ Nigeria is one of the countries that has moved against the human rights of sexual minorities with the passage of, and presidential assent to, the Same-Sex Marriage (Prohibition) Act (SSMPA) 2013.⁴

The SSMPA has placed sexual minorities in Nigeria in a complex dilemma that exacerbates their predicament. Before the passage of the SSMPA, laws criminalising adult consensual same-sex conduct and other related offences (often referred to as ‘sodomy laws’) had already been in existence in Nigeria.⁵

¹ JJ Rousseau *The social contract* trans Maurice Cranston (1998) 49.

² There is a converging global consensus that sexual minorities are entitled to human rights as leading democracies across the globe such as the USA, the United Kingdom, Canada, the Netherlands, Spain, etc have made efforts towards decriminalising consensual adult homosexual conduct from their penal codes.

³ See AJ Kretz ‘From “kill the gays” to “kill the gay rights movement”: The future of homosexuality legislation in Africa’ (2013) 11 *Northwestern Journal of International Human Rights* 209-210. Kretz makes an in-depth analysis of the legal statuses of the 57 nations in Africa, singling out South Africa as the only country in Africa that has constitutionally banned discrimination on the ground of sexual orientation, and further analysing the various kinds of punishments homosexuals are subjected to in African countries. Kretz listed 15 African countries where consensual same-sex activity is not explicitly illegal. The countries are Burkina Faso, Cape Verde, Republic of Cote d’voire, Guinea-Bissau, Mali, Niger, Rwanda, Madagascar, the Central African Republic (CAR), Chad, Democratic Republic of Congo (CAR), Equatorial Guinea, Gabon, Republic of the Congo, and Mozambique.

⁴ The then Nigerian President, Dr Goodluck Ebele Jonathan signed the SSMPA 2013 into law in January 2014.

⁵ The Federal Criminal Code Act, Federal Penal Code Act and the Sharia Penal Code laws of 12 northern states in Nigeria penalises same-sex conduct with various degrees of punishment.

Borno State and Kano State in northern Nigeria enacted similar laws in 2000.⁶ The dilemma being confronted by sexual minorities in Nigeria is that of choosing between exercising their right to fully express themselves in line with their sexual orientation, on the one hand, and obeying the dictates of homophobic legislation, thus surrendering their human rights, on the other. There are challenges, both for the government of the Federal Republic of Nigeria and sexual minorities in Nigeria. For the government, implementing the new legislation and activating other sodomy laws would arguably infringe the rights of sexual minorities. For sexual minorities, exercising their human rights to equality, freedom of association, dignity of the human person and non-discrimination on the basis of their sexual orientation would entail breaking the law and expose them to potentially going to jail.

At the same time, Nigeria has a robust Constitution in place, arguably also protecting the rights of sexual minorities, and has also accepted as binding a number of international treaties that all arguably provide for the protection of the rights of sexual minorities. This situation poses the question whether current Nigerian law (the SSMPA and other sodomy laws) is valid or is in violation of the Nigerian Constitution and Nigeria's international human rights obligations.

Criminalisation of homosexual conduct has a hugely detrimental effect on homosexuals, not just within the legal sphere but also socially, because by criminalising conduct in which they routinely engage, the state has identified this group of individuals as criminals.⁷ This directly and indirectly imposes state sponsored homophobia; the homophobic hysteria is quickly passed down to members of society who feel that, in certain situations, they have the right to discriminate against, bully and harass homosexuals.⁸ A further consequence of the signing of the SSMPA by the Nigerian President is that it revitalised other

⁶ See the Borno State Law on Prostitution, Homosexuality, Brothels and Sexual Immoralities 2000 and Kano State Prostitution and other Immoral Acts (Prohibition) Law 2000.

⁷ J Hepple 'Will sexual minorities ever be equal? The repercussions of British colonial "sodomy" laws' (2012) 8 *Equal Rights Review* 50-51.

⁸ Hepple (n 7 above) 51.

sodomy laws in Nigeria.⁹ That singular action resulted in an upsurge of violence targeted against actual and perceived homosexuals.

The then United Nations Secretary-General, Mr Ban Ki-moon, in January 2014 voiced such concerns when he expressed fears that the signing of the SSMPA might fuel violence.¹⁰ The signing of the SSPMA indeed activated homophobic actions against sexual minorities in Nigeria. Up to that time, anti-sodomy laws had existed in Nigeria, but people did not really know much about these laws, and they were seldom invoked. This new law has the potential to dangerously goad Nigerian security agencies and citizens to deploy violence against perceived homosexuals. On the rising incidence of anti-homosexual violence, a leading Nigerian daily newspaper in 2014 reported as follows:¹¹

Five people have been arrested in Bauchi State for alleged sodomy. This is coming few days after the law banning same-sex marriage. Bauchi State Police spokesman Haruna Mohammed said: “The Police are aware of the case, but the suspects were arrested by the Sharia Commission and taken to Court.” Bauchi Sharia Commission Chairman Mustapha Baballeh could not be reached, but it was learnt that the suspects would be charged to court after investigation.

In Abuja, the capital city of Nigeria, it was also reported in 2014 that a mob armed with wooden clubs and iron bars dragged 14 young men from their beds and assaulted them. The mob screamed that they were going to ‘cleanse’ their neighbourhood of gay people.¹² Dorathy Aken’ Ova of the Nigeria International Centre for Reproductive Health and Sexual Rights stated that the police in Bauchi State had drawn up a list of 168 allegedly gay men, 38 of whom

⁹ Before the signing of the SSMPA, the Criminal Code Act, Penal Code Act and Sharia Penal Codes of 12 states in the north all criminalised homosexual practices. However, the sodomy provisions of these penal codes were rarely invoked in the form of arrest and prosecution of offenders. A flurry of arrests and arraignments of alleged homosexuals commenced in various part of Nigeria with the signing of the SSMPA.

¹⁰ Michelle Nichols ‘U.N. Chief Ban fears Nigeria anti-gay law will fuel violence’ available at <http://mobile.reuters.com/article/lidUSBREADE19R20140115?irpc=932> (accessed: 11 March 2014).

¹¹ Austine Tsenzughul & Vincent Ikurola ‘Five held for alleged sodomy in Bauchi’ *The Nation* 15 January 2014 9.

¹² Obi Jeremiah ‘Mob, Police beat up alleged gays in Abuja’ *Nigerian Pilot* 16 February 2014 8.

had been taken into custody.¹³ Thomas Jefferson famously said that '[we all must] bear in mind this sacred principles, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable, that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.'¹⁴ The wise assertion of Jefferson seems to mirror the exact predicament of sexual minorities in Nigeria. Nigerian sodomy laws seemingly violate the human rights provisions of the Nigerian Constitution and international law. The elites in Nigeria have argued that the SSMPA and other sodomy laws do not infringe on the human rights of homosexuals. Nigeria's former President of the Christian Association of Nigeria, Bishop Ayo Oritsejafor, clearly notes:

We in CAN appreciate the trouble taken to ensure that the process for such a law was followed before Mr President appended his signature in the circumstance, we call on all those talking about human rights and international conventions to remember that there is always a limit to certain rights and that those who go out of their ways to over step the limits now know the consequence of their actions.¹⁵

A majority of Nigerians share Oritsejafor's view that the sodomy laws do not infringe on the rights of sexual minorities as their claims to rights have constitutional limitations. The Nigerian Constitution is the supreme law of the land.¹⁶ Any other law whose provision conflicts with the law is rendered a nullity.¹⁷ Few people hold the view that, on the face of it, the SSMPA and other

¹³ Bernd Debusmann 'Dozens arrested after anti-gay law passed in Nigeria' available at http://www.telegraph.co.uk/news/worldnews/africaindiannocan/Nigeria/0571660/dozens.arrested_after_anti-gay_law_passed_in_nigeria.html (accessed 11 March 2014).

¹⁴ Thomas Jefferson. First inaugural address delivered on March 4 1801. Washington DC, available, at <http://www.americapresidents.org/inaugral/03a.asp> (accessed 11 April 2014).

¹⁵ Friday Olorokor 'Anti-gay law: CAN hails presidency, National Assembly, berates rights groups' available at <http://www.punchng.com/news/anti-gay-law-can-hails-presidency-berates-rights-groups> (accessed 26 March 2014).

¹⁶ Section 1(1) 1999 CFRN.

¹⁷ Section 1(3) 1999 CFRN.

multiple sodomy laws violate not only the Nigerian Constitution, but also international law.¹⁸

At the international level, there is an emerging consensus that sodomy laws violate the human rights of sexual minorities. The groundbreaking decision of the Human Rights Committee of the UN in the case of *Toonen v Australia*¹⁹ set the stage for an emerging consensus on the rights of sexual minorities. In the *Toonen's* case the HRC held that sections 122(a), 122(c), and 123 of the Tasmanian Criminal Code violated article 17 of the ICCPR.²⁰ At the regional level, the European Court of Human Rights has also given a similar decision in *Dudgeon v United Kingdom of Great Britain and Northern Ireland*,²¹ *Karner v Austria*,²² *Modinos v Cyprus*,²³ etc. Domestically, several courts in different countries have made landmark decisions on the issue of the right of sexual minorities.²⁴ At the moment, Nigerian courts have not yet decided on the rights of sexual minorities. However, the growing consensus in civilised democracies, in the light of judicial decisions, can serve as an impetus to Nigerian judges to tow the same line of thinking.

Bishop Oritsejafor argues as follows:

Human rights without limit are recipes for the destruction of any society. The culture and morality of a people must be taken into cognizance because it is important to remember that culture and morality are inextricably linked with each other. By the belief of most Nigerians, same sex marriage is offensive to us as a people.²⁵

¹⁸ Y Olomjobi *Human rights on gender, sex and the law in Nigeria* (2013) 187-188. Olomjobi argues that the SSMPA contravenes the CEDAW and human rights provision of the Nigerian Constitution. See also E Obidimma & A Obidimma 'The travails of same-sex marriage under Nigerian law' (2013) 17 *Journal of Law, Policy and Globalization* 45-46.

¹⁹ UN Human Rights Communication No 488/1992/UN Doc CCPR/C/50/D/488/1992/ (1994).

²⁰ *Toonen* (n 19 above) para 8.2.

²¹ 45 ECtHR (Ser. A) 1982.

²² Application No 40016/89.

²³ Application No 15070/89.

²⁴ For instance in South Africa, the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) knocked down the common law offence of sodomy. A host of other cases were decided by South African courts affirming the rights of sexual minorities. See generally H De Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina*. I did an in-depth analysis of these cases in chapter 6 of this thesis.

²⁵ Olorokor (n 15 above).

This view of Mr Oritsejafor is widely held by many Nigerians.²⁶ It is often argued that homosexual behavior is unnatural and falls foul of religious morality. In Nigeria, there is a widespread belief that homosexuality is imported from the West.

While some religious books like the Qur'an and the Bible are most read as explicitly denouncing homosexual conduct, others like the Buddhist holy texts do not. In any event, no one would be able to prove that God hates homosexuals as they express themselves in modern society. This research shows that far from being a Western import, homosexual behaviour existed in many parts of Africa long before the coming of the colonial masters. Studies in the field of sexual behaviour indicate that homosexual people often have no choice in the matter of their sexuality, strongly suggesting that there is a genetic basis of homosexuality.²⁷ This insight not only calls for empathy but also for the paternalistic or legal enforcement of the rights of these sexual minorities. The rights to universal enjoyment of human rights, non-discrimination and recognition before the law are violated when laws are introduced which criminalise consensual adult homosexual conduct. This research employs the radical theory of freedom developed by British philosopher Isaiah Berlin to argue in favour of protection of sexual minorities' rights in Nigeria. Berlin declares that to coerce a man is to deprive him of his freedom.²⁸ To discriminate against sexual minorities is to coerce them, and finally to deprive them of the freedom.

²⁶ For instance, the Nigerian delegation to the second cycle of the UN Universal Periodic Review led by its then Attorney General Mohammed Bello Adoke objected to the recommendation for decriminalisation of existing sodomy laws in Nigeria on the grounds that Nigeria's cultural, religious and moral beliefs abhor same-sex relations. See Human Rights Council 'Report of the working group on the UPR: Nigeria' UN Doc A/HRC.25/6 para 5 & 6.

²⁷ G Wilson & Q Rahman *Born gay: The psychobiology of sex orientation* (2008) 20-50.

²⁸ H Hardy (ed) *Isaiah Berlin, freedom and its betrayal: Six enemies of human liberty* (2002) 44.

1.2 Research problem

On the face of it, the SSMPA and other sodomy laws in Nigeria seem to violate the human rights provision of the Constitution and international law. The Constitution provides for the rights of Nigerian citizens.²⁹ A closer perusal of the 1999 Constitution of Nigeria will show that sexual minorities are arguably entitled to: the right to life;³⁰ the right to dignity of the human person;³¹ the right to privacy and family life;³² the right to freedom of association and assembly;³³ and the right to non-discrimination.³⁴ Nigeria is also a state party to the following international treaties which protect the aforementioned rights: the African Charter on Human and Peoples' Rights;³⁵ the International Covenant on Civil and Political Rights (ICCPR);³⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR);³⁷ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);³⁸ and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).³⁹

The dominant role of customs and religion in society are widely seen as the root of the country's homophobic culture.⁴⁰ The kernel of the argument of the supporters of the Act and other sodomy laws in Nigeria is that consensual same-sex practice is against the religious belief of Nigerians, and that it is an unAfrican lifestyle and capable of corrupting public morality.⁴¹ This line of

²⁹ See Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) as amended in 2011.

³⁰ Section 33 1999 CFRN.

³¹ Section 34 1999 CFRN.

³² Section 37 1999 CFRN.

³³ Section 40 1999 CFRN.

³⁴ Section 42 1999 CFRN.

³⁵ Signed on 31 August 1982 and ratified on the 22 June 1985.

³⁶ Ratified on 29 July 1993.

³⁷ Ratified on 29 July 1993.

³⁸ Signed on 28 July 1988, ratified 28 June 2001 by the Nigeria government.

³⁹ Signed on 23 April 1984, and ratified 15 June 1985.

⁴⁰ Olomjobi (n 18 above) 189.

⁴¹ J Onuche 'Same-sex marriage in Nigeria: A philosophical analysis' (2013) 12 *International Journal of Humanities and Social Science* 91. Onuche for instance asserts that the ethical basis

reasoning was the basis for the passage of the SSMPA by Nigerian law-making bodies and the resurgence of various sodomy laws in Nigeria. As it stands, by criminalising consensual adult homosexual conduct, Nigeria's multiple sodomy laws have effectively branded its LGBT community not just as deviants but also as prospective criminal convicts in spite of the fact that Nigeria has a constitution that protects human rights and is also a state party to lofty international human rights treaties. The problem thus is that of reconciling Nigeria's human rights obligations in the face of its multiple sodomy laws, and the SSMPA.

1.3 Research questions

Within the general framework of the research problem specified above, the research seeks to answer the following specific questions:

1. To what extent does Nigerian law dealing with sexual orientation place criminal liability on consensual adult homosexual conduct?
2. Does Nigerian law regulating homosexual activities *prima facie* violate the human rights provisions of the Nigerian Constitution and Nigeria's international law obligations?
3. What are the main justifications for criminalising consensual adult homosexual conduct in Nigeria and what is their validity?
4. Can the emerging global trend towards rights affirmation and rights to non-discrimination for sexual minorities impact positively on Nigeria's legal system and move Nigeria towards decriminalising consensual adult homosexual conduct?

1.4 Significance of the study

This study investigates the legal validity of Nigeria's multiple sodomy laws and other laws related to homosexuality by subjecting these laws to a validity test

for the opposition to homosexuality is founded on the ground that the practice is an affront on the moral foundations of Nigeria.

against the human rights provision of the Nigerian Constitution and international human rights law. The research aims to break the silence that tends to mystify sexual minorities and make them seem less than human in the eyes of the heterosexual majority. The predicament of sexual minorities will be explored in the context of law, religion and culture. The research further aims to widen the frontiers of knowledge by using Isaiah Berlin's notion of radical liberty to reinforce the belief that sexual minorities are entitled to human rights.⁴²

1.5 Delineation, limitation and scope of the study

The scope of events relating to the focus of this research has 1 June 2017 as its cutoff date. As far as is possible, the thesis updates events to that date.

Conducting research on a very sensitive issue like sexual minorities' rights in a volatile nation like Nigeria will definitely suffer both substantive and methodological limitations. One of the major chain of events that triggered my interest in sexual minorities' rights is the signing of the SSMPA by the President of the Federal Republic of Nigeria. One of the main features of the Act is to prohibit marriage contracts among people of the same sex.⁴³ Even if this researcher could have delved into the wide subject of marriage, from the perspective of the English system of marriage and traditional Nigerian system, this research opts to steer clear of marriage as a concept and limits itself to relevant portions of the Act dealing with sexual minorities, and with the law as it in the main relates to sexual acts.

In appraising the various laws in Nigeria dealing with sexual minorities, this research restricts itself to only the portions relevant to sexual orientation. It is worthy to note that the Act delved into the issue of marriage, as it clearly stated

⁴² This research employs the radical theory of freedom developed by British philosopher Isaiah Berlin to argue in favour of protection of sexual minorities' rights in Nigeria. Berlin declares that to coerce a man is to deprive him of his freedom. See Hardy (n 28 above) 44.

⁴³ The long title of the SSMPA 2013 reads thus: 'An Act to prohibit a marriage contract or civil union entered into between persons of the same sex, solemnisation of same, and for related matters'.

that only a marriage entered between a man and woman is recognised in Nigeria.⁴⁴ As noted earlier, this study avoids that pitfall of digressing to the question of marriage in order to maintain focus on issues related to criminalisation. The study is limited to Nigeria and places particular emphasis on the Idoma-speaking area of Benue State. At the same time, the research will refer to regional and global developments with regard to the homosexual rights question to shed additional light on the Nigerian situation

1.6 Definition of terms

Concepts and terms are frequently used in this thesis because of their relevance to the research. These terms will always be recurring decimals in the study; as such it will be significant to clarify the terms from the onset.

1.6.1 Sexual minorities

This research revolves round the concept 'sexual minorities'. It is therefore of fundamental importance for this phrase to be clarified and understood. This study is investigating the legal validity of Nigerian law dealing with these group of persons. Thus, they constitute the object of investigation of this research. The term 'sexual minorities' has been used by researchers to refer to individuals who have dissimilar sexual orientation from others (the dominant group).⁴⁵ James Wilets describes sexual minorities as including 'all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior or gender identity'.⁴⁶ Jack Donnelly describes sexual minorities as individuals who are despised and targeted by the majority heterosexual society simply on the basis of their sexuality. They basically become targets and victims of discrimination and rights infringement owing to their

⁴⁴ Section 3 SSMPA 2013.

⁴⁵ Olomjobi (n 18 above) 183.

⁴⁶ Cited in LE Huamusse 'The right of sexual minorities under the African human rights system' Unpublished LLM dissertation, University of Western Cape 2006 6.

sexuality.⁴⁷ Donnelly compares sexual minorities to victims of racism, sexism and religious persecutions. Donnelly asserts that ‘they are human beings who have being identified by dominant social groups as somehow less than fully human, and thus not entitled to the same rights as “normal” people, “the rest of us.”⁴⁸ In the Nigerian setting and for the purpose of this research, the term sexual minorities will be used in the context of sexual orientation, rather than gender identity and sex characteristics.

1.6.2 Sex

The *Black’s law dictionary* defines sex as ‘the sum of the peculiarities of structure and function that distinguish a male from a female organism’.⁴⁹ Sex also refers to the framework of biological attributes and characteristics that can be used to categorise a developed individual (for example, genes, chromosomes, gonads, internal and external genital structures, hormonal profiles).⁵⁰ In Nigerian parlance, people have always posed this question to parents when they break the news of the birth of a new child – what is the sex of the new child? (Inquiring whether the new-born child is a girl or a boy). Visser and Picarra identify three main sexes that exist within the definition of biological sex, namely male, female and intersex.⁵¹

1.6.3 Sexual orientation

The *Black’s law dictionary* aptly defines sexual orientation as ‘a person’s predisposition or inclination toward a particular type of sexual activity or

⁴⁷ J Donnelly ‘Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime’ in P Hayden (ed) *The philosophy of human rights* 2001 554.

⁴⁸ Donnelly (n 47 above) 554.

⁴⁹ BA Garner (ed) *Black’s law dictionary* (1999) 1379.

⁵⁰ W Byne, ‘Biology and sexual minorities status’ in IH Meyer & ME Northridge (eds) *The health of sexual minorities: Public health perspectives on lesbian, gay, bisexual, and transgender population* (2007) 65-66. The Academy of Science of South Africa defines sex as the biological and physiological characteristics that define men and women, and this is conditioned by primary and secondary sexual features at birth. See Academy of Science of South Africa: ‘Diversity in human sexuality: Implications for policy in Africa’ (2015) 18.

⁵¹ C Visser & E Picarra ‘Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism’ (2012) 28 *South African Journal on Human Rights* 506-511.

behavior; heterosexuality, homosexuality, or bisexuality'.⁵² By this definition, irrespective of one's sex, that person's sexual preference is the concept of the person's sexual orientation. According to Makau Mutua, the term can be better understood in terms of emotional, sexual and romantic affections. Mutua agrees that sexual orientation falls under heterosexuality, homosexuality and bisexuality.⁵³ To simply put it, 'sexual orientation refers to an individual's sexual preference in partners'.⁵⁴ The study will focus basically on Nigerian law dealing with sexual orientation with particular emphasis on LGBs.

1.6.4 Gender identity

Gender identity is an individual's innate conviction of being of a particular sex, male or female. This sense of identity may contradict the biological sex of that individual.⁵⁵ Gross views gender identity as 'our classification of ourselves (and others) as male or female,'⁵⁶ while Byne sees it similarly as 'one's sense of belonging to the male or female gender category.'⁵⁷ The study will not bring the gender identity question into focus as much, but will make a peripheral reference to aspects of Nigerian law dealing with gender identity.

⁵² Garner (n 49 above) 1379. In a similar vein, the Yogyakarta Principles explains sexual orientation to mean 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'. See *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* available at www.yogyakartaprinciples.org/principles-enpdf (accessed 6 October 2017).

⁵³ M Mutua 'Sexual orientation and human rights: Putting homophobia on trial' in S Tamale (ed) *African sexualities: A reader* (2011) 457.

⁵⁴ Visser & Picarra (n 51 above) 512.

⁵⁵ Academy of Science of South Africa (n 50 above) 92. The concept is also understood to mean 'each persons deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'. See *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* available at www.yogyakartaprinciples.org/principles-enpdf (accessed 6 October 2017).

⁵⁶ R Gross *Psychology: The science of mind and behavior* (2010) 563.

⁵⁷ Byne (n 50 above) 66.

1.6.5 Heterosexuality

Heterosexuality is a form of sexual orientation where the individual is attracted to members of the opposite sex romantically and sexually.⁵⁸ This kind of sexual orientation is the most acceptable in Nigeria. Any form of sexual expression outside heterosexuality is an aberration in Nigeria.

1.6.6 Homosexuality/homosexual conduct

Homosexuality is another term that is frequently used in this study. It is another form of sexual orientation that involves romantic and sexual attraction or behaviour between members of the same sex or gender.⁵⁹ The bulk of this research revolves round this concept. Nigeria has put in place several laws prohibiting any form of sexual relationship between persons of same sex, be it a marriage relationship or a romantic relationship.⁶⁰ The concept of homosexuality is clearly distinguished from homosexual conduct. While homosexuality as defined above is a form of sexual orientation, homosexual conduct is the practical and physical expression given to that orientation by consenting adults of same sex in the confines of privacy. Thus, homosexual conduct or homosexual acts are better used as activity criminalised and punished under Nigerian law.

1.6.7 Homophobia

Homophobia is an expression of hate in action and words, or even gestures towards homosexuals. More often than, this attitude is expressed by the heterosexual majority. Ottoson defines homophobia as ‘the fear of, aversion to, or discrimination against homosexuality or homosexuals, the hatred, hostility, or disapproval of homosexual people’.⁶¹ Homophobia in the Nigerian context takes the form of oppressive laws, physical violence targeted at homosexuals,

⁵⁸ Academy of Science of South Africa (n 50 above) 19.

⁵⁹ Academy of Science of South Africa (n 50 above) 19.

⁶⁰ These laws are extensively discussed in chapter 2 of this thesis.

⁶¹ D Ottoson *State-sponsored homophobia: A world survey of laws prohibiting same sex activity between consenting adults* (2009) 4.

verbal assault, ostracism from family, etc. Makau Mutua sees homophobia as ‘a range of feelings and prejudices against homosexuality’.⁶² According to Mutua, these negative feelings can be manifested in the form of ‘apathy, contempt, prejudice, irrational fear and aversion and can sometimes manifest themselves in discrimination, violence or even murderous rage’.⁶³

1.6.8 LGBT persons

The abbreviation refers to lesbians, gays, bisexuals, and transgendered persons. In this research, this abbreviation will be often referred to, as most of the legislation in Nigerian dealing with homosexual offences has in contemplation, gay, lesbian, bisexual, and transgender activities.

A lesbian is a female who is sexually attracted to another female or indulges in sexual activities with a female to the exclusion of male partners.⁶⁴ The Sharia Penal Code Law of Zamfara State, one of the sodomy laws this research focuses on, supplies a descriptive definition of lesbianism, stating clearly that ‘whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of sexual excitement of one another has committed the offence of lesbianism’.⁶⁵

A gay person on the other hand is the direct opposite of the lesbian.⁶⁶ A man whose sexual orientation is a desire for sexual, romantic and intimate affairs with another male is said to be gay.⁶⁷ The term is mostly associated with male homosexuals. Bisexuality is romantic and sexual attraction toward both sexes.⁶⁸ People who engage in bisexuality are often referred to as bisexuals. From the explanation it is possible for a lesbian to be a bisexual and a gay to also be a bisexual.

⁶² Mutua (n 53 above) 459.

⁶³ Mutua (n 53 above) 459.

⁶⁴ JD Wilets ‘From divergence to convergence? A comparative and international law analysis of LGBTI rights in the context of race and post-colonialism’ (2011) 21 *Duke Journal of Comparative & International Law* 631.

⁶⁵ See section 134 of the Sharia Penal Code of Zamfara State.

⁶⁶ Wilets (n 64 above) 631.

⁶⁷ Academy of Science of South Africa (n 50 above) 91.

⁶⁸ See Wilets (n 64 above) 631. See also Academy of Science of South Africa (n 55 above) 91.

Transgender is another term that is given peripheral attention in this study. Visser and Picarra succinctly explain the concept in the following words:

Transsexuals, simply put, believe that their true sex is not the one that has been assigned to them in terms of their biological and anatomical sex characteristics. A biological male transsexual has the desires and constant belief that he is in fact a female, and the opposite is true of a biological female transsexual.⁶⁹

Transsexualism is viewed in some medical quarters as a medical condition correctable through surgeries.⁷⁰ Transsexualism and transgenderism are often used interchangeably. They are sometimes mistaken for one and the same phenomenon. While transsexuals do request sex-change procedures to transition to the sex they identify with psychologically, transgendered persons do not necessarily wish to change their sexes despite not fitting into the rigid male-female mold.⁷¹

The above terms ('LGBT') should be distinguished from 'intersex'. Intersexed people manifest both male and female sexual characteristics.⁷² Julius Kaggwa, a Ugandan intersex person, narrated his own story on the experience of being an intersex as follows:

The climax of my struggle happened during puberty when, in an all-girls boarding school, I failed to fulfill age-old female sexuality milestones, such as menstruation and sexual attraction to the 'opposite' sex. Although I had negligible breast development, I grew unsightly body hair on my face, legs, and arms. The most alarming of all was the progressive development of male genitalia and consequent attraction to some of the girls I associated with.⁷³

Kaggwa's story is a classic example of an individual born with distinct male and female features, who desperately sought for answers to his identity questions.⁷⁴ Sally Gross stated more boldly: 'I was born to Jewish parents in Cape Town, South Africa in 1953. Although I did not realise this, my genitalia were

⁶⁹ Visser & Picarra (n 51 above) 512.

⁷⁰ Gross (n 56 above) 563.

⁷¹ Visser & Picarra (n 51 above) 514-515.

⁷² Wilets (n 64 above) 631.

⁷³ J Kaggwa 'Intersex: The forgotten constituency' in Tamale (n 53 above) 231.

⁷⁴ Kaggwa (n 73 above) 231-234.

ambiguous and it is clear, in hindsight, that there were difficulties deciding whether I was to be classified as a little boy or as a little girl. In short I was intersexed'.⁷⁵ Most intersex persons, like transsexuals, often seek medical intervention to help them align with their properly identified sex.⁷⁶

The issues affecting intersex persons are often quite distinguishable from those affecting gay and lesbian – and to some extent, transgender – persons. For this reason, intersex persons are not covered by this study. If broader reference to the sex and gender non-conforming community is made, the term 'LGBT' is therefore used.

1.6.9 Sodomy

In academic discourse on the subject of homosexuality, some scholars have often used the phrase 'sodomy and sodomy laws'⁷⁷ in preference to homosexual conduct and homosexuality laws. Sodomy derives its origin from the Biblical city of Sodom and Gomorrah where the act of same-sex practice was first muted in Biblical records.⁷⁸ Sodomy is therefore, for the purpose of this research defined and punished under Nigerian criminal law as consensual same-sex conduct between adults in the sphere of their privacy, clearly different from homosexual rape contemplated by the Biblical record of the incident of Sodom and Gomorrah.

⁷⁵ S Gross 'The chronicle of an intersexed activist's journey' in Tamale (n 53 above) 235.

⁷⁶ Gross (n 75 above) 235-237.

⁷⁷ Hepple (n 7 above).

⁷⁸ The Holy Bible (New Living Translation) Genesis 19: 4-5. Mushin Hendricks has rightly posited that the act of homosexuality attempted in the town of Sodom was non consensual and that makes it a prospective homosexual rape rather than an attempted homosexual conduct. See 'Islamic texts; A source of acceptance of queer individuals into mainstream Muslim societies' available at www.theinnercircle.org.za/wp-content/uploads/2014/11/islamic-texts.MHendricks.pdf (accessed 8 October 2017). For an excellent rendition of the story of Sodom and Gomorrah and the origin of the word 'sodomy' see AJ Osogo 'An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the 'seperability thesis', secularism and international human rights' Unpublished LLD thesis, University of Pretoria (2016) 79-83.

1.6.10 International human rights law

The term 'international human rights law' is used in the thesis as comprising both law at the global level, developed under the United Nations, and at the regional level, under the African Union.

1.7 Methodology of approach

This research employs basically three methodological approaches: The doctrinal (analytical) method, the comparative method and the multidisciplinary method. The work did not strictly employ the comparative approach, however, in chapter 6, the study took a voyage round the world to seek inspiration from selected jurisdictions and regional systems where the sexual minorities' rights debate has been or is being dealt with.

1.7.1 Doctrinal (analytical) approach

In this doctrinal approach to the research, primary and secondary sources are relied upon to analyse what the Nigerian law dealing with sexual orientation is, and to further answer the research questions raised related to the rights of rights-holders and the state obligations as duty-bearer.

Primary source analysis

The primary sources analysed include the various anti-homosexuality codes in Nigeria such as the Criminal Code Act, the Penal Code Act, the Sharia Penal Codes and the SSMPA. Analysis of these primary sources reveals the extent to which they regulate or interfere with the conduct of sexual minorities. These sodomy laws are further analysed to see how their provisions violate the rights of sexual minorities as provided and entrenched in the Nigerian Constitution and international legislation.

Additional primary sources that are analysed include international, regional and domestic human rights law. The human rights provisions of the Constitution of the Federal Republic of Nigeria are probed. The human rights obligation of Nigeria under international law (i.e. global and regional human

rights treaties such as ACHPR, ICCPR, ICESCR, CAT and CEDAW) are critically appraised.

Secondary source analysis

The research relies on relevant academic articles and books that throw light on the concept of sexual minorities and sexual orientation, Nigeria's sexual minorities and the question of human rights.

1.7.2 Comparative approach

Comparative and descriptive studies of Nigeria's multiple sodomy laws

Nigeria is a diverse country with diverse sodomy laws prohibiting and penalising sexual conduct among members of the same sex. These sodomy laws regulating the sexual orientation of Nigerians are critically analysed in chapter 2 of this study to ascertain the degree of prohibition and severity of the penalties obtainable in the various codes.

Comparative studies of cases/decisions of treaty bodies/countries

The comparative approach to the study is very prominent in chapter 6 of this thesis. Domestically, courts in South Africa, Botswana, Kenya, and Uganda have given judgments in cases related to the violation of the rights of sexual minorities and the legality of criminal codes penalising such conduct. South Africa today uniquely stands out and leads other African countries in sexual minority rights jurisprudence. The historical perspective of South Africa's remarkable odyssey towards a holistic rights recognition for homosexuals mirrors a steady gradualist approach. The Constitution of South Africa expressly forbids discrimination on the basis of sexual orientation. Key judicial pronouncements have been made by South African courts affirming the non-discriminatory spirit of the Constitution. Yet this homosexuality rights-affirming socio-political environment was not always in place. Anti-homosexual laws had existed for over a hundred years before the adoption of the 1996 Constitution of South Africa. The struggle for

the recognition of homosexuality rights mirrored the anti-apartheid struggle, with gay and lesbian organisations springing up to fight for LGBT rights while identifying with the anti-apartheid movement. The process of recognizing LGBT rights thus progressed from the stage of social mobilisation to the stage of political action and finally judicial victory.⁷⁹ The fact that South Africa once had entrenched sodomy laws in its statute books and was once a hotbed for homophobia makes South Africa a suitable source of inspiration to Nigeria, hence a good comparator. Similar to South Africa, the wave of decriminalisation of consensual adult homosexual conduct has been extended to other African countries such as Mozambique, Cape Verde, Mauritius and Seychelles.⁸⁰ These latter countries which hitherto, had sodomy laws are studied to understand the process that led to decriminalisation of homosexual conduct in their jurisprudence, and how it can benefit Nigeria.

In another vein, some other African countries with constitutions similar to Nigeria, arguably protecting human rights of sexual minorities, along the line also having draconian sodomy laws similar to Nigeria, are using the instrument of the courts to make positive pronouncements for sexual minorities. Those with similar constitutions and sodomy laws to Nigeria but are taking tentative steps towards decriminalisation are Kenya, Uganda and Botswana.⁸¹

In the Asian continent, India stands out as a worthy study country for Nigeria with the historical significance both countries share in the sodomy provision in their statute book. Furthermore, the Indian Constitution shares similar human rights features with the Nigerian Constitution.⁸²

The international human rights systems have also charted a course for sexual minorities' rights. The United Nations Human Rights Committee have decided landmark cases on the rights of sexual minorities. The European Court

⁷⁹ See section 6.2 of chapter 6 for a detailed discussion of the South African perspective on rights recognition for sexual minorities.

⁸⁰ See section 6.4 of chapter 6 for the discussion on Mozambique, Cape Verde, Mauritius, and Seychelles.

⁸¹ See section 6.5 of chapter 6 for the discussion on Botswana, Kenya, and Uganda.

⁸² See section 6.6 of chapter 6 for the discussion on India.

of Human Rights has also decided interesting cases on the rights of sexual minorities. The inter-American rights system is not left out too. A comparative study of these systems is made in chapter 4 and chapter 6 to see how Nigeria can key into the emerging global trend for rights recognition for sexual minorities.

1.7.3 Multi-disciplinary approach

This research in part, employs a multi-disciplinary approach. The justifications for criminalising homosexuality in Nigeria are legal non-legal; the non-legal are essentially religious, cultural and moral. As such, this research goes beyond being strictly legal as it employs historical studies of Nigerian societies and cultures. The research on homosexual practices in pre-colonial and colonial Idomaland is conducted based on the original insights and emotional affiliation of this researcher who is from the Idoma speaking area of Benue State. The researcher also obtained informal information from the guide keepers and custodian of oral traditions of Idomaland. The research delves into religion and philosophy. The validity of the non-legal bases for the criminalisation of same-sex activities is tested against the legal yardstick.

1.8 Literature review

There is a paucity of academic work regarding the law regulating sexual orientation in Nigeria. *Okonkwo & Naish on criminal law in Nigeria* is one of the most well-established works on penal law in Nigeria.⁸³ This text highlights the various categories of crime under Nigerian criminal law, analysing the definitions and legal elements of these offences. The authors only touch on unnatural offences (homosexual offences) peripherally. They concede that ‘there are provisions in the code dealing with other sexual offences but it is not practicable to deal with all of them.’⁸⁴ Okonkwo and Naish devote only a page to the offence

⁸³ CO Okonkwo & ME Naish *Okonkwo & Naish on criminal law in Nigeria* (1980).

⁸⁴ Okonkwo & Naish (n 83 above) 227.

of homosexuality and the discussion of the offence is restricted to the Criminal Code Act,⁸⁵ which is just one out of 16 sodomy laws in Nigeria. No text in Nigeria has comprehensively discussed the various and multiple sodomy laws in Nigeria. It is this lacuna that the first research question of this study aims to fill.

Ostien provides a chronicle and historical insight into criminal law legislation in Northern Nigeria.⁸⁶ In their article 'Changes in the law in the Sharia states aimed at suppressing social vices',⁸⁷ Ostien and Umaru enumerate the various sodomy laws operative in the Sharia states in Nigeria. Policy reports such as the International Lesbian and Gay Association report of May 2008 provides vital insight into sodomy laws of over 90 countries. However, discussion on Nigerian sodomy laws is restricted to the portion of the Criminal Code Act.⁸⁸

The question of whether Nigerian sodomy laws violate the human rights provision of the Nigerian Constitution and international law, and by extension the infringement on the rights of sexual minorities, has received appreciable attention. Olomjobi's *Human rights on gender, sex and the law in Nigeria* supplies a good analysis of the SSMPA, and how it violates human rights under international law.⁸⁹ Olomjobi contends that the SSMPA undoubtedly attempts to negate the Nigerian constitutional right to freedom of peaceful association.⁹⁰ Olomjobi further contends that a crucial point to note is that the provisions of the law in its current posture contravenes article 1 of the Universal Declaration of Human Rights, 1948, which declares that all human beings are born equal in dignity and rights.⁹¹ The works of Ayeni⁹² and Onuora-Oguno⁹³ points to the

⁸⁵ Okonkwo & Naish (n 83 above) 227.

⁸⁶ P Ostien (ed) *Sharia implementation in Northern Nigeria 1999-2006: A sourcebook* (2007).

⁸⁷ P Ostien & MJ Umaru 'Changes in the law in the Sharia states aimed at suppressing social vices' in Ostien (n 86 above) vol 3, 9.

⁸⁸ Ottoson (n 61 above) 28.

⁸⁹ Olomjobi (n 18 above).

⁹⁰ Olomjobi (n 18 above) 189.

⁹¹ Olomjobi (n 18 above) 189.

⁹² VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same-Sex Marriage (Prohibition) Act' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 203-237.

⁹³ AC Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Government of Nigeria* in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 238-244.

direction that there is likely violation of the Nigerian Constitution and international law by Nigerian sodomy laws and the SSMPA.

The dominance of custom, religion and public morality form the tripartite basis of Nigeria's homophobic culture.⁹⁴ Kuwali's critical interrogation of cultural, religious, and moral justifications for criminalising adult homosexual conduct fits into the thrust of the third question of this research.⁹⁵ Kuwali rightly asserts that 'governments have invoked justifications such as cultural sovereignty, protection of public morals, religious sanctity and traditional values as justifications for criminalising queer sexuality'.⁹⁶ In the article, 'Same sex marriage in Nigeria: A philosophical analysis'⁹⁷ Onuche, rationalising the criminalisation of same sex practices, expresses the view that 'the challenge is ethical, same-sex couples want the same rights as heterosexual couples. However, most Nigerians believe that homosexuality is not part of our culture and therefore cannot gain ground here'.⁹⁸ Onuche further asserts that 'as long as Nigeria's moral context remains communitarian, homosexuality, as it is today, will remain an aberration, deviant, unnatural, foreign and unacceptable sexual practice'.⁹⁹ According to Onuche, 'homosexuality as it is today has failed the Nigerian moral test'.¹⁰⁰ Ebobrah in the article 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator',¹⁰¹ holds a different view. Ebobrah argues that 'there is as yet no convincing basis to make a claim that the rejection of homosexuality and its clothing with cultural opprobrium is the result of a resort to compelling African values'.¹⁰² The missing link in most of these articles on culture, morality and religion as relating to the question of homosexuality, is the obvious fact that their

⁹⁴ Olomjobi (n 18 above) 189.

⁹⁵ D Kuwali 'Battle for sex?: Protecting sexual(ity) rights in Africa' (2014) 36 *Human Rights Quarterly* 22-60.

⁹⁶ Kuwali (n 95 above) 58.

⁹⁷ Onuche (n 41 above).

⁹⁸ Onuche (n 41 above) 91.

⁹⁹ Onuche (n 41 above) 98.

¹⁰⁰ Onuche (n 41 above) 98.

¹⁰¹ (2012) 1 *International Human Rights Review* 110-136.

¹⁰² Ebobrah (n 101 above) 135.

authors have not conducted extensive researches to understand the perception of Nigerians as per their cultural, moral and religious inclination towards homosexual activities.

There is an emerging consensus among scholars on the rights recognition for sexual minorities on the platform of international human rights treaties. The judicial mechanism of the UN has affirmed the rights of sexual minorities in a plethora of cases, as noted by Mittelstaedt.¹⁰³ Mittelstaedt lists the ICCPR, CEDAW, and the ACHPR among the sources of international human rights law that advocate rights protection for sexual minorities.¹⁰⁴ Mittelstaedt points out clearly that Nigeria's current sodomy laws conflict with its international law obligations in the light of the judgements of the UNHRC affirming homosexual rights.¹⁰⁵ Thomas also shares the view that non-discrimination and equal protection under international law extend to sexual orientation, just like other groups.¹⁰⁶ MacAuthor's article also succinctly presents the application of sexual minorities' rights under the UN legal framework.¹⁰⁷ Braun notes that though no UN human rights treaty explicitly references sexual orientation as a protected right, the jurisprudence of the UN Human Rights Committee demonstrates that 'the identity of LGBT people is also protected under the term "other status".'¹⁰⁸

At the regional level, an important human rights instrument that arguably protects sexual minorities from discrimination which Nigeria has ratified and domesticated is the African Charter on Human and Peoples' Rights.¹⁰⁹ Murray and Viljoen point out that the Charter too does not make reference to the topic

¹⁰³ E Mittelstaedt 'Safeguarding the rights of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations' (2008) 9 *Chicago Journal of International Law* 356.

¹⁰⁴ Mittelstaedt (n 103 above) 359-367.

¹⁰⁵ Mittelstaedt (n 103 above) 371-377.

¹⁰⁶ M Thomas 'Teetering on the brink of equality: Sexual orientation and international constitutional protection' (1997) 17 *Boston College Third World Law Journal* 365-373.

¹⁰⁷ G MacAuthor 'Securing sexual orientation and gender identity rights within the United Nations framework and system: Past, present and future' (2005) 15 *Equal Rights Review* 25.

¹⁰⁸ K Braun 'Do ask, do tell: Where is the protection against sexual discrimination in international human rights law?' (2014) 29 *American University International Law Review* 870.

¹⁰⁹ See African Charter on Human & Peoples' Right (Ratification & Enforcement) Act Chapter 10 LFN 1990.

of sexual orientation, but an inclusive interpretation could bring gays and lesbians under the scope of the robust rights provided in the Charter.¹¹⁰ The works of Rudman,¹¹¹ Ibrahim¹¹² and Johnson¹¹³ converge on the assertion that protection exists for sexual minorities within the AU framework.

It is inspiring to note that rights are available for sexual minorities under international human rights law. It is revealing that Nigeria's current sodomy laws seemingly violate these rights. No court in Nigeria has yet given a positive pronouncement on the rights of sexual minorities rather people have been tried, convicted and jailed in Nigeria based on their sexual orientation. The shortcoming of the articles reviewed above is the failure to create a domestic legal basis upon which the international law jurisprudence on sexual orientation can be invoked to affirm rights for Nigeria's LGBT community. The thesis seeks to fill this lacuna.

This research employs the radical theory of freedom developed by British philosopher Isaiah Berlin¹¹⁴ to argue in favour of the protection of the rights of sexual minorities. Berlin declares that to coerce a man is to deprive him of his freedom.¹¹⁵ Ferrell's work on Berlin, 'Isaiah Berlin: Liberalism and pluralism in theory and practice,'¹¹⁶ is a valuable prognosis on Berlin's idea of liberty.

No study has undertaken to explore all the sodomy laws in Nigeria and how they regulate the affairs of sexual minorities from the perspective of the legality of these laws, in the light of the Nigerian Constitution and international human rights law. This research aims to be the most panoramic and

¹¹⁰ R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and the procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86-111.

¹¹¹ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27.

¹¹² AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263-281.

¹¹³ P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 249-279.

¹¹⁴ Hardy (n 28 above) 44.

¹¹⁵ Hardy (n 28 above) 44.

¹¹⁶ (2009) 8 *Contemporary Political Theory* 295-316.

comprehensive study on the raging question of the human rights of sexual minorities in Nigeria.

1.9 Chapter analysis

This thesis is structured into seven chapters in a bid to adequately answer the four research questions projected in this work.

1.9.1 Chapter 1: Introduction to the thesis

This chapter consists of fragments dealing with background and problem statement, the research questions, the significance of the study, assumptions, limitations and scope of the study, definition of terms, methodology, literature and chapters review. The background explains the intrigues and politics necessitating the undertaking of this research. Germane research questions are raised in this chapter. These questions are what gave rise to the subsequent chapters and the issues that were investigated in subsequent chapters. The significance of the study is also emphasised. This research is not merely an academic exercise but also aims to be of practical relevance to society. Its relevance to humanity and society is well reflected in the significance of the study. The research methodologies employed in this study are presented further in a logical sequence in this chapter.

1.9.2 Chapter 2: Sodomy laws and the status of sexual minorities under Nigerian criminal law

This chapter deliberates on sodomy laws in Nigeria and how these laws regulate the conduct of sexual minorities in the country. Nobel peace laureate, Aung San Suu Kyi, famously stated that ‘within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of isolation, and fear of failure’.¹¹⁷ This quote aptly captures the apprehension of sexual minorities in Nigeria with regard to

¹¹⁷ AS Suu Kyi *Freedom from fears* (1991) 180.

the deleterious effect the application of Nigeria's multiple sodomy laws will have on their individual and collective existence.

The chapter is divided into eight sections. Coming after the introductory note, the second section gives a detailed description of penal laws in Nigeria and the criminal justice system administration operative in the country, with particular emphasis on the competency and jurisdiction of courts to administer the various sodomy laws. Section three traces the historical origin of sodomy laws and their introduction into the Nigerian criminal jurisprudence. The processes leading to the enactment of the SSMPA are also looked into. Section four looks at the classification of homosexual offences under the Criminal Code Act, while section five of this chapter analyses homosexual offences under the Penal Code Act. Section six focuses on the classification of homosexual offences under the Sharia penal code laws of various Sharia compliant states in Nigeria. Section seven focuses on the SSMPA, and relevance sections of it pertaining to homosexuality. The chapter closes with a critical examination of the application of sodomy laws in Nigeria.

1.9.3 Chapter 3: The human rights implications of Nigeria's homosexuality laws under the Nigerian Constitution

This chapter is an attempt to answer the second research question of this thesis which primarily seeks to determine whether Nigeria's sodomy laws in any way violate the Nigerian Constitution. The chapter takes a critical look at the human rights provisions entrenched in the Nigeria Constitution with the aid of decided cases. The chapter further seeks to determine the extent to which the human rights provisions in the Constitution embrace sexual minorities' rights. The possible violations of the rights of sexual minorities by the continued existence of the anti-homosexuality laws are examined.

1.9.4 Chapter 4: The human rights implications of Nigeria's anti-homosexuality laws under international law

Firstly, the status of international law and domestication of international treaties in Nigeria is the entry point of this chapter. The other sections of the chapter look at the rights of sexual minorities under international law, since Nigeria is a state party to international treaties such as the ICCPR, ICESCR, the CAT, CEDAW and ACHPR. These international treaty documents were critically analysed to see how, *prima facie*, Nigerian sodomy laws violate the rights of sexual minorities in the international human rights regime.

1.9.5 Chapter 5: The validity of the justifications for criminalising consensual same-sex conduct in Nigeria

This chapter is an attempt to critically investigate the justification for criminalising same-sex conduct in Nigeria. The first section of this chapter introduces the three major reasons routinely supplied by Nigerians to justify their near uncompromising rejection of homosexuality. The second section deals with public morality justification views. It is on the basis of the public outcry against the supposed immorality of homosexual practices that this research will derive its theoretical framework from the work of Isaiah Berlin. This study employs Berlin's theory of negative liberty to reinforce the belief that sexual minorities are entitled to human rights. The section also critically examines the Hart-Devlin debate in the Nigerian context. The third section looks at the religious justification for the antagonism against homosexuality. This section takes into cognisance the influence of Nigerian's two dominant religions (Christianity and Islam) in Nigerians' perception of homosexuality. The section examines the degree to which the ethics of interpretation is conditioned by the perspectives of the two religions on homosexuality. The chapter considers the cultural justification for the opposition to homosexuality and consequent legislation against the practice.

1.9.6 Chapter 6: The emerging trend on rights recognition for sexual minorities: Fertile sources of positive inspiration for the Nigerian LGBT discourse?

This chapter takes a peripheral voyage round the globe and establishes that there is a growing recognition for sexual minorities' rights protection as several countries are reforming their penal laws towards total decriminalisation of homosexuality. Global and regional human rights bodies have, through the instrumentality of their judicial institutions, given judgments that affirm the rights of sexual minorities. The first section of this chapter examines South Africa's legislative and judicial journey towards rights recognition for sexual minorities. The chapter also focuses on other African countries where domestic judicial decisions on sexual minorities' rights have in one way or the other beamed a beacon of hope. The third section analyses India's jurisprudence on sexual orientation and gender identity with a particular emphasis on the Indian Penal Code and the Indian Constitution. This section further examines developments in regional human rights organisations. It discusses the jurisprudence of sexual orientation and gender identity of the European Court of Human Rights. The section also examines the human rights instruments of the Organisation of American States. This chapter shows that the domestic legal basis for the emerging global consensus on the rights of sexual minorities is anchored on the Nigerian Constitution and the Fundamental Rights and Enforcement Procedure Rules 2009.

1.9.7 Chapter 7: Conclusion and recommendations: Towards a future of equality and fairness for sexual minorities in Nigeria

This concluding chapter argues that in view of the emerging global consensus on the imperative of recognising the rights of sexual minorities as arguably protected by the Nigerian Constitution and international human rights law, Nigeria's multiple sodomy laws infringe on the rights of sexual minorities. This thesis argues that the existing sodomy laws violate the human rights provisions of the 1999 Constitution and international human rights instruments and

conventions to which Nigeria is a state party. The thesis insists that the religious, cultural and moral justifications for the vicious antagonism towards same sex conduct in Nigeria are thoroughly flawed.

Chapter 2: Sodomy laws and the status of sexual minorities under Nigerian criminal law

2.1 Introduction

As in every other country, criminal law is an integral aspect of the Nigerian legal system. It is the aspect of law that regulates the potentially criminal conduct of people. Criminal law stipulates what constitutes a crime, what conduct amounts to a crime, and what actions are not crimes. To this end the Constitution of the Federal Republic of Nigeria clearly stipulates that, for conduct to be considered a criminal act, it must be prohibited by a written law.¹ To a large extent, Nigerian criminal law derives the bulk of its content from English common law.² Even if the bulk of Nigerian criminal law derives its origin from English common law, various other legislative entities in Nigeria have made enactments that regulate criminal conduct. Each state has a legislative arm of government saddled with the responsibilities of law making.³ Besides the 36 states and the capital city, there are 774 local government areas, all with legislative competence.⁴ The federalist nature of Nigeria makes the criminal legal system very complex as each state can enact criminal laws that are in consonance with the culture and customs of the people in that state.

Homosexual acts are among the practices prohibited under Nigerian criminal law. These offences are technically called ‘offences against morality’⁵ and ‘unnatural offences’.⁶ As noted earlier, the federal structure of government operative in Nigeria makes it complex to analyse criminal law in Nigeria as there

¹ Section 36(12) 1999 Constitution of Federal Republic of Nigeria (as amended in 2011).

² CO Okonkwo & ME Naish *Okonkwo and Naish on criminal law in Nigeria* (1980) 3.

³ Section 4(7) of the 1999 CFRN (as amended), gives the House of Assembly of a state the power to make laws for the peace, order and good governance of the state.

⁴ See first schedule part 1 & 11 of the 1999 CFRN for a detail list of the 36 component states and 774 local government areas in Nigeria.

⁵ Under the Criminal Code Act applicable in the Southern Nigeria, homosexual offences are termed ‘offences against morality’. See chapter 21 of the CCA specifically section 214.

⁶ The phrase ‘unnatural offences’ is used in section 284 of the Penal Code Act applicable in the Northern Nigeria to describe homosexual offences.

is a multiplicity of laws regulating criminal conduct. The same multiplicity dilemma is therefore applicable to the laws regulating homosexual offences in Nigeria. There are several statutes related to homosexual conduct in Nigeria. Several states of the federation have enacted unique laws prohibiting homosexual activities.⁷ These laws carry legal weight independent of federal laws.

The aim of this chapter is to identify all the laws, both at the federal and state level, criminalising homosexual activities in Nigeria, and to make a critical analysis of the laws as they regulate the affairs and conducts of same-sex practitioners in Nigeria. This chapter identifies the various sodomy laws in Nigeria and discusses how they impact on the activities of sexual minorities. There are 36 states in Nigeria.⁸ Each of these states has a penal code governing the conduct of the people. The diversity in the penal laws of Nigeria is a result of the cultural and religious diversity of the Nigerian people. Each of the penal laws have peculiar provisions that regulate homosexual conduct. Aside from the penal laws, some states have advanced further by enacting laws particularly for regulating homosexual conduct and other ‘immoral’ activities.⁹ The SSMPA, however, is unique in that it is applicable to the entire Federal Republic of Nigeria. It is worthy to note that Nigeria inherited a substantial part of its penal law from Britain.

Some 42 countries with anti-sodomy laws – over half of the countries that maintain criminal sanctions against homosexuals – are former British colonies.¹⁰ In the colonial period, very strict anti-‘sodomy’ laws were imposed

⁷ By virtue of the enabling provision of section 4(7) of the 1999 CFRN (as amended), 12 states in Nigeria namely Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara have all enacted Sharia Penal Codes which redefined the concept of homosexual crimes different from the position in the Criminal Code Act and Penal Code Act. See the list of the above mentioned states and date of enactment in D Ottosson *Homophobia: A world survey of laws prohibiting same sex activity between consenting adults* (2009) 29.

⁸ See first schedule. Section 3 part of the 1999 CFRN.

⁹ See for instance (n 7 above).

¹⁰ J Hepple ‘Will sexual minorities ever be equal? The repercussions of British colonial “sodomy” laws’ (2012) 8 *Equal Rights Review* 52.

on all the colonies controlled by Britain.¹¹ Nigeria is one of these countries. The interesting aspect of Nigeria's history of criminalisation of homosexual conduct is the fact that the country has introduced and enacted additional draconian sodomy laws at both the federal and state levels. Knowing how the sodomy laws regulate the day to day life of sexual minorities in Nigeria will help shed more light on whether the rights of sexual minorities are being violated or not.

The chapter gives a brief overview of the Nigerian penal law and criminal justice system and traces the origin of homosexual offences under Nigerian criminal law. The chapter further identifies the homosexual laws in Nigeria and subjects each of the laws to critical analysis.

2.2 An overview of Nigerian penal law and criminal justice system

Criminal law and procedure is an embodiment of all the laws, both substantive and procedural, which regulate criminal conduct and criminal trials. For the purpose of giving a glimpse into Nigerian criminal law, a geographical demarcation of Nigeria is imperative. Nigeria is often divided along religious, cultural and geographical lines, distinguishing between southern and northern Nigeria. This division also largely determines what constitutes a crime. The predominantly Muslim northern Nigeria tends to define crime and criminal behaviour from the perspective of the Holy Qur'an. Thus, an act, such as consumption of alcohol, is seen as a criminal offence in the north, whereas in the southern part of Nigeria, consumption of alcohol is seen as a social and acceptable habit, and not a crime.¹² It is interesting to note, however, that

¹¹ Hepple (n 10 above) 52.

¹² Concerning consumption of alcoholic drinks, the Holy Qur'an 2:219 states as follows: 'They ask you concerning alcoholic drink and gambling say; in them there is a great damage, and benefit for men, but the sin of them is greater than their benefit'. The Qur'an further admonishes Muslims to avoid alcohol in Qur'an 5:90, 'O you who believe! Intoxicants (all kinds of alcoholic drinks) gambling, *Al-Anzab*, and *Al-Azlan* are an abomination of Shaitan's handiwork. So avoid that in order than you may be successful'. in line with the Qur'anic prohibition of alcohol, the PCA which is applicable in the predominant Muslim north of Nigeria in section 403 provides that 'whoever being of the Moslem faith drinks anything containing alcohol other than for a medicinal purpose shall be punished with imprisonment for a term which may extend to one month or with fine which may extend to ten naira or with both'. In Zamfara State where the Sharia Penal Code was first introduced, the offence of drinking alcohol

criminal laws in southern and northern Nigeria are unanimous in their criminalisation of homosexual acts. The following are some of the criminal statutes available in the north of Nigeria: the Penal Code Act;¹³ the Criminal Procedure Code;¹⁴ the Penal Code Laws;¹⁵ the Sharia Penal Codes;¹⁶ the Area Courts Edicts;¹⁷ Borno State Law on Prostitution, Homosexual, Brothel and Sexual Immoralities;¹⁸ Kano State Law on Prostitution, Homosexuality and Other Acts (Prohibition) Law.¹⁹

For the southern Nigeria, the following criminal enactments are applicable: the Criminal Code Act;²⁰ Criminal Code laws²¹ the Criminal Procedure Act;²² Criminal Procedure Laws; and the Administration of Criminal Justice Act.²³

Criminal statutes that are applicable uniformly in both north and southern Nigeria are: the Armed Forces Act;²⁴ the Children and Young Persons Act;²⁵ the Nigeria Security and Civil Defense Act;²⁶ the Corrupt Practices and other Related Offences Act;²⁷ the Economic and Financial Crimes Act;²⁸ the Evidence Act.²⁹ The list is, however, not exhaustive.

In a democracy such as Nigeria, the dispensation of criminal justice is the joint responsibility of the three arms of government, namely, the legislature, the executive and the judiciary. The legislative arm of the federal government

is punishable with caning of 80 lashes. See, sections 149, 150 and 151 of the Sharia Penal Code Law No. 10 of 2000 of Zamfara State.

¹³ Cap P3, Laws of the Federation of Nigeria 2004.

¹⁴ Cap 30, Laws of Northern Nigeria, 1963.

¹⁵ Re-enacted version of the PCA by the 19 States that make Northern Nigeria.

¹⁶ Enacted by 12 States in the northern Nigeria, see Ottosson (n 7 above) 29.

¹⁷ The Area Courts Edicts of 1967 establishes the Area Courts in the northern Nigeria.

¹⁸ Borno State of Nigeria Gazzette No 42 volume 26 2001.

¹⁹ Kano State of Nigeria Gazzette No 4 volume 33 2000.

²⁰ Cap 38, Laws of the Federation of Nigeria, 2004.

²¹ Re-enacted version of the CCA by the 17 states that make up the southern Nigeria.

²² Cap C41 laws of the Federation of Nigeria, 2004.

²³ 2015.

²⁴ Cap A20, Laws of the Federation of Nigeria, 2004.

²⁵ Cap C2 Laws of the Federation of Nigeria, 2004.

²⁶ A 47 2003 No 2.

²⁷ Cap C31 Laws of the Federation of Nigeria, 2004.

²⁸ Cap E1 Laws of the Federation of Nigeria, 2004.

²⁹ Cap E1 Laws of the Federation of Nigeria, 2004.

in Nigeria is bicameral in nature;³⁰ at the state level, it is unicameral.³¹ The role of the legislature in the criminal law justice system entails enacting laws, in this regard, criminal codes, dealing with the substance of crimes and the procedure for securing prosecution and conviction. For instance, the National Assembly enacted the SSMPA which is applicable throughout Nigeria. In like manner, various states have enacted criminal laws that regulate criminal conduct of people of the respective states.³²

2.3 Criminal justice administration in homosexual offences

Bob Osamor divides the courts of criminal jurisdiction in Nigeria into courts of special criminal jurisdiction and courts of general criminal jurisdiction.³³ The courts of special criminal jurisdiction exercise jurisdiction over a particular class of offenders or particular types of offences, while the courts of general criminal jurisdiction hear a wide range of cases involving different offenders and offences.³⁴ Under Nigerian criminal law, offences of homosexuality do not fall into the category of special offences, as there are no special or separate courts established to entertain the offences. Because of the classification of homosexual conduct under “general offences”, this research provides a cursory glance at the courts with general criminal jurisdiction.

In the hierarchy of courts in Nigeria, the Supreme Court is the apex court in the land as well as the court of last resort. It has no original jurisdiction to hear criminal matters,³⁵ including homosexual crimes. It only exercises appellate jurisdiction over criminal matters that must be channeled through

³⁰ Section 4(1) of the 1999 CFRN (as amended) vests the legislative powers on the National Assembly which consists of Senate and a House of Representative.

³¹ In like manner to the bicameral legislative function of the National Assembly, section 4(6) of the 1999 CFRN also vests legislative powers on the House of Assembly of a state in Nigeria.

³² See Ottosson (n 7 above) 29. For some states that have promulgated criminal laws different from the relatively uniform criminal codes at the federal level.

³³ B Osamor *Criminal procedure laws and litigation practices* (2012) 14.

³⁴ Osamor (n 33 above) 14.

³⁵ Section 232(2) 1999 CFRN (as amended) categorically states that ‘no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter’.

the Court of Appeal.³⁶ As such, the Supreme Court can entertain cases of breach of anti-homosexuality laws only in appellate capacity. The first and only homosexual trial heard by the Nigerian Supreme Court in its appellate capacity is the celebrated case of *Magagi Bello v Nigerian Army*.³⁷ The Court of Appeal, which is only one step lower than the Supreme Court in the country's judicial hierarchy, also has no original criminal jurisdiction to hear issues relating to the offence of homosexual conduct or other crimes.³⁸ It can only hear criminal cases in appellate capacity from designated courts such as the Federal High Court, State High Courts, Sharia Courts of Appeal, the Customary Court of Appeal, and the Court Martial.³⁹ *Magaji's* celebrated case also passed through the Court of Appeal.

The most important court in criminal matters in Nigeria is the High Court of a state. Every state has a High Court.⁴⁰ In criminal matters, the jurisdiction of the State High Court to try any offence or any person is virtually unlimited.⁴¹ Further to the enormous powers of a State High Court to try all manner of offences, the Constitution of the Federal Republic of Nigeria provides as follows:

Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty liability, privilege, interest, obligation or duty is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of any offence committed by any person.⁴²

³⁶ Section 233(1) of the 1999 CFRN further states that 'the Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal'.

³⁷ (2008) 8 NWLR (Pt 1089) 338. This case is analysed in detail in later part of this chapter.

³⁸ See section 239 of the 1999 CFRN (as amended) for the original jurisdiction of the Court of Appeal.

³⁹ See section 240 of the 1999 CFRN (as amended) for the appellate jurisdiction of the Court of Appeal.

⁴⁰ Section 270(1) of the 1999 CFRN (as amended) states that 'there shall be a High Court for each state of the Federation'.

⁴¹ JA Agaba *Practical approach to criminal litigation in Nigeria: Pre-trial and trial proceedings* (2011)146.

⁴² Section 272 of the 1999 CFRN.

The High Courts in all the 36 states in Nigeria including the Federal Capital Territory (FCT) High Court,⁴³ do not just have wide and almost unlimited jurisdiction to try criminal offences, they also have unlimited jurisdiction to impose sentences. The highest punishment known to law the world over is the death sentence; the High Court has jurisdiction to impose the death sentence.⁴⁴ Given the enormous powers of State High Courts to try most offences and impose the maximum penalty, it can be safely concluded that the High Courts have the jurisdiction to try all homosexual offences in Nigeria, particularly in states where the offence of homosexual conduct carries the maximum penalty. The SSMPA vests the State High Courts specifically with the exclusive powers to hear and entertain criminal breaches of the Act.⁴⁵ ‘High Courts’ in this regard was interpreted to clearly mean High Court of a State or of the Federal Capital Territory.⁴⁶ There are other courts of original criminal jurisdiction that can try homosexual offences, for example the Court Martial, which was the first trial court in the *Magaji* case. For the homosexual offences listed under the SSMPA, only the High Courts of a State or the FCT can entertain matters arising thereof.

Homosexual offences are provided for in 16 identified statutory laws in Nigeria. The State High Courts, the Court Martial, the Magistrate Courts, the Sharia Courts and the Area Courts have original jurisdiction to entertain offences relating to homosexual conduct. It is, however, only the State High Courts that have the exclusive jurisdiction to entertain cases of violation of the SSMPA. Notably the maximum punishment for homosexual crimes under the Criminal Code Act and Penal Code Act is 14 years imprisonment.⁴⁷ However, under the Sharia Penal Codes, the maximum punishment for homosexual

⁴³ The High Court of the FCT has the same powers as that of the various states in Nigeria.

⁴⁴ Agaba (n 41 above) 150.

⁴⁵ Section 6 of the SSMPA 2013.

⁴⁶ Section 7 of the SSMPA 2013.

⁴⁷ See section 215 of the CCA & Section 287 of the PCA for the punishment for sodomy.

crimes is death.⁴⁸ Where a person is charged with a homosexual offence that carries the death penalty, only a State High Court can try such a person.⁴⁹

There are some courts technically called ‘inferior courts’ in Nigeria. These courts (the Magistrate Courts, Area Courts, and Sharia Courts) are not created by the Constitution. They are basically created by the various states of the Federation.⁵⁰ As discussed more fully later in this chapter, the bulk of homosexual offences is tried in these courts. All lesser crimes in Nigeria are tried by these courts.

The Magistrate Court is a very important court in criminal justice administration of Nigeria. Femi Pedro asserts that ‘more than 90% of criminal cases that get to the court system are commenced in the magistrate courts’.⁵¹ Every State in Nigeria, both in the north and south, has a Magistrate Court. As Pedro rightly observes, the powers of a Magistrate Court to hear a criminal matter is largely confined to the territory of its state and in some cases to a magistrate district in the state.⁵² As such, a person who for example commits a homosexual offence in Bauchi State cannot be presented for a trial in a Magistrate Court in neighboring Plateau State. The respective states in Nigeria have their peculiar way of grading their magistrate courts and vesting them with powers to impose fines and sentences. Osamor gives an example of the grades of the seven Magistrate Courts in Delta State, in southern Nigeria.⁵³ Categorisation of grades of magistrate court is not applicable to Lagos State in southern Nigeria, as all magistrate courts in that State have equal powers to

⁴⁸ Ottosson (n 7 above) 29.

⁴⁹ The reason for this assertion is that the inferior courts do not have the power to pass the maximum sentence of death on an accused person.

⁵⁰ Section 6(2) of the 1999 CFRN.

⁵¹ L Pedro ‘Criminal jurisdiction of Magistrate Courts in Nigeria: A need for review’ available at magistrates Nigreia.com/man/downloads/criminal/20jurisdictionpdf (accessed 20 May 2015) 1.

⁵² Pedro (n 51 above) 4.

⁵³ Osamor (n 33 above) 21. The highest of them, which is the Chief Magistrate Grade 1, can only sentence convicts of triable crimes up to 7 years imprisonment and impose a maximum fine of ₦7000.

impose fines and sentence offenders.⁵⁴ The maximum prison sentence a magistrate may impose in Lagos State is 14 years.⁵⁵

For Magistrate Courts in northern Nigeria, the position is somewhat similar to that in the south. For instance, in Kano State, the highest grade of Magistrate court has powers to impose a 14 year jail term or hand out an optional ₦ 30,000.00 monetary fine.⁵⁶ In all the states in Nigeria no Magistrate Court has powers to sentence a person to a term of more than 14 years or adjudicate over an offence which penalty exceeds 14 years prison term.⁵⁷ The maximum penalty for the offence relating to homosexual conduct under the Criminal Code which is applicable to southern Nigeria is 14 years.⁵⁸ In northern Nigeria where the applicable law is the Penal Code, the maximum term of punishment for any form of homosexual offence is also 14 years.⁵⁹

However, in northern Nigeria, as noted earlier, 12 states have enacted the Sharia Penal Code as the applicable criminal law and under the Sharia Penal Code some homosexual offences carry the death penalty. Going by the fact that the maximum term of imprisonment for the offence of homosexuality is 14 years under the Criminal Code Act and the Penal Code Act, it becomes logical that the Magistrate Court is the most appropriate court to handle criminal matters relating to homosexual offences where charges are brought under these two laws.

There are other inferior courts like the Area Courts and Customary Courts that have original criminal jurisdiction also and can try offences. The Area Court is another important court in the administration of homosexual

⁵⁴ Section 93(1) of the Magistrates Courts Law, 2009 of Lagos State provides that there is now only one uniform Magistrate Court in the state. Also section 93(2) abolishes the hitherto existing grades of Magistrate Courts.

⁵⁵ See section 29(5) of the Magistrate Court Laws (2009) Lagos State.

⁵⁶ Agaba (n 41 above) 159-160.

⁵⁷ Pedro (n 51 above) 12.

⁵⁸ See sections 216 and 217 of the Criminal Code Act.

⁵⁹ See section 284 of the PCA.

crimes in northern Nigeria. The Area Court is peculiar to only the predominantly Muslim north.⁶⁰

2.4 The historical evolution of the crime of consensual adult homosexual conduct under Nigerian criminal law

At present, Nigeria has various explicit laws criminalising homosexual activities with varying forms and degrees of punishments, ranging from caning, fines, and prison terms to the death penalty. The origin of criminalisation of consensual adult same-sex practices and allied matters is historical. To properly deal with the evolution of the current laws dealing with consensual adult homosexual acts, four periods of developments are traced, namely: homosexuality in pre-colonial Nigeria (before 1 January 1901), in colonial Nigeria (1901 to 1960), post-independent Nigeria (1960 to 1999), and democratic Nigeria (1999 to 2014). Similar to other parts of the criminal law, the law related to consensual adult homosexual conduct has not been static, but has undergone complex changes to suit the religious, socio-economic and political peculiarity of modern dynamics.

2.4.1 Regulating homosexual conduct in pre-colonial Nigeria

Not only is there evidence affirming the existence of consensual adult homosexual conduct in pre-colonial Nigeria, but there is also evidence that it was fairly widely tolerated prior to the advent of colonialism. The notion that homosexuality is a practice alien to sub-Saharan Africa in general, and Nigeria in particular, is traceable to early British travelers in Africa and historians like Richard Burton and Edward Gibson.⁶¹

⁶⁰ For a detailed discussion on the jurisdiction of the Area Courts, see Agaba (n 41 above) 151-159.

⁶¹ SO Murray 'Homosexuality in 'traditional' sub-Saharan African and contemporary South Africa' available at www.semgai.free.fr/doc_et_pdf/Africa_A4pdf (accessed 24 October 2010).

Homosexual practices in this period have been confirmed among the Nupe of north central Nigeria. Nupe warriors practiced homosexuality while away from their homes on military campaigns.⁶² Nadel and Gaudio also reported the existence of lesbianism among the Nupes.⁶³ The phenomenon of female husbands in southern Nigeria is well documented.⁶⁴ Among the Igbo people of the south-east Nigeria, for example, a woman is allowed by tradition to marry another woman and have children through the 'wife'.⁶⁵ After marrying a fellow woman, the female husband picks a male partner for the 'wife'. The children produced by the union belong to the female husband and bear her father's name.⁶⁶ The Calabar people of south-south Nigeria tradition allowed the oldest daughter in a family without a male heir to marry a wife and perpetuate the family name through the children resulting from the union of the wife and a man chosen by the female husband.⁶⁷

However, Amadiume has insisted that the female-husband tradition does not fit into Western discourse on lesbianism because the context of this pre-colonial tradition is heterosexual.⁶⁸ She argues that there is no sexual connotation to women-to-woman marriage since the female husband does not enter into any sexual relationship with the woman she marries. This, of course, does not indicate the impossibility of emotional or, rather, sexual attachment developing between the female husband and her wife. It is striking that the practice offers an alternative sexual narrative. The reality of female husbands is an acknowledgement that hetero-normativity did not reign supreme in pre-

⁶² V Mabvurira, PD Mostsi, T Masuka & EE Chigondo 'The politics of sexual orientation in Zimbabwe: A social work perspective' (2010) 2 *International Journal of Humanities and Social Science* 220.

⁶³ See Murray (n 61 above).

⁶⁴ See KC Nwoko 'Female husbands in Igbo land: Southeast Nigeria' (2012) 5 *The Journal of Pan African Studies* 69-79. See also J Onuche 'Same-sex marriage in Nigeria: A Philosophical analysis' (2013) 3 *International Journal of Humanities & Social Science* 94.

⁶⁵ Nwoko (n 64 above) 75.

⁶⁶ See V Ilesanmi 'Debunking the myths: Is homosexuality, bisexuality or transsexualism un-African or unnatural' available at www.freethoughtblog.com/yemmynisting/2013/05/05/debunking-the-myths-is-homosexuality-bisexuality-or-transsexualism-unafrican (accessed 11 May 2015).

⁶⁷ Ilesanmi (n 66 above).

⁶⁸ I Amadiume *Male daughters, female husbands: Gender, and sex in an African society* (1987)7.

colonial Nigeria and that the Nigerian past was willing to countenance the idea of a woman having a female husband.

After examining Yoruba traditional texts, Ajibade,⁶⁹ Olurankise,⁷⁰ and Ojoade⁷¹ all confirmed the existence of homosexuality in pre-colonial Yoruba land. Long before the coming of the British, they contend, a homegrown homosexual subculture thrived in Yoruba land.

Alimi notes that there is actually a term in the Yoruba language for a male who engages in the act of homosexuality. The term is *Adodi*. He holds the view that the very existence of the word indicates that consensual adult homosexual conduct is not a phenomenon foreign to the Yoruba people.⁷² Alimi goes on to note that deities like Esu and Sango are depicted in artworks in a manner that challenges the notion that consensual adult homosexual conduct is a European cultural import. The deity Esu is not depicted as a male or female, which implies that there could be a third gender. The deity Sango is often cast as a transvestite image and the goddesses Yemoja and Oya exhibit 'a level of romantic affinity for each other'⁷³ in Yoruba mythology.

There are, however, some dissenting opinions to the more logical and empirically valid thesis on the prevalence of and tolerance for consensual adult homosexual conduct in pre-colonial Yoruba land abound. Essien and Aderinto endorse the conclusion of Ajibade and his proponents of homosexual visibility, but insist that consensual adult homosexual conduct was discouraged in Yoruba land even though homosexuals were not actively persecuted.⁷⁴ Shakur goes on to remind us that the Ifa Odu, the Yoruba ancient text, forbids

⁶⁹ SO Olanisebe & AJ Adelokun 'Re-interpreting 'Sodom and Gomorrah' passages in the context of homosexuality controversy': A Nigerian perspective' (2013) *Ilorin Journal of Religious Studies* 200.

⁷⁰ O Olurankise 'Euphemism as a Yoruba folkway' (1992) 5 *African Languages and Cultures* 189-202.

⁷¹ JO Ojoade 'African sexual proverbs: Some Yoruba examples' (1983) 94 *Folklore* 201-213.

⁷² Bisi Alimi 'Homosexuality is well rooted in the core of Nigerian society & identity' available at <http://www.naija.com/54704.html> (accessed 19 October 2015).

⁷³ Alimi (n 72 above).

⁷⁴ K Essien & S Aderinto 'Cutting the head of the monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monographs* 126.

consensual adult homosexual conduct and concludes with the following lines: 'We used the right oil to eat yam. It is ... enjoyable to make love with a woman than a man'.⁷⁵

In northern Nigeria, the *yan daudu* gay subculture thrived before the coming of the British and continues to exist underground in the post-colonial era. The Hausa term *yan daudu* refers to those feminine men who dress, act and even talk like women.⁷⁶ The term is generally used to describe Kano gay subculture. Strictly speaking, however, not all *yan daudu* are homosexual in orientation. While some are indeed homosexual males, others are heterosexuals.⁷⁷ Members of the in-group who regard themselves as persons rejected by mainstream society interact closely with one another and provide emotional and material support to one another. The *yan daudu* were tolerated, remarkably, in pre-colonial times and were even accorded a special status, having been regarded as possessing certain spiritual powers considered of benefit to society.⁷⁸

With particular reference to the Idoma people, homosexual practices have been found to exist long before the advent of colonialism.⁷⁹ It was a practice more peculiar to those who were referred to as *olomuchus*.⁸⁰ The 'olomuchus' were not really stigmatised persons, but other members of the heterosexual societies often consider them as jesters and men with certain 'abnormalities' who behave in peculiar ways like women. They were men who entertain the villagers with their seductive feminine dance steps during *ililoway* dances late in the night at the full glare of moonlight in the dry seasons.⁸¹

⁷⁵ See Assata Shakur 'Ifa Odu forbids homosexuality' available at www.assatashakur.org/forum/spirituality-connect-your-centre/1318-ifa-odu-forbids-homosexuality.html (accessed 19 October 2015).

⁷⁶ RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009) 4-6.

⁷⁷ Gaudio (n 76 above) 65.

⁷⁸ B Fremont *Horses, musicians and gods: The Hausa cult of spirit possession* (1983) 122-123.

⁷⁹ Interview with His Royal Highness, Chief DE Enenche on 4 April 2015.

⁸⁰ Enenche (n 79 above). According to Chief Enenche, *Olomuchu* is an Idoma coinage for men who have sex with other men through the anus.

⁸¹ Enenche (n 79 above).

Ancient Idoma culture frowned at certain sexual behaviours like adultery, rape, and fornication. For the act of adultery, where the perpetrators are caught, both the man and the woman are made to dance round the village naked down to the village square (market site) where they are forced to sit down to be scorned at by onlookers and sprayed with dirts. After the public disgrace, they both undergo cleansing in the village shrine, where goats and yams are offered to appease *Alekwu*.⁸² Thereafter, the man makes monetary compensation to the husband of the female culprit. Where the offence is committed in secrecy, *Alekwu*, the Idoma deity has a way of mysteriously unleashing sudden and strange illness on the woman, tormenting her till she confesses to the crime, while curiously sparing the man of divine visitation.⁸³

For the offence of fornication, which is not seen as a very serious one, the female bears the brunt as her parents summon her age grade and openly embarrass her by putting a pepperish substance in her vagina.⁸⁴ According to the account of Chief Obekpa, homosexuals are not known to be punished in any form, as the Idoma society sees them as mentally impaired people, cursed with strange disorders. The Idoma societies often merely make jest of them and look forward to moonlight night dances and festive periods where the *olomuchus* entertained with feminine dance steps. At no point was their activities penalised with punishments. However, they carried out their consensual same-sex activities in secrecy as a result of the stigmatisation they were subjected to. Obekpa asserts that homosexual conduct did not really fit in or was accommodated into the culture of the Idoma people, but that perceived homosexuals were well tolerated, even if they were viewed as abnormal people

⁸² Telephone communication with Ochi'Idoma, His Royal Highness, Chief Ikoyi Obekpa on 9 April 2015.

⁸³ Obekpa (n 82 above).

⁸⁴ Obekpa (n 82 above). The practice of deterring females from sexual 'immoralities' and other anti-social behavior is very prevalent in many societies in Nigeria currently. The ongoing trial of 10 persons before an Ikeja High Court in what has been famously dubbed 'the Ejigbo pepper sodomy case' is a pointer to this harsh practice. See A Abdulah & B Madukwe 'Ten remanded in prison over Ejigbo pepper sodomy' available at <http://www.vanguardngr.com/2015/05/10-remanded-in-prison-over-ejigbo-peper-sodomy/> (accessed 18 May 2015).

and as, objects of fun and jest. The Idoma people did not go beyond making jest of homosexuals to the extreme point of bullying or penalising their acts.⁸⁵

A cursory glance has been taken at the homosexual practices in major ethnic nations in pre-colonial Nigeria, including the Idoma nation. One thing that is very clear is that homosexual practices existed and manifested in various cultural formats in pre-colonial Nigeria. However, these activities were neither encouraged nor criminalised. Nigeria has had an organised penal system long before foreign intrusion into Nigerian soil, various communities had robust system of meting out punishments for wrong doings and many acts that are now referred to as crimes were also prohibited then.⁸⁶ Chukkol however concedes that ‘the intricate classification and definitions of offences and some of the esoteric concepts such as *mens rea* might not have developed to that of today’s standard but certainly what our forefathers regarded as heinous conducts, and deserving punishment remain more or less similarly regarded by us today’.⁸⁷ In pre-colonial Nigeria, homosexual conduct was not classified amongst the offences worthy of punitive measures. The pre-colonial era in Nigeria could safely be termed as the period of tolerance and acquiescence of homosexual behaviour and same-sex marriage. In that era, the customary laws in place did not criminalise homosexual behaviour in any known Nigerian society despite the relative prevalence of such acts.

2.4.2 Regulating homosexual conduct in colonial Nigeria

Colonialism made a deep impression on the Nigerian legal landscape, and particularly left its imprint on the customary criminal justice system of pre-colonial Nigerian societies. The most remarkable of the changes was the introduction of religion that eroded the core of the peculiar African tradition relevant to the various ethnic nationalisms. In southern Nigeria, Christianity spread widely, while Islam took its roots in northern Nigeria. Obeya describes

⁸⁵ Obekpa (n 82 above).

⁸⁶ KS Chukkol *The law of crimes in Nigeria* (1988) 8.

⁸⁷ Chukkol (n 86 above) 8.

the advent of Christianity and Islam in Idoma land with its attendant consequence on the culture and tradition of the Idoma nation as the 'age of apocalypse'.⁸⁸ According to him, it was the age of downward movement in the rich cultural heritage passed from the ancestors and the founding fathers of the Idoma nation. Obeya expresses the view that 'Africa and indeed the Idoma nation suffered gradual abrasion of their identity as the result of the undesirable civilisation attacks from two frontiers-the European civilisation (Greco-Roman heritage) and the Arabian civilisation (Muhammadian Islamic civilisation)'.⁸⁹ Obeya further asserts that 'Christianity in Idoma land contributed more than 70% to the near collapse of the entire *ucholo; Kai Idoma*, the culture and traditions of the Idoma people'.⁹⁰ Obeya supplies a critical example of the marriage institution, which hitherto was based on ancestral rules, which became substituted for God, through the Christian Bible as one man, one wife became a prerequisite for acceptance into the church communicant folds.⁹¹ There is no historical evidence to buttress the claim that colonial-era European missionaries frowned at the few cases of homosexual practices in Idoma land or elsewhere. But, since the Christian Bible is mostly interpreted as explicitly denouncing and condemning the practice, homosexual practices were very likely to be denounced as a sin against God by the white missionaries.⁹²

Religious incursion into the customary life and customary laws of ethnic societies aside, the colonial government took legislative steps that had an impact on the customary laws of the people and by extension the same-sex

⁸⁸ BO Nelson *Ucholokai'Idoma: A compendium of Apa heritage* (2009)112.

⁸⁹ Nelson (n 88 above) 112.

⁹⁰ Nelson (n 88 above) 117.

⁹¹ Nelson (n 88 above) 116.

⁹² Leviticus 18:22 admonishes that 'do not lie with a man as one lies with a woman; that is detestable'. Further in Leviticus 20:13 the Bible prescribe the punishment for homosexuality thus, 'if a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their heads; In like manner, Romans 1:26-28, 1 Corinthians 6:9-11, Hebrews 13: 1-5 (NIV) all condemned homosexual practices.

marriage customary laws of the Igbo nation in Nigeria.⁹³ The first-ever legislative action taken to stop same-sex marriage in Nigeria was the introduction of the validity test on indigenous customary laws. An applicable rule of customary law is not to be enforced by the courts unless it passes three tests.⁹⁴ The first is that the customary law is not repugnant to natural justice, equity and good conscience. The second is that it is not incompatible either directly or indirectly with any law for the time being in force. The third is that it is not contrary to public policy.⁹⁵ These tests were further explained in the case of *Laoye v Oyetunde*⁹⁶ and *Eshugbayi Eleko v Officer administering the government of Nigeria*.⁹⁷ It was on the basis of repugnancy that *Eugene Meribe v Joshua Egwu*⁹⁸ was decided, bringing same-sex marriage under the bracket of barbaric culture.

Lagos State, which later became the capital city of Nigeria, was first ceded to the British crown in 1861 and in 1866. The English criminal common law was imported en masse and made applicable to Lagos.⁹⁹ Chukkol gives a vivid account of the intrigues that led to the introduction of the British styled criminal code applicable throughout Nigeria.¹⁰⁰ The interesting aspect to this study is the inclusion of the 'sodomy clause' criminalising homosexual practices in Nigeria. The clause is found in section 214 of the Criminal Code.¹⁰¹ At the

⁹³ See UB Chuks 'Repugnancy doctrine and customary law in Nigeria: A positive aspect of British colonialism' (2008) 2 *African Research Review* 286-295.

⁹⁴ AO Obilade *The Nigerian legal system* (1979) 100.

⁹⁵ Obilade (n 94 above) 100.

⁹⁶ (1944) A.C. 170 at 172 – 173.

⁹⁷ (1931) A.C. 662 at 673.

⁹⁸ In that landmark case that brought to an end the tradition of female to female marriage, the court held that a woman to woman marriage is repugnant to natural justice, equity and good conscience. In that case a woman married another woman so as to procreate children as she was barren. She presented her 'wife' to her husband who had children with her (1976) LPELR-SC.48/1975.

⁹⁹ Chukkol (n 86 above) 8.

¹⁰⁰ Chukkol (n 86 above) 8-9. For more detail exposition on the development of criminal law in Nigeria, see AG Karibi-White *History and sources of Nigerian criminal law* (1993) 68-80. See also Okonkwo & Naish (n 2 above) 4-11.

¹⁰¹ See section 2.5 of this chapter for a detail discussion of the sodomy law provision of the Criminal Code.

end of this period, the Criminal Code was the only law criminalising consensual adult homosexual conduct.

2.4.3 Regulating homosexual conduct in post-independence Nigeria (1960-1998)

With homosexual law firmly entrenched in Nigeria by virtue of the uniformisation of the Criminal Code (because the Criminal Code was then applicable to both southern and northern Nigeria), the stage became set for legislative development of homosexual laws to reflect the legal plurality that is embedded in Nigeria. The introduction of the Criminal Code in Nigeria did not annihilate indigenous customary criminal laws and for some time a dual system of criminal law operated in Nigeria.¹⁰² This dual system of criminal law created a lot of controversies, particularly in the northern part of the country where the doctrines of Sharia law differed in many fundamental respects from the provisions of the British imposed criminal code.¹⁰³ The agitation for northern Nigeria basically was to have a code that will reflect the punishment prescribed in the Holy Qur'an.¹⁰⁴

The Penal Code for northern Nigeria came about as a model based on Sudanese Penal Code, which also derived its origin from 1860 Indian Penal Code and which was a popular code among the Muslim population of those countries. The Code gained considerable acceptance among Nigeria northern elites.¹⁰⁵ The Penal Code was then introduced to the northern region, with effect from 1 October 1960 from which date the Criminal Code ceased to apply in the northern part of the country.¹⁰⁶ Consensual adult homosexual conduct became also explicitly criminalised in section 284 of the Penal Code of northern Nigeria

¹⁰² MA Ajomo & IE Okagbue *Human rights and the administration of criminal justice in Nigeria* (1991) 25.

¹⁰³ Ajomo & Okagbue (n 102 above) 26.

¹⁰⁴ Chukkol (n 86 above) 12-17.

¹⁰⁵ Chukkol (n 86 above) 28.

¹⁰⁶ An excellent presentation of events that led to the emergence of the Penal Code for northern Nigeria is highlighted by FO Okoye 'Sharia law and criminal justice system' in EE Alemika & FO Okoye (eds) *Human rights and shariah penal code in Northern Nigeria* (2005) 42.

captured by the phrase ‘unnatural offences’. Ironically, homosexual conduct under the Criminal Code and the then new Penal Code carried the same description and punishment.

The Penal Code provision for homosexual conduct did not reflect the punishment stipulated under Islam, however.¹⁰⁷ With this lacuna in the punishment for the crime of homosexual conduct in the Penal Code the stage was still set for agitation and possible reforms to meet the standard of the Holy Qur’an.

2.4.4 Regulating homosexual conduct in democratic Nigeria (1999 – 2014)

The year 1999 ushered in a democratically elected government in Nigeria, with Olusegun Obasanjo voted in as president. The shortcomings of the Penal Code in relation to the standard of crimes and punishment in the Holy Qur’an generated much interest particularly amongst scholars from northern Nigeria. Chukkol succinctly brings the incompatibility between offences and punishment under the Penal Code and offences and punishment under the Holy Qur’an to the fore, when he states as follows:¹⁰⁸

It is submitted that even a more cursory glance at the Penal Code would convince one that it is based on anything but Shari’a. All the punishment provisions are quite dissimilar to what exists under Islamic criminal law. To take for instance theft under section 286 is punishable under section 287 with five years imprisonment. The robbery as defined under section 296 is punishable under section 298 with ten years imprisonment. Any student of Islamic law knows that a convicted thief would have his hand amputated and robbery ... attracts a sentence of death.

Okagbue suggests that the reason why the now controversial Penal Code gained acceptance of the liberal Muslim elites in the first place was because it

¹⁰⁷ Though the Holy Qur’an in 26:165-166, Qur’an 4:16 all prohibit adult male homosexuality, there is no punishment spelt out for the offence under the Qur’an. However from the Sunnah & Hadith of the Prophet the punishment is death for male homosexuality (I discuss this extensively in chapter five).

¹⁰⁸ Chukkol (n 86 above) 15.

proscribed certain traditional Islamic crimes such as adultery, drinking of alcohol and insulting the modesty of women.¹⁰⁹ Chukkol responds by asserting that 'it is important to note that even in the few offences thought to be codified on grounds of religion the code's provisions are not compatible with the Sharia'.¹¹⁰ In the area of sexual offences, the Penal Code was particularly found wanting. In the Penal Code, the punishment for the offence of adultery is two years imprisonment,¹¹¹ however, the offence carries the death penalty under Islam.¹¹² For homosexual offences, the punishment is 14 years in the PCA while ideally under Islam it should be death.

Ahmed Bello Mahmud has echoed that 'the protagonist of Sharia Penal Code made up mainly of Muslims contend that the fact and circumstances of our colonial past, coupled with the multi-ethnic and multi-religious composition Nigeria had impacted much on the said Penal Code as it does not fully represent the stance of Sharia law'. He further lamented the shortcomings of the Penal Code that

[n]ot only were offences defined and punishments prescribed to meet the requirement and standard of the common law and its trappings, certain fundamental objectives of the sharia legal system (like the cultivation and protection of the collective morality of the Ummah and the deterrent objective underlying the penal system, amongst other, were disregarded with scorn.¹¹³

The agitation for fully fledged Islamic penal codes reached a feverish pitch in the northern Nigeria in 1999, with one of the leading governorship candidates promising the electorates that he will implement the Sharia Penal Code if voted into power. Having won the election, Alhaji Ahmed Sani Yerima, through the

¹⁰⁹ Ajomo & Okagbue (n 102 above) 28.

¹¹⁰ Chukkol (n 86 above) 15.

¹¹¹ See sections 387 and 388 of the Penal Code Act for the definition and punishment of the offence adultery respectively.

¹¹² Adultery otherwise known as *Zina*.

¹¹³ The then Attorney General and Commissioner of Justice Zamfara State in his introductory remark to the Sharia Penal Code Law of Zamfara State.

State House of Assembly, introduced the full Islamic penal code law in Zamfara State in 2000.¹¹⁴ The euphoria surrounding this development echoed in 11 other northern states as these states, namely Bauchi;¹¹⁵ Borno;¹¹⁶ Gombe;¹¹⁷ Kaduna;¹¹⁸ Kano;¹¹⁹ Kastina;¹²⁰ Kebbi;¹²¹ Jigawa;¹²² Sokoto;¹²³ and Yobe;¹²⁴ all introduced the controversial law. The punishment for homosexual conduct in the aforementioned laws is a radical departure from the position in the Penal Code Act. These laws are indeed more elaborate on the offences of homosexuality and take the punishment for the crime of homosexual conduct to capital punishment in line with the Sharia. These laws are discussed in details in later part of this chapter. It must however be pointed out that prior to the introduction of Sharia in these 12 states, the maximum punishment for the crime of consensual adult homosexual conduct was 14 years imprisonment both in the northern and southern part of Nigeria. With the Sharia Penal Code firmly entrenched in these 12 states of northern Nigeria, the maximum penalty for the offence on conviction is now the death penalty.

Nigeria took its homophobic legislation to a new high in 2014 when the president, Goodluck Jonathan, signed into law a Bill prohibiting same sex marriage.¹²⁵ This new law is uniquely different from other anti-homosexual laws

¹¹⁴ Sharia Penal Code Law of Zamfara State. Gazette volume 3 No 10, 15 June 2000.

¹¹⁵ Bauchi State Sharia Penal Code Law 2001. Bauchi State Gazette Volume 26 No 16 September 2001.

¹¹⁶ Borno State Sharia Penal Code Law 2001. This law did not however see the light of the day. Though drafted and underwent legislative passage, the government of Governor Malla Kachella was reluctant in signing the law; hence it has been referred to as 'a dead letter'. See GJ Weimann *Islamic criminal law in Northern Nigeria: Politics, religion, judicial practice* (2010) 42.

¹¹⁷ Gombe State Sharia Penal Code Law, 2001.

¹¹⁸ Kaduna State Sharia Penal Code Law, 2002, law No 4 of 2002. Kaduna State Gazette No 17 Volume 36.

¹¹⁹ Kano State Sharia Penal Code Law 2000.

¹²⁰ Kastina State Sharia Penal Code Law 2001. Katsina State Gazette Volume 12 No 23.

¹²¹ Kebbi State Sharia Penal Code (Amendment) Law 2000, law No 21 of 2000. Kebbi State Gazette Volume 2 No 1 2000.

¹²² Jigawa State Sharia Penal Code Law 2000, law No. 12 of 2000. Gazette Volume 1 No 12 2000.

¹²³ Sokoto State Sharia Penal Code Law 2000.

¹²⁴ Yobe State Sharia Penal Code Law. Yobe State Gazette Volume 11 No. 12 March, 2000.

¹²⁵ The bill was signed into law on 13 January, 2014. See A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 2.

in the sense that it places a ban on same-sex marriage unlike the others that merely prohibited and criminalised consensual adult same-sex relationship. Hitherto, Nigeria had made two failed attempts at legislating against same-sex marriage in 2006 and 2008. Faith Olarenwaju et al attribute the agitation for same-sex marriage during the international conference on HIV/AIDS (ICASA) in 2005 in Abuja, Nigeria as the impetus that triggered the Federal Government of Nigeria to propose a same-sex marriage prohibition bill to the National Assembly for approval into law.¹²⁶ In 2006, a member of the Nigerian clergy took a bold step of establishing a gay church named House of Rainbow, situated at No 36/38 Yakoyo Street, Ojodu, Berger Lagos. In an interview to the CNN, he declared:

My church is a voice of the younger generation of citizens, activists, and diasporans, and our collective belief is a more progressive Nigeria. They are afraid of our growing influence as we gather allies not just from the west, a people that are not afraid but powerful and resilient. Right now, we are spreading our tentacles to every village, town and city around the world.¹²⁷

According to Ebusi Sesson, 'his members were only men who worshipped as brethren and lovers'.¹²⁸ Reverend Jide Macaulay fled Nigeria in 2008 for the United Kingdom; he is reputed to be the first openly gay preacher and the founder of House of Rainbow fellowship. Macaulay has been ordained a Deacon of the Anglican Church in Chelmsford, United Kingdom by the Bishop of Chelmsford, the Right Rev Stephen Cotterel.¹²⁹ In an interview with the *Premium Times*, Macaulay narrated the frustrations he was subjected to in the

¹²⁶ F Olarenwaju, F Chidozie & A Olarenwaju 'International politics of gay rights and Nigeria US Diplomatic relations. (2015) 1 *European Scientific Journal* 6.

¹²⁷ F Ajayi 'Legalizing same-sex marriage in Nigeria is against African deities' available at <http://nigeriaworld-com/columnist/ajayi/122811.html> (accessed 22 June 2015).

¹²⁸ E Sesson 'Nigerian law against our fundamental rights-gays' available at <http://www.vanguardngr.com/2013/06/nigerian-law-is-against-our-fundamental-rights-gays/> (accessed 22 June 2015).

¹²⁹ J Macaulay 'My ordination is a source of hope for sexual minorities' available at <http://www.nigerianeye.com/2013/06/my.ordination-is-source-of-hpe-for.html> (accessed 4 May 2015).

hands of a homophobic population, and the negative media publicity given to the House of Rainbow.¹³⁰

Macaulay's church focuses on reconciliation of sexuality and spirituality. He explains that in his ministry GAY means God Accepts You, God Adores You and God Affirms You.¹³¹ His church is not exclusively for self-identifying lesbians, gays, bisexual, transgender and intersex (LGBTI) people, as others are welcome.¹³² The proposed 2006 Bill on same-sex marriage prohibition was intended to serve as 'an Act to make provisions for the prohibitions of sexual relationship between persons of the same sex, celebration and marriage by them and for other matters connected therewith'.¹³³ The Bill prohibits same-sex marriage and adoption of children by intending same-sex couples.¹³⁴ While invalidating same-sex marriage, the Bill also denies same-sex couples the benefits accruing to heterosexual marriage. The Bill in this regard states: 'Marriage between persons of the same sex are invalid and shall not be recognized as entitled to the benefits of a valid marriage'.¹³⁵ In a deft move to prevent a situation where a foreigner or a Nigerian in the Diaspora may contract same-sex marriage and import same to Nigeria, the Bill states:

Marriage between persons of same sex-entered into any jurisdiction whether within or outside Nigeria, any other state or country or otherwise or any other location or relationships between persons of the same sex which are treated as marriage in any jurisdiction, whether within or outside Nigeria are not recognised in Nigeria.¹³⁶

¹³⁰ Macaulay (n 129 above).

¹³¹ <http://www.houseofrainbow.org/aboutus.html> (accessed 8 May 2015).

¹³² (n 125 above).

¹³³ See long title of Same Sex Marriage (Prohibition) Bill 2006.

¹³⁴ Section 4(1) SSMPB 2006. The section states: 'Marriage between persons of same sex and adoption of children by them in or out of same marriage or relationship is prohibited in the Federal Republic of Nigeria'.

¹³⁵ Section 4(3) SSMPB 2006. Section 4(4) further provides that: 'Any contractual or other rights granted to persons involved in same sex marriage or accruing to such persons by virtue of a license shall be unenforceable in any court of law in Nigeria'.

¹³⁶ Section 5(1) SSMPB 2006. Section 4(2) of the Bill further states: 'Any marriage entered into by persons of same sex pursuant to a license issued by another state, country, foreign tradition or otherwise shall be void in the Federal Republic of Nigeria.'

Nigerian courts are barred from entertaining any matrimonial causes arising from same-sex marriage.¹³⁷ Celebration of same-sex marriage in religious places of worship is also prohibited,¹³⁸ while at the organisational level, government agencies are barred from registering or identifying with same-sex related groups.¹³⁹

The Bill further penalised the aforementioned offences with five years jail term each.¹⁴⁰ This Bill never saw the light of the day as the then Nigeria President, Olusegun Obasanjo never assented to it for an inexplicable reason. With the coming of President Umaru Yaradua in 2007, the agitation for passage of the same sex marriage bill was also mooted. It could perhaps be said that both Olusegun Obasanjo and Umaru Yaradua lacked the political will to sign the Bill into law because of mounting international pressures. Nigeria elected a new president in 2011, Goodluck Jonathan, who finally signed the SSMPA in 2013.

The SSMPA started its journey on 29 November 2011 when the Senate which is the upper legislative house of the Nigeria law-making arm of government passed a bill criminalising same-sex marriage in Nigeria. The storm generated over same-sex marriage in 2006-2008 was reignited again in early 2011 when two gay men went to a registry somewhere in Edo State to get married and were refused. The gay partners and their organisation were said to have threatened to sue the registrar for discrimination on grounds of their

¹³⁷ Section 4(5) states: 'The courts in Nigeria shall have no jurisdiction to grant a divorce, separation and maintenance orders with regards to such same sex marriage, consider or rule on any of their rights arising from or in connection with such marriage.' See also section 5(2) which states that: 'All arms of government and agencies in the Federal Republic of Nigeria shall not give effect to any Public Act, record or judicial proceedings within or outside Nigeria, with regard from such marriage or relationship'.

¹³⁸ Section 6(1) SSMPB 2006 states: 'Same sex marriage shall not be celebrated in any place of worship by any recognized cleric of a mosque, church, denomination to which such place of worship belongs'.

¹³⁹ Section 7(1) SSMPB 2006 provides as follows: 'Registration of gay clubs, societies, and organizations by whatever name they are called in institutions from secondary to the tertiary level or other institutions in particular and, in Nigeria generally, by government agencies is hereby prohibited'. Media advertisement of same-sex activities and public display of amorous feelings among persons of same-sex are also prohibited. See section 7(2).

¹⁴⁰ See sections 7(3), 8(1) and 8(2) SSMPB 2006 for the punishment.

sexual orientation. The distressed court registrar drew the attention of the authorities to the fact that there were no laws in the land specifically banning same-sex marriage.¹⁴¹ Senator Domingo Obende, representing Edo north senatorial district where the incident of the two gay men happened, initiated the Bill. Almost a year after the Senate passed the Bill, the House of Representative, the lower House of Nigeria's law-making organ of government passed the same Bill on 12 November 2012. On passing the Bill in 2011, the then Nigeria Senate president, David Mark echoed that 'our values are our values, if there is any country that does not want to give us aid or assistance, just because we want to hold onto our values, that country can keep her aid and assistance',¹⁴² in apparent reaction to threats by foreign donor nations to cut aids to Nigeria on the heel of passage of the Bill.¹⁴³ Senator Baba Ahmed Yusuf Datti described consensual adult homosexual conduct and same-sex union as a display of mental illness and suggest that 'such elements in society should be killed'.¹⁴⁴ Nkechi Nwagu, a vocal female senator concurred that the 14 years jail term for same-sex marriage was a unanimous decision by the senators because the conducts violate the culture, tradition and religious beliefs of Nigerians. She pointed out that 'same sex marriage has negative effect on the health of any one that is involved in it ... it is very unfortunate that the western countries want to force their culture on us.'¹⁴⁵

This SSMPA no doubt, is the most popular bill in the history of Nigeria's legislative law making as there was no single dissenting voice amongst the law makers. It is one law that attracted a lot of commendation from religious leaders and traditional rulers.¹⁴⁶ While the President and the law-makers basked in the

¹⁴¹ J Adibe 'The politics of same-sex marriage in Nigeria' (2012) 1 *Journal of African Studies* 99.

¹⁴² Kunle Akogun 'Senate criminalizes same sex marriage' *THISDAY* 30 November 2011 6.

¹⁴³ Countries like Britain, Canada and the US lend their voices in crying out against the bill and in some instances resorting to threats of cutting of aids to Nigeria. See Adibe (n 141 above) 100.

¹⁴⁴ Akogun (n 142 above) 6.

¹⁴⁵ Akogun (n 142 above) 6.

¹⁴⁶ The President of Christian Association of Nigeria, Bishop Ayo Oritsejafor, hailing the president on behalf of Nigerian Christian, said: 'We in CAN appreciate the troubles taken to ensure that the process of such law was followed before Mr President appended his signature

euphoria of the law, security agents and street touts took to town to clampdown on suspected homosexuals. In Abuja, the capital city of Nigeria and the seat of power, a mob armed with modern clubs and iron bars, dragged 14 young men from their beds and arrested them, while yelling that they want to ‘cleanse’ their neighborhood of gay people, marching them to the police station where the police in turn kicked and punched them.¹⁴⁷ Dorathy Aken’ Ova of Nigeria International Centre for Reproductive Health and Sexual Rights claimed that police in Bauchi State has drawn up a list of 168 allegedly gay men, 38 of whom have been taken into custody so far.¹⁴⁸ The SSMPA of 2013 finally consolidates the discriminatory provisions in the legal codes of Nigeria.

2.5 Classification of homosexual offences under the Criminal Code Act

The substantive criminal law that governs southern Nigeria is the Criminal Code Act. It is the code that regulates criminal conduct in southern Nigeria. It defines what act amounts to a crime and clearly spells out the punishment where an act breaches the law. As noted earlier, for an act to amount to a crime in Nigeria punishable by the law, such act must be clearly prohibited by a written law.¹⁴⁹ The crime of consensual adult homosexual conduct and other related offences are termed ‘unnatural offences’ under the Criminal Code Act. Section 214 states as follows:

Any person who-

- (1). has carnal knowledge of any person against the order of nature; or

in the circumstance ...’. See Friday Olorok, ‘Anty-gay law: CAN hails presidency, National Assembly, berates rights groups’ available at <http://www.punchng.com/news/anti-gay-law-can-hails-presidency-berates-rights-groups> (accessed 26 March 2014). Another leading Nigerian clergy, Bishop Mike Okonkwo, the founder of the Redeemed Evangelical Mission, is reported to have said; ‘The Bible is very clear on gay issues. He made them male and female. We do not support homosexuality and there are no two ways about it ... I am standing with the President on the position he has taken’. See Sunday Oguntola ‘Okonkwo, Bismark: We resisted pressure on same-sex’, *THE NATION*, 9 February 2014 72.

¹⁴⁷ Obi Jeremiah ‘Mob, Police beat up alleged gays in Abuja’ *Nigerian Pilot* 16 February 2014 8.

¹⁴⁸ Bernard Debusmann ‘Dozens arrested after anti-gay law passed in Nigeria’ available at <http://www.telegraph.co.uk/news/worldnews/africanndianocean/nigeria/10571/660/dozen-s-arrested-after-anti-gay-law-passed-in-nigeria.html> (accessed 11 February 2014).

¹⁴⁹ See (n 1 above).

- (2). has carnal knowledge of any animal; or
- (3). Permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years.

This section of the law did not clearly pontificate on its provision as prohibiting homosexual offences. Homosexuality is basically a sexual act between members of the same sex.¹⁵⁰ This provision of the code expands the prohibition of unlawful sexual act to also include unnatural way of indulging in sex between heterosexual couples by the provision of section 214(3). Before delving into the substance of the provision of section 214 of the Act, two key concepts must be understood. What does the provision envisage by the term ‘carnal knowledge’ and ‘against the order of nature’? Carnal knowledge is explained to mean an archaic or legal euphemism for sexual intercourse.¹⁵¹ If carnal knowledge can be legally translated to mean sexual intercourse then the import of that law is to prohibit sexual intercourse against the order of nature. The Criminal Code Act is being quite economical with the usage of the phrase ‘whoever has carnal knowledge with any person against the order of nature’. Section 214(1) of the Criminal Code is similar to section 377 of the Indian Penal Code. There has not been by judicial decision in Nigeria to throw more light on the purport of that provision. However, in *Naz Foundation v Govt of NCT of Delhi*, (*Naz Foundation case*),¹⁵² the phrase ‘carnal intercourse against the order of nature’ was interpreted to mean all forms of sexual activity other than heterosexual penile-vaginal intercourse.¹⁵³ If the position in *Naz Foundation* is to be applied under section 214(1) of the Nigerian Criminal Code Act, then any other type of sex outside heterosexual penile-vaginal intercourse is prohibited and criminalised.

Let me pause here and look at other types of sexual intercourse aside from the heterosexual penile-vaginal intercourse. We have other types of sex

¹⁵⁰ C Visser & E Picarra ‘Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism’ (2012) 28 *South African Journal of Human Rights* 512.

¹⁵¹ *Magaji* (n 37 above) 373 para D-F.

¹⁵² WP(C) No. 7475/2001.

¹⁵³ *Naz Foundation* (n 152 above) para 2.

such as: Anal sex, when there is simulation or penetration by a penis of another person's anus; Oral sex, using the mouth and tongue to stimulate the other partner's genital area (penis or vagina) and sex toys (for example, vibrators).¹⁵⁴

The combined effect of section 214(1) and (3) consequently means that to fall foul of this law, not only should the perpetrators be persons of the same sex. They can also be heterosexual couples as far as they engage in any of the above mentioned sexual activities; they stand the risk of being jailed for 14 years as any other mode of sex aside from heterosexual penile-vagina sex is termed 'unnatural'. To narrow section 214(1) and (3) of the Criminal Code to mean a ban against homosexuality can therefore be misleading as the scope of this provision is wider and prohibits all forms of sexual intercourse outside heterosexual penile-vagina sex outright. By the import of this law, heterosexual oral sex and heterosexual anal sex are also prohibited. It cannot be ruled out that there are some heterosexuals who may prefer anal or oral sex to penile-vaginal sex. By implication, couples who engage in anal or oral sex can be penalised under this provision too.

The *actus reus* of the offence as contemplated in section 214(1) and (3) are as follows: There must be a person, male or female, secondly there must be sexual intercourse, thirdly, the sexual intercourse can be between a male person and another male person. The sexual intercourse can also be between a male person and female person but done extra penile-vagina style. A mere attempt to commit any of the above enumerated sexual acts (offences) by a person is punishable by seven years imprisonment.¹⁵⁵

Gay relationships are brought into proper perspective and narrowed down under section 217 of the Criminal Code Act. The section provides:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures, another male person to commit any act of gross indecency with, or attempts to procure the commission of any such act by any male person with himself or with another male person,

¹⁵⁴ See <http://www.healthyrespect.co.uk/sexualhealthessentialguide/pages/Typesofsex.aspx> (accessed 15 March 2015).

¹⁵⁵ Section 215 of the Criminal Code Act.

whether in public or private, is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant.

Under the provisions of section 217, another problem of interpretation comes up. What amounts to gross indecency? The law is a direct importation of section 11 of the Criminal Law Amendment Act 1885. It suggests the phrase to mean sexual affairs between men.¹⁵⁶ The criminal elements of the offence of gross indecency between male persons are: The participants must be males, there must be an act of gross indecency between the male persons involved and the act may be in public or private.

It is instructive to note that while the Criminal Code explicitly prohibits male homosexual conduct, the code is silent on female homosexual conduct. The offence of gross indecency carries three years imprisonment. Offenders under section 214 can only be arrested with a warrant whereas offenders under 217 need no warrant for their arrest.

2.6 Classification of homosexual offences under the Penal Code Act

The Penal Code Act is the substantive criminal law applicable in the 19 northern states of Nigeria namely, Benue, Kogi, Plateau, Kwara, Niger, Nasarawa, Kaduna, Kano, Kebbi, Jigawa, Zamfara, Bauchi, Yobe, Borno, Adamawa, Taraba, Gombe, Kastina and Sokoto. All the states have replicated and domesticated this federal criminal enactment into state laws. As noted earlier, 12 of these states enacted the Sharia Penal Code laws. The presence of the Sharia Penal Code does not in any way oust the jurisdiction of the Penal Code since the Sharia Penal Code is only applicable to Muslims.¹⁵⁷ A person

¹⁵⁶ See AJ Osogo 'An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the 'separability thesis', secularism and international law' Unpublished LLD thesis, University of Pretoria (2016) 114-115. See also the provision of section 13 of the Sexual Offences Act 1956.

¹⁵⁷ Section 3 of the Sharia Penal Code Law of Zamfara State states that: 'Every person who professes the Islamic faith and or every other person who voluntarily consents to the exercise of the jurisdiction of any Sharia Courts established under the Sharia Courts Law, 1999, shall be liable to punishment under the Sharia Penal Code for every act or omission contrary to the provisions thereof of which he shall be guilty within the State'. Ike Oraegbunam acknowledges that only Muslims are being subjected to Sharia law trials in Nigeria but raises the fear that

who violates the criminalising section of the homosexual law can either be tried under the Penal Code or the Sharia Penal Code (where there is Sharia Penal Code). The Penal Code Act provides:

Whoever has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.¹⁵⁸

In terms of punishment, the provision of the Penal Code Act is similar to that of the Criminal Code Act applicable in southern Nigeria.¹⁵⁹ There are certain distinctive features of the offence of sodomy in both the CCA and the PCA. Under the CCA, the punishment for the offence of sodomy is solely a potential jail term whereas under the PCA an offender is liable to both jail terms and monetary fine. The PCA does not criminalise an attempt to commit sodomy. There is also a difference in operative words. The PCA employs the use of the word ‘carnal intercourse’ whereas the Criminal Code uses the word ‘carnal knowledge’ in place of intercourse. It is worthy to note that that there is no mention of homosexual sex or sodomy, gay sex or lesbianism in the PCA provision. But by analogical deduction, it can be safely concluded that the section refers to consensual homosexual conduct between adults. The Act further explains that there must be penetration for the offence to constitute carnal intercourse.¹⁶⁰ The criminal elements of the offence as provided in this section are: There must be carnal (sexual) intercourse between the parties, the parties may be male-male, female-female or heterosexual sex, the intercourse must be against the order of nature, that is non-heterosexual penile-vagina sex and there must be penetration. While for law enforcement officers to arrest offenders under the Criminal Code warrant is needed, no such requirement is needed to effect the arrest of homosexuals caught in the act under the PCA.

experiences in other Islamic countries shows that these Sharia laws possess the potentials to extend their applications to the adherents of other religions. See I Oraegbunam ‘Sharia criminal law, Islam and democracy in Nigeria’ (2011) 8 *A New Journal of African Studies* 192.

¹⁵⁸ Section 284 of the PCA.

¹⁵⁹ Both the CCA and PCA recommend jail terms which may extend to 14 years imprisonment.

¹⁶⁰ Explanatory note to section 284 of the PCA.

The PCA here again refers to certain acts as ‘gross indecency’ without stating in explicit terms what actions amount to gross indecency. The PCA provides:

Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine. Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.¹⁶¹

The *Black’s law dictionary* defines indecency as meaning ‘the condition or state of being outrageously offensive, especially in a vulgar or sexual way’.¹⁶² No doubt, going by the above definition gross indecency as contemplated by section 285 connotes sexual behaviors and amorous advances towards persons of the same sex. For gross indecency to be applied here, the person towards which it is displayed must not have consented. Even where consent is given and the person is below the age of 16, such consent will be null and void. This can also be seen as an exception or exclusion of children from the offence of homosexual conduct. In the PCA too, explicit use of the word lesbians and gays are omitted. In both the PCA and CCA, the emphasis seem to be more on male consensual homosexual practices.

2.7 A descriptive analysis of homosexual offences and punishments under the Sharia compliant states

As noted earlier, 12 states out of the 19 states in the Northern Nigeria adopted the Sharia penal codes with variations here and there to reflect the position of Islam in criminal justice administration. One of the substantial changes made by the Sharia law in respect of offence is in the area of homosexual acts. In this

¹⁶¹ Section 285 PCA.

¹⁶² BA Garner (ed) *Black’s law dictionary* 7th Ed (1999) 772.

section, I do a legal analysis of homosexual offences under the various codes of the Sharia compliant states.

2.7.1 Homosexual offences under the Sharia Penal Code Law of Zamfara State

Zamfara State in the northwestern Nigeria was the first state to adopt the Sharia Penal Code; as such I first deal with its provision as touching homosexual offences.

The Zamfara State Sharia Penal Code law on homosexual offences is a radical departure from the position in both the CCA and PCA. The Zamfara Sharia law brought the nomenclature ‘sodomy’ to describe homosexual acts. The law states explicitly:

Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy:

Provided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or the subject of the act of sodomy shall not be deemed to have committed the offence.¹⁶³

Clearly or explicitly defining sodomy is not the only unique feature of this criminal code. The introduction of ‘homosexual rape’ is another innovation distinctive from the position under the PCA and CCA. The law did not first stop at defining and prohibiting sodomy but went further to raise the presumption of probable homosexual rape. Where the act of sodomy occurs between two parties and one of the parties did not consent, in the eyes of this law, the non-consenting partner has not committed sodomy, especially where he was compelled by the use of force or threat to indulge in the act. Here, the law presents two scenarios. One is consensual sodomy. This is where both partners agree to the act and indulge in it. Both parties have violated the law and are guilty accordingly. The second scenario is non-consensual sodomy act. In this instance, the consent of one of the parties was obtained through, threat or use

¹⁶³ Section 130 of (n 114 above).

of force. In the latter case, the person who applied the threat or force to obtain the consent of the other is the guilty party, the other whose consent was obtained (the victim) would be absolved of any criminal responsibility.

The law further provides as a way of punishment by stating as follows:¹⁶⁴

Whoever commits the offence of sodomy shall be punished:

- (a). With caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for the term of one year; or
- (b) if married with stoning to death(rajm).

The punishment for sodomy under this law further presents us with a two case scenario basically revolving round the marital status of the offenders. One, where the offenders are not married, the punishment seems lighter than the position in the CCA and PCA since the offenders will be given 100 lashes in addition to a probable jail term of one year. The second case scenario is where the offenders are married. If the offenders are married, they face the death penalty and the only way of execution is stoning to death. It is very open by this law that offenders can be even married couples. For instance, in marriage where heterosexual couples prefer anal or oral sex to penile-vaginal sex, they would automatically fall foul of the provision of this law with the consequence of being stoned to death on conviction. Another instance could also present itself in a marriage where the male partner compels the wife into 'carnal intercourse against the order of nature', where such wife takes up the matter before law enforcement agencies, the man stands the risk of losing his life with the wife as a witness and also a victim.

A very crucial question that must be asked here is whether a minor can commit sodomy? At what age can a person be said to be liable to have a free mind of his own to commit or consent to the offence of sodomy. On this salient issue, the Sharia Penal Code of Zamfara State is silent. The dilemma the silence of this Code on the position of minor offenders presents can possibly lead to jailing children accused of sodomy.

¹⁶⁴ Section 131 (n 114 above).

The Sharia Penal Code is very explicit about the act of lesbianism, which it refers to as *sihaq*. The Code defines lesbianism as follows:

Whoever being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism.¹⁶⁵

The offence is committed by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.¹⁶⁶ For this offence to be sufficiently proved, the following elements are involved: The parties involved must be women, there must be carnal intercourse between the women, the carnal intercourse must involve the stimulation of the sexual organs of the parties for the purpose of sexual excitement and the stimulation of the sexual organ can be with the aid of natural or artificial means. The punishment for the offence is spelt out as follows:

Whoever commits the offence of lesbianism shall be punished with canning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months.¹⁶⁷

Comparatively, the punishment for sodomy is far harsher than that of lesbianism under the Sharia Penal Code law of Zamfara State. Another distinctive feature of the code is the explicit definition and criminalisation of the act of lesbianism. Both the PCA and CCA are curiously silent on homosexuality as it concerns the female gender.

The Code also prohibits the act of gross indecency with a potential jail term of one year and liability of fine for offenders.¹⁶⁸ Where consent of a person below the age of 15 is obtained, such consent will be disregarded and the victim will be absolved of criminal liability.¹⁶⁹

¹⁶⁵ Section 134 (n 114 above).

¹⁶⁶ Explanatory note to section 134 above.

¹⁶⁷ Section 135 (n 114 above).

¹⁶⁸ Section 138 (n 114 above).

¹⁶⁹ Section 138 (n 114 above).

2.7.2 Homosexual offences under the Sharia Penal Code Law of Bauchi State

The Bauchi Sharia Penal Code law defines sodomy (*liwat*) as follows:

Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy:

[P]rovided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy shall not be deemed to have committed the offence.¹⁷⁰

The meaning of sodomy, the criminal elements of the offence, and the exception to culpability of the offence are similar under the Zamfara law. However, there is no demarcation for separate punishment on the basis of marital status for offenders under the Bauchi law, as the Bauchi law prescribes non-optional death penalty for offenders.¹⁷¹ While the Zamfara law recommends the death penalty for sodomy offence committed by married persons and offers the way of execution to be strictly by stoning to death¹⁷² the Bauchi law suggests any other means of executing a death sentence other than stoning as the State deems fit.

For the offence of lesbianism (*Sihag*) the law provides:

Whoever, being a woman engages another woman in carnal intercourse through her sexual organ or by mean of stimulation or sexual excitement of one another has committed the offence of lesbianism.¹⁷³

The offence of lesbianism as defined by the Bauchi law is similar to the provision of Zamfara State law. However, under the Bauchi law the punishment for the offence is caning that may extend to 50 lashes, in addition to a term of

¹⁷⁰ Section 133 (n 115 above).

¹⁷¹ For punishment for sodomy, section 134 of the Bauchi sodomy law states that 'whoever commits the offence of sodomy shall be punished with death by stoning (*rajm*) or by any other means, decided by the state'.

¹⁷² See (n 164 above).

¹⁷³ Section 137 (n 115 above).

imprisonment which may extend to five years.¹⁷⁴ The Bauchi law provides for more severe punishment for acts of gross indecency. The law states as follows:

Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threat compels a person to join with him in the commission of such act shall be punished with caning of fifty lashes and shall also be liable to imprisonment for a term of seven years and may also be liable to fine: provided that a consent given by a person below the age of maturity to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be consent within the meaning of this section.¹⁷⁵

The Bauchi law is also not definite on the age of a juvenile offender as it uses the ambiguous phrase of ‘the age of maturity’.

2.7.3 Homosexual offences under the Sharia Penal Code Law of Kaduna State

In Kaduna state, sodomy also known as *liwat* is punishable by *rajm* (death). Sodomy is defined as follows:

Whoever has anal coitus with any male person is said to commit the offence of sodomy.¹⁷⁶

For the punishment of sodomy the law states that ‘whoever commits the offence of sodomy shall be liable to *rajm* punishment’.¹⁷⁷ ‘Anal coitus’ here still refers to anal sex. By the usage of the word ‘whoever’ it could be implied that under the Kaduna State law sodomy can be committed also with a female person as long as the sexual intercourse is anal coitus in procedure. A very distinct feature of sodomy under the Kaduna law is that where sodomy is committed with the wife the punishment is reduced to *ta’sir*.¹⁷⁸ For the offence

¹⁷⁴ Section 138 (n 115 above) provides that ‘whoever commits the offence of lesbianism shall be punished with canning which may extend to forty lashes and in addition, be sentenced to a term of imprisonment which may extend to five years’.

¹⁷⁵ Section 141 of (n 115 above).

¹⁷⁶ Section 125 of (n 118 above).

¹⁷⁷ Section 126 of (n 118 above).

¹⁷⁸ See section 126(2) of the Kaduna law provides that ‘whoever commits the offence of sodomy with his wife shall be subject to *ta’zir* punishment’.

of lesbianism also known as *sihaq* in Arabic, under Kaduna Sharia law it is defined as follows:

Whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism.¹⁷⁹

The law stipulates for the punishment of the act of lesbianism thus, 'whoever commits the offence of lesbianism shall be liable to *Yazir* punishment'.¹⁸⁰

Lesbianism from the interpretation above is strictly between two female persons to the exclusion of any male person. Carnal intercourse in the act of lesbianism is not restricted to or involvement of sexual organs alone. Any means of stimulation like kissing and fondling of the mammary organs aimed at sexual excitement, as far as it is done by a woman to another woman falls under the contemplation of this law. The punishment for lesbianism under the Kaduna State law is also curiously lesser than the punishment for sodomy.

For the act of gross indecency, the law states that 'whoever commits an act of gross indecency in public, exposure of nakedness in public, and other related acts of similar nature capable of corrupting public morals shall be subject of *ta'zir* punishment'.¹⁸¹

2.7.4 Gender identity offences under the Borno State Law on Prostitution, Homosexuality, Brothels and other Sexual Immoralities & the Kano State Prostitution and other Immoral Acts

Aside from the Sharia Penal Code law of Borno State and the Penal Code law that is parallel in Borno State in criminal matters, the Borno State House of Assembly took a step further towards tightening the noose round the neck of sexual minorities by enacting this law in 2000.

¹⁷⁹ Section 129 of (n 118 above).

¹⁸⁰ Section 130 of (n 118 above).

¹⁸¹ Section 133 of (n 118 above).

The previous sodomy laws and the SSMPA discussed earlier basically placed criminal sanctions on sexual orientation. The unique feature of the BSLPHBS1 is that it widens the scope of sexual minority discourse from mere just gays' and lesbians' affairs to a gender identity question. This law leads us to a very interesting aspect of this research – gender identity. The law defines a homosexual to mean the following:

A man who engages in sexual intercourse with another man and includes a man who dresses, behaves or acts as woman with the aim of enticing another man to engage in homosexual intercourse or other immoral acts.¹⁸²

The law further defines a lesbian to be 'any woman who acts or behaves with the intent of enticing another woman into sexual relationship with her or any other woman'.¹⁸³

The definition of a homosexual under the Borno law can be easily faulted. The reason is that it narrows the understanding of a homosexual to simply a male person. However, one insight given by this law is the fact that the law perceives transgender and transsexuals, in fact persons in quest of gender identity as criminals too. To understand the scope of gender identity criminalisation in Nigeria, it is germane to analyse this Borno law side by side with the Kano State Prostitution and other Immoral Acts (Prohibition) Law¹⁸⁴ which is rather more focused on prohibiting free expression of gender identity. The Kano law did not make mention of sexual orientation but rather criminalised feminine behaviours by men. The law states that:

Any person being a male gender who acts, behaves or dresses in a manner which imitate the behavioral attitude of women shall be guilty of an offence and upon conviction, be sentenced to 1 year imprisonment or a fine of ₦10, 000, or both.¹⁸⁵

Etscorit famously said that:

The human form will always be

¹⁸² Section 2 of (n 18 above).

¹⁸³ (n 18 above).

¹⁸⁴ See (n 19 above).

¹⁸⁵ Section 9 of (n 19 above).

Far more than what the eyes can see
To be oneself should not seem strange
The difficulty is the change.¹⁸⁶

Etscorit's poetic quote alludes to the reality that a person's physical appearance might not necessarily be a reflection of who the person is in the sense of gender identity. The begging question now is, why would a male person behave like a woman or imitate feminine behaviour? Why would a male person also dress like a woman? For these questions to be better appreciated a cursory look must be taken at the question of gender identity. Sexual orientation which the discussed sodomy laws and SSMPA had in contemplation, refers to an individual's sexual partner preference. Visser and Picarra explained further that 'heterosexual individuals are those who if biologically sexed male, are attracted to biologically sexed females and vice versa. In other words, these individuals are in complicit with the heterosexual norm. Homosexual individuals, on the other hands, are sexually attracted to members of their own biological sex.'¹⁸⁷ The gender identity criminalisation which the Borno and Kano law envisage revolve round transsexuals and transgender persons. Taitz describes transsexualism as a 'passionate, lifelong conviction that one's psychological gender-that indefinable feeling of maleness, or femaleness is opposite to one's anatomic sex'.¹⁸⁸ The gender description of section 2 of the Borno law is aptly categorised by JT Weiss as transvestites, which Weiss explained to mean

[i]ndividuals who wear clothing of the opposite gender primarily for erotic arousal or sexual gratification, although some do so for emotional or psychological reasons, as well have a male gender identity, enjoy their male bodies, including their genitals, and in no desire to change their sex.¹⁸⁹

¹⁸⁶ Quoted in Visser & Picarra (n 150 above) 506.

¹⁸⁷ Visser & Picarra (n 150 above) 512.

¹⁸⁸ Cited in Visser & Picarra (n 150 above) 512. Visser & Picarra further note that 'transsexual believe that their true sex is not the one that has been assigned to them in terms of their biological and anatomical sex characteristics' They also assert that 'a biological male transsexual has the desire and constant belief that he is in fact a female, and the opposite is true of a biological female transsexual'.

¹⁸⁹ Visser & Picarra (n 150 above) 513.

A classic insight into the activities of effeminate men in Nigeria is given by Rudolf Gaudio.¹⁹⁰

The Borno law recommends a non-optional death penalty for any one engaged in sexual intercourse with person of same gender.¹⁹¹ Under this law, marital status of the offenders is not brought into consideration in determining the degree of punishment unlike the other sodomy laws where an offender must be a married person for the death penalty to be applicable to the person, who must be of the male gender.¹⁹² The law also provides for the courts to try offences under this law.¹⁹³ For the offence of consensual adult male homosexual conduct and lesbianism, the BSLPHBS1 did not provide any optional punishment apart from the death penalty. As such, where the offence is consensual adult homosexual conduct, the courts listed in section 9 do not have the jurisdiction to try the offence. It must be tried and sentence passed by the High Court of Borno State.

2.7.5 Homosexual offences under the Sharia Penal Code Law of Kano State

The offence of sodomy under the Kano code like the other Sharia codes, is an offence committable only by a male person on another male or on a female through her rectum. The law provides as follows:

Whoever has intercourse against a man or woman through her rectum is said to commit the offence of sodomy, except that whoever is compelled by use of force or threat or without his consent to commit sodomy with another shall not

¹⁹⁰ Gaudio (n 76 above) 31. In his classic account of the *yan daudus* in the densely populated Hausa-speaking city of Sabon Gari, Kano State, Nigeria, Rudolf aptly brings to the fore the homosexual practice of the *yan daudus* and their effeminate behaviourism. He describes them ‘... as men who are said to talk and act like women’.

¹⁹¹ Section 7 of (n 18 above) states that: ‘Any person who engages in sexual intercourse with another person of the same gender shall upon conviction be punished with death’.

¹⁹² Under the Sharia Penal Code laws of Zamfara, Kano and Jigawa, for the death sentence to be passed the offender must be married.

¹⁹³ Section 9 of (n 18 above) states as follows: ‘The Upper Sharia Court or competent Sharia Court, or any Area Court or Magistrates Court with jurisdiction in the area where the offence mentioned under this law occurs shall have jurisdiction to try the offence’. It must however be pointed out that since homosexual offences carry the maximum penalty of death under this law, it will be difficult for the courts listed above to assume jurisdiction to try homosexual offences under the law. The proper court to hear and try homosexual offences under this law should be the State High Court.

be subject of an act of sodomy nor shall he be deemed to have committed the offence.¹⁹⁴

Under Kano laws, potential convicts for the offence of sodomy come under a tripartite categorisation on the basis of their marital status: married, divorce, unmarried. For the category of married offenders and divorced offenders of this law, the punishment is death by means of stoning.¹⁹⁵ For the unmarried offenders, the punishment is caning for a 100 lashes in addition to one year imprisonment.¹⁹⁶ The *actus reus* for sodomy under this law is the proof of penetration through the rectum.¹⁹⁷

Lesbianism is viewed as a serious crime under the Sharia penal law of Kano state as the offence carries same penalty as sodomy. For lesbianism, the law prescribes that: 'Whoever being a woman, engages another woman in a carnal intercourse through her sexual organs or by means of stimulation or sexual excitement of one another commits the offence of lesbianism'.¹⁹⁸ In Kano State the offence of lesbianism and sodomy carry the same punishment. The law further spells the punishment for lesbianism with reference to section 129 as follows:

Whoever commits the offence of lesbianism shall be punished under section 129.¹⁹⁹

Under section 129, the punishment there as discussed above is death by stoning, for married and divorced sodomists, 100 lashes in addition to one year imprisonment for unmarried sodomists. It therefore follows that married and divorced lesbians who are convicted under section 184 of the Kano law will face death penalty by stoning while unmarried lesbians convicted under same section will face 100 lashes and one year imprisonment.

¹⁹⁴ Section 128 of (n 119 above).

¹⁹⁵ See 129(a) of (n 119 above) states that: 'Whoever commits the offence of sodomy shall be punished with stoning to death (*rajm*) if he is married or has been previously married'.

¹⁹⁶ Section 129(b) of (n 119 above).

¹⁹⁷ See explanatory note to section 129 of the Kano law.

¹⁹⁸ Section 183 of (n 119 above).

¹⁹⁹ Section 184 of (n 119 above).

The Kano Sharia Penal Code law defines what acts constitute gross indecency in the following words:

Whoever commits an act of gross indecency by way of kissing in public, exposure of nakedness in public and other related acts of similar nature, in order to corrupt public morals upon the person of another without his consent or by the use of force or threats or compel a person to join with him in the commission of such acts shall be punished with canning of forty lashes and also shall be liable to imprisonment for a term of one year, and shall be liable to a fine of ten thousand naira or all.²⁰⁰

Gay and lesbian persons who chose to display feelings such as kissing in public are likely to violate this law. The transvestite who exposes part of the body can also be targeted as manifesting acts capable of corrupting public morals. The elements of this offence are: Kissing in public, exposure of nakedness in public and other related acts of similar nature, maybe like smooching in public, holding hands and hugging in public. The offence of gross indecency can be committed by both homosexuals and heterosexuals as the prohibited acts specified under section 187 are acts capable of being done by both. The law, however, exempts a person who has not attained the age of puberty from criminal culpability where such an act is done by the person's teacher, guardian or any person entrusted with his care or education.²⁰¹

Unlike other Sharia penal codes, which specify what age a person must have attained to be said to be lacking in ability to consent to this offence, the Kano law does not specify as the law just leaves it vague with the usage of the phrase 'age of puberty'. The law has no explicit explanation for what the age of puberty is. It has however been explained to mean the period of a person's life during which their sexual organs develop and they become capable of having children.²⁰² Richard Gross has explained that the age of puberty is a relative thing which is subject to the variations of time and place.²⁰³ It can be concluded that a female for instance may be sexually developed and capable of having a

²⁰⁰ See section 184 of (n 119 above).

²⁰¹ See also section 187 of (n 119 above).

²⁰² S Wehmeier (ed) *Oxford advanced learners dictionary* (2000) 1172.

²⁰³ R Gross *Psychology: The science of mind and behavior* 6th edition (2010) 577-581.

child at the age of 10, while another may not even at 15. For this law to leave the age of consent and criminal culpability for the offence of gross indecency at puberty age is therefore misleading and complicated.

2.7.6 Homosexual offences under Katsina State Sharia Penal Code law

In Katsina state, northwestern Nigeria, the Sharia Penal Code prohibiting sodomy stipulates elaborately as follows:

Whoever has carnal intercourse against the man or woman through the rectum is said to commit the offence of sodomy.

Except that whoever is compelled by the use of force or threat or without his consent to commit that act of sodomy with another shall not be the subject of the act of sodomy nor shall he be deemed to have committed the offence.²⁰⁴

The Katsina law places emphasis on the fact that sodomy can be committed by a man with a woman as far as there is penetration through the rectum of the woman by the man. The law further punishes the act of sodomy by death.²⁰⁵ The law exculpates a victim of homosexual rape from criminal culpability.

For the offence of lesbianism, the law states that: ‘Whoever being a woman, engages another woman in carnal intercourse through the sexual organ or by means of stimulating or sexual excitement of one another commits the offence of lesbianism.’²⁰⁶ Katsina, like Kano State penalises lesbianism with the death penalty.²⁰⁷ However, unlike Kano, where there is a demarcation on the basis of marital status for imposition of punishment, Katsina has no such distinction. As far as the Katsina law is concerned, both married and unmarried lesbians potentially face the death penalty. On conviction for gross indecency, the law while penalising the act, defines it as follows:

Whoever, commits an act of gross indecency by way of kissing in public, exposure of nakedness in public and other related acts of similar nature in order

²⁰⁴ Section 128 of (n 120 above).

²⁰⁵ Section 129 of (n 120 above) provides that ‘whoever commits the offence of sodomy shall be punished with stoning to death (*rajm*)’

²⁰⁶ Section 183 of (n 120 above).

²⁰⁷ Section 184 of (n 120 above) categorically states that ‘whoever commits the offence of lesbianism shall be punished (under paragraph 129) with stoning to death (*rajm*)’.

to corrupt public morals upon the person of another without his consent or by the use of force or threats or compels a person to join with him in the commission of such act shall be punished with caning of fifty lashes and shall also be liable to fine of ten thousand naira or with both;

Except that a consent given by a person who does not attain puberty to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this paragraph.²⁰⁸

2.7.7 Homosexual offences under the Kebbi State Sharia Penal Code

The Kebbi State Sharia law position on the offence of sodomy provides as follows:

Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy;

Provided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy, shall not be deemed to have committed the offence.²⁰⁹

The law provides for three elements to prove this offence namely, (1) soundness of mind, (2) self-confession (3) four male witnesses who saw the act of sodomy who shall be trustworthy Muslims.²¹⁰ It is of course only the Kebbi law that places very strict onus of proving this offence. The punishment for sodomy is also death by stoning under this law.²¹¹

For the act of lesbianism, the Kebbi law provides, 'Whoever, being a woman, engages another woman in carnal intercourse through her sexual organs or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism'.²¹² As a deviation from the position under Kano and Katsina where lesbianism is punishable by death, in Kebbi

²⁰⁸ See section 187 of (n 120 above).

²⁰⁹ Section 131 of (n 121 above).

²¹⁰ See section 131 (n 121 above).

²¹¹ Section 132 of (n 121 above) states that 'whoever commits the offence of sodomy shall be sentenced to death by stoning (*rajm*)'.

²¹² Section 135 of (n 121 above).

lesbianism is penalised by 50 lashes in addition to six months imprisonment.²¹³ It is explained that the offence is committed by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.²¹⁴

For gross indecency the law states as follows:

Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act shall be punished with caning of forty lashes and may also be liable to fine;

Provided that a consent given by a person below the age of fifteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.²¹⁵

A distinctive feature of the offence of gross indecency under the Kebbi law is that it clearly pegs the age of consent at 15.

2.7.8 Homosexual offences under the Jigawa State Sharia Penal Code law

The definition of the offence of sodomy under Jigawa State Sharia Penal Code is similar to that under Kebbi State.²¹⁶ For the offence of sodomy the law stipulates the punishment thus; 'Whoever commits the offence of sodomy shall be punished (a) with caning of 100 lashes if unmarried, and shall also be liable to imprisonment for the term of one year, or (b) if married with stoning to death (rajm).'²¹⁷ The offence of lesbianism under Jigawa Sharia law is defined in the same breath and wordings as in Kano, Katsina and Kaduna laws.²¹⁸ The punishment for lesbianism is spelt out thus:

²¹³ Section 136 provides 'whoever commits the offence of lesbianism shall be punished with canning which may extend to fifty lashes and may in addition be sentenced to a term of imprisonment which may extend to six months'.

²¹⁴ See explanatory note to section 136 above.

²¹⁵ Section 139 of (n 121 above).

²¹⁶ Section 130 of (n 122 above).

²¹⁷ Section 131 of (n 122 above).

²¹⁸ Section 134 of (n 122 above) for the definition of lesbianism.

Whoever commits the offence of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months.²¹⁹

The act of gross indecency is given an entirely different definition under Jigawa law. The law states as follows:

Whoever acts in a manner which is offensive of common propriety or which generally offends against modesty or acts in an unbecoming manner that is unfit to be seen or heard is said to have committed gross indecency.²²⁰

For punishment of gross indecency the law states that ‘whoever commits an act of gross indecency whether by himself upon the person of another shall be punished with canning of 40 lashes and shall also be liable to imprisonment for a term of one year and may also be liable to fine’.²²¹

2.7.9 Homosexual offences under the Criminal Law of Lagos State, 2011

Lagos state is the only state in Nigeria to have tinkered with the traditional view of consensual adult homosexual conduct under Nigerian criminal law. In the new Criminal Code of Lagos State, there is no provision for the offences of lesbianism or sodomy. However, the law describes what it calls sexual assault by penetration. It provides as follows:

A person who penetrates sexually the anus, vagina, mouth or any other opening in the body of another person with a part of his body or anything else, *without the consent of the person* is guilty of a felony and liable to imprisonment for life.²²²

Mere attempt of this offence attracts 14 years imprisonment.²²³ With this emphasis on consent (or rather, the lack thereof), the provision of the Lagos State law is a welcome development in the direction of decriminalisation of

²¹⁹ Section 135 of (n 122 above).

²²⁰ Section 138 of (n 122 above).

²²¹ Section 139 of (n 122 above).

²²² Section 259 of CLLS (emphasis added).

²²³ Section 260 CLLS 2011.

consensual adult homosexual conduct in Nigeria. For sodomy to be an offence under this law, it must have been done with coercion. Where there is mutual consent, in other words, the Lagos law does not criminalise the act. It is also instructive to note that section 417 of the Criminal law of Lagos State effectively repealed the hitherto existing Criminal Code law of Lagos State (which is the domesticated form of the CCA), in that it states: 'The Criminal Code Law Cap. C17 Laws of Lagos State of Nigeria is hereby repealed.'²²⁴

While the omission of consensual adult homosexual conduct as an offence from the CLLS is a welcome legislative development, it should however, be pointed out that Lagos State, been a component unit of Nigeria is inevitably affected by the nationwide applicability of the SSMPA. While it can be validly argued that private consensual adult homosexual conduct is not a crime under the CLLS, homosexual marriage in Lagos State is prohibited and amounts to a crime by virtue of the general application of the SSMPA throughout the federation of Nigeria (I discuss the SSMPA in details in later section of this chapter).

2.7.10 Homosexual offences under the Sokoto State Sharia Penal Code

The Sokoto Sharia Penal Code provides for the offence of sodomy as follows:

Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy;

Provided that whoever is compelled by the use of force or in fear of death or grievous hurt or fear of any other serious injury or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy shall not be deemed to have committed the offence.²²⁵

The punishment for the offence is provided as follows:

Whoever commits the offence of sodomy shall be punished:

- (a) With stoning to death

²²⁴ Section 417 of the CLLS 2011.

²²⁵ Section 132 of (n 123 above).

- (b) If the act is committed by a minor on an adult person, the adult person shall be punished by way of ta'azir which may extend to 100 lashes and the minor with correctional punishment.²²⁶

The Sokoto law gives a similar definition of the offence of lesbianism in the same manner as other Sharia codes elaborately explaining the key ingredients of the offence.²²⁷ The punishment for the offence of lesbianism in Sokoto Sharia Penal Code is the same as the provision under Jigawa State.²²⁸

Gross indecency under Sokoto is an exact replica in all ramification with the position of the Kebbi law.²²⁹

2.7.11 Homosexual offences under the Armed Forces Act

This law basically establishes the Nigeria Armed Forces comprising the Nigerian Army, the Nigerian Navy and the Nigerian Air Force.²³⁰ The Armed Force Act serves as the regulating criminal code for every member of the Nigerian military who is subject to the service law. Amongst the sexual offences clearly prohibited and penalised by the AFA is the offence of sodomy. For this offence the AFA states;²³¹

A person subject to service laws under this Act who-

- (a)
- (b) Has carnal knowledge of a person against the order of nature; or
- (c) Has carnal knowledge of an animal; or
- (d) Permits a person to have carnal knowledge of him against the order of nature, is guilty of an offence under this section.

It was the platform of the AFA that the famous *Magaji's* case was tried and decided before the Court Martial. For gross indecency, the AFA states:

A person subject to service law under this Act who, whether in public or private, commits an act of gross indecency with any other person or procures another

²²⁶ Section 133 of (n 123 above).

²²⁷ Section 136 of (n 123 above).

²²⁸ Section 137 of (n 123 above).

²²⁹ See section 140 of (n 123 above).

²³⁰ Section 1(1) of the Armed Forces Act.

²³¹ Section 81(1) of the Armed Forces Act.

person to commit an act of gross indecency with him or attempts to procure the commission of an act of gross indecency by any person with himself or with another person whether in public or private, is guilty of an offence under this section.²³²

The punishment for sodomy and gross indecency is prison term of seven years.²³³ The punishment under this law for sodomy offences is a way lighter than the position in the CCA, PCA and other sodomy laws in Nigeria.

2.7.12 Homosexual offences under Yobe State Sharia Law

For the offence of sodomy, Yobe State Sharia Penal Code provides:

Whoever has anal coitus with any man or woman is said to commit the offence of sodomy;

Provided that whoever is compelled by the use of force or threat or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy, shall not be deemed to have committed the offence.²³⁴

Yobe law also penalises sodomy with the death penalty. However, where the offenders are a couple, they are exempted from the death penalty. Section 131(1) provides as follows:

Subject to the provision of subsection (2), whoever commits the offence of sodomy shall be punished with stoning to death (rajm).

Section 131(2) provides that 'whoever commits the offence of sodomy with his wife shall be punished with caning which may extend to 50 lashes. By this provision, the Yobe law has mitigated the harshness of meting out the capital punishment where the act of sodomy is committed with one's own wife.

For the offence of lesbianism under Yobe law is similar in definition with the position under Jigawa and Sokoto,²³⁵ with similar punishment of 50 lashes

²³² Section 81(2) of the Armed Forces Act.

²³³ Section 81(3) of the Armed Forces Act.

²³⁴ Section 130 of (n 124 above).

²³⁵ Section 134 of (n 124 above).

in addition to a probable jail term of six months.²³⁶ It is further explained that
8 the offence is committed by the unnatural
fusion of the female sexual organs and or by the use of natural or artificial
means to stimulate or attain sexual satisfaction or excitement.²³⁷

The provision for gross indecency under the Yobe law is the same as what
is obtainable in Katsina.²³⁸

2.8 Homosexual offences under the Same-Sex Marriage (Prohibition) Act

The then President of the Federal Republic of Nigeria, Dr Goodluck Ebele Jonathan assented to the Same-Sex Marriage (Prohibition) Bill sometime in January 2014.²³⁹ The unanimity with which the law was passed by both the Senate and the House of Representative is an indisputable testament to the popularity of the Act. There was no single dissenting voice in both houses during the debate over the issue of same-sex marriage in Nigeria.

The passage of the Act was greeted with wide spread jubilation particularly from religious quarters and the President was praised to the high heavens.²⁴⁰ While Nigerians celebrated and applauded the President for the Act, the international community reacted with disappointment. The Prime Minister of Britain said Britain would not give any assistance or aid to countries that are opposed to same-sex marriage.²⁴¹

In the same vein, the Canadian government condemned the passage of the Bill criminalising same-sex marriage and homosexual activities in Nigeria

²³⁶ Section 135 of (n 124 above).

²³⁷ Explanatory note to section 134.

²³⁸ See section 138 of (n 124 above).

²³⁹ See the presidential assent clause, wherein the President comment thus: 'I certify that this bill has been carefully compared by me with the decision reached by the National Assembly and found by me to be true and correct decision of the Houses and is in accordance with provisions of the Acts Authentication Act Cap A2 Laws of the Federation of Nigeria, 2004.

²⁴⁰ See Olokor (n 146 above)

²⁴¹ OA Odiase-Alegimenle. & JO Garuba 'Same-sex marriage: Nigeria at the middle of western politics (2014) 3 *Oromia Law Journal* 286. The British High Commissioner in Nigeria, Mr. Andrew Lyod, in a closed door meeting with the Jigawa State Governor, Alhaji Lamido, even asked the Nigerian government to rescind its decision on punishing individuals in same-sex marriage, adding that such a law infringes on the fundamental rights of choice and association.

by the senate.²⁴² Odiase-Alegimenle and Garuba assert that 'Nigeria as a sovereign state has the authority to make laws for the good governance of the people without any form of interference or external influence of any kind'.²⁴³ In this section, I do an analysis of the SSMPA and look into how it regulates sexual conduct of gay and lesbian persons, and even goes beyond gay and lesbian persons as such.

2.8.1 Offences and activities associated with homosexual conduct under SSMPA

As has been indicated, Nigeria already had existing laws prohibiting consensual same-sex practices in place even before the passage of the SSMPA as noted earlier. However, none of these laws criminalising consensual adult same-sex touches on same-sex marriage. As such, the SSMPA is an expansion on the anti-homosexual laws. The Act clearly prohibits marriage or civil union by persons of same sex by providing as follows:

A marriage contract or civil union entered into between persons of same sex:

- (a) Is prohibited in Nigeria; and
- (b) Shall not be recognized as entitled to the benefits of a valid marriage.²⁴⁴

In Nigeria, three types of marriage are recognised; the statutory, the customary and Islamic systems. The statutory marriage in Nigeria is governed by the Marriage Act and the Matrimonial Causes Act, while the customary and Islamic marriages are regulated by customary and Islamic laws respectively.²⁴⁵ What is same-sex marriage? Obidinma and Obidinma view same-sex marriage as a 'marriage between two persons of the same gender identity'.²⁴⁶ As far back as

²⁴² Odiase-Alegimenle & Garuba (n 241 above) 286.

²⁴³ Odiase-Alegimenle & Garuba (n 241 above) 287.

²⁴⁴ Section 1 SSMPA 2013.

²⁴⁵ N Tijani 'Matrimonial causes' in AF Afolayan & PC Okorie (eds) *Modern civil procedure law* (1998) 431.

²⁴⁶ E Obidinma & A Obidinma 'The travails of same-sex marriage relation under Nigerian law' (2013) 17 *Journal of Law, Policy and Globalisation* 42.

the 18th century, the English Court of Probate and Divorce has defined in the case of *Hyde v Hyde*,²⁴⁷ the concept of marriage while knocking down any substance of same-sex marriage. By the provisions of section 1 SSMPA, persons of the same sex are not only prohibited from marrying but they cannot also enjoy the benefits of a valid marriage in Nigeria. The Act in its own definition of marriage, states as follows:

Marriage means a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic law, or customary law.²⁴⁸

The emphasis on persons of opposite sex is very important here. Under the three types of marriage obtainable in Nigeria, none accommodates same-sex marriage. The Act clearly defines same-sex marriage as ‘the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship’.²⁴⁹

While also defining civil union, the Act enumerates instances where members of same sex can fall under the category to mean ‘any arrangement between persons of the same sex to live together as sex partners; includes such description as; adult independent relationships; caring partnerships; civil partnership; civil solidarity pacts; domestic partnerships; reciprocal beneficiary relationship; registered partnership; significant relationships; and stable unions’.²⁵⁰

The Act further stamps a note of finality on the recognised marriage in Nigeria.²⁵¹ People marry for different reasons. For some, it is for the purpose of procreation and for others, it is for the reason of companionship. God in his words gave a strong ground for creating Eve and offering her as a wife for the lonely Adam.²⁵² Practitioners of same sex seeking companionship definitely are

²⁴⁷ (L.R.) IP & D130.

²⁴⁸ Section 7 SSMPA 2013.

²⁴⁹ Section 7 SSMPA 2013.

²⁵⁰ Section 7 SSMPA 2013.

²⁵¹ Section 3 of the Act emphatically states that ‘only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria’.

²⁵² Genesis 2:18.

bound to seek legal marriage. The quest by gays and lesbians to marry is another way of self-expression and taking their homosexual desires to the next level of marriage. However, in Nigeria, this desire for marriage is restricted and prohibited by the Act. The sodomy laws discussed earlier did not mention same-sex marriage probably because the framers of these laws did not envisage that a time will come when homosexuals will yearn for not just sexual expression and satisfaction but attainment of marital status like their heterosexual counterparts. The prohibition of same-sex marriage is also extended to foreigners or Nigerians in the diaspora who have entered into such relationship but intend to come to Nigeria. To this effect, the Act states as follows:

A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there from by virtue of the certificate shall not be enforced by any court of law.²⁵³

In countries where same-sex marriage is allowed nationals of such countries on stepping into Nigeria are technically stripped off their marital status as gay or lesbian couples. The provision of the Act concerning foreigners who were married as gays or lesbians and are in Nigeria may arguably sound disrespectful to the sovereignty of these countries. This scenario is also applicable to Nigerian homosexual nationals marrying foreigners abroad. The Sharia law with all its supposed harshness still recognises non-Muslims and restricts its application to only Muslims.²⁵⁴ One may wonder why the Act cannot be applicable to only Nigerians to the exclusion of foreigners. Or why can't foreigners who are legally married as gays and lesbians retain their marital status on setting their feet on Nigerian soil.

The audacity of the SSMPA is further manifested in its intrusion into places of worship. In Nigeria, another way of celebrating marriage is by

²⁵³ Section 1(2).

²⁵⁴ See (n 154).

ceremonies in places of worship like churches, mosques and shrines.²⁵⁵ Gays and lesbians too may also wish to solemnise their relationship in places of worship. This is not to be since the Act imposes restriction on solemnisation of same-sex marriage in places of worship.²⁵⁶ Here again, the Act makes effort to regulate how people should worship God. It interferes with freedom of worship as it disregards the right of religious institutions to decide on their own how to treat their gay and lesbian members. This is a non-optional directive on how gays and lesbians should be treated by churches, mosques and other places of worship in Nigeria.

At the organisational level, the Act also limits and restricts the activities of sexual minorities.²⁵⁷ By implication of the legislative clampdown on homosexual activities, it becomes a crime for an owner of a premises to rent out his building to whoever needs it for the purpose of gay activities such as gay clubs, or hotel. Even when the owner of the premises inadvertently lets it out, without the knowledge of the possibility of its usage for homosexual activities, he also stands the risk of being jailed.

Another worrisome aspect of the Act is the prohibition of harmless show of affection between persons of same sex in public.²⁵⁸ With this provision, even non-homosexuals are likely to be dragged into the criminalisation of homosexual activities. The framers of this law might not even take cognisance of the fact that heterosexual Nigerians like to express filial affections to one another openly. If you visit beaches in Nigeria, you see Nigerians dressed in skimpy clothing hugging, holding hands and kissing or pecking. Meanwhile,

²⁵⁵ Section 21 of the Marriage Act, Chapter 218, Laws of the Federation of Nigeria 1990 stipulates licenced place of worship where marriage can be celebrated. It states that ‘marriage may be celebrated in any licenced place of worship by any recognized minister of the church, denomination or body to which such place of worship belongs, and according to the rites or usages of marriage observed in such church, denomination or body’.

²⁵⁶ Section 2(1) of the SSMPA cautions that: ‘A marriage contract or civil union entered into between persons of same sex shall not be solemnised in a church, mosque or any other place of worship in Nigeria’.

²⁵⁷ Section 4(1) of the SSMPA states that: ‘The registration of gay clubs, societies and organisatons, their sustenance, processions and meetings is prohibited’.

²⁵⁸ Section 4(2) of the SSMPA provides that ‘the public show of same sex amorous relationship directly or indirectly is prohibited’.

they are not homosexuals. Can such demonstration of affection qualify as ‘amorous relationships’? Considering the well-documented instances of police and other law enforcement agents’ brutality in Nigeria, there is a very high probability that law enforcement agents can cash in on the vagueness of section 4(2) of the Act to unleash terror on unsuspecting heterosexuals who show open affection for themselves.

2.8.2 Punishments for homosexual conduct and related activities under the SSMPA

The Act prescribes 14 years imprisonment as penalty for any person who enters into same-sex marriage or civil union.²⁵⁹ This term of punishment is similar to the position in the Criminal Code and Penal Code. For registration, operation or participation in gay clubs and societies, including public show of same-sex amorous relationship, the punishment is 10 years imprisonment on conviction.²⁶⁰

The above section is a deviation from criminalisation of mainstream homosexual activities and a questionable criminalisation of heterosexual sympathisers of homosexuals. If a person is related to a homosexual and wishes to witness the solemnisation of the gay person’s marriage, the witness is marked for potential criminal prosecution even when the witness is a heterosexual. Heterosexuals who operate gay clubs as a source of economic livelihood are also at a risk of jail. Another apprehensive aspect of the law is the criminalisation of gay rights activism and advocacy.

Only the State High Courts have powers to try offenders under this Act²⁶¹ unlike the other sodomy laws, where the Magistrate Court, Area Court and Sharia Court have jurisdiction to try offenders.

²⁵⁹ Section 5(1) of the SSMPA articulates that ‘A person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment’.

²⁶⁰ Section 5(2) SSMPA.

²⁶¹ Section 6 of the SSMPA 2013.

2.8 Application of anti-homosexual laws in Nigeria

Consensual adult homosexual offences unlike other offences under Nigerian law do not come up for prosecution frequently probably because the offence is committed consensually and in private. It can also be arguably asserted that this offence or act does not hurt the society directly; as such, the interest of law enforcement to clampdown on perpetrators remains very slim.

The first case of sodomy to be heard by the Nigerian Supreme Court is the highly celebrated case of *Major Bello Magaji v the Nigeria Army*. This case went on appeal to the Nigerian Supreme Court where all appellate issues raised were exhaustively deliberated upon. The legal platform upon which *Magaji Bello's* case was instituted and prosecuted was the violation of the sodomy provision of section 81(1) of the Armed Forces Act, 1993. It is not only *Magaji's* case that has been tried in Nigerian courts; others cases have come up for trial predominantly in the northern Nigeria. In this section, I analyse the application of the laws criminalising homosexual acts in some of the well-known cases in Nigeria.

2.8.1 The case of *Major Bello Magaji v Nigerian Army*

Magaji's case is the first and only sodomy trial to have been subjected to the appellate scrutiny of the Nigerian Supreme Court in 2008. Mr Bello Magaji, a very senior military staff member, was a major as at the time of committing the offence. He was charged before the General Court Martial for sodomy contrary to section 81(a) of the Armed Forces Act. The basis of the charge was that sometimes in 1996, he had carnal knowledge of four boys namely; Mohammed Abubakar, Joseph Unigbe, Emmanuel Ilagoh and Isaac Jonah. On arraignment he pleaded not guilty to the charge.²⁶²

From the facts of the case reported, the trial involved the testimony of each of the four victims of the alleged offence. The appellant (Bello) informed the General Court Martial, through his counsel, that he would not call

²⁶² *Magaji* (n 37 above) 341.

witnesses and that he was resting his case on that of the prosecution. At the end of the trial, he was found guilty as charged, convicted and sentenced to a term of seven years imprisonment, which was however, later reduced to five years by the confirming authority.²⁶³ Magaji, being dissatisfied with the verdict of the Army Court Martial appealed to the Court of Appeal, which dismissed his appeal. He pressed further, and approached the Supreme Court where his conviction was yet again confirmed.

The former Army major committed the offence of sodomy with the four boys at the Army Cantonment Boys Secondary School in Ojo cantonment in Lagos sometime in 1996. Ordinarily, he could have been charged under section 214 of the Federal Criminal Code Act, applicable to southern Nigeria, but he was rather charged under the Armed Forces Act presumably because he was a serving member of the Nigerian Army and as such subject to the service law of the army.

One of the issues the Supreme Court considered extensively in this case is the sodomy provision of sections 81(1) of the AFA. The definition of sodomy offence was succinctly laid bare here. On what amounts to sodomy, the Supreme Court held that ‘sodomy is a sexual act in which a man puts his penis in another man’s anus’.²⁶⁴ By this definition, the Supreme Court has narrowed the definition of sodomy strictly to acts between a man and another man. This interpretation is a radical departure from the position of sodomy in the CCA, PCA and other sodomy laws where it is envisaged that a man can sodomise a woman in a consensual act. While reviewing the evidence-in-chief of the first prosecution witness (one Emmanuel Eneya) Niki Tobi, JSC, in his lead judgment quoted the testimony of the PW1 and how the appellant performed the act of sodomy on him as follows:

All of us went inside the guest room ... After that he offs his nicker and off Mohammed’s nicker and he sexed Mohammed through the anus. Then Mohammed shouted that this wasn’t what Joseph told him that he was coming to do there. Then Oga stood up and Mohammed went out, he told Mohammed

²⁶³ *Magaji* (n 37 above) 341.

²⁶⁴ *Magaji* (n 37 above) 390 para D.

to bring a white container. When Mohammed brought the container the container was filled with cream, so he used the cream to rub our penis; I and Mohammed and then Mohammed went out then Oga wanted to use me too. He turned me upside down and used his penis and put it into my anus then, I shouted that I can't take it that is not what Joseph told me too, then he said I should go out.²⁶⁵

Niki Tobi JSC took pains to further expatiate on the phrases 'carnal knowledge', 'the order of nature' and 'against the order of nature'. He notes:

The Armed Force Decree does not define carnal knowledge. Section 6 of the Criminal Code Act defines carnal knowledge or the term carnal connection. The term implies that the offence, so far as regards that elements of it, is complete upon penetration. While carnal knowledge is an old legal euphemism for sexual intercourse with a woman. It requires a different meaning in section 81. The section 81 meaning comes to light when taken along with the proximate words 'against the order of nature'. The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people.²⁶⁶

Tobi JSC, in his analysis and understanding of the phrases captured in section 81, brings to the fore the famed belief of the unnaturalness of a homosexual act while conforming to the popular hypothesis that heterosexual penile-vagina sex is the morally right and the religiously correct form of sexual activity. For Tobi JSC, anal sex is against nature and obviously ungodly. He expresses the view that 'the natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration. That is against the order of nature and again that is what section 81 legislates against.'²⁶⁷ In his verdict Tobi JSC gave a scathing assessment of the appellant's action in the following statement:

What the appellant decided to do was to dare nature in his craze for immoral amorous satisfaction. By his conduct, the appellant re-ordered God's creation. Has he got the power to do that? No. No human being, whether in the military or not, has the power to re-order God's creation ... By his conduct, the appellant has brought shame to himself. Although a bit of the dent is on the army. I am

²⁶⁵ *Magaji* (n 37 above) 365 para G-H.

²⁶⁶ *Magaji* (n 37 above) 373 para D-F.

²⁶⁷ *Magaji* (n 37 above) 373 paras H

not prepared to hold that force guilty of the conduct of the appellant. The army did not ask him to commit this heinous and atrocious offence. He is a terrible criminal. And he is alone, clearly alone.²⁶⁸

Justice Tobi, erudite law professor turned judge, did not hide his contempt for the act of homosexuality from his description and linkage of it as an attempt to challenge God. To a large extent, Justice Tobi dwelt on the moral question of a man having sex with a man and deviated from the issue of homosexual rape. His Lordship's verdict could also be seen as a great boost to the popular argument amongst religious Nigerians that consensual same-sex practices are acts against God. Tobi JSC is not alone in expressing his disdain for the offence of sodomy. Akintain JSC, in his concurring judgement added that 'the offence for which the appellant was convicted is an unusual, abnormal and unbelievable one'.²⁶⁹ From Akintain's viewpoint, the abnormality about homosexual offences could perhaps stem from mental imbalance. Bello's case and the utterances of Nigeria's most senior judges from the apex court is a clear pointer to the level of homophobia expressed by not just the uninformed man on the street, but from the 'all knowing' jurist on the bench too.

2.8.2 Other identified cases and trials of sodomy offences

Before the passage of the SSMPA, few cases of sodomy trials and convictions have being recorded in Nigeria, aside from the celebrated *Magaji Bello* case. In 2001, the maximum death sentence for sodomy offences was invoked in a Sharia Court sitting in Kebbi State. Attahiru Umar was sentenced to death by stoning for sodomising a seven-year old boy.²⁷⁰ In February 2002, Abdullahi Barkehi in Zamfara State, got 100 strokes of lashes after conviction for sodomy.²⁷¹ In 2003 another death sentence was also passed in a case of sodomy

²⁶⁸ *Magaji* (n 37 above) 378 para A-C.

²⁶⁹ *Magaji* (n 37 above) 379 para E.

²⁷⁰ Weimann (n 116 above) 174

²⁷¹ Weimann (n 116 above) 174.

in Bauchi State. In this case Jibrin Babaji was sentenced to death by stoning for sodomising teenage boys. However, the convict was discharged and acquitted by the Sharia Court of Appeal in March 2004 after successfully pleading the defense of insanity.²⁷²

After the passage of the SSMPA in 2013, a flurry of arrest and arraignment of suspected 'sodomists' gained ground across the country. On 24 December 2013 an interesting homosexual trial came up in *Bauchi State Sharia Commission v Ibrahim Marafa*.²⁷³ The accused was charged before His Honour El-Yakub Aliyu of the Upper Shari'a Court of Bauchi State for sodomy under section 133 of the Bauchi State Sharia Penal Code. The charge brought against Mr Ibrahim Marafa as read out to him by Barr Dayyabu Ayuba, the prosecuting counsel stated as follows:

That you Ibrahim Marafa of Bauchi some time ago you engaged yourself in the act of committing homosexuality in Bauchi town with different people within the jurisdiction of this court, you thereby committed an offence contrary to section 133 of the Sharia Penal Code law 2001, laws of Bauchi State.²⁷⁴

The accused pleaded not guilty to the offence and was subsequently remanded in prison custody by the trial judge.²⁷⁵ Despite the vagueness of the charge against the accused he was remanded in prison custody without bail basically because the offence for which he was charged carries the death penalty.²⁷⁶ After having been in detention for almost six months without the prosecuting counsel calling a single witness, the defense counsel approached the court for bail for the accused on 3 May 2014, insisting that the court should grant bail on liberal terms as the accused had languished in prison for long.²⁷⁷ In his objection the prosecution stated as follows:

We are objecting for the bail of the accused person because he is not

²⁷² Weimann (n 116 above) 174.

²⁷³ Case No CRF/132/13.

²⁷⁴ Certified True Copy of records of proceedings of *Ibrahim Marafa* (n 273 above) 1.

²⁷⁵ CTC of *Ibrahim Marafa* (n 273 above) 2.

²⁷⁶ See (n 171 above). Section 7 of the Sharia Criminal Procedure Code Laws of Bauchi State 2001, also provide to the effect that hudud offences under Islamic law are not bailable.

²⁷⁷ CTC of records of proceedings of *Ibrahim Marafa* (n 273 above) 5.

entitled to bail by section 7 of the Shari'a Criminal Procedure Code laws of Bauchi State 2001, because the offence with which he is charge is a *hudud* offence under Islamic law.²⁷⁸

While appraising the arguments of both defense and prosecuting counsel on the bail proposal the trial judge, El-Yakub Aliyu has this to say:²⁷⁹

Be that as it may section 7 of the code must be read with careful understanding not to infringe the right of the accused person. Since the accused person was arraigned on 24th December, 2013 the accused person has been in custody barely six months now and no single witness was provided by the prosecution. In Shari'a the dignity and personality of a person is always respected, therefore, in the interest of justice I will grant the bail of the accused under the following condition:

1. He shall provide a reasonable surety, a government worker above grade level 12.
2. He and the surety shall execute a bond in the sum of N200, 000.00 each.

In El-Yakub's final judgment in *Marafa's* case he expressed his disappointment at the lackadaisical approach to the prosecution of a serious case as homosexual conduct which is ordinary not bailable. He commented as follows:

I have carefully noticed that since this case began last year the prosecution could not produce any evidence against the accused person. All adjournments given by the court are in the instance of the prosecution and up to today the prosecution could not bring any witness to establish the guilt of the accused person.²⁸⁰

According to Yakubu, the prosecution owes the court the duty of proving its allegation against the accused through concrete evidence and in this case since the prosecution has failed to produce evidence against the accused person, the court will have no option than to discharge the accused person under section

²⁷⁸ *Ibrahim Marafa* (n 273 above) 5.

²⁷⁹ *Ibrahim Marafa* (n 273 above) 5-6.

²⁸⁰ *Ibrahim Marafa* (n 273 above) 7.

28 of the Sharia Criminal Procedure Code 2001 laws of Bauchi State and he is accordingly discharged.²⁸¹

The case of Marafa sends a signal to sexual minorities in Nigeria that with the wave of homophobia in the country, various charges can be cooked up and perceived homosexuals not even caught in the act dragged before the court to go through the ordeal of prolonged trials. In January 2014, another similar trial presided over by same judge El-Yakub Aliyu came up in the case of *Bauchi State Government v Usman Sabo & anor*.²⁸² The statement of complaint as read by Barr Dayyau Ayuba on behalf of the Attorney General of the State to the two accused states:

That you Usman Sabo male residence of Bauchi town and Hafizu Abubakar of the same address sometimes between November to December, 2013 you indulged yourself in the act of committing the offence of sodomy in a house at Bakin Kura Street in Bauchi town. Such act is an offence under section 133 of the Bauchi State Shari'a Penal Code law 2001.²⁸³

To this one count charge, the two accused pleaded not guilty and were remanded in prison custody by the judge.²⁸⁴ On the next adjourned date of 6 January 2014, the prosecution called his first witness before the court, I replicate his testimony here:

My name is Dalhatu Gambo, Muslim 35 years old residence of Bakin Kura in Bauchi. I am a carpenter. I know the accused persons for over 2 years; we leave in the same street. The accused person have (sic) a separate house in the street where they used to gather to do this act of sodomy. When the news became so open to the people in the street we put the house under surveillance. When they understood that we put them under supervision they changed the time of their gathering from night to morning.

One evening ... we saw the accused person entering in to the said house, then I and other persons followed them. We met the first accused person making a call with his GSM phone in a short nicker and the second accused person sitting down with a tee shirt. We asked them as to what are they doing, they could not give us a satisfactory answer, we then arrested them and took them to the Shari'a Commission that is all I know.²⁸⁵

²⁸¹ *Ibrahim Marafa* (n 273 above) 7.

²⁸² Case No CRF/129/2013.

²⁸³ Certified True Copy of records of proceedings *Usman Sabo* (n 282 above) 1.

²⁸⁴ *Usman Sabo* (n 282 above) 2.

²⁸⁵ *Usman Sabo* (n 282 above) 3.

From the evidence of the sole prosecution witness, the accused persons were charged to court on the mere suspicion that they were having homosexual sex in a particular house. The witness testimony did not per se point out the fact that the accused were committing sodomy before their privacy was invaded by the curious neighbours. During cross examination of the sole prosecution witness, the following interaction ensued:²⁸⁶

1st Accused: Have you ever caught me with somebody doing this act together?

Prosecution Witness (1): No, I have never.

1st Accused: Between you and God, when you entered the house under what circumstances do you see me?

Prosecution W (1): You in a short nicker and the second accused person in his dress.

The second accused person who was also unrepresented by a legal counsel subjected the prosecution witness to cross examination and the witness revealed that he never caught the two accused persons in the act ‘but we are told that is what they use to do in the house’.²⁸⁷ In his judgment, El-Yakubu expressed the view that there should be at least two adult male witnesses that should testify in case as serious as sodomy in line with the provision of the Holy Qur’an. He stated as follows:

Islamic law requires that in capital offences like this evidence of two male witnesses is necessary to prove the guilt of the accused person. The offence of sodomy is a serious offence under our law which attracts death penalty if it is proved beyond reasonable doubt.²⁸⁸

Aside from providing only a sole witness, El-Yakubu, J rightly noted that the evidence of the prosecution has not established a prima facie case against the

²⁸⁶ *Usman Sabo* (n 282 above) 3.

²⁸⁷ *Usman Sabo* (n 282 above) 4.

²⁸⁸ *Usman Sabo* (n 282 above) 7.

accused persons. His honour, while discharging and acquitting the accused persons quoted the Hadith of Prophet Muhammed (SAW) as follows:²⁸⁹

If people were to be given judgment on the face of their claim, some people would have claimed the blood and wealth of others, but it is for the claimant to produce evidence (witness) and for this defendant to take an oaths.

In January 2015, the case of *Commissioner of Police v Edwin Kelechi & Anor*²⁹⁰ came before the Area Court of the Federal Capital Territory, Abuja, for trial. Edwin Kelechi and Khalid Ibrahim were jointly charged for committing unnatural offence contrary to section 284 of the Penal Code.²⁹¹ Both accused persons pleaded guilty to the offence. The first accused, while pleading guilty to the charge, stated as follows: ‘We have committed the act of unnatural sex but it is a temptation and a work of devil and we later regret our action’.²⁹² On pleading guilty to the charge, the prosecuting officer Corporal Anigbo Paul urged the trial court to convict and sentence the two accused persons accordingly.²⁹³ The trial judge Hon Gambo Garba convicted the two accused for the offence of sodomy and fined Mr Edwin Kelechi to 10,000 naira, or in the alternative, to serve one year imprisonment in default of payment in addition to a 14 days imprisonment without an option of fine as punishment for the offence of sodomy. The second accused was given with the same punishment.²⁹⁴

²⁸⁹ *Usman Sabo* (n 282 above) 7.

²⁹⁰ Case No CR/07/15 (unreported).

²⁹¹ See page 1 Of the Certified True Copy of records of proceedings of (n 290 above). The statement of complaint filed by the prosecutor discloses that on the 21 January 2015 at about 1400hrs, the 1st accused, Mr. Kelechi of Sauka Airport Road Abuja invited his friend Khalid Ibrahim at Galadimawa village. They both had sex which resulted into a fight as the first accused failed to give the 2nd accused the sum of two thousand naira he promised him as an incentive for sex. This brawl led to their arrest by the police.

²⁹² CTC of *Edwin Kellechi* (n 290 above) 2. In their allocotus after conviction, both 1st and 2nd convicts pleaded for leniency from the court. The 1st convict pleaded with the court to give him an option of fine. In his own words, he lamented thus: ‘What we did really is not a good thing. It is a bad thing but we regret our action. I have never commit such offence before and it is the devil that lead(sic) me to this temptation to commit the offence and I really regret my act’. See 3 of CTC of records of proceedings.

²⁹³ CTC of *Edwin Kellechi* (n 290 above) 2.

²⁹⁴ CTC of *Edwin Kellechi* (n 290 above) 4.

Also, some time in 2015, the case of *Commissioner of Police v Barr Armstrong Ihua & 2 ors*²⁹⁵ came up for trial. The three accused persons, the first, a lawyer, Armstrong Ihua, Collins Ekike Inyanya and Pius Bameiyi Joseph, were charged before the Upper Area Court of Nasarawa State, sitting at Maraba Gurku, for unnatural offence contrary to section 284 of the Penal Code. The first and second accused persons were alleged to have had carnal knowledge of the third accused person. The trial was not, however, conclusively decided as the trial judge discharged the accused persons for lack of evidence against them.²⁹⁶

In 2016, in the case of *Commissioner of Police v Bestwood Chukwuemeka*,²⁹⁷ a leading Nigerian actor was convicted and sentenced to three months imprisonment by a Karu Senior Magistrate Court, Abuja, for also having carnal knowledge with a nominal complainant through his anus. The charge was brought before the Senior Magistrate Court by prosecutor Mohammed Umar under section 284 of the Penal Code. This case too did not go through the rigours of a full trial, as the accused pleaded guilty to the charge telling the court: 'I was under the influence of alcohol and I want the court to temper justice with mercy'.²⁹⁸ The trial Magistrate, Nafisatu Buba, held that alcohol intake should not be an excuse for committing such offence and handed down a three month jail term on the accused stating that 'this would serve as warning to other youths who hide under the influence of alcohol to commit crimes'.²⁹⁹

Two similar cases of sodomy trial are also ongoing in Plateau State, Nigeria. In the case of *Commissioner of Police v Emeka Eze and anor*,³⁰⁰ the accused persons, Emeka Eze and Jonathan Akatim, were arrested by the police based on information that the duo were having carnal knowledge against the

²⁹⁵ Case No: UACMG/CR/105/2015 (unreported).

²⁹⁶ Certified True Copies of record of proceeding of *Bestwood Chukwurah* (n 295 above).

²⁹⁷ The Certified True Copy of the records of proceedings of this case has been applied for by this researcher under the Freedom of Information Act, but yet to be obtained as at the time of putting pen to paper.

²⁹⁸ See 'Nigerian actor goes to jail for having sex with another man' available at <http://www.premiumtimesng.com/news/100558-actor-28-sentenced-to-3-months-imprisonment-for-homosexual-acts.html> (accessed 26 December 2015).

²⁹⁹ As above.

³⁰⁰ UACI/CR/360/2015 (unreported).

order of nature. At the level of police investigation, the two accused persons confessed to the act, and were arraigned before the Upper Area Court at Kasuwan Namma presided over by MM Hassan J. Despite confessing to the police of committing the alleged offence, the two accused persons pleaded not guilty before MM Hassan J. *Commissioner of Police v Stephen Pam*,³⁰¹ is another ongoing sodomy trial by the Upper Area Court, Kasuwan Namma involving the sodomisation of a nine year old by name Andrew Ogwonye. The accused aged 39 lured the victim and forcefully had sexual intercourse with him through the anus in an uncompleted building. The accused was charged under section 284 of the Penal Code.³⁰²

2.9 Conclusion

The Nigerian Constitution states in unequivocal terms that for an action to amount to a criminal offence, it must not only be prohibited by a validly promulgated written law, but a clear penalty must be attached to such act.³⁰³ Homosexual acts meet the formal constitutional requirement of legislative enactment to qualify as a crime under Nigerian criminal jurisprudence. The criminal codes operative throughout the Federal Republic of Nigeria at both the federal and states levels all have provisions clearly prohibiting and penalising homosexual acts and other sexual behaviours that are related to homosexual conduct. With sodomy laws firmly entrenched in Nigeria criminal jurisprudence, there is no ambiguity as to the fate that may befall homosexuals apprehended engaging adult consensual same-sex sexual acts.

The laws have been applied up to the Supreme Court, as shown in *Magaji's* case. Several instances of arraignment, trials, and convictions have also been highlighted in this chapter. It is not only in the eyes of the law that sexual minorities in Nigeria are considered as criminal outlaws. In the court of

³⁰¹ Case No: UACI/CR/216/2015.

³⁰² See the First Information Report of this case.

³⁰³ See section 36(12) CFRN 1999.

public opinion, LGBT persons are also viewed with disdain.³⁰⁴ The resultant spill-over of these social attitudes towards sexual minorities is not just stigmatisation of LGBT persons, but outright physical violence orchestrated against perceived homosexuals by both law enforcement agencies and the homophobic population.³⁰⁵ The height of homophobia in Nigeria to my mind is exhibited by the Supreme Court's description of homosexuality in Niki Tobi JSC's assertion that Magaji's 'appeal involves the beastly, barbaric and bizarre offence of sodomy. A more common place name is homosexual or homosexuality'.³⁰⁶ From the Judge's scathing view, a same-sex sexual act is nothing short of animalistic behaviour that should be confined to the stone age of primitivity. For Akintan JSC, the offence of homosexuality for which Magaji 'was convicted is an unusual, abnormal and unbelievable one'.³⁰⁷ The judicial view as expressed by justices of Nigeria's apex court is a pointer to the zero tolerance level of homosexual conduct in Nigeria.

As I have shown, in the pre-colonial era, things were not so for homosexuals in Nigeria. From the historical analysis I have made on the progression of sodomy and sodomy laws in Nigeria, the first stage, which I would like to term as the stage of acquiescence and tolerance, homosexuals were not subjected to the status of deviants and criminals by any society in Nigeria.³⁰⁸ The now popular story of Ifeyinwa Olinke of the nineteenth century Eastern Nigeria who married nine wives as a way of establishing and showcasing her social status as a prosperous woman is a clear testament to the fact that lesbianism existed and was in some societies celebrated.³⁰⁹ Traditional criminal

³⁰⁴ The public hostility displayed against LGBT persons are manifest in the homophobic utterances of religion, traditional and political leaders.

³⁰⁵ See IGLHRC *Voices from Nigeria: Gays, lesbians, bisexuals and transgender speak out about the same-sex bill* (2006). In this publication, members of the LGBT communities in Nigeria regaled their ordeals in the hands of law enforcement agencies and the homophobic public. See also Unoma Azuah 'The impact of blackmail and extortion: Extortion & blackmail of Nigerian lesbians and bisexual women, in R Thoreson & S Cook *Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa* (2011) 46-49.

³⁰⁶ *Magaji* (n 37 above) 364 para C.

³⁰⁷ *Magaji* (n 37 above) 379 para E-F.

³⁰⁸ See, section 2.4.1 of this chapter.

³⁰⁹ WN Eskridge Jr 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1419-1420.

system robustly existed in that era, with clear classification of what amounts to an offence and corresponding punishments.³¹⁰ In spite of the clear classification of crimes in the pre-colonial era, there is no historical evidence to show that any society in Nigeria viewed homosexuality as a crime.

The second, third and fourth phases of sodomy law development is the period of criminalisation of homosexual behaviour. Several laws particularly the British entrenched sodomy laws, became introduced into Nigeria criminal jurisprudence, as in other British colonies.³¹¹ The progressive enactment of sodomy laws in Nigeria climaxed in the SSMPA, which extended criminalisation of homosexual behavior to same-sex marriage and sympathisers of adult consensual same-sex behavior. The impact of criminalisation of homosexual behaviour in Nigeria confirms the fear raised by Joshua Hepple that criminalising adult consensual same-sex act has the capacity to trigger homophobia amongst the state populace that may seemingly have the backing of the government.³¹² Nigeria's multiple sodomy laws by their enactment alone have isolated sexual minorities as potential criminals to support the assertion of Dan Kahan that 'sodomy laws, even when unenforced, express contempt for certain classes of citizens'.³¹³

³¹⁰ Chukkol (n 86 above) 8.

³¹¹ See generally Human Rights Watch *This alien legacy: The origins of 'sodomy' laws in British colonialism* (2008) available at <http://www.org/reports/2008/12/17/alien-legacy-0> (accessed 8 October 2015).

³¹² Hepple (n 7 above) 51.

³¹³ DM Kahan 'The secret ambition of deterrence' (1999) 113 *Harvard Law Review* 413. Cited in (n 307 above) 28.

Chapter 3: The human rights implications of Nigeria’s anti-homosexuality laws under the Nigerian Constitution

3.1 Introduction

Right from the inception of constitutionalism in Nigeria, from 1960 to the current democratic dispensation, the issues of human rights have featured prominently in Nigeria’s constitutional development. The various constitutions adopted by Nigeria along the way have always recognised and provided a safeguard for the protection of these rights.¹ The Constitution of the Federal Republic of Nigeria as amended in 2011 dedicates two chapters to the topic of human rights.² The 1999 Constitution emphatically set the tone for human rights protection by dedicating itself to ‘the purpose of promoting the good governance and welfare of all persons on ... the principles of freedom, equality and justice’.³ Chapter 2 of the Constitution considers rights under the caption ‘fundamental objectives and directive principles of state policy’.⁴ These rights relates to economic, social and cultural aspects of the human rights discourse. The motivation for the entrenchment of these categories of rights in the Nigerian Constitution is premised on the necessity for the material comfort of the citizens which the state is under an obligation to meet.⁵ Chapter 4 of the Constitution, on the other hand, is committed to the protection of civil and political rights. While rights under Chapter 2 of the Constitution are not legally enforceable in a court of law in Nigeria,⁶ the rights spelt out under Chapter 4 are enforceable.⁷

¹ The Constitution of the Federal Republic of Nigeria 1963, No 20 dedicates Chapter 3 to fundamental human rights. Section 18-29 1963 CFRN provides for fundamental rights. The 1979 Constitution of Nigeria dedicates Chapter 4 to the topic of fundamental rights. See section 30-41 of the 1979 Constitution which is similar to section 33-45 of the CFRN 1999.

² See Chapters 2 & 4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

³ See the Preamble to the 1999 CFRN.

⁴ These rights are spelt out in section 13-21 of the 1999 CFRN.

⁵ See section 13 of the 1999 CFRN.

⁶ See section 6(6)(c) 1999 CFRN.

⁷ Section 46 of the 1999 CFRN states categorically that ‘any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to High Court in that State for redress’.

This chapter of the thesis focuses on the civil and political rights under Chapter 4 because these rights seemingly hold out more promise for sexual minorities in Nigeria. This chapter undertakes to examine the probable rights available to sexual minorities under the current Nigerian Constitution. It further examines the possible violations of the rights of sexual minorities by the continued existence and enforcement of anti-homosexuality legislation in Nigeria.

3.2 A scrutiny of the human rights provision of the Nigerian Constitution and the quest for rights for sexual minorities

The current Nigerian Constitution robustly makes provision for 11 civil and political rights which include right to life,⁸ right to dignity of the human person,⁹ right to personal liberty,¹⁰ right to fair hearing,¹¹ right to private and family life,¹² right to freedom of thought, conscience and religion,¹³ right to freedom of expression and the press,¹⁴ peaceful assembly and association,¹⁵ right to freedom of movement,¹⁶ right to freedom from discrimination,¹⁷ and right to acquire and own immovable property anywhere in Nigeria.¹⁸ The aforementioned rights are classified as fundamental human rights under the 1999 Constitution of the Federal Republic of Nigeria¹⁹ and are also popularly referred to as ‘civil and political rights’.²⁰ Aside from these rights, the

⁸ Section 33 CFRN.

⁹ Section 34 CFRN.

¹⁰ Section 35 CFRN.

¹¹ Section 36 CFRN.

¹² Section 37 CFRN.

¹³ Section 38 CFRN.

¹⁴ Section 39 CFRN.

¹⁵ Section 40 CFRN.

¹⁶ Section 41 CFRN.

¹⁷ Section 42 CFRN.

¹⁸ Section 43 CFRN.

¹⁹ See Chapter 4 of CFRN.

²⁰ MT Ladan ‘Should all category of human rights be justiciable’ in MT Ladan (ed) *Law, human rights and the administration of justice in Nigeria* (2001) 67.

Constitution also has provision for other rights such as economic,²¹ social,²² cultural,²³ educational²⁴ and environmental rights.²⁵ The distinctive feature of the two categories of rights under the Nigerian Constitution is the fact that while the former are ‘justiciable’ the latter rights are not.²⁶

For the purpose of this study, emphasis will be placed on six out of the 11 rights provided in Chapter 4 of the Nigerian Constitution, because these six rights are arguably breached by Nigerian laws criminalising adult consensual same-sex practice and the SSMPA.

3.2.1 The right to life

Section 33 of the CFRN, which guarantees the right to life, stipulates as follows:

1. Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.
2. A person shall not be regarded as having been deprived of his life in contravention of this section; if he dies as a result of the use, to such extent in such circumstances as are permitted by law, of such force as is reasonably necessary.
 - (a) For the defence of any person from unlawful violence or for defence of property.
 - (b) For the purpose of suppressing a riot, insurrection or mutiny.

A critical analysis of the above provision shows that the right to life is not an absolute one. It is conditioned upon four limitation clauses: firstly, in the execution of death sentence passed by a competent court of law. Certain

²¹ Section 16 CFRN.

²² Section 17 CFRN.

²³ Section 21 CFRN.

²⁴ Section 18 CFRN.

²⁵ Section 20 CFRN.

²⁶ See section 6(6)(c) CFRN. Though Ebobrah challenges the conception that section 6(6)(c) of the CFRN oust the jurisdiction of the court to hear issues concerning socio-economic rights. In Ebobrah’s view (which I also share) ‘the Nigerian Constitution does not prohibit justiciability of social, economic and cultural rights and such rights can be litigated upon, depending on the normative basis chosen by a prospective litigant’. ST Ebobrah ‘The future of economic, social and cultural rights in Nigeria (2007) 1 *Review of Nigerian Law and Practice* 111.

offences such as homicide,²⁷ and homosexuality²⁸ carry the death penalty under Nigerian criminal law. The right to life can also be waived in the defence of any person from unlawful violence or defence of property, furthermore, in circumstances to effect lawful arrest or prevent the escape of a person in lawful custody, and for the purpose of suppressing a riot, insurrection or mutiny.²⁹ Where persons are tried and convicted of capital offences, the right to life cannot be said to be breached. In a plethora of judicial decisions, Nigerian courts have handed over the death sentences to convicts.³⁰ The idea of taking someone's life judicially in the guise of criminal offences itself is generating considerable debates and controversies among scholars.³¹ Protagonists of the death sentence have always argued that it serves as deterrence to others.³² However, it has been noted that some of the crimes that attract death penalty in Nigeria are rather on the increase despite the severity of the penalty.³³

A curious question that I pose at this juncture is: Does Nigerian criminal law put into consideration the magnitude and severity of an offence before attaching the maximum penalty to it? It is worrisome enough to criminalise consensual adult same sex relationship but perhaps more worrisome to penalise the offence with death penalty.

²⁷ Under the Penal Code Act applicable in northern Nigeria, the offence of culpable homicide is punishable with the death penalty, see section 221 of the PCA. However, the offence is mitigated under circumstances provided in section 222. Section 319 of the Criminal Code Act also penalises homicide with the death penalty.

²⁸ See, section 2.7 of chapter 2 for a detailed discussion of the death penalty provision for homosexuality under the Sharia compliant states in Nigeria.

²⁹ See, section 33(1)(2) CFRN.

³⁰ See, the cases of *Oladele v State* (1993) 1 (pt 71) 404, *Yusuf v State* (1998) 4NWLR (pt 86) 96, *Akinyemi v State* (1999) 6NWLR (pt 607) 465.

³¹ N Ejimnkeonye & A Adekunbi 'Death penalty in Nigeria: To be or not to be, the controversy continues' (2013) 3 *Arabian Journal of Business and management Review* 53. The authors advocate that in the Nigerian situation death penalty should be applicable in 'the most serious and heinous crimes'. Wole Iyaninwa argues that the death penalty has not solved the problem it was created to solve, hence unjustified. W Iyaninwa 'The death penalty- A negation of the right to life' (2014) 14 *Global Journal of Human Social Science* 33-41. For a detailed discussion on the controversial subject of the death penalty, see L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007).

³² *Akinyemi v State* (1999) 6NWLR (pt 607) 465.

³³ Iyaninwa (n 31 above) 35.

The limitation clause to the right to life under section 33(1) has come under fierce criticisms. Dada has raised particular concern on the limitation provision which excuses and justifies deprivation of life in defence of property, in order to effect lawful arrest, or to prevent the escape of a person from lawful custody.³⁴ Dada observes that ‘the Constitution fails to define the quantum of property which will justify such killing and in any case, ascribing or placing the value of property over and above that of human life is preposterous’.³⁵ In the same vein, justifying state approved killings of homosexuals on the grounds of criminality is questionable.³⁶

3.2.2 The right to dignity of the human person

The right to the dignity of the human person as provided in section 34(1) of the 1999 CFRN states:

Every individual is entitled to the respect and for the dignity of his person and accordingly-

- (a) No person shall be subjected to torture or to inhuman or degrading treatment.
- (b) No person shall be held in slavery or servitude; and
- (c) No person shall be required to perform forced labour or compulsory labour.

This section highlights specific actions that are testament to a breach of the dignity of the human person. The mentioned acts are torture, degrading treatment, holding a person in slavery or servitude, compelling a person to forced labour or compulsory labour.

³⁴ JA Dada ‘Human rights under the Nigerian Constitution: Issues and problems’ (2012) 2 *International Journal of Humanities and Social Science* 42.

³⁵ Dada (n 34 above) 42.

³⁶ For a detail discussion on the constitutional violation of the right to life see section 3.4.1 of this chapter.

Jamo rightly asserts that ‘human dignity as a concept is not capable of any precise definition’.³⁷ What actions dignify a person and what actions degrade a person? As all-encompassing as this right is, it is one of the most abused and violated rights by security operatives in Nigeria in the form of torture and other physical acts of violence.³⁸ A further analysis of the provision of section 34(1)(a) and (b) shows that there is no limitation clause to this right. It is a right for everybody. It is an absolute right which the person accused of the most heinous crime, the convict of the most heinous crime or the convict of death sentence is entitled to enjoy in the same way as the free individual on the street. The essence or rationale for the universal protection of the right to human dignity is rooted in the famous quote of the Catholic Church:

The dignity of the human person is rooted in his creation in the image and likeness of God; it is fulfilled in his vocation to divine beatitude ... Endowed with a spiritual and immortal soul, the human person is the only creature on earth that God has willed for its own sake. For his conception, he (man) is destined for eternal beatitude.³⁹

The sacredness of human dignity and inherent nature of human beings is something which ordinarily can never be given to or should be taken away by state-created laws, or by actions of fellow human beings.⁴⁰ Bradshaw further asserts that ‘it is an aspect of our personhood, which is given to us by God alone at conception, along with an immortal soul which will never cease to go out of existence’.⁴¹ The sacredness of human creation in the image of God therefore calls for the treatment of every human being with respect and dignity. The list of actions spelt out by section 34 as tantamount to a breach are not exhaustive. Unfortunately, as has been shown in chapter 2, actions orchestrated towards the homosexual community in Nigeria are affronts to this

³⁷ NM Jamo ‘Civil and human rights under the 1999 Nigeria Constitution: Need for some amendment’ in Ladan (n 19 above) 100.

³⁸ FD Nzarga ‘An analysis of human rights violation by the Nigerian security services’ (2014) 30 *Journal of Law, Policy and Globalisation* 2-6.

³⁹ Catechism of the Catholic Church (1700 – 1703) quoted in BP Bradshaw ‘The dignity of the human person’ available at www.catholicadultfaith.com (accessed 6 June 2015).

⁴⁰ Bradshaw (n 39 above) 1.

⁴¹ Bradshaw (n 39 above) 1.

constitutionally guaranteed right.⁴² Aside from these well-documented actions against sexual minorities which strip them of right to dignity of the human person, there are also punishments prescribed by law for gays and lesbians that can arguably be viewed as degrading to their human dignity.⁴³

3.2.3 The right to private and family life

Right to privacy and family life is one of the fundamental rights provided under the Nigerian Constitution. Section 37 provides as follows:

The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

Privacy has been described as the 'right to be left alone'.⁴⁴ The desire for privacy to conduct a person's own thinking, make choice and engage the mental faculty

⁴² It has become a commonplace occurrence for gays and lesbians to be assaulted, mob actions orchestrated at them and even blackmailed with attendant extortion from the bullying public. Unoma Azuah documents a detailed interview of lesbian and bisexual women subjected to harrowing tales of extortion and blackmail in Nigeria. See U Azuah 'Extortion and blackmail of Nigerian lesbians and bisexual women' in R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in sub-sahara Africa* (2011) 46-60. The publication of International Gay and Lesbian Human Rights Commission, *Voices from Nigeria: Gays, lesbians and transgenders speak out about the Same-Sex Bill* (2006) 3-4 presents the true life testimonies of Chuma and Emma. This tale of brutalisation by the Nigerian policemen on account of their sexual orientation is really appalling. According to Chuma's account '... A team of policemen in Lagos came to my apartment and took me away to an unknown destination for two days. I was beaten beyond recognition, and I am still receiving treatment for the head injury I received. I was dehumanised and paraded naked to the press. My money, ID Card and shoes were taken. Eventually I was released without being charged or tried. My only offense was that I am gay'. In Emma's case, he narrated thus, 'On January 15, 2005, a group of policemen came to our house very early in the morning. The police asked us if we were gay, and my boyfriend admitted that we were. They then arrested us. We resisted and they became violent with us. They handcuffed us and took us to the police station'.

⁴³ As discussed in chapter 2, some states in Nigeria prescribe lashing as punishment for certain homosexual conduct. For example, section 136 of the Kebbi State Sharia Penal Code Law penalises acts of lesbianism with 50 lashes of the cane.

⁴⁴ S Warren & T Brandeis, 'The right to privacy' (1890) 4 *Harvard Law Review* 289. In *Puttaswamy v Union of India & ors* Petition No 494 of 2012 para 2, the Indian Supreme Court states that 'privacy in its simplest sense, allows each human being to be left alone in a core which is inviolable'. The Court further held that 'right to privacy ... is a cherished constitutional value, and it is important that humans be allowed domains of freedom that free of public scrutiny'. See para 75.

dates back to ancient times. Great prophets like Jesus Christ had cherished privacy from the crowd that accompanied him a great deal.⁴⁵ Prophet Mohammed (SAW) conceived the idea of Islam and the great revelation in the atmosphere of privacy.⁴⁶ Undoubtedly, that is an aspect of individual life that is inherently confidential and which the individual would not want to share with everybody.

Privacy is very fundamental to humans as it is ‘the desire by each of us for physical space where we can be free of interruption, intrusive, embarrassment or accountability and the attempt to control the time and manners of disclosing of personal information about ourselves’.⁴⁷ For the purpose of this research, right to privacy and family life in this provision will be analysed from the perspective of non-interference of the state in the consensual sexual behaviour of homosexuals. Sexual intercourse for human beings is normally conducted in privacy for both heterosexual and homosexual couples. As such, if the state does not interfere with this private conduct of heterosexuals, then it should do the same to homosexuals. Instead homes of alleged homosexuals in Nigeria are broken into and homosexual partners dragged from the privacy of their bedrooms.⁴⁸ Nowhere in Nigerian law is it stated that it is a crime to be a self-confessed homosexual. It only becomes a crime when someone is caught in the act. Invading the homes of homosexuals violates the right to privacy. Better still, Nigerian sodomy law that encourages invading homes of homosexuals to apprehend them in the act of consensual same sex violates their rights to privacy.

⁴⁵ See Mark 6:31-32 (New Living Translation of the Holy Bible).

⁴⁶ Qur’an 53:4-9.

⁴⁷ Robert Ellis quoted in K Renaud & D Galves-Cruz ‘Privacy: Aspects, definitions and a multi-faceted preservation approach’ available at icsa.cs.up.ac.za/issa/full/25_paper (accessed 23 June 2015).

⁴⁸ Several incidents of invasion of homes of alleged homosexuals are reported frequently in Nigeria. Shortly after the passage of the SSMPA, members of the Police Force in many parts of the country embarked on a clampdown of homes and ‘hideouts’ of suspected homosexuals. See Oarhe Dickson ‘Police detectives invade hideouts of homosexuals in Benin’ *Indepth News* 20 October 2015. See also the account of Chuma and Emma whose privacies were invaded by officers of the Nigerian Police on account of their sexuality. IGLHRC (n 42 above).

The SSMPA, which is ostensibly enacted to prohibit marriage between persons of the same sex also interferes with the right of homosexual couples to start a family.

3.2.4 The right to freedom of thought, conscience and religion

Religion is one sacred aspect of human life that most people hold dear to their heart. It is popularly believed by various adherents of religion that it is the sure way to their creator.⁴⁹ The unique thing about religious practices is that there is no one universally accepted religion; as such it is a pluralistic way of worship. It has been rightly said that ‘the religion of everyman must be left to the conviction and conscience of every man’.⁵⁰ The right to practice any religion of one’s choice has never really been a right recognised from time immemorial.⁵¹ Biblical records have shown that conflict of religion had always existed in recorded history.⁵² Besides the Biblical history of struggle for religious freedoms, several events in human march toward civility and civilisation has shown the innate yearnings of people to be free to practice religion in their own way.⁵³ Section 38 of the Constitution of Nigeria provides for the right to freedom of religion:

- (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom

⁴⁹ John 3:16, Qur’an 45:18.

⁵⁰ James Madison, a former American President is credited with the statement. See *The papers of James Madison*.

⁵¹ O Salam ‘Right to freedom of thought, conscience and religion’ in O Oliyete & O Awolowo (eds) *Rights* (2006) 116.

⁵² Exodus 3, Acts 7:58 (New Living Translation of the Holy Bible).

⁵³ Developed democracies like the US, France and the UK had in their recent histories experienced intense agitations and struggle for religious freedom and liberty. See generally AJ Scopino Jr (ed) *The struggle for religious freedom in America* (2016), CF James *Documentary history of the struggle for religious liberty in Nigeria* (2006). D Prudlo ‘A reflection on the French revolution and the struggle for religious liberty’ available at <http://www.truthandcharityforum.org/a-reflection-on-the-french-revolution-and-the-struggle-for-religious-liberty/> (accessed 20 October 2015). See also the story of the French protestant Huguenot in an era where it was a criminal offence punishable with death to be a protestant Christian. Brenda Kellow ‘The French Huguenot intense struggle for religious freedom’ available at http://starlocalmedia.com/opinion/blogs/blog_7/the-french-huguenot-intense-struggle-for-religious-freedom/article-0aa8d004-9781-11e5-b203-9bce064b983.html (accessed 20 October 2015).

- (either alone or in community with others, and in public or in private) to manifest his religion or belief in worship, teaching, practice and observance.
- (2) No person attending any place of education shall be required to receive religious instruction or to take part in any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.
 - (3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination

It is clear from the above provision that the right to religious freedoms in Nigeria entails the individual's right to practice a religion of his own choice. The Constitution does not bar a person who becomes disillusioned with his religion from changing to another. The right of change of religion is also firmly entrenched, regardless of the fact that some religious books object to this right.⁵⁴ Religious freedom is, however, not an absolute right under the Constitution, as the Constitution bars the formation and membership of secret society in the name of religion.⁵⁵

3.2.5 The right to peaceful assembly and association

This right is constitutionally protected under section 40 of the 1999 Constitution. It provides that 'every person shall be entitled to assemble freely and associate with other persons and in particular he may form or belong to any political party, trade union or any other association for the protection of his interest'.

The right to peaceful assembly and association was given strong judicial nod in the Nigerian case of *Mbanefo v Molokwu*.⁵⁶ While upholding the sanctity

⁵⁴ In Islam, for instance, change of religion otherwise known as apostasy is forbidden. The prophet of Islam is famed to have said in a Hadith that 'if anyone changes his religion, put him to death'. Though Taha Jabir notes that apostasy does not have any Qur'anic backing. See TJ Alalwani *Apostasy in Islam: A historical and structural analysis* (2012) 14-15.

⁵⁵ Section 38(4) CFRN.

⁵⁶ (2009) 11 NWLR (pt 1153) 431 C.A.

of this right, the Federal Court of Appeal however, noted that ‘the right given under section 40 of the 1999 Constitution is not absolute as same can be tempered with under a law or circumstances reasonably justifiable in any democratic society’.⁵⁷ The right to freedom of association is conditioned on the peaceful nature of that group. It is a right bed-rocked on voluntariness and the individual has the ultimate choice to keep being a member or not. Tsamiya JCA notes: ‘A man who joins a society ... must abide by the will of that association or clear out. If a man finds himself as a member of such association and it takes a decision which he does not accept, a decision which could even be contrary to common sense, he has only one course open to him, and that is, to get out. He has to abide or get out as voluntarily as he came in’.⁵⁸ This remark from the jurist further underlines the fact that there is no compulsion in association, as ‘association is a product of choice’.⁵⁹ The problem with the limitation provision of this section is in the difficulty of evaluating what law can abrogate this right in the guise of association being ‘unreasonable’. Under what circumstances an association should be described as undemocratic, illegal, unreasonable, and unjustifiable?

3.2.6 The right to freedom from discrimination

Omiunu rightly observes that the history of man has been prominently marked by discrimination, from ancient to contemporary times.⁶⁰ Equality and the right to non-discrimination are core values of human rights law globally.⁶¹ In Nigeria, discrimination manifests on the basis of health status, ethnicity, religion, sex, gender, etc⁶² yet, the right to freedom from discrimination is explicitly provided for in section 42 of the 1999 CFRN, which stipulates:

⁵⁷ *Mbanefo* (n 56 above) 454 paras D-E.

⁵⁸ *Mbanefo* (n 56 above) 455 paras C-F.

⁵⁹ A Agada *The power of association* (2006) 15.

⁶⁰ OO Gideon ‘Demographic characteristics, discrimination at work and performance among civil servants in Nigeria’ (2014) 4 *Developing Country Studies* 1.

⁶¹ These rights are robustly provided for by international and regional human rights instruments such as the ICCPR, ICSEER, ACHPR.

⁶² Gideon (n 60 above) 1.

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religious or political opinion shall not, by reason only that he is such a person-
 - a. Be subjected either expressly by, or in the practised application of, any law in force in Nigeria or any executive or administrative action of the government, to disability or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious, or political opinions are not made subject, or
 - b. Be accorded either expressly by, or in the practised application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic group, and places of origin, sex, religious or political opinions.
- (2) No citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstance of his birth.

The right to freedom from discrimination as enshrined above raises seven grounds upon which a person or citizen of Nigeria should not be discriminated against, namely: community, ethnicity, place of origin, sex, religion, political opinion and birth circumstances. This right received the judicial nod of Nigeria's Court of Appeal in the case of *Timothy v Oforka*,⁶³ where Sotonye Denton-West JCA asserts, on the constitutional provision to right from discrimination, that 'by virtue of section 42(2) of the 1999 Constitution no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.'⁶⁴ Further, in *Asika v Atuanya*,⁶⁵ the sacredness of non-discrimination is emphasised.

3.3 Constitutional violation of sexual minorities' rights by Nigeria's anti-homosexuality law

Human rights of Nigerians as I have shown in the previous section are protected under the Constitution. The Constitution also affords same rights to homosexuality by virtue of their humanity and being citizens of Nigeria. In this

⁶³ (2008) 9NWLR (pt 1091) 204 CA.

⁶⁴ *Timothy* (n 63 above) 216 paras E-F.

⁶⁵ (2008) 17 NWLR (pt 1117) 484 CA.

section I analyse how existing anti-homosexuality legislation infringe on the Constitutional rights of homosexuals.

3.3.1 Death penalty as the price for homosexual conduct in 12 northern Nigerian states

As I have shown in chapter 2, 12 states in northern Nigeria criminalise homosexual offences with the death penalty.⁶⁶ Pointedly, section 131(b) of the Zamfara State Sharia Penal Code Law advocates the death penalty only where offenders are married. In Bauchi State, section 134 of the law also prescribes a non-optional death penalty by stoning to death irrespective of the marital status of convicted offenders. Section 125 of the Kaduna State law also advocates the death penalty for convicted offenders. In sharp contrast to the position of the Bauchi law, however, the Kaduna law mitigates the punishment where offenders are married couple and consensually indulge in the act of sodomy. Jigawa and Kano states also prescribe the death penalty for sodomists under conditions similar to what prevails in Zamfara State.⁶⁷ It therefore becomes crystal-clear that the right to life of homosexuals in Nigeria is threatened by the provisions of the criminal law of the 12 states in the north where the maximum punishment for the offence of homosexual act is the death penalty.

It is extremely curious to observe that Nigerian law places the offence of homosexual conduct, armed robbery, and murder in the same bracket of punishment. While the latter two offences directly and grievously hurt the victims of the relevant criminal actions, the same cannot be said of the former which involves two adult persons mutually consenting to a sexual act in the privacy of their bedroom and also gaining emotional satisfaction – and not causing harm to each other – in the process. It then becomes questionable for the law to criminalise and further penalise this offence with the death sentence. Homosexuals are human beings, and are entitled to life under the Nigerian

⁶⁶ See also D Ottosson *State-sponsored homophobia: A world survey of laws prohibiting same sex activity between consenting adults* (2009) 29.

⁶⁷ See, section 131 of Jigawa state law and also section 129(a) of the Kano law.

Constitution, irrespective of their sexual orientation. However, since Nigerian law has criminalised the acts of homosexuality by death punishment in some places, going by the provision of section 33(1) of the Constitution, any execution emanating from a sentencing of the court becomes justified by law. The dilemma of sexual minorities particularly in the affected 12 states in Nigeria lies in the fact that the Constitution itself, which should have upheld their rights to life, has given tacit approval to laws criminalising homosexual activities with death penalty by the limitation clause of section 33(1).

Two classic examples can be cited where convicted homosexuals were sentenced to death under the sharia penal code laws. Shortly after the enactment of the Kebbi State Sharia Penal Law, one Attahiru Umar was charged under section 131 of the law, before a Birnin Kebbi Sharia Court in 2001 for sodomising a seven-year-old boy. Attahiru's trial led to his conviction and the death sentence was passed on him.⁶⁸ The death sentence for sodomy was also invoked in the case of Jibrin Babaji in 2003 under section 134 of the Bauchi State Sharia Penal law. Babaji who was accused of homosexual affairs with teenage boys, however, had his death penalty quashed in March 2004 after successfully pleading the defence of insanity before the Sharia Court of Appeal sitting in Bauchi State.⁶⁹

Another indirect way sodomy laws promote the violation of the right to life of homosexuals in Nigeria can be seen in the extrajudicial murder of perceived and real homosexuals in Nigeria.⁷⁰ Ayeni cites the case of a 60 year-old homosexual man beaten to death on account of being gay.⁷¹ On 17 February 2016, the extrajudicial murder of Mr Akinnifesi Olumide Olubunmi was widely reported in Ondo West, Ondo State of Nigeria. He was caught in the act with Hon Dotun, a serving councilor. Mr Olubunmi was brutally beaten and rushed

⁶⁸ See, section 2.8.2 of chapter 2 of this thesis.

⁶⁹ See, section 2.8.2 of chapter 2 of this thesis.

⁷⁰ VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same-Sex Marriage (Prohibition) Act' in S Nnawase & A Jjuuko (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 225.

⁷¹ Ayeni (n 70 above) 226.

to the hospital where he died of injuries sustained from the mob action. A Nigerian rights group Initiative for Equal Rights described the attack that led to the death of Olumide Olubunmi as ‘barbaric, inhuman and a gross denial of his rights under the Constitution of Nigeria’.⁷² TIERS, while calling for justice for the murdered Olumide, rightly stated: ‘[T]he right to life of every Nigerian is sacrosanct irrespective of their class, status, ethnicity, religion, gender or sexual orientation.’⁷³ While Olumide was brutally murdered, his accomplice, with whom he was reportedly caught pants down, Hon Dotun, a serving councilor, escaped but had his house set ablaze.

In an echo of the *Olumide* case, a brutal Nigerian South-West militia group, Oduduwa Peoples’ Congress, masterminded the stoning to death of two homosexual men in Ikotun, Lagos on 16 January 2016.⁷⁴ One of Nigeria’s leading newspapers reported the gruesome murder of Joy, who was mistaken for his homosexual brother, Alex. The death occurred in Durumi, a slum on the outskirts of Abuja, Nigeria’s capital city. In a mistaken identity tragedy, the homophobic mob invaded the home of Alex, who was well known for his homosexual escapades. The mob descended on Joy and inflicted injuries on him, leading to his death.⁷⁵

⁷² See ‘Horror of Nigerian man beaten to death for being gay’ available at <http://www.mambaonline.com/2016/03/14/horror-nigerian-man-beaten-death-gay/> (accessed 26 March 2017). An excited homophobe Ogbeni Ade Omo expressed delight at the death of Olumide on Olumide’s facebook page thus: ‘End of a gay! This will serve as a lesson to all the people that love engaging in bisexual, homosexual, lesbianism and gay’.

⁷³ As above.

⁷⁴ See ‘Two homosexual men stoned to death in Ikotun, Lagos, Nigeria for having gay sex’ available at <https://archive.org/details/TwoHomosexualMenStonedToDeathInIkotunLagosNigeriaForHavingGaySex> (accessed 26 March 2017).

⁷⁵ Richard Ngbokai ‘Youths hack man to death over his brother’s homosexual behaviour’ Daily Trust 12 December 2016 1. See online version of the story at <http://www.dailytrust.com.ng/news/city-news/youths-hack-man-to-death-over-brother-s-homosexual-behaviour/175585.html> (accessed 12 April 2017).

Only serious crimes such as armed robbery,⁷⁶ murder,⁷⁷ treason,⁷⁸ treasonable conspiracy,⁷⁹ kidnapping⁸⁰ and abetting the invasion of Nigeria by hostile forces.⁸¹ The reality however, is that consensual homosexual adult conduct, a harmless offence has been elevated to the league of heinous crimes in Nigeria.

3.3.2 Stripping homosexuals of the right to dignity of the human person

The mode of punishment prescribed under the sodomy laws of the 12 sharia-compliant states in the northern Nigeria obviously strip homosexuals of their human dignity, thus violating the right to dignity of the human person provided under section 34 of the Constitution. The statutory violation of this right is exemplified by the provisions of section 31 of the Zamfara state law which prescribes 100 lashes of the cane for unmarried male homosexuals. Under section 135 of the same law, convicted lesbians are punished with 50 lashes of the cane in addition to a jail term of six months. In a similar vein, Bauchi state law punishes lesbianism with 40 lashes of the cane under section 138 of its law. The other sharia states prescribe different degrees of flogging for lesbianism.⁸²

Non-statutory violation of the right to human dignity of gay persons manifest itself in the physical brutality meted out to homosexuals almost on a daily basis in Nigeria. Ayeni gives a vivid account of instances where

⁷⁶ See section 1(2) of the Robbery and Firearms (Special Provisions) Act R 11, Laws of Federation of Nigeria 2004.

⁷⁷ See section 319 of the Criminal Code Act.

⁷⁸ See section 37(1) of the CCA.

⁷⁹ See section 37(2) of the CCA.

⁸⁰ See for instance, the Prohibition of Hostage Taking and other Related Offences Law, 2009 of Imo State.

⁸¹ See section 38 of the CCA.

⁸² See an in-depth discussion of the punishment for lesbianism under the Sharia Penal Code of 12 northern Nigerian states at section 2.7 of chapter 2 of this thesis.

homosexuals are physically assaulted and brutalised by both law enforcement agents and the homophobic population.⁸³

3.3.3 Sodomy legislation as a legitimisation for the invasion of privacy and family life of homosexuals

The right to privacy and family life is one right that is obviously violated by the sodomy law of Nigeria. India, a country with similar sodomy provision as Nigeria has in a landmark privacy right judgement declared sexual orientation as an element of privacy and dignity.⁸⁴ Articulating eloquently on right to privacy, the Indian Supreme Court stated that ‘privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation’.⁸⁵ Although, this laudable judicial pronouncement has not translated to decriminalisation of sodomy under section 377 of the Indian Penal Code, it has however, shown that indeed, criminalisation of homosexual conduct is a violation of the right to privacy which is a ‘cherished constitutional value’⁸⁶ and there is hope in the horizon. As shown in chapter 2, in Nigeria, section 131 of the Zamfara State law audaciously recommends death penalty for married couples who engage in sodomy (non penile-vaginal sex). This is obviously legislative rascality taken to the extreme, for married couples ordinarily should be at liberty to enjoy sexual intercourse in any form they deem fit. The law also envisages an invasion of privacy for the purpose of gathering evidence of commission of the said act. For instance, section 131 of the Kebbi State law conditioned the conviction of an accused person on the testimony of four trustworthy Muslim male witnesses who must have witnessed the act of sodomy. By implication, the four witnesses must invade the privacy of the perpetrators to get firsthand evidence of the

⁸³ Ayeni (n 70 above) 225-227.

⁸⁴ *Puttaswamy* (n 44 above) para 128.

⁸⁵ *Puttaswamy* (n 44 above) para 180.

⁸⁶ *Puttaswamy* (n 44 above) para 75.

commission of the offence since the act of sodomy, more often than not, occurs within the confines of privacy. Yobe State law is even more explicit in the violation of privacy and family rights. The Yobe law states in section 131(2) that ‘whoever commits the offence of sodomy with his wife shall be punished with caning which may extend to 50 lashes’. The mitigation of the offence from death penalty to 50 lashes under Yobe law is probably in recognition of the fact that a male person can commit sodomy with the wife. This is a clear violation of the right to family life. The law should not dictate to married couples the best possible ways to engage in sexual intercourse, as sex is an integral aspect of a couple’s family life. Married couples reserve the sole right to engage in, and enjoy sexual intercourse, in ways that best appeal to them.

The case of *Bauchi State Government v Usman Sabo & Anor* indicates how busybody neighbours invaded the room of the two accused persons on the mere suspicion that they were having homosexual sex, only to find the accused persons dressed in shorts. The fact that the accused were not fully dressed fuelled the suspicion of the inquisitive neighbours who promptly marched the accused to the police station, from where the accused were, unbelievably, arraigned before a court of law.⁸⁷ This case strengthens the postulation that the invasion of the privacy of suspected homosexuals by ‘meddlesome interlopers’ is necessary to build up a case of sodomy. Instances of invasion of the privacy of homosexuals abound. Ayeni recounts that in August 2007, Police officers in Bauchi State arrested 18 alleged gay men by breaking into the venue of their party. In another incident in 2014, Gishiri, Abuja, hoodlums with harmful objects dragged 14 young men from their beds and physically assaulted them with the active connivance of the police.⁸⁸

The SSMPA comfortably fills the lacuna created by the existing sodomy laws not targeting same-sex marriage. The whole essence of the SSMPA is to prevent marriages between persons of the same sex. By the provisions and

⁸⁷ See section 2.8.2 of chapter 2 for a detailed discussion of this case.

⁸⁸ Ayeni (n 70 above) 227.

effect of the SSMPA persons of the same sex who desire to start a family cannot do so. The Act further invalidates retrospectively any marriage or union of persons of the same-sex, irrespective of the fact that a subsisting family unit exist in such a union.⁸⁹

3.3.4 Sodomy legislation as a regulator of the right to freedom of thought, conscience and religion of sexual minorities

The SSMPA is a clear affront on the rights of worship and freedom of religion. Section 2(1) of the SSMPA categorically states that ‘marriage contract or civil union entered into between persons of same sex shall not be solemnised in a church, mosque or any other place of worship in Nigeria’. The provision above is tantamount to dictating to religious organisations the types of marriages they should solemnise and which one they should not. Where a church believes in the solemnisation of same-sex union, according to its doctrine, this section bars them from so doing. This obviously amounts to dictating and imposing religious doctrines on sexual minorities contrary to the spirit of section 38 of the Constitution. Aside from section 38 of the Nigerian Constitution guaranteeing rights to freedom of religion, the Constitution is also very clear on the secular status of Nigeria.⁹⁰ The import of this provision of the Constitution is that Nigeria is a country characterised by religious diversity; as such no one religion is superior to the other, and there can’t be an imposition of religious doctrines on any citizen of Nigeria. The SSMPA acts ultra vires when it dictates to religious bodies what kind of marriage to solemnise. This amounts to violating the right to worship. Section 3 of the SSMPA further violates the Constitution when it provides that ‘only marriage contracts between a man and a woman either

⁸⁹ See section 1 & 2 of the SSMPA 2013.

⁹⁰ Section 10 of the Nigerian Constitution states: ‘The government of Nigeria or of the State shall not adopt any religion as State religion’.

under Islamic, Customary and Marriage Act is recognised in Nigeria'. This further violates the secular nature of Nigeria.⁹¹

3.3.5 Violation of the right to freedom of association

Again the provisions of the SSMPA come into focus. Section 4(1) of the Act prohibits the registration of gay clubs, societies and organisations, their sustenance, processions and meetings. Even public show of affection directly or indirectly is termed 'amorous' and prohibited.⁹² Gays and lesbians are denied the right to assemble freely and fraternise as people of common aspiration. The strangulating effect of infringing on the right to freedom of association of sexual minorities is also extended to heterosexuals. The prohibition of the 'public show of same-sex amorous relationship directly or indirectly' is ambiguous and vague. This could affect filial relationships of heterosexuals. At the organisational level, the right to freedom of association of gays and lesbians is infringed upon also. A further manifestation of inconsistency with the constitutional guarantee of right to association is the prohibition of persons from administering, witnessing, abetting or aiding the solemnisation of same-sex marriage or civil union.⁹³ These provisions apparently violate section 40 of the Nigerian Constitution. The aim of section 4(1) of the SSMPA is to proscribe LGBT organisations. In Nigeria, there exist functional LGBT organisations that not only promote the homosexual subculture but also attend to public health concerns of homosexuals and heterosexuals.⁹⁴ Consequently, proscribing such

⁹¹ See AJ Osogo 'An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the 'separability thesis', secularism and international human rights' unpublished LLD thesis, University of Pretoria, 2016 167-180. Ambani argues that the concept of state secularism which a country like Nigeria by virtue of section 10 of its Constitution subscribe to does not permit Nigeria and other countries to use religion to justify criminalisation of homosexuality.

⁹² Section 4(2) SSMPA 2013.

⁹³ Under section 5(3) of the SSMPA, administering, witnessing, abetting or aiding the solemnisation of same sex marriage or union is punishable with 10 years' imprisonment.

⁹⁴ See for instance LGBT organisations such as The Coalition for the Defence of Sexual Rights, International Centre for Reproductive Health and Sexual Rights, International Centre for Advocacy & Right to Health, the Initiative for Equal Rights.

LGBT organisations will have a negative impact on the health of citizens in general.

Section 4(2) of the SSMPA which prohibits the public show of same-sex amorous relationship directly or indirectly is open-ended and vague. One clear danger posed by this section is the criminalisation of even filial relationship and any form of public show of affection among persons of the same sex. The criteria to be used for measuring what actions amount to ‘public show of same-sex amorous relationship’ are not explicitly defined. The resultant effect of this imprecision is an incitement to violence and hate crime targeted at real or perceived homosexuals. The vagueness of this section of the SSMPA can erode the close-knit fabric of love and fraternity inherent in Nigerian communitarian society.⁹⁵ The SSMPA, as we have seen earlier, punishes LGBT organisations and public show of affection with ten years imprisonment.

Another scenario in the SSMPA which hurts the right to freedom of association under the Constitution of Nigeria is section 5(3).⁹⁶ The ambiguity of what amounts to ‘aiding and abetting’ of homosexual activities should be worrisome. This section potentially extends criminalisation to clergies who solemnise homosexual marriages. It stifles sexual minorities rights activism and advocacy as lawyers who represent victims of rights abuse and discrimination based on their homosexual orientation may be seen as ‘aiding and abetting’ homosexuality. Family members are also barred from associating with homosexual members of their family. The list of persons who can be penalised for identifying with homosexuals under this section is endless.

⁹⁵ ‘Anti-gay law may criminalise family, parental show of affection, Nigerian human rights chief warns’ available at <http://www.premiumtimesng.com/news/137910-anti-gay-law-may-criminalise-family-parental-show-of-affection--nigerian--human-rights-chief-warns.html> (accessed 10 May 2017). According to Chidi Odinkalu ‘The African cultures of family values have always cohabited quite happily with our culture of public show of affection and compassion’.

⁹⁶ The section provides that ‘A person or group of persons who administers, witnesses, abets or aids the solemnisation of same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment’.

3.3.6 Violation of the right to freedom from discrimination

Ayeni rightly identifies the right to freedom from discrimination as one right that is absolutely exempted from the limitation effect of section 45 of the Constitution of Nigeria.⁹⁷ The question that comes to mind is if this right is sacrosanct why, then, do Nigerian criminal laws flagrantly discriminate against sexual minorities? From previous discussion in chapter 2, it is obvious that the homosexuals carry the tag of criminals waiting to be apprehended by reason of the operation of sodomy laws outlawing consensual adult homosexual conduct. The mere existence of the sodomy laws even when not invoked is discriminatory against same-sex practitioners because, as Hepple notes, the sodomy laws have identified and segregated these individuals as deviants, thereby opening vistas of opportunities to a homophobic population to unleash mayhem on homosexuals.⁹⁸

In enacting its sodomy laws, Nigeria did not put into consideration the fact that emerging scientific studies have shown that a biological basis of homosexuality exists and that the country's Constitution prohibits discrimination on the ground of circumstances of birth. Homosexuals invoke the right to non-discrimination on the ground of circumstances of birth to advance their cause.⁹⁹ Discrimination against homosexuals on the ground of circumstances of birth¹⁰⁰ will definitely lead us to an interesting aspect of this research.

3.4 The biological thesis of same-sex orientation and the right to non-discrimination under Nigerian Constitution

The 1999 Constitution of the Federal Republic of Nigeria explicitly forbids discrimination of Nigerian citizens on the basis of the circumstances of their birth. The Constitution clearly stipulates that: 'No citizen of Nigeria shall be

⁹⁷ Ayeni (n 70 above) 223.

⁹⁸ J Hepple 'Will sexual minorities ever be equal? The repercussions of British colonial "sodomy" laws' (2012) 8 *Equal Rights Review* 51.

⁹⁹ Hepple (n 98 above) 51.

¹⁰⁰ See section 3.5 of this chapter for full discussion of this.

subjected to any disability or deprivation merely by reason of the circumstances of his birth'.¹⁰¹ The operative phrase in this constitutional provision is 'circumstances of his birth'. This operative phrase covers the range of events and coincidental occurrences linked to the development of the fetus in the mother's womb which are beyond the control of the individual. Biological traits such as the race of an individual, congenital physical disability, characteristics such as albinism, being left-handed, and sexual orientation all come under the heading of "circumstances of birth". The individual born in such circumstances cannot conceivably be blamed for biologically and physically developing in a pattern determined by these circumstances.

The Nigerian nation has a history of discrimination on the basis of birth. Persons living with Albinism suffer serious discrimination. Not only are they denied certain social services like education but they are also targets of ritual killings by elements who regard albinos as people with spiritual powers that can be activated and transferred to anyone who uses their body parts to make charms.¹⁰² In an environment where human rights are frequently violated, it is not surprising that LGBT persons daily tell tales of woes. Yet it is not by choice that LGBT persons are what they are. Empirical researchers and scientific findings corroborate the biological thesis of same-sex orientation. What is the evidence?

In the 20th century, homosexuality was regarded as a mental illness.¹⁰³ It was not until 1973 that the American Psychiatric Association (APA) removed the illness tag. It took another 17 years before the World Health Organisation (WHO) declassified homosexuality as an illness.¹⁰⁴

The study on the role of genetics in male sexual orientation carried out by Hamer et al identified the Xq28 region on the X chromosome in gay men,

¹⁰¹ Section 42(2) CFRN.

¹⁰² OS Olagunju 'Towards a biblical response to myth and discrimination against the human rights of albinos in Yorubaland' (2012) 1 *Journal of Studies in Social Sciences* 46-58.

¹⁰³ GM Hereck 'Sexual orientation differences as deficits: Science and stigma in the history of American psychology' (2010) 5 *Perspectives on Psychological Science* 693-699.

¹⁰⁴ Academy of Science of South Africa 'Diversity in Human sexuality: Implications for policy in African' (2015) 14.

which plays a role in the transmission of gay traits.¹⁰⁵ This region is believed to influence sexual orientation. Since the marker on the X chromosome is contributed by the female, Hamer and his colleagues theorised that maternal genetic constitution plays a major role in male sexual orientation.¹⁰⁶ A significant number of interviewed families with more than one homosexual son had a maternal uncle or aunt's son who was gay. The Xq28 is suspected to contain a gene which influences male homosexual behaviour.¹⁰⁷ Studies carried out by Bocklandt et al confirmed the peculiar structure of the X chromosome in mothers of homosexual males.¹⁰⁸ The researchers noted that some mothers of homosexual men had an extreme skewing of the X chromosome inactivation. One of the double X chromosome in women is inactivated. In the case of mothers of homosexuals there is an extreme skewing of X chromosome inactivation. 13% of mothers with one homosexual son had this skewing while for those with two homosexual sons the percentage rose to 23.¹⁰⁹ Sanders et al found a second linkage region, the pericentromeric region.¹¹⁰ Despite these studies not discovering a specific gay gene or confirming a chromosomal basis of homosexuality, they indicate a strong associative environmental-cum-genetic contribution to male homosexuality.

Still on the maternal connection in male gay orientation, studies on maternal pregnancy stress reveal that pregnancy stress-induced uterine hormonal imbalance negatively affected the full masculinisation of male fetuses and contributed to homosexual orientation.¹¹¹ Ellis and Cole-Harding found out

¹⁰⁵ DH Hamer, S Hu, VL Magnuson, N Hu, & AM Pattatucci 'A linkage between DNA markers on the X chromosome and male sexual orientation' (1993) 261 *Science* 321.

¹⁰⁶ Hamer et al (n 105 above) 321-327.

¹⁰⁷ Hamer et al (n 105 above) 325.

¹⁰⁸ Academy of Science of South Africa (n 104 above) 31.

¹⁰⁹ Academy of Science of South Africa (n 104 above) 31.

¹¹⁰ Academy of Science of South Africa (n 104 above) 30.

¹¹¹ L Ellis & A Ames 'Neurohormonal functioning and sexual orientation: A theory of homosexuality-heterosexuality' (1987) 101 *Psychological Bulletin* 233-258.

that mothers of gay men had higher stress levels during pregnancy than mothers of heterosexual men.¹¹²

Explaining how evidence from epigenesis adds to the growing body of scientific work indicating the biological basis of homosexuality. Rice et al suggest that epimarks that survive or escape generational erasure may be passed to the next generation, making it possible for a father to pass masculine tendencies to his daughters and the mother feminine tendencies to her sons.¹¹³ Bergman et al showed that endocrine disruptors like pharmaceuticals, dioxine, polychlorinated biphenyls, and dichlorodiphenyltrichloroethane (DDT) can affect foetal brain development and, consequently, the parts of the brain associated with sexual orientation and functioning.¹¹⁴ Confirming the role of hormones in the uterine environment, Bailey, Dunne, and Martin discovered that women with congenital adrenal hyperplasia (CAH), a condition consequent upon prenatal high androgens levels, shows higher bisexual and homosexual tendencies.¹¹⁵

Family backgrounds researches by Pillard and Weinrich and Bailey and Benishay lend support to the biological thesis. Pillard and Weinrich found that the presence of a homosexual male in a family led to an 18-25 % chance of another brother in the same family being gay.¹¹⁶ Bailey and Benishay discovered that lesbians have more lesbian sisters than heterosexual women while Blanchard and Zucker found that the probability of a man being gay rose with the number of elder brothers he has.¹¹⁷ While these trends may well be influenced by the environment, twin studies tend to strengthen the case in favour of the biological basis of homosexuality.

¹¹² L Ellis & S Cole-Harding 'The effect of prenatal stress, and of prenatal alcohol and nicotine exposure on human sexual orientation' (2001) 74 *Physiology and Behavior* 213-226.

¹¹³ Academy of Science of South Africa (n 104 above) 31.

¹¹⁴ Academy of Science of South Africa (n 104 above) 32.

¹¹⁵ JM Bailey, MP Dunne, & NG Martin 'Genetic and environmental influences on sexual orientation and its correlates in an Australian twin sample' (2000) 78 *Journal of Personality and Social Psychology* 533.

¹¹⁶ Academy of Science of South Africa (n 104 above) 26 – 27.

¹¹⁷ Academy of Science of South Africa (n 104 above) 27.

Langstrin et al evaluated the sexual behavior of monozygotic or identical twins and zygotic or fraternal twins in a large Swedish sample and reported a 9.8% concordance rate among gay monozygotic twins.¹¹⁸ The study conducted by Bailey, Dunne, and Martin on Australian twins noted that though direct linkages were found only between genetic factors and childhood gender non-conformity, the significant contribution of family factors in homosexual behaviour strongly supports the biological thesis.¹¹⁹ In a twin study conducted in Minnesota, Hershberger discovered that genetic factors significantly influence female orientation although no such correlation was found for men.¹²⁰

Bailey and Pillard, measuring concordance rates among identical and fraternal twins, as well as adoptive brothers, discovered a 52% concordance among identical twins, 22% among fraternal twins, and only 11% among adoptive twins. They inferred that homosexuality pattern according to type of relatives revealed genetic contribution.¹²¹ Identical twins are very likely to be gay if one twin is gay. This concordance can be as high as 65% in identical male twins and 75% in identical female twins, according to Whitam et al.¹²² Evolution favours species that can reproduce. How is it that homosexuality has not died out since homosexuals cannot reproduce? Why does homosexuality persist across cultures and in all regions of the world? Researchers like Janini et al have discovered that homosexuality plays a reproductive role. On the average, female relatives of homosexual men have more children than women with no gay relatives.¹²³ Lemmola and Camperio-Ciani found that this heightened

¹¹⁸ N Langstrom, Q Rahman, E Carlstrom, & P Lichtenstein 'Genetic and environmental effects on same-sex sexual behavior: A population studies of twins in Sweden' (2010) 39 *Archives of Sexual Behavior* 75-80. Concordance indicates the commonality of homosexuality among identical and fraternal twins. Seven out of 71 identical male twins were concordant, that is, both were homosexual. The concordance rate was lower among fraternal twins.

¹¹⁹ Bailey, Dunne, and Martin (n 115 above) 534.

¹²⁰ SL Hershberger, 'A twin registry study of male and female sexual orientation' (1997) 34 *The Journal of Sex Research* 212 - 222.

¹²¹ JM Bailey and RC Pillard 'A genetic study of male sexual orientation' (1991) 48 *Archives of General Psychology* 1094.

¹²² Academy of Science of South Africa (n 104 above) 28.

¹²³ Academy of Science of South Africa (n 104 above) 33.

fertility level held only among female relatives.¹²⁴ This phenomenon argues in favour of the fact that homosexuality survives natural selection because it plays a role in the continuity of the human race.

In a US probability sample, Norton, Allen, and Sims found that five and two tenths percent of gay men have some level of control over their homosexuality while 16 and four tenths of lesbians report having a fair level of choice over their sexuality.¹²⁵ 42% of bisexual persons also report having a fair power of choice over their sexuality. The data indicate that the overwhelming majority of homosexual persons experience a feeling of inevitability as far as their same-sex attraction is concerned. Herek et al report that 88% of gay men and 68% of gay women felt they had no choice.¹²⁶ The overwhelming feeling of inevitability, comparable to what heterosexual persons experience, argues in favour of biological determinism.

The work of Hooker, which demonstrates that gay persons were just as psychologically healthy as heterosexual persons ignited the agitation to have homosexuality declassified as an illness.¹²⁷ Over the decades the gay rights movement has won important victories for LGBT persons through legal and political intervention.

Homosexuality is now legal in 117 countries while 65 countries have anti-discrimination laws.¹²⁸ Unfortunately, no progress has been made in Nigeria. On the contrary, Nigeria has passed discriminatory laws, notably the SSMPA. This is in clear violation of section 42(2) of the 1999 Constitution. In the light of what we now know of the biological basis of homosexuality, the continued suppression of Nigerian LGBT community has become a question of the suppression of the fundamental human rights of persons on account of the

¹²⁴ Academy of Science of South Africa (n 104 above) 33.

¹²⁵ AT Norton, TJ Allen & CL Sims 'Demographic, psychological, and social characteristics of self-identified lesbian, gay, and bisexual adults in US probability sample, (2010) 7 *Sexuality Research and Social Policy* 186.

¹²⁶ Academy of Science of South Africa (n 101 above) 34.

¹²⁷ E Hooker 'The adjustment of the male overt homosexual' (1957) 21 *Journal of Projective Techniques* 18-31.

¹²⁸ Academy of Science of South Africa (n 104 above) 14.

circumstances of their birth. Section 42(2) must be activated to lift the current disability placed on LGBT persons.

3.5 Conclusion

There is not a single judicial decision by Nigerian courts on the violations of human rights of Nigerians on the basis of sexual orientation and gender identity. Rather, sodomy laws have been actively invoked across several courts in Nigeria to secure convictions of homosexuals and, more often than not, send them to jail.¹²⁹ The first attempt by a litigant to press for the judicial pronouncement on the rights of homosexuals was thrown out for lack of *locus standi*.¹³⁰ Despite the fact that Nigerian courts have not made any pronouncement on whether LGBTs are entitled to the rights enshrined in Chapter 4 of the Constitution or not, one indisputable fact is that the Constitution did not exclude LGBTs explicitly from enjoying the rights therein. Nigeria's multiple sodomy laws with their attendant punitive measures on consensual homosexual conduct violate the principles of non-discrimination and equality enshrined in international human rights treaties and the Nigerian Constitution. The principle of non-discrimination firmly abhors unfair treatment of Nigerian citizens by any extant law or administrative actions of government agencies, on the basis of ethnicity, place of origin, sex, religion etc.¹³¹ Section 42(2) goes on to forbid discrimination on the basis of

¹²⁹ See sections 2.8.1 and 2.8.2 of chapter 2 of this thesis.

¹³⁰ See A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 3. See the case of *Teriah Joseph Ebah v Federal Republic of Nigeria* Suit FHC/ABJ/CS/197/2014. For a detail analysis of this case, see AZ Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Government of Nigeria*' in S Namwase & A Jjuuko (eds) *Protecting human rights of sexual minorities in contemporary Africa* (2017) 239-244.

¹³¹ Section 42(1) 1999 Constitution FRN states: 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-(a) be subject either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions of which citizens of Nigeria and of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria on any such executive

circumstances of birth. Sections 42(1) and 42(2) clearly make references to laws in force in Nigeria, which discriminate against citizens on the above named grounds. These laws may include Nigerian sodomy laws. It should be noted that one of the prohibited grounds of discrimination is 'sex'. And 'sex' has been interpreted to encompass sexual orientation and gender identity within the province of international human rights law. As we have seen in chapter 1, administrative actions have been taken against perceived homosexuals that may amount to discrimination.

Besides the human rights provision of the 1999 Nigerian Constitution, international (UN and regional) human rights treaties have also documented protections of rights for sexual minorities and prohibited discriminatory laws. Notwithstanding the obvious shortcoming of these treaties in not explicitly listing sexual orientation as a prohibited ground of discrimination, the judicial interpretation of the word 'sex' as it appears in the various treaty documents has compensated for this shortcoming.

In Nigeria, scholars have begun to aggregate consensus opinions on rights recognition as extending to homosexuals,¹³² even though this emerging consensus has not translated to concrete judicial interpretation of these rights as applicable to sexual minorities. As it currently stands, however, the status of homosexuality under Nigerian laws is that of criminality as the practice of consensual adult same-sex act is prohibited outright. The criminalisation of consensual adult homosexual conduct in Nigeria, therefore amount to violation of the of the human rights provision of the 1999 Constitution of Nigeria.

or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria and of other communities, ethnic groups, place of origin, sex, religious or political opinions.

¹³² E Obidimma & A Obidimma 'The travails of same-sex marriage relation under Nigerian law' (2013) 17 *Journal of Law, Policy and Globalisation* 45-47. The authors contend that Nigeria's penal provisions against sodomy gravely violate the fundamental rights enshrined in the Constitution of Nigeria. Y Olomjobi *Human rights on gender, sex and the law in Nigeria* (2013) 183-190 argues that individual sexuality is not a state property, hence the SSMPA contravenes the human rights provision of the Nigerian Constitution.

Chapter 4: The human rights implications of Nigeria's anti-homosexuality laws under international law

4.1 Introduction

Globally, there is a tidal wave of resistance to law criminalising consensual adult same-sex activities. The platform upon which this resistance is being launched is respect for 'human rights'. Now more than ever, there is a global clamour for respect of human rights. Henkin rightly puts the celebration of human rights as 'the idea of our time'.¹ This noble 'idea of our time' has inspired agitation by homosexuals for rights recognition from discriminatory laws.

While it is true that sexual minorities have been persecuted from time to time in recorded history,² what is remarkable about the persecuting of these people purely on the basis of their sexual orientation is the indisputable fact that the 20th century – and now the 21st century – was the century of the triumph of universal human rights, the century in which human rights activism reached its peak. In this century, racial segregation was defeated in the United States of America.³ Towards the end of the same century, precisely in the early 1990s,

¹ Cited in F Viljoen 'Contemporary challenges to international human rights law and the role of human rights education' (2011) 44 *De Jure* 208.

² See generally G Grau & C Shopmann *The hidden holocaust? Gay and lesbian persecution in Germany 1933-1945* (1995), H Heger *The men with the pink triangle: The true life and death story of homosexuals in the Nazi death camps* (1994). Aside from the shrill narratives of the ordeals homosexuals were subjected to in Adolf Hitler's Nazi Germany by the above authors, elsewhere in apartheid South Africa, aside from physical maltreatment, homosexuals have also been subjected to psychological ordeal through the entrenchment of homophobic legislations. See H De Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 226-242. De Ru succinctly highlights the legislative developments soaring from court decisions that led to rights recognition for gays and lesbians in such South African's statutes as: The Maintenance Act 99 of 1998; The Domestic Violence Act 116 of 1998; Medical Schemes Act 131 of 1998; The Rental Housing Act 50 of 1999, amongst others. See also M Van Zyl et al (eds) 'Human rights abuse of gays and lesbians in the South African defence force by health workers during the Apartheid era' (1999).

³ The landmark US Supreme Court judgment in *Brown v Board of Education of Topeka* 347 U.S. 483 (1954) marked a turning point of racial discrimination in the United States of America. For a detailed discussion of the civil rights movements in the US, see JF Healey *Diversity and society: Race, ethnicity and gender* (2012) 175-227.

apartheid was defeated in South Africa.⁴ The question of rights for sexual minorities has also become an issue that features prominently in the international human rights agenda and debate.⁵ Nigeria is not, however, among the nations moving towards the direction of rights recognition for sexual minorities despite the fact that it has a Constitution which robustly provides for the rights of her citizens, of which, without doubt, the Nigeria LGBT communities are members. In addition to the constitutional provisions and safeguards for rights protection, Nigeria is a state party to international human rights treaties, which all provide for the protection of rights of individuals, arguably also including sexual minorities.

International human rights law encompasses human rights treaties, human rights documents and related institutions and processes at both the global level and the regional levels.⁶ It is in the light of this definition that this chapter aims at analysing how the rights of sexual minorities are violated in Nigeria by reason of deeply entrenched sodomy laws, under international human rights instruments.

In this chapter, I look at the international human rights regime as it relates to the rights of sexual minorities, purposely to probe whether rights exist for sexual minorities under international law or not. I also further analyse how

⁴ Nelson Mandela as one of the most prominent activists in the struggle against apartheid in South Africa vividly describes the pains and gains of the struggle in his autobiography. See N Mandela *Long walk to freedom: The autobiography of Nelson Mandela* (1994).

⁵ The sexual minority rights debate has indeed taken its place in international human rights discourse. More than before, international human rights forums have begun to pick interest in this discourse. The UN which is the world's most unifying forum has issued many periodic reviews on the rights of sexual minorities. The agenda for rights recognition for sexual minorities as a front burner global issue is also manifest in the numerous publications from various offices of the UN human rights commission with the aim of sensitising member nations on rights accruable to sexual minorities. For example, 'Born Free and equal: Sexual orientation and gender identity in international human rights law' (2012) UN human rights office of the high commissioner highlights the dilemma confronting sexual minorities across the globe. The UN human rights committee has also passed a plethora of resolutions on sexual orientation and human rights.

⁶ Viljoen (n 1 above) 208. At the global level, such treaties and human rights documents come under the auspices of the United Nations. For the regional levels, we have human rights treatise under the auspices of the African Union, European Union, Arab Human Rights Committee etc. At the regional level, this chapter considers AU for the fact that Nigeria is a member of the organisation.

Nigerian sodomy law threatens these rights. Viljoen has rightly noted that ‘a principal rationale of international human rights is to provide a normative beacon of commonly agreed standards of humanity and dignity that all states should respect’.⁷ The term international human rights will better be understood from the human rights treaties of the United Nations and other regional bodies.⁸

Indeed, sexual intimacy forms an indispensable aspect of human existence, displayed most rationally in the sphere of individual privacies.⁹ In any way sexual affections are manifested, it is also an incontrovertible fact that homosexual fraternity will feature, no matter how remote.¹⁰ The penalisation of consensual adult same-sex conduct would, therefore, have a deeply negative effect on practitioners, not just within the legal sphere but also socially because the state has categorised this group of individuals as criminals and outlaws.¹¹ This scenario will definitely have the resultant effect of state sanctioned homophobia that is quickly passed down to members of society who feel that they derive legitimacy from homophobic laws to discriminate and, quite often, bully and harass homosexuals.¹² Criminalisation of consensual homosexual conduct manifests in many visible form of punishment, ranging from torture, caning, fine, imprisonment to death.¹³ Sexual minorities globally remain an ‘endangered species’ despite the human rights promise.

Succour seems, however, to lie in the dark horizon for sexual minorities. As Thomas Michael rightly notes, the agitation for rights recognition and quest

⁷ Viljoen (n 1 above) 209.

⁸ Viljoen defines the term international human rights law ‘to be the human rights treaties and other documents and related institutions and process at both the global level (under the auspices of the United Nations) and of the regional level (under the African Union)’. See (n 1 above). In this regard there are other human rights organisations at the regional level like African Union and European Union who have charters that provide for human rights.

⁹ P Narayan ‘Somewhere over the rainbow ... International human rights protections for sexual minorities in the new millennium’ (2006) 24 *Boston University International Law Journal* 313.

¹⁰ Narayan (n 9 above) 313.

¹¹ J Hepple ‘Will ‘sexual minorities ever be equal? The repercussions of British colonial ‘sodomy’ laws’ (2012) 8 *Equal Rights Review* 51.

¹² Hepple (n 11 above) 51.

¹³ These are visible in the various penal sentences provided in the multiple sodomy laws in Nigeria.

for equal protection under the law for sexual minorities has taken the front burner in many countries.¹⁴

4.2 Defining the status of international law under Nigerian domestic law

It is not enough to have a constitution (in Nigeria, as elsewhere) that seemingly protects the rights of sexual minorities; and that a country (such as Nigeria) is a state party to a number of international treaties that have guaranteed rights for sexual minorities. To be meaningful, these rights have to be translated into domestic accessibility. The vital point is the relevance of these international human rights law in Nigeria, and thus their domestic implementation under Nigeria's municipal law. How often are references actually made to international treaties in the Nigerian judiciary or Nigerian courts? Viljoen rightly asserts that 'the ultimate test of international human rights law is the extent to which it takes effect in national soil.'¹⁵

I look at the effect of international human rights treaties in Nigeria, especially its status under Nigerian law. Although Nigeria is a state party to these treaties and has ratified some of them – which arguably protect the rights of sexual minorities – it is noteworthy that the ratification of UN and regional human rights treaties becomes relevant only once state parties make them significantly applicable in their legal processes.¹⁶ As Steiner and Alston put it, 'human rights violation occurs within a state rather than on the high seas or in outer space outside the jurisdiction of any one state'.¹⁷ Ultimately, effective protection for human rights must be an internal initiative of the state, the Nigerian state in this case. According to Bangamwabo, there are only two ways through which states can comply with their legal international obligations as

¹⁴ M Thomas 'Teetering on the brink of equality: Sexual orientation and international constitutional protection' (1997) 17 *Boston College Third World Law Journal* 365.

¹⁵ F Viljoen *International human rights law in Africa* (2012) 517.

¹⁶ Viljoen (n 15 above) 517.

¹⁷ HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 987.

contained in treaties.¹⁸ Firstly, by observing or respecting their national law which are consistent with international norms, and secondly, by making those international norms or obligations part of the national legal or political order, that is, by domesticating them.¹⁹ In this regard Nigeria has provisions in its Constitution that reflect the position of international human rights law. Nigeria has also set the record as the only country that has domesticated the African Charter.²⁰

In analysing the status of international human rights law under Nigerian domestic law, I bear in mind that ‘there are two dominating but opposing theories of the relationship of international law to domestic law’.²¹ Traditionally, scholars posit two approaches in respect of the reception of international law into natural legal system, characterising countries as either monist or dualist.²² Monists view international and national law as part of a single legal order, where international law is directly applicable in the national legal order, in which case there is no need for domestic implementing legislation.²³ Dualists, on the other hand, view international and national law as distinct legal orders; for international law to be applicable in a national legal order, it must be received through domestic legislative measures, the effect of which is to transform this international rule into a national one.²⁴ Nigerian legal order is dualistic in nature as emphasised by section 12 of the CFRN, which states as follows:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.²⁵

¹⁸ F Bangamwabo ‘The implementation of international and regional human rights instruments in the Namibian legal framework’ in A Bosl & N Horn (eds) *Human rights and the rule of law in Namibia* (2009) 165.

¹⁹ Bangamwabo (n 18 above) 165.

²⁰ Viljoen (n 15 above) 527.

²¹ ON Ogbu ‘Nigeria courts and domestic application of international human rights instruments’ in A Ibinabo-Obe & TF Yerima (eds) *International law, human rights and development* (2004) 98.

²² Bangamwabo (n 18 above) 166.

²³ Bangamwabo (n 18 above) 166.

²⁴ Bangamwabo (n 18 above) 167.

²⁵ Section 12(1) CFRN 1999.

Viljoen posed the following three questions with respect to the extent to which international human rights law has been domesticated in African states: Are international human rights norms part of domestic law? Where do international human rights norms feature in the hierarchy of the municipal legal order? Have domestic courts applied international human rights norms in their decisions?²⁶ I shall adopt these 3 questions in an attempt to x-ray the status of international human rights law in Nigeria.

For Nigeria, the answer to the question whether international human rights law is part of Nigerian law is settled by the provisions of section 12 of the 1999 CFRN cited above. It is pursuant to the provisions of section 12 that Nigeria has domesticated the ACHPR. In this regard, there are two scenarios: one, an international or regional human rights law domesticated in Nigeria, and two, an international or regional human rights law ratified to or acceded by Nigeria, but not domesticated through national legislation. For the first scenario, section 1 of the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act provides:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.²⁷

In the second scenario where an international treaty has not been domesticated, the Nigerian Supreme Court categorically stated that 'no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into law of the country by the National Assembly'.²⁸ In conclusion, while domesticated international treaties become part and parcel of Nigeria law, those not

²⁶ Viljoen (n 15 above) 517.

²⁷ Section 1 ACHPR (Enforcement & Ratification) Act, Cap 10, Laws of Nigeria, 1990.

²⁸ *Abacha v Fawehinmi* (2000) 6 NWLR (pt 660) 356-357 para A. Ejiwunmi JSC further notes that '... with regards to international treaty entered into by the Federal Government of Nigeria. If such a treaty is not incorporated into the municipal law, our domestic courts would have no jurisdiction to construe or apply it. Its provisions cannot therefore have any effect upon citizens' rights and duties'. 357 para D.

domesticated, though binding at the international plane only assume a reference status.

Are international human rights treaties, domesticated and not domesticated, superior to Nigerian law, are they at par, or are they inferior to Nigerian laws? It is worth noting that the question of hierarchical structure of international treaty vis-à-vis municipal law only arises upon domestication of the international treaty,²⁹ such, which the ACHPR have become part and parcel of Nigerian law by virtue of their statutory domestication.³⁰

As a democracy Nigeria recognises the supremacy of its constitution. The Nigerian Constitution is the supreme law of the land and its provisions are binding throughout the Federal Republic of Nigeria.³¹ In the face of any other law (which may include international law) that is inconsistent with the provisions of the Nigerian Constitution, such inconsistent laws are null and void and will be of no effect.³² On the supremacy of the Constitution as provided in section 1(1) and 1(3) of the CFRN, the Nigeria Supreme Court stated as follows:

It follows therefore, that all powers; be they legislative, executive and the judiciary, must ultimately be traced or predicated on the Constitution for the determination of their validity. All these three powers must and indeed, cannot be exercised inconsistently with any provisions of the Constitution. Where any of them is so exercised it is invalid to the extent of such inconsistency. Furthermore, where the Constitution has enacted exhaustively on any situation, subject or conduct, anybody or authority that claims to legislate, in addition to what the Constitution had enacted must demonstrate, in clear and unambiguous terms, that it has derived the legislative authority from the Constitution to do so.³³

Where the Nigerian Constitution has clearly set out certain conditions that guarantee the legality of enacted laws, no legislation of the National Assembly or State House of Assembly can alter these conditions as supremacy to all other law is the attribute of the Constitution.³⁴ In numerous judicial decisions,

²⁹ Viljoen (n 15 above) 525.

³⁰ See section 12(1) CFRN 1999 (n 25 above).

³¹ Section 1(1) CFRN 1999.

³² Section 1(3) CFRN 1999.

³³ Per Pius Aderemi (JSC) in *Aminu Tanko v The State* (2009) (Pt 1131) 4NWLR 452 para C-F.

³⁴ *Aminu Tanko* (n 33 above) 452 para F-H.

Nigerian courts have knocked down laws that contravene the provisions of the Nigerian Constitution.³⁵ The leading *locus classicus* of the status of international treaty in Nigerian law is the *Fawehinmi* case. In this case, the Supreme Court categorically stated that ‘the African Charter is not superior to and does not override the Constitution of the Federal Republic of Nigeria’.³⁶ The Supreme Court further held that any decision of the Court of Appeal to elevate the African Charter above the Constitution would amount to a violation of the principle of the supremacy of the Constitution.³⁷

The Charter, which is an enforceable international human rights treaty in Nigeria is not superior to the Constitution as it derives its competency from the provisions of section 12 of the Constitution. I have stated earlier that domestic laws in conflict with the Constitution have been declared inconsistent and hence void. However, there is no judicial decision in Nigeria where the provision of an international treaty has been declared inconsistent with the Constitution, despite the incontrovertible matter of the supremacy of the Constitution over international treaties. While the African Charter is robustly applied in Nigerian courts and has the full force of law and enforcement, the same cannot be said of other treaties like the ICCPR, ICESR, CAT, and CEDAW.

On the application of international human rights treaty laws by Nigerian courts, two distinctions come into play. As earlier noted, only domesticated treaties are enforced, for instance the Charter, which forms part and parcel of Nigerian law. In *Ohakosin v Commissioner of Police Imo State*,³⁸ Kekere Ekun,

³⁵ See the cases of *Attorney General of Abia State v Attorney General of Federation* (2008) All FWR, *Attorney General of Ogun State v Attorney General of Federation* (2002) 18 NWLR (Pt 798) 232.

³⁶ See *Fawehinmi* (n 28 above) 289 para E-F. Ogundare JSC, delivering the leading judgment, canvassed that ‘the African charter possesses ‘a greater vigour and strength’ than any other domestic status but that is not to say that the status is superior to the Constitution as tenuously submitted by learned counsel for the respondent’.

³⁷ *Fawehinmi* (n 28 above) 301-302 paras G, H. Mohammed JSC in his concurring judgment expresses the view that ‘in incorporating African Charter on Human Rights this country (Nigeria) provided that the treaty shall rank at par with other municipal laws. In other words, this country did not expressly state that the treaty after its ratification and embodiment into our municipal laws had attained a status superior to our Constitution or other municipal laws’.

³⁸ (2009) 15 NWLR pt 1164 229 CA.

JCA, in his leading judgment states that ‘by virtue of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap. A9 Law of the Federation of Nigeria, 2004, the African Charter on Human and Peoples’ Rights constitutes part of the law of Nigeria and must be upheld by all law courts in the country. Indeed, Nigeria has given due recognition to the Charter by enshrining most of the rights and obligations guaranteed therein in chapter 4 of the 1999 Constitution’.³⁹ A former Chief Justice of Nigeria, Mohammed Bello, in an earlier decision also affirmed that the provisions of the Charter could be enforced by Nigerian courts like any other municipal law since Nigeria has domesticated the Charter.⁴⁰ It is now commonplace to see Nigerian lawyers bring fundamental rights enforcement actions before Nigerian courts by relying solely on the African Charter provisions.⁴¹ Furthermore on the effect of the enactment of international treaties into Nigeria’s domestic legislation, Ogundare has underlined the fact that any international treaty given legal backing by the National Assembly becomes automatically enforceable by Nigerian courts.⁴²

Before the enactment of an international treaty into law by the National Assembly, such a treaty has no force of law as to make its provisions justiciable in Nigerian courts.⁴³ Curiously, however, one of Nigeria’s radical jurists, Prof Niki Tobi, in the case of *Mojekwu v Ejikeme*⁴⁴ digressed from this position of treating undomesticated treaty with levity when he argued that a party to a suit had rights under Article 2 of CEDAW and further insisted that law courts in Nigeria should provide ‘teeth to the provision of CEDAW’. Niki Tobi’s view derives its strength from the Nigerian Constitution that also advocate that: ‘The foreign policy objectives shall be respect for international law and treaty obligations.’⁴⁵ The Fundamental Rights Enforcement Procedure Rules 2009, which are the

³⁹ *Ohakosin* (n 38 above) 251-252 para G-A.

⁴⁰ *Ogugu v The State* (1994) 9 NWLR (pt 366).

⁴¹ *Fawehinmi* (n 28 above) Per Ejiwunum JSC in *Fawehinmi*’s case states that ‘anyone who felt that his rights as guaranteed by the Charter, have been violated could well resort to its provisions to obtain redress in our domestic courts’ 357, para E.

⁴² *Fawehinmi* (n 28 above) 289 paras B-C.

⁴³ *Fawehinmi* (n 28 above) 288 paras F-G.

⁴⁴ (2000) 5NWLR 402.

⁴⁵ Section 19(d) CFRN.

rules regulating the application and enforcement of Chapter 4 (fundamental rights provision) of the 1999 Constitution explicitly states that in promoting and safeguarding the rights and freedoms of the applicants:

[T]he Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention of which the Court is aware.⁴⁶

With the unambiguous position of the FREPR, it is apparent that human rights provisions of international bills of rights such as the ICCPR, ICESCR, CEDAW, and CAT, even though not domesticated in Nigeria, should be respected by Nigerian courts.

4.3 The UN human rights treaty-based system and its relevance to the issue of sexual orientation in Nigeria

Nigeria is a state party to the most important UN treaties of potential relevance to sexual minority rights like the ICCPR, ICESCR, CEDAW, and CAT. Nigeria has also undergone the UPR twice.

Sexuality as it concerns sexual minorities has now become a topical issue of some controversial interest within the United Nations human rights system.⁴⁷ It is trite that currently most United Nations declarations, national constitutions, and local statutes fail to expressly guarantee equal protection and non-discrimination for sexual minorities.⁴⁸ However, as Mittelstaedt points out, ‘a number of international treaties and other sources of international law indirectly address the rights of sexual minorities, and UN case law has explicitly incorporated ‘sexual orientation’ as a protected status’.⁴⁹ Mittelstaedt’s position on the rights of sexual minorities in the realm of international law is applicable

⁴⁶ Preamble 3b FREPR, 2009.

⁴⁷ I Saiz ‘Bracketing sexuality: Human rights and sexual orientation- A decade of development and denial at the UN’ (2004) 7 *Health & Human Rights* 50.

⁴⁸ Thomas (n 14 above) 365.

⁴⁹ E Mittelstaedt ‘Safeguarding the rights of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations.’ (2008) 9 *Chicago Journal of International Law* 359.

to the Nigerian situation, where there is a robust Constitution which, arguably, guarantees the right of sexual minorities.⁵⁰ Mittelstaedt restates the obvious current position where no known international or regional treaty has made specific provisions for rights recognition for sexual minorities outright.⁵¹ Kerstin Braun held Mittelstaedt's position even more emphatically. Braun asserts that 'since the development of the international human rights regime in the aftermaths of world war 11, no treaties or other instruments adopted by the United Nations Generally Assembly explicitly reference sexual orientation'.⁵² Inasmuch as it is agreeable that international human rights treaties do not explicitly prohibit discrimination on the basis of sexual orientation, the inspiration and insights from the provision of the treaties and case law is an adequate assurance of the stance of UN human rights system concerning the rights of sexual minorities.

This section sets out to look critically at these instruments and their positioning with regard to the rights debate for sexual minorities and its relevance to the Nigerian LGBT debate particularly.

4.3.1 The ICCPR as the UN's cornerstone treaty for civil and political rights protection

After the adoption of the Universal Declaration of Human Rights (UDHR), the next stage was to establish legally binding principles in international human rights.⁵³ According to Rehman, the original intention of the Human Rights Commission of the UN was to promulgate a single document covering all the fundamental rights. However, with the fallout of the cold war and emergence of new nation states with their contrasting priorities it became impossible to

⁵⁰ See Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria for the well spelt out fundamental human rights which I discussed in details in chapter 3 of this thesis.

⁵¹ Mittelstaedt (n 49 above) 359.

⁵² K Braun 'Do ask, do tell, where is the protection against sexual discrimination in international human rights law' (2014) 29 *American University International Law Review* 872.

⁵³ J Rehman *International human rights law* (2010) 64.

incorporate all the rights within one document.⁵⁴ Rehman points out that the more economically stable Western states put emphasis on civil and political rights while the focus of the socialist and newly independent states was economic, social and cultural rights and the right to self-determination.⁵⁵ The debate among these two blocks culminated in the emergence of two human rights treaties namely the ICCPR⁵⁶ and the ICESCR.⁵⁷ Nigeria became a state party to the ICCPR in 29 July 1993.⁵⁸ From the onset, it should be pointed that Nigeria has not domesticated the provisions of the ICCPR explicitly to warrant judicial enforcement of the rights therein in Nigerian courts. Furthermore, Nigeria have not accepted the Optional Protocol to the ICCPR, which is the access route for individuals to lodge communications before the Human Rights Committee.

The Preamble to the ICCPR gives a glimpse into the treaty's readiness to place human rights in the front burner of UN affairs.⁵⁹ The ICCPR provides for the following rights, the right to life,⁶⁰ freedom from torture or cruel, inhuman or degrading treatment or punishment,⁶¹ right to privacy for every individual,⁶² right of freedom of thought, conscience and religion,⁶³ right of peaceful assembly,⁶⁴ freedom of association, right to marry and form a family,⁶⁵ and equality before the law.⁶⁶

⁵⁴ Rehman (n 53 above) 84.

⁵⁵ Rehman (n 53 above) 84.

⁵⁶ Adopted on 16 December 1996 and entered into force 23 March 1976. General Assembly Resolution 2200A (XXI) UN Doc A/6316 available online at <https://treaties.un.org/Publication/UNTS> (accessed 12 August 2015).

⁵⁷ Adopted on 16 December 1996 and entered into force on 3 January 1976. General Assembly Resolution 2200A (XXI) UN Doc. A/6613.

⁵⁸ See <http://www.ohchr.org> for the ratification status of Nigeria (accessed 11 April 2016).

⁵⁹ Article 6.

⁶⁰ Article 6 ICCPR.

⁶¹ Article 7 & 8 ICCPR.

⁶² Article 17 ICCPR.

⁶³ Article 18 ICCPR.

⁶⁴ Article 21 ICCPR.

⁶⁵ Article 22 & 23 ICCPR.

⁶⁶ Article 26 ICCPR.

4.3.1.1 Exploring for rights for sexual minorities under the ICCPR

The ICCPR has been touted as ‘the treaty that holds the most potential for protecting the rights of sexual minorities.’⁶⁷ This assertion is a valid argument in the light of the fact that most of the rights sexual minorities aspire to are civil and political in nature, which the ICCPR makes provisions for. The platform upon which the UN Human Rights Committee (UNHRC) stamps its affirmation on sexual minorities rights in the ICCPR is the landmark case of *Toonen v Australia*.⁶⁸ Emma Mittelstaedt notes that the ICCPR does not recognise LGBT rights explicitly but it does contain general protection that seems to include sexual minorities.⁶⁹ The thrust of *Toonen’s* case is the non-discrimination and the right to privacy as enshrined in the ICCPR.

The non-discrimination clause of the ICCPR states:

Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status.⁷⁰

On the right to privacy and family life, the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.⁷¹

On the equality and non-discrimination before the law, article 17 further affirms equality before the law and equal protection under the law regardless of

⁶⁷ M Hollander ‘Gay rights in Uganda: Seeking to overturn Uganda’s Anti-sodomy law’ (2009) 50 *Virginia Journal of International Law* 229.

⁶⁸ UN Human Rights Committee communication No 488/1992/ UN Doc CCPR/C/50/D/488/1992/ (1994).

⁶⁹ Mittelstaedt (n 49 above) 360.

⁷⁰ Article 2 ICCPR.

⁷¹ Article 26 ICCPR.

differences of race, colour, sex, language, religion, political or other opinion, property, birth, etc.⁷²

In *Toonen's* case, the man at the centre of communication No 488/1992, an Australian citizen born in 1964, residing in Hobart in the state of Tasmania, Australia, and a leading member of the Tasmanian Gay Law Reform Group (TGLRG), claimed to be a direct victim of violations by Australia of articles 2(1), 17 and 26 of the ICCPR.⁷³ Nicholas Toonen challenged two provisions of the Tasmania Criminal Code, namely sections 122(9) and (c) and 23, which penalise all forms of sexual contracts between men, including all forms of sexual contracts between consenting adult homosexual men in private.⁷⁴

The issue for determination before the HRC was whether Nicholas Toonen has been the victim of unlawful or arbitrary interferences with his privacy, contrary to article 17(1), and whether he has been discriminated against in his right to equal protection of the law, contrary to article 26.⁷⁵ The Committee held to the effect that inasmuch as article 17 is concerned, it is undisputable that adult consensual sexual activity in private is covered by the idea of 'privacy' and that Toonen as it stands is actually affected by the continued existence of the Tasmanian law. The Committee agreed that section 122(a), (c) and 123 of the TCC interfered with the author's privacy, even if these provisions have not been enforced for a decade.⁷⁶ The Committee further observed to the effect that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct is no guarantee that no actions will be brought against practitioners in the future, particularly in the light of undisputed statements of the DPP of Tasmania in 1988 and those of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly 'interferes' with the author's privacy.⁷⁷

⁷² Article 17 ICCPR.

⁷³ *Toonen* (n 68 above) para 1.

⁷⁴ *Toonen* (n 68 above) para 2.1.

⁷⁵ *Toonen* (n 68 above) para 8.1.

⁷⁶ *Toonen* (n 68 above) para 8.2.

⁷⁷ *Toonen* (n 68 above) para 8.2.

The Committee concluded that the provisions do not meet the ‘reasonable’ test in the circumstance of the case, and that they arbitrarily interfere with Toonen’s right under article 17(1).⁷⁸

Another grey and very important decision of the UNHRC in *Toonen’s* case is the interpretation of the phrase ‘other status’ as used in article 26 of the ICCPR. Remarkably, on whether sexual orientation may be considered to come under “other status” for the purpose of article 26, the Committee, confines itself to the usage of sex in articles 2(1) and 26 and explained ‘sex’ to include sexual orientation.⁷⁹ The emphatic judgment of the UNHRC to a large extent clarifies or cures the shortcomings of the ICCPR in not explicitly protecting the rights of sexual minorities as some scholars have argued.⁸⁰

Almost a decade after *Toonen*, the UNHRC again considered sexual minorities’ rights, in *Young v Australia*.⁸¹ *Young’s* case widened the scope of sexual minorities’ jurisprudence under the United Nations. Edward Young was in a same-sex relationship with C for 38 years. His partner was a war veteran, whom the author cared for in the last years of his life. After the demise of his partner the author demanded for a pension under section 13 of the Veterans’ Entitlement Act 1986 as a veteran’s dependent. The Repatriation Commission denied him the pension on 12 March 1999 on the grounds that he was not a dependant as defined by the Act.⁸² Further appeal of the author to the Veterans Review Board (VRB) for a review of the Commission’s decision was rebuffed as the VRB affirmed the decision of the Commission.⁸³

Mr Young argued that the state party’s refusal to provide him with a pension benefit, on the basis of him being of the same sex as his partner, violates his right to equal treatment before the law contrary to article 26 of the ICCPR.

⁷⁸ *Toonen* (n 68 above) para 8.6.

⁷⁹ *Toonen* (n 68 above) para 8.7.

⁸⁰ K Braun (n 52 above) 878. Braun laments that no explicit reference has been made to sexual orientation and gender identity in the international bill of rights.

⁸¹ Communication No 941/2000, U.N. Doc. CC PR/C/78/D/9411 2000 (2003) available at www.equalrightstrust.org (accessed 18 June 2015).

⁸² *Young* (n 81 above) para 2.

⁸³ *Young* (n 81 above) para 2.

He conceded that article 26 does not compel a state party to enact a particular legislation, but argued that where a state does enact legislation, that legislation must comply with article 26.⁸⁴

On its part, the state party argued that the author is not a victim within the meaning of article 1 of the Optional Protocol. It argues further that a thorough examination of the facts and their application to the VCA reveals that no partner of C, whether homosexual or heterosexual, would have been entitled to the pension under the VEA. Consequently, the state party argued that neither the author's sexual orientation nor the sexual orientation of C is determinative of the issue.⁸⁵ Apparently, the argument carried by the state party is that *ab initio* Young had not established any basis for, or proved the existence of any, benefits accruing to him through his partner. To the state party, Young's sexual orientation was never an issue, but that there was no such benefit to lay claim.

The Committee, dismissing the state party's argument, stated that an author of a communication is a victim within the meaning of article 1 of the Optional Protocol if they are personally adversely affected by an act or omission of the state party.⁸⁶ The Committee observed that in the instant case, the domestic authorities refused the author a pension on the pretext that he did not meet the definition of being a 'member of a couple' through not having lived with a 'person of the opposite sex'. In the Committee's view it was clear that the author's sexual orientation was a decisive factor in the denial of his entitlement. In that respect the author has established that he is a victim of an alleged violation of the covenant for purposes of the Optional Protocol and his communication is deemed admissible.⁸⁷

Another important decision of the UNHRC lies in the case of *Joslin v New Zealand*.⁸⁸ The authors of this communication, Ms Joslin and Ms Rowan started a lesbian relationship in January 1988, and lived together thereafter. They

⁸⁴ *Young* (n 81 above) para 4.1.

⁸⁵ *Young* (n 81 above) para 4.

⁸⁶ *Young* (n 81 above) para 5.1.

⁸⁷ *Young* (n 81 above) para 5.1.

⁸⁸ Communication No 902/1999, U.N. Doc. A/57/40/ at 214 (2002).

applied under the Marriage Act 1935 to the local registrar of Births, Deaths and Marriages for a marriage licence, by lodging a notice of intended marriage at the local registry. The deputy registrar-general rejected the application.⁸⁹ In their arguments and submissions, the authors claimed to be victims of a violation by New Zealand of articles 16 and 17, on its own and in conjunction with article 2(1); article 23(1), in conjunction with article 2, and article 26 of the Covenant. The authors claimed that the failure of the Marriage Act to provide for homosexual marriage discriminates against them directly on the basis of sex and indirectly on the basis of sexual orientation.⁹⁰ The authors further argued that their inability to marry caused them to suffer “a real adverse impact” in several ways as they were denied the ability to marry, a basic civil right, and were excluded from full membership of society and their relationship was stigmatized. Also there could be detrimental effects on their self-worth and they did not have the ability to choose whether or not to marry, like heterosexual couples did.⁹¹

The state party rejected the authors’ argument that the Covenant requires state parties to enable homosexual couples to marry, noting that such an approach would require redefinition of a legal institution, protected and defined by the Covenant itself and of an institution reflective of the social and cultural values in the state which are consistent with the Covenant.⁹² The Committee expressed its view that in the light of the scope of the right to marry under Article 23(2), of the Covenant, the Committee could not find that by mere refusal to provide for marriage between homosexual couples, the state party had violated the rights of the authors under articles 16, 17, 23(1) and (2), or articles 26 of the Covenant.⁹³

In *X v Colombia*,⁹⁴ the UNHRC further affirmed the right of sexual minorities as defined in Article 26.

⁸⁹ *Joslin* (n 88 above) para 1.

⁹⁰ *Joslin* (n 88 above) para 4.

⁹¹ *Joslin* (n 88 above) para 4.

⁹² *Joslin* (n 88 above) para 4.

⁹³ *Joslin* (n 88 above) para 4.

⁹⁴ HR Committee Communication 1361/2005.

According to Braun, the decided cases so far before the UNHRC illustrate the rapid development of jurisprudence reflecting the protection of LGBT people.⁹⁵ Braun expresses the view that ‘this jurisprudence of the HRC suggests that although the international community has affirmed the general applicability of international human rights law, clear and specific protection for such rights of LGBTI people have not yet been established’.⁹⁶ There is practically no provision in ICCPR categorically protecting sexual minorities. The aforementioned judicial decisions have interpreted supposedly relevant sections of the ICCPR to provide succour to LGBT people in some cases. The opinion of Pratima Narayan that ‘sexual minorities would gain greater protection if the UN amends the Charter to include language that explicitly protects sexual minorities’⁹⁷ is apt. This is obviously where the shortcomings of the ICCPR lie.

As it currently stands, Nigeria has not ratified the First Optional Protocol to the ICCPR that should ideally be the access route for prospective homosexual litigants to lodge complaints before the HRC.⁹⁸ It is, hereby recommended that Nigeria should ratify the all important First Optional Protocol to the ICCPR to enable the Human Rights Committee of the ICCPR accept individual complaint from Nigeria in line with *Toonen*, exactly when judicial remedies would not result in finding that anti-sodomy laws violate the Nigerian Constitution and international law.

⁹⁵ Braun (n 52 above) 882.

⁹⁶ Braun (n 52 above) 883.

⁹⁷ Narayan (n 9 above) 326.

⁹⁸ The Optional Protocol is the procedural mechanism for implementing the Covenant and as the preamble best capture its mission, the Protocol enables the HRC to receive and consider communication from victims of rights abuses. For a detail and excellent rendition on the Protocol see generally E Mose & T Opsahl ‘The Optional Protocol to the International Covenant on Civil and Political Rights’ (1981) 21 *Santa Clara Law Review*.

4.3.1.2 Concluding Observations of the Human Rights Committee of the ICCPR and its consequence for LGBT rights protection in Nigeria

The Human Rights Committee's Concluding Observations is another important mechanism that plays a big role in 'highlighting violations of human rights and praising positive progression towards treaty obligations'.⁹⁹ However, Nigeria has not yet submitted report in respect to LGBT rights.¹⁰⁰ In the aspect of LGBT rights, the platform too has not beamed its searchlight on Nigeria yet. The HRC has, however, in its Concluding Observations, made vital comments on LGBT rights violations in other African countries with similar discriminatory anti-homosexuality penal codes like Nigeria.

In Ethiopia, the Committee showed concern about the continued criminalisation of homosexuality, pointing out that such criminalisation violates the right to privacy. The Committee urged Ethiopia to take steps towards decriminalisation.¹⁰¹ The Committee also frowned at the criminalisation of homosexual acts under section 347 of the Penal Code of Cameroon. The Committee urged Cameroon to amend the homosexual provisions of its penal law to bring it in line with the non-discrimination principle of the ICCPR.¹⁰² In Kenya, where consensual adult same-sex is penalised under section 162 of the Kenyan Penal Code, the Committee urged a repeal as the penalising section contradicts the provision of articles 17 and 26 of the Covenant.¹⁰³ Similar to Kenya, the Committee also frowned at the criminalisation of adult homosexuality by Lesotho and recommended an amendment of same law to tally with its international human rights obligations.¹⁰⁴ The SSMPA targets aliens by the

⁹⁹ G MacAuthor 'Securing sexual orientation and gender identity within the United Nations framework and system: Past, present and future' (2015) 15 *The Equal Rights Review* 37.

¹⁰⁰ Nigeria submitted its report to the Committee last in 1996 and the issue of sexual orientation did not feature in the report. See HRC CCPR/C/92/Add.1.

¹⁰¹ Human Rights Committee 'Consideration of reports submitted by state parties under article 40 of the Covenant, Concluding Observations of the HRC: Ethiopia' UN Doc. ECCPR/C/ETH/CO/1 para 12.

¹⁰² Human Rights Committee 'Consideration of reports submitted by state parties under article 40 of the Covenant. Concluding Observations of the HRC: Cameroon'. UN Doc. CCYR/C/CMR/CO/4 para 12.

¹⁰³ Concluding Observations: Kenya, CCPR/CO/83/KEN, para 27, March 28 2005.

¹⁰⁴ Concluding Observations: Lesotho, CCPR/C/79/ Add.106, para 13, 8 April 1999.

invalidation of same-sex marriage entered into by foreigners in Nigeria.¹⁰⁵ Zimbabwe, like Nigeria, also targets foreigners who are homosexuals by tagging them as ‘prohibited persons’ subject to deportation. To this end, the Committee recommended the repeal of such legislation and urged that such legislation be brought in conformity with the spirit of the Covenant.¹⁰⁶ Sudan, similar to Nigeria, also penalises homosexual acts with the death penalty. The Committee pointed out to Sudan that homosexual conduct is not the most serious offence to attach the death penalty to and doing so is incompatible with article 6 of the Covenant.¹⁰⁷ In Namibia, the Committee considered the absence of anti-discrimination measures for homosexuals, and urged the state party to promulgate anti-discrimination legislation on grounds of sexual orientation.¹⁰⁸

The observations and recommendations made by the HRC of the ICCPR are very relevant and useful for Nigeria in relation to decriminalisation of consensual adult homosexual conduct. The HRC has not made similar recommendations for Nigeria because Nigeria has not been consistent in submitting state reports to the Committee, particularly relating to sexual orientation. As recommended earlier, Nigeria would have to step up in making regular reports to the HRC. Where the government is reluctant to report on the issue of sexual orientation, the burden then falls on civil society groups to include sexual orientation in their shadow reports to the Committee.

4.3.2 The ICESCR as UN’s framework for economic, social and cultural rights protection

The ICESCR is the United Nations twin legislation to the ICCPR.¹⁰⁹ Economic well-being of an individual is an inextricable aspect of the person’s human rights

¹⁰⁵ See section 1(2) of the SSMPA.

¹⁰⁶ Concluding Observations: Zimbabwe, CCPR/C/79/Add.89, para 24 April 1998.

¹⁰⁷ Concluding Observations: Sudan, C/79/Add.85, para 8, 29 July 1997.

¹⁰⁸ Concluding Observations: Namibia, CCPR/CO/81/NAM, para 22, July 30 2004.

¹⁰⁹ The ICESCR was adopted at the same time as the ICCPR and entered into force on 3 January 1976. See Rehman (n 53 above) 149.

to the extent that it is inevitable to discuss economic rights.¹¹⁰ Colleen Sheppard asserts that ‘economic well-being constitutes an essential prerequisite to the effective enjoyment of civil, political, social and cultural rights.’¹¹¹ Colleen argues, rightly, to the effect that it is necessary to feature economic rights prominently in the human rights agenda.¹¹² National constitutions have also followed suit in favour of the arguments for economic, social and cultural rights recognition.¹¹³ The snag, however, lies in the non-justiciability of these rights. Pointedly, economic, social and cultural rights still contrast with their civil and political counterparts as the latter rights have been more accepted by world nations.¹¹⁴ Nigeria joined the league of nations that have ratified the ICESCR on 29 July 1993,¹¹⁵ thus making its human rights provisions binding on Nigeria.¹¹⁶

The ICESCR, despite seemingly playing second fiddle role to the ICCPR in the realm of rights, provides for the following substantive human rights: The right to self-determination,¹¹⁷ the right to form trade unions and the right to work,¹¹⁸ the right to just and favorable condition to work,¹¹⁹ the right to form trade union and right to strike,¹²⁰ the right to social security, including social insurance,¹²¹ the right to an adequate standard of living, including adequate

¹¹⁰ C Sheppard ‘A review of Lucie harmarche, perspectives occidentales du droit international des droits ‘economique de la personne’ (1996) 41 *MC Gill Law Journal* 907.

¹¹¹ Sheppard (n 110 above) 907.

¹¹² Sheppard (n 110 above) 907.

¹¹³ See Chapter 3 of the Nigerian Constitution for instance.

¹¹⁴ S Kelantry, JE Getgen & SA Koh ‘Enhancing enforcement of economic, social and cultural rights using indicators: A focus on the rights to education in the ICESCR (2010) 32 *Human Rights Quarterly* 255.

¹¹⁵ See the website of the UN High Commissioner for Human Rights, <http://.orchr.org>.

¹¹⁶ Although the 1999 Constitution of Nigeria replicated these rights in Chapter 2, the socio-economic rights remain unenforceable by virtue of section 6(6)(c) of the 1999 CFRN. However, scholarly debates about the judicial enforceability of the socio-economic rights in Nigeria are gaining grounds. See the works of S Ibe ‘Beyond justiciability: Realising the promise of socio-economic rights in Nigeria’ (2007) 7 *African Human Rights Law Journal* 225-248; ST Ebobrah ‘The future of economic, social and cultural rights litigation in Nigeria’ (2007) 1 *Review of Nigerian Law and Practice* 108-124; WO Egbewole ‘Realizing socio-economic rights in Nigeria and the justiciability question: Lessons from South Africa and India (2017) 8 *International Journal of Politics and Good Governance* 1-24.

¹¹⁷ Article 1 ICESCR.

¹¹⁸ Article 6 ICESCR.

¹¹⁹ Article 7 ICESCR.

¹²⁰ Article 8 ICESCR.

¹²¹ Article 9 ICESCR.

food, clothing and living, and continuous improvement of living conditions,¹²² the right to enjoyment of the highest attainable standard of physical and mental health,¹²³ the right to education,¹²⁴ the right to take part in cultural life and to enjoy the benefits of scientific progress.¹²⁵

4.3.2.1 Seeking for economic and social rights for sexual minorities under the ICESCR

The aforementioned rights in the ICESCR accrue to sexual minorities too by reason of their humanness. Similar to the ICCPR, the ICESCR did not specifically allot any right to sexual minorities distinctively as a group; however it makes a generic non-discrimination provision, prohibiting discrimination of any kind on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.¹²⁶ Courtney reiterates that although sexual orientation is not explicitly listed as a protected category, the Committee on economic, social and cultural rights has noted in its general comment that other status includes sexual orientation.¹²⁷

Further, the Committee on Economic, Social and Cultural Rights (ESCR Committee) has highlighted and thrown more light on the position of sexual minorities in its Preamble. The ESCR Committee asserts the following:

Discrimination undermines the fulfillment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to the sustainable development, and individual and groups of individuals continue to face socio economic inequality, often because of entrenched historical and contemporary forms of discrimination.¹²⁸

¹²² Article 11 ICESCR.

¹²³ Article 12 ICESCR.

¹²⁴ Article 13 & 14 ICESCR.

¹²⁵ Article 15 ICESCR.

¹²⁶ Article 2(2) ICESCR.

¹²⁷ CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 442.

¹²⁸ UN Committee on ESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (article 2 para 2, of the International Covenant of Economic, Social and Cultural Rights) 42 session General, 4-22, May 2009 para 1.

Instances abound where people are victimised on the basis of their sexual orientation in places of employment.¹²⁹ This discrimination not only violates their rights to sexual orientation but it also violates the provisions of the ICESCR. The ICESCR unambiguously correlates equality and non-discrimination policy with human capacity to enjoy social, economic, and cultural rights. Article 2(2) of the ICESCR places a burden on states to take all steps that may be required in eliminating discrimination on the grounds of sex, race, colour, language, religion, political opinion, national or social origin, property, birth or other status, in accordance with the provisions of the Covenant.

The concepts of ‘sex’ and ‘other status’ in the light of the provision of the ICCPR have been given judicial interpretation in *Toonen* to include sexual orientation.¹³⁰ The ESCR Committee went further to clarify the ICESCR position on the phrase ‘other status’. It provides that ‘other status’ as recognised in article 2(2) includes sexual orientation.¹³¹ State parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as one of the prohibited grounds of discrimination. For example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in school or in the work place.¹³²

¹²⁹ See generally R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa* (2011).

¹³⁰ *Toonen* (n 68 above) para 8.7.

¹³¹ See United Nations, Committee on ESCR, General Comment No 20 ‘Non-discrimination and economic, social and cultural rights’. E/C.12/GC/20, 2 July 2009, para 32. The Committee explain ‘any other social conditions’ as provided in article 2(2) of the ICESCR to include sexual orientation. See also United Nations, Committee on ESCR, General Comment No 18 ‘Right to work’ E/C.12/GC/18, 6 February 2006 para 12 The Committee prohibited against discrimination in access to employment on the basis of sexual orientation. United Nations, Committee on ESCR, General Comment No 15. ‘The right to water’ E/C. 12/2002/11 20 January, 2003 para 13. The Committee also listed sexual orientation as a ground upon which a person may not be denied water under articles 11 and 12 of the ICESCR. United Nations, Committee on Economic, Social and Cultural Rights, General Comment No 14 ‘The right to enjoy the highest attainable level of health’ E/C.12/2000/4, 11 August 2000, para 18. The Committee also listed sexual orientation as among prohibited grounds of discrimination in the right to enjoy highest attainable level of health under the ICESCR.

¹³² Thoreson & Cook (n 129 above).

The above clarification goes a step further to re-emphasise the place of sexual minorities under the ICESCR.

4.3.2.2 Concluding Observations of the Committee on Economic, Social and Cultural Rights and its consequence for LGBT rights protection in Nigeria

Similar to the ICCPR, the ESCR Committee has not appraised Nigeria in the area of sexual orientation law. However, the Committee on ESCR has taken up the issue of sexual orientation rights violation with a couple of African countries with similar homophobic legislation to Nigeria. The observations and recommendations made by the Committee will definitely have positive consequences for Nigeria. Kenya is one of the African countries the Committee has closely paid attention to.¹³³ The Committee noted particularly the absence of comprehensive anti-discriminatory legislation in Kenya.¹³⁴ The Committee categorically expressed concern over the continued existence of the homosexuality penalising section of the Kenyan Penal Code.¹³⁵ The Committee showed that LGBT persons face social stigmatisation, as they are denied access to social services particularly health-care services.¹³⁶ The Committee recommended that Kenya should take steps towards decriminalisation of consensual adult homosexual conduct.¹³⁷ It was further recommended to Kenya to ‘put an end to the social stigmatisation of homosexuality and ensure that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity’.¹³⁸ In the light of the absence of anti-discriminatory legislation in Kenya, the Committee recommended for the

¹³³ Concluding Observation on the combined second to fifth periodic reports of Kenya. Committee on ESCR E/C.12/KEN/CO/2-5. The Committee on ESCR considered the second to fifth periodic reports of Kenya on the implementation of IESCR.

¹³⁴ E/C.12/KEN/CO/2-5 (n 133 above) para 19.

¹³⁵ E/C.12/KEN/CO/2-5 (n 133 above) para 21.

¹³⁶ E/C.12/KEN/CO/2-5 (n 133 above) para 21.

¹³⁷ E/C.12/KEN/CO/2-5 (n 133 above) para 22.

¹³⁸ E/C.12/KEN/CO/2-5 (n 133 above) para 22.

enactment of such legislation to bring in conformity with the non-discrimination clause of article 2 of the IESCR.¹³⁹

In its concluding observations for Burundi between 21 September to 9 October 2015,¹⁴⁰ the Committee on ESCR raised concern over the statutory definition of homosexuality as a crime in the Criminal Code and the Ministerial Order No 620/613 on 7 June 2011 that makes provision for school children to be dropped out of school on grounds of their sexual orientation.¹⁴¹ The Committee recommended that the state party should repeal discriminatory provisions of the penal law that persecute or punish citizens on the grounds of their sexual orientation and gender identity.¹⁴² The Committee further urged Burundi to take necessary action to ensure that LGBT persons enjoy all the rights in the parent treaty.¹⁴³

The Committee made similar observation to the West African nation of Gambia in its 54th session between 23 February to 6 March 2015.¹⁴⁴ The Committee noted the absence of anti-discrimination law in the Gambia, and also expressed concern over the criminalisation of homosexual conduct in the state party's Criminal Code giving rise to incidents of arbitrary arrest and detention of homosexuals.¹⁴⁵ The Committee urged the Gambian government to 'adopt comprehensive anti-discriminating legislation in line with article 2, paragraph 2 of the Covenant, taking into account the Committee's General Comment no 20 (2009) on non-discrimination in economic, social and cultural rights'.¹⁴⁶

Beaming its searchlight on Morocco,¹⁴⁷ the Committee pointed out that Morocco also lacked anti-discriminatory legislation prohibiting discrimination affecting the enjoyment of the rights enshrined in the covenant.¹⁴⁸ The

¹³⁹ E/C.12/KEN/CO/2-5 (n 133 above) para 20.

¹⁴⁰ First Reporting Cycle E/C.12BDI/CO/1.

¹⁴¹ E/C.12BDI/CO/1 (n 140 above) para 17.

¹⁴² E/C.12BDI/CO/1 (n 140 above) para 18.

¹⁴³ E/C.12BDI/CO/1 (n 140 above) para 18.

¹⁴⁴ Second Reporting Cycle E/C.12/GMB/CO/1.

¹⁴⁵ E/C.12/GMB/CO/1 (n 144 above) para 12.

¹⁴⁶ E/C.12/GMB/CO/1 (n 144 above) para 12.

¹⁴⁷ Fourth Reporting Cycle E/C.12/MAR/CO/4.

¹⁴⁸ E/C.12/MAR/CO/4 (n 147 above) para 13.

Committee noted that homosexuals, along with persons with disabilities, asylum seekers and children born out of wedlock are denied access to employment, social services, healthcare and education.¹⁴⁹ The Committee further singled out article 489 of the Moroccan Criminal Code, expressing concern that the provision violates the rights contained in the parent treaty.¹⁵⁰ The Committee recommended law reforms towards repealing the criminalising section of the Moroccan Criminal Code and the adoption of measures to stop discrimination and stigmatisation of LGBT persons.¹⁵¹ The Committee further urged Morocco to punish perpetrators of violence against sexual minorities.¹⁵²

For Sudan, the Committee picked holes in the discriminatory provisions of major statutes dealing with women, religious minorities and LGBTs.¹⁵³ The Committee listed the Criminal Law Act, Personal Status Act, the Public Service Regulations, the Social Insurance Act and the Sudanese National Act as some of the legislation discriminating against LGBT persons.¹⁵⁴ The Committee recommended the review and reform of the above listed legislation to bring them in conformity with the non-discriminatory provision of article 2 of the parent treaty.¹⁵⁵

In Uganda, another hotbed of homophobia, the Committee bemoaned the absence of anti-discriminatory legislation, and queried the 'lack of information on the mandate and the actual functioning of the Equal Opportunities Commission'.¹⁵⁶ The Committee raised particular concern over incidents of state-sponsored persecution and punishment of homosexuals since the enactment of the Anti-Homosexuality Act in 2014.¹⁵⁷ The Committee also raised issues concerning the incidents of forced eviction of homosexuals in Uganda, following the passage of the AHA as this action conflicts with its General Comment No 7

¹⁴⁹ E/C.12/MAR/CO/4 (n 147 above) para 14.

¹⁵⁰ E/C.12/MAR/CO/4 (n 147 above) para 15.

¹⁵¹ E/C.12/MAR/CO/4 (n 147 above) para 16.

¹⁵² E/C.12/MAR/CO/4 (n 147 above) para 16.

¹⁵³ Second Reporting Cycle, E/C.12/SDN/CO/12.

¹⁵⁴ E/C.12/SDN/CO/12 (n 153 above) para 19.

¹⁵⁵ E/C.12/SDN/CO/12 (n 153 above) para 20.

¹⁵⁶ First Reporting Cycle E/C.12/UGA/CO1. Para 15.

¹⁵⁷ E/C.12/UGA/CO1 (n 156 above) para 16.

(1997) on the right to adequate housing and forced eviction.¹⁵⁸ The Committee further expressed concern over the denial of LGBT persons access to healthcare, and the difficulty experienced by homosexuals in accessing HIV/AIDS-related treatment.¹⁵⁹ The Committee urged Uganda to amend its Penal Code to decriminalise homosexual acts and to ‘investigate, deter and prevent acts of discrimination against lesbian, gay, bisexual, transgender and intersex people, bring perpetrators to justice and provide compensation to victims’.¹⁶⁰ The Committee also further urged the Ugandan government to ‘investigate all reported cases of illegal evictions of lesbian, gay, bisexual, transgender and intersex persons and ensure they are compensated’.¹⁶¹ The Committee also recommended that the state party provides everyone including LGBTs access to quality healthcare and address the difficulty faced by LGBT persons in accessing HIV/AIDS Medicare.¹⁶²

The observations and recommendations made by the Committee on Economic, Social and Cultural Rights are very relevant and useful for Nigeria in relation to economic and social welfare of sexual minorities in Nigeria. The Committee on Economic, Social and Cultural Rights has not made similar recommendations for Nigeria because Nigeria has not been consistent in submitting state reports to the Committee, particularly relating to the welfare of sexual minorities. As recommended earlier in the case of the ICCPR, Nigeria would have to step up in making regular reports to the Committee on Economic, Social and Cultural Rights. Where the government is reluctant to report on the issue of economic and social welfare of sexual minorities in Nigeria, civil society groups should do so in their shadow reports to the Committee on Economic, Social and Cultural Rights.

¹⁵⁸ E/C. 12/UGA/CO1 (n 156 above) para 30.

¹⁵⁹ E/C. 12/UGA/CO1 (n 156 above) para 32.

¹⁶⁰ E/C. 12/UGA/CO1 (n 156 above) para 16.

¹⁶¹ E/C. 12/UGA/CO1 (n 156 above) para 30(c).

¹⁶² E/C. 12/UGA/CO1 (n 156 above) para 32.

4.3.3 CEDAW and rights protection for the ‘weaker’ sex

The CEDAW is viewed as ‘the cornerstone of the structure of the UN to help build a structure of internationally agreed strategies, standards, programmes and goals to advance the status of women worldwide’.¹⁶³ The CEDAW is basically a treaty for the protection of women in a male-dominant society from discrimination on the basis of their gender.¹⁶⁴ Most segments of Nigerian societies are riddled with cultural practices and laws that place women on a lesser pedestal than their male counterparts.¹⁶⁵ The CEDAW holds a huge potential of being invoked to assert the necessity of equal treatment and non-discrimination on the grounds of sex.¹⁶⁶ Obliging state parties to eliminate discrimination, against women, it provides that ‘state parties condemn discrimination against women in all its forms, agree to pursue by all means and without delay a policy of eliminating discrimination against women.’¹⁶⁷ CEDAW calls on states to explicitly affirm the principles of the equality of men and women in their constitutions and other vital legislative documents in the hope that the institutionalisation of gender equality will eventually lead to the elimination of discrimination against women around the world. Interestingly, Nigeria is also a state party to the CEDAW, having ratified the treaty.¹⁶⁸

4.3.3.1 Rights protection for lesbian and bisexual women under the CEDAW

Little attention has been given to the rights available to sexual minorities under the CEDAW, probably because of the gender-sensitive nature of the treaty.

¹⁶³ AEV King and AB Johnson *Foreword to the CEDAW and its Optional Protocol: Handbook for parliamentarian. United Nations* 2003 para 3.

¹⁶⁴ Article 1 of the CEDAW clearly defines discrimination against women as ‘any distinction, exclusions or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their mental status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

¹⁶⁵ EO Ekhatior ‘Women and the law in Nigeria: A reappraisal’ (2015) 16 *Journal of International Womens’ Studies* 285.

¹⁶⁶ Ekhatior (n 165 above) 291.

¹⁶⁷ Article 2.

¹⁶⁸ Nigeria ratified the CEDAW on 13 June 1985, see <http://www.ohchr.org>.

Lesbianism, an expression of sexuality practised by women, is a component of the LGBT grouping and, by compound extension, sexual minorities. CEDAW has made anti-discriminatory provisions in article I and identified ‘sex’ as a basis of discrimination, which may extend to discrimination against women on the basis of their sexual orientation as lesbians or bisexuals.¹⁶⁹ It will amount to a violation of article 1 of CEDAW when laws are made to criminalise acts of lesbianism or female bisexuality. As noted in chapter 2, there are Nigerian laws discriminating against women on the basis of their sexual identity as lesbians and bisexuals.

4.3.3.2 Concluding observations of the Committee on Elimination of Discrimination against Women and its consequence for LBT rights protection in Nigeria

Instructively, the Committee on the Elimination of Discrimination against Women has clearly recognised sexual orientation, based on gender identity or sexuality, as a ground for prohibiting discrimination. The Committee invites state parties to note the interconnecting relations existing between discrimination of women on the basis of their sex and gender and such seemingly remote factors as ethnicity, religion, race, class, status, age, gender identity and sexual orientation.¹⁷⁰ It urges state parties to take steps to prohibit such subtle forms of discrimination using legal instruments. The recommendation goes further to define the term ‘sex’ as constituting the biological differences between men and women and ‘gender’ as ‘socially construed identities’.¹⁷¹

The Committee on the Elimination of Discrimination against Women in its concluding observation on the Gambia in its 61st session, held from 6-24 July 2015,¹⁷² noted that criminalisation of homosexuality in the Gambia is capable of

¹⁶⁹ United Nations’ Committee on the Elimination of Discrimination against Women, Draft of General Recommendation No 28 on the core obligations of state parties under Article 2 of the CEDAW. CEDAW/C/GC/28. 16 December 2010.

¹⁷⁰ CEDAW/C/GC/28 (n 169 above) para 18.

¹⁷¹ CEDAW/C/GC/28 (n 169 above) para 5. See also United Nations’ Committee on the Elimination of Discrimination against Women, General Recommendation No. 27 on women of age and the protection of their human rights. CEDAW/C/GC/27, 16 December 2010 para 13.

¹⁷² Fifth Reporting Cycle CEDAW/C/GMB/CO/4-5.

inciting hatred against lesbian, bisexual and transgender women, more so as there are reported cases of arbitrary detention of women perceived to be lesbians.¹⁷³ The CEDW recommended that

[t]he state party ... repeal the provisions of the criminal code on 'unnatural offences' and 'aggravated homosexuality', and the arbitrary detention of lesbians and provide them with effective protection from violence and discrimination and provide appropriate training to law enforcement officials.¹⁷⁴

Elsewhere in Malawi, the CEDW hailed the adoption of the Gender Equality Act which prohibits sex discrimination.¹⁷⁵ The Committee, however, pointed out that the Penal Code Amendment of 2011 still punishes consensual same-sex affairs among women.¹⁷⁶ The Committee recommended the decriminalisation of consensual female homosexual conduct.¹⁷⁷

In the CEDW concluding observations on Uganda,¹⁷⁸ the Committee listed a number of positive legislative enactments aimed at promoting the rights of women and prohibiting discrimination against women on the basis of their gender.¹⁷⁹ However, a principal area of concern for the Committee is the criminalisation of homosexuality in Uganda.¹⁸⁰ The Committee showed concern over reported cases of 'harassment, violence, hate crimes and incitement of hatred against women on account of their sexual orientation and gender identity.'¹⁸¹ The Committee urged Uganda to

[d]ecriminalize homosexual behavior and to provide effective protection from violence and protection and discrimination against women based on their sexual

¹⁷³ CEDAW/C/GMB/CO/4-5 (n 172 above) para 44.

¹⁷⁴ CEDAW/C/GMB/CO/4-5 (n 172 above) para 45.

¹⁷⁵ 7th Reporting Cycle, CEDAW/C/MWI/CO/7 para 10(a).

¹⁷⁶ CEDAW/C/MWI/CO/7 (n 175 above) para 10(c).

¹⁷⁷ CEDAW/C/MWI/CO/7 (n 175 above) para 11(d).

¹⁷⁸ Concluding Observations of the Committee on the Elimination of Discrimination against Women, Uganda. CEDAW/C/UGA/CO/7.

¹⁷⁹ CEDAW/C/UGA/CO/7 (n 178 above) para 6. The Committee listed The Land Act Amendment (2004); The Employment Act (2006); The Equal Opportunities Commission Act (2007); The Domestic Violence Act 3 (2010) among others.

¹⁸⁰ CEDAW/C/UGA/CO/7 (n 178 above) para 43.

¹⁸¹ CEDAW/C/UGA/CO/7 (n 178 above) para 43. The Committee further expressed concern over the issue of discrimination women in Uganda face in employment, healthcare, education and other fields on account of their sexual orientation and gender identity.

orientation and gender identity, in particular through the enactment of comprehensive anti-discrimination legislation that would include the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation and gender identity.¹⁸²

Nigeria has not yet submitted any report in respect of the violation of rights of women on the basis of their sexual orientation and gender identity before the Committee on CEDW, despite the fact that Nigeria arguably has the most homophobic and elaborate legislation against lesbianism in Africa.¹⁸³ Well documented cases of extortions and blackmail of lesbians on the ground of sexual orientation in places of employment abound in Nigeria.¹⁸⁴ Nigeria, being a state party to the CEDAW, is under a legal and moral obligation to adopt the recommendations of the CEDW in respect to other African countries with similar homophobic legislation against women as Nigeria, as the Committee ‘has given the idea a more practical touch in its concluding observations’.¹⁸⁵

4.3.4 Sexual minorities’ rights under CAT

Torture has been described as one of the most atrocious violations against human dignity, which destroys the dignity and impairs the capability of victims to continue their lives and their various activities.¹⁸⁶ The acts of torture are as ancient as human history itself; therefore, it is a crime of antiquity.¹⁸⁷ The CAT is the product of a sustained campaign to respond to growing instances of torture

¹⁸² CEDAW/C/UGA/CO/7 (n 178 above) para 44.

¹⁸³ See section 2.7 of chapter 2 for analysis of the homosexuality-penalising sections of the Sharia Penal Codes of 12 states in northern Nigeria where in some cases lesbianism is punishable with the maximum death penalty.

¹⁸⁴ See U Azuah ‘The impact of blackmail and extortion: Extortion and blackmail of Nigerian lesbians and bisexual women’ in Thoreson & Cook (n 129 above) 46-59.

¹⁸⁵ AJ Osogo ‘An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the ‘separability thesis’, secularism and international human rights’ Unpublished LLD thesis, University of Pretoria (2016) 207.

¹⁸⁶ Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, UN Doc. A/conf. 157/23 12 (July 1993) para 55 (part II), quoted also in Rehman (n 53 above) 808.

¹⁸⁷ Rehman (n 53 above) 808.

and violence.¹⁸⁸ CAT defines torture comprehensively to mean any act through which bodily or psychological pain or suffering is inflicted on someone with the ultimate goal of forcing information from the victim. According to CAT, the individual being tortured may be going through the degrading process not because he or she is directly guilty of any offence but by virtue of his or her connection or association with another person suspected of committing an offence. For an act to qualify as torture, however, it must not flow from the lawful use of sanction, and a representative or representatives of a public institution or authority must be involved.¹⁸⁹ As is the case with the other UN treaties discussed above, Nigeria is also a state party to the CAT.¹⁹⁰

4.3.4.1 Concluding Observations of the Committee against Torture and its consequence for LGBT rights protection in Nigeria

The CAT does not directly mention sexual orientation and LGBT people in its articles. However, the Committee against torture has expressly listed sexual minorities amongst the minority groups that state parties must strive to protect from torture.¹⁹¹ The Committee in its monitoring function in a concluding observation on Kenya requested that Kenya should

[p]rovide information on the measures taken to address the reported discrimination and ill-treatment, including acts of violence, of lesbians, gay, bisexual and transgender persons...indicate whether the State party has repealed any legal provisions that foresee penalties against such persons.¹⁹²

¹⁸⁸ Rehman (n 53 above) 811, states that ‘many occurrences of torture including those of the treatment of political opponents in the East Bengal civil war (1970), in Chile (1973) and under regimes of men like Idi Amin of Uganda (1971-79) and Francisco Macias Ngwama of Equatorial Guinea (1968-79) all highlighted the necessity for concerted international action.’ See page 811.

¹⁸⁹ Article 1 CAT.

¹⁹⁰ Nigeria ratified the CAT on 28 June 2001. See <http://www.ohchr.org>.

¹⁹¹ United Nations, Committee Against Torture, General Comment No 2, ‘Application of article 2 by state parties’ CAT/C/GC/2, 24 January 2008, para 20 & 21. More so, reports of the UN Special Rapporteur on torture has indicated that LGBTs are victims of torture in various countries of the world. See *Born free and equal: Sexual orientation and gender identity in international human rights law* (2012).

¹⁹² CAT/C/KEN/QPR/3 para 33.

4.3.4.2 Individual complaints under the CAT and relevance to LGBT rights discourse in Nigeria

An interesting development in the proceedings of the Committee against torture is its decision in the individual complaint on the *refoulement* of a sexual minority rights defender to Uganda.¹⁹³ In the communication, the complainant, a Ugandan citizen residing in Canada, claims that his extradition to Uganda would constitute a gross violation of article 3 of the convention.¹⁹⁴ The complainant asserted in his petition that he was born gay and as a known gay activist in Uganda he actively participated in a public gay rights demonstration near the Ugandan Parliament in August 2007. The complainant further alleged that in the course of the demonstration, the Ugandan Police, arrested and handcuffed him after subjecting him to physical beatings.¹⁹⁵ The complainant graphically described the kind of torture he was subjected to: he was kept in a dark interrogation room with his hands firmly tied up, while a machine was used on him to inflict pains on his body. The complainant alleged to have been kept in detention for 3 days and beaten regularly.¹⁹⁶ The complainant fled to Canada on 14 October 2010 with the imminent passage of the Anti-Homosexuality Bill which would give the government the legal right to imprison and torture homosexuals.¹⁹⁷ The complainant's application for refugee status failed as the Refugee Protection Division found that he was not a person in need of protection by Canada.¹⁹⁸

The complainant's main contention before the Committee is that Canada would infringe on his rights under article 3 of the CAT if he was forcibly returned to Uganda where he will most likely be tortured to death on the ground of his sexual orientation.¹⁹⁹ The Committee took arguments from the state party.²⁰⁰

¹⁹³ *J.K. v Canada* Communication No 562/2013.

¹⁹⁴ *J.K.* (n 193 above) para 1.1.

¹⁹⁵ *J.K.* (n 193 above) para 2.3.

¹⁹⁶ *J.K.* (n 193 above) para 2.3.

¹⁹⁷ *J.K.* (n 193 above) para 2.6-2.7.

¹⁹⁸ *J.K.* (n 193 above) para 2.7.

¹⁹⁹ *J.K.* (n 193 above) para 3.1.

²⁰⁰ *J.K.* (n 193 above) para 4 & 5.

The main issues before the Committee was whether the expulsion of the complainant to Uganda would constitute a violation of article 3 of the CAT and also whether substantial grounds exist to believe that on the complainant's return to Uganda he would be a victim of torture.²⁰¹ The Committee noted that 'taking all the factors in the present case, substantial grounds exist for believing that the complainant will be in danger of torture or ill-treatment if returned to Uganda'.²⁰² The Committee, acting in accordance with article 22(7) of CAT, concluded that the complainant's expulsion to Uganda by the state party would violate article 3 of the CAT.²⁰³ The Committee expressed the view that 'the state party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the complainant to Uganda'.²⁰⁴

The jurisprudence of UN human rights treaty system on sexual orientation apparently indicates that LGBT rights formed an integral part of its agenda. Ambani notes that despite the non-explicit prohibition of discrimination on the ground of sexual orientation in the human rights instruments of the UN, the Committees of the treaties have continued to liberally interpret the provisions of parent treaties to accommodate LGBTs.²⁰⁵

4.4 The UN human rights UPR system and its protection of LGBT rights in Nigeria

The pioneer platform of law that projected the concept of non-discrimination and equality of the United Nations is the UN Charter.²⁰⁶ With the adoption of the UN Charter, the UN charted a new course of non-discrimination applying to everyone as a recognised element of international law.²⁰⁷ The Charter, however, fell short

²⁰¹ *J.K.* (n 193 above) para 10.2.

²⁰² *J.K.* (n 193 above) para 10.6.

²⁰³ *J.K.* (n 193 above) para 11.

²⁰⁴ *J.K.* (n 193 above) para 12.

²⁰⁵ Osogo (n 185 above) 209-210.

²⁰⁶ L Weiwei 'Equality and non-discrimination under international human rights law' (2004) *Norwegian Centre for Human Rights. Research Notes* 5.

²⁰⁷ Weiwei (n 206 above) 5.

of the standard of rights as it did not ‘establish any particular regime of human rights protection’.²⁰⁸

With the obvious limitation of the Charter, the stage became set for the promulgation of other all-encompassing human rights treaties discussed earlier. In 1946, the United Nations created the Commission on Human Rights to promote human rights according to Article 68 of the UN Charter. The Human Rights Commission drafted the International Bill of Human Rights, which include the Universal Declaration of Human Rights.²⁰⁹

The UDHR was adopted by the UN General Assembly in 1948.²¹⁰ The Declaration contains 30 Articles that robustly supports the underlying principles of universal rights.²¹¹ The Declaration in its preamble emphatically hammered on the equality stance of the United Nations as touching humanity, stating explicitly that respect for human rights is necessary for freedom, justice, and peace to thrive in the world.²¹² The introduction to the Charter is emphatic in asserting that people everywhere desire to enjoy freedom of speech and belief and the right to live without fear of external actors acting arbitrarily.²¹³ It is a truism that man’s abuse of rights of other men has led to the formation of the UN and the various human rights documents and treaties. It can safely be concluded that ‘barbarous acts’ are still been perpetrated against a section of humanity that the society has stigmatised on the basis of their sexual orientation.

The first section of the Declaration states categorically that ‘All human beings are born free with reason and conscience and should act towards one another in a spirit of brotherhood’.²¹⁴ The admonition of article 1 is to emphasise that equality and dignity should be the foundation for human rights as no person

²⁰⁸ Rehman (n 53 above) 30.

²⁰⁹ Rehman (n 53 above) 75-76. Rehman argues that the ‘Declaration is arguably an authoritative interpretation of the meaning of rights as prescribed within the United Nations Charter’. See page 79.

²¹⁰ 10 December 1948, UN General Assembly Resolution 217 A (III).

²¹¹ As above.

²¹² Preamble to the UDHR.

²¹³ As above.

²¹⁴ Article 1 UDHR.

will assume the moral high horse to condemn another on the basis of primordial sentiments. The non-discrimination clause of the declaration states that ‘everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status ...’²¹⁵ Pratima contends that ‘given that the Universal Declaration of Human Rights explicitly provides protection for individuals of ‘other status’, the document already affords some degree of protection to sexual minorities.’²¹⁶ I agree with Pratima as the phrase ‘other status’ leaves room for further inclusivity. Pratima further argues that ‘almost every clause begins with the word “everyone” conferring positive rights on all human beings’,²¹⁷ including sexual minorities who are also humans.

The Declaration enumerates certain rights which are also fundamental to sexual minorities. These rights include right to life, liberty and security of persons,²¹⁸ the right to dignity of the human person,²¹⁹ the right to freedom from discrimination and equality before the law,²²⁰ the right to privacy and family life,²²¹ the right to freedom of thought, conscience and religion,²²² and the right to freedom of association.²²³ The Declaration set the moral agenda for human rights globally. As Cohen notes, ‘the declaration is not a treaty. It is not legally binding upon the members of the United Nations’.²²⁴ Effectively, the declaration should serve as a template to arouse the conscience of humanity to take the rights of their citizens more seriously.²²⁵

²¹⁵ Article 2 UDHR.

²¹⁶ Narayan (n 9 above) 329.

²¹⁷ Narayan (n 9 above) 329.

²¹⁸ Article 3 UDHR.

²¹⁹ Article 4 and 5 UDHR.

²²⁰ Article 7 UDHR.

²²¹ Article 12 UDHR.

²²² Article 11 UDHR.

²²³ Article 11 UDHR.

²²⁴ BV Cohen ‘Human rights under the United Nations Charter’ (1949) 14 *Law and Contemporary Problems* 432.

²²⁵ Cohen (n 224 above) 434.

The United Nations General Assembly replaced its Commission on Human Rights with the Human Rights Council in 2006.²²⁶ Spohr describes the establishment of the Human Rights Council as ‘one of the most significant reforms of the United Nations Human Rights System.’²²⁷ The Human rights Council was established by Resolution 60/251 of the UNGA,²²⁸ The newly established Human Rights Council the CHR, equally inherited ‘all mandates, mechanisms, functions and responsibilities of the Commission on human rights’.²²⁹ One of the key platform of carrying out its duties is the univer periodic review mechanism. Spohr asserts that the UPR is ‘the most important element of the establishment of the new HRC’²³⁰ To this end, the Resolution provides that the Council shall, inter alia;

Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.²³¹

While pursuing this mandate, the UPR process has made remarkable interpretations and emphatic statements on the application of international principles of human rights law to sexual minorities’ rights.

In this section, I take a cursory look at the UPR concluding observations of the UN HRC relating to homosexuality rights in Nigeria and other African countries.

With characteristic candour, the UPR has consistently frowned at the homophobic legislations and violence targeted at LGBT persons in Africa. Recommendations on decriminalisation have been made, yet the response of African member states has not been encouraging. Several African countries have hinged the resistance to the recommendations of the UPR on the usual rhetoric

²²⁶ See M Spohr ‘United Nations Human Rights Council: Between institution-building phase and review of status’ (2010) 14 *Max Planck Yearbook of United Nations Law* 171.

²²⁷ Spohr (n 226 above)

²²⁸ A/RES/60/251.

²²⁹ Resolution 60/251 (n 228 above) para 6.

²³⁰ Spohr (n 226 above) 178.

²³¹ Resolution 60/251 (n 228 above) para 5(e).

of culture, religion and morality. Nigeria's first appearance at the first circle of the UPR was led by a delegation headed by its then foreign affairs minister, Ojo Madueke. On the vexed issue of same-sex marriage, sexual orientation and gender identity, Canada urged Nigeria not to pass the then controversial Same Gender Marriage Bill (which was being considered by the National Assembly). Canada further urged Nigeria to repeal existing laws that discriminate against individuals on the basis of gender and sexual orientation.²³² Finland also urged Nigeria to recognise and protect the rights of sexual and gender minorities and further abrogate any law prohibiting same-sex marriage.²³³ The Nigerian delegation responded that the National Assembly was yet to pass a law relating to the issue of same-sex marriage.²³⁴ Nigeria's recalcitrant stance on the issue of LGBT rights and same-sex marriage came up more emphatically in its national report at the session where the delegation emphasised that sexual minorities are not visible in Nigeria, and that the consensus of 90 per cent of Nigerians is that same-sex marriage was not a human rights issue. The delegation further reiterated the fact that Nigerian laws abhor same-sex marriage and only recognise a marriage between a man and a woman.²³⁵

At the second cycle of the UPR, Nigeria's position on sexual orientation and gender identity was scrutinised more closely with a host of UN member states recommending steps towards decriminalisation of subsisting anti-homosexuality laws.²³⁶ Nigeria's 2013 delegation was led by Bello Adoke, the then Attorney-General and Justice Minister. While stating its firm commitment to UPR as a platform for advancing human rights, the delegation announced that since the first review of 2009, the country has made giant strides in fulfilling its human rights obligation to citizens.²³⁷ The delegation listed a plethora of

²³² Human Rights Council 'Universal Periodic Review report on the Working Group on the UPR: Nigeria' UN Doc A/HRC/ 11/26 para 61 & 103(12).

²³³ See UN Doc A/HRC/ 11/26 (n 232 above) para 84 & 103(12).

²³⁴ UN Doc A/HRC/ 11/26 (n 232 above) para 100.

²³⁵ Human Rights Council 'National report submitted in accordance with paragraph 15(A) of the annex to HRC resolution 5/1: Nigeria' UN Doc. A/HRC/WG.6/4/NGA/1 para 76.

²³⁶ Human Rights Council, twenty-fifth session 'Report of the working group on the Universal Periodic Review: Nigeria' UN Doc A/HRC 25/6.

²³⁷ UN Doc A/HRC 25/6 (n 236 above) para 5 & 6.

achievements in the country's march to realising human rights for its citizens.²³⁸ However, on the thorny topic of homosexuality and Nigeria's persistent toying with the idea of legislating against same-sex marriage and consensual adult homosexual acts, the delegation pointed out that even within the UN human rights system, the quest for LGBT rights does not enjoy consensus.²³⁹ The delegation further asserted that the 'overwhelming majority of Nigerians objected to same-sex relationships, on the basis of their deeply held religious, cultural, and moral beliefs, against which no government could successfully legislate'.²⁴⁰ The Nigerian delegation curiously pointed out that there was no government policy or societal practice of witch-hunt, or victimising people on the basis of their sexual orientation.²⁴¹

Not to be deterred, critical comments and recommendations from peer-reviewing countries were suggested. Austria for example urged Nigeria to amend and review its laws with a view to decriminalising homosexuality. Austria further urged Nigeria to also release all persons imprisoned or detained on the ground of their sexual orientation and gender identity.²⁴² The Czech Republic advised Nigeria to exercise restraint in signing any new legislation criminalising homosexuality.²⁴³ Sweden and Australia urged Nigeria to safeguard the rights of all citizens irrespective of their age, sexual orientation, gender identity or religious affiliation.²⁴⁴ Canada recommended that Nigeria should enact laws to prevent violence against people based on their sexual orientation.²⁴⁵ Argentina and France advocated for measures to be taken towards repealing laws that discriminate against citizens on the basis of their sexual orientation and gender

²³⁸ See UN Doc A/HRC 25/6 (n 236 above) para 7-15.

²³⁹ UN Doc A/HRC 25/6 (n 236 above) para 16.

²⁴⁰ UN Doc A/HRC 25/6 (n 236 above) para 16.

²⁴¹ UN Doc A/HRC 25/6 (n 236 above) para 16.

²⁴² UN Doc A/HRC 25/6 (n 236 above) para 138.1.

²⁴³ UN Doc A/HRC 25/6 (n 236 above) para 138.2.

²⁴⁴ UN Doc A/HRC 25/6 (n 236 above) para 138.4 & para 138.6.

²⁴⁵ UN Doc A/HRC 25/6 (n 236 above) para 138.5.

identity.²⁴⁶ The United States of America²⁴⁷ and Uruguay²⁴⁸ also made useful recommendations.²⁴⁹

These recommendations did not enjoy the support of Nigeria as the delegation reminded the UPR that Nigeria did not accept the previous recommendation on same-sex marriage and the criminalisation of consensual adult homosexual conduct because the recommendations conflicted with national and cultural values. According to the submission of the delegation, a poll conducted in 2011 had indicated that 92% of the people were against same-sex marriage.²⁵⁰ The recommendations offered Nigeria by peer-reviewing countries on the two UPR cycles fell on deaf ears. Nigeria submitted itself for the second review between October and November 2013.²⁵¹ A month later, the then Nigeria President, Goodluck Jonathan, signed into law the SSMPA 2013, extending criminalisation of homosexuality to the marital sphere.

The rejection of recommendations geared towards decriminalisation of homosexuality in Africa is not peculiar to Nigeria. Other African countries have towed this line too. For instance, Kenya, in its report of the working group on the UPR, justified the intolerance of the government and the population towards same-sex relationships on the ground that the practice is contrary to the cultural beliefs of the people, insisting that overwhelming opposition to decriminalisation of homosexuality holds sway.²⁵² The Kenyan delegation emphatically held that ‘same-sex unions were culturally unacceptable in Kenya’²⁵³ as a reaction to

²⁴⁶ UN Doc A/HRC 25/6 (n 236 above) para 138.7 & 138.9.

²⁴⁷ UN Doc A/HRC 25/6 (n 236 above) para 138.3. The USA recommended that Nigeria should establish policies and procedures that will protect human rights and security of all Nigerians including LGBTI persons, their families and associates.

²⁴⁸ UN Doc A/HRC 25/6 (n 236 above) para 138.10. Uruguay recommended that measures be taken to combat discrimination against persons on the ground of sexual orientation, and sexual acts between consenting adults of the same-sex be decriminalised in order to bring Nigeria’s criminal legislation in that regard in line with the second Optional Protocol of the ICCPR.

²⁴⁹ UN Doc A/HRC 25/6 (n 236 above) para 138.

²⁵⁰ UN Doc A/HRC 25/6 (n 236 above) para 69.

²⁵¹ UN Doc A/HRC 25/6 (n 236 above) para 1.

²⁵² Human Rights Council ‘Report of the working group on the Universal Periodic Review: Kenya’ UN Doc A/HRC/15/8 para 50.

²⁵³ UN Doc A/HRC/15/8 (n 252 above) para 108.

recommendations made by other peer-reviewing countries.²⁵⁴ Obviously, the recommendations did not enjoy the support of the Kenyan government.

Uganda is another country in the same league with Kenya in the outright rejection of the UPR's call for the decriminalisation of homosexual offences. Peer review countries such as Canada,²⁵⁵ Denmark,²⁵⁶ Sweden²⁵⁷ and The Netherlands²⁵⁸ raised serious concerns over the plight of LGBTs and homophobic legislations in Uganda. The swift response of the Ugandan government was also to play the culture justification card. The Ugandan delegation pointed out that article 31, para 2 of the Constitution of Uganda prohibits same-sex marriage, while sections 145 and 146 of the Penal Code also prohibit same-sex relationship. The delegation argued that while the Ugandan Constitution, under chapter 4, accommodates the rights of all persons, the promotion and protection of same rights must be carried out within the country's social and cultural

²⁵⁴ For the recommendations see (n 252 above) para 103.5. The Netherlands suggested that Kenya should take concrete steps to provide for the protection and equal treatment of LGBT persons. Czech Republic and the USA recommended the repeal of laws that criminalise adult consensual same-sex. France also suggested that Kenya decriminalises homosexuality by abrogating the legal provisions that punish homosexuality between consenting individuals, and to further subscribe to the December 2008 General Assembly Declaration on sexual orientation and human rights.

²⁵⁵ Human Rights Council 'Report of the working group on the universal periodic review: Uganda' UN Doc A/HRC/19/16 para 42 & para 113.1. Canada showed concerned about the violent treatment being meted to LGBTs. Canada urged the Ugandan government to publicly announce the shelving of the proposed bill on homosexuality and decriminalise homosexual behavior.

²⁵⁶ UN Doc A/HRC/19/16 (n 255 above) para 54 & 113.16. Denmark showed concern at the attack on LGBTs and urged Uganda to fulfill its obligation under international human rights law and repeal any laws that explicitly or implicitly discriminated on any grounds, including sexual orientation, gender identity and gender expression.

²⁵⁷ UN Doc A/HRC/19/16 (n 255 above) para 85. Sweden was more concerned over the Ugandan Penal Code that criminalised consensual adult same-sex conduct.

²⁵⁸ UN Doc A/HRC/19/16 (n 255 above) para 89. The Netherlands noted the discrimination and violence based on sexual orientation and gender identity.

context.²⁵⁹ Norway,²⁶⁰ Slovenia,²⁶¹ Belgium,²⁶² Switzerland,²⁶³ Austria,²⁶⁴ Spain²⁶⁵ and the USA²⁶⁶ further made recommendations aimed at rights recognition for LGBTs in Uganda. These recommendations did not, however, enjoy the support of the Ugandan government. For Zimbabwe, whose President is famed for homophobic utterances,²⁶⁷ it was an outright rejection of France's recommendation for decriminalisation of laws prohibiting sexual relations between consenting adults of the same sex, and to repeal the 2006 law.²⁶⁸

4.5 The jurisprudence of sexual orientation under the African Union and the African Commission on Human and Peoples' Rights

The question of rights for sexual minorities in Africa is beginning to gain ground at the African Union (AU). The AU started its life as the Organisation of African Unity (OAU). The OAU was founded in Addis Ababa on May 25 1963 with the adoption of the Charter of the OAU by a meeting of the Heads of States and

²⁵⁹ UN Doc A/HRC/19/16 (n 255 above) para 25.

²⁶⁰ UN Doc A/HRC/19/16 (n 255 above) para 113.2 & 113.4. Norway recommended that the Ugandan Parliament should shelve aside the proposed Anti-Homosexuality Bill 2009. And to fulfill its obligation under international human rights law by decriminalising same-sex relationships between consenting adults.

²⁶¹ UN Doc A/HRC/19/16 (n 255 above) para 113.3. Slovenia in same vein as Norway canvassed for the rejection of the Anti-Homosexuality Bill and decriminalisation of homosexuality between consenting adults.

²⁶² UN Doc A/HRC/19/16 (n 255 above) para 113.5. Belgium recommended for the repeal of laws that discriminate against LGBTs. Australia, Argentina, and Brazil share the same sentiments with Belgium. See paras 113.7, 113.8 and 113.9 for their respective recommendations.

²⁶³ UN Doc A/HRC/19/16 (n 255 above) para 113.6 & 113.8. Switzerland recommended that Uganda revised its national legislation towards decriminalising homosexuality. It also advised that persons detained for the reasons of sexual orientation and gender identity be released.

²⁶⁴ UN Doc A/HRC/19/16 (n 255 above) para 113.11. Austria made similar recommendations to Switzerland that the Ugandan government should decriminalise homosexual offences and put an end to arbitrary arrest and detention of persons because of their sexual orientation or gender identity.

²⁶⁵ UN Doc A/HRC/19/16 (n 255 above) para 113.12. Spain recommended the abrogation of laws that criminalise same-sex relationships, and that the Ugandan government to put an end to the defamatory and harassing campaigns against LGBTs.

²⁶⁶ UN Doc A/HRC/19/16 (n 255 above) para 113.15. The US advocated that the Ugandan government should ensure equal rights for all individuals, regardless of sexual orientation.

²⁶⁷ FI Lyonga 'Un-African? Representations of homosexuality in two contemporary Nigerian films' (2014) 4 *International Journal of Humanities and Social Science* 97. Lyonga rates Mugabe as the leading reference point for African homophobia. Mugabe according to him is quoted as blurting that 'homosexuals were worse than pigs and dogs'.

²⁶⁸ Human Rights Council 'Report of the working group on the Universal Periodic Review: Zimbabwe' UN Doc A/HRC/19/14 para 95:17.

governments of 32 independent African states.²⁶⁹ In 1981, the OAU adopted one of its most important documents, the ACHPR, in Nairobi, Kenya. In 2000 the AU replaced the OAU. This transformation, however, did not affect the existence of the African Charter.²⁷⁰ The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 and entered into force on 21 October 1986.²⁷¹ The Charter is rightly viewed as the pivotal human rights document of the African Union.²⁷² The regulatory framework established by the Charter is the African Commission on Human and Peoples' Rights, later complemented with an African Human Rights Court.²⁷³ The Charter stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African people,'²⁷⁴ connoting the cornerstone of its philosophy of human rights. In a bid to stamp an air of collective brotherhood and equality the Preamble of the Charter clearly emphasises its non-discrimination and commitment to

[t]he total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.²⁷⁵

The ACHPR's non-discrimination philosophy proclaims that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion,

²⁶⁹ NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Journal* 55.

²⁷⁰ Viljoen (n 15 above). See 156-169 for a detailed discussion of the intrigues that led to the metamorphosis of the OAU to AU.

²⁷¹ GJ Naldi 'Observations on the rules of the African court on human and peoples' rights' (2014) 14 *African Human Rights Law Journal* 367.

²⁷² C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

²⁷³ Naldi (n 271 above) 367.

²⁷⁴ Preamble to ACHPR.

²⁷⁵ Preamble to ACHPR.

national and social origin, fortune, birth or other status.²⁷⁶ The equality principle of all human beings before the law is restated by the ACHPR.²⁷⁷ The ACHPR, like other international treaties, recognises such political and social rights as right to life,²⁷⁸ right to dignity of the human person,²⁷⁹ right to liberty,²⁸⁰ right to freedom of religion,²⁸¹ and right to freedom of association and assembly,²⁸² in addition to robust provision for social and economic rights.²⁸³

Notably, ‘the rights-holders under the African Charter are ‘everyone’, ‘every human being’ and every individual’.²⁸⁴ The aforementioned rights are available and accessible to all human beings without any discrimination,²⁸⁵ sexual minorities inclusive.²⁸⁶ Viljoen further reiterates earlier assertions that no international or regional human rights treaty categorically protects the rights of sexual minorities;²⁸⁷ the African Charter is no exception. However, the non-discrimination provision of article 2, which mentions sex as a ground of non-discrimination, arguably provides a form of refuge for sexual minorities.²⁸⁸ More so as the phrase ‘other status’ has been judicially interpreted to accommodate sexual orientation.²⁸⁹

Human rights debates on the sensitive question of human sexual orientation will continue to generate controversy within the human right

²⁷⁶ Article 2 ACHPR (emphasis added).

²⁷⁷ Article 3 ACHPR.

²⁷⁸ Article 4 ACHPR.

²⁷⁹ Article 5 ACHPR.

²⁸⁰ Article 6 ACHPR.

²⁸¹ Article 8 ACHPR.

²⁸² Article 10 & 11 ACHPR.

²⁸³ Article 15 -24 ACHPR.

²⁸⁴ Viljoen (n 15 above) 264.

²⁸⁵ Viljoen (n 15 above) 264.

²⁸⁶ Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights and United Nations (2016) 30. This resolution suggest that the all-encompassing provision on right-holders gives adequate room for sexual minorities to claim rights to their sexual orientation and gender identity.

²⁸⁷ Viljoen (n 15 above) 261.

²⁸⁸ (n 286 above) 31.

²⁸⁹ (n 286 above) 30.

movement,²⁹⁰ particularly the African continent where members of the LGBT community are subjected to various degrees of rights violation chiefly because of their sexuality.²⁹¹ Viljoen attributes the sweeping wave of homophobia in the continent essentially to religious dogmas and political opportunism of African leaders.²⁹²

4.5.1 Progress towards protection of sexual minority rights by the African Commission

The African Commission meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April 2014 to 12 May 2014 adopted Resolution 275. The adoption of Resolution 275 by the African Commission is a pointer to the fact that the human rights of sexual minorities is becoming favourably accommodated under the Charter. The Resolution deals the protection against violence and other human rights violation against persons on the basis of their sexual orientation and gender identity. The Resolution places emphasis on the anti-discriminatory provision of article 2 of the Charter and the doctrine of equality before the law as provided in article 3. Acknowledging the apparent fact that violence and discriminatory acts of human rights violations have become the lots of LGBT persons in Africa, the Resolution condemned in totality the escalating spate of murder, rape, assault and other violence on LGBT persons. The Resolution urged state parties to end all forms of violence and acts whether by state or non-state actors against sexual minorities, and to further take legislative measures to end such violence targeted at persons on the basis of their sexual orientation and gender identity.²⁹³

²⁹⁰ S Maguire 'The human rights of sexual minorities in Africa' (2004) 35 *California Western International Law Journal* 1.

²⁹¹ Viljoen (n 15 above) 259.

²⁹² Viljoen (n 15 above) 260.

²⁹³ (n 286 above) 28-29

4.5.2 The politics of accessibility of LGBT litigants before the AU judicial mechanisms

The African Charter, which is the principal document of the AU encompassing human rights, has as its enforcement organs the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights.²⁹⁴ Article 63(3) of the ACHPR provides for the establishment of the African Commission, empowering it with both a protective and promotional mandate.²⁹⁵ The African Court was established to play a complementary role to the protective mandate of the African Commission.²⁹⁶ The African Court which seemingly has more judicial powers than the African Commission has been ratified by 30 states, including Nigeria.²⁹⁷ The African Court Protocol provides for three access routes to the African Court, namely: through the African Commission on behalf of individual complainants, through a member state and through African NGOs.²⁹⁸ Availability of direct access to NGOs is only guaranteed when such NGOs are granted an observer status before the African Commission.²⁹⁹ For NGOs and individuals' direct application to the Court, a member state must have made a declaration accommodating the jurisdiction of the African Court to entertain individual applications. As it currently stands, only 7 countries have made such declaration, excluding Nigeria.³⁰⁰

The African Commission and the African Court have not yet decided any case relating to sexual orientation. The raging debate on sexual orientation and

²⁹⁴ AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Right have the final say?' (2016) 16 *African Human Rights Law Journal* 2.

²⁹⁵ P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the History of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 256-257. Johnson describes the protective mandate of the ACmHPR to involve receiving petitions relating to rights violations under the ACHPR and investigating same, communicating its findings and decisions to member state, while its promotional mandate entails holding bi-annual conferences where it receives reported and proposals from member states.

²⁹⁶ Johnson (n 295 above) 257. Johnson criticises the supposed complimentary role the ACmHPR is to play to the ACrHPR as been ill-defined. He premised the criticism on the ground that the ACmHPR has no exclusive power over applications made under the ACPHR.

²⁹⁷ Enabulele (n 294 above) 3.

²⁹⁸ Enabulele (n 294 above) 3-4. See also Johnson (n 286 above) 257-258.

²⁹⁹ Johnson (n 295 above) 257.

³⁰⁰ Johnson (n 295 above) 257.

rights of sexual minorities has not really been given adequate attention at the level of the African Commission.³⁰¹ The closest the Commission came in tackling the question of rights of sexual minorities was in the case of *Curzon v Zimbabwe*,³⁰² where the complainant asked the Commission to consider the legal status of homosexuals in Zimbabwe, the criminalisation of sexual conduct between men, and statements made by senior political figures against such practices.³⁰³ This unique opportunity to subject the anti-homosexuality laws operative in most African states to the test of judicial scrutiny before the Commission was not utilised as the complainant withdrew the case.³⁰⁴ The AU and its judicial mechanism (ie the African Commission and the African Court) have been described as offering ‘good starting points for dialogue about LGBT rights’.³⁰⁵ Some scholars have, however, suggested that inasmuch as the African Commission has the potential to enhance dialogue on rights for LGBTs, it is advisable not to opt for litigation yet. Prospective litigants are urged to thread on the side of caution to avoid a negative situation where the African Commission gives a judgment unfavourable to the sexual minorities cause.³⁰⁶ Abadir Ibrahim points out that the International Gay and Lesbian Human Rights Commission has even cautioned prospective litigants from bringing homosexual rights cases before the African Commission.³⁰⁷ Paul Johnson also notes that the silence of the African Commission and the failure of the Commission to take a favourable stance on issues relating to same-sex rights is a pointer to the fact that the African Commission is not in the least enthusiastic about sexual orientation and gender identity rights.³⁰⁸ Curzon is reported to have withdrawn his petition

³⁰¹ R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the AU’ (2007) 29 *Human Rights Quarterly* (2007) 86.

³⁰² Communication 136/94, *William Curzon v Zimbabwe* (2000) AHRLR 335 (ACHRR) (1995) (7th Annual Activity Report), cited in Viljoen (n 16 above) 265.

³⁰³ Viljoen (n 15 above) 265.

³⁰⁴ See Viljoen (n 15 above) 265- 266.

³⁰⁵ AM Ibrahim ‘LGBT rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 272.

³⁰⁶ Ibrahim (n 305 above) 272.

³⁰⁷ Ibrahim (n 305 above) 272.

³⁰⁸ Johnson (n 295 above) 259.

before the African Commission at the instance of the activist group, Gays and Lesbians of Zimbabwe (GALZ), which expressed the view that

[w]e acknowledge that gay and lesbian rights in Zimbabwe are a constitutional issue and must be dealt with at this level. However, many of our members feel that, as an organization, we cannot support your efforts lest we jeopardize our ‘understanding’ with the government which allows us a relatively large amount of freedom.³⁰⁹

The Commission’s attitude to sexual minorities’ issues was made manifest in its refusal to grant observer status to Coalition of African Lesbians (CAL) in 2010.³¹⁰

The Commission in its report at the Executive Council in Uganda noted the following:

The ACHPR decided, after a vote, not to grant observer status to the Coalition of African Lesbian (CAL), South Africa, whose application had been pending before it. The reason being that, the activities of the said organization do not promote and protect any of the rights enshrined in the African Charter.³¹¹

The fierce rejection of CAL’s application was hinged on the highly discredited thesis that homosexuality is alien to African culture. In fact, one of the Commissioners, Bitaye, who was the first to comment on CAL’s application, questioned the value of same-sex relationships to the society as it does not allow procreation. Commissioner Atoki expressed the view that there was no provision that applied to LGBTI people in the ACHPR.³¹²

Nevertheless, the African Commission yielded to the pressure from CAL and granted it observer status in April, 2015.³¹³ The observer status granted to CAL hangs in a precarious balance currently as the AU’s Executive Council has instructed the African Commission to withdraw the observer status of CAL.³¹⁴

³⁰⁹ Quoted in Johnson (n 295 above) 259.

³¹⁰ Ibrahim (n 305 above) 273.

³¹¹ African Union Doc ‘28th Activity report of the African Commission on Human and Peoples’ Rights (ACHPR)’ (2010) EX CL/600(XVII) para 33.

³¹² S Ndashe ‘Seeking the protection of LGBTI rights at the African Commission on Human and Peoples’ Rights’ (2011) 15 *Feminist Africa Legal Voice* 31.

³¹³ Ibrahim (n 305 above) 273.

³¹⁴ Decision on the 38 activity report of the African Commission on Human and Peoples’ Rights, Doc. EX.CL/921 (XXVII). Currently, the CAL observer status before the African Commission is

Amnesty International has also voiced its concern over the decision to withdraw CAL's observer status, terming the decision as amounting to 'blatant interference with and disregard for the independence and autonomy of the African Commission'.³¹⁵

The directive of the Executive Council of the AU indeed place CAL's observer status in a precarious situation. The *status quo* was however, maintained when CAL and Centre for Human Rights of the law faculty, University of Pretoria approached the African Court, seeking an advisory opinion of the African Court on the best possible way to resolve the impasse.³¹⁶ In its judgment, the African Court declined to give its advisory opinion on the basis that the two NGOs lack the competence to push for the request.³¹⁷ The implication of this decision paints a bleak future for NGOs related to sexual minorities' rights in quest for observer status within AU framework. The Director of Centre for Human Rights, Frans Vioen captures this unfavourable decision of the African Court when he pointed out that 'if the Court's advisory role is not brought into play, the Executive Council and African Commission remains on a collision course that may seriously erode human rights protection within the AU',³¹⁸ thus further politicising accessibility of prospective homosexual litigants before the AU judicial mechanism.

Ibrahim expresses concern that if a trivial issue such as a mere observer status can generate large scale controversy before the African Commission, then, obviously, the Commission will be very reluctant to push for a more visible

still in effect despite the judgement of the African Court on CAL and the Centre for Human Rights. At the 61st Ordinary Session of the African Commission on Human and Peoples' Rights held in the Republic of The Gambia from 1-15 November 2017, CAL to this effect submitted a proposal for a panel discussion about the advisory opinion of the African Court. For details see 'CAL at the 61st Ordinary Session of the African Commission of Human and Peoples' Rights and NGO Forum' available at <https://www.cal.org.za> (accessed 9 December 2017).

³¹⁵ Amnesty International 'From rhetoric to action: Seven recommendation to the 27th summit of the African Union' (2016) 20.

³¹⁶ Centre for Human Rights, University of Pretoria 'African Court rejects Centre for Human Rights and CAL request, leaving political tension within the AU unresolved' 6 October 2017.

³¹⁷ As above.

³¹⁸ As above.

agenda for sexual minorities rights.³¹⁹ Paul Johnson expresses fears that neither the African Commission nor state parties will be willing to communicate a complaint relating to sexual orientation to African Commission.³²⁰ Ibrahim suggests that the starting point for legal litigation should be the domestic front. Momentum from the domestic base can then swing sentiments towards decriminalisation. For Ibrahim, the African Commission holds promise, but at this stage it is still problematic a forum to launch gay rights litigations.³²¹

As I noted earlier, the closest the African Commission came to scrutinising the status of homosexuals under the ACHPR was in the stillborn *Curzon* case.³²² However, Viljoen points out that in the findings in one of its communications, the Commission affirmed that the aim of the non-discrimination principle under article 2 of the Charter is to ‘ensure equality of treatment for individuals irrespective of a number of grounds, including ‘sexual orientation.’³²³ Despite the paucity of judicial decisions of the African Commission in the area of LGBT rights, unlike the European Courts on Human rights,³²⁴ Finerty holds the view that ‘the principle set forth in Social and Economic Rights Action Center, along with the open-ended anti-discriminatory language in the Charter, provides a strong basis for concluding that sexual minorities are protected’.³²⁵ I am of the strong opinion that with the robust provisions of the Charter on the rights of ‘everyone’ without distinction on the grounds of sex, among others, when finally the opportunity avails the Commission to express its view on the nagging issues of LGBT rights, it will toe the line of other international human rights bodies

³¹⁹ Ibrahim (n 305 above) 274.

³²⁰ Johnson (n 295 above) 258.

³²¹ Ibrahim (n 305 above) 272-276.

³²² See section 4.6.1 of this chapter.

³²³ Viljoen (n 15 above) 265. Viljoen cites the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLJ 128 (ACHPR 2006), noting that the observation was made obiter, as the case did not turn on the issue of sexual orientation.

³²⁴ The ECHR has decided on the rights of LGBTs in landmark cases as *Dudgeon v United Kingdom of Great Britain and Northern Ireland*, *Kama v Austria*, *Modinos v Cyprus*, etc. See Hollander (n 67 above) 240-244. A detailed discussion of these cases are discussed in chapter 6 of this thesis.

³²⁵ Finerty (n 127 above) 443.

4.6 Conclusion: Anti-homosexuality laws and the violation of Nigeria's human rights obligation under international law

From the analyses of international and regional human rights jurisprudence on sexual orientation, it is clear that there is a seeming convergence of views on the rights of sexual minorities under international law, particularly the UN human rights regime.³²⁶ The case laws analysed earlier under the ICCPR Human Rights Committee not only reiterated the fact that sexual minorities are entitled to privacy right, equality and non-discrimination on the ground of sexual orientation but went further to interpret the word 'sex' and 'other status' to include sexual orientation.³²⁷ Nigeria is a state party to a legion of international treaties that are favourably disposed to rights recognition for sexual minorities. Notwithstanding the fact that the international standard of rights recognition cannot be applied to Nigeria directly,³²⁸ there seems to be a constitutional basis to believe that anything short of complying with international standard of rights recognition for sexual minorities is a negation of Nigeria's obligation under international law. The Nigerian Constitution in that regards stipulates that Nigeria's foreign policy objective must be based on respect 'for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.'³²⁹

This goes to show that Nigeria is under a constitutional duty to respect international law and treaty obligations. The position of international law and treaties is therefore applicable to Nigeria. First, the mere existence of sodomy law with its attendant consequences on the penal system of Nigeria discriminates against sexual minorities. The right to equality and non-discrimination are the principles underpinning international human rights law.³³⁰ The sodomy

³²⁶ See sections 4.3, 4.4, 4.5 and 4.6 of this chapter for an elaborate discussion of UN jurisprudence on rights recognition for sexual minorities.

³²⁷ See *Toonen* case in section 4.4.1 of this chapter.

³²⁸ VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same-Sex Marriage (Prohibition) Act' in S Nnawase & A Jjuuko (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 230.

³²⁹ Section 19(d) CFRN.

³³⁰ D McGoldrick 'The development of status of sexual orientation discrimination under international human rights law' (2016) 16 *Human Rights Law Review* 617.

provisions of the CCA, PCA, the SSMPA and other sodomy laws in Nigeria violate the right to equality and non-discrimination as enshrined in article 17 and 26 of the ICCPR. The right to freedom from discrimination is also firmly entrenched in article 2 of the African Charter, which the discussed sodomy laws violate. In this regard, the Africa Commission in its twenty-first activity report states as follows:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights ... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.³³¹

It is in view of the danger of discrimination posed by Nigeria's sodomy laws that the African Commission reprimanded Nigeria on the import of enacting the SSMPA which is capable of inciting violence against citizens on grounds of their actual or perceived sexual orientation. The Commission further warned the Nigerian government of the risk of escalating the HIV pandemic with vulnerable homosexual persons running underground, thereby missing routine treatment.³³² The UN Human Rights Council has in its periodic reviews beckoned on states to repeal laws criminalising homosexuality and also enact legislations prohibiting discrimination based on sexual orientation.³³³ Other international human rights treaties to which Nigeria is a state party also prohibit discrimination.³³⁴ The invasion of privacy of homosexuals in Nigeria is another form of discrimination. In the landmark *Toonen* judgement, the UN Human Rights Committee held that the mere existence of provisions in the Tasmanian Criminal Code criminalising sodomy constituted an interference with the privacy rights of Toonen guaranteed under article 17 of the ICCPR and that amounted to discrimination. In the same vein, the continued existence of Nigeria's sodomy

³³¹ African Commission on Human and Peoples' Right Twenty first activity report EX.CL/322 (X).

³³² See Concluding Observations and Recommendation on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter at the 57th ordinary session. 4-18 November 2015, Banjul, The Gambia at para 81.

³³³ See section 4.5 of this chapter.

³³⁴ For instance article 2 of the ICESCR prohibits discrimination.

laws not only violate the privacy rights of homosexuals guaranteed under article 17 of the ICCPR but also amount to discrimination.

The death penalty which is the maximum penalty for homosexual conduct in the 12 sharia-compliant states of Nigeria is another case of violation of the right to life as guaranteed under international human rights law. According to Rehman, the right to life is not just the most fundamental of all rights but it is one protected by all international and regional human rights instruments.³³⁵ Article 6(1) of the ICCPR boldly provides that 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. In a similar vein, the African Charter upholding this all-important right provides in article 4 that 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

As it stands, there is a growing international pressure on countries that retain the death penalty in their criminal statute book to abolish same. The United Nations Commission on Human Rights (UNCHR) has made the abolition of the death penalty a human rights issue.³³⁶ The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) adopted in 1989³³⁷ calls for the universal abolition of the death penalty. Although Nigeria has not ratified the Second Optional Protocol to the ICCPR, it has however, ratified and is, a state party to the ICCPR document itself. The ICCPR with specific reference to the death penalty, the ICCPR states:

In countries which have not abolished the death penalty, sentences of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provision of the present Covenant ... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.³³⁸

³³⁵ Rehman (n 53 above) 92.

³³⁶ UNCHR Resolution 1997/12 of 3 April 1997; see also resolution 2005/59 of 20 April 2005 (UN Doc E/CN.4/2005/L.10/Add.17).

³³⁷ See General Assembly Resolution 44/128 of 15 December 1989.

³³⁸ Article 6(2).

To encourage retentionist states to jettison the death penalty, the ICCPR states that: ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’³³⁹ The Working Group of the African Commission on Human and Peoples’ Rights on the Death Penalty, Extrajudicial, Summary or Arbitrary Killings produced General Comment 3 to article 4 of the African Charter on Human and Peoples’ Rights in a bid to prod African countries in the direction of abolition. The Comment states clearly that

[t]hose states which have abolished the death penalty in law shall not reintroduce it, nor facilitate executions in retentionist states through *refoulement*, extradition, deportation, or other means including the provision of support or assistance that could lead to a death sentence. Those States with moratoria on the death penalty must take steps to formalise abolition in law, allowing no further executions.³⁴⁰

On 19 December 2016 the United Nations General Assembly adopted Resolution 71/187 which called for a moratorium on the death penalty. Surprisingly, Nigeria abstained from voting.³⁴¹

When the legal stipulation of the death penalty for grave crimes under Nigerian law and the increasing international clamour for the abolition of the death penalty are juxtaposed with the recent legal prescription of the death penalty in northern Nigeria for the harmless behaviour of consensual adult homosexual conduct, one encounters a truly troubling state of affairs. The penalisation of consensual adult homosexual conduct places violent crimes and sexual orientation on the same moral scale – a travesty of justice. If the world is moving towards abolishing the death penalty for grievous crimes, the penalisation of adult consensual homosexual conduct with the maximum possible punishment – the wilful termination of life – stands as a retrogressive measure of astounding proportions. Regardless of the fact that the sodomy laws

³³⁹ Article 6(6).

³⁴⁰ See section 3 of the General Comment.

³⁴¹ See, Amnesty International ‘Death penalty 2015: Facts and figures’ available at <http://www.amnesty.org/en/latest/nesw/2016/04/death-penalty-2015-facts-and-figures/> (accessed 23 August 2017).

of the 12 states in northern Nigeria where homosexual conduct is punished by death were legitimately enacted, it is submitted that these laws contravene international law. The 'offence' of homosexuality is not heinous in any way to attract the death penalty.

Torture, infliction of cruel and inhuman treatment are other punitive measures prescribed by Nigeria's multiple sodomy laws, particularly in the 12 Sharia-compliant states, for the offence of homosexuality. This takes the form of flogging convicted homosexuals, which strips them off their dignity of the human person. Article 7 of the ICCPR guarantees freedom from torture, cruel and inhuman treatment; this same freedom is also guaranteed by article 5 of the African Charter. Article 1(1) of CAT, which provides a robust definition of the term torture, refers to pains, physical or mental, inflicted on a person 'for any reason based on discrimination of any kind'. It is a fact that Nigeria's sodomy laws that prescribe physical flogging for homosexuals suggest the punitive measure based on their sexual orientation. There have been well documented instances in Nigeria where perceived homosexuals have been brutally tortured and beaten to death, as I have shown in a previous chapter.³⁴² In 2006, some members of the LGBT community spoke out to IGLHRC on the physical and psychological trauma they were being subjected to on account of their sexual orientation. Chuma narrates the ordeal meted out to him when a team of policemen invaded his house on the suspicion of his being a homosexual. Chuma was beaten beyond recognition, and received a serious injury on his head. Chuma was paraded naked to the press after his dehumanising beatings.³⁴³ Veteran Nigerian LGBT activist Davis Mac Iyalla also narrated the tale of his being locked up for 3 days without food and water for daring the Nigerian Anglican church on the persecution of homosexual members of the Church.³⁴⁴ The continuous physical and mental ordeal members of the Nigerian LGBT

³⁴² See section 3.3.1 of chapter 3 of this thesis.

³⁴³ International Gay and Lesbian Human Rights Commission 'Voices from Nigeria: Gays, lesbians, bisexuals, and transgender speak out about the same-sex bill' (2006) 3.

³⁴⁴ International Gay and Lesbian Human Rights Commission (n 343 above) 5.

community face is a clear case of violation of international human rights law prohibiting torture, cruel and inhuman treatment.

Despite the arguable violation of Nigeria's international human rights obligation by the continued existence and application of ant-homosexuality laws, Nigeria has not made any meaningful impact towards pressing for sexual minorities' rights at the international scene. A first attempt to press for rights recognition for homosexuals at the domestic level suffered a setback with a Nigerian Federal High Court striking out the case for lack of *locus standi*.³⁴⁵ A viable option open to prospective homosexual litigants is ICCPR platform which holds a lot of promises for sexual minorities.³⁴⁶ The ICCPR, however, does 'not have any provision for an individual right of petition'.³⁴⁷ There is therefore the need for Nigeria to ratify the Optional Protocol to allow for the possibility of individual communications from the Nigerian LGBT community to the HRC of the ICCPR.

The need for more alternative reports by sexual minority rights NGOs becomes imperative, as the Nigerian government would most likely paint a rose picture whenever its report; and more than that, NGOs should also urge and encourage the government to engage in regular state reporting and include the issue of sexual orientation in its reports.³⁴⁸ Furthermore, NGOs championing the cause of sexual minority rights should increase their involvement in the UPR to make more UPR recommendations.

³⁴⁵ AZ Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Government of Nigeria*' in S Namwase & A Jjuuko (eds) *Protecting human rights of sexual minorities in contemporary Africa* (2017) 239-244.

³⁴⁶ Hollander (n 67 above) 229.

³⁴⁷ Mose & Opsahl (n 98 above) 275.

³⁴⁸ See section 4.5 of this chapter for the reaction of the Nigerian government at the second cycle of the UPR.

Chapter 5: A critical analysis of the arguments in favour of criminalising consensual adult homosexual conduct in Nigeria in the light of Berlin's theory of liberty

5.1 Introduction

Jack Donnelly must have had Nigeria in mind when he wrote that 'homosexuality is widely considered – by significant segments of society in all countries, and by most people in most countries – profoundly immoral. The language of perversion and degeneration is standard'.¹ Such has been and largely still is the level of public animosity towards homosexuality as a sexual orientation, and towards the lesbian, gay, bisexual, and transgender (LGBT) persons in Nigeria, whose consensual same-sex conduct virtually all the legal systems operative in the country criminalise.

A 2013 Pew Research Centre survey of sections of the public in 39 countries found that about 98% of Nigerians support the criminalisation of homosexual acts,² although more recent studies suggest the figure is down to 87%.³ Same-sex conduct has always been illegal in Nigeria, with both the Sharia legal system operational in 12 northern Nigeria states⁴ and the CCA in place in southern Nigeria unambiguously spelling out harsh penalties for offences related to homosexual conduct.⁵ Before the official adoption of Sharia in the far North of Nigeria, the Penal Code, which is in force all over the northern region already forbade homosexual practices.⁶ The bid to further criminalise

¹ J Donnelly 'Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime' in P Hayden (ed) *The philosophy of human rights* (2001) 558.

² See The Pew Research Centre 'The global divide on homosexuality' available at www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/ (accessed 17 August 2016).

³ A 2015 opinion poll commissioned by gay rights activists in conjunction with the Bisi Alimi Foundation found that 87% of Nigerians remained opposed to the legalisation of homosexuality. See BBC News 'Nigeria poll suggests 87% oppose gay rights' 30 June 2015 available at www.bbc.com/news/world-africa-33325899 (accessed 17 August 2016).

⁴ See section 2.7 of chapter 2 of this thesis.

⁵ See section 2.5 of chapter 2 of this thesis.

⁶ See section 2.6 of chapter 2 of this thesis.

same-sex conduct gained traction in 2011 when the Nigerian Senate led by Senate President David Mark voted in favour of the Same-Sex Marriage (Prohibition) Bill.⁷

The upsurge in homophobic sentiments in Nigeria is coming at a time the world, especially the Western world, has become more accepting of LGBT individuals. Same-sex conduct between consenting adults has been or has become legal in 117 countries – mostly in the global North, but also in other parts of the world such as Latin America-with 65 of these countries also putting in place anti-discrimination laws.⁸ Most of the legal pronouncements that shaped LGBT environment affecting LGBT persons in the past three decades had been made by the time Nigeria took a giant step backwards with the presidential assent to the anti-gay Bill.⁹

The SSMPA was greeted with wild jubilation among Nigerians of all social standing, a clear indication of the strength of homophobic sentiments in the country.¹⁰ Political, religious, and community leaders, students, professionals, academics, and ordinary citizens struggling to make ends meet were united in applauding the National Assembly and the president for what they considered resistance to Western cultural imperialism. Criticism from Western religious leaders like the Archbishop of Canterbury Justin Welby¹¹ and political leaders like John Kerry¹² were roundly dismissed in the national newspapers as an example of the West's meddling in the internal affairs of a sovereign African

⁷ See section 2.8 of chapter 2 of this thesis.

⁸ Academy of Science of South Africa Report 'Diversity in human sexuality: Implication for policy in Africa' (2015) 14.

⁹ See for instance, the European Court for Human Rights (ECHR) ruling in *Dudgeon v United Kingdom* ECHR (22 October 1981) Ser A 45; *Toonen v Australia* Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994); *Modinos v Cyprus* ECHR (22 April 1993) Ser A 259; *Lawrence v Texas* 539 US 558, 572-573, 576 (2003). In these landmark cases the courts ruled against the criminalisation of consensual same-sex conduct.

¹⁰ AO Aliu 'PFN lauds Jonathan on anti-gay law' *The Guardian* 23 January 2014 9.

¹¹ See the article 'UK bishops criticise Nigerian, Ugandan anti-gay laws' *Daily Sun* 31 January 2014 16.

¹² See the editorial 'Same-sex storm: Law against same-sex marriage is in tandem with our cultural belief' *The Nation* 22 January 2014 19. The editorial accused the West of intolerance of non-Western viewpoints and called for resistance to what it considered a domineering Western viewpoint masquerading as human rights.

nation. The aggressive public support for the Act drowned the few dissenting voices in the land.¹³

Three major platforms provide inspiration for social conservatism in Nigeria in its determination to prevent the legal recognition of homosexual practices, namely: majority morality platform; the cultural platform; and the religious platform.

The majority morality platform derives its strength and potential legal legitimacy from section 45 of the Nigerian Constitution. The religious platform has been very effective in sustaining homophobic sentiments given the deep-seated religiosity of the overwhelming majority of Nigerians. The cultural platform presents an argument that forcefully submits that since homosexuality is foreign to Africa it must have been imported from the 'decadent' West.¹⁴ A variant of this argument appeals to the priority of cultural relativism over the universality of human rights.¹⁵ An extension of the cultural argument is the nationalist platform that feeds on the residual resentment against the past colonial adventure of the West. An imperialism argument that appeals to nationalist fervour in whipping up anti-Western sentiments, which are then conveniently transferred to the international homosexual lobby and finally to the local LGBT community.¹⁶

¹³ See Stan Chu Ilo 'The Same Sex Marriage Prohibition Act, 2013: A call for dialogue for the sake of those on the margins' *Sahara Reporters* 29 January 2014. <http://saharareporters.com/article/same-sex-marriage-prohibition-act-2013-call-dialogue-sake-those-margins-stan-chu-ilo> (accessed 20 February 2014). Ilo writes sympathetically: 'Cultural and religious systems being historical are constantly challenged not to use old answers to meet new questions, and to stretch themselves in the face of new questions which were not often clearly understood and interpreted in the past'.

¹⁴ Many Africans genuinely believe homosexuality is foreign to Africa. African political leaders like Robert Mugabe and Sam Nujoma, for example, routinely promote this idea. See ST Ebobrah, 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 114; See also Luke Onyekakeyah, 'The anti-same sex marriage law (1)' *The Guardian* 28 January 2014 15.

¹⁵ For a discussion of the conflict between cultural relativism and the thesis of the universality of human rights, see FR Tesón 'International human rights and cultural relativism' in Hayden (n 1 above) 387.

¹⁶ J Massad *Desiring Arabs* (2007) 163. Massad accuses the global gay rights movement of contributing to the spread of homophobia through the subtle imperialist-driven imposition of

This chapter examines the issues mentioned above and make a strong case for the decriminalisation of consensual homosexual practices in Nigeria.

5.2 Public morality objection (majority morality)

Most objections to homosexual conduct in Nigeria and elsewhere come under the umbrella of public morality objection. It is widely held that homosexual behaviour is inherently immoral. This, of course, is another way of saying the lifestyle of homosexual persons is objectionable not only on the grounds that I disapprove of it but also because the majority of the public disapprove of it. This public morality objection becomes the basis of criminalisation and, in the case of Nigeria, increased criminalisation. The psychological aversion that leads someone who is *straight* to conclude that another person's homosexuality is immoral does not have to lead to outright hostility. The psychological disgust may be expressed as pity even when a fair level of tolerance has been achieved by the heterosexual. But pity is hardly what the homosexual needs. The homosexual tendency is not a crime. No study has shown that being homosexual is any more abnormal than being *straight*.

The dilemma of the homosexual individual is brought to the fore when he or she encounters another individual who appeals to their faith or conscience to deny the homosexual person what ordinarily he or she is entitled to. Here religious beliefs clash with human rights. Religion is a basic source of society's belief about what constitutes right and wrong. The two dominant religions in the world, that is Christianity and Islam, seemingly prohibit homosexual relations.¹⁷ Feldblum has identified three broad views of homosexuality that condition tolerance or intolerance, acceptance or rejection¹⁸. The first view

western norms of human rights on countries where homosexuality does not exist or is not a problem.

¹⁷ For the Biblical views on homosexuality see, Leviticus 20:13; Leviticus 18:22; Romans 1:26-27; 1 Corinthians 6:9-10; 1 Timothy 1:10. See Surat An-Nisa 4:16; Surat Al-Anbiya 74-75 for the Islamic view.

¹⁸ CR Feldblum 'Moral conflict and liberty: Gay rights and religion' (2006) 27 *Brooklyn Law Review* 69-70.

holds that same-sex sexual behaviour is morally wrong and causes harm to both the individual so oriented and the community itself. The second and third views hold that homosexual acts should be tolerated.¹⁹ While the second view is not inclined to classifying homosexual conduct as harmful, it nevertheless regards the orientation as some kind of harmless abnormality. The third view is the liberating affirmative view. It holds fast to the equivalency thesis. Obviously, most Nigerians and Africans hold the first view.

Public morality objection throws up the question of legislating morality, an issue that has divided famous jurists the world over, as I show in a later section of this chapter. Nigeria relies on a provision in the 1999 Constitution to limit the scope of human rights guaranteed by the same Constitution. Section 45(1)(a) is often cited as a legal basis to justify Nigeria's anti-homosexuality laws. It reads:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health.

Article 45(1) can be described as a general limitation clause, as far as it relates to the rights provided for in articles 37 to 41 of the Constitution of Nigeria. The contentious term as far as LGBT rights are concerned is 'public morality.' Can the government of a country legislate morality? Is majority morality the basis for making laws? Should laws that discriminate against minorities be upheld simply because the non-criminal behaviour of minorities offends the majority? While scholars and jurists like Fitzjames Stephen,²⁰ Devlin,²¹ MT Ladan,²² JM Elegido,²³ and JM Finnis²⁴ see a particular link between the law and morality,

¹⁹ Feldblum (n 18 above) 69-70.

²⁰ M Martin *The legal philosophy of HLA Hart: A critical appraisal* (1987) 240.

²¹ P Devlin *The enforcement of morality* (1965).

²² MT Ladan *Introduction to jurisprudence, classical and Islamic* (2006).

²³ JM Elegido *Jurisprudence* (1994) 358.

²⁴ JM Finnis 'Law, morality, and sexual orientation' (1994) 69 *Scholarly Works Paper 205* 1049-1076.

and even the law and the legal enforcement of morality, others like Mill and Hart seek the separation of the moral and legal realms.²⁵

On the one hand, a law can be regarded as a rule or injunction, a prohibition or binding provision intended to enable the administration of justice.²⁶ It is therefore a veritable form of social control, enforceable for the public good and for the prevention of impunity and arbitrariness.²⁷ On the other hand, morality presupposes a set of values and standards of conduct widely accepted in a given society.²⁸ Religion is a major source of moral values.

The concern of liberals like Mill and Hart in seeking the separation of the legal from the moral is the fear of public morality forcefully determining state laws that may hurt the interests of minority elements. Hart, for instance, advocated legal positivism out of the concern that legalism may be conflated with moralism. Legal positivism is the theory that legal practices constitute an independent sphere; it rejects grandiose notions of the objectivity of morality and any direct links between law and morals.²⁹ Religion views wrongdoing as sin, which attracts the disapproval of a supreme being considered as having dominion over all things. If such a being disapproves of a particular sin, then humans must disapprove of it too. A crime is the secularised version of a sin. A crime is a wrong, so pronounced by a judge in a competent court or a legislative act, and therefore punishable.³⁰ Natural law theories are less antagonistic of public morality, being rooted in the Christian tradition, with the medieval Christian philosopher Thomas Aquinas laying much of the foundation of the natural law theory. The natural law is supposed to be that fundamental belief rooted in human reason and conscience. Aquinas makes the natural law a species of God's eternal law by subordinating it to the latter.³¹ On the connection between law and morals, Elegido asserts that

²⁵ See JS Mill *On liberty* (2003); HLA Hart *Immorality and treason* (1971) 49-54.

²⁶ Ladan (n 22 above) 17.

²⁷ Elegido (n 23 above) 334-341.

²⁸ Ladan (n 22 above).

²⁹ Elegido (n 23 above) 49.

³⁰ D Ormerod *Smith and Hogan's criminal law* (2011) 6.

³¹ Thomas Aquinas, *ST*, 1-11, Q. 91 Art. 2.

[l]aw creates real obligations in the citizens only because it operates within the framework of some basic moral norms which prescribe that we must foster the common good of our community and that in order to do this effectively we must obey the rule established by custom or laid down by those in authority.³²

Dworkin³³ and Shavell³⁴ agree with Elegido. Dworkin, for instance, endorses the idea of a conventional morality that provides a broad space for the interpretation and enforcement of legal provisions.

Nevertheless, it is important to state that immorality cannot be the only reason or even a major reason for determining what is criminal.³⁵ A number of practices are considered immoral by the public but are not punished by law in most countries; adultery for example.³⁶ When the criterion of determining what a crime is becomes the immorality test majority morality will encroach on the rights of minority elements, leading to inequality and injustice.

5.2.1 Revisiting the Hart-Devlin debate in the Nigerian context of homosexuality

Consensual adult homosexual conduct is illegal in Nigeria. Nigerian sodomy laws seem to have the backing of section 45(i)(a) of the Constitution. The section recognises the promotion of public morality as a ground for limitation of human rights generally. The multiple sodomy laws in Nigeria purport to protect public morality. This apparent constitutional support is hinged on the public morality thesis which the Hart-Devlin debate discredited. The debate was preceded by an earlier but similar confrontation between Mill and Stephen. Mill proposed the now famous harm principle to limit the capacity of the state to encroach into the sphere of individual privacy in the guise of defending public morality.³⁷

³² Elegido (n 23 above) 358.

³³ RM Dworkin 'Philosophy, morality and law – Observations prompted by Professor Fuller's novel claims' (1965) 113 *Faculty Scholarship Series* 690.

³⁴ S Shavell 'Law versus morality as regulators of conduct' (2002) 4 *American Law and Economics Review* 227-257.

³⁵ Ormerod (n 30 above) 8.

³⁶ Sections 387 and 388 of the Penal Code of Northern Nigeria criminalise adultery and fornication respectively. But the provisions are rarely enforced.

³⁷ Mill (n 25 above).

Mill, relying on the liberal understanding of autonomy as a supreme good, separated public morality from the law and defended the right of the individual to live according to his or her desires, provided no harm to others follow as a consequence of the act of individual will. Stephen scoffed at Mill's liberalism in his conviction that the moral space is where laws operate and derive their legitimacy.³⁸ Stephen felt that Mill was preaching an anarchic creed.

Devlin and Hart renewed the controversy in the 20th century. The occasion for the renewal was the publication of the Wolfenden report in 1957 by a committee chaired by John Wolfenden. The report recommended the decriminalisation of consensual adult same-sex practice. Homosexual conduct was criminalised in England in 1533. The 1861 Offences Against the Person Act prescribed servitude for life for homosexual conduct. The Vagrancy Act of 1898 consolidated homosexual laws in England.³⁹ It was not until the Wolfenden report was published that respite came the way of homosexuals in England.

Devlin questioned the wisdom of the report from a conservative standpoint while Hart defended it from a liberal standpoint. Devlin took Stephen's conservative position while Hart sided with Mill. The Wolfenden report insisted that it was not the business of the law to dabble into private morality matters as long as there is no threat to third parties.⁴⁰ In a 1959 lecture entitled 'The enforcement of morals' delivered to the British Academy, Lord Devlin contended that separating law from morality and public morality from private morality weakens the moral standards of the society, leading eventually to the internal decay of the society.⁴¹ Devlin holds the view that Mill's harm principle is chiefly concerned with physical harm rather than psychological harm. But a psychological harm can be done in the absence of a physical harm. For Devlin immorality is a moral (or psychological) harm. Both

³⁸ L Blom-Cooper & G Drewry (eds) *Law and morality: A Reader* (1976) 13.

³⁹ Blom-Copper and Drewry (n 38 above) 91.

⁴⁰ Martin (n 20 above) 240.

⁴¹ Devlin (n 21 above) 104.

types of harm are inseparable one from the other. It stands to reason that if immorality constitutes a (moral) harm and states are permitted to legislate against harmful things and conducts the law has a legitimate interest in suppressing what society considers as immorality.⁴²

Devlin's argument is quite subtle. Let us assume that Nigerian law punishes murder, incest and abortion. Now it is possible to murder a person consensually, that is, both the murderer and the victim can agree to the deed of murder before it is committed. Incest and abortion can occur through consent. According to Devlin, the harm principle fails here because consensual murder, incest, and abortion will still be punished by the law when they happen. It is immaterial that these acts were done by mutual agreement. When the law punishes murder, for instance, it is the immorality of the act of murder it is punishing.⁴³ Throwing more light on Devlin's submission, Martin says Devlin is of the view – going by Mill's harm principle – that Mill does not see any moral imperative to punish the conducts mentioned above since they are consensual. If the harm principle does not compel the penalisation of consensual murder, then there is a higher ethical imperative to punish immorality.⁴⁴

Devlin seems to think that immoral conduct is similar to treason in its corrosive effect. Just as treason can destroy a state from within, so can immorality if left unchecked. Hart rejects the analogy of consensual murder and homosexuality. He is of the view that the psychological attitude of disgust of one person for the conduct of another cannot be the basis for determining the morality of the conduct. Appealing to reason, Hart insists that before we can come to a conclusion about the immorality of any practice it is absolutely necessary for us to have all the necessary facts and dispassionately determine that public morality is not informed by ignorance, superstition or confusion.⁴⁵

⁴² Devlin (n 21 above) 135-136.

⁴³ Devlin (n 21 above) 6.

⁴⁴ Martin (n 20 above) 243.

⁴⁵ HLA Hart, 'Immorality and treason' in RA Wasserstrom (ed) *Morality and the law* (1971) 54.

It is only when such a step has been taken that justice can be seen to have been done.

In response to Hart's appeal to rationality, Devlin notes that the tactic is elitist. He thinks that society is better placed than the intelligentsia in deciding issues of practical morality. After all, learned people hardly hold a common view about moral questions.⁴⁶ Undaunted, Hart in his *Law, liberty, and morality* distinguishes between positive morality and critical morality. Positive morality is the moral content of any society, the values and standards widely adhered to at any given time. Critical morality supervises positive morality and determines how moral standards can be applied with justification. Hart holds the view that critical morality will justify only what is reasonable. He pointedly insists that it is morally a better alternative for a state to disintegrate than for it to promulgate discriminatory laws in the name of self-defence.⁴⁷ Hart sees the society as justified in acting in accordance with the harm principle even as he rejects Devlin's moral legalism, the doctrine that society can enforce moral standard through the instrumentality of the law.⁴⁸

Gregory Bassham gives victory to Hart after reviewing the famous debate. Bassham scores Hart 2^{1/2} and Devlin 1, though he did not provide a particular weighing scale.⁴⁹ Devlin himself conceded victory to Hart on the question of the legal enforcement of morals.⁵⁰ Summarising the challenge of Hart to Devlin, Bassham imagines the former telling the latter triumphantly: 'You defend morality laws by appealing to either the disintegration thesis, the definitional thesis, or the conservative thesis. But none of these views is defensible. So your defense of morality laws fails.'⁵¹ By 'definitional thesis' Bassham is referring to Devlin's emphasis on the society as a moral community determining collective

⁴⁶ Martin (n 20 above) 249.

⁴⁷ HLA Hart *Law, liberty, and morality* (1966) 19.

⁴⁸ Martin (n 20 above) 252.

⁴⁹ G Bassham 'Legislating morality: Scoring the Hart-Devlin debate after fifty years' (2012) 25 *Ratio Juris* 130.

⁵⁰ Martin (n 20 above) 241.

⁵¹ Bassham (n 49 above) 123.

ethos and which may suffer extinction if radical liberal reform of the Hart kind is countenanced.⁵²

The heart of the Hart-Devlin debate is the struggle between liberal and conservative ideologies for supremacy. On the one hand, liberalism prides itself as the defender of human rights, and on the other hand, conservatism sees itself as protecting traditional values it considers important for social cohesion. Liberals will point out that liberalism in the West has not led to the disintegration of Western societies as feared by conservatives.⁵³ Devlin's appeal to majoritarian morality to justify the criminalisation of certain kinds of behaviour may have fallen into disrepute in the West, but the view is still dominant in other parts of the world, especially in Africa. The public morality or majority morality excuse is the bulwark of Nigeria's anti-gay laws. It is possible that intolerance, extreme religious views, and unscientific conclusions coalesce under the umbrella of public morality which then is imposed through the instrumentality of the law on a whole nation. This seems to be the case with anti-homosexuality laws. The consequence of the triumph of Devlin over Hart in Nigeria is the continued denial of sexual minorities' right to be who or what they are as long as being who or what they are does not pose any threat to the society.

It is instructive that when Africans insist that their value system is different from the value system of the West, they are partly referring to the essentially African collectivist or communitarian worldview which prioritises the well-being of the group over the individual's comfort.⁵⁴ Like all collectivist value systems, Nigerian and African value systems are not receptive to the western liberal tendency. Indeed, Julius Nyerere argues that Black Africa practices a form of socialism built on the extended family network. Nyerere calls this unique African socialist system *ujamaa* or family hood.⁵⁵ In the African

⁵² Bassham (n 49 above) 122.

⁵³ See Blom-Cooper and Drewry (n 38 above) 103.

⁵⁴ A. Ada *Existence and consolation: Reinventing ontology, gnosis, and values in African philosophy* (2015) 189-191.

⁵⁵ J. Nyerere, *Ujamaa: Essays on Socialism* (1968).

community the claims of the group are far stronger than the claims of the individual.⁵⁶ Hence, group stability is seen as a higher good than individual freedom or even harmless individual eccentricity.

The strong rejection of the LGBT communities in Nigeria and Africa is not in doubt. African Catholic bishops, for instance, have differed sharply from some of their European counterparts over the Catholic Church's proposed welcoming of homosexual persons. They have rebuked political leaders like Obama and Cameron for tying aid to Africa to the liberalisation of the LGBT environment, popularising the term 'ideological colonisation' to describe the West's promotion of LGBT rights in Africa.⁵⁷ For Nigerians, this researcher aligns with Devlin's position on the debate over the legal enforcement of morals. Much of Nigerian moral values is derived from Christianity, Islam, and African Traditional Religion (ATR). While Nigeria officially claims to be a secular state, it is in practice a profoundly religious state with the Constitution recognising both Sharia and Customary courts. The Constitution draws much of its moral character from Christian and Islamic teachings; so also do the Criminal and Penal codes. A possible shift towards the liberal Western tradition will be required for Nigeria to start welcoming the idea of LGBT rights.

5.2.2 Insights for Nigeria from Mill's Harm Principle

Mill, one of the giants of the Western liberal tradition, rejects any appeal to public moral sentiments in the criminalisation of supposedly immoral conduct that belongs strictly to the private sphere. Mill draws the line between public and private morality matters. He puts forward the famous harm principle to balance individual autonomy which he considers an intrinsic good with the

⁵⁶ Ada (n 54 above).

⁵⁷ See Elise Harris, "African bishops throw swift punches at ideological colonization," *Catholic News Agency* 8 October 2015, accessed 10 October 2015, <http://www.catholicnewsagency.com> >Home>News>Vatican.

legitimate demands of society for some kind of control over human conduct. Mill states his harm principle thus:

- a. That the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their members, is self-protection.
- b. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.⁵⁸

Mill insists that not even the personal good of the individual justifies interference in their private conduct. Society's opinion in this regard is insignificant. Mill is satisfied that the condition of autonomy is respected if the state ignores the self-destructive activities of an individual which do not pose any harm to his fellow humans. What count is the harm the conduct of the individual will do to others. Mill declares: 'Over himself, over his own body and mind, the individual is sovereign.'⁵⁹ The principle, however, is restricted to adults. Mill, of course, is aware that children lack the capacity to make fully rational choices. To interfere in the private affairs of individuals is the same thing as denying them freedom. For Mill the only freedom worth the name is that which makes it possible for humans to pursue their own good as they deem fit 'so long as we do not attempt to deprive others of theirs, or impede their effort to obtain it'.⁶⁰

Scholars like Posner think Mill's interference clause is exaggerated. Posner believes that Mill's concern for the integrity of the private sphere led him to over-react by way of forbidding interference even in deeply offensive matters like drunkenness and prostitution provided such matters cause no physical or financial harm.⁶¹ Greenawalt sees merit in Posner's criticism. While agreeing with the liberal framework of Mill's harm principle, Greenawalt yet sees the need for some degree of paternalism. The problem he envisages here is the

⁵⁸ Mill (n 25 above) 80.

⁵⁹ Mill (n 25 above) 81.

⁶⁰ Mill (n 25 above) 83.

⁶¹ RA Posner 'On liberty: A revaluation' in D Bromwich & G Kateb *On liberty* (2003) 206.

extent to which people will tolerate state interference for their own good.⁶² Greenawalt notes correctly that modern societies do not practise the absolutist libertarian principles Mill enunciated. Greenawalt notes that political correctness restricts freedom of action and expression in the bid to prevent causing offence to some elements of the society even though such offence may not necessarily be accompanied by harm. Some actions hardly cause concrete harm, yet they offend certain people who look out for such actions.⁶³ In recognition of the core liberal value of the harm principle, Greenawalt insists that there must be a moral justification for offence taken at the free actions of individuals before there can be interference. This way a balance is struck between absolute non-interference and justified interference.

Both the expansive liberal dimension and the restrictive liberal dimension of Mill's harm principle support LGBT rights when the principle itself is applied to the Nigerian situation. The expansive dimension absolutely forbids external interference in the private life of the individual as long as the conduct of the individual has no negative or harmful consequences for others. It does not matter if the individual's conduct causes harm to him or her. What is important here is the affirmation of autonomy. The implication for the LGBT community in Nigeria is the affirmation of their right to lead their lives as they deem fit regardless of the harm caused them by what they do. It is enough that they are not engaging in non-consensual same-sex relation. The restrictive dimension of the harm principle allows state interference in special cases to prevent self-harm or limit the exercise of freedom which may not cause direct harm but may provoke offence in others. If this is the case, then the Nigerian state is obliged to intervene affirmatively using legal instruments to protect LGBT rights. Such intervention is a way of enforcing morals. The defence of homosexual rights is a moral issue. One enduring legacy of Devlin's legal moralism is his belief that

⁶² K Greenawalt 'The legal enforcement of morality' (1995) 85 *Journal of Criminal Law & Criminology* 719.

⁶³ Greenawalt (n 62 above) 720.

the state can in some way enforce morality through the application of the law; the belief in a connection between law and morality.⁶⁴

5.2.3 Limitation of rights under section 45 of the Nigerian Constitution in the light of the Siracusa Principles

Section 45 of 1999 Constitution places a restriction on the right to private and family life,⁶⁵ right to freedom of thought and religion,⁶⁶ right to freedom of expression and the press,⁶⁷ and the right to peaceful assembly and association.⁶⁸ Section 45 empowers the Nigerian state to restrict these rights in defence of public morality, amongst others. The implication of section 45 for LGBT rights is obvious. The state can refer to it to justify the anti-homosexuality laws. The SSMPA for instance forbids same-sex marriage and the running of homosexual clubs. These restrictions constitute an infringement on the right to private and family life as well as freedom of association. Yet Section 45 of the Nigerian Constitution provides justification for enactment of discriminatory anti-homosexuality laws. Interestingly section 45 leaves a clause that laws must be ‘reasonably justifiable in a democratic society’. The anti-homosexuality laws in Nigeria obviously fail the ‘reasonable justification’ as the state has no compelling interest in the criminalisation of consensual same-sex conduct. As I noted elsewhere, the right to dignity of the human person and freedom from discrimination are not subject to the limitation clause of section 45.⁶⁹ The discriminatory posture of the sodomy laws against sexual minorities run foul of section 42 of the CFRN which list sex as a prohibited ground of

⁶⁴ Greenawalt (n 62 above) 724.

⁶⁵ See section 37 CFRN 1999.

⁶⁶ Section 38 CFRN 1999.

⁶⁷ Section 39 CFRN 1999.

⁶⁸ Section 40 CFRN 1999.

⁶⁹ See section 3.2.2 of chapter 3 for a detail discussion of the right to the dignity of the human person.

discrimination.⁷⁰ A number of Nigerian cases have frowned at legislation targeted at limiting the rights of citizens under the Constitution.⁷¹

The African Commission in a deft move has also dealt with the issue of limitation of rights by domestic and national laws. It is settled law that the African Charter which contains rights similar to the one in Chapter 3 of the CFRN has become an integral part of Nigerian law.⁷² In the *Media Rights Agenda & ors v Nigeria*,⁷³ the African Commission notes that though the African Charter does not explicitly contain a limitation clause, however, under article 27(2) the case of possible limitation may be exercised with due regards to the rights of others, collective security, morality and common interest.⁷⁴ The African Commission contained any possible limitation on the strict test of proportionality.⁷⁵ The *Media Rights Agenda* case championed the cause of TELL magazine and other newspaper whose existence had become illegal by virtue of the retroactive Newspaper Decree no 43 of 1993. Section 7 of the Decree required fresh registration for previously registered newspapers, the real objective being the gagging of the press that was then critical of the military government. The Decree empowered security agents to seize 50,000 copies of a TELL magazine edition particularly critical of the government even as the magazine's editor-in-chief Nosa Igiebor was detained. The complainants alleged violation of their rights under articles 6, 7, 9, 14 and 16 of the African Charter which guarantees right to liberty and security, fair hearing, freedom of

⁷⁰ VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same-Sex Marriage (Prohibition) Act' in S Nwase & A Jjuuko (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 223.

⁷¹ See for instance *Tafida v FRN* (2004) 5NWLR (Pt 1399) 129 at 136 paras f-g. The Nigerian Supreme Court held that sections 104 and 203 of the Criminal Code of Lagos State are at variance with section 36(12) of the 1999 CFRN and in the circumstance the said sections of the criminal code are nullified.

⁷² See African Charter on Human and Peoples' Rights (Ratification & Enforcement) Act Chapter A9 Laws of the Federation of Nigeria 2004. Section 1 clearly states that 'as from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'.

⁷³ (2000) AHRLR 227 (ACHP 1999).

⁷⁴ *Media Rights Agenda* (n 73 above) para 67-68.

⁷⁵ *Media Rights Agenda* (n 73 above) para 69.

expression, right to property, and right to health respectively.⁷⁶ Rejecting the efficacy of the ouster clause in Decree no 43 of 1993, the African Commission ruled that there was a violation of articles, 6, 7(1), 7(1)(c), 7(2), 9(1), 9(2), 14 and 16 of the African Charter.⁷⁷ Consequently, the Commission urged the Nigerian government to ‘take the necessary steps to bring its law into conformity with the Charter’.⁷⁸ In a similar case, *Constitutional Rights Project v Nigeria*⁷⁹ the African Commission reiterated its position that limitation of rights must be strictly proportionate with the advantages which follow.⁸⁰ Going by these decisions of the African Commission, the limitation clause in the 1999 CFRN should not obstruct the enforcement of a human rights regime for sexual minorities, especially, as same-sex relationships do not constitute a threat to public order, safety and morality.

In the case of *Mtikila v The United Republic of Tanzania*⁸¹ the African Court on Human Rights passed a watershed judgement on the restriction of rights. The applicant in this case, a national of Tanzania contended before the African Court that certain amendments to the Tanzanian Constitution which bars independent candidates from contesting elections into political offices violated his rights safeguarded by the African Charter and other international human rights instruments.⁸² The applicant further argued that the prohibition is not only discriminatory to independent candidates but also violated his right to freedom of association.⁸³ The respondent in their counter argument stressed the point that the restriction of independent candidates is ‘a way of avoiding

⁷⁶ *Media Rights Agenda* (n 73 above) para 1-16 for a detailed fact of the case.

⁷⁷ *Media Rights Agenda* (n 73 above) para 92.

⁷⁸ *Media Rights Agenda* (n 73 above) para 93. While adducing reasons for its decision that there was a violation of the Charter, the Commission noted that unlike other international human rights instruments the Charter does not accommodate a limitation clause, as such, limitations on rights and freedoms inherent in the Charter can’t be compromised on the altar of emergencies or special circumstances. The Commission further asserted that for limitations to the enjoyments of rights as provided in article 27(2) of the Charter to be invoked, such limitations must pass the test of proportionality. See para 66-69.

⁷⁹ (2000) AHRLR 227 (ACHPR 1999).

⁸⁰ *Constitutional Rights Project* (n 79 above) para 41-42.

⁸¹ Application No 011/2011.

⁸² *Mtikila* (n 81 above) para 78.

⁸³ *Mtikila* (n 81 above) para 89.2 & 89.3.

absolute and uncontrolled liberty, which would lead to anarchy and disorder; the prohibition is necessary for good governance and unity.⁸⁴ The respondent further asserted that the prohibition is ‘necessary for national security, defence, public order, public peace and morality’.⁸⁵

The African Court in its decision on the restriction of rights stated as follows:

The jurisprudence regarding the restriction on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued. Once the complainant has established that there is *prima facie* violation of a right, the respondent state may argue that the right has been legitimately restricted by “law”, by providing evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter.⁸⁶

The African Court concluded that the limitation imposed by the respondent was not ‘in consonance with international standards, to which the respondent is expected to adhere’.⁸⁷ The African Court expressed the same sentiments in the case of *Konate v Burkina Faso*.⁸⁸ The applicant in this case alleged that his conviction for criminal defamation by an Ouagadougou High Court which imposed a prison term, huge fine, damages and court costs on him was a violation of his right to freedom of expression protected by article 9 of the African Charter and article 19 of the ICCPR.⁸⁹ The African Court reiterated the view that for a restriction to be acceptable, it must serve a legitimate purpose⁹⁰ and that ‘the reasons for possible limitation must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained’.⁹¹

⁸⁴ *Mtikila* (n 81 above) para 90.1.

⁸⁵ *Mtikila* (n 81 above) para 90.1.

⁸⁶ *Mtikila* (n 81 above) para 106.1.

⁸⁷ *Mtikila* (n 81 above) para 108.

⁸⁸ Application No 004/2013.

⁸⁹ *Konate* (n 88 above) para 9.

⁹⁰ *Konate* (n 88 above) para 132.

⁹¹ *Konate* (n 88 above) para 133.

South African constitutional case law also presents a fertile source of inspiration in reconciling the justification and limitation of rights posed by section 45 of the Nigerian Constitution.⁹² In the case of *S v Makwanyane*,⁹³ the Constitutional Court held that limiting laws must pass the test of proportionality. In the case of *Brummer v Minister for Social Development*,⁹⁴ the Constitutional Court articulated that

[i]n assessing whether the limitation ... is reasonable and justified under section 36(1), regard must be had to, among other factors, the nature of the right limited; the purpose of the limitation; the efficacy of the limitation, that is, the relationship between the limitation and the purpose; and whether the purpose for the limitation could reasonably be achieved through other means that are less restrictive of the right in question. Each of these factors must be weighed up but ultimately the exercise is one of proportionality which involves the assesment of competing interests.⁹⁵

Preventing such arbitrary behaviour by states led to the convening of the Siracusa conference in Italy in 1984 under the aegis of the American Association of the International Commission of Jurists (AAICJ). The provisions of the ICCPR which permits limitations and derogations from some of the rights guaranteed in the ICCPR document were being abused by authoritarian states. This prompted the AAICJ to convene a colloquium of experts from around the world to take a second look at the ICCPR document, its general objectives, and the conditions under which limitations can be allowed. The Siracusa Principles

⁹² Section 36 of the CRSA.

⁹³ 1995 3 SA 391 CC 104. In this landmark judgement, The Constitutional Court of South Africa invalidated the capital punishment provision of section 277(1)(a) of the Criminal Procedure Act of 1977 Of South Africa. See para 87.

⁹⁴ 2009 6 SA 323 CC.

⁹⁵ Quoted in I Currie 'Balancing and the limitation of rights in the South African Constitution' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 254. A plethora of the South African Constitutional Court cases has dealt with this issue, see a detailed analysis of the cases in A Price 'The content and justification of rationality review' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 36-73. See also C Courtis 'Rationality, reasonableness, proportionality: Testing use of standards of scrutiny in the constitutional review of legislation' (2011) 4 *Constitutional Court Review* 31-50.

on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights made the following declarations:

1. No limitation referred to in the Covenant shall be applied for any purpose other than for which it has been prescribed.⁹⁶
2. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.⁹⁷
3. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.⁹⁸

Article 2 of the Covenant forbids the violation of the human rights of individuals on the basis of race, sex, religion, birth, etc. Not even consideration of public order can justify violation of the Covenant's provisions safeguarding fundamental human rights. Section 58 of the Siracusa Principles forbids limitation from the Covenant's guarantee of right to freedom from degrading treatment. The Siracusa Principles reinforced article 5(1) of the Covenant, which forbids the wilful limitation of human rights by states and non-state actors. Article 17 of the Covenant explicitly states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

The provision above is unambiguous. It forbids states from interfering in the private sphere of the individual. Sexual relations are very private matters. Section 45 of the 1999 Constitution is inconsistent with a provision of an international treaty body to which Nigeria is a state party. Given this conflict, and in view of the fact that the contentious section clearly serves discriminatory purposes with regard to homosexual persons, it has become necessary for the Nigerian state to review it. Nigeria is favourably disposed to amending its Constitution. A review of section 45 to remove the 'public morality' allusion will go a long way in starting the process of decriminalising consensual adult homosexual conduct.

⁹⁶ Section 6.

⁹⁷ Section 9.

⁹⁸ Section 15.

5.3 Religious objection to consensual adult homosexual conduct

Nigeria, Africa's most populous nation, is home to the largest number of black people in the world. Nigeria is also a profoundly religious nation. The country is almost equally divided along the Christianity-Islam line, with the northern region being predominantly Islamic and the southern region predominantly Christian.⁹⁹ North Central Nigeria (the Middle Belt) is heavily populated by Christians, Muslims, and a sprinkling of adherents of the age-old African Traditional Religion (ATR). ATR is a fading religion in Nigeria although many Christians in the Middle Belt and the South still hold on to aspects of ATR such as deification of ancestors.

Given the fervour with which Nigerians embrace the religious life, it is hardly surprising that biblical and qur'anic passages forbidding homosexuality have in no small way shaped the thinking of Nigerians on the morality of homosexual conduct and the ethics of interpretation in general. Both educated and uneducated Nigerians sternly frown on homosexuality. The more religious a nation is the more socially conservative it becomes. Both the Christian and Islamic holy books firmly endorse hetero-normativity. The Bible, for instance, enjoins Christians to be fruitful and multiply.¹⁰⁰ Since homosexuality cannot lead to conception it is seen as an aberration which violates this divine injunction.¹⁰¹

In the West the triumph of the liberal tradition softened religious antagonism towards homosexual conduct. In Africa, and Nigeria in particular, the liberal tradition has little or no influence, hence the radical conservatism of the people, as we saw earlier. The African and Western attitudes towards homosexuality from the religious perspective is exemplified by the confrontation between the African Anglican church and the Western Anglican church, when

⁹⁹ See the article 'Religion in Nigeria' in *Wikipedia*, http://en.wikipedia.org/wiki/Religion_in_Nigeria (accessed 5 October 2015).

¹⁰⁰ Genesis 1:28 (Revised Standard Version).

¹⁰¹ JA Ottuh 'Marriage and procreation in the light of Genesis 1:27–28: A face-off towards homoerotic marriage in Nigeria' (2013) 4 *International Journal of Humanities and Social Science Invention* 3.

the latter led by the then Archbishop of Canterbury Rowan Williams tried to liberalise church teachings on homosexuality.¹⁰² The Anglican Church, Nigerian Communion, which boasts an impressive 25% of practising Anglicans worldwide – more than the share of the Church of England – unsurprisingly quickly assumed leadership of the conservative tendency in the Anglican Church and forced the church to soft-pedal on its proposed reforms.¹⁰³

The traditional attitude of Christianity and Islam to homosexuality will be more closely examined in the next two sections.

5.3.1 Consensual adult homosexual conduct from the perspective of Christianity

The standard Christian view is that homosexuality (or the practice of homosexuality) is a sin. The Catholic Church, for instance, considers homosexuality a disorder, though Pope Francis has adopted a more conciliatory tone since ascending to the papacy.¹⁰⁴ Evangelicals are more uncompromising on the issue of homosexuality. Opposition to the LGBT rights movement by evangelicals remains strong even in the United States of America.¹⁰⁵ Many conservative Christians typically assert that they ‘love the sinner, but hate the sin.’¹⁰⁶ The sinner is of course the homosexual while the sin is homosexuality.

The Bible contains explicit verses forbidding homosexuality, both in the Old Testament¹⁰⁷ and the New Testament.¹⁰⁸ While the Old Testament prescribes the death penalty for homosexuality, the New Testament merely

¹⁰² J Anderson ‘Conservative Christianity, the global south and the battle over sexual orientation, (2011) 32 *Third World Quarterly* 1591.

¹⁰³ Anderson (n 102 above) 1590.

¹⁰⁴ Tom Dart ‘Gay Catholics find some solace in Pope’s inclusiveness but a dilemma looms’ *The Guardian* 21 September 2015, www.theguardian.com/world/2015/sep/21/gay-catholics-solace-pope-inclusiveness-mixed-message (accessed 5 October 2015); Susan Milligan, ‘Outsiders keep the faith’ *US News* 23 September 2015, www.usnews.com/news/thereport/articles/2015/09/23/pope-francis-and-the-catholic-church-outsiders (accessed 5 October 2015).

¹⁰⁵ Feldblum (n 18 above) 61-123.

¹⁰⁶ Feldblum (n 18 above) 61.

¹⁰⁷ Leviticus 20:18 (New Living Translation, Holy Bible).

¹⁰⁸ Romans 1:26–27; 1 Timothy 1–10 (New Living Translation, Holy Bible).

forbids it. Christianity, which derives its doctrines predominantly from the New Testament, presents itself as a religion that prioritises the place of love in human affairs, and even in the God-man relationship. The Bible declares God to be love. In John 3:16 it is written: 'For God so loved the world that he gave his only Son, that whoever believes in him should not perish but have eternal life.' Indeed, the love fixation of Christianity, which is seen as ushering in the dispensation of forgiveness and grace, has motivated liberal theologians like Boswell to remove consensual homosexuality from the list of prohibitions.¹⁰⁹ The thinking here is that consensual same-sex conduct does not constitute a sinful act in itself if no harm is caused to those involved and also third parties. To interfere in the activities of consenting homosexual couples would amount to being judgmental.

Liberal biblical scholars like Duffield and Loughlin asserts that the Pauline understanding of homosexuality is different from contemporary understanding of the same phenomenon. Convinced that the New Testament is not antagonistic to same-sex love, Duffield disputes the conservative interpretation of the term 'unnatural' as it appears in Romans 1:26. The conservative interpretation ties the term to sin, but Duffield holds that the term does not indicate that homosexual practices are sinful. For him, Paul and other seemingly anti-homosexual writers in the Bible merely classify same-sex practices as shameful or dishonourable under Jewish laws.¹¹⁰ The implication of this reading of the New Testament is that consensual same-sex conduct is permissible in the dispensation of grace.

Nevertheless, the conservative interpretation of biblical teachings on homosexuality and the famous story of Sodom and Gomorrah continue to be more widely adhered to, especially in Africa and Nigeria. The story of Sodom and Gomorrah is narrated in the book of Genesis. Two angels of God visited Lot

¹⁰⁹ J Boswell *Christianity, social tolerance and homosexuality* (1980) 93–95.

¹¹⁰ See SO Olanisebe and AJ Adedokun 'Re-interpreting 'Sodom and Gomorrah' passages in the context of homosexuality controversy: A Nigerian perspective' (2013) 3 *Ilorin Journal of Religious Studies* 199–200.

and were persuaded by Lot to be his guests for the night. The people of Sodom are depicted as highly immoral. The men of the city surrounded Lot's house and rudely demanded to have sexual intercourse with the angels. Most Christians interpret the destruction of Sodom and Gomorrah as God's expression of strong disapproval of homosexuality. It is noteworthy, however, that what the men of Sodom attempted is homosexual rape rather than homosexual sex. Rape is manifestly a social offence. Consequently, the story of Sodom and Gomorrah cannot be used to justify homophobia. Rape is quite common among heterosexuals. The fact that it is common does not discredit heterosexuality as an orientation. The same argument can be extended to homosexuality. That some homosexuals indulge in the social offence of rape cannot be ground for impugning homosexuality as an orientation. Adult consensual same-sex relation is harmless just like adult opposite sex relation.

5.3.2 Consensual adult homosexual conduct from the perspective of Islam

The dominant Islamic perspective of homosexuality is as hostile to LGBT rights as the dominant Christian view, if not more. Many Islamic nations have various versions of the Sharia code in their legal statutes. Nigeria, for instance, allows the operation of Sharia courts in the predominantly Muslim northern region. Iran, Saudi Arabia, Mauritania, Sudan, the United Arab Emirates (UAE), and Yemen – all Islamic nations – prescribe the death penalty for male homosexual conduct.¹¹¹

The main sources of anti-homosexuality legislation in Islamic nations are the Hadith and Sunnah of Prophet Mohammed. The Qur'an itself is ambiguous on the question of homosexual conduct. Surat An-Nisa 4:16 is often cited in support of the harsh penalty for homosexual conduct prescribed by the main schools of Islamic jurisprudence. It reads: 'If two men are guilty of lewdness

¹¹¹ M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 208.

both of them should be reprimanded. If they repent and amend leave them alone, for Allah is oft-returning, Most Merciful'. In Surat Al-Anbiya, verse 74-75 we read: 'And to Lot, too, We gave wisdom and knowledge; We saved him from the town which practised abominations. Truly they were a people given to evil, a rebellious people. And we admitted him to our mercy; for he was one of the righteous'. Surat An-Naml, verse 54-58, also condemns homosexual acts. Islam regards sexual intercourse outside the institution of marriage as sinful.¹¹² Thus fornication and adultery are forbidden. In Islamic jurisprudence a homosexual act is compared with fornication and adultery, with punishment prescribed according to the marital status of offenders.¹¹³ Adultery is punishable with stoning to death after four witnesses must have testified. The idea here is that if adultery is punishable with death and homosexual act among married persons is like adultery, then the death penalty is a just punishment for married persons who engage in homosexual practices.

The Qur'an is silent on the issue of female homosexual conduct. Muhsin Hendricks explains this silence as a direct consequence of a macho Arab culture that places emphasis on male sexual pride.¹¹⁴ The penetrating male is regarded as the dominant actor who deserves admiration while the passive partner is scorned as an effeminate. Hendricks suggests that the Arab patriarchy found male homosexual conduct particularly offensive not on the basis of any explicit qur'anic condemnation but rather to preserve male pride.¹¹⁵ Female homosexual conduct was regarded as less threatening, hence the relative silence on this matter. Nevertheless, Surat an-Nisa 4:16 is often cited as forbidding and prescribing punishment for lesbianism. The verse reads: "If any of your women are guilty of lewdness, take the evidence of four witnesses

¹¹² J Rehman & E Polymenopoulou 'Is Green a part of the Rainbow? Sharia, homosexuality and LGBT rights in the Muslim world' (2013) 37 *Fordham International Law Journal* 10.

¹¹³ Rehman & Polymenopoulou (n 112 above) 10-12.

¹¹⁴ M Hendricks 'Islamic texts: A source of acceptance of queer individuals into mainstream Muslim societies' www.theinnercircle.org.za/wp-content/uploads/2014/11/Islamic-Texts.MHendricks.pdf. (accessed 2 October 2015)

¹¹⁵ Hendricks (n 114above).

from amongst you against them; and if they testify, confine them to houses until death do claim them, or God ordains for them some (other) way.”

The Hanafi school of thought in Islam prescribes severe lashing for a first offence while the Shafi, Maliki, and Hanbali schools punish a first confirmed offence with the death penalty for a married offender.¹¹⁶ If single the Shafi school prescribes 100 lashes. A married person who indulges in gay sex is considered to have committed a sin comparable to adultery. A single individual convicted of homosexual conduct is deemed guilty of fornication. Support for this legal regime comes basically from the traditions of the Prophet, not from the Qur’an which is the most important source of Islamic doctrines.¹¹⁷

The story of Sodom and Gomorrah is invoked by most Christians and social conservatives to support their homophobic stance and validate their disdain for same-sex relationships.¹¹⁸ But Hendricks has argued persuasively that the city of Sodom was known for a host of immoral behaviour, including inhospitality (the inhospitality thesis) to strangers, rape, barbaric customs dictated by the prevailing idolatry of the times, and unbridled greed.¹¹⁹ The Muslim population of Nigeria favours the conservative interpretation of the Qur’an, the Hadith and the Sunnah, being mostly adherents of the Sunni branch of Islam. The Islamic group Jama’atu Nasril Islam (JNI) and leaders from Nigeria’s predominantly northern region enthusiastically welcomed the

¹¹⁶ Rehman and Polymenopoulou (n 112 above) 12.

¹¹⁷ Hendricks (n 114 above).

¹¹⁸ Olanisebe & Adedokun (n 110 above), 194. They reject the inhospitality thesis and insist homosexuality was the chief cause of the destruction of Sodom. Hear them: “This line of interpretation, to us, is only a play down on the sin of homosexuality on the part of the men of Sodom and Gomorrah ... sin of inhospitality could not have caused God to bring about the total annihilation of the great city of Sodom. At best, he could have destroyed those involved in the act of inhospitality and not the whole cities. Sin of inhospitality should not have warranted death since an act of inhospitality depends on an individual’s discretion and liberality and not necessarily by divine fiat.” Yet the supporter of the inhospitality thesis will argue that inhospitality is only one premise among many, the other premises including the unbridled sexual adventurism of the people of Sodom which inclines them to rape.

¹¹⁹ Hendricks (n 114 above).

same-sex marriage prohibition Act, insisting that homosexual conduct is incompatible with Islamic sexual morality.¹²⁰

5.3.3 Consensual adult homosexual conduct from the perspective of African Traditional Religion in Nigeria

African traditional religion (ATR) is the appellation for the pristine systems of worship and connection with the transcendental realm practised by the indigenous people of Africa long before the coming of the colonialists. Indeed, so well entrenched is ATR in Africa, and sub-Saharan Africa in particular, that this pre-colonial religious system survives to this day especially in rural areas. One feature of ATR relevant to the debate over LGBT rights in Africa is the distinctly tolerant attitude of ATR towards non-conventional phenomena in general and sexual orientation in particular. This is in sharp contrast to the intolerant tendencies in the two dominant religions in contemporary Africa, Christianity and Islam. Unlike Christianity and Islam, ATR denies any direct knowledge of the Supreme Being and, consequently, any privileged revelation. God is so great and so remote that He can only be approached through lesser deities, divinities and even ancestors functioning as mediators.¹²¹

The practical implication of the recognition of a pantheon of divinities and deities mediating between God and humans is that there are many routes to God. No one route is absolute. The repudiation of absolutism means that ATR embraces a live-and-let-live attitude. This perspective encourages the virtue of tolerance in all facets of traditional life. It is, therefore, not surprising that tolerance towards homosexuality was a feature of pre-colonial Nigerian societies. Ojoade has found evidence of the existence and tolerance of homosexuality in traditional Yoruba society in his study of Yoruba folklore.¹²²

¹²⁰ See Misbahu Bashir and Maryam Ahmadu-Suka 'Northern traditional rulers, JNi welcome anti same-sex law' *Weekly Trust*, <http://weeklytrust.ng/index.php/new-news/151395-northern-traditional-rulers-jni-welcome-anti-same-sex-law> (accessed 20 June 2014).

¹²¹ JS Mbiti *Concepts of God in Africa* (1975) 117-119; B Idowu *African traditional religions: A definition* (1973) 165 - 166; UM Ushe 'God, divinities and ancestors in African traditional religious thought' (2017) 3 *Igwebuike: An African Journal of Arts and Humanities* 165

¹²² JO Ojoade 'African sexual proverbs: Some Yoruba examples' (1983) 94 *Folklore* 201 - 213.

Olurankise makes a similar discovery in his independent study of Yoruba folklore.¹²³ Essien and Aderinto acknowledge that homosexuals were tolerated even though the lifestyle was not encouraged.¹²⁴ Bisi Alimi adds that *adodi* was the popular Yoruba term for a male homosexual.¹²⁵ He goes on to assert that the homosexual sub-culture filtered into Yoruba art and religion, to the extent that the Esu deity is depicted as genderless in a way suggestive of a third gender while the god Sango is presented in the image of a transvestite.¹²⁶

The present author's investigation of attitudes towards sexual minorities in pre-colonial Idomaland revealed that homosexuals were tolerated. Men with feminine tendencies, for instance, were used as entertainers at moonlight *ililowe* dance.¹²⁷ Homosexuals were called *olomuchu* in traditional Idoma societies. Fremont has noted that the *yan daudu* of Kano were regarded as persons possessing special spiritual powers on account of their unconventional sexual practices and were accordingly tolerated.¹²⁸

From the foregoing, it is an irony that Christianity and Islam, which claim to be on a higher moral pedestal than ATR, should be the religions promoting intolerance towards homosexuals while the so-called primitive ATR perfectly understands the importance of tolerance in a given society.

5.3.4 Consensual adult homosexual conduct and the ethics of interpretation

In the interpretation of the rightness or wrongness of homosexual conduct the conservative viewpoint has clashed with the liberal viewpoint even as the former has called upon religious doctrines for support while the latter insists it is

¹²³ O Olurankise 'Euphemism as a Yoruba folkway' (1992) 5 *African Languages and Cultures* 189 - 202.

¹²⁴ K Essien & S Aderinto 'Cutting the head of the roaring monster. Homosexuality and repression in Africa' (2009) 30 *African Study Monographs* 126.

¹²⁵ Bisi Alimi 'Homosexuality is well rooted in the core of Nigerian society & identity' available at <http://www.naija.com/54704.html> (accessed 19 October 2015).

¹²⁶ Alimi (n 125 above).

¹²⁷ See chapter 2 of this thesis.

¹²⁸ B Fremont *Horses, musicians and gods: The Hausa cult of spirit possession* (1983) 122-123.

backed by scientific evidence. In Africa some of the questions that come to mind in the debate over homosexuality from conflicting perspectives include the role of the environment in determining homosexual attraction, the genetic or hereditary factor, and cultural acceptability. In recent years the LGBT movement has recorded much progress by promoting the idea that homosexuals cannot help being whom they are any more than heterosexuals can. Scientific evidence seems to support the biological thesis. The interpretation of homosexual orientation as an innate phenomenon has been the major plank of the declaration of the Yogyakarta Principles.¹²⁹

The religious right is quick to point out that no scientific research has shown conclusively that there is any such thing as a gay gene. Social conservatives argue that the environment plays the biggest role in determining the direction of a person's sexual orientation. Jones, a conservative scholar, notes that the hereditary thesis is dominant today because most of the scholars in the field of human sexuality today are liberals and ideologically committed, with a good number of them gays or lesbians. Jones includes Gregory Herek, Simon LeVay, Dean Hamer, Susan Cochran, Lee Beckstead, Douglas Haldeman, Lisa Diamond, Jack Drescher, and Ritch Savin-Williams.¹³⁰ Jones notes that 'the failure of dissenting voices to appear in the dialogue is striking.'¹³¹

¹²⁹ O'Flaherty and Fisher (n 111 above), 207–248. The Yogyakarta Principles are basically a compendium of State duties and obligations on the interpretation and application of international human rights law as they relate to sexual orientation and gender identity. On 26 March 2007, leading human rights experts across the world articulated 29 principles on sexual orientation and gender identity. The Principles articulate basic standards on governments' obligations to sexual minorities. A recent development to the Principles is the Yogyakarta Principles plus 10 which is an additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to compliment the Yogyakarta Principles of 2006 which document 29 cardinal principles. The Yogyakarta Principles plus 10 adopted on 10 November 2017 at Geneva increased the principles from 29 to 38. For a full detail of the YP +10 see <https://yogyakartaprinciples.org> (accessed 17 January 2018).

¹³⁰ Stanton L Jones 'Sexual orientation and reason: On the implications of false beliefs about homosexuality' www.christianethics.org (accessed 10 May 2015).

¹³¹ Jones (n 130 above).

Jones criticises the sampling methods of pro-homosexual biologists and social scientists for being open to what he calls volunteer bias, a situation where sample populations collude with researchers indirectly to produce a favourable outcome. Jones notes that pioneer LGBT rights activist and researcher Evelyn Hooker also struggled with the possibility of false reporting by her sample population consisting of people intimately connected with one another.¹³² Jones singles out the research of Gary Gates as one of the few researches into the homosexual lifestyle that covered a truly representative sample. Before the Gate report it was widely believed, and is still believed in some quarters, that about 10% of the human race is homosexual. The Gate report put the LGBT population of the US at an estimated 3.5% of the entire population, with bisexuals constituting some 1.8% and gays and lesbians making up the remaining 1.7%.¹³³

While Jones may have a point about sample populations not being representative enough, the number of studies in support of the thesis of biological determinism clearly indicates that the biological factor weighs higher than the environmental factor in determining homosexual orientation. In an empirical study conducted by Norton et al only 5.2% of homosexual men reported any serious or great degree of control over their sexual orientation. The figure for lesbians is 16.4% while for bisexuals it is 42%.¹³⁴ The low figure for gays and lesbians is instructive. The works of Norton et al, Herek et al and others have discredited the effectiveness of conversion therapy.¹³⁵

Epigenetic, familial, maternal stress, and twin studies undermine Jones' basic conclusions about homosexual orientation. While a specific gay gene may not have been identified, studies show that maternal genetic make-up plays some role in male homosexuality. Hamer et al identified the Xq28 region on the

¹³² E Hooker 'Male Homosexuality in the Rorschach' (1958) 22 *Journal of Projective Techniques* 40.

¹³³ See Jones (n 130 above).

¹³⁴ GM Herek, AT Norton, TJ Allen & CL Sims 'Demographic, psychological and social characteristics of self-identified lesbians, gays, and bisexual adults in a US probability sample' (2010) 7 *Sexuality Research and Social Policy* 186.

¹³⁵ See Academy of Science of South Africa Report (n 8 above) 11.

X chromosome in gay men believed to play an important role in genetic transmission of gay tendencies. This marker influences male homosexuality. A mother contributes the X chromosome. Hamer et al discovered that a significant number of respondents in a sample population from families with more than one homosexual son had a maternal uncle or the son of an aunt who was gay.¹³⁶ Bocklandt et al confirmed the results of Hamer and his colleagues in a later study.¹³⁷ Other studies by Rice et al.¹³⁸ Bailey et al,¹³⁹ Bailey and Pillard,¹⁴⁰ and Hershberger¹⁴¹ have confirmed the strong contribution of biology to homosexual orientation.

If there is a genetic basis of homosexuality and sexuality itself is an intimate aspect of personality, it must follow that sexual orientation is basic to identity contrary to Jones' position. Homosexual conduct is a form of sexual expression, just like heterosexual conduct. In its expression same-sex relationships are no more harmful than heterosexual relationships. The main difference between the two forms of sexual expression is that one is procreative while the other is not. But this is hardly an excuse to discriminate against LGBT persons in stable and close relationships.

There seems to be no good reason for considering consensual same-sex conduct immoral, which is the popular narrative in many parts of the world, including Nigeria. To conclude that homosexual conduct in itself is immoral we will have to determine that it predisposes people to immorality. Public prejudice about the social unacceptability of same-sex conduct cannot be the basis for

¹³⁶ D Hamer, S Hu, VL Magnuson, N Hu, & AM Pattatucci 'A linkage between DNA markers on the X chromosomes and male sexual orientation' *Science* 261 (1993): 325.

¹³⁷ Academy of Science of South Africa Report (n 8 above) 31.

¹³⁸ Academy of Science of South Africa Report (n 8 above). Rice and colleagues argue that the epi-marks that survive generational erasure may be passed on to the next generation in a way that affects sexual orientation. Normally, epi-marks do not survive generational erasure, but when they do it is possible for a mother to pass feminine features to her son and a father masculine features to his daughter.

¹³⁹ Academy of Science of South Africa Report (n 8 above) 29.

¹⁴⁰ JM Bailey and RC Pillard 'A genetic study of male sexual orientation' (1991) 48 *Archives of General Psychiatry* 1089-1096.

¹⁴¹ SL Hershberger 'A twin registry study of male and female sexual orientation' (1997) 34 *The Journal of Sex Research* 212-222.

determining the immorality of harmless consensual activities between two adults. If we say that there have been cases of homosexuals molesting children, this again is really no argument against homosexuality because there are pedophiles among heterosexuals. We do not say that heterosexuality is inherently immoral because some heterosexuals are paedophiles. Another popular myth about homosexuality is that homosexuals will convert heterosexuals to their lifestyle if the former are allowed to thrive in society. So far there is no indication that this fear is rational. Interaction with homosexual does not threaten the lifestyle of a non-homosexual.¹⁴² Orientation is innate and fundamental. It is possible for self-identified heterosexual persons to experiment with same-sex relation out of curiosity or some other reason, but this does not make them homosexual. They remain basically heterosexual and will return to heterosexual orientation.

5.4 Cultural objection to consensual adult homosexual conduct in Nigeria

Today, sexual minorities' rights activism is driven essentially by the West. This has led to the belief in the global south that LGBT activism is a part of a larger Western imperialist agenda. This perception is expressed in the language of conflict, precisely a clash of cultures or civilisations, something like the West and the rest of us or the West versus Africa. This, however, is not the case. The West simply happens to be the bastion of human rights. Since LGBT persons are human beings, their rights become fundamental human rights that should be protected.

Nevertheless, the perception of LGBT rights activism as a 21st century Western imperialist adventure persists in Africa, giving many cause to assume that African culture is not only in opposition to Western culture but also that homosexuality is unAfrican. Is there a distinct African worldview that subordinates human rights to social or community cohesion? In his polemical exchange with Thaddeus Metz on the correct interpretation of the African

¹⁴² Academy of Science of South Africa report (n 8 above) 53-54.

philosophy of *ubuntu*, Anthony Oyowe suggests that human rights as understood in the West is incompatible with *ubuntu*.¹⁴³ According to Mogobe B Ramose *ubuntu* is the heart of the African cultural worldview. It is a community-centred worldview that frowns at fragmentation and vigorously pursues wholeness.¹⁴⁴ It seeks the well-being of the individual by ensuring the stability of the group.

Ubuntu is also humanistic in essence, for its goals are the attainment of peace and justice among mankind.¹⁴⁵ Oyowe's thinking is that if *ubuntu* is a communitarian philosophy basic to African culture, human rights activism will not resonate with Africans as obsessively as it does with Westerners. Metz responds that moderate communitarianism is compatible with human rights in general.¹⁴⁶

Metz finds support for his position in Kwame Gyekye, an advocate of moderate communitarianism.¹⁴⁷ On the basis of this moderate conception of African communitarianism, Metz asserts that commitment to the protection of LGBT rights is not unAfrican. The Metz-Oyowe debate calls to mind the broader debate over cultural relativism and the universality of human rights. Champions of the former insists that homosexuality is foreign to Africa while defenders of the latter believe the protection of LGBT rights is an obligation of all states, including African states. Tesón is of the view that leaving the all-important matter of human rights at the mercy of local customs and socio-political viewpoints promotes discrimination.¹⁴⁸ He recognises the legitimate claims of local actors such as states and religious or political organisations but rejects the suggestion that these claims should supersede human rights. For him, human moral worth is not subject to cultural and geographical variations.

¹⁴³ See T Metz 'African values and human rights as two sides of the same coin: A reply to Oyowe' (2014) 14 *African Human Rights Law Journal* 306–310.

¹⁴⁴ MB Ramose 'The philosophy of *Ubuntu* and *Ubuntu* as a philosophy' (2003) 276. <http://www.docstoc.com/?docId=81721439&download=1> (accessed 20 April 2015).

¹⁴⁵ Ramose (n 144 above) 279.

¹⁴⁶ Metz (n 143 above) 318–321.

¹⁴⁷ K Gyekye *Tradition and modernity: Reflections on the African experience* (1997) 36–54.

¹⁴⁸ Tesón (n 15 above) 380.

A woman living in a Third World country desires the protection of her fundamental human rights as much as a woman living in a First World country. Tesón contends that: 'If the initial conditions are not morally distinguishable, the requirement of universalisability fully applies to statements about individual rights, even when the agents are immersed in different cultural environments.'¹⁴⁹

Donnelly agrees with Tesón in principle but warns against exuberance in view of the obvious fact that the practice of human rights is often met with one impediment or the other unlike the theory of human rights.¹⁵⁰ Donnelly fears that triumphalism on the part of the defenders of the universality thesis can lead to a hardening of the stance of cultural relativists. Donnelly notes that sustained external pressure especially from the West gives the impression that human rights activism is a Western ideology; it may also compel African states to pay lip service to human rights just to please foreign states and shift the pressure away.¹⁵¹ But Donnelly is all for the defence of human and LGBT rights. Donnelly takes a position against the widely held belief that human rights are culturally rooted in Western culture: on the contrary, notions of human rights are the consequences of socio-political and economic changes of modernity.¹⁵²

Donnelly insists that the human rights era cannot overlook the case for the protection of sexual minorities' rights since the call for non-discrimination is backed by both moral and intellectual arguments. Morally, sexual minorities are as much a part of humanity as the heterosexual majority and do not deserve discriminatory treatment. From the intellectual or conceptual perspective, there is no convincing argument against homosexual orientation. He writes: 'They are adult human beings exercising their right of personal autonomy to speak and

¹⁴⁹ Tesón (n 15 above) 387.

¹⁵⁰ J Donnelly 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 281-291.

¹⁵¹ Donnelly (n 150 above) 291.

¹⁵² Donnelly (n 150 above) 287.

behave as they choose, and to associate, in public and private, with whom they choose, as they choose.¹⁵³

Scholars like Massad dispute the position of Western liberal scholars who assert the universality of sexual minorities rights. To Massad, the liberal tradition dominant in today's intellectual circle is a Western cultural narrative. He pointedly accuses the international LGBT movement of cultural imperialism, the imposition of liberal Western sexual standards and practices on cultures outside the liberal sphere.¹⁵⁴ This imperialist narrative has resonated with Africans vehemently opposed to same-sex relation, consensual or otherwise.¹⁵⁵

In spite of cultural and ideological differences between the West and Africa, evidence abound in support of homosexuality as a phenomenon native to every part of the world, not least in Africa and Nigeria, as we shall see in the next section. To deny the reality of homosexuality anywhere is to deny the obvious. Africa will have to come to terms with modern developments and accord LGBT persons equal protection under the law. Consensual same-sex practices do not threaten the core values of the African people.

The typical Nigerian will swear that homosexual act is a practice imported from the West. He or she will say that the very word 'homosexuality' has no equivalent in their native Nigerian language. This to them is ample proof that homosexuality was introduced into Nigeria by Europeans. Until recently very few people had the courage to discuss same-sex issues publicly as the homosexuality theme itself was considered the great taboo. Such matters were considered too dirty to be mentioned. There were always homosexuals, of course, but they operated underground. Society moved on, content with the unchallenged way of majority morality.

Recently, however, the silence has been shattered with the increased prominence of gay rights activism and visibility of LGBT persons in the West.

¹⁵³ Donnelly (n 1 above) 562-563.

¹⁵⁴ Massad (n 16 above).

¹⁵⁵ See Olanisebe and Adedokun (n 110 above) 200-205; KE Obasola 'An ethical perspective of homosexuality among the African people' (2013) 1 *European Journal of Business and Social Science* 77-85.

The visibility of homosexual persons in the West is the direct result of legal interventions. These legal interventions were in their turn prompted by the effective Western gay lobby. Since this lobby movement has gone global, Africa has been forced to respond to the age of liberalism. The continent responded negatively, invoking outdated colonial-era laws to recriminalise consensual adult homosexual conduct. The backlash has been pronounced throughout Africa, except South Africa which already had a transformative post-apartheid constitution that protected sexual minorities' rights. Where anti-homosexuality laws were not strengthened with additional legislations as in Nigeria and Uganda,¹⁵⁶ public opinion assumed a more hostile tone towards homosexuals. Attempts by liberal Western scholars to remind Africa that the colonial anti-homosexual legislation are the true symbols of cultural imperialism have been rebuffed by Africans. The nationalist spectrum of the opposition to same-sex conduct rejects the very idea that the West will always determine the standards of sexual conduct for Africa. African cultural nationalists believe that if there is any need for change in attitude towards human sexuality, Africans themselves will drive that change. The nationalist perspective is ideologically opposed to the West.¹⁵⁷

But are same-sex practices foreign to Africa? Evidence support the thesis that homosexual conduct has always existed in Africa, long before the coming of the Europeans. In the book *Allah made us: Sexual outlaws in an Islamic African city*, Gaudio tells the story of the *yan daudu* of Kano. The *yan daudu* are effeminate men who dress like women, act like women, and also have sex with other men, whether these men be fellow *yan daudu* or masculine men.¹⁵⁸ They were tolerated before the coming of European colonialism. Besmer

¹⁵⁶ The Ugandan anti-gay law was declared null and void by the Ugandan Constitutional Court on procedural grounds. See Elias Biryabarema: Uganda court overturns anti-gay law that halted Western aid," *Reuters*, Friday August 1, 2014, accessed 5 October 2014, <http://in.renters.com/article/2014/08/01/Uganda-homosexuals-id1NL6N0Q73IV20140801>.

¹⁵⁷ J Adibe 'The politics of same-sex marriage in Nigeria' (2012) 1 *Journal of African Union Studies* 102-104.

¹⁵⁸ RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009) 4-6.

Fremont attributes this pre-colonial tolerant of a sexual minority like the *yan daudu* to the belief that the *yan daudu* possess special spiritual powers which may be of benefit to the society.¹⁵⁹ In the absence of scientific knowledge about the causes of homosexual behaviour such non-conforming conduct was explained in supernatural terms.

Gaudio notes, however, that many members of the group cannot be called homosexuals in the strict sense because they were married and welcomed female sexual favours. Since some of the *yan daudu* actually choose the lifestyle, it is argued that for the *yan daudu* 'gender, sexuality and other 'identities' should be seen as practices rather than essences, as things people do rather than things people are.'¹⁶⁰ The *yan daudu* distinguish themselves from the *yan aras* – masculine men who may or may not be homosexuals but who have sex with both the *yan daudu* and other masculine men.¹⁶¹

The tolerance the group enjoyed prior to the coming of the colonialists was eroded in the colonial era. With the enforcement of the Sharia legal code in 12 northern Nigerian states the *yan daudu* have been further driven underground. The tendency to deny the reality of homosexual practices in Africa comes to the fore once again when one notes that some people believe the Kano gay sub-culture was imported into Northern Nigeria by the Arabs from the Middle East and North Africa.¹⁶² Research on the existence and prevalence of homosexuality in the South-west of Nigerian confirms the fact that homosexuals existed in Africa before the age of colonialism. Ajibade, for instance, came to this conclusion after studying oral Yoruba traditional texts.¹⁶³ Wazha has also argued forcefully against the biased assumption that homosexuality was imported from the West.¹⁶⁴

¹⁵⁹ B Fremont *Horses, musicians and gods: The Hausa cult of spirit possession* (1983), 122-123.

¹⁶⁰ Gaudio (n 158 above) 65.

¹⁶¹ Gaudio (n 158 above) 75 & 112.

¹⁶² Gaudio (n 158 above) 191.

¹⁶³ See Olanisebe and Adelokun (n 110 above) 200.

¹⁶⁴ W Lopang 'No place for gays: Colonialism and the African homosexual in African literature' (2014) 4 *International Journal of Humanities and Social Science* 77-83.

There is ample proof that homosexual orientation in Africa became a matter for legal intervention following the introduction of discriminatory anti-homosexuality laws by the British.¹⁶⁵ While noting that homosexuality was common in ancient Greece and Rome, Susan Haskins also points out that discrimination started with the Romans who frowned at penetrative sex involving aristocratic Romans as the passive partners.¹⁶⁶ What this implies is that same-sex relationships in ancient Rome reflected the patriarchal power structure as the concern was not so much with the wrongness of homosexual sex as it was with the protection of the masculinity of the aristocratic class.¹⁶⁷ The social disapproval of effeminate men was accorded legal legitimacy under Justinian. The Roman law against homosexual conduct entered England through the canon law of the church; from England these discriminatory laws found their way to the various British colonies in Asia and Africa in the era of Pax Britannica.

Given that homophobic sentiments were introduced into Africa from outside, it is surprising how fast these sentiments have spread and the intensity with which they are promoted. Scholars like Sylvia Tamale explain this phenomenon by pointedly accusing American evangelicals of encouraging and emboldening African religious and political leaders to support discriminatory laws.¹⁶⁸ However, John Anderson has insisted that the line of thinking adopted by scholars like Tamale is simplistic as it seems to deny agency to Africans.¹⁶⁹ Anderson believes Africans may have their own agenda independent of the American conservative right.

What is beyond dispute is the emphatic homophobic sentiments on display all over Africa. South Africa, the bastion of transformative

¹⁶⁵ Human Rights Watch *This alien legacy: The origins of 'sodomy' laws in British colonialism* <http://www.hrw.org/en/reports/2008/12/17/alien-legacy?print> (accessed 22 December 2008).

¹⁶⁶ S Haskins 'The influence of Roman laws regarding same-sex acts on homophobia in Africa' (2014) 14 *African Human Rights Law Journal* 393-406.

¹⁶⁷ Haskins (n 166 above) 405-406.

¹⁶⁸ S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 166.

¹⁶⁹ Anderson (n 102 above) 1602.

representative democracy in Africa, experiences a very high level of anti-homosexual behaviour. Indeed, Else Bonthuys fears that in South Africa ‘those who regard same-sex relationship as unacceptable constitute a very large, very vocal and probably numerically overwhelming group.’¹⁷⁰ Like Metz, Ebobrah holds out hope of the Africanisation of human rights,¹⁷¹ when Africans will cease to regard human rights and same-sex rights in particular, as preoccupations of Westerners. Ebobrah contends that when Africans domesticate the human rights culture, they will be better disposed towards welcoming sexual minorities in their midst. When the continent succeeds in domesticating LGBT rights it will become more obvious that homosexual conduct is not unAfrican after all.

5.5 Isaiah Berlin’s theory of liberty: A theoretical framework for the acceptance of homosexual rights in Nigeria?

Isaiah Berlin is one of the most important political philosophers of the 20th century. Like Mill before him, Berlin philosophised in the liberal tradition. He opposed totalitarian viewpoints and praised autonomy as an end in itself. Berlin identifies two forms of liberty, that is, negative and positive liberty. Berlin preferred negative liberty to positive liberty because of the former’s emphasis on individualism.

5.5.1 Negative liberty from Berlinian perspective

Berlin develops his idea of negative liberty most fully in his famous inaugural Oxford lecture, ‘Two concepts of liberty’. The essay itself is preoccupied with the question of coercion which Berlin announces as the chief question of political theory.¹⁷² He links negative liberty to the distinguished tradition of luminaries like Hobbes, Mill, Locks, Bentham, and Paine. To be free is to live without

¹⁷⁰ E Bonthuys ‘Irrational accommodation: Conscience, religion and same-sex marriage in South Africa’ (2008) 125 *South African Law Journal* 480.

¹⁷¹ Ebobrah (n 14 above) 110-136.

¹⁷² I Berlin ‘Two concepts of liberty’ in H Hardy (ed) *Freedom and its betrayal* (2014) 181.

coercion from external forces. To clarify the notion of freedom itself, Berlin distances the inability to realise one's goals from the condition of being prevented from realising one's goals. One cannot be said to lack freedom if he or she cannot realise their goals, but we rightly say a person has been denied his or her freedom if they are prevented from fulfilling themselves. Negative liberty carves out a private sphere that neither the state nor the community can intrude into. It guarantees a minimum set of values based on autonomy that cannot be violated for any reason without the degradation of the personal worth of the victim. In Berlin's words, the minimum is that 'which a man cannot give up without offending against the essence of our human nature.'¹⁷³ For Berlin, negative liberty validates the aspiration of the individual to be who they are and become what they want to become without anyone placing obstacles in their way. Negative liberty insists on individuals choosing their acts and expanding them in their own private spheres, unrestrained by the state, the group, or any institution such as the church.

So radical is Berlin's emphasis on autonomy that he questions Mill's emphasis on individualism for its own sake and agrees with Mill's antagonist Fitzjames Stephen that 'bold independence and fiery individualism' can thrive in totalitarian environments as much as in liberal democratic settings.¹⁷⁴ Individualism in the absence of autonomy is far from ideal, for Berlin. The ideal of freedom is the core of civilisation itself. It is driven by the wish not to be subject to the whims of anyone, the wish to be one's own master. Negative liberty is the wish 'to be left alone, to live one's life as one chooses, the very sense of privacy, of the area of personal relationships as sacred in its own right; the belief that it is more worthy of a human being to go to the bad in his own way than to the good under the control of a benevolent authority'.¹⁷⁵ This is the heart of Berlin's notion of negative liberty. Its platform is autonomy, freedom

¹⁷³ Berlin (n 172 above) 188.

¹⁷⁴ Berlin (n 172 above) 191.

¹⁷⁵ Berlin (n 172 above) 192.

from external interference, the right of persons to choose their goals and pursue them without interference from any external coercive force

5.5.2 Positive liberty from Berlinian perspective

By way of distinguishing positive liberty from negative liberty, Berlin asks the following questions. 'By whom am I governed? Who is to say what I am not to be or do?'¹⁷⁶ While negative liberty does not ask these questions positive liberty is preoccupied with them. Positive liberty is concerned with self-mastery, with self-control, and reasonableness. Consequently, positive liberty recognises the possibility of limits to personal desires. Positive liberty makes us keenly aware of the demands of rationality, for it requires the balancing of choice and consequences and the taking of responsibility for choices made.

Berlin tries to clarify that while there is indeed a connection between positive and negative liberty the two ideas are not the same. Berlin refers to the thought of Thomas Hill Green to make his point. Green's notion of positive liberty asserts the possibility of one not subject to coercion yet dominated by irrational desires to such an extent that one's condition can be compared to physical slavery.¹⁷⁷ This state of being mastered by one's so-called 'irrational' impulses is no freedom for Green while for Berlin it is part of the condition of autonomy. The excuse of searching for one's true 'nature' or 'self' or 'ideal' being all too often leads to the crushing of the impulses that make for autonomy. Positive liberty so conceived distinguishes between a real self that must be promoted and a lower self that must be suppressed. Often society, the state, the church, and other institutions with communitarian goals approve of the 'real' self and try to suppress the 'lower' self. Indeed, the group may even assure the individual that because he or she panders to the 'irrational' needs of the 'lower' self they do not know what is good for them and should be saved from their baser nature. Berlin thinks this positive conception of liberty, which

¹⁷⁶ Berlin (n 172 above) 194.

¹⁷⁷ Berlin (n 172 above) 195-196.

glorifies self-mastery, runs the risk of restricting autonomy even though positive liberty is a good just like negative liberty.

Berlin is very much a product of the Western liberal tradition, which took off in earnest with the work of Immanuel Kant, one of the greatest thinkers in the Western tradition. Kant replaced the ethnocentric worldview of the medieval world with the anthropocentric worldview of the modern world. His categorical imperative and formula of humanity marked a new conception of man as an autonomous being answerable only to reason and conscience. Kant's famous categorical imperative states that: 'Act only in accordance with that maxim through which you can at the same time will that it becomes a universal law'.¹⁷⁸ This call for justice yielded the formula of humanity which states that: 'Act so that you use humanity, as much in your own person as the person of every other, always at the same time as end and never merely as means'.¹⁷⁹ Kant's humanism broadly influenced Western liberalism and the liberal tradition,¹⁸⁰ from Mill to such contemporary thinkers as Berlin himself and John Rawls.¹⁸¹

Liberalism holds the fundamental view that people are free and that freedom cannot be restricted without reasonable justification. Liberalism encompasses a set of political, philosophical, economic, social, religious, and cultural views that champion tolerance, empathy, and individual rights.¹⁸² Liberals, following Kant, believe freedom is an end in itself and therefore worth promoting.¹⁸³ This is certainly the sense in which celebrated liberals like Mill, Joel Feinberg,¹⁸⁴ and John Kekes¹⁸⁵ conceive freedom.

The liberal tradition can contribute to the promotion of LGBT rights in Nigeria with its humanistic focus and respect for individual autonomy. It has worked for the West and can work for Nigeria once the fallacy of Western

¹⁷⁸ I Kant *Groundwork for the metaphysics of morals* (2002) 37.

¹⁷⁹ Kant (n 178 above) 47.

¹⁸⁰ Berlin (n 172 above).

¹⁸¹ J Rawls *Political liberalism* (1996).

¹⁸² N Capaldi *John Stuart Mill: A biography* (2004) 266-268.

¹⁸³ Capaldi (n 182 above) 229.

¹⁸⁴ J Feinberg *Harm to others* (1984).

¹⁸⁵ J Kekes *The morality of pluralism* (1993).

ideological colonisation is debunked with the submission that homosexuality has always been an African phenomenon in the same way that it has always been a Western phenomenon, and therefore a human phenomenon.

5.5.3 A critical evaluation of Berlin's theory and its applicability to the sexual minorities rights debate in Nigeria

Berlin's theory of freedom is radically libertarian. Berlin is ready to sanction individualism up to the level of individual eccentricity as long as the individual does not constitute a threat to other persons. As explained above, Berlin prefers that an individual ruins himself while being his own master than be subjected to the whims of those persons who may assume they know better what is good for him. In other words, Berlin considers liberty a supreme good just like Mill before him.¹⁸⁶ But the social setting is an arena of competing goods. Liberty is not the only good in a plural social environment. Social stability and group solidarity are also goods worth pursuing. While Berlin claims to recognise value pluralism, it is obvious that his preference is for liberalism, as we saw in the preceding section.

Berlin is of the view that commitment to liberalism does not rule out the capacity to empathise with persons who do not share one's beliefs.¹⁸⁷ The implication of Berlin's defence of pluralism is that tolerance is a desirable value to be cultivated in a plural social setting. However, Ferrell thinks that Berlin's liberalism clashes with his support for pluralism. He thinks that in a pluralist setting no single value, including liberalism, ought to be privileged.¹⁸⁸ He suggests that given the plurality of values that characterises modern society, Berlin has not sufficiently defended his liberal beliefs. Scholars like Kekes believe that liberalism need not imply pluralism as both are committed to

¹⁸⁶ Berlin (n 172 above) 177–241.

¹⁸⁷ Isaiah Berlin 'My intellectual path' in H Hardy (ed) *The power of ideas* (2000) 12.

¹⁸⁸ J Ferrell 'Isaiah Berlin: Liberalism and pluralism in theory and practice' (2009) 8 *Contemporary Political Theory* 296.

different goals.¹⁸⁹ For Berlin, however, the two values need not be in opposition. Berlin declares himself a liberal rationalist,¹⁹⁰ one who subscribes to the tenet of tolerance which promotes pluralism. Berlin is by no means under the illusion that liberty is the only good; he is only concerned with the danger posed by all forms of totalitarian tendencies, whether we are talking of the state, the community, or the church. Berlin's major concern is with human freedom as such, the right to be who and what you can be. Consequently, liberalism and pluralism are not in conflict. Berlin's theory of liberty throws up three main ideals to which he is strongly committed: The ideal of liberty as an end in itself; the ideal of pluralism as the way society is organised; and the ideal of tolerance which promotes fairness in a pluralist setting of competing rights.

These ideals are directly applicable to the Nigerian LGBT environment. If liberty is a good enjoyed by all persons by virtue of their humanity there is no reason for sexual minorities to be denied their freedom of action in furtherance of the maximum realisation of their individuality. Pluralism commits us to the acceptance that there are more than one sexual orientations, that in addition to the heterosexual lifestyle there are other lifestyles such as homosexuality, bisexuality, and transvestitism. But the acceptance of the reality of plural values is dependent on the activation of tolerance, a virtue seemingly scarce in today's Nigeria as far as the gay rights debate is concerned. The key demand of Berlin's radical conception of liberty is the demand that individual choice be respected and privacy protected from coercive invasion. Radical liberty is the 'desire not to be impinged upon, not to be dictated to, to be free from the arbitrary deprivation of rights and liberties.'¹⁹¹ LGBT rights are all about upholding this natural desire in humans not to be dictated to and to be allowed to live the way they wish. Morality demands that this innate human desire be respected in all persons, regardless of their sexual orientation. To deny any person the right to free expression of harmless desires critical for individual

¹⁸⁹ Kekes (n 185 above) 210.

¹⁹⁰ R Jahanbeglo *Conversations with Isaiah Berlin* (2000) 70.

¹⁹¹ Berlin (n 172 above) 192.

development is to condemn them to servitude. Interference in the lives of LGBT persons who have not broken the legitimate laws of the land and whose activities pose no threat to other persons and the state is irrational behaviour which grossly violates the principles of liberty as adumbrated by the great liberal thinkers.

5.6 Conclusion

Consensual adult homosexual conduct became a criminal offence in Nigeria with the arrival of the British colonialists.¹⁹² Before the colonial era homosexuality was fairly tolerated in Africa.¹⁹³ This is ironic given that one of the reasons for the widespread homophobia in Africa is the conviction that homosexuality is a Western cultural import. The colonial era anti-sodomy laws made their way into the Criminal Code operative in southern Nigeria and the Penal Code operative in northern Nigeria and have since been retained. With the introduction of Sharia into 12 northern states, two legal systems were antagonising the LGBT community, the Islamic legal system and the common law. As if the prevailing anti-sodomy laws in the country required further fortification, the Nigerian Senate voted in favour of the same-sex marriage prohibition bill which President Goodluck Jonathan signed into law promptly. The overwhelming support for the law across all strata of the Nigerian society clearly shows how rabidly anti-homosexual the Nigerian society is. Indeed, the 2013 Pew Global Attitude Project estimates that 98% of Nigerians oppose homosexuality.¹⁹⁴

Yet Nigeria is a state party to international treaties such as the ICCPR, ICESCR, the ACHPR, among others. Article 12 of the UDHR states explicitly: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

¹⁹² Haskins (n 166 above) 396.

¹⁹³ Gaudio (n 158 above).

¹⁹⁴ The Pew Research Centre (n 2 above).

Everyone has the right to the protection of the law against such interference or attacks.’ Article 2 of the ACHPR forbids discrimination of persons on the basis of sex. Article 17 of the ICCPR reinforces article 12 of the UDHR. The right of privacy guaranteed by these documents was instrumental to the wave of European Court rulings that paved the way for the current homosexual-friendly environment in the West.¹⁹⁵

As I showed in previous sections that religious beliefs, cultural relativism and a presumed Western ideological imperialism majority morality thesis are the most commonly held reasons for the overwhelming opposition to same-sex practices in Nigeria. Christianity is a religion founded on love and tolerance. Islam itself does not explicitly forbid homosexual conduct. The traditions of the Prophet are the main source of anti-homosexual laws in the Sharia legal system. The traditions of the Prophet have been dogged by the problem of accuracy due to the fact that some sayings of the Prophet were collected long after his death and could have been manipulated or even fabricated outright.¹⁹⁶

The imperialism or nationalist thesis asserts that homosexuality is a phenomenon not indigenous to Africa. According to this thesis, it is a Western habit being imposed on Africa. Closely tied to the imperialism thesis is the issue of cultural relativism which denies the universality of human rights and asserts that norms and values are culture-specific.¹⁹⁷ But we see in this chapter that homosexual conduct has always existed in Africa just as it has always existed in every human society. Homosexuality is a human phenomenon. Scientific research has since established that there is a biological basis of homosexuality.

If there is a biological basis of homosexuality, then further criminalisation serves no useful purpose except the unjust persecution of a minority group. Criminalising homosexual conduct is never going to stop some persons from

¹⁹⁵ See, for instance, the landmark judgment *Dudgeon v United Kingdom* ECHR (22 October 1981) Ser A45. The Court ruled that the criminalisation of homosexual practices between consenting adults violates Article 8 of the European Convention of Human Rights. The understanding of privacy was extended to the sphere of consensual same-sex practice.

¹⁹⁶ Rehman and Polymenopoulou (n 112 above) 19.

¹⁹⁷ Tesón (n 15 above).

being homosexual since it is in their biological nature to be homosexual. The liberal tradition of Mill, Berlin, Hart, Feinberg, and others can provide the theoretical framework for the acceptance of homosexual rights in Nigeria. The liberal tradition emphasises autonomy, individualism, and tolerance. These ideals when assimilated by Nigerians will lead to a cultural shift, a softening of the conservative perspective, without which attitudes cannot change. This shift will pave the way for the success of legal intervention.

Chapter 6: The emerging global trend on rights recognition for sexual minorities: Fertile sources of positive inspiration for the Nigerian LGBT rights discourse?

6.1 Introduction

The current chapter takes a voyage around the globe to investigate the emerging trends related to rights recognition for sexual minorities. Adopting a comparative analysis, this chapter examines how judiciaries of selected states have been able to deal with the question of rights for sexual minorities.

Like racial discrimination and apartheid, homophobia is a form of societal discrimination that ultimately manifests itself in the violation of rights of victims. Homophobia is based on social stereotyping, which is also upheld legally by states and legitimised, just as racial discrimination had been in the US and apartheid in South Africa. The good news, however, is that the walls of homophobia is gradually cracking, with increased rights recognition for sexual minorities in a growing number of countries.¹

While much of the world is tilting towards decriminalisation of consensual adult same-sex behaviour and extending rights recognition to sexual minorities, the same cannot on the whole be said about the African continent, where countries are, instead entrenching more anti-homosexual laws in addition to those that had been inherited by the former colonial master, Britain, thus instigating a new wave of particularly pernicious homophobia in the continent.²

¹ Countries that have accorded varying degrees of sexual rights to persons of the same sex include Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, United States, Mexico, Denmark, United Kingdom, New Zealand, Uruguay, Greenland, Andorra, Australia, Austria, Colombia, Croatia, the Czech Republic, Ecuador, France, Germany, Hungary, Ireland, Israel, Luxembourg, Slovenia and Switzerland. See JD Wilets 'From divergence to convergence? A comparative and international law analysis of LGBTI rights in the context of race and post-colonialism' (2011) 21 *Duke Journal of Comparative & International Law* 644-645. See also J Adibe 'The politics of same sex marriage in Nigeria' (2012) 1 *Journal of African Union Studies* 100.

² F Viljoen *International human rights law in Africa* (2012) 259. The author identifies discrimination in the form of criminalisation of consensual adult same-sex affairs, physical assault, corrective rape, arbitrary arrests, extortion, etc, as some form of display of homophobia in the continent of Africa.

This chapter aims to show the role the emerging consensus on rights recognition for LGBTs can play with respect to law reform in Nigeria, in order to provide succour for LGBTs. The countries that will be used as comparators had through their judiciaries dealt with arguments for criminalising adult same-sex conduct. This chapter identifies South Africa, whose legal and judicial reforms in rights recognition will be beneficial to Nigeria. The chapter further selects other African countries, in particular, Uganda, Botswana, Kenya and others that have similar sodomy laws as Nigeria, but have made at least some appreciable progress in the march towards decriminalisation. In the Asian continent, India is a choice comparator because of the similarity it shares with Nigeria in terms of the sodomy provision of its penal law, public morality provision of its Constitution, and the peculiar sexual minority community in India. The chapter also looks at two key regional human rights system where considerable progress has been made in terms of rights recognition for sexual minorities.

6.2 The South African perspective on the recognition of human rights for sexual minorities: A historical overview

South Africa, no doubt, is the leading jurisdiction in sexual minorities' rights jurisprudence in Africa. The Constitution has been hyped for its transformative impact on the South African society.³ A testament to the constitutionally protected places for sexual minorities is the unprecedented inclusion of 'sexual orientation' as a ground for non-discrimination under South African law.⁴ The international attention the South African Constitution generates is attributed to

³ J Klaaren, J Dugard & J Handmaker 'Public interest litigation in South Africa: Special issue introduction' (2011) 27 *South African Journal of Human Rights* 1.

⁴ Section 9(3) of the Constitution of the Republic of South Africa, 1996, provides as follows: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, culture, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. Vollenhoven & Els similarly assert that 'South Africa was the first country to adopt a Constitution that protects people from discrimination on grounds of sexual orientation'- WJ Van Vollenhoven and CJ Els 'The human rights paradox of lesbian, gay, bisexual and transgender students in South African education' (2013) 46 *De Jure* 265.

the room of equality and non-discrimination it accords to homosexuals.⁵ As laudable as the current South African law on sexual minorities' rights is, South Africa, like other countries, has had an unpleasant history of rights violation against sexual minorities.⁶ Vollenhoven and Els trace the existence of adult male consensual sex as a common law crime in South Africa to back as far as 1872.⁷ Costa Santos rightly attributes the presence of sodomy laws in South Africa to colonial influence, which lingered for almost 200 years.⁸

According to De Ru, apartheid South Africa promoted arbitrary state interference in the privacy of citizens.⁹ This interference was also extended to sexual intimacy between males which was prohibited by the common-law offence of sodomy and unnatural sexual acts in terms of the Immorality Act 5 of 1927.¹⁰ Further, under apartheid, the Immorality Act was repealed and replaced with the Sexual Offences Act 23 of 1957.¹¹ The regulation of sexuality was not only reflected in the criminal law of apartheid South Africa, the regulation also manifested in various pieces of legislation.¹²

A major catalyst that triggered awareness for rights recognition for sexual minorities in South Africa is the emergence of LGBT-affiliated organisations rooted in rights activism. Barnard-Naude notes that the criminalisation of homosexual conduct with its attendant persecution of homosexuals coincided with the anti-apartheid struggle.¹³ According to De Ru, the global outcry against

⁵ C Potgieter & FCG Reygan 'Lesbian, gay and bisexual citizenship: A case study as represented in a sample of South African life orientation textbooks' (2012) 30 *Perspectives in Education* 39.

⁶ Vollenhoven & Els (n 4 above) 263.

⁷ Vollenhoven & Els (n 4 above) 263.

⁸ GG da Costa Santos 'Decriminalising homosexuality in Africa; lessons from the South African experience' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013) 313-314.

⁹ H De Ru 'The recognition of same sex union in South Africa' Unpublished LLM thesis, University of South Africa, 2009 16.

¹⁰ De Ru (n 9 above) 16.

¹¹ De Ru (n 9 above) 16.

¹² J Barnard-Naude 'Sexual minority freedom and the heteronormative hegemony in South Africa' in O Vilhena, U Baxi, F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 312.

¹³ Barnard-Naude (n 12 above) 313.

the apartheid government in the late 1980s for the abuse and discrimination directed towards black people gave impetus to the establishment of gay and lesbian movements which in turn placed the homosexual rights concern as an agenda of the anti-apartheid struggle both in South Africa and abroad.¹⁴ The homosexual rights issue was greatly enhanced by the fact that some of the anti-apartheid activists were openly homosexuals.¹⁵ While De Ru in her account of the history of gay and lesbian movements in South Africa suggests that a viable homosexual movement emerged during the 1980s, noticeably with the creation of Gay Association of South Africa (GASA) in 1982,¹⁶ Ashley traced the gay and lesbian movement to the 1960s and 1970s.¹⁷ Currier specifically identified the police raid of white gays in a Johannesburg gay party in January 1967 as the event triggering the launch of a maiden Homosexual Law Reform Fund in 1968.¹⁸ Currier further points to the establishment of the Gay Aid Identification Development Movement in 1976 in Durban.¹⁹ Currier's account of the 1960 and 1970 gay and lesbian movement discloses the fact that it was a purely 'whites-only' affair.

The 1980s came with the establishment of a more organised Gay and Lesbian Association of South Africa (GASA) dedicated to the promotion of the cause of white gay men.²⁰ GASA with its broad establishment was yet dogged by racism as 'black gay men and lesbians remained minorities in GASA'.²¹ Another setback for GASA was the fact that it remained seemingly unsympathetic to the anti-apartheid cause, an ideology that affected the international reputation of

¹⁴ De Ru (n 9 above) 17.

¹⁵ H De Ru 'A historical perspective on the recognition of same sex unions in South Africa' (2013) 19 *Fundamina: A Journal of Legal History* 227-228.

¹⁶ De Ru (n 9 above) 17.

¹⁷ AM Currier 'The visibility of sexual minority movement organisations in Namibia and South Africa' unpublished PhD thesis, University of Pittsburg, 2007 31 – 36.

¹⁸ Currier (n 17 above) 33.

¹⁹ Currier (n 17 above) 35.

²⁰ P De Vos 'The inevitability of same sex marriage in South Africa's post-Apartheid state' (2007) 23 *South African Journal on Human Rights* 432. Currier (n 17 above) 38, states that on its formation in 1982, GASA became 'the first national-level gay and lesbian SMO, recruited white, middle-class gay men and lesbians as dues-paying members and established branches throughout the country'.

²¹ Currier (n 17 above) 38.

the organisation with the resultant expulsion from membership of International Lesbian and Gay Alliance (ILGA).²² As noted earlier, GASA was suspended from IGLA due to its racist stance and non-interference in the apartheid question. Costa Santos also attests that the arrest of Simon Nkoli a member of the GASA for anti-apartheid protests in 1986 and the conspiratorial silence of the organisation helped expose the internal contradictions of GASA.²³ Currier records that even as an active member of GASA Simon Nkoli had carved an internal faction of black gay men, with threat of expulsion from the dominant white GASA members.²⁴ Nkoli's travails at the hands of the apartheid governments and his gay rights activism contributed immensely in his becoming 'internationally visible as a bridge between gay and anti-apartheid organising'.²⁵

Owing to the internal contradictions rocking GASA two further movements emerged with the formation of Lesbian and Gays against Oppression (LAGO) in Cape Town. De Ru describes the LAGO as the first with obvious ties to, and working in tandem with, anti-apartheid organisations.²⁶ Simon Nkoli, a now internationally acclaimed figure in the gay rights and anti-apartheid struggle, also established Gay and Lesbian Organisation of the Witwatersrand (GLOW) in 1988. Most members were black activists under his leadership.²⁷ Nkoli articulated his pro-gay and anti-apartheid stance when he stated: 'I am fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.'²⁸ With the demolition of GASA, and the creation of the two major organisations, the gay rights movement became immersed in the anti-apartheid struggle.²⁹ The melting point of the leading pro-

²² De Ru (n 9 above) 18. Currier in his own account of the chain of event that led to the expulsion of GASA from ILGA points out that GASA's silence on Simon Nkoli's (a black gay and anti-apartheid activist) imprisonment was a confirmation of its apolitical stance on Apartheid.

²³ Costa Santos (n 8 above) 318.

²⁴ Currier (n 17 above) 39.

²⁵ Currier (n 17 above) 39.

²⁶ De Ru (n 15 above) 227.

²⁷ De Ru (n 15 above) 227.

²⁸ Quoted in De Ru (n 15 above) 227.

²⁹ Currier (n 17 above) 39.

gay and anti-apartheid groups was the merger with the United Democratic Fund (UDF), an international political outfit that brought many anti-apartheid organisations under its umbrella.³⁰

Despite the growing alliance of the gay movements and the anti-apartheid struggle largely projected by the African National Congress (ANC), there were little pockets of resistance to gay acceptance within the ANC fold. A leading human rights activist and female member of the ANC, expressed contempt for the gay rights struggle. According to Currier, Ruth Mompoti viewed 'gay and lesbian organising as potentially derailing the ANC's effort to liberate South Africans from apartheid rule'.³¹ Currier further recorded that ANC through its then Director of Information, Thabo Mbeki, took an official position that countered Mompoti's views and re-emphasised ANC's commitment to protection of sexual minorities' rights.³² With sexual minority rights becoming an integral part of the ANC policy thrust, the party included the agitation for rights recognition for LGBTs in its pre-democracy constitutional proposals.³³ In both the interim constitution and final constitution, equality provisions were created for sexual minorities.³⁴

6.2.1 The South African Constitution, 1996, and the jurisprudence of sexual orientation

In December 1996, President Nelson Mandela signed into law a new South African Constitution which became the first in the world to include a sexual orientation clause under its Bill of Rights.³⁵ One of the major features of the

³⁰ Santos (n 8 above) 319.

³¹ Currier (n 17 above) 41.

³² Currier (n 17 above) 42.

³³ Banard-Naude (n 12 above) 313.

³⁴ For a detailed discussion of how the non-discrimination provision on the ground of sexual orientation crept into the interim constitution and the final constitution, see De Ru (n 9 above) 21-26.

³⁵ Sean Hagen 'An investigation into the attitude of male and female university students towards the legalization of gay marriage in South Africa' available at reference-sabinet.Co.2a/sa_epublication_article/unipsyc_vz_a2_al p/1

apartheid regime in South Africa was discrimination, chiefly on the ground of race. Deane remarks that the issue of racial discrimination has always occurred in other parts of the world but South Africa's case is peculiar because the discrimination was not only legalised but also institutionalised.³⁶ Another notable ground of discrimination in apartheid South Africa was sexual orientation.³⁷ In sharp contrast to the apartheid era, the Constitution of South Africa ushered in a democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-socialism and non-sexism.³⁸ The Constitution contains Bill of Rights, which according to Le Roux serves as a 'post-liberal manifesto for the transformation of post-apartheid society into a multi-cultural and egalitarian social democracy'.³⁹

The Bill of Rights has been aptly described as the cornerstone of democracy in South Africa, embodying the rights of the citizenry while affirming the democratic values of human dignity, equality and freedom.⁴⁰ The South African Constitution is emphatic that 'the state must respect, protect, promote and fulfill the rights in the Bills of Rights.'⁴¹ The South African Constitution provides for the following among other rights, the right to human dignity,⁴² the right to life⁴³ the right to freedom and security of the person,⁴⁴ the freedom from slavery, servitude and forced labour,⁴⁵ the rights to privacy,⁴⁶ the freedom of religion, belief and opinion,⁴⁷ the right to freedom of expression,⁴⁸ the right to

³⁶ T Deane 'Understanding the need for anti-discriminatory legislation in South Africa' (2005) 3 *Fundamina: A Journal of Legal History* 1.

³⁷ See Vollenhoven & Els (n 4 above) 263-264.

³⁸ Section 1(a)(b) of RSA Constitution 1996.

³⁹ W Le Roux 'Descriptive overview of the South African Constitution and Constitutional Court' in (n 12 above) 145.

⁴⁰ Section 7(1) CRSA.

⁴¹ Section 7(3) CRSA.

⁴² Section 10 CRSA.

⁴³ Section 11 CRSA.

⁴⁴ Section 12 CRSA.

⁴⁵ Section 13 CRSA.

⁴⁶ Section 14 CRSA.

⁴⁷ Section 15 CRSA.

⁴⁸ Section 16 CRSA.

peaceful assembly,⁴⁹ and the freedom of association.⁵⁰ These rights together with other political and socio-economic rights form the core of the Bill of Rights.⁵¹ It is, however, the equality clause of the South African Constitution that raises the interest of this segment of the research. While emphasising on the unique innovation of the equality clause in the South African Constitution, Govender rightly points out that while apartheid brazenly promoted inequality, the South Africa Constitution prioritises the achievement of equality.⁵² Section 9(1) of the South Africa Constitution reiterates the principles of equality of all before the law as confirmed by the Preamble.⁵³ It expands the definition of equality to include the full and equal enjoyment of all rights and freedoms.⁵⁴ Section 9(3) went further to forbid the state from unfairly discriminating directly or indirectly against anyone on 16 listed grounds among which is sexual orientation.⁵⁵ The inclusion of sexual orientation as a ground of non-discrimination in the South African Constitution brings to a climax the agitation for rights recognition for sexual minorities in South Africa. The provision of section 9(3) of the South African Constitution will now become a template for enforcement of rights of LGBTs and a veritable ground for South African courts to declare discriminatory sodomy laws or actions unconstitutional.

6.2.2 Overview of South Africa's legislative developments towards recognition of LGBT rights

Usha Jivan points out that South Africa has gone through a streamlined legislative procedure in rights recognition for sexual minorities.⁵⁶ Jivan

⁴⁹ Section 17 CRSA.

⁵⁰ Section 18 CRSA.

⁵¹ See chapter 2 of the CRSA for the full provisions of the Bill of Rights.

⁵² K Govender 'Equality, sexuality and taking rights seriously' (2008) 29 *Obiter* 6.

⁵³ Section 9(1) states that 'everyone is equal before the law and has the right to equal protection and benefit of the law'.

⁵⁴ Section 9(2).

⁵⁵ The other grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.

⁵⁶ U Jivan 'From individual protection to recognition of relationships: Same-sex couples and the South African experience of sexual orientation reform' (2007) 11 *Law, Democracy & Development* 27.

succinctly brings the legislative steps taken by South Africa under the sphere of criminal law, civil law and family law.⁵⁷

Decriminalisation of homosexual conduct in South Africa took effect with the inclusion of the equality clause in the final Constitution of South Africa. Having prohibited discrimination on the grounds of sexual orientation, section 9(3) technically ousted the anti-sodomy provisions of section 20A of the Sexual Offences Act of 1957. Thus, it can be safely concluded that the journey to law reform on the matter of sexual orientation in South Africa started with the unprecedented provision of section 9(3) of the 1996 Constitution of South Africa.⁵⁸ According to Jivan, the motive of the anti-discriminatory clause is to ensure equal treatment for individual lesbians and gay men.⁵⁹ The section lifts the criminality status hitherto placed on homosexuals, thereby becoming the basis for judicial pronouncements striking out discriminating provisions in the penal order of South Africa (some of these judicial decisions are discussed in the following section of this chapter).

In what follows, I analyse the legislative enactments intended to provide reprieve for sexual minorities after the decriminalisation effect of section 9(3) of the Constitution.

The Maintenance Act 99 of 1998 in its Preamble restates the supremacy of the South African Constitution as a law adopted on the basis of democratic values accessible non-discriminately to all citizens.⁶⁰ Specifically, the Act stipulates that its provisions 'shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship

⁵⁷ Jivan (n 56 above) 27. He identifies the decriminalisation of laws prohibiting consensual adult male sex in South Africa under the criminal law reform, while in the area of civil law discriminatory laws against homosexuals have also been rendered a nullity with the legislative bodies enacting laws that place homosexuals at par with their heterosexual counterparts. The last stage of reforms which is in the family law terrain is the extension of marriage rights to same sex couples.

⁵⁸ Costa Santos (n 8 above) 326, argues that 'the enactment of the Constitution can be considered the first step towards abolition of the judicial engine that criminalised several aspect of sexuality'.

⁵⁹ Jivan (n 56 above) 26.

⁶⁰ Preamble to the Maintenance Act 99 of 1998.

between those persons giving rise to that duty'.⁶¹ De Ru interprets this section to mean that a contractual duty of support by same-sex life partners who have agreed on a duty to support each other can arise.⁶² The essence of the Act is basically to acknowledge the existence of a legal obligation of support between parties,⁶³ homosexual parties inclusive.

Jivan bemoans the disadvantaged position of homosexual partners before 1994, in terms of legal benefits that accrue to heterosexual couples that their homosexual counterparts cannot access simply because homosexual unions were then forbidden.⁶⁴ He lists one of the innovations of the Act to include benefits and obligations in respect of children of heterosexual couples, which hitherto were not available to homosexual couples.⁶⁵ However, the non-discriminatory provision of section 2(1) of the Maintenance Act has cured this disadvantage. Prior to the enactment of the Domestic Violence Act 116 of 1998, the Prevention of Family Violence Act subsisted. Jivan, however, notes that one of the shortcomings of the Prevention of Family Violence Act is that it did not extend the protection which it conferred on heterosexual couples to same sex couples.⁶⁶ The Act defines a domestic relationship to mean a relationship between a complainant and a respondent in any of the following ways:⁶⁷

- (a) They are or were married to each other, including marriage according to any law, custom or religion.
- (b) They (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to marry each other.

⁶¹ Section 2(1) Maintenance Act 1998.

⁶² De Ru (n 9 above) 26.

⁶³ TL Coutts 'A critical analysis of the implementation of the Maintenance Act of 1998: Difficulties experienced by the unrepresented public in the Maintenance Court as a result of the poor implementation of the Act' unpublished LLM dissertation, University of Kwazulu-Natal, 2015 14.

⁶⁴ Jivan (n 56 above) 24.

⁶⁵ Jivan (n 56 above) 24.

⁶⁶ Jivan (n 56 above) 26.

⁶⁷ Section 1 Domestic Violence Act.

By this provision, homosexual couples and partners are expressly protected under this Act from physical abuse, sexual abuse, emotional abuse and psychological abuse, economic abuse, intimidation, etc.⁶⁸

The Medical Schemes Act 131 of 1998 Act robustly provides for sexual minorities by listing sexual orientation as one of the prohibited grounds of discrimination.⁶⁹ The Employment Equity Act 55 of 1998, similar to the Medical Schemes Act also mentioned specifically sexual orientation as a prohibited ground from discrimination.⁷⁰ The Act also forbids harassment of an employee on the basis of sexual orientation as such conduct amounts to unfair discrimination.⁷¹ The Act derogates from the general principle of 'unfair discrimination' in the event of inherent or special requirement for a particular job.⁷² Where an employee is unfairly dismissed on the above grounds, including sexual orientation, such dismissal is null and void.⁷³

The Rental Housing Act 50 of 1999 aims at regulating the relationship between a landlord and tenants and potential tenants in all types of rental housing. The Act forbids discrimination in rental housing on the ground of sexual orientation among other grounds.⁷⁴ The Promotion of Equality and

⁶⁸ See (n 67 above) for additional list of acts amounting to domestic violence.

⁶⁹ Section 24(2)(e) Medical Schemes Act No 131 of 1998. In spite of the prohibition of discrimination on the ground of sexual orientation, the Act has drawn criticism from academic quarters. Louw has criticised the rather broad definition given to the concept of 'dependent' in the Act as this ambiguity might give rise to different scenario which might occasion discretionary powers to medical schemes to decide which relationship to recognise for the purpose of dependency. For Louw, the ambiguity of what constitutes the legal minimum has become the dilemma of same sex partners under the Act. In sharp contrast to married heterosexuals, who by reason of their marriage, are automatically registered with a medical aid scheme, homosexual partners are subjected to the discretionary treatment of the medical scheme. See R Louw 'Sexual orientation' (1997) 245 *South African Human Rights Year Book* 252. Jivan (n 26 above) 30.

⁷⁰ Section 6(1) EEA 1998.

⁷¹ Section 6(3) EEA 1998.

⁷² Section 6(2) of the Act states that 'it is not unfair to – (a) take affirmative action measures consistent with the purpose of this act; or (b) distinguish, exclude, or prefer any person on the basis of an inherent requirement of a job.

⁷³ For instance, section 187(1)(f) of the Labour Relations Act, 1995 states that 'a dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to section 549 or if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

⁷⁴ Section 4(1) Rental Housing Act 50 of 1999.

Prevention of Unfair Discrimination Act 4 of 2000 prohibits discrimination on the grounds listed in section 9(3) of the South African Constitution. The Act creates equality courts to specifically hear matters relating to unfair discrimination on prohibited grounds.⁷⁵ Aside from including sexual orientation as one of the prohibited grounds of discrimination,⁷⁶ the Act explicitly defines 'marital status' to include 'the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship'.⁷⁷ To give the Equality Act a broader scope, the Judicial Matters Amendment Act, 2005 amends the PEPUDA to accommodate intersex in its jurisprudence of sex as one of the prohibited grounds of discrimination.⁷⁸

South Africa's immigration law did not recognise the right of homosexual citizens and residents to sponsor their homosexual partners for permanent residency.⁷⁹ According to Jivan, gay and lesbian partners were not entitled to the benefits of Section 25(5) of the Alien Control Act which heterosexual couples enjoyed.⁸⁰ Thus in a deft move to enable citizens to sponsor their homosexual partners for permanent residency the Immigration Act 13 of 2002, defines a spouse as follows:

[A] person who is a party to a marriage, or a customary union, or a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a prescribed affidavit and substantiated by a notarial contract and 'spousal relationship' has a corresponding meaning.⁸¹

⁷⁵ Section 16(1)(a) of PEPUDA 2000 grants every High Court to assume the status of an equality court for the area of its jurisdiction.

⁷⁶ Section 1(xxii) of PEPUDA 2000.

⁷⁷ Section 1(xv) PEPUDA 2000.

⁷⁸ Section 16 of the Judicial Matters Amendment Act, 2005 states that 'section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended- (a) by the insertion in subsection (a) after the definition of 'HIV/AIDS status' of the following definition: 'intersex means a congenital sexual differentiation which is atypical, to whatever degree; and (b) by the insertion in subsection (1) after the definition of 'sector' of the following definition. 'sex includes intersex'.

⁷⁹ See section 25(5) of the Alien Control Act 96 of 1991.

⁸⁰ Jivan (n 56 above) 25-26.

⁸¹ Section 1 (xxxvii) Immigration Act 2002.

Having broken the yoke of discrimination by outrightly defining ‘spouse’ to encompass both heterosexual and homosexual marital relationship, the Act extends permanent residence permit to a foreigner who is the spouse of a citizen or resident on the satisfaction of the department requirement that a good faith spousal relationship exists.⁸² South Africa immigration law also holds a place for LGBT refugees seeking succor and asylum in South Africa. The Refugees Act, 1998, accommodates sexual minorities under the umbrella of ‘social group’⁸³ which is listed as a ground of persecution and intimidation that could afford one eligibility status to seek for refugee status in South Africa.⁸⁴

Homosexual couples were not accorded parental options of adoption like their heterosexual counterparts basically because the Child Care Act 74 of 1983 vested these rights in only heterosexual couples.⁸⁵ However, with the enactment of the Children’s Act 38 of 2005 a child may be adopted jointly by a husband and wife, partners in a permanent domestic life partnership, or other persons sharing a common household and forming a permanent family unit.⁸⁶ Though same-sex partnership has not been categorically mentioned in the Act it has been given judicial interpretation in *Du Toit and Anor v Minister of Welfare and Population Dev. & Ors*⁸⁷ (this case is fully discussed in later part in this chapter).

The Civil Union Act 17 of 2006 became the climax of the legislative developments in South Africa towards the recognition of rights for sexual minorities. In the words of Nomthandazo Nttamel, the Act ‘serves as a direct and accessible legal instrument in laying foundation for the equal rights of people in same-sex relationships, as it seeks to limit any potential for reliance on the courts for enforcing the right to equality’.⁸⁸ The foregoing legislative actions of

⁸² Section 26 IMA 2002.

⁸³ See Refugees Act 1998. Section 1(xxi) defines ‘social group’ to include among others, a group of persons of particular gender, sexual orientation, disability, class or caste.

⁸⁴ Section 2 and 3 of the Refugees Act 1998.

⁸⁵ Jivan (n 56 above) 24.

⁸⁶ Section 231 (1)(a) of Children’s Act 38 of 2005.

⁸⁷ 2003 (2) SA 198 (CC).

⁸⁸ N Ntlama ‘A brief overview of the Civil Union Act’ (2010) 13 *Potchefstroom Electronic Law Journal* 191.

the South African state have re-echoed several rights for gays and lesbians; however there was a vacuum that existed to be filled. The right of same-sex partners to get legal recognition to marry from the state had no statutory backing. For Jivan, the symbolic value of marriage and its social relevance in society could as well be motivating factors for homosexual to agitate for state legalisation of same sex marriage.⁸⁹ Jivan notes that ‘the opening of the institution of marriage to gays and lesbians would be a form of legal celebration of homosexuality and an indication that gays and lesbians are closer to a position of real legal equality’.⁹⁰ It is the ‘legal equality’ to marry that makes the Civil Union Act unique. The Act came into effect on 30 November 2006 as a result of the judgement in *Minister of Home Affairs v Fourie*.⁹¹

6.2.3 The judicial process that led to rights recognition for sexual minorities in South Africa

6.2.3.1 The pioneer decision in South Africa

With section 9 of the South African Constitution firmly prohibiting discrimination against persons on the basis of their sexual orientation, the case of *National Coalition for Gay and Lesbians Equality v Minister of Justice*,⁹² became the first opportunity afforded the Constitutional Court to invalidate and nullify the common law offence of sodomy.

The equality clause provision of section 9(3) of the South African Constitution became the basis for a Witwatersrand Court to void the criminalisation of same-sex activities between two consenting adults. The matter before the Constitutional Court relates to the confirmation of an order of invalidity of section 20A of the Sexual Offences Act, 1957, made by Heher J in the Witwatersrand High Court sometimes in May 1998.⁹³

⁸⁹ Jivan (n 56 above) 38-39.

⁹⁰ Jivan (n 56 above) 39.

⁹¹ 2006 1 SA 524 (CC) at para 61.

⁹² 1999(1) SA 6 (CC).

⁹³ *NCGLE* (n 92 above) para 1.

In the judgment of the Constitutional Court, Ackermann J, proffered a definition of sexual orientation with a panoramic inclusion of not just gays and lesbians but also bisexuals, and transsexuals.⁹⁴ Ackermann J devoted a great deal of time analysing the impact of discriminatory sodomy laws on gays and lesbians as a minority in a dominant heterosexual political society. In his words: ‘the impact is severe, affecting the dignity, personhood and identity of gay men at a deep level’.⁹⁵ Ackermann J laid bare the fact that sodomy in itself is a harmless conduct of adults which the law targets to regulate based on moral and religious justifications.⁹⁶ Ackermann J reiterated the fact that sodomy laws do not only affect the equality rights of gay men but also constitute a threat and violation of the right to dignity of the human person and right to privacy provided and guaranteed by the South African Constitution.⁹⁷

While also arguing that sodomy laws interfere with inter-human relationship, and thus in a breach of the constitutional right to privacy, Ackermann J asserted that ‘the way we give expression to our sexuality is at the core of private intimacy’.⁹⁸ Thus, to the learned Judge, sodomy laws are discriminatory because they breach the rights of privacy and dignity of the human person.⁹⁹

Sachs J, in his concurring judgment, questioned the motive of the law in criminalising consensual same sex conduct. He advances his argument in the following forceful words:

It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norms is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury.

⁹⁴ *NCGLE* (n 92 above) para 20-21.

⁹⁵ *NCGLE* (n 92 above) para 26(a).

⁹⁶ *NCGLE* (n 92 above) para 26(b).

⁹⁷ *NCGLE* (n 92 above) para 28.

⁹⁸ *NCGLE* (n 92 above) para 32.

⁹⁹ *NCGLE* (n 92 above) para 32.

In the case of male homosexuality, however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm.¹⁰⁰

Sachs J, agreeing with Ackermann J, rightly observed that ‘the invalidation of anti-sodomy laws will mark an important moment in the maturing of an open democracy based on dignity, freedom and equality’.¹⁰¹ Sachs J, optimistically held the view that the judgment of the trial court so affirmed holds a balancing effect for the South African society: one, for the gays and lesbians who can now freely express their sexuality, and for heterosexuals who are free to also hold on to their religious beliefs.¹⁰²

6.2.3.2 Judicial decisions according equal rights and benefits to homosexual partners

In the case of the *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs*,¹⁰³ the provision of the Aliens Control Act was subjected to intense judicial scrutiny. The main issue raised in this case is the inconsistency of section 25(5) of the Aliens Control Act 98 of 1991 with section 172(1)(b) of the 1996 Constitution of South Africa, which allows the immigration of spouses of permanent South African residents while not extending the same benefits to homosexuals in same-sex life partnerships with permanent South Africa residents.¹⁰⁴

Ackermann J rejected in its entirety the thesis of the respondent that exclusion of same sex life partners from the gains of section 25(5) was government’s own policy of protecting heterosexual families from negative value impact of homosexuality.¹⁰⁵ In his final remarks, the learned judge asserted that

[t]here is nothing in the scales to counteract such conclusion. I accordingly hold that section 25(5) constitutes unfair discrimination and a serious limitation of

¹⁰⁰ *NCGLE* (n 92 above) para 108.

¹⁰¹ *NCGLE* (n 92 above) para 135.

¹⁰² *NCGLE* (n 92 above) para 137.

¹⁰³ 2000 (2) SA I (CC).

¹⁰⁴ *NCGLE* (n 103 above) para 1.

¹⁰⁵ *NCGLE* (n 103 above) para 56.

the section 9(3) equality rights of gays and lesbians who are permanent residents in the Republic and who are in permanent same-sex life partnership with foreign nationals.¹⁰⁶

The case of *Farr v Mutual and Federal Insurance Company Ltd*¹⁰⁷ presents an opportunity for the court to determine what constitutes a family and who qualifies to be a member of a family. According to Louw J, to narrow the meaning and interpretation of 'family' in clause 2.1.1 to only heterosexual relationships and partners would mean hurting the spirit and intendment of the non-discriminatory provision of section 9 of the Constitution. He concluded that 'Johnson is indeed a member of the applicant's family within the meaning of exclusions clause 2.1.1 of the policy and that the application should be dismissed'.¹⁰⁸

*Suzanne Du Toit and Anor v The Minister for Welfare and Population Development*¹⁰⁹ presents another path-finding case that charted a course for rights recognition for same-sex partners. Susan Du Toit and Anna-Marie De Vos, first and second applicant in the suit respectively, had been in a long lesbian relationship and their quest to adopt two children was hampered by the prevailing legislation on adoption, which resulted in the second applicant becoming the sole adoptive parent.¹¹⁰ The applicants challenged the

¹⁰⁶ *NCGLE* (n 103 above) para 57.

¹⁰⁷ 2000 (3) SA 684 (C). The fact of the case discloses that on 13 July 1996, Paul Johnson was in the same vehicle with the applicant when they were involved in an auto-accident. Having been injured in the accident, he claims damages from the applicant. On seeking indemnity for the third party (Mr Johnson), the respondent rejected any claim by the applicant for indemnification on the basis of an exclusion clause in Motor Insurance Policy. The applicant approached the court for an order compelling the respondent to indemnify him against any claim brought by Paul Johnson occasioned by injuries sustained in the accident. Further facts showed that the applicant and Paul Johnson have cohabited and maintained an intimate homosexual relationship for an unbroken period of 10 years, and Johnson appears a beneficiary in the applicant's will. It was the submission of counsel to the respondent that 'having regard to the context and in particular the probable purpose of including clause 2.1.1 in the contract of insurance, the word 'family' should be construed to include same-sex partners living together with same permanency in the manner that a husband and wife would live together'. See para F-G 685, para A-F 686, para B 687.

¹⁰⁸ *Farr* (n 107 above) para E-I 690.

¹⁰⁹ 2002 10 BCLR 1006 (CC).

¹¹⁰ *Du Toit* (n 109 above) para 1.

constitutional validity of section 17(a), 17(c) and 20(1) of the Child Care Act,¹¹¹ and section 1(2) of the Guardianship Act¹¹² on the grounds that the two legislations are discriminatory of their sexual orientation and are contrary to their equality rights and dignity as provided and protected under sections 9(3) and 10 of the Constitution.¹¹³ The applicants approached the Constitutional Court for confirmation of the judgment of the Pretoria High Court.

Skweyiya AJ, delivering a unanimous judgment of the Constitutional Court, argued that ‘excluding partners in same-sex life partnership from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principles enshrined in section 28(2) of the constitution’.¹¹⁴ Agreeing in totality with the position of the High Court on the discriminatory effect of the legislation, Skweyiya further noted that the provisions of section 17(a) and (c) are in conflict with section 9(3) of the South African Constitution.¹¹⁵

Jivan notes that the judgment goes beyond conferring the same parental right to adoption and guardianship on homosexual as previously enjoyed solely by heterosexual couples, and firmly acknowledges committed homosexual relationships.¹¹⁶

The trend in Du Toit’s case was also re-echoed in *J & B v Director General, Department of Home Affairs*.¹¹⁷ The applicants approached the Durban High

¹¹¹ Act 74 of 1983. Section 17(a) and (c) of the Act provides to the effect that a child can be adopted by a husband and his wife jointly; and by a married person whose spouse is the parent of the child. Section 20(1) furthermore provides that: ‘An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse contemplated in section 17(c)) immediately prior to such adoption, and that parents relatives’.

¹¹² Act 192 of 1993.

¹¹³ *Du Toit* (n 109 above) para 2.

¹¹⁴ *Du Toit* (n 109 above) para 22.

¹¹⁵ *Du Toit* (n 109 above) para 26.

¹¹⁶ Jivan (n 56 above) 34.

¹¹⁷ 2003 5 BCLR 463 (CC). The applicants in this suit have been partners in a same-sex life partnership since 1995, and the second appellant gave birth to twins sometimes in August 2001 by means of artificial insemination from the sperm of an anonymous donor, while the female ova was donated by the first applicant. The desire of the applicants to be registered and recognised as the lawful parents of the twins was partially successful as only the second applicant was accepted as the ‘birth mother’ of the children and registered according to section 32 of the Births and Deaths Registration Act of 1992. There was provision for the registration of only one male

Court seeking an order requesting the first respondent to issue both applicants birth certificates in respect of the twins and to register their births indicating the second appellant as their mother while the first applicant as their parent. The applicants sought an order from the court requiring the second respondent (Minister of Home Affairs) to amend the form annexed to the regulations to allow for the recording of a person in the situation of the first applicant. They further sought to have section 5 of the Status Act declared constitutionally invalid.¹¹⁸ The High Court granted the prayers of the applicants in its entirety.¹¹⁹

On appeal for confirmation order by the applicant, the respondent submitted that the words ‘or permanent life partner’ should be read into section 5 of the Status Act instead of the phrase ‘or permanent same-sex life partner’ to avoid unfair discrimination against unmarried heterosexual couples.¹²⁰ Goldstone J, in a unanimous judgment held section 5 of the Status Act to be inconsistent with section 9(3) of the South African Constitution, thereby upholding the judgment of the Durban High Court.¹²¹ Goldstone J, further discountenanced the submission of the respondent that the phrase ‘or permanent same-sex life partners’ discriminates against permanent heterosexual life partners.¹²²

*Satchwell v The President of the Republic of South Africa*¹²³ presents another scenario of judicial affirmation of equal rights for homosexuals. The applicant successfully challenged the constitutional incompatibility of the provision of sections 8 and 9 of the Judges Remuneration and Conditions of

and one female parent. Hence, the first appellant who donated the ova fell short of the legal qualification to be so registered. See para 2-3.

¹¹⁸ *J & B* (n 117 above) para 4-5.

¹¹⁹ *J & B* (n 117 above) para 7. Magid J, held that the provisions of section 5 of the Status Act is discriminatory on the grounds of marital status and sexual orientation. The trial judge struck out the controversial word ‘married’ where it appears in subsections 1(a) and (b), inserting the words ‘or permanent same-sex life partner’ after the word husband, where it appears in subsection 1(a) and (b) and 2(b) of section 5. See para 9 & 10.

¹²⁰ *J & B* (n 117 above) para 11.

¹²¹ *J & B* (n 117 above) para 13.

¹²² *J & B* (n 117 above) para 19.

¹²³ 2002 (6) SA I CC.

Employment Act¹²⁴ and Regulations 9(2)(b) and 9(3)(a) of the Regulations in respect of Judges Administrative Recesses, Leave, Transport and Allowance,¹²⁵ before Kgomo J of the Pretoria High Court.¹²⁶ The applicant, Katheleen Margaret Satchwell, avers that she and Miss Lesley Louise Carnelley have been in a committed lesbian relationship since 1986, a relationship well known to their families and friends.¹²⁷ Satchwell gave further evidence to buttress emotional and financial inter-dependence with Miss Carnelley in the form of their completed last will, first purchase of property where they both live and duly registered in their names, insurance documents and other investment policies where Carnelley appears as the applicant's beneficiary, among other pieces of evidence.¹²⁸ The issue before the Constitutional Court was whether the applicant's agitation that Ms Carnelley should be entitled to the benefits accruing to the spouses of judges under the Act should be confirmed.¹²⁹ The Constitutional Court took a clue from the decision in *National Coalition v Home Affairs* where the issue of the meaning of spouse has been considerably dealt with. Consequently, the court held that 'the word 'spouse' cannot be read to include a same-sex partner'.¹³⁰ Madala J asserted as follows:

The legislation has effectively excluded all those in relationships other than heterosexual marriages. The question that arises is whether to the extent that the Act restricts benefits to spouse, and does not afford them to same-sex life partners, it is inconsistent with the Constitution.¹³¹

¹²⁴ The contentious issue in the challenged provisions of section 8 and 9 of the Act is the restrictive provision of certain benefits to spouses of judges only. The challenged provisions employed the usage of the word 'spouse' which technically excludes other non-spousal relationship of which same-sex partnership falls under. See (n 169 above) para 9.

¹²⁵ Just like sections 8 and 9 of the Judges Remuneration and Conditions of Employment Act, Regulations 9(2)(b) and 9(3)(a) of the Regulations in respect of Judges Administrative Recess, Leave, Transport and Allowance also make room for the controversial usage of the word 'spouse' which the applicants contend was discriminatory. See (n 151 above) para 9 & 27.

¹²⁶ *Satchwell* (n 123 above) para1-2.

¹²⁷ *Satchwell* (n 123 above) para 4.

¹²⁸ *Satchwell* (n 123 above) para 5.

¹²⁹ *Satchwell* (n 123 above) para 8.

¹³⁰ *Satchwell* (n 123 above) para 9.

¹³¹ *Satchwell* (n 123 above) para 10.

Madala J ruled to the effect that the provisions of the Act which only secures benefit to spouse and not extending same to same-sex partners who have been manifestly proved to be in a permanent life relationship like other marriages constitute unfair discrimination.¹³²

The case of *Mark Gory v Kolver*¹³³ affords another interesting scenario where spousal benefit rights were extended to same-sex partners. This case dealt with the constitutional validity of section 1(1) of the Interstate Succession Act 81 of 1987 as to the extent that the provision of the Act confers rights of interstate succession on only heterosexual spouses but not on same-sex partners in a permanent relationship.¹³⁴ Van Heerden AJ of the Constitutional Court while confirming part of the judgment of Hartzengerg J, of the Pretoria High Court declaring section 1(1) of the Act unconstitutional encouraged members of the LGBT community to continue to approach the law courts to challenge legislation violating their constitutional rights.¹³⁵

In the case of *Geldenhuys v National Director of Public Prosecutions*,¹³⁶ the Constitutional Court also confirmed the decision of the Supreme Court of Appeal which declared section 14(1)(b) and 14(3)(b) of the repealed Sexual Offences Act¹³⁷ discriminatory and unconstitutional. Mokgoro J in his leading judgment points out that

[t]he differential age of consent perpetrates a damaging stereotype of sexual conduct between same-sex partners as somehow disgraceful or as of less value than sexual conduct between opposite sex partners. The effect is demeaning and in conflict with our Constitution and its values.¹³⁸

Mokgoro points out that the significance of the impugned sections boils down to resultant inference about the oddity and negative colouration that society will

¹³² *Satchwell* (n 123 above) para 23.

¹³³ 2007 (4) SA 97 (CC).

¹³⁴ *Gory* (n 133 above) para 1.

¹³⁵ *Gory* (n 133 above) para 65.

¹³⁶ (2008) ZACC 21.

¹³⁷ 23 of 1997.

¹³⁸ *Geldenhuys* (n 136 above) para 37.

attach to homosexual acts and homosexuals.¹³⁹ In a confirmation judgment, he states:

I find that the differential age of consent provided for by section 14(1)(b) and 14(3)(b) discriminates unfairly on the grounds of sexual orientation. Justification for the discrimination not having been shown, the provisions are unconstitutional and therefore invalid.¹⁴⁰

6.2.3.3 Extending marriage rights to same-sex couples

The third dimension of judicial development of rights recognition for sexual minorities came in the groundbreaking judgment in *Fourie & Anor v Minister of Home Affairs & Ors.*¹⁴¹ Jivan describes this landmark decision as the ‘site of celebration.’¹⁴² This case is a radical departure from the previous case law on same-sex agitations in the sense that in the previous cases discussed, the emphasis was more on rights recognition and extension of spousal benefits to same-sex partners in a permanent relationship. *Fourie* presents us with a new agitation of same-sex parties for the right to marry as available to heterosexual couples. Jivan rightly points out that opening the floodgate of marriage institution to homosexuals will have that symbolic value of equality with heterosexuals.¹⁴³ The main crux of the *Fourie* case before the Supreme Court of Appeal was whether the common law concept of marriage which deprives committed same-sex couples of the choice of getting married violates the constitutional right not to be discriminated against on grounds of sexual orientations.¹⁴⁴

The Appellants in this case, Marie Fourie and Cecilia Bonthuys, two lesbians in a committed relationship for more than 10 years had approached a division of the Pretoria High Court for orders declaring their marriage to be recognised as a legally valid marriage under the Marriage Act 25 of 1961 and

¹³⁹ *Geldenhuis* (n 136 above) para 36.

¹⁴⁰ *Geldenhuis* (n 136 above) para 38.

¹⁴¹ 2005 (3) SA 429 (SCA).

¹⁴² Jivan (n 56 above) 38.

¹⁴³ Jivan (n 56 above) 39.

¹⁴⁴ *Fourie* (n 141 above) para 3.

directing the Minister of Home Affairs & Director General, Home Affairs (respondents) to register their marriage in terms of the provisions of the Marriage Act and the Identification Act 68 of 1997. The thrust of their agitation was requesting the High Court to develop the common law in line with the Constitution of South Africa to suit and accommodate their constitutional right to non-discrimination on the basis of sexual orientation. This application was however dismissed by Roux J.¹⁴⁵ In his majority ruling at the Supreme Court of Appeal, Cameron JA asserts that the common law definition of marriage as obtainable deprives committed same-sex couples of the choice to marry, a choice in all its attendant benefits only opened to heterosexual couples.¹⁴⁶ In his own words, 'legislation has ameliorated, but not eliminated, the disadvantage same-sex couples suffer more deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them'.¹⁴⁷ Cameron rejected the justification defence projected by the respondent's counsel that procreancy is the hallmark of marriage and it is an exclusive possibility for heterosexuals. He countered that 'the suggestion that gays and lesbians cannot procreate has already been authoritatively rejected as a mistaken stereotype'.¹⁴⁸ Cameron argued further that the Marriage Act violates the equality and dignity provisions of the Bill of Rights and this aspect of the violation must be developed to conform to the Constitution.¹⁴⁹ According to Cameron,

[i]n all these circumstances, I conclude that the appellants are entitled to immediate declaratory relief regarding the development of the common law, and to a declaration that their intended marriage is capable of recognition as lawfully valid subject to compliance with statutory formalities.¹⁵⁰

Cameron therefore set aside the order of the lower court, declaring that the common law concept of marriage be developed to accommodate same-sex

¹⁴⁵ *Fourie* (n 141 above) para 2 & 39.

¹⁴⁶ *Fourie* (n 141 above) para 14-15.

¹⁴⁷ *Fourie* (n 141 above) para 15.

¹⁴⁸ *Fourie* (n 141 above) para 17.

¹⁴⁹ *Fourie* (n 141 above) para 40.

¹⁵⁰ *Fourie* (n 141 above) para 48.

couples in conformity with sections 8(3), 39(2) and 173 of the South Africa Constitution. Marriage will therefore be read as the ‘union of two persons to the exclusion of all others for life’.¹⁵¹ Farlam JA practically concurred with the majority decision of Cameron to the extent that he advocated for a suspension of the court’s order for a period of time to enable parliament to enact a legislation that will put the appellants’ right in proper perspective.¹⁵² In the views of Cameron JA, Farlam’s suggested suspension of the court order does not do justice to the appellants’ case. He argues that ‘developing the common law does not stray into the legislative domain’.¹⁵³ Cameron held the view that the Bill of Rights in the Constitution places a legal obligation for the development of the common law to meet with the standard of rights preserved by the constitution on the law courts.¹⁵⁴

In a nutshell, the majority and the minority judgments arrived at the same conclusion that the common law definition of marriage discriminated against same-sex couples unfairly. The discrepancy in the two judgments lies thinly in methodological approach of enforcement of the right to marry.¹⁵⁵ All the parties to the suit were dissatisfied with the judgment of the Supreme Court of Appeal, hence the appeal to the Constitutional Court. The parties clearly articulated their ground of appeal, with the state contending that it was inappropriate for the court to overhaul the institution of marriage, that any such change should be left to the parliament, while the applicants expressed dissatisfaction with Farlam JA’s ruling that suggests suspension of the development of the common law notion of marriage, while also faulting Cameron JA’s suggestion that the Marriage Act barred them from marrying save in certain situations.¹⁵⁶ It should be noted here that in the same view, the Lesbians and Gay Equality Project had

¹⁵¹ *Fourie* (n 141 above) para 49. Even in his minority judgment, Farlam JA admits that the common law definition of marriage infringes on the appellants’ constitutional right not to be unfairly discriminated against as well as violating their right to human dignity. Para 93 & 94.

¹⁵² *Fourie* (n 141 above) para 148-150.

¹⁵³ *Fourie* (n 141 above) para 38.

¹⁵⁴ *Fourie* (n 141 above) para 41.

¹⁵⁵ *Fourie* (n 141 above) para 32.

¹⁵⁶ *Minister of Home Affairs v Fourie*.

also instituted another action in Johannesburg High Court challenging the constitutional validity of the common law definition of marriage and the prescribed marriage formula in section 30(1) of the Marriage Act 25 of 1961. They applied that their case be consolidated with *Fourie* at the Constitutional Court and heard concurrently.¹⁵⁷ To this request by the Gay Equality Project for direct access to the Constitutional Court and a consolidated hearing, the state objected on the basis that it would not serve the interest of justice for the court to grant the application. Sachs however expressed the view that the purport of the definition of marriage under the common law and the constitutional validity of section 30(1) of the Marriage Act were the same; thus he granted the application and consolidated the two suits.¹⁵⁸ Sachs J, formulated two main questions for appellate determination, namely, whether or not the failure of the common law and the Marriage Act to provide a template for homosexual couples to marry amount to unfair discrimination towards them; secondly, if the first question is answered in the affirmative, how should this be constitutionally remedied.¹⁵⁹

Sachs J notes that

[t]he exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.¹⁶⁰

In this statement, Sachs J articulately demonstrated the obvious shortcomings of the common law concept of marriage as replicated in the Marriage Act with regard to the discriminatory impact on same-sex couples. Sachs points out,

¹⁵⁷ *Fourie* (n 141 above) para 33.

¹⁵⁸ *Fourie* (n 141 above) para 34-35.

¹⁵⁹ *Fourie* (n 141 above) para 44.

¹⁶⁰ *Fourie* (n 141 above) para 45.

correctly, that same-sex couples in the subsisting legal order are not entitled to publicly celebrate their relationship in marriage events backed by law. He argues that ‘if heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as to whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples’.¹⁶¹ According to Sachs, ‘to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.’¹⁶²

Sachs held that sections 9(1) and 9(3) of the South African Constitution cannot just be merely interpreted to mean providing a protective shield for homosexual couples from criminal punishment or stigmatisation. He argues that the applicants no longer care for the right to be left alone by the state, but now seek boldly the right of be acknowledged on equal footing with their heterosexual counterparts. He therefore reached the conclusion that ‘the common law and section 30(1) of the Marriage Act continue to deny the same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(2) of the Constitution.’¹⁶³ Sachs intelligently adduced reasons for holding the common law and section 30(1) of the Marriage Act to be discriminatory. According to him, the law should have created structures and mechanism for same-sex couples to celebrate marriage rites publicly, the same way the law gives a viable platform to heterosexual couples to express marital commitments. This law, according to Sachs, is discriminatory because ‘it gives to the one and not to the other’.¹⁶⁴ Sachs also held that the court has the powers to pronounce curative judgment on the shortcomings of the common law definition of marriage. According to him, it is a power vested on it by section 172(1)(a) of the South African Constitution.¹⁶⁵

¹⁶¹ *Fourie* (n 141 above) para 71.

¹⁶² *Fourie* (n 141 above) para 72.

¹⁶³ *Fourie* (n 141 above) para 72.

¹⁶⁴ *Fourie* (n 141 above) para 78.

¹⁶⁵ *Fourie* (n 141 above) para 80.

Sachs in his order declared the common law definition inconsistent with the Constitution and the omission of the words ‘or spouse’ after the words ‘or husband’ from section 30(1) of the Marriage Act 25 of 1961 is also inconsistent with the Constitution. He gave the parliament 12 months from the date of his judgment to statutorily correct the defects.¹⁶⁶

O’Regan J in her separate judgment, dissented with Sach’s majority judgment. O’Regan agreed to the extent that suspending the declaration of invalidity for a period of 12 months will amount to postponing the rights of gays and lesbian couples to marry.¹⁶⁷ O’Regan J suggested strongly that the court has a responsibility to the applicants to make an order which will have an immediate effect to enable the applicants reap from the fruit of the court’s judgment.¹⁶⁸

6.4 Extending the wave of decriminalisation of consensual homosexual conduct from South Africa to Mozambique, Cape Verde, Mauritius and Seychelles

Mozambique, Cape Verde, Mauritius and Seychelles also join South Africa as islands of equality in a sea of seething homophobia. These countries have decriminalised same-sex practices thereby serving as a beacon of hope for a continent still virulently opposed to sexual minorities’ rights. I take a brisk look at these countries’ odyssey to decriminalisation of homosexual conduct.

6.4.1 Mozambique

Like other African countries south of the Sahara, Mozambique is a state party to the ICCPR and the African Charter.¹⁶⁹ Unlike most African countries, however,

¹⁶⁶ *Fourie* (n 141 above) para 121.

¹⁶⁷ *Fourie* (n 141 above) para 162.

¹⁶⁸ *Fourie* (n 141 above) para 165.

¹⁶⁹ Mozambique ratified the ICCPR on 21 July 1993 and ratified the African Charter on 22 February 1989.

Mozambique does not currently criminalise same-sex marriage, thereby living true to the spirit of its Constitution which prohibits discrimination of citizens.¹⁷⁰

Homosexual conduct was legalised in Mozambique on 29 June 2015. Article 70 and 71(4) of the Mozambique Penal Code outlawed ‘unnatural vices’, a supposedly criminal category under which homosexual conduct is stigmatised in the criminal codes of several African countries.¹⁷¹ While Mozambique did not explicitly criminalise same-sex conduct, it also did not provide equality for homosexual citizens. Things changed for the with the 2015 introduction of a new and more LGBT friendly criminal code. Before this development, the decriminalisation process was already ongoing. The Mozambique Labour Law No 23/2007 of August 2007 enshrined the universal right to work and established the principle of equal benefits for equal work. The labour law made sexual orientation a ground of possible non-discrimination.¹⁷² While more victories remain to be won for sexual minorities in Mozambique, for instance in the area of same-sex marriages,¹⁷³ there is no doubt that Mozambique has taken a giant stride by decriminalising its penal law. Lopes attributes these victories in part to the tireless efforts of the civil society.¹⁷⁴

6.4.2 Cape Verde

The revised 1995 Constitution of Cape Verde enshrines the principle of equality before the law in article 24, regardless of differences in sex, language, religion

¹⁷⁰ Article 35 of the Constitution of Mozambique does not explicitly mention sexual orientation as a ground of possible discrimination, but the reference to sex carries positive implication for LGBTI rights.

¹⁷¹ The version of Mozambique’s unnatural vices can be found in the section 214 of Nigeria’s Criminal Code Act christened unnatural offences.

¹⁷² Article 4(1) of the Labour Law states that: ‘This law shall be interpreted and applied in accordance with, among other principles, the principle of the right to work, of employment stability and job stability, of change in circumstances and of non-discrimination on grounds of sexual orientation, race or HIV/AIDS status’. Article 108(3) guarantees equal benefit for equal work without distinction based on sexual orientation among others.

¹⁷³ Article 7 of the Mozambican Family Law No 10/2004 defines marriage in the heterosexual context of a union between man and woman.

¹⁷⁴ E Lopes ‘The legal status of sexual minorities in Mozambique’ in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 185.

among others. The former Portuguese colony decriminalised homosexuality in 2004.¹⁷⁵ The Código Penal Code of 2004 repealed article 71 of the 1886 Penal Code which frowned at the so-called vices against the order of nature, which provides grounds for discrimination against homosexuals. Article 71(4) of the Código Penal Code equalised the age of consent for heterosexuals and homosexuals. The law fixed the age of consent at 16.¹⁷⁶

In 2008 Cape Verde introduced anti-discrimination laws. Articles 45(2) and 406(3) of the Labour Code prohibit workplace discrimination on the grounds of sexual orientation. Such is the level of progress Cape Verde has recorded that between 24 and 29 June, 2013 the Cape Verde city of Mindelo held Cape Verde's first ever homosexual pride march which was organised by the Cape Verdean Gay Association.¹⁷⁷ While same-sex marriage is yet to be legalised in Cape Verde, there is no doubt that the archipelago has made remarkable progress in the recognition of the rights of sexual minorities.

6.4.3 Mauritius

The Constitution of Mauritius, like those of Mozambique and Cape Verde, grants a range of rights to citizens.¹⁷⁸ Unfortunately, the Constitution does not recognise sexual orientation as a ground of non-discrimination. Nevertheless, Mauritius, like Mozambique and Cape Verde, has made recorded remarkable progress towards LGBT rights recognition. The Criminal Code Act of 1838, a colonial era law criminalise sodomy alongside bestiality.¹⁷⁹ The law focused more

¹⁷⁵ See Amnesty International 'Making love a crime: Criminalization of same-sex conduct in sub-Saharan Africa' available at <https://www.amnestyusa.org/sites/default/files/making-love-a-crime-africa-lgbti-report-emb-6.24.0.pfd> (accessed 24 April 2017).

¹⁷⁶ The age of consent was further reduced to 14. See 'Age of consent in Cape Verde' www.ageofconsent.net/world/cape-verde (accessed 24 April 2017).

¹⁷⁷ See the article 'Cape Verde gets ready for first ever pride week' available at <http://dayagainsthomophobia.org/cape-verde-gets-ready-for-first-ever-pride-week/> (accessed 24 April 2017).

¹⁷⁸ For instance articles 5, 11, 12 and 16 of the Republic of Mauritius grants citizens the right to liberty, freedom of conscience, freedom of expression and right to non-discrimination

¹⁷⁹ Section 250 which criminalises sodomy also prescribes a jail term of 5 years for offenders.

on same-sex acts between males.¹⁸⁰ However, homosexuality ceased to be a criminal act in Mauritius with the introduction of the Equal Opportunities Act No 42 of 2008 which prohibits discrimination on the basis of sexual orientation among other grounds. It is worthy to point out that the Sexual Offences Bill of 2007 proposed by the Law Reform Commission which is LGBT friendly has remained in Parliament for reasons ranging from popular opposition to change of government in Mauritius.¹⁸¹ Formerly, sodomy has thus not yet been decriminalised.

Popular opposition to the Sexual Offences Bill highlights the disconnect between legal decriminalisation and social intolerance in countries that have taken legal measures to safeguard LGBT rights. In spite of the legal protections available to LGBT persons in Mauritius, society continues to exhibit hostility towards sexual minorities.¹⁸²

6.4.4 Seychelles

On 18 May 2016 the Seychelles Parliament voted to decriminalise homosexual conduct¹⁸³ by amending section 151 of the colonial era penal code that criminalise homosexual conduct with up to 14 years imprisonment. This landmark political development is the culmination of a decriminalisation process that commenced with the 2006 amendment to the Employment Act of the 1995 Act prohibits employment prohibition on the basis of sexual orientation.

While the 1996 amended Constitution of the Federal Republic of Seychelles makes no direct reference to sexual orientation as a possible ground of decriminalisation, it nevertheless leaves the door open for an LGBT-friendly interpretation of section 27(1). This section forbids discrimination, proclaiming

¹⁸⁰ See RA Mahadew & DS Raumnauth 'A psychological reflection on issues surrounding the LGBTI community in Mauritius' in S Namwase & A Jjuuko (n 174 above) 163.

¹⁸¹ Mahadew & Raumnauth (n 180 above) 164.

¹⁸² Mahadew & Raumnauth (n 180 above) 159.

¹⁸³ See N Turkson 'A victory for LGBT rights in Seychelles' *The Atlantic* 19 May 2016 available at <http://www.theatlantic.com/international/archive/> (accessed 26 April 2017).

the right to equal protection before the law without distinction ‘on any ground except as is necessary in a democratic society’. The avalanche of international and regional courts’ decision, a good number of which I discussed previously demonstrate conclusively that prohibiting same-sex conduct is not a measure that is necessary in a democratic society. Given this state of affairs, section 27(1) holds much promise of further positive developments in LGBT rights recognition in Seychelles.

6.5 Hesitating steps towards recognition of rights for sexual minorities in Kenya, Uganda and Botswana? An analysis of positive judicial developments towards rights recognition for LGBTs

The few and scattered attempts at the affirmation of LGBT rights in Africa have been legal exercises in hesitancy, unlike the bold judicial manoeuvres that catapulted the West into the age of the affirmation of equality. In what follows I will show the extent to which the Afrocentric approach has succeeded or failed in advancing LGBT rights on the continent. African countries with no clear anti-gay laws are Burkina Faso, Cape Verde, Ivory Coast, Niger, Mali, Guinea-Bissau, Rwanda, Madagascar, Central Africa Republic, Chad, Democratic Republic of Congo and Mozambique.¹⁸⁴ The absence of identifiable anti-homosexuality laws in these countries does not, however, mean that their populations are not substantially homophobic.

6.5.1 The experience in Kenya

Similar to most African countries, Kenya is not accommodative to the idea of LGBT rights. On the matter of homosexual conduct, the population and the leaders are on the same page. The former president of Kenya, Daniel arap Moi

¹⁸⁴ AJ Kretz ‘From “kill the gays” to “kill the gay rights movement”’: The future of homosexuality legislation in Africa’ (2013) 11 *New Journal of International Human Rights* 210.

had declared that homosexual conduct was anti-Christian and not consistent with African culture.¹⁸⁵

In Kenya, the criminal law prescribes 14 years as punishment for anyone who engages in sexual acts against the order of nature. If the offence is committed non-consensually or with the use of force the jail sentence rises to 21 years. 21 years is also prescribed if the consent of the other party was obtained through the use of force or deceit.¹⁸⁶ An attempt to commit the offence of sexual intercourse against the order of nature is penalised with 7 years' imprisonment.¹⁸⁷ Section 165 penalises acts of gross indecency between males with five years' imprisonment. Like section 377 of the Indian Penal Code, sections 162, 163 and 165 are relics of the age of the British Empire.¹⁸⁸

The law does not offer LGBT persons protection in Kenya. The police which is statutorily vested with the duty of protecting the civilian population is at the forefront of the persecution of members of the LGBT community.¹⁸⁹ The police and other public agencies routinely harass LGBT persons. These LGBT persons are arrested and coerced into bribing the police to regain freedom. Sometimes the police promise non-prosecution if the victims agree to part with money by way of inducement. There is general stigmatisation of homosexuals in Kenya. The average gay or lesbian faces rejection on all fronts. The society rejects him or her, the family cuts off communion or disowns them outright, friends turn hostile, etc.¹⁹⁰ Like in all countries, homosexuals are exposed to the risk of sexual transmitted infections (STIs) in a way heterosexuals are not.¹⁹¹ Given the

¹⁸⁵ See S Maguire 'The human rights of sexual minorities in Africa' (2004) 35 *California Western International Law Journal* 6.

¹⁸⁶ See section 162(a) of the Kenyan Penal Code 2009.

¹⁸⁷ Section 163 Kenyan Penal Code, 2009.

¹⁸⁸ See CE Finerty 'Being gay in Kenya: The implications of Kenya's new constitution for its anti-sodomy laws' (2010) 45 *Cornell International Law Journal* 436-437.

¹⁸⁹ Kenya Human Rights Commission *The outlawed among us* (2011) 21-23.

¹⁹⁰ See The Equal Rights Trust *In the spirit of Harambee: Addressing discrimination and inequality in Kenya* (2012) 114-120.

¹⁹¹ Kenya Human Rights Commission (n 189 above) 45. The National Aids Control Council (NACC) reports higher HIV prevalence among gay men than in other groups. This higher incidence of HIV among gay men is in part due to the criminalisation of homosexuality, which compels gay men to operate underground.

magnitude of social disapproval of same-sex relationships, homosexuals go underground and are cut off from the public healthcare system, thus jeopardising their health conditions and adversely affecting the fight against HIV/AIDS. Cases of forced counselling, attempt at the 'correction' of sexual orientation and hormonal therapy are not uncommon in the anti-LGBT Kenya environment.¹⁹²

The Kenya Human Rights Commission has sided with the LGBT community and works for the protection of LGBT rights despite the prevailing homophobia. The KHRC has formed a productive partnership with LGBT advocacy groups like the Gay and Lesbian Coalition of Kenya (GALCK), an umbrella group of the pro-same-sex rights movement, Minority Women in Action, Gay Kenya, Artists for Recognition, Acceptance, and People Aggrieved and Marginalised. Specifically, the partnership between the KHRC and GALCK aims at removing those factors that promote the stigmatisation of LGBT persons through mass sensitisation programmes.¹⁹³ Among other initiatives, both organisations have embarked on fact-finding missions to determine whether LGBT rights have been violated in reported cases, the registration of LGBT groups, mediation in disputes between LGBT persons and their families and capacity building for entrenched and emergent LGBT advocacy groups.¹⁹⁴

The KHRC has argued repeatedly that Kenya's anti-homosexuality laws violate the non-discrimination clause of the ICCPR to which Kenya is a state party. Since Kenya has not raised objections over the non-discrimination clause of the ICCPR, it is under obligations to fully domesticate the clause. The KHRC holds the view that the maintenance of the colonial era sodomy laws contravenes article 27(4) and 27(5) of the new 2010 Constitution of Kenya which forbids the discrimination of Kenyans on any ground. Indeed, Finerty sees in the use of 'on any ground' a ray of light at the end of the tunnel as far as LGBT rights in Kenya

¹⁹² Kenya Human Rights Commission (n 189 above) 22-41.

¹⁹³ Kenya Human Rights Commission (n 189 above) 6.

¹⁹⁴ Kenya Human Rights Commission (n 189 above) 6-7.

is concerned.¹⁹⁵ Finerty holds the view that the positive choice of words can provide a leeway for LGBT advocates bringing in sexual orientation into their argument and securing the repeal of discriminatory laws.

The emphasis on the robust projection of fundamental human rights is a sign for the future of LGBT rights. The new Constitution explicitly acknowledges international treaties to which Kenya is a state party, as part of domestic law, thus giving international human rights values a foothold in the Constitution.¹⁹⁶ This development can nudge the Kenyan judiciary in an activist direction since it can be argued that LGBT persons suffer discrimination on the ground of their sexual orientation whereas the 2010 Constitution has prohibited discrimination on any ground.

In Kenya, LGBT status has further been elevated by the decision of the Kenya High Court in the case of *Eric Gitari v Non-government organisations co-ordination board and 4 others*.¹⁹⁷ The petitioner in this case submitted an application to register an NGO before the first respondent, who is a cooperate body charged with the responsibility of registering, facilitating and coordinating the activities of national and international NGOs operating in Kenya. The objective of the petitioner's NGO is to advance the human rights of LGBT persons in Kenya. The petitioner's application for registration was rejected by the second respondent on the ground that his proposed NGO sought to protect gay and lesbian people.¹⁹⁸

¹⁹⁵ Finerty (n 188 above) 449.

¹⁹⁶ Finerty (n 188 above) 350.

¹⁹⁷ (2015) petition 440 of 2013 Kenya law report 2016.

¹⁹⁸ *Eric Gitari* (n 197 above) para 1 -5. Factual background information showed that on the 2 April, 2013, the petitioner submitted the names Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organisation to the first respondent who advised the petitioner to review same names. Not to be deterred, the petitioner, on 19 March 2013, resubmitted, for registration, another reviewed set of names, namely, Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective. The second respondent came out directly to inform the petitioner in a letter dated 25 March 2013 that sections 162, 163 and 165 of the Penal Code of Kenya criminalise homosexuality, and on that basis, his application to register any NGO with homosexual background stands rejected. Dissatisfied with the explanation supplied by the first respondent, the petitioner, Mr. Eric Gitare, approached the High Court of Kenya sitting at Nairobi in a petition dated 19 September 2013. The petitioner gave reasons for his quest to register the NGO to include the continual victimisation, stigmatisation and orchestrated violence

The first respondent asserted that the petitioner's NGO is not only capable of destroying cultural values, but also an affront on public morality.¹⁹⁹ In asking the Court to dismiss the petition, the first respondent referred the Court to pages from the Bible and the Qur'an which frown at homosexual conduct, a cause the petitioner's NGO sought to promote.²⁰⁰

From the arguments of the petitioner and respondents, the Court formulated two core issues for determination, namely:²⁰¹ (1) Do LGBTI persons have a right to form associations in accordance with the laws? (2) If they do, is the refusal of the first respondent to register the intended NGO a violation of the rights of the petitioner as provided under article 36 and 27 of the Kenyan Constitution. The Court dwelt extensively on the content and import of the right to freedom of association, citing a plethora of cases decided by the ACtHPR and the ACmHPR on the issue of freedom of association.²⁰²

targeted at sexual minorities. The petitioner pointed out that these cases of discrimination and violence against sexual minorities is well documented by the Kenyan Human Rights Commission in a report titled 'The outlawed amongst us: A study of the LGBTI community's search for equality and non-discrimination in Kenya' The petitioner's case is hinged on the provisions of Articles 20(2), 31(3), 27(4), 28 and 36 of the Constitution of Kenya. He rests his case on the right and freedom of association which is provided and guaranteed under Article 36. His contention is that Article 36 provides for freedom to associate for 'every person' and there was no distinction between the categories of persons. The petitioner claimed that refusal to register the NGO was tantamount to breaching his right to freedom of association, dignity, equality and the right not to be discriminated against. The petitioner argued that from the objectives of the NGO, there was nothing to show that it will further the cause of criminality. Article 36 of the Constitution of Kenya which confers on 'every one' the freedom of association does not exclude gays and lesbians. Thus refusal to register the NGO is tantamount to inhuman and degrading treatment as the action isolates homosexuals as a group of deviants. The first respondent in their reply contended that there was no breach of the petitioner's right to associate with others as the identified infringement of the petitioners rights is justifiable. The first respondent asserted that its refusal to register the NGO is founded on the provisions of the Penal Code law of Kenya which criminalise homosexuality. The first respondent also argued that it derived inspiration from Article 45 of the Constitution of Kenya which, in its family provision, limits marriage to heterosexual couples alone. The board further relied on regulation 8(3)(b) of the NGO Regulation of 1992 as another basis for turning down the petitioner's request for registration. The regulation gives the Board the powers to refuse registration of NGOs where 'such name is in the opinion of the director repugnant to or inconsistent with any law or it is otherwise undesirable. See para 10-32.

¹⁹⁹ *Eric Gitari* (n 197 above) para 35.

²⁰⁰ *Eric Gitari* (n 197 above) para 36-37. The third interested party in the case, Kenyan Christian Professional Forum (KCPF) also aligned itself with the, cultural, religious and morality arguments of the first respondent. Para 9, 42-46.

²⁰¹ *Eric Gitari* (n 197 above) para 57.

²⁰² *Eric Gitari* (n 197 above) para 81-83. The court cited cases such as *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), *Amnesty International v Zambia* (2000) AHRLR 325

The Court pointed out that the right to freedom of association is an essential component of democracy, providing individuals with invaluable opportunities to express their political opinions, engage in literary and artistic pursuits²⁰³ and form social bonds with others in an association. The Court further pointed out that the Constitution of Kenya in guaranteeing the rights to all Kenyans to associate is not selective. That right according to the Court belongs to everyone, no matter how unpopular or unacceptable the majority of the society views a certain group clamouring for rights to association.²⁰⁴ The Court held that it was improper for the first respondent to limit the right to freedom of association on the basis of popular opinion.²⁰⁵ The Court made the observation that

[w]hat the petitioner seek is not legalisation of same sex unions or marriage as the Board and 3rd interested party appear to be apprehensive about, but the right to associate in an organization recognized by law.²⁰⁶

This assertion by the Court is critical to the overall argument in this case. The petitioner is more concerned about registering an NGO whose one objective was to promote the human rights of LGBTI persons, whereas the Board's contention is that the penal law of Kenya prohibited homosexuality. As the Court observed and resolved, the petitioner is not against the law but probably against refusal to register the NGO. The Court held that the action of the first respondent in refusing to register the petitioner's NGO is a clear infringement on the petitioner's right to associate under article 36 of the Kenya Constitution.²⁰⁷ The Court also notably pointed out that the penal code of Kenya does not in any way criminalise the right of association of people based on their sexual orientation and as such

(ACHPR1999) *Aminu v Nigeria* (2000) AHRLR 208 9(ACHPR 2000) *CLO v Nigeria*, Comm No 101/93 etc.

²⁰³ *Eric Gitari* (n 197 above) para 84.

²⁰⁴ *Eric Gitari* (n 197 above) para 88-89.

²⁰⁵ *Eric Gitari* (n 197 above) para 92.

²⁰⁶ *Eric Gitari* (n 197 above) para 99.

²⁰⁷ *Eric Gitari* (n 197 above) para 107.

limiting the rights of the petitioner to associate by the first respondent is not justified in accordance with the requirements of the Constitution.²⁰⁸

6.5.2 The experience in Uganda

Hostility towards homosexuals is as pronounced in Uganda as it is in Kenya. However, there is a higher intensity in the pro-LGBT and anti-LGBT conflict in Uganda than in Kenya. LGBT advocacy groups in Uganda appear better organised even as anti-LGBT groups have done better in pushing anti-gay laws through parliament in Uganda than in Kenya.²⁰⁹

The African narrative on the origin of homosexual acts has always been that it is a Western import. The narrative is as influential in Uganda as it is elsewhere on the continent. Yet there is evidence of pre-colonial homosexual activities in Uganda; the Ugandan King Mwanga of the royal family, is believed to have been involved in homosexual relationships to the extent of keeping a male harem.²¹⁰ Section 145(a) of the Uganda Penal Code criminalises sodomy. Section 145(c) prescribes life imprisonment for male homosexual act and male-female anal sex. Section 146 penalises attempted homosexual acts with 7 years' imprisonment while section 148 penalises public and private acts of gross indecency with 7 years' imprisonment.

Kretz has noted that even with the anti-sodomy sections of the Uganda Penal Code in force anti-gay sentiments were largely muted until 2000 when the Uganda Penal Code was revised,²¹¹ in part due to the advancement of homosexual rights in the West. Parliamentary backbencher David Bahati proposed the Anti-Homosexuality Bill of 2009 which sought, among others, the imposition of the death sentence for opportunistic homosexual conduct like the

²⁰⁸ *Eric Gitari* (n 197 above) para 108-125.

²⁰⁹ The Anti-Homosexuality Bill of 2009 was eventually modified and signed into law by President Museveni in February, 2014. Refer to the Anti-Homosexuality Act 2014 for details.

²¹⁰ See SR Mazzochi 'The great debate: Lessons to be learned from an international comparative analysis on same-sex marriage' (2011) 16 *Roger Williams University Law Review* 595.

²¹¹ Kretz (n 184 above) 219.

type involving children and physically disabled persons. The Bill also sought to outlaw pro-same-sex rights advocacy.²¹² A sustained international outcry frustrated the attempt to pass the Bill. Bahati tried to reintroduce the Bill in 2010 and 2011 and failed. Things later changed as the anti-homosexual Bill returned to Parliament under the guidance of the speaker Rebecca Kadaga. By then the Bill had been reworked to remove the more outrageous sections such as the death penalty. In the new Bill the maximum penalty for homosexual conduct was life imprisonment. Kadaga insisted that the Bill represented the will of the people of Uganda. It was rumoured that she was using the Bill to shore up her acceptance among Ugandans ahead of a future bid to succeed president Museveni.²¹³ President Museveni eventually signed the Bill into law in February 2014.

The Anti-Homosexuality Act, 2014, unlike the Uganda Penal Code, focuses on lesbians as much as gays. A person is guilty of the offence of homosexuality if, being a male, he engages in penetrative and or oral sex with another male,²¹⁴ and if he or she uses an object to stimulate or penetrate the sex organs of another person of the same sex.²¹⁵ Touching a person of the same sex with the motive of engaging in homosexual acts also makes a male or female guilty of the offence of homosexual conduct.²¹⁶ Aggravated homosexuality arises in opportunistic circumstances and also when an offender regularly breaks the law.²¹⁷ The penalty for aggravated homosexual conduct, as stated earlier, is life imprisonment.²¹⁸ Attempt to commit an act of homosexual conduct and attempted aggravated homosexual conduct attracts a penalty of 7 years imprisonment²¹⁹ and life imprisonment respectively.²²⁰ Victims of homosexual

²¹² Kretz (n 184 above) 219.

²¹³ Kretz (n 184 above) 208.

²¹⁴ Section 2(1)(a) Anti-Homosexuality Act 2014.

²¹⁵ Section 2(1)(b) Anti-Homosexuality Act 2014.

²¹⁶ Section 2(1)(c) Anti-Homosexuality Act 2014.

²¹⁷ Section 3 Anti-Homosexuality Act 2014.

²¹⁸ Section 3(2) Anti-Homosexuality Act 2014.

²¹⁹ Section 4(1) Anti-Homosexuality Act 2014.

²²⁰ Section 4(2) Anti-Homosexuality Act 2014.

acts are exempted from penalties whatsoever,²²¹ and are in fact due compensation as determined by a competent court of law.²²² Similar to the Nigerian Same Sex Marriage (Prohibition) Act of 2013, the Uganda Anti-Homosexuality Act of 2014 prohibits homosexual marriage.²²³ Promotion of homosexual acts in whatever form and by whatever organisation is an offence punishable with a fine of five thousand currency points or between 5 to 7 years imprisonment or both.²²⁴

In spite of the overturning of the Act on 1 August 2014, by the Uganda Constitutional Court on technical grounds,²²⁵ persecution of LGBT persons in Uganda persists. As earlier stated, LGBT groups in Uganda are relatively well organised. Ugandan courts have heard cases relating to LGBT rights and made pronouncements that hold promise for the future of LGBT rights in Uganda.

The case of *Victor Juliet Mukasa and Yvonne Oyo v Attorney-General*²²⁶ involves Mukasa a transgender activist and her guest at the time of the invasion of Mukasa's home, Yvonne Oyo. The applicants lodged the case with the High Court of Uganda at Kampala under article 50 of the Constitution and Rule 3 (Fundamental Rights and Freedoms) to have their fundamental rights and freedoms enforced under articles 27, 23(1) and 24 of the Constitution.

The second applicant, a Makerere University student, claimed to have been unlawfully arrested and brutalised by the police acting on the orders of the L.C.I. Chairman of Kireka Zone (hereinafter referred to as the Chairman). The applicants submitted before the Court that the Chairman breached their right to privacy, home and property which article 27 of the Constitution guarantees. They complained that their right to personal liberty and protection from degrading

²²¹ Section 5(1) Anti-Homosexuality Act 2014.

²²² Section 5(4) Anti-Homosexuality Act 2014.

²²³ Section 12 Anti-Homosexuality Act 2014.

²²⁴ Section 13 Anti-Homosexuality Act 2014.

²²⁵ See E, Biryabarema 'Uganda court overturns anti-gay law that halted Western aid' Reuters August 1, 2014, <http://in.reuters.com/article/2014/08/01/uganda-homosexuals-idINL6NOQ731V20140801> (accessed 11 February 2015).

²²⁶ (2008) AHRLR 248.

treatment guaranteed by article 23(1) and article 24 of the Constitution had been breached by the Chairman and the OC.²²⁷

The Judge questioned the evidence of the Chairman and found it shaky as it remained uncorroborated. Indeed, the judge declared it false. The judge wondered why the Chairman and the second applicant would be exchanging “hot” words at the station as claimed by the OC if truly the Chairman had intervened to save the applicants from mob action. The judge preferred to believe the testimony of the applicants. She ruled that the rights of the applicants were violated. She pronounced that the Attorney-General was not liable for the illegal actions of the Chairman as argued by Ms Nabakooza who represented the Attorney-General; however, the Attorney-General was liable for the actions of the police. The judge awarded the second applicant ten million shillings as compensation for the breach of her rights as guaranteed by article 24 of the Ugandan Constitution. The first applicant was awarded three million shillings as compensation for the breach of her right to property under article 27(2) of the Ugandan Constitution.²²⁸

The case is about the fundamental human rights of two Ugandan citizens; yet it is noteworthy that the harassment of the applicants was premised on the suspicion that they were engaged in a non-heterosexual relationship. There might not have been any decisive reference to sexual orientation by the court, but the willingness of the judge to ignore the Chairman’s homophobic innuendos indicates that when African judges muster enough courage they can go beyond the hesitant defence of persecuted LGBT persons and emulate their counterparts in the West.

The *Kasha Jacqueline & Ors v Rolling Stone Ltd & Anor*²²⁹ was the result of an incendiary newspaper publication that openly called for the killing of suspected homosexuals whose pictures were also published alongside the story. The application was lodged in the High Court of Uganda sitting in Kampala under

²²⁷ *Victor Mukasa* (n 226 above) para 19.

²²⁸ *Victor Mukasa* (n 226 above) para 43-44.

²²⁹ Misc Cause No. 163/10.

article 50(1) and (2) of the Constitution of Uganda and Rule 7 of the judicature (Fundamental Rights and Freedoms) Rules of 2008. The case was also lodged under Order 41, Rules 2 and 9 of the civil procedure rules.

The applicants prayed the High Court to issue a permanent injunction restraining the respondents from further publication of injurious information about the applicants. The applicants also wanted the court to order the respondents to pay necessary compensation and to be awarded the cost of their application.²³⁰

On 2 October 2010, *Rolling Stone*, a Ugandan newspaper published by the respondents, carried a scandalous story titled: “Hang them; they are after our kids!!! Pictures of Uganda’s 100 homos leak”. The story, clearly intended to incite passion and violence, accused the people in the list of trying to recruit young Ugandans into a homosexuality cult. The story mentioned the respondents as leaders of the homosexual movement and called for their hanging to prevent a looming moral collapse of the society.²³¹

The Court was convinced that the case before it was not a homosexual case *per se* but one of the infringement of fundamental human rights which the Ugandan Constitution guarantees and which the court is empowered to adjudicate upon. The High Court asserted that the call to hang the applicants and the public exposure of their identities and homes threatened their right to human dignity and right to the privacy of the person and their homes. Interestingly, the court noted that homosexuality as a lifestyle, or “gayism”, was not criminalised by section 145 of the Penal Code Act but rather the actual commission of the acts prohibited under the legislation. Consequently, the High Court granted the prayers of the applicants.²³²

The case of *Kasha Jacqueline & Ors* led to a judicial pronouncement bolder in scope than the *Victor Juliet Mukasa* decision. In the case under review, the trial judge did not hesitate to take up the question of homosexuality, going as far

²³⁰ *Kasha Jacqueline* (n 229 above).

²³¹ *Kasha Jacqueline* (n 229 above).

²³² *Kasha Jacqueline* (n 229 above).

as stating that only persons caught in the act of committing the offences spelled out in section 145 can be charged to court, not a person claiming to be a homosexual. As bold as the pronouncement was, it hardly made any difference as far as advancement of LGBT rights in Uganda is concerned. This is true since the trial judge did not point out the obvious: the discriminatory nature of section 145. There appeared to be no judicial appetite to question the constitutional validity of the legislation. The Anti-Homosexuality Bill was signed into law by President Museveni four years after the *Kasha Jacqueline & Ors* case.

In *Jjuuko Adrian v Attorney General of Uganda*²³³ equal opportunities for sexual minorities was given a boost yet again. The case challenged the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act 2007.²³⁴ The implication of this provision is that homosexuals cannot seek redress from the Equal Opportunities Commission, an agency established to promote equality for all Ugandans.²³⁵ In the *Adrian* case, the petitioner contended that section 15(6)(d) violates articles 20(1), 21(1), 21(2), 28(1) and 36 of the Uganda Constitution.²³⁶ The Constitutional Court of Uganda agreed with the petitioner that the impugned section indeed violates articles 20, 21, 28 and 43 of the Ugandan Constitution by ‘creating a class of social misfits who are referred to as immoral, harmful and unacceptable.’²³⁷ The Court further observed that the impugned section has effectively legitimised discrimination against the categories of persons termed immoral, harmful and unacceptable, resulting in an obvious denial of access to justice to the section of persons by the Equal Opportunities Commission.²³⁸ In the final ruling, Justice Richard

²³³ Constitutional Petition No. 001 of 2009.

²³⁴ The provision barred the Commission from investigating ‘any matter involving behavior which is considered to be immoral and socially harmful or unacceptable by the majority of the cultural and social communities of Uganda’.

²³⁵ A Jjuuko ‘The incremental approach: Uganda’s struggle for the decriminalisation of homosexuality’ in C Lennox, M Waites et al (eds) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013) 338.

²³⁶ *Adrian* (n 233 above) para 20-45.

²³⁷ *Adrian* (n 233 above) para 370.

²³⁸ *Adrian* (n 233 above) para 375.

Buteera held that section 15(6)(d) is inconsistent with article 2(2) of the Ugandan Constitution and thereby null and void.²³⁹

6.5.3 The experience in Botswana

Section 164 of the Penal Code punishes carnal knowledge of a person against the order of nature with seven years' imprisonment. The Botswana anti-homosexuality legislation punishes both male and female homosexual conduct. Section 165 punishes attempted homosexual conduct with five years' imprisonment. Section 167 criminalises both private and public consensual adult homosexual conduct.

The Botswana judiciary is unwilling to risk a confrontation with the society which remains strongly anti-LGBT. This fact came to the fore in *Utjiwa Kanane v The State*.²⁴⁰ Kanane was reported to have allowed Graham Norrie to perform homosexual acts on him on 26 December 1994. Kanane submitted before the trial court that anti-sodomy provisions under which he was charged violated section 3 of the Constitution of Botswana which guarantees right to privacy, conscience, expression and association. Kanane submitted that the impugned legislation was to the extent that it violated section 3 unconstitutional.²⁴¹ The trial judge Mwaikasu was of the opinion that the anti-homosexuality legislation did not violate the Constitution of Botswana. Falling back on the public morality

²³⁹ *Adrian* (n 233 above) para 385.

²⁴⁰ Criminal Appeal No. 9/03.

²⁴¹ *Kanane* (n 240 above). Kanane's alleged offence was committed in 1994. The sections of the Penal Code dealing with homosexuality had not been amended at that time to include female homosexuality. Kanane was therefore right in contending that sections 164(c) and 167 discriminated against him as a male. Section 164(c) before amendment read: "Any person who ... permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years". The 1998 amendment of the Penal Code replaced the word 'male' with 'any other'. Section 167 before amendment read: "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit an act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of an offence". The 1998 amendment removed 'male' from the legislation and replaced it with 'or her' immediately after 'him'. Immediately after 'himself' the words 'or herself' is used to indicate that lesbians are not exempted.

argument of Devlin, the trial judge asserted that the anti-homosexuality legislation mirrored the prevailing moral values of the society. The judge noted that morality is the foundation of the criminal law; what was acceptable in the West might be anathema in Botswana.²⁴²

Justice Tebbutt of the Court of Appeal, reading the lead judgment, was of the opinion that the trial judge overlooked the status of the anti-homosexuality legislation before its 1998 amendment and carried on as if the appellant had been charged under the post-amendment legislation. He found that section 167 of the Penal Code pre-amendment, under which the appellant was charged, was discriminatory while section 164(c) pre-amendment was not discriminatory. Consequently, the appeal succeeded in part.²⁴³

The Court of Appeal dealt with the case in a wholly technical way, without relating to the real-world experience of homosexuals. The judgment made no remark on the necessity of tolerance towards a group that qualifies to be called sexual minorities.

Similar to the *Eric Gitare* case, the quest for legal recognition in terms of registration as an NGO presents itself in the case of *LEGABIBO v Attorney General of Botswana*.²⁴⁴ The applicants approached the High Court of Botswana sitting at Garbone through a notice of motion seeking an order declaring the action of the Minister of Labour and Home Affairs refusing the registration of LEGABIBO in contravention of section 3 of the Constitution of the Republic of Botswana.

According to the applicants, the action of the Minister of Labour and Home Affairs denied them the right to equal protection of the law contrary to section 3, the right of freedom of expression contrary to section 12, the right to freedom of association and assembly contrary to section 11, and the right to freedom from discrimination contrary to section 15 of the Botswana Constitution. The circumstances surrounding this suit show that on 16 February 2012, the

²⁴² *Kanane* (n 240 above).

²⁴³ *Kanane* (n 240 above).

²⁴⁴ MAHGIB 000175-13.

applicants filed an application for registration of their organisation, the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). The Director of Civil and National Registration rejected the application for registration on the basis that the Constitution of Botswana does not recognise homosexuals and that their application would violate section 7(2)(a) of the Societies Act. On 12 April 2012, the applicants appealed to the Minister of Labour and Home Affairs, who further upheld the decision of the Director of Civil and National Registration. Aggrieved, the applicants filed this suit on the 25 March 2014 seeking an order to declare the actions of the director unconstitutional.²⁴⁵

Reacting to the claim of the Director of Civil and National Registration, that the objective of LEGABIBO offends section 7(2)(a) of the Societies Act, the Court held that the objectives of LEGABIBO was 'quite harmless and in fact promote good values'.²⁴⁶ The Court specifically pointed out article 4(5) of the Constitution of LEGABIBO which states that one of the objective of the organisation is to carry out political lobbying for equal rights and decriminalisation of same-sex relationships.²⁴⁷ On this objective, which the authorities probably capitalised on to refuse LEGABIBO registration, the Court held that 'there is nothing sinister or unlawful about the process of lobbying or advocacy'.²⁴⁸ The Court pointed out that it is a democratic norm for groups to lobby the government of their various countries towards achieving legislative reforms. The High Court also examined the other ground for refusal to register LEGABIBO which is that the Botswana Constitution does not recognise homosexuals. The Court promptly faulted this ground and asserted that no provision in the Constitution expressly denied homosexuals or recognised them.²⁴⁹ The Court succinctly put this reality in the following statement:

²⁴⁵ *LEGABIBO* (n 244 above) para 4.

²⁴⁶ *LEGABIBO* (n 244 above) para 18-19. Section 7(2)(4) of the Societies Act upon which the director based his rejection to register LEGABIBO states that: 'The Registrar shall refuse to register and shall not exempt from registration a local society where it appears to him that any of the objects of the society is or is likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare or good order in Botswana'.

²⁴⁷ *LEGABIBO* (n 244 above) para 20.

²⁴⁸ *LEGABIBO* (n 244 above) para 21.

²⁴⁹ *LEGABIBO* (n 244 above) para 24.

It may be that engaging in homosexual activity is outlawed. But if I were to use an example of one born left handed, if it was a crime to write with a left hand, such a person would not be punished for being left handed but for writing with a left hand just as a gay person would not be punished for being gay rather for engaging in same sex relationship.²⁵⁰

The Court stated that based on all the objectives of LEGABIBO enunciated in its Constitution, there was nothing unlawful or incompatible with peace, welfare or good order in Botswana. Everyone has the right to lobby for change in laws to their own advantage. It was left to the legislators to reject such overtures where they think a change in legislation is inimical to the society.²⁵¹ The Court concluded that in a democratic society freedom of association, assembly and expression are fundamental values protected by the Constitution and can only be limited in a reasonably justifiable fashion permitted by law.²⁵² The Court also held that the objects of LEGABIBO are all *ex facie* lawful and that it is not a crime to be a homosexual.²⁵³ The refusal to register LEGABIBO, according to the Court, was not reasonably justified under the Constitution of Botswana or section 7(2)(a) of the Societies Act, and the refusal is in violation of the applicants' right to freedom of expression, freedom of association, and freedom of assembly, as enshrined under sections 3, 12 and 13 respectively of the Constitution of Botswana.²⁵⁴ Judge Rannaowane declared the actions of the respondent unconstitutional. He set aside the decisions of the Minister of Labour and Home Affairs and ordered that the applicants (LEGABIBO) are entitled to assemble and associate under the name and style of LEGABIBO.²⁵⁵

²⁵⁰ LEGABIBO (n 244 above) para 25.

²⁵¹ LEGABIBO (n 244 above) para 40.

²⁵² LEGABIBO (n 244 above) para 57.

²⁵³ LEGABIBO (n 244 above) para 58.

²⁵⁴ LEGABIBO (n 244 above) para 59.

²⁵⁵ LEGABIBO (n 244 above) para 61.

6.6 A glimpse at Asia: India as a case study

India is chosen as a worthy case study for the purpose of this thesis because the country shares similar penal features as Nigeria in the criminalisation of consensual adult homosexual conduct. In the Asian continent, India has recorded a still birthed breakthrough in *Naz Foundation* case. Homosexual culture is also a prominent feature of some Indian societies. Furthermore, the Constitution of Indian guarantees similar human rights as does Nigeria's Constitution.

This section aims at bringing out the apparent similarity between Nigeria and India in the sexual orientation discourse.

6.6.1 A brief overview of the LGBT story in India

With the second highest population in the world after China, the Union of India is the world's largest democracy.²⁵⁶ With its robust democratic culture, it would be expected that India would be in the forefront of the defence of the rights of sexual minorities. This, however, is not the case. LGBT rights in India are not as protected as these rights in the Western world. India is definitely not the best of places for the LGBT community. India was not always hostile to sexual non-conformists. Non-heteronormativity in India has a long history, going back to ancient times. The ancient people of Asia such as the Babylonians, Hittites, and Assyrians are recorded to have been fairly tolerant of homosexual behaviour.²⁵⁷ The Indians, like other peoples of Asia, also tolerated non-conformist sexual behaviour. The *hijira* transgender communities of India, for example, have always had a place in the cultural and religious life of India.²⁵⁸

²⁵⁶ Sonia Farooqui 'India will become the world's most populous country by 2022, the U.N. says' 30 July 2015, *Time Magazine*. Available at <http://time.com/3978175/india-population-worlds-most-populous-country/> (accessed 21 November 2016). Sonia reports that the population division of the UN's economic and social affairs has projected that India's 1.31 billion population which is currently the second in the world may skyrocket to 1.7 billion by 2050 to overtake China's current lead. See also 'World population prospect: The 2015 revision, key findings and advance tables' for details of the population of India.

²⁵⁷ Wilets (n 1 above) 635.

²⁵⁸ DM Thappa, N Singh & S Kaimal 'Homosexuality in India' (2008) 29 *Indian Journal of Sexually Transmitted Diseases* 60.

The *hijiras* are overwhelmingly biological males who wear female clothes and generally adopt feminine manners.²⁵⁹ They wear colourful clothes, nose rings, and bright make-up. In this regard, they are like the *yan daudu* of Northern Nigeria.²⁶⁰ Unlike the *yan daudu*, the *hijiras* play a distinct religious role in Indian society and have been a permanent feature of Indian society for centuries.²⁶¹ The *hijiras* are referred to as eunuchs because they undergo voluntary castration and devote themselves to the goddess Bedhraj Mata.²⁶² They can be found outside temples in India begging for alms or waiting to be hired for social occasions such as birth and wedding ceremonies and other occasions where they serve as entertainers. With modernity catching up with India, the *hijiras* have found themselves less useful to the society as modern means of entertainment render their services superfluous. Consequently, many *hijiras* in today's India work as prostitutes or beg for alms in public places.²⁶³ Thus, the *hijiras* are not only a religious group but a sexual minority. Unlike the Western transgender community that has no direct link to religious institutions, the *hijiras* fit into the Indian religious system.

While some *hijiras* assume their transgender identity by the self-immolative act of castration, others undergo 40 days religious ritual which qualifies them for membership of the transgender community. In today's India the *hijiras* are effectively social outcasts despite enjoying the broadest rights among India's sexual minorities.²⁶⁴ They live in dirty communes on the outskirts of cities and towns.²⁶⁵ In these communes they organise themselves into a

²⁵⁹ Thappa (n 258 above) 60.

²⁶⁰ For details on the ways of life of the *Yan daudu* of northern Nigerian, a social outcast group like the Indian *hijiras*, see RP Gaudio *Allah made us: Sexual minorities in an Islamic African city* (2009).

²⁶¹ S Dickson & S Sanders 'Indian, Nepal, and Pakistan: A unique South Asian constitutional discourse on sexual orientation and gender identify' in SH Williams (ed) *Social difference and constitutionalism in Pan-Asia* (2014) 323.

²⁶² Dickson & Sanders (n 261 above) 323.

²⁶³ Dickson & Sanders (n 261 above) 324.

²⁶⁴ Dickson & Sanders (n 261 above) 324.

²⁶⁵ Jefferson Mok & Stephanie Linning 'Hidden world of the hijiras: Inside India's 4000-year-old transgender community where religious respect doesn't protect them from modern-day discrimination' available at www.dailymail.co.uk/news/article-2852834/Hidden-world-hijiras-

distinct social group and express solidarity for one another. *Hijiras* rejected by their families find solace in these communes.

But the *hijiras* are not the only sexual minorities in India. There are gay groupings such as the *kothis* (men who exhibit feminine characteristics), the *panthis* (a more masculine class of men who have intercourse with the *kothis*), and the middle and upper class gay and bisexual men and women.²⁶⁶ Yet, the *kothis* and *panthis* cannot be said to be gay in the strict Western interpretation of the term because they marry women. In this regard, once again, they are similar to the *yan daudu* of northern Nigeria.

Given the cultural roots of the *hijiras* in Indian society and the centuries-long recognition, it is not surprising that this transgender group enjoys broad rights in modern India, with the India Supreme Court recognising them as a third gender in 2014.²⁶⁷ The pre-colonial tolerance of unconventional sexual behaviour in India gave way to hostility and discrimination with the coming of the British colonial masters who introduced anti-sodomy legislations that have since survived the death of colonialism, entrenched as they are in section 377 of the Indian Penal Code of 1860. The historical roots of section 377 are in the Fleta and Britton common law texts of 1290 and 1300 respectively, which later metamorphosed into the 1533 Buggery Act that punished sodomy with death by hanging.²⁶⁸ The death penalty for sodomy was abolished in 1861 in England and Wales. However, the 1861 Offences against the Person Act still harshly penalised sodomy as it prescribed servitude for life for anyone convicted of the offence. The English sodomy law was introduced into India through the famous British Jurist Lord Macaulay who wrote the Indian Penal Code.²⁶⁹

Not many convictions have been secured under section 377, but its very presence in the Penal Code constitutes a legal menace to the Indian LGBT

[inside-5-5-000-year-old-transgender-community-religious-respect-doesn-tprotect-modern-day-discrimination-html](#) (accessed 29 February 2016).

²⁶⁶ Dickson & Sanders (n 261 above) 323.

²⁶⁷ Mok & Linning (n 265 above).

²⁶⁸ See L Blom-Cooper & G Drewry, (eds) *Law and morality: A reader* (1976) 91.

²⁶⁹ J Hepple 'Will sexual minorities ever be equal? The repercussions of British colonial "sodomy" laws' (2012) 8 *The Equal Rights Review* 54.

community. The section which criminalises male homosexuality, provides a justification for the discrimination of Indians who happen to be sexual minorities.²⁷⁰ The most celebrated and earliest recorded trial of an accused under section 377 is the *Nowshirwan* case of 1935. Nowshirwan Irani, a shopkeeper, was charged to court for the offence of sodomy allegedly committed with a teenager called Ratansi, a disreputable fellow. The prosecution claimed that Nowshirwan had forceful carnal knowledge of Ratansi without being able to prove their case. The judge rejected the testimony of Ratansi who he believed was in league with the two police witnesses, Solomon and Gulubuddin, to nail Nowshirwan by all means. The two witnesses claimed to have observed Nowshirwan committing the offence he was charged with through the key-hole of a door in Nowshirwan's house. The two witnesses also took credit for the arrest of the accused. Relying on medical report which could not establish forceful penetration and the porous testimonies of the eyewitnesses, the trial judge decided that there was no solid case against Nowshirwan.²⁷¹ Apart from the fact that the charge of forceful assault was unfounded, the judge also noted that the act of sodomy has not been completed.²⁷² Clearly, the judge was sympathetic, convinced that there was a conspiracy to persecute the shopkeeper.

The case was the first high profile trial under section 377 in India. The trend of judges approaching LGBT cases with empathy continued with the landmark *Naz Foundation v Union of India* judgment,²⁷³ in which the Delhi High Court declared section 377 of the Indian Penal Code null and void to the extent that it criminalised consensual adult same-sex behavior. At this stage it is worthwhile to quote the provision of section 377. It states:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

²⁷⁰ Hepple (n 269 above) 54.

²⁷¹ See A Narrain, 'A new language of morality: From the trial of Nowshirwan to the judgment in *Naz Foundation*' in O Vilhena, U Baxi and F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 293.

²⁷² Narrain (n 271 above) 293-295.

²⁷³ WP(C) 7455/2001.

The explanatory note to the section refers to penetration as the determinant of the commission of the offence of carnal knowledge against the order of nature. The judicial nullification of section 377 insofar as it criminalises consensual adult same-sex acts has been hailed as a victory of constitutional morality over public morality by Arvind Narrain.²⁷⁴ While public morality is myopic, narrow-minded, arbitrary, and ultimately discriminatory, constitutional morality affirms the equality of all persons before the law and the inviolability of fundamental human rights as enshrined in the Constitution of India.

6.6.2 Homosexuality under the Indian penal law

The Indian Penal Code (IPC) is the main legal document that stipulates offences and penalises them in accordance with their degree of severity. Homosexuality is among the numerous offences prohibited and penalised by the IPC. As I showed in the previous section, the offence of homosexuality is clearly spelt out under section 377 of the IPC. It is true that there is no explicit reference to the term 'homosexuality' or even 'sodomy' in section 377, but the intent is clear. The phrase 'carnal intercourse against the order of nature' read with the reference to penetration in the explanatory note easily encompass the practice of sodomy. Section 377 provides for a scenario where a man can be convicted for an offence against the order of nature if he has had penetrative sex with another man. The appearance of the word 'voluntary' constitutes double jeopardy for homosexual males²⁷⁵ for the reason that consensual adult same-sex relationships are thereby prohibited by law. It was dissatisfaction with this invasive aspect of section 377

²⁷⁴ Narrain (n 271 above) 306.

²⁷⁵ It may be argued that the ability to 'penetrate' is not a preserve of the human male as the phenomenon of sex toys can make it possible for a woman to be tried under section 377. While indeed a sex toy can act as a penetrative tool, it cannot be disputed that the contentious section refers directly to the penis as a tool for penetration. This consideration may have persuaded the International Lesbian and Gay Association (ILGA) to classify female homosexuality in India as legal. See International Lesbian and Gay Association 'State-sponsored homophobia: A world survey of laws prohibiting same sex activity between adults' May 2008 www.ilga.org/statehomophobia/satte-sponsored-homophobia-ILGA-07-pdf (accessed 23 July 2015).

that prompted a pro-LGBT coalition to challenge the constitutionality of the colonial-era law and demand the decriminalisation of penile non-vaginal sexual consensual intercourse between adult men not driven by commercial interests.

India is a socially conservative state with a pronounced religious consciousness and a largely anti-LGBT population. The *Naz Foundation* case before the Delhi High Court, however, marked a willingness on the part of judicial officers to prioritise human rights concerns over public morality standards which are often informed by prejudices. Before *Naz Foundation* there was the *Nowshirwan* trial in which the court refused to convict the accused under section 377. *The Naz Foundation* case advanced the *Nowshirwan* case and represents the kind of progressive impact a sympathetic bench can have on the decriminalisation process in India. Despite the illegality of homosexual marriage, it is noteworthy that in 2011 a Gurgaon Court directed the police to offer protection to a lesbian couple (Beena and Savita) who claimed to have married before a public notary in Gurgaon.²⁷⁶ In spite of the decision not being a landmark one, having been decided by a session's judge in a remote village, it is yet another promise of the potential of the judicial process in advancing LGBT rights in India.

6.6.3 Morality, law and human rights under the Indian Constitution

India is a democratic nation that practices the parliamentary system of government, like Britain. Unlike Britain, however, India has an elaborate written

²⁷⁶ See, DK Dash and Sanjay Yadavi, 'In a first Gurgaon Court recognises lesbian marriage' *The Time of India* July 29, 2011 available at <http://timesofindia.indiatimes.com/city/gurgaon/in-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421/cms> (accessed 12 April 2016). On the strength of the claim of Beena and Savita of having undertaken a marriage pledge and signed an affidavit before a public notary, and relying on a 2009 Punjab and Haryana High Court directive to district and sessions judges to protect couples fleeing local persecution, the sessions judges in Gurgaon extended police protection to the homosexual couple. One of the couple, Beena, is said to have acted like a male from childhood and is treated as a male by her family.

Constitution.²⁷⁷ Constitutionality, then, is the guiding principles of the Union of India, the ground norm of the constituent parts which upholds the doctrine of unity in diversity. The Indian judiciary interprets the 1949 Constitution of India, from district judges up to Supreme Court judges. The framers of the 1949 Constitution recognised the diversity of the Union of India and its history of human rights abuse; consequently, they made the promotion of human rights a constitutional priority.²⁷⁸ India is home to Hindus, Christians, Muslims, Sikhs, Buddhists and other religious groups. It has a history of discrimination institutionalised through the caste system.²⁷⁹

The inherent discrimination in the Indian social structure notwithstanding, India is a tolerant nation with humanistic moral standards derived from the basic Hindu worldview which preaches universal brotherhood and respect for life.²⁸⁰ The spirit of Hindu morality and tolerance permeates the highly progressive Constitution of India. The Union of India is a state party to such international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).²⁸¹

²⁷⁷ About the unwritten feature of the British Constitution, see DW Vick 'The human rights Act and the British Constitution' (200) 37 *Texas International Law Journal* 332-333. Douglas Vick views Britain as a democracy without a written constitution. According to him 'there is no single, identifiable document that is widely accepted as a systematic statement of the basic tenets of British constitutional law'. The Union of India on the other hand has its constitutional principles consolidated in one document.

²⁷⁸ See, PH Parekh 'Universal Declaration of Human Rights and Constitution of India-Achievements, problems and challenges' (2008) *Human Rights Year Book* 119-125.

²⁷⁹ The four major castes recognised in Hinduism, the dominant religion of India, are the Brahmins, the Kshatriyas, the Vaisyas and the Shudras. The highest caste, the Brahmins, is the priestly class and enjoyed pre-eminence in ancient Indian society. The Kshatriyas belongs to the warrior class. The Vaisyas belong to the merchant and peasant class. They are considered inferior to the priestly and warrior classes. The lowest caste is occupied by the Shudras who are treated little better than slaves. The vedic religion institutionalised the caste system, as its adherents could not change their castes. The social identity was passed from parents to offspring from generation to generation. See S Sivananda *All about Hinduism* (1999) 31.

²⁸⁰ See, for instance, S Sivananda *All about Hinduism* (1999); CS Crawford *The evolution of Hindu ethical ideals* (1982).

²⁸¹ Both the ICCPR & ICESCR were ratified by the Republic of India on 10 April 1979.

6.6.3 Constitutional guarantee of human rights under the Indian Constitution

Article 14 of the 1949 Constitution calls for the equal treatment of all citizens before the law. Discrimination on the basis of sex²⁸² and caste²⁸³ stands prohibited.

Part III of the Constitution is clear about the fact that all laws preceding the enactment of the Constitution that are in force in the Union of India will be null and void to the extent that they clash with the human rights provisions of the Constitution²⁸⁴ Article 15(2) forbids discrimination on the basis of religion, race, and place of birth. This provision grants all citizens the right to shop freely, go to places of entertainment, and benefit from public social services. Article 16 guarantees all Indian citizens equality of opportunity in public employment regardless of the region they come from, their sex, religion, etc.

The problem of ‘untouchability’ is one that sticks out in Indian history. With the close-knit relationship between religions, culture, and morals, the caste system has become very hard to eradicate. The Constitution took the plight of ‘untouchables’ into consideration and expressly forbid caste-motivated discrimination of any kind. Article 17 categorically states that “Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘untouchability’ shall be an offence punishable in accordance with law”. Article 19, 20, 21, 22, 23, 24 and 25 guarantees indispensable fundamental human rights such as right to freedom of expression and association, freedom from the arbitrary application of the law, right to life and personal liberty, right to legal representation in the event charges are brought against a citizen in a law court, freedom from exploitation and forced labour, right of the child to enjoy a childhood free from participation in the labour market and right to freedom of religion.

²⁸² See Article 15(1) of the Constitution of India 1949.

²⁸³ Article 15(2) Constitution of India 1949.

²⁸⁴ See Article 13(1) and 13(2).

The Constitution recommends affirmative action to correct cultural and educational imbalances that works against women, children, and minorities. Article 29(1) and 2(2) proclaims the equality of India's diverse cultural identities and equal access to educational institutions. Article 30 spells out the educational rights of cultural minorities.

Similar to section 45 of the Constitution of Nigeria, which provides the conditions under which constitutionally guaranteed rights can be limited, Article 19(2) of the Indian Constitution, 1949, lists factors that can warrant limitations from the fundamental human rights principles laid down in the Constitution. Section 45 of the Nigerian Constitution, 1999, identifies public morality as a ground for limiting certain human rights, a caveat that can easily be invoked to deny LGBT persons their right to equality. It is worth recalling that the Hart-Devlin debate discussed in a previous chapter arose over the claims that public morality provides adequate justification for the criminalisation of certain conducts like homosexuality. Article 19(2) identifies public morality and decency as grounds for the limitation of human rights. The appeal to public morality and decency was deployed by a defendant in the *Naz Foundation* case, as we will soon see.

The *hijiras* enjoy the broadest rights of all India's sexual minorities. This status of the *hijiras* is no doubt due mostly to their cultural anchor in Indian society. In the last two decades this transgender community has seen the fortunes of its members rise in ways that will draw the envy of other sexual minorities. Prior to 1994 the *hijiras* could only vote as males. In 1994 they won the right to vote as both males and females.²⁸⁵ In the State of Tamil Nadu the *hijiras* have particularly enjoyed robust educational advantages. The State's Aravani Welfare Board which was established in 2008 protects and promotes the interests of the *hijiras*.²⁸⁶ In 2005 the government of India officially conferred the third gender status of the *hijiras* and made it possible for them to select the 'E'

²⁸⁵ Dickson & Sanders (n 261 above) 324.

²⁸⁶ Dickson & Sanders (n 261 above) 326.

box on passport forms that identifies them as eunuchs. In 2006 the High Court of Madras awarded 500, 000 rupees as compensation to the family of a *hijira* who committed suicide through self-immolation after he was raped and tortured by the police,²⁸⁷ a case the High Court of Delhi referred to in the *Naz Foundation* case. The *hijiras* have also won political rights. In 1999 a *hijira* Shabnam Mausi was elected to the Madhya Pradesh legislature.²⁸⁸ These victories flowed from the robust human rights protection emphasis of the Indian Constitution.

The Supreme Court of India has been at the forefront of constitutionality and the defence of human rights in India. Apart from recognising the third gender status of the *hijiras*, the Indian Supreme Court has actively promoted a human rights regime elsewhere through judicial interventions. In the case of *DK Basu v State of West Bengal* in which it was held that the state of West Bengal was liable for negligence, the Indian Supreme Court, in awarding damages against the state, emphasised on the value of pecuniary compensation in the dispensation of full justice, proclaiming that

[t]he old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations...Mere punishment of the offender cannot give such solace to the family of the victim.²⁸⁹

In *Sadhuram Bansal v Pulin Behari Sarkar*,²⁹⁰ the Indian Supreme Court amplified the theme of social justice and the obligation of the judiciary to take due cognisance of the concrete humanity of individuals in the dispensation of justice. The apex court, in paragraph 30, stated that the practice of jurisprudence has moved away from the niceties of elaborately constructed technicalities and meaningless abstraction towards a more direct engagement with individuals who, after all, are the focus of the law. The apex court asserted

²⁸⁷ Dickson & Sanders (n 261 above) 327.

²⁸⁸ Dickson & Sanders (n 261 above) 325.

²⁸⁹ See, M Mudgal 'Compensation for human rights violation: Dynamic approach of the Indian Judiciary' in PH Parekh (ed) *Human Rights Year Book* (2006) 86.

²⁹⁰ (1984) 3 SCC 410.

that the new jurisprudence engages individuals as human beings with needs, beings in search of justice, be it social, political, or economic.²⁹¹ The new emphasis by the Indian judiciary on social justice is consistent with the preamble to the Indian Constitution which elevates the absolute necessity of social justice.

The legal shift in favour of social justice culminated in the *Naz Foundation* case – at least at the High Court level - which saw the LGBT community recording its most remarkable victory in Indian legal history.

6.6.4 A critical analysis of the judgment in *Naz Foundation v Union of India: The Implications for Nigeria*

The outcome of the *Naz Foundation* case is the product of a noticeable tendency in Indian jurisprudence towards the affirmation of social justice. This required a more sympathetic and activist judiciary. The journey began with the Nowshirwan case in which the trial judge rejected the testimony of the prosecution witnesses and acquitted the accused who had been charged under section 377 of the IPC. *Naz Foundation* has its antecedents in a 1994 challenge to section 377 by a non-profit organisation committed to the fight against the Acquired Immuno-deficiency Syndrome (AIDS). Persuaded that the campaign against AIDS would be more successful if the contentious section was repealed. AIDS Bhedbhav Virodi Andolan (ABVA) went to court to have section 377 nullified. However, *ABVA v Union of India and Others*²⁹² was an exercise in futility as technicalities and lack of diligent prosecution saw an untimely end to its challenge.

The next attempt at repealing section 377 came at a time the Indian LGBT groups were better organised, determined, and vocal. In *Naz Foundation*, the petitioner averred that section 377 of the IPC was unconstitutional as it violated articles 14, 15, 19, and 21 of the Constitution of India. The provisions of the Constitution referred to affirm the equal protection and equality before the law, non-discrimination on the basis of sex, among others, freedom of expression and

²⁹¹ *Bansal* (n 290 above) para 30.

²⁹² WP(C) 1784/1994.

association, and the right to liberty. In a comprehensive interpretation of the wording of section 377, the Delhi High Court noted that while the term ‘unnatural offences’ does not appear within the text of section 377 the reference to ‘carnal intercourse against the order of nature’ clearly indicates the assumption on the part of the drafter of the law that an act which corresponds to ‘carnal intercourse against the order of nature’ constitutes an unnatural offence. With copious references to decided cases on what types of sexual activity constituted a violation of the natural order, the Delhi High Court noted that the contentious law decides the criminality of sexual behaviour (against the order of nature) no longer on the basis of an act being non-procreative but rather on the ground of the act amounting to sexual perversity.²⁹³ In other words, the law views any act of sexual perversity an unnatural offence. In this case, sodomy is an unnatural offence.

The Delhi High Court clearly favoured an interpretation of the Constitution from the perspective of social justice founded on constitutionalism as it made copious references to local and international rulings on human dignity. The Delhi High Court referenced article 12 of the Universal Declaration of Human Rights which forbids interference in the private affairs of individuals, article 17 of the International Covenant on Civil and Political Rights which underlined article 12 of the UDHR, article 8 of the European Convention on Human Rights which lends support to the earlier stated human rights provisions, and the Indian Constitution itself.²⁹⁴

On 2 July 2009, the Delhi High Court delivered its judgment declaring section 377 unconstitutional ‘insofar it criminalises consensual sexual acts of adults in private’.²⁹⁵ The Delhi High Court stressed the inclusivity of traditional

²⁹³ *Naz Foundation* (n 273 above) para 5.

²⁹⁴ *Naz Foundation* (n 273 above) para 29-31.

²⁹⁵ *Naz Foundation* (n 273 above) para 132. One of the most contentious issues that I discussed in chapter 3 is whether the right to privacy as guaranteed under the Nigerian Constitution protects the activities of homosexuals and whether the continuous existence of sodomy laws violate this right. The decision in *Naz Foundation* has demonstrated that the sodomy laws in their unenforced state is in contravention of the right to privacy. Section 377 of the IPC is very much similar to the provisions of Nigeria’s section 214 of the Criminal Code and 284 of the Penal Code. The implication here is that, Nigerian LGBT communities can tap positive inspiration from

Indian society and its appreciation of the virtue of tolerance. The Delhi High Court did not think that majority prejudice should condemn minorities to misery, asserting that the mere fact that the majority considers sexual minorities different or deviant does not mean the latter should be ostracised.²⁹⁶ Narrain hails the judgment as a major victory for constitutionalism. He lauds the Court for introducing what he considers as a new language of morality, that is, the subversion of the supremacy of public morality and the promotion of constitutional morality as a better and more rational alternative.²⁹⁷ The victory of constitutional morality over public morality in the *Naz Foundation* case is a judicial re-enactment of the Hart-Devlin intellectual drama. Just as Hart won in the West, so did he in the judgment of the Delhi High Court of India.²⁹⁸ Constitutional morality comes down firmly on the side of dignity, rationality, justice, and the humane consideration of individuals. It affirms the principle of equality of all persons before the law over social prejudice.

The judges in *Naz Foundation* made extensive references to some of the landmark cases of homosexuality decided in Western courts and the European Court of Human Rights. The positive influence on the judges by decided cases from around the world is yet another confirmation of the global trend towards rights recognition for sexual minorities. But as Dickson and Sanders caution, it will be a mistake to assume that the *Naz Foundation* judgment merely apes Western social progressivism, that the decision itself is *Lawrence v Texas* transposed to the Indian environment.²⁹⁹ As stated earlier, India has a history of tolerance towards sexual non-conformism, in particular the *hijira* sub-culture. This much the Delhi High Court acknowledged in its ruling, when it asserted that inclusivity is a characteristic of Indian society. While the language and

the decision in *Naz Foundation* and argue that the continuous existence of the sodomy laws violate their constitutionally guaranteed right to privacy.

²⁹⁶ *Naz Foundation* (n 273 above) para 130.

²⁹⁷ *Naz Foundation* (n 273 above) 304-305.

²⁹⁸ The Supreme Court of India has since upturned the High Court ruling scraping section 377. The apex court ruled that the contentious section does not violate the Constitution of India, maintaining that it is the duty of the legislature to repeal or amend section 377.

²⁹⁹ Dickson & Sanders (n 261 above) 333.

manner of presentation of the judgment might be termed Western, the concerns raised and resolved in the judgment are local.

It is important to point out that the landmark decision in the *Naz Foundation* case was not an enduring occasion for celebration for the Indian LGBT community as the Supreme Court of India overturned the judgement.³⁰⁰ The avenue that afforded the Supreme Court the ground to upturn this judgement came up in *Suresh Kumar Koushal & anor v Naz Foundation & ors.*³⁰¹ The appellants in this case argued that section 377 of the Indian Penal Code is constitutional as it does not breach articles 14, 15 and 21 of the Constitution of India, and that the court of first instance erred in so holding. The appellants pressed that the right to privacy and dignity does not translate to commit any offence under section 377 of the IPC. They asserted that the statistics in the Respondents' petition before the lower court claiming that section 377 adversely affected the management of HIV/AIDS was merely manufactured and fraudulent. The contended further that if section 377 was struck down, India's social fabric and institution of marriage would be adversely affected and young individuals will be tilted to homosexual acts. They also argued that it was not the duty of the courts to make and unmake laws.³⁰²

The respondents on the other hand stuck to their initial argument before the Delhi High Court. The respondents submitted that section 377 offends the spirit of articles 14, 15 and 21 of the Indian Constitution and that 'sexual intimacy is a core aspect of human experience and is important to mental health, psychological wellbeing and social adjustment'.³⁰³ The Supreme Court held that the decision of the Delhi High Court was legally unsustainable and that section 377 of the IPC does not violate the Constitution. The judges however curiously

³⁰⁰ See J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 8.

³⁰¹ Civil Appeal No 10972 of 2013 available at

³⁰² *Koushal* (n 301 above).

³⁰³ *Koushal* (n 301 above).

noted that the legislature was at liberty to tinker with the idea of deleting or amending section 377 of the IPC.³⁰⁴

While *Suresh Kumar Koushal* is indeed a setback for the Indian sexual minorities, the fact remains that in *Naz Foundation* local anxieties encountered global assurance.

They are obvious lessons for Nigeria in the *Naz Foundation* judgment. The Nigerian judiciary cannot wait until the society changes its attitude towards homosexuality before invoking the concept of constitutional morality to protect sexual minorities from the prejudice of the majority. There is no sign today that such a major attitudinal shift is on the way, with Islamic fundamentalism consolidating in northern Nigeria and Christian radicalism increasingly finding a foothold in southern Nigeria. Nigerian judges will have to muster enough courage to take the bull by the horn. LGBT organisations must step up their activities and test the judiciary with cases of persecution over consensual adult homosexual relations. The Nigerian social environment is definitely hostile to the notion of homosexual rights as human rights, but, then, opposition exists to be

³⁰⁴ *Koushal* (n 301 above). The position of the Indian Supreme Court on this matter is however, not finally resolved yet as the Indian Supreme Court is currently exploring the judicial review system known as the ‘curative jurisdiction’ which permits legal proceedings to continue after a final decision by the apex court is reached. This policy gives the apex court the rare opportunity to overturn its judgement where same is seemingly reached in error. See Gautam Bhatia ‘Indian Supreme Court’s “curative” hearing in the “LGBT case” available at <http://ohrh.law.ox.ac.uk/the-indian-supreme-courts-curative-hearing-in-the-lgbt-case/> (accessed 17 January 2018). See also ‘Supreme Court to reconsider, review section 377 of IPC: Apex court’s 2013 judgement upheld criminality of gay sex’ available at <http://www.firstpost.com/india/supreme-court-to-reconsider-review-section-377-of-ipc-apex-courts-2013-judgment-upheld-criminality-of-gay-sex-4292727.html> (accessed 17 January 2018). In the landmark privacy rights judgement of *Puttaswamy v Union of India & ors* Petition No 494 of 2012 para 127, the Indian Supreme Court in a hope rekindling judgement for sexual minorities stated as follows: ‘The views in *Koushal* that the High Court had erroneously relied upon international precedents “in its anxiety to protect the so-called rights of LGBT persons” is similarly, in our view unsustainable ... Their rights are not “so-called” but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination’. In what seems like a reassuring life-line for sexual minorities in India, the Supreme Court further held that ‘consequently, we disagree with the manner on which *Koushal* has dealt with the privacy-dignity based claims of LGBT persons on this aspect. Since the challenge to section 377 is still pending before a larger Bench of this Court, we would leave the constitutional validity to be determined in an appropriate proceeding’. *Puttaswamy* para 128.

overcome. The success so far recorded on the international scene is a source of hope for the Nigerian LGBT community. In the fullness of time global trends will, it is anticipated have an impact on the Nigerian LGBT scene.

6.7 The European Convention on Human Rights and the jurisprudence related to sexual orientation rights

The ECHR is a human rights treaty document of the Council of Europe adopted in 1950 and came into operation in 1953.³⁰⁵ The ECHR was created ostensibly to pursue the ideals of human rights protection among European countries.³⁰⁶ It provides for a plethora of human rights.³⁰⁷

At the inception of the ECHR, the main judicial mechanism for enforcement of the rights contained therein were the European Commission on Human Rights, the European Court of Human Rights and the Committee of Ministers. These committees have collapsed into the single European Court of Human Rights since 1 November 1998.³⁰⁸ The history of the ECmHR and the ECtHR shows that before the 1980 homosexuality was not given an affirmative judicial nod by these institutions of the ECHR.³⁰⁹ As a matter of fact, the defunct ECmHR initially approved criminalisation of adult consensual same-sex activity for the protection of morals in the society.³¹⁰ Johnson notes that the remarkable

³⁰⁵ J Rehman *International human rights law* (2010) 184.

³⁰⁶ LR Helfer 'Finding a consensus on equality: The homosexual age of consent and the European Convention on Human Rights' (1990) 65 *New York University Law Review* 1047-1048. Rehman (n 305 above) articulates that Europe as a continent had witnessed a brutal abuse of human rights during the Second World War and there was an urgent need for a regional treaty spelling out civil and political rights to prevent future occurrences. The treaty was also aimed at extending democracy to the communist quarter of Europe, banishing of dictatorial tendencies and totalitarian ideologies in Europe.

³⁰⁷ Article 2-14 of the European Charter contains such rights as the right to life, right not to be subjected to torture, prohibition of slavery and forced labour, right to liberty and security, right to fair trial, right to respect for privacy and family life, freedom of thought, conscience and religion, freedom of assembly and association, right to marry, prohibition from discrimination

³⁰⁸ Rehman (n 305 above) 215.

³⁰⁹ P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 252-253.

³¹⁰ See, P Girard 'The protection of the rights of homosexuals under the international law of human rights: European perspectives' (2014) 23 *Osgoode Legal Studies Research Series* 7-14. Also see, Johnson (n 309 above) 253.

thing about the historical refusal of both the ECmHR and the ECtHR to affirm sexual minorities' rights under the ECHR is the persistence of gay men and lesbian women to keep bringing up the issue till a breakthrough was achieved.³¹¹ In what follows next, I discuss a selected cases out of the many by the ECtHR affirming rights for homosexuals and declaring the anti-sodomy provisions of domestic penal codes of some European countries inconsistent with the ECHR.

While tracing the history of section 377 of the Indian Penal Code, which criminalises homosexuality, I indicated that the law has a colonial heritage. Private homosexual conduct in England among adults had become legal following the adoption of the Wolfenden report of 1957.³¹² Nevertheless, anti-sodomy laws – which were rarely enforced – were still on the statute books of Northern Ireland, a constituent part of the United Kingdom. *Dudgeon v United Kingdom*³¹³ was a direct challenge to the Offences against the Person Act, 1861 which punished the actual commission of buggery together with the attempt to commit the act.³¹⁴

The applicant submitted before the Court that the continued existence of the laws in contention subjected him to psychological agony as he lived in constant fear of prosecution. He complained that his correspondence was not returned to him by the police until an entire year after it was seized. He submitted that his rights under article 8 of the European Convention had been violated. Article 8(1) declares that: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) further forbids the state or its servants from interfering with the basic right to privacy.

³¹¹ Johnson (n 309 above) 279.

³¹² See Blom-Cooper & Drewry (n 268 above).

³¹³ ECHR (23 September 1981) Ser A 45.

³¹⁴ Section 11 of the Criminal Law Amendment Act of 1885 (the 1885 Act) criminalised sexual relations between two men. Section 11 of the 1885 Act penalises an act of gross indecency between two men with a jail term of two years maximum, be the act committed in private or in public. Section 61 of the 1861 Act punishes the actual commission of the offence of buggery with life imprisonment while section 62 punishes the attempt to commit buggery with a ten-year jail term.

The only grounds for limitation are the interests of national security, public health and morals, the protection of the rights of others, public safety or the state's economic well-being.³¹⁵

In its decision, the European Court noted that the buggery and indecency laws cover homosexual conduct. The applicant's fear about possible arrest and prosecution is justified because as a homosexual he is very likely to engage in homosexual practices in the future, thus risking police prosecution. The European Court arrived at the conclusion that to the extent that the contentious legislation forbids private consensual same-sex sexual conduct between males the legislation violates the right to private life under Article 8(1) of the European Convention.³¹⁶ Consequently, its continued existence constitutes a violation of the applicant's right to respect for his private life. In arriving at this decision, the European Court extended the privileges of a private life to the enjoyment of a preferred sexual lifestyle. The European Court had no cause to disagree in principle with the idea of regulating sexual practice to some extent to prevent sexual abuse and exploitation of vulnerable groups like children and the disabled, pointing out that member states of the Council of Europe have laws against sexual exploitation. However, it noted that the Northern Ireland law was unreasonable as it penalises buggery and gross acts of indecency between males regardless of the circumstances.³¹⁷ The European Court could not find any circumstance warranting the maintenance of the impugned legislation in a democratic setting as spelled out in Article 8(2) of the Convention.

The government, in defence of the legislation, told the European Court that social attitudes were different in Northern Ireland and Great Britain as far as the question of morality was concerned, given that social conservatism still prevailed in Northern Ireland. Since this is the case, it stands to reason that article 8(2) has not been violated by the continued existence of the legislation.³¹⁸ On its part,

³¹⁵ *Dudgeon* (n 313 above) para 37.

³¹⁶ *Dudgeon* (n 313 above) para 40.

³¹⁷ *Dudgeon* (n 313 above) para 39.

³¹⁸ *Dudgeon* (n 313 above) para 55-56.

the European Court was not convinced that the moral nuances of Northern Ireland society made a compelling case for the necessity of the impugned legislation. The European Court submitted that there had been no evidence of a lowering of standards of sexual morality in Northern Ireland in spite of the non-enforcement of the impugned law in recent times.³¹⁹ There had been no demand by the society for stringent application of the law because the law had little bearing on the moral state of the society. The European Court thus suggested the law was superfluous.³²⁰ The European Court concluded that article 8 had been breached and that the applicant's human rights had been violated.

In his dissenting opinion, Judge Zekia asserted that the State had not breached article 8. Judge Zekia noted that the Christian and Islamic religions condemned homosexuality and that for a long time all civilised societies prescribed punishment for homosexuality.³²¹ Appealing to majoritarian sentiments, the judge saw no reason for the interest of homosexuals under article 8(1) to override the feelings of the overwhelming majority who consider homosexuality immoral. The judge contended that this majority deserves to have their religious beliefs respected in a democracy under articles 8, 9 and 10 of the Convention and article 2 of Protocol No 1. Judge Zekia concluded that the government was justified in maintaining a law that promotes morals and is acceptable to the majority in the society.³²²

Judge Zekia's appeal to majoritarian morality does not convince. The Hart-Devlin debate has already settled the matter. It takes nothing away from society if the majority allows minorities to freely claim the same fundamental human rights enjoyed by the majority.

*Karner v Austria*³²³ is another case involving the rights of homosexuals under article 8 of the Convention. Unlike the *Dudgeon* case, the *Karner* case invited the European Court to make a pronouncement on article 14 of the

³¹⁹ *Dudgeon* (n 313 above) para 58-60.

³²⁰ *Dudgeon* (n 313 above) para 60.

³²¹ *Dudgeon* (n 313 above) para 1 of the dissenting view of Zekia.

³²² *Dudgeon* (n 313 above) para 2 & 3 of the dissenting view of Zekia.

³²³ Application No 40016/89

Convention. The case under consideration was lodged with the European Commission of Human Rights for adjudication by the ECHR on July 24, 1997. The applicant complained that the refusal of the Austrian Supreme Court to recognise his right of succession to the tenancy held by his homosexual partner until his death constituted discrimination against him as a homosexual, which discrimination violated article 14 of the Convention read with article 8.³²⁴

The European Court was not impressed by the Government and the Supreme Court's narrow interpretation of section 14(3) of the Rent Act which discriminates against certain persons on the basis of their sexual orientation, noting that for any such discrimination to be justified there must be a compelling reason for discriminating.³²⁵ The European Court rejected the argument about protecting the traditional family as a basis for sustaining the narrow interpretation of section 14(3). Accordingly, it ruled that the particular way of interpreting the rent law that prevented a surviving partner from succeeding to a tenancy on the basis of sexual orientation violated Article 14 of the European Convention read together with article 8.³²⁶

The majority decision seems to me sound because the European Court pronouncement clearly deepens sexual minorities' rights and sets a precedent that cannot but serve the cause of the global equality campaign.

³²⁴ *Karner* (n 323 above) para 3. The fact of the case shows that the applicant was born in 1955, the applicant had been living with his partner Mr W from 1989 in a flat in Vienna whose rent they jointly paid for. By 1991 Mr W discovered he was living with HIV. Mr W was nursed by the applicant until 1994 when the former died. Before his death Mr W appointed the applicant his heir. The landlord wanted to terminate the applicant's tenancy in 1995, but the Favoriten District Court obstructed the move, insisting that section 14(3) of the Rent Act affirmed the right of transfer of tenancy from a family member to another, which right is also enjoyed by persons in a same-sex relationship. On April 30, 1996 the Vienna Regional Civil Court upheld the January 6, 1996, judgment of the Favoriten District Court. Undaunted, the landlord proceeded to the Supreme Court on appeal. The Supreme Court saw merit in the appeal and quashed the decision of the Vienna Regional Civil Court on December 5, 1996. The Supreme Court ruling automatically ended the lease. The Supreme Court contended that at the time the contentious law was enacted the term "life companion" was not intended to encompass individuals engaged in a homosexual relationship. See para 10-16.

³²⁵ *Karner* (n 323 above) para 41.

³²⁶ *Karner* (n 323 above) para 42-43. The European Court awarded 5000 euros to the estate of the applicant to cover costs and expenses that might have been incurred in the course of the litigation. No damage was awarded as there was no injured party to make any claim to damages. See para 47.

*L and V v Austria*³²⁷ is a case involving two applications against Austria lodged with the Commission in pursuant of article 25 of the European Convention by two citizens of Austria whose full names were not given.³²⁸ The European Court held Austria's different age of consent for homosexuals and heterosexuals to be discriminatory and that 'there has been a violation of article 14 of the European Convention taken in conjunction with article 8'.³²⁹ The European Court decided that it was not necessary to pronounce on the question of article 8 taken alone given that its ruling on the breach of article 14 of the European Convention taken with article 8 already addressed the matter.³³⁰

The decision in *Modinos v Cyprus*³³¹ arose out of an application lodged with the Commission by a Cypriot citizen Alecos Modinos on 25 May 1989. As a homosexual living in Cyprus, the applicant submitted that he lived under the

³²⁷ Application No 39392/98 & 39829/98.

³²⁸ *L & V* (n 327 above). The applicants' grouse was with the continued existence of Article 209 of the Austrian Criminal Code under which they were convicted. Article 209 prohibits same-sex relationships between adult men and consenting boys between 14 and 18 years. In the case of Mr L, the first applicant, he was found guilty of violating article 209 of the Austrian Criminal Code by the Vienna Regional Criminal Court on February 8, 1996. Accordingly, he was sentenced to one year imprisonment, suspended for three years on probation. There was no direct evidence of Mr L committing the offence of which he was convicted. However, entries in his diaries revealed that between 1989 and 1994, the applicant had indulged in non-genital sexual activities with multiple partners between the ages of 14 and 18, in Austria and abroad. The identity of his adolescent partners was not established given the peculiar circumstances surrounding Mr L's case. The Supreme Court's quashing of the judgment dealing with the offence committed by the applicant abroad made the Regional Criminal Court to discontinue the particular case. Nevertheless, the Regional Criminal Court pressed on with trial for the offences committed in Austria, ultimately finding Mr L guilty and sentencing him to a jail term of 11 months suspended for three years. The applicant appealed the judgment but was not obliged by the Supreme Court, which rejected Mr L's claim that his conviction under Article 209 constituted an infringement of his right to respect for his private life and his right to non-discrimination. The applicant appealed his sentence at the Vienna Court of Appeal, which reduced his sentence minimally to eight months' jail term suspended on probation for three years. For the facts of the case of the first Applicant see (n 327 above) para 9-14. The case of the second applicant is similar to the case of the first applicant. Unlike the first applicant, however, the second applicant was additionally charged and convicted on one count of misappropriation. The Vienna Regional Criminal Court on February 21, 1997, sentenced the second applicant to six months' jail term suspended on probation for three years. He urged the Vienna Court of Appeal to demand that the Constitutional Court review the constitutionality of article 209 of the Austrian Criminal Code, convinced that the legislation was discriminatory and breached his right to respect for his private life. The Court of Appeal was unimpressed and, accordingly, dismissed the applicant's prayers with regard to his sentence and the review of the constitutionality of article 209. See para 15-16.

³²⁹ *L & V* (n 327 above) para 54.

³³⁰ *L & V* (n 327 above) para 55.

³³¹ Application No. 15070/89.

perpetual fear of arrest and prosecution as a result of the continued existence of sections 171, 172 and 173 of the Criminal Code of Cyprus which criminalise homosexual relations among men.³³² The European Court chose to side with the applicant, pointing out that not only did the law criminalising consensual adult homosexual relations remain entrenched in the Cypriot Criminal Code but also that the Supreme Court of Cyprus in *Costa v The Republic* ruled that the impugned legislation was constitutional and did not run foul of the Convention despite the pronouncement of the European Court in the *Dudgeon* case.³³³

6.7.1 The margin of appreciation doctrine of the European Court of Human Rights

The origin of the margin of appreciation doctrine has been traced to the principle of subsidiarity and fair balance expounded by the European Court.³³⁴ The doctrine aims at balancing the concern of states with the imperative of the protection of the whole population of their states with the other imperative of defending the rights of individuals as enshrined in the European Convention and in the light of changing social attitudes and conditions.³³⁵ The principle of subsidiarity, as factored into the European Court's interpretative process, gives expression to the doctrine of the margin of appreciation. The inspiration for the principle of subsidiarity can be found in articles 1 and 35 of the European Convention which recognise states as supporting authorities with powers to enforce the human rights provisions of the European Convention in their domestic jurisdictions. The principle of subsidiarity and the doctrine of the margin of appreciation go together; while the principle of subsidiarity recognises the importance of contracting states and their domestic sovereignty, the margin of appreciation underlines the supervisory role of the European Court and,

³³² *Modinos* (n 331 above) para 7.

³³³ *Modinos* (n 331 above) para 20.

³³⁴ See, P Johnson 'Homosexuality, freedom of assembly and the margin of appreciation doctrine of the European Court of Human Rights: *Alekseyev v Russia*.' (2011) 11 *Human Rights Law Review* 589.

³³⁵ Johnson (n 334 above) 589.

consequently, the Court's power to determine how far the contracting states can go in the exercise of their limitation powers.³³⁶

6.7.2 The European Court case law on the margin of appreciation doctrine in homosexuality cases

The earliest case in which the European Court clearly and broadly invoked the doctrine of margin of appreciation³³⁷ to negotiate the labyrinth of consensus and the need to uphold individual rights is *Handyside v UK*.³³⁸ The applicant was convicted for publishing a book intended for the consumption of children and teenagers, which was deemed sexually explicit and prohibited in Britain.

The European Court held that article 10(2) of the Convention allowed contracting states a margin of appreciation in the justified restriction of rights and imposition of penalties over matters relating to morality. The assumption here is that states are better placed to untangle the socio-cultural web that complicates human rights enforcement at the domestic level. However, the European Court added a caveat when it insisted that the margin of appreciation allowed contracting states is subject to the supervision of the European Court.³³⁹

Given the elusiveness of consensus among contracting states, the Court has been faced with the dilemma of balancing the interests of national governments with its duty to uphold human rights. This dilemma is highlighted by the LGBT cases it has handled. In *Rees v UK*,³⁴⁰ the European Court was persuaded that the UK had gone to its limits in respecting the rights of the applicant despite the applicant being denied the right to alter his birth certificate to reflect his post-operative gender status. The European Court pointedly asserted that the UK, in the exercise of its margin of appreciation prerogative, had the right to determine what measures to adopt, taking into account the

³³⁶ See, I Radačić 'The margin of appreciation, consensus, morality and the rights of the vulnerable groups' (2010) 31 *Zbornik Pravnog fakulteta Sveucilista u Rijeci* 600–606.

³³⁷ Radacic (n 336 above) 603.

³³⁸ Application No 5493/72 (1996) [Series A no 24].

³³⁹ *Handyside* (n 338 above) para 49.

³⁴⁰ Application No 9532/81 (1986) [Series A no 106].

situation on the ground and what its legal system permitted.³⁴¹ The European Court was willing to grant the UK a wide margin on the grounds of lack of consensus among contracting states vis-à-vis the practical legal conundrum on the status of post-operative transsexuals.

In *Cossey v UK*,³⁴² the European Court affirmed the *Rees* decision with regard to the question of margin of appreciation. It held that the refusal by the relevant authorities to alter the historical fact of the applicant's male biological gender as it appeared in her birth certificate did not constitute unlawful interference in the applicant's private life.³⁴³ The European Court did not find any violation of articles 8 and 12 of the European Convention which guarantee the right to private life and the right to marry. In *Goodwin v UK*,³⁴⁴ the applicant contended that her male birth (certificate) status had made life very difficult for her and had fueled transphobic reactions in the workplace and elsewhere. Unlike in the *Rees* and *Cossey* cases, the European Court this time did not merely dwell on legalities and technicalities. It expressed a much higher level of empathy, acknowledging that the dissonance between the applicants' socially accepted female gender status and her legal male birth status was anomalous and 'unsatisfactory'.³⁴⁵ The European Court was willing to overlook the consensus criterion and focus attention on changing social attitudes and international trends which favoured social acceptance and legal recognition of transsexuals. The European Court denied the respondent government any wide margin of appreciation and ruled clearly that 'the fair balance that is inherent in the European Convention tilted decisively in favour of the applicant. There has, accordingly, been a failure to respect the right to private life in breach of article 8 of the Convention.'³⁴⁶ In the same vein, the Court held that the applicant's right to marry under article 12 had been violated.³⁴⁷

³⁴¹ *Rees* (n 340 above) para 42.

³⁴² Application No 10843/84 (1990) [Series A no 184].

³⁴³ *Cossey* (n 342 above) para 36.

³⁴⁴ Application No 28957/95 (2002).

³⁴⁵ *Goodwin* (n 344 above) para 79.

³⁴⁶ *Goodwin* (n 344 above) para 93.

³⁴⁷ *Goodwin* (n 344 above) para 104.

In *Fretté v France*,³⁴⁸ the consensus criterion was a key factor in swaying the European Court towards the French government argument in defence of the refusal by the Conseil d'Etat – France's highest administrative court – to allow the applicant, who is a single homosexual male, to adopt a child. In granting the French authorities a wide margin of appreciation to decide what was in the best interest of a child available for adoption, the European Court noted the absence of consensus among contracting states on the matter of the legality of single homosexual males adopting children. The European Court also noted the dearth of conclusive scientific data on the impact of single-parent homosexual adoption on child development.³⁴⁹ Consequently, the European Court saw no violation of the applicant's rights under article 14 of the European Convention.³⁵⁰

In *Alekseyev v Russia*,³⁵¹ the European Court took a less conservative path. The European Court rebuffed the attempt by the Russian government to invoke the margin of appreciation doctrine to justify the decision of the Moscow authorities not to allow the Moscow gay pride marches that were to be held between 2006 and 2008. The applicant was the organiser of the banned pride marches. While ruling that the applicant's rights under articles 11, 13 and 14 of the European Convention had been violated, the European Court asserted that the rights of a minority group (in this case, the LGBTI community) cannot be premised on acceptance by the majority.³⁵² The *Alekseyev* case showed that the European Court was capable of coming out strongly in support of individual rights. It rejected the over-flogged excuse of the margin of appreciation frequently invoked by states to justify restriction of human rights.

From the foregoing, it is obvious that the resort to the margin of appreciation doctrine where consensus is absent or tenuous breeds inconsistency in the European Court's decisions.³⁵³ Benvenisti fears that the

³⁴⁸ Application No 3651/97 (2002).

³⁴⁹ *Frette* (n 348 above) para 28.

³⁵⁰ *Frette* (n 348 above) para 43.

³⁵¹ Application No 4916/07, 25924/08 and 14599/09 (2010).

³⁵² *Alekseyev* (n 351 above) para 81.

³⁵³ Johnson (n 334 above) 590.

doctrine advances moral relativism as opposed to the universality of human rights given that it allows contracting states space to enforce human rights laws they are comfortable with while ignoring those they find inconvenient.³⁵⁴ He notes that the European Court's emphasis on consensus as an indispensable guide in its interpretation and application of European Convention provisions can jeopardise the cause of human rights in non-European countries where there is scant regard for fundamental freedoms.³⁵⁵ This position is relevant to the Nigerian situation where laws criminalising consensual adult homosexual acts have been promulgated. Radačić³⁵⁶ and Nozawa³⁵⁷ favour de-emphasising the doctrine as it works against the emergence of universal human rights standards and puts vulnerable groups at risk.

While reviewing *Alekseyev v Russia*, Johnson identifies one optimistic and one pessimistic view of the application of the European consensus standard by the European Court. The optimistic view regards the instrument as a means of realising the widest possible rights available to LGBT (and other minorities) persons under existing social, cultural and legal conditions in Europe; the pessimistic view regards the consensus criterion as having the capacity to cause the European Court to deny applicants their fundamental human rights at a future time on the ground of a lack of majority backing for these rights.³⁵⁸

Given the shortcomings of the consensus criterion, its inconsistent application – the tendency to produce divergent rulings in related cases and the temptation to grant national governments too wide a margin of appreciation – Nozawa has suggested abandoning the negative use of the consensus criterion. The negative use of the consensus criterion, for Nozawa, is its application in

³⁵⁴ Eya Benvenisti 'Margin of appreciation, consensus, and universal standards' (1999) 31 *International Law and Politics* 844.

³⁵⁵ Benvenisti (n 354 above) 853.

³⁵⁶ Radacic (n 336 above) 600.

³⁵⁷ J Nozawa 'Drawing the line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European Consensus" standard under article 14' (2013) 29 *Merkourios: Utrecht Journal of International and European Law* 73.

³⁵⁸ Johnson (n 334 above) 593.

determining the margin of appreciation allowed national governments where legal practices differ broadly among states.³⁵⁹

6.8 The Inter-American system for human rights and protection of sexual minorities' rights

The Organisation of American States (OAS) was established in 1948 during the ninth Inter-American Conference held in Bogota with the central aims of strengthening the peace and unity of the continent, to promote and consolidate representative democracy.³⁶⁰ A major distinctive feature of the Inter-American system of human rights that sets it apart from other regional human rights systems like those in Africa and Europe is the OAS's duality of human rights instruments: the OAS Charter and the America Declaration of Rights and Duties of Man, on the one hand, and the American Convention on Human Rights on the other hand.³⁶¹ The Inter-American human rights system can be said to be a creation of a regional rights system with the adoption of the OAS Charter and the American Declaration by the ninth International Conference of American states.³⁶² The OAS, which somewhat resembles the UN Charter, makes references to human rights.³⁶³ The OAS Charter generally affirms the firm commitment of the signatories to upholding the fundamental rights of the individual without distinction on the grounds of race, nationality, creed or sex.³⁶⁴ The Charter, which Wynen Thomas and J Thomas view as the constitutional instrument of the OAS,³⁶⁵ did not expatiate elaborately on the concept of human rights as such; according to Rehman, it was the American Declaration that overcame the shortcomings of the OAS Charter in expanding the meaning of

³⁵⁹ Nozawa (n 357 above) 73.

³⁶⁰ H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 868.

³⁶¹ Rehman (n 305 above) 272.

³⁶² A Huneeus 'Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 498.

³⁶³ Rehman (n 305 above) 273.

³⁶⁴ Article 3(1) OAS Charter.

³⁶⁵ AV Thomas & AJ Thomas 'Human rights and the organization of American states' (1972) 12 *Santa Clara Law Review* 323.

human rights. The American Declaration provides for a good deal of civil and political rights such rights as right to life³⁶⁶ liberty and personal security,³⁶⁷ right to equality before the law,³⁶⁸ right to religious freedom and worship,³⁶⁹ right to freedom of investigation, opinion, expression and dissemination,³⁷⁰ right to protection of honour, personal reputation and private and family of life,³⁷¹ and other rights.³⁷² The Declaration also imposes duties on the individual, such as duties to society,³⁷³ duties toward children and parents,³⁷⁴ duty to receive instruction,³⁷⁵ duty to vote,³⁷⁶ and a host others.³⁷⁷ Thomas and Thomas justifies the inclusion of duties in the Declaration on the basis that ‘each individual recognise that he owes certain responsibilities to the society in which he lives, and that stress should not be placed solely upon the responsibility of the state to secure human rights.’³⁷⁸

The second leg of the Inter-American human rights system is the American Convention on Human Rights which was adopted in 1969 and entered into force in 1978.³⁷⁹ The OAS human rights system presents us with two judicial organs, namely, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. These two judicial organs operate the OAS Charter, American Declaration and the American Convention.³⁸⁰

In the Americas, sexual minorities can cling to the robust human rights provisions of the Charter, the American Declaration, and the American

³⁶⁶ Rehman (n 305 above) 272.

³⁶⁷ ADRDM article 1.

³⁶⁸ ADRDM article 2.

³⁶⁹ ADRDM article 3.

³⁷⁰ ADRDM article 4.

³⁷¹ ADRDMA article 5.

³⁷² ADRDM see article 6-28 for a host of other rights entrenched therein.

³⁷³ Article 29.

³⁷⁴ Article 30.

³⁷⁵ Article 32.

³⁷⁶ Article 32.

³⁷⁷ See article 33-36 for other duties imposed by the American Declaration.

³⁷⁸ Thomas & Thomas (n 365 above) 324.

³⁷⁹ Rehman (n 305 above) 278.

³⁸⁰ For a detailed discussion on the jurisdiction of the IACHR and the IACrTHR see Rehman (n 305 above) 275-301. See also FF Kidanemariam ‘Enforcement of human rights under regional mechanisms: A comparative analysis’ unpublished LLM desertation, University of Georgia 2006.

Convention for rights recognition like their European counterparts, who have invoked the provision of the ECHR. The human rights jurisprudence of the American Declaration, and the American Convention with regards to the rights of sexual minorities was tested in the case of *Atala Riffo and Daughters v Chile*.³⁸¹ *Atala* presents us with the first ever case to go before the IACtHR involving a lesbian judge and mother of three daughters from Chile.³⁸²

On 17 September 2010, the IACmHR filed a claim against the Republic of Chile on behalf of Atala before the IACrHR. The IACmHR contended before the IACtHR that the government of Chile acted discriminatorily against Ms Atala and invaded her privacy and family life by its action filed against Atala based on her sexual orientation in a prolonged legal process that exhausted local judicial remedies, in the process of which she lost control of her three daughters.³⁸³ This case lingered from the Juvenile Court down to the Supreme Court. The Supreme Court of Chile expressed concern over the potential sexual identity crises the girls will suffer growing up in an environment where the mother cohabits with a homosexual partner. According to the Supreme Court of Chile, by choosing to co-habit with her sexual partner, Ms Atala has put her own interest before those of her daughters.³⁸⁴ The Supreme Court further emphasised the fact that living with Ms Atala and her lesbian partner puts the girls in a situation of risk, and expose them to a non-conducive social environment.³⁸⁵

³⁸¹ IACrHR, 24 Feb 2012 (Series C) No 239.

³⁸² J Stern 'Creating legacy today: The first LGBT ruling by the inter-American Court of Human Rights' (2012) 15 *Cuny Law Review* 247.

³⁸³ *Atala* (n 381 above) para 1-3. A brief history of the case shows that Ms Atala married her estranged husband Ricardo Allendes in 1993 and the union produced three daughters. The marriage was dissolved in 2002 with Ms Atala taking custody of the three girls. In November 2002, Ms Atala commenced a homosexual relationship with Ms Emma Ramon who moved into the home of Ms Atala and her three daughters. Worried by the homosexual relationship between Ms Atala and Ms Ramon and the impact on his three daughters, Mr Allendes on January, 2003 filed a custody suit with the Juvenile Court of Villarrica, arguing that the physical and emotional development of the three girls was at risk if they continue to live with Ms Atala considering her new homosexual lifestyle. Atala responded to the custody suit stating that her sexual orientation as a lesbian does not affect her parental duties to her daughters in anyway. She further argued that the Chilean Civil Code or the law on minors does not consider sexuality a ground for disqualification as a minor. See para 30-32.

³⁸⁴ *Atala* (n 381 above) para 56.

³⁸⁵ *Atala* (n 381 above) para 57.

Having exhausted all the available domestic channels of adjudication, Ms Atala pressed on to the IACmHR. The IACmHR agreed with Ms Atala that the case concerns the discrimination and arbitrary interference in the private life of the complainant. The IACmHR contended that custody of the girls were taken from Ms Atala because of her sexual orientation.³⁸⁶ The state of Chile denied that the withdrawal of custody from Ms Atala had anything to do with her sexual orientation. It insisted that the judgement of the Supreme Court was purely informed by consideration of which parent was in a better position to ensure the well-being of the girls.³⁸⁷ The IACmHR argued that under articles 24 and 1(1) of the American Convention, 'it is widely acknowledged in the American states that discrimination based on sexual orientation is forbidden.'³⁸⁸ The Commission also noted that the sexual orientation of Ms Atala as a lesbian was the ground for the Chilean Supreme Court's decision to permanently remove the custody of the girls from her.³⁸⁹

The Inter-American Court, in remarking that 'if sexual orientation is an essential component of a person's identity, it was not reasonable to require Ms Atala to put her life and family project on hold',³⁹⁰ concluded that the judgment of the Supreme Court which gave provisional custody of the girls to the father on the considered reasons and arguments constituted discriminatory treatment of Ms Atala; hence the state has violated the right to equality enshrined in article

³⁸⁶ *Atala* (n 381 above) para 59.

³⁸⁷ *Atala* (n 381 above) para 61.

³⁸⁸ *Atala* (n 381 above) para 72.

³⁸⁹ *Atala* (n 381 above) para 72. Arguments were canvassed on both sides. The IACtHPR in a bid to resolve the controversy examined the scope of the right to equality and non-discrimination, sexual orientation as a category protected by article 1(1) of the American Convention, whether in the case of Atala there was a difference in treatment based on sexual orientation and whether the difference amounted to discrimination. The IACtHPR held that the right to equality and non-discrimination under Article 1(1) of the Convention is sacrosanct. The Court frowned at the idea of condemning any human group to an inferiority status. The Court pointed out that the 'notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual'. The Court did not mince words in viewing sexual orientation as a category protected under article 1(1) of the American Convention. According to the Court, the operative phrase 'any other social condition' includes sexual orientation. The Court noted that since the overall custody proceedings argue that Ms Atala's homosexual status and the homosexual presence of her partner will adversely affect the development of the girls, there was a difference in the treatment of Ms Atala based on her sexual orientation. See para 77-95.

³⁹⁰ *Atala* (n 381 above) para 139.

24 and article 1(1) of the American Convention to the detriment of Ms Karen Atala Riffo.³⁹¹ During the trial before the ACtHPR, the ACmHPR and Ms Atala's representative argued that granting custody of the girls to their father on the ground of Atala's homosexuality amounts to interference with the right to privacy and family life, which is protected by articles 11(2) and 17 of the American Convention. Their contention before the Inter-American Court is that there is no single concept of family and that Ms Atala, her daughters and partner constituted a valid family unit which was shattered by decisions based on prejudice against Atala.³⁹² The Inter-American Court agreed that there was arbitrary interference in the private life of Ms Atala as the custody proceedings touched mainly on her sexual orientation. Consequently, there was a violation of article 11(2), in conjunction with article 1(1) of the American Convention.³⁹³ On the vexed question of whether a family unit existed between Ms Atala, Ms De Roman and her daughters, the ACtHPR noted that before the decision on provisional custody was made in May 2003, there existed a close-knit relationship among Atala, her lesbian partner, Atala's older son and the three girls.³⁹⁴ The Inter-American Court concluded on the basis of the emotional closeness subsisting among Ms Atala, Ms De Ramon, her son and three daughters, that they have successfully created a family unit which has the protection of articles 11(2) and 17(1) of the American Convention.³⁹⁵ The Inter-American Court ruled that granting provisional custody of the girls to their father resulted in interference with an existing family life. As such, the state violated articles 11(2) and 17(1) of the American Convention to the detriment of Ms Atala and the three girls.³⁹⁶

³⁹¹ *Atala* (n 381 above) para 146.

³⁹² *Atala* (n 381 above) para 158.

³⁹³ *Atala* (n 381 above) para 167.

³⁹⁴ *Atala* (n 381 above) para 176 the Court quoted Atala as stating before it that 'we were an absolute normal family. A boy, three girls ... we had projects as a family. We had dreams as a family'.

³⁹⁵ *Atala* (n 381 above) para 177.

³⁹⁶ *Atala* (n 381 above) para 178.

Judge Alberto Perez Perez, in his partial dissenting opinion, pointed out that ‘it is sufficient to declare a violation of article 11(2) and it is not necessary or prudent to declare a violation of article 17 which would be taken as an implicit pronouncement on the interpretation of various provisions of said article’.³⁹⁷ It is the contention of Perez that a combined reading of the provisions of all the paragraphs of article 17 of the American Convention in a way presupposes that the family is based on a heterosexual marriage or de facto union.³⁹⁸

According to Perez the ideal conception of family as having its roots in heterosexual marriage is in tandem with the position of many Latin American constitutions.³⁹⁹ Perez agreed that sexual orientation should be a prohibited ground of discrimination under the American Convention in line with emerging global consensus.⁴⁰⁰ Perez, however, digressed from the majority judgement when he asserted that the same notion of application of liberal interpretation of the American Convention in regard to sexual orientation cannot be extended to the concept of family. According to Perez, the notion of family as the foundation or natural unit of society continues to be present in the constitutions of many state parties, and the various concepts of family obtainable in the constitutions of member states, must not necessarily conform to what the American Convention understands family to mean.⁴⁰¹ States must be allowed to define their understanding of the concept of family. Perez refers to that arena where evolving interpretations of family in tune with the American Convention should

³⁹⁷ *Atala* (n 381 above) See para 1 of the dissenting judgement of Perez. Article 11(2) of the American Convention which Judge Perez aligns with the majority judgement that the state violated states that: ‘No one may be the object of arbitrary or abusing interferences with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation’. Whereas article 17(1) which provides for protection of family and constituting the basis of Perez dissent states that: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.

³⁹⁸ *Atala* (n 381 above) para 18 of the dissenting judgement of Perez.

³⁹⁹ *Atala* (n 381 above) para 19 of the dissenting judgement of Perez. Perez cited the constitutions of Bolivia Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El- Salvador, Nicaragua, Paraguay, Peru, Uruguay, Venezuela where the emphasis on family all seems to be pointing at a heterosexual union.

⁴⁰⁰ *Atala* (n 381 above) para 20 of the dissenting judgement of Perez.

⁴⁰¹ *Atala* (n 381 above) para 21 of the dissenting judgement of Perez.

not be allowed to encroach and should be left to domestic interpretation as the national margin of appreciation.⁴⁰²

6.8 Conclusion: Observations for Nigeria and the domestic legal basis for the emerging global consensus on rights recognition for LGBTs

It is not in doubt that Nigeria has pursued some of the most aggressive anti-homosexual policies in Africa. There are multiple pieces of anti-homosexuality legislation in Nigeria, from the Criminal and Penal Codes, the Same-Sex Marriage (Prohibition) Act 2013 to the Sharia legal system in force in the far North of Nigeria. Certainly, Nigeria is not the best of places for homosexuals.

There have been some serious – even if ultimately impotent – judicial challenges to anti-homosexual laws in African countries like Uganda, Kenya and Botswana, as I have shown in previous sections. This trend has not been replicated in Nigeria. There is no reported legal case in any Nigerian court involving homosexuals successfully challenging any legislation that criminalises consensual and private adult homosexual conduct. The celebrated case of *Major Bello Magaji v The Nigerian Army* that reached the Supreme Court, the case of *Commissioner of Police v Edwin Kelechi & Anor* and others discussed in some detail in chapter 2 were either rape or consensual cases prosecuted by the state. It is understandable that the Supreme Court upheld the Court of Appeal ruling that confirmed the Army Court Martial judgment which found Major Bello guilty, since this case involved rape. However, it is noteworthy that he was found guilty of sodomy rather than rape. The derogatory language used by the judges is an indication of the intense homophobia prevalent in Nigeria.⁴⁰³

The Nigerian cases involving consensual same-sex conduct were quickly dealt with in court. For instance, the *Edwin Kellechi* case saw the accused

⁴⁰² *Atala* (n 381 above) Para 22 of the dissenting judgement of Perez.

⁴⁰³ In his lead judgement, Justice Niki Tobi described the convict as a terrible criminal who has chosen to dare God by engaging in homosexual act. He described the act as a 'heinous and atrocious offence'. As I pointed out, the justice digressed from the topic of homosexual rape and dwell largely more on the act of homosexuality. See chapter two of this thesis for an extensive discussion of the *Bello Magaji* case see, section 2.8.1 of chapter 2.

pleading guilty and receiving accelerated hearing and sentencing as if the judge found the case before him unpalatable. One of the accused, Edwin Kelechi, blamed the devil for tempting him into engaging in homosexuality. In no case was reference made to the discriminatory character of Nigeria's anti-gay laws.⁴⁰⁴

The overwhelming influence of Christianity and Islam in Nigeria means LGBT advocacy is a not a welcomed business. The intense anti-homosexuality stance of politicians, religious leaders, and the overwhelming majority of the people can intimidate even the boldest judges. Yet, a precedent has to be set. When a precedent is set it will be easier for judges to play more activist roles and appeal more broadly to developments in parts of the world where LGBT rights are protected.

In Nigeria, as in most parts of Africa, there is residual anti-colonial anger; this makes Nigerians more inclined to read cultural imperialism into liberal policies pursued by the Western world. President Robert Mugabe of Zimbabwe has successfully tapped into this latent anti-Westernism. In a 2015 speech to members of the United Nations General Assembly, Mugabe said:

We equally reject attempts to prescribe new rights that are contrary to our norms, values, traditions and beliefs. We are not gays. Cooperation and respect for each other will advance the cause of human rights worldwide. Confrontation, vilification and double standards will not.⁴⁰⁵

The willingness of Nigerians to dismiss same-sex rights advocacy as an example of Western neo-imperialist imposition calls for thinking outside the box. Instead of Western pro-same-sex rights organisations showing direct interest in local LGBT affairs, they should support active home-based and home-grown LGBT organisations. Nigerian LGBT groups should maintain more visibility than their foreign partners. This way the LGBT rights initiative will not be seen as imperialism masquerading as human rights advocacy. Kretz has correctly noted

⁴⁰⁴ See, section 2.8.2 of chapter two of this thesis.

⁴⁰⁵ See, A Justice 'In Zimbabwe "we are not gays": President Robert Mugabe rejects homosexual rights in UN speech' *International Business Time* September 29, 2015 www.ibtimes.co.uk/zimbabwe-we-are-not-gay-president-robert-mugaber-rejects-homosexual-rights-un-speech-1521685 (accessed 18 March 2016).

that LGBT advances in the West have led to the hardening of anti-homosexual sentiments in many parts of African. He notes that ‘pushing forward becomes a rallying cry for anti-gay forces to organize a campaign to further erode whatever meager protections do exist for sexual minorities’.⁴⁰⁶

True, negotiating a choice between direct foreign involvement and an unmotivated local advocacy will not be easy. The failure of the Afrocentric approach I discussed in previous sections tempts us to be sceptical of the Africanisation and Nigerianisation of LGBT advocacy. But, then, the approach of direct foreign involvement has not only failed but has inspired anti-Western sentiments in Nigeria. A home-grown LGBT advocacy is better placed to ‘reason’ with the Nigerian populace and show why LGBT persons should be left in peace to pursue their peculiar lifestyle as long as they do not engage in coercive same-sex relations.

In this chapter, I have shown that the world is gradually gravitating towards a consensus on rights recognition for LGBTs. I have also shown that Europe, where sexual minorities today enjoy a high level of legal protection, once had a history of stiff resistance to homosexuality.⁴⁰⁷ The same story is applicable to the American continent. Despite Africa’s homophobic outlook, pockets of countries have decriminalised consensual adult same-sex affairs.⁴⁰⁸ Even at the AU, this idea of decriminalisation is increasingly becoming a subject for discussion.

This sweeping revolution that has resulted in rights recognition for LGBTs is anchored on international human rights instruments. At the UN level, most of the court-led decisions upholding the rights of LGBTs derived their inspirations from the robust provisions of the ICCPR. In Europe, the decisions upholding rights recognition for LGBTs and declaring domestic sodomy laws discriminatory derived strength from the human rights provision of the ECHR. Atala’s case,

⁴⁰⁶ Kretz (n 184 above) 243.

⁴⁰⁷ Johnson (n 309 above) 252-254.

⁴⁰⁸ See, generally J Corrales *LGBT rights and representation in Latin America and the Carribeans: The influence of structure, movements, institutions, and culture* (2015).

which was also the first to be decided by the IACtHR, was midwived on the platform of the OAS human rights instruments. South Africa, the first country in African to decriminalise homosexuality, has seen its judges deliver daring groundbreaking judgments that made inspirational references to international human rights instruments and regional courts decisions on gay rights.

For Nigeria, the question now is: what domestic legal platform can we invoke to bring home the argument in this chapter that Nigeria can toe the line of the consensus sweeping around the globe?

The domestic basis for this argument is the Nigerian Constitution and the Fundamental Rights (Enforcement Procedure) Rules. Although the Nigerian Constitution seemingly denies the force of law to international treaties that have not been domesticated in Nigeria, there is room for manoeuvre. The Constitution provides that: ‘The foreign policy objectives shall be respect for international law and treaty obligations...’⁴⁰⁹ The international human rights treaties to which Nigerian is a state party all provides for human rights which have been severally interpreted in ways that accommodate LGBTI rights.⁴¹⁰ The injunction to respect these international law and treaties which is a constitutional order places a burden on Nigeria to decriminalise consensual adult homosexual acts. The UN Human Rights Committee in the past two circles of its UPR has recommended to Nigeria as part of its treaty obligation to ensure decriminalisation of homosexuality and put up legislation to protect the right of sexual minorities. Nigeria’s failure to heed the commendations of the UPR is failure to comply with section 19 (d) of its Constitution.

The FREPR 2009, on the other hand, which are the rules regulating the application and enforcement of Chapter 4 (fundamental rights provision) of the Constitution explicitly states that in promoting and safeguarding the rights and freedoms of the applicants:

[T]he Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention of which the Court is aware,

⁴⁰⁹ Section 19(d) CFRN.

⁴¹⁰ See, sections 4.3, 4.4, 4.5 and 4.6 of chapter 4 for a full discussion of LGBT rights under international human rights treaties for which Nigeria is a state party.

whether these bills constitute instruments in themselves or forms parts of larger documents like constitution. Such bills is include (i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system, (ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system.⁴¹¹

The obvious admonition of the FREPR is for the Nigerian courts to respect not just municipal human rights laws in application to human rights adjudication, but also accord respect to cited international human rights law. The FREPR specifically mentioned the ACHPR, the ICCPR, ICESCR, CAT, and the CEDAW. The Nigerian Supreme has also provided a domestic legal basis upon which Nigeria can derive inspiration from global legal trends.⁴¹² Belgore JSC pointed out that: 'It is always of great help to know the line of thinking jurisprudentially in other countries' courts with constitutional provisions resembling our own'.⁴¹³ As I have shown, these human rights instruments have given recognition to LGBT rights. Further pronouncements have been made on the platform of ICCPR recognising the rights of LGBTs. The novel idea in the FREPR that urges Nigerian courts to respect international human rights instruments in adjudicating human rights cases is a strong basis for Nigeria to buy into the idea of this seemingly emerging global consensus on rights recognition for LGBTs.

⁴¹¹ Preamble 3b FREPR, 2009. See E Nwauche 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?' (2010) 10 *African Human Rights Law Journal* 512-513.

⁴¹² *Ogugu v State* (1994) 5NWLR pt 366.

⁴¹³ *Ogugu* (n 412 above) 43 para H.

Chapter 7: Conclusion and recommendations: Towards a future of equality and fairness for sexual minorities in Nigeria

7.1 Introduction: Dilemmas and challenges

Throughout this work I have been unambiguous in showing the magnitude of the problems that sexual minorities in Nigeria face. As I have shown in previous chapters, Nigerian society is profoundly conservative, and takes the business of religion seriously. The prevailing social conservatism favours a non-progressive interpretation of the teachings of the Bible and Qur'an on homosexual conduct. In the southern part of Nigeria, the Criminal Code holds sway, while the Penal Code is operative in the northern part. Both legal systems prohibit homosexual relations, as have been shown in previous chapters. The Sharia legal system prescribes very harsh penalties for same-sex offences. This system is operative in the Muslim-dominated part of the North, consolidates the anti-homosexual provisions of the Penal Code.¹ Such is the extent of homophobic sentiments in Nigeria that when former President Goodluck Jonathan signed the Same-Sex Marriage (Prohibition) Bill into law in January 2014 there were spontaneous and widespread jubilations within Nigeria.²

7.2 Research findings

The dilemmas and challenges confronting sexual minorities in Nigeria are captured in this work. The overall research problem I set out to investigate in this thesis is whether there are human rights implications arising from the Nigerian law criminalising consensual adult homosexual conduct. The hypothesis flowing from this central research question is that Nigeria's sodomy

¹ See, RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009) 4.

² See, for instance, Alemma-Ozioruve Aliu 'PFN lauds Jonathan on anti-gay law' *The Guardian* 23 January 2014 9.

laws arguably offends the spirit of the Nigerian Constitution and the international human rights law obligations of the state. The central research problem is broken down into four research questions, which are: (i) Is it evident that Nigerian law dealing with sexual orientation place criminal liability on consensual adult homosexual conduct?; (ii) Does Nigerian law regulating homosexual activities *prima facie* violate the human rights provisions of the Nigerian Constitution and Nigeria's international law obligations?; (iii) What is the validity of the reasons for criminalising consensual adult homosexual conduct in Nigeria? and (iv) Can the emerging global trends towards rights recognition for sexual minorities influence Nigeria towards decriminalisation? The findings flowing from the above generated research questions are discussed below.

7.2.1 Consensual adult homosexuality conduct formed part of the cultural existence in Nigerian societies long before colonialism

A discredited premise constantly advanced by the homophobic populace in Nigeria is the assertion that homosexual conduct is a Western cultural import. This blatant assertion is made in the face of overwhelming and incontrovertible evidence in support of the counter-claim that homosexual conduct is an indelible fact of human existence, a manifestation of human nature. I unearthed in this work documented instances of homosexual practices in pre-colonial Nigeria. Scholars like Nadel and Gaudio have reported indigenous homosexual practices among the Nupe people of Nigeria. Homosexual practices are confirmed to have existed in pre-colonial times among the Calabar and Yoruba people of southern Nigeria, even as similar practices were common among the Hausa of northern Nigeria.

This work breaks new ground in research by investigating the situation in pre-colonial Idomaland. Homosexual conduct, once again, was confirmed to have existed long before the coming of the British colonialists. Among the Idoma, who today can be found in central Nigeria, a male homosexual is called

olomuchu. Informal interviews with local chiefs and the elderly custodians of the oral traditions of the Idomas confirmed that homosexual conduct is not a new phenomenon in Idomaland. The custodians of Idoma oral traditions affirmed that homosexuals were never persecuted in the past but were rather regarded as abnormal persons.

From the foregoing, there is no doubt that the latter-day criminalisation of consensual adult homosexual conduct has no correlation with the way homosexuals were treated in the past. More significantly, the conclusive reports about the widespread practice of same-sex conduct among the Idoma and other Nigerian ethnic groups long before the arrival of the colonial masters supply enough evidence to discredit the argument advanced in contemporary times about the non-existence of homosexual conduct before Nigeria's contact with the West.

7.2.2 Colonialism was the catalyst that activated the criminalisation of consensual adult homosexual conduct in Nigeria

If homosexual conduct not only was a reality of pre-colonial Nigeria but was also fairly tolerated before the coming of the colonialists, as I have demonstrated in this research, it stands to reason that colonialism was the catalyst for the criminalisation of consensual adult homosexual conduct in modern Nigeria. Homosexual conduct was criminalised in England as far back as 1533. It was not until the Wolfenden Report was published in 1957 that England commenced the slow journey towards complete decriminalisation. By this time, British colonialism and British law had taken firm roots in Nigeria. Homosexual conduct had become a criminal offence under the Penal Code that northern Nigeria was to adopt at independence and also under the Criminal Code that was adopted in southern Nigeria.

7.2.3 The criminalisation of consensual adult homosexual conduct remains a strong political selling point in Nigeria

The Nigerian nation has reacted with hostility towards the emerging global consensus on rights recognition for sexual minorities. This submission is validated by the curious strengthening of existing anti-homosexuality laws with new draconian laws. As if the anti-homosexual provisions of the Penal Code and the Criminal Code were not enough, 12 northern Nigerian states consolidated homophobic sentiments in the region with the adoption of the Sharia legal system which prescribes the death sentence for certain cases of same-sex conduct. Not long after the advent of the Sharia legal system, President Goodluck Jonathan signed the Same-Sex Marriage (Prohibition) Bill into law in January 2014. This law banning homosexual marriage came into force throughout the Federation of Nigeria, further worsening the plight of sexual minorities in the country.

I discussed in Chapter 2 that the Nigerian judiciary has entertained homosexuality cases which led to the penalisation of offenders. The cases of *Major Bello Magaji v Nigeria Army*,³ *Commissioner of Police v Edwin Kelechi & Anor*⁴ and *Commissioner of Police v Bestwood Chukwuemeka*⁵ readily come to mind. The *Major Bello Magaji* case was prosecuted up to the Supreme Court. It was a case of homosexual rape that was eventually sensationalised as an example of a homosexual offence.⁶ The challenge before the Nigerian judiciary is mustering the courage to entertain cases questioning the constitutionality of the various anti-homosexuality laws in force in the country in the light of the robust rights enjoyed by Nigerian citizens under the 1999 Constitution, the African Charter on Human and Peoples' Rights (African Charter) and other international treaties to which Nigeria is state party. Getting the judiciary to take a stand on the constitutionality of the sodomy laws as a first step in the

³ (2008) 8 NWLR pt (1089) 338. See, detail analysis of this case in section 2.8.1 of chapter two of this thesis.

⁴ Case No CR/07/15 (unreported). See, section 2.8.2 of chapter 2 of this thesis.

⁵ See, section 2.8.2 of chapter two of this thesis.

⁶ *Magaji* (n 3 above).

struggle for decriminalisation will of course require the support of pro-sexual minority rights activist organisations and other advocacy groups.⁷

7.2.4 Criminalisation of consensual adult homosexual conduct conflicts with the non-discrimination provisions of the Nigerian Constitution and Nigeria's international law obligations

Section 42 prohibits any kind of discrimination on the ground of sex. The criminalisation of consensual adult homosexual conduct constitutes a violation of the constitutional rights of homosexual Nigerians to private life and non-discrimination on the ground of sex. In landmark cases like *Dudgeon v the UK* and *Karner v Austria* decided by the European Court of Human Rights (ECHR), the right to private life and non-discrimination on the basis of sex (broadened to include sexual orientation) were grounds instrumental to the now celebrated pro-homosexual rulings. International human rights treaties like the African Charter, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Civil and Political Rights (ICCPR) to which Nigeria is a state party implicitly prohibit discrimination on the basis of sexual orientation. The landmark cases determined by the ECHR contributed to the emerging trend of rights recognition for homosexuals in international law. The continued criminalisation of same-sex conduct in Nigeria, therefore, amounts to a violation of the 1999 Constitution and international law.

Chapters 3 and 4 of this work highlighted the contradictions between the Nigerian *status quo* which is continued consolidation of discriminatory homosexuality laws and the international trend towards rights recognition for sexual minorities. It is noteworthy that the 1999 Constitution of the Federal Republic of Nigeria has guaranteed a wide range of freedoms for its citizens,

⁷ The role of sexual minorities rights advocacy groups in public interest litigation cannot be over-emphasised. For instance, the National Coalition of Gay and Lesbian Equality of South African played a big role in the landmark *National Coalition of Gay and Lesbians Equality & the South African Human Rights Commission v Minister of justice & Others* (1999) 1 SA 6.

including the right to the dignity of the human person,⁸ the right to personal liberty,⁹ the right to private and family life,¹⁰ the right to non-discrimination on the grounds of sex¹¹ and circumstances of birth,¹² all of which supplies ammunition for the case against the criminalisation of private consensual same-sex conduct. The chief problem, then, is the non-enforcement of the freedoms lavishly granted by the 1999 Constitution.

This reluctance to vigorously enforce the freedoms granted citizens by the Constitution is further compounded by an insidious clause in the Nigerian Constitution, the limitation clause of section 45, which blatantly restricts the freedoms spelt out in sections 34, 35, 37, 42, and others.

One question naturally follows from the restriction of fundamental human rights by section 45, which in essence functions as a limitation clause, stops Nigerian courts from hearing and deciding human rights cases, especially given that Nigeria is state party to the African Charter which does not contain any limitation clause.¹³ Should the limitation clause stand in the way of rights recognition and enforcement by courts? Section 45(1)(a) of the 1999 CFRN lends validity to any law promulgated ‘in the interest of defence, public safety, order, public morality or public interest’. Public morality is surely no valid ground for negating sexual minorities’ rights to private life, as I explain in Chapter 5. In the case of *Media Rights Agenda and Others v Nigeria*¹⁴ the African Commission on Human and Peoples’ Rights (African Commission) held that the Nigerian military government could not use the

⁸ Section 34 of the Constitution of FRN 1999.

⁹ Section 35 CFRN 1999.

¹⁰ Section 37 CFRN 1999.

¹¹ Section 42(1) CFRN 1999.

¹² Section 42(2) CFRN 1999.

¹³ See *Garba v Lagos State Attorney- General* Suit ID/599M/91 (31 October 1991). The trial judge invoked the African Charter in his ruling that the ousting of the jurisdiction of law courts to entertain cases relating to the validity of the Robbery and Firearms (Special Provisions) Decree 5 of 1984 could not stop the court from hearing cases relating to fundamental human rights to life. The court specifically appealed to the efficacy of the African Charter as its elements had been incorporated into the 1979 Constitution. Thus the suspension of the Constitution by the military regime did not affect the continued existence and efficacy of the African Charter.

¹⁴ (2000) AHRLR 200 (ACHPR) (1998) (*Media Rights Agenda* case).

claim of making laws for the maintenance of peace, order and good governance to 'evade its obligations under international law,'¹⁵ which is the protection of fundamental human rights.

The *Media Rights Agenda* case championed the cause of TELL magazine and other newspaper whose existence had become illegal by virtue of the retroactive Newspaper Decree no 43 of 1993. Section 7 of the Decree required fresh registration for previously registered newspapers, the real objective being the gagging of the press that was then critical of the military government. The Decree empowered security agents to seize 50,000 copies of a TELL magazine edition particularly critical of the government even as the magazine's editor-in-chief Nosa Igiebor was detained. The complainants alleged violation of their rights under articles 6, 7, 9, 14 and 16 of the African Charter which guarantees right to liberty and security, fair hearing, freedom of expression, right to property, and right to health respectively.¹⁶ Rejecting the efficacy of the ouster clause in Decree no 43 of 1993, the African Commission ruled that there was a violation of articles, 6, 7(1), 7(1)(c), 7(2), 9(1), 9(2), 14 and 16 of the African Charter.¹⁷ Consequently, the Commission urged the Nigerian government to 'take the necessary steps to bring its law into conformity with the Charter'.¹⁸ Going by this decision, the limitation clause in the 1999 CFRN should not obstruct the enforcement of a human rights regime for sexual minorities, especially, as same-sex relationships do not constitute a threat to public order, safety and morality.

¹⁵ *Media Rights Agenda* case (n 14 above) para 11.

¹⁶ See, *Media Rights Agenda* case (n 14 above) para 1-16 for a detailed fact of the case.

¹⁷ *Media Rights Agenda* case (n 14 above) para 92.

¹⁸ *Media Rights Agenda* case (n 14 above) para 93. While adducing reasons for its decision that there was a violation of the Charter, the Commission noted that unlike other international human rights instruments the Charter does not accommodate a limitation clause, as such, limitations on rights and freedoms inherent in the Charter cannot be compromised on the altar of emergencies or special circumstances. The Commission further asserted that for limitations to the enjoyments of rights as provided in article 27(2) of the Charter to be invoked, such limitations must pass the test of proportionality. See, para 66-69.

7.2.5 The social rejection of consensual adult homosexual conduct is in conflict with scientific evidence for the biological basis of homosexuality

It is widely but erroneously held in Nigeria, as is the case elsewhere in Africa, that homosexuality is unnatural. Consequently, religious, moral and cultural objections arise to impede the struggle for rights recognition for sexual minorities. Yet, there is an increasing body of scientific research that clearly demonstrates the biological basis of homosexuality, as I showed in chapter 4 of this work. Genetic, epigenetic, hereditary, familial, maternal stress and twin studies have demonstrated that sexual orientation is not something people learn and unlearn. A person's sexual orientation is innate. Researchers like Hamer, Rice, Bailey, Pillard and others have confirmed the biological basis of same-sex attraction in their various scientific studies.

If there is a biological basis of homosexuality, it amounts to a grave injustice for the Nigerian society to continue with the culture of stigmatising homosexuals. Homosexuals cannot help being who they are in the same manner that heterosexuals cannot help being heterosexuals. Compelling homosexuals to become heterosexuals is like compelling heterosexuals to become homosexuals. Obviously, heteronormativity informs the social rejection of homosexuality. Science which provides us with the surest knowledge about ourselves and our world has shown that there is nothing unnatural about same-sex orientation. These scientific findings support the idea that homosexuality is a fact of human existence, not a feature of western lifestyle.

7.2.6 Consensual adult homosexual conduct does not harm society in any way to justify the moral, religious and cultural arguments in support of criminalisation

The uncompromising rejection of homosexual conduct by governments of many African countries is mostly anchored on the religious, cultural, and

public morality platforms, as pointed out by Dan Kuwali.¹⁹ This is the case with Nigeria as I showed in chapter 5.²⁰ Reason proposes that conduct deserves to be criminalised only if it is injurious to the well-being of society. In the specific case of consensual adult homosexual conduct, no harm is done to society, morally, spiritually, culturally, or physically, when two persons of the same sex agree to engage in sex. Homosexual practices are no more dangerous than heterosexual practices. In this regard, Kuwali rightly raises the question:

[I]f the objective of the law is to protect the society, what harm does an act that happens behind lock and key by two consenting adults do to the society?²¹

The religious platform puts forward the argument that God forbids the practice of consensual adult homosexual conduct in the holy books of Christians and Muslims as exemplified in the Genesis account of the destruction of Sodom and Gomorrah. The religious argument is further expanded to encompass the question of procreation. It is argued that since God has commanded mankind to procreate and multiply on the surface of the earth and since homosexual couples cannot procreate unassisted by modern artificial methods, homosexual conduct obstructs His plan for mankind.²² The religious objection to homosexual conduct which is very strong in Nigeria follows from a fundamentalist interpretation of religious texts like the Bible and the Qur'an. Homophobia cannot be reconciled with the loving message of the founder of the Christian religion even as the Qur'an does not explicitly forbid consensual adult homosexual conduct.

The cultural platform has been as effective as the religious platform in nursing homophobic anxiety. In Nigeria, and Africa in general, there is a

¹⁹ See D Kuwali 'Battle for sex?: Protecting sexual(ity) right in Africa' (2014) 36 *Human Rights Quarterly* 58.

²⁰ See sections 5.2, 5.3 and 5.4 of chapter five of this thesis.

²¹ Kuwali (n 19 above) 49.

²² A comprehensive analysis of the religious objection to homosexual rights is discussed in section 5.3 of chapter five of this thesis.

deeply rooted conviction that homosexual conduct is a Western import. It has now come to light that the criminalisation of homosexual practice is, in fact, a legacy of ancient Roman law passed on to Africans through the British colonialists.²³ The cultural relativism which submits that moral standards vary according to cultural backgrounds, consequently, what is right for one cultural group may be unacceptable for another. The implication for sexual minority rights in particular, and human rights in general, is the rejection of objective universal human rights standards, a move that portends great danger for people living under undemocratic governments. Donnelly has argued persuasively for the universality of human rights,²⁴ which is no surprise since injustice is the same in all cultures.

The Hart-Devlin debate demonstrated the hollowness of the public morality objection to the discrimination of consensual adult same-sex conduct. Hart argued in opposition to Devlin that morality cannot be legislated and that majority sentiments cannot be a valid ground for denying rights, especially when Mill's harm principle is factored into the matter.²⁵ This thesis argues that the repugnance of homosexuality for one individual or group is no valid reason for the criminalisation of a harmless lifestyle. Morality cannot be the sole basis for deciding what constitutes a criminal offence. Consequently, the religious and moral objections to homosexuality lack any justification.

7.2.7 The decriminalisation efforts of Lagos State show that current global trends of rights recognition for sexual minorities can impact positively on Nigeria

The triumph of the liberal tradition in the West contributed in no small way to the wave of decriminalisation set in motion by the European Court on Human Rights and various national courts. The emerging global consensus

²³ See S Haskins 'The influence of Roman laws regarding same sex acts on homophobia in Africa' (2014) 14 *African Human Rights Law Journal* 406.

²⁴ J Donnelly 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 281-291.

²⁵ See G Bassham 'legislating morality: Scoring the Hart-Devlin debate after fifty years' (2012) 25 *Ratio Juris* 130.

offers a glimmer of hope for Africa and Nigeria in particular despite the recent resurgence of anti-homosexual sentiments in Africa's most populous nation. As recently as 17 May 2016 the Seychelles Parliament successfully amended that country's Penal Code and decriminalised consensual adult homosexual conduct.²⁶ Seychelles thus joins African countries such as South Africa, Cape Verde, Congo, Madagascar, Central Africa Republic, Equatorial Guinea, Gabon, Mali, Burundi, Ivory Coast, and Rwanda which do not criminalise consensual private adult homosexual conduct.²⁷ This is where Nigeria should be. The obstacles in the way of decriminalisation are great given the profound social conservatism prevailing in the country, but with the emerging global trends there is hope that Nigeria will eventually join the progressive camp. It is heart-warming that Lagos State, a component unit of the Nigerian federation, does not criminalise private consensual homosexual conduct among adults.²⁸ The decriminalisation of consensual adult same-sex conduct by the Lagos State Government came as a pleasant surprise at a time when it seems that Nigeria was bent on distinguishing itself as the most homophobic nation on earth with the passing of a cocktail of anti-homosexual laws. With the repeal of the old Criminal Code of Lagos State and its replacement with a new law that does not criminalise consensual adult homosexual conduct, a new chapter in the fight against discrimination has been opened in Lagos State, a component unit of Nigeria. This laudable development shows Nigeria is not isolated from the rest of the world that has noticeably moved in the direction of rights recognition for sexual minorities. With more states following the example set by Lagos State – Nigeria's richest and most populous state – there is no doubt that sexual minorities will dare to breathe a sigh of relief.

²⁶ Centre for Human Rights, University of Pretoria 'Seychelles decriminalize sodomy, fulfilling constitutional, regional and international human rights obligations' 20 June 2016.

²⁷ Haskins (n 23 above).

²⁸ Section 259 of the Criminal Law of Lagos State which deals with sexual offences states that 'A person who penetrates sexually the anus, vagina, mouth or any other opening in the body of another person with a part of his body or anything else, without the consent of the person is guilty of a felony and liable to imprisonment for life'. The attempt to commit this felony attracts a 14 year jail term. This provision does not criminalise private consensual homosexual conduct.

7.3 Recommendations: The future of sexual minorities' rights in Nigeria and an agenda for action towards decriminalisation

As stated above, Lagos State has been able to decriminalise consensual homosexual conduct using section 259 of the Criminal Law of Lagos State. The success of Lagos State demonstrates the potential of legal reform as an instrument of decriminalisation. The Nigerian judiciary has entertained human rights cases in the face of intimidation from agents of military regimes.²⁹ If the judiciary can dare a military regime in order to uphold justice, this same judiciary should be able to entertain cases related to homosexual rights in the current democratic dispensation that social justice may be served. Should the Nigerian judiciary assume this activist role, it can count on international courts and the international community for support in an era that has witnessed the steady decriminalisation of homosexual conduct in many parts of the world. The legislative and judicial arms of the government are not alone in the potential roles for decriminalisation of consensual adult homosexual conduct. Executive actions can also be employed for this purpose. In what follows, I discuss the potential roles these three arms of government can play in the agenda for decriminalisation.

7.3.1 The judiciary as a potential tool for decriminalisation

South Africa presents a classic case of a nation that has effectively used the judiciary as a potent tool in the push for decriminalisation of discriminatory sodomy laws.³⁰ They are lessons for the Nigerian sexual minorities rights movement from the South African experience. Sexual minorities in Nigeria are presented with a unique opportunity to test the legality of Nigerian sodomy laws not just in domestic courts, but in a myriad of regional courts and UN human rights bodies. To further boost the aspiration of Nigeria's homosexual minorities towards rights recognition, the country's statutory procedural

²⁹ See *Garba* (n 13 above).

³⁰ For the key judicial decisions that culminated into rights recognition for sexual minorities in South Africa see section 6.2.3 of chapter 6 of this thesis.

framework for enforcement of fundamental rights recognises municipal, regional and UN-based human rights as derivative sources of human rights.³¹

7.3.1.1 The Nigerian judiciary and lessons from other jurisdictions in the quest for decriminalisation

In chapter 2, it is shown that the Nigerian criminal jurisdiction can be divided into courts of special criminal jurisdiction and courts of general criminal jurisdiction. The former have a restricted sphere of influence while the latter have powers to hear a wide range of cases involving diverse offences and offenders. The offence of homosexual act falls under courts of general jurisdiction. Consequently, the Supreme Court of Nigeria which is the highest court in the land, can hear appeals from the various divisions of the Court of Appeal in an appellate order from subordinate courts.³²

Human rights actions and enforcements are regulated by the Nigerian judiciary. The Fundamental Rights (Enforcement Procedure) Rules, 2009, (FREPR) give unrestricted access to all Nigerian citizens to approach the court for protection of their rights. The FREPR explicitly states as follows:

Any person who alleges that any of the fundamental rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification & Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the state where the infringement occurs or is likely to occur, for redress.³³

³¹ The Preamble to the Fundamental Rights (Enforcement Procedure) Rules, 2009 in paragraph 3(b) states that 'For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include;

(i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system,
(ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system.'

³² Chapter 7 of the 1999 CFRN is majorly devoted to the judicial structure in Nigeria. See also section 2.2 of chapter 2 of this thesis for the hierarchy of courts under the Nigerian Constitution.

³³ See Order 2 Rule 1 of the FREPR 2009. Also section 46(1) of the CFRN gives the leeway to all and sundry to approach the designated courts for redress in fundamental rights matters.

The High Courts are empowered to hear human rights violation cases.³⁴ These courts have entertained human rights cases under pressure in the era of the military regimes which invariably suspended the Nigerian Constitution and restricted the freedoms guaranteed by this document. The cases of *Garba v Lagos State Attorney General*³⁵ and *Fawehinmi v Abacha*³⁶ comes readily to mind. In both these decisions, the spirit of the African Charter was invoked as the Court ruled that the suspension of the then 1979 Constitution by the Buhari and Abacha regimes did not oust the powers of the court to hear human rights violation cases. In the *Garba* case, the Court held that since Nigeria had already domesticated the African Charter and since the Charter was still in operation at the international level, the suspension of the 1979 Constitution had no negative effect under the provision of the African Charter. By this ruling the Court affirmed the relative superiority of international human rights law over domestic law such as the Robbery and Firearms (Special Provisions) Decree 5 of 1984 that purported to oust the jurisdiction of the courts to hear cases related to the decree.³⁷

The *Fawehinmi* case provoked the Nigerian Court of Appeal to rule that by virtue of the incorporation of the African Charter into Nigerian law under chapter 10 of the laws of the Federation, the decrees of the federal military government cannot oust the powers of the court to hear cases on human rights violation brought under the provisions of the African Charter.³⁸ Fawehinmi had gone to court challenging his arrest by security operatives.

The 1999 CFRN and the FREPR, 2009 provide procedural framework that can be easily explored by prospective LGBT litigants to get a favourable decision from the judiciary to serve as a template for law reforms towards abolishing anti-homosexuality laws in Nigeria. From the provisions of section

³⁴ Order 1 Rule 2 of the FREPR 2009 states to the effect that the Federal High Court, High Court of a State in Nigeria or the High Court of the FCT, Abuja can entertain fundamental rights actions.

³⁵ *Garba* (n 13 above).

³⁶ (1996) 9 NWLR pt (475) 710.

³⁷ See F Viljoen *International human rights law in Africa* (2012) 534.

³⁸ *Fawehinmi* (n 36 above) para B-C 343.

46 of the 1999 Constitution of Nigeria, LGBT litigants can directly approach the High Court of a State or the Federal High Court to challenge the continued existence of sodomy laws in Nigeria.³⁹ This is because the mere existence of the sodomy laws remains a threat to sexual minorities enjoying the rights enshrined in the Nigerian Constitution and international law. Prospective LGBT litigants can tap positive inspiration from the case laws discussed in previous chapters of this thesis to seek for legal redress in the designated courts. For instance, in the *Toonen* case, the HRC of the ICCPR agreed with Nicholas Toonen that section 122(a)(c) and 123 of the Tasmanian Criminal Code interfered with the privacy rights of Toonen even when the laws remain unenforced.⁴⁰ In the same vein, Nigerian sodomy laws even when unenforced remains a threat to the privacy rights of sexual minorities. Similar to *Toonen*, LGBT litigants should approach the designated courts to challenge the continued existence of sodomy laws in Nigerian statute book. The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* where Ackermann J articulated that that sodomy laws even when unenforced do not only constitute a violation of the rights of gay men but also infringe on their rights to privacy⁴¹ will serve as an inspiration to prospective Nigerian LGBT litigants to similarly initiate a fundamental rights action in the State or Federal High Court to contest the constitutional validity of sodomy laws as infringing on their rights to privacy, among other constitutionally guaranteed rights.

The second statutory platform open to prospective LGBT litigants to challenge for rights recognition is to exploit and explore the flexibility of the FREPR which creates room for public interest litigation. The FREPR provides as follows:⁴²

³⁹ Section 46(1) of the CFRN clearly states as follows: ‘Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that state for redress.’

⁴⁰ See section 4.3.1.1 of chapter 4 of this thesis.

⁴¹ See section 6.2.3.1 of chapter 6 of this thesis.

⁴² See paragraph 3(e) of the FREPR.

The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights applications, the applicant may include any of the following:

- (1) Anyone acting in his own interest;
- (2) Anyone acting on behalf of another person;
- (3) Anyone acting as a member of, or in the interest of a group or class of persons;
- (4) Anyone acting in the interest of its members or other individuals or groups.

With the FREPR 2009 welcoming and encouraging public interest litigation, the floodgates of court actions become open for LGBT individuals, LGBT based groups, human rights activists and other persons of interest to initiate human rights cases on behalf of sexual minorities in Nigeria. The South African experience that led to judicial affirmation of rights for homosexuals shows that some of the court actions were initiated by LGBT rights advocacy groups.⁴³ The *Eric Gitare* case in which a litigant successfully challenged a Kenyan governmental institution saddled with the responsibility for registering NGOs operating in Kenya for refusal to register an LGBT based NGO may serve as inspiration to Nigerian LGBT organisations to challenge the legality of the SSMPA which also gives the Nigerian Corporate Affairs Commission the powers to decline the registration of LGBT organisations.⁴⁴

It is obvious that there are opportunities within the judicial system for activist judges to take the bull by the horns and set a precedent. What seems to be lacking here is the will and, perhaps, interest. As Nigeria is a socially conservative country, it is not impossible that most judges are socially conservative.

⁴³ See section 6.2.3.3 of chapter 6 for the South African experience.

⁴⁴ See section 6.5.1 of chapter 6 of this thesis.

7.3.1.2 Exploring the potential of the ECOWAS Court of Justice

Nigeria is located in West Africa. The region has a court established by 1993 Revised Treaty of the Economic Community of West African States (ECOWAS). The 1993 treaty reaffirmed the May 1975 Lagos Treaty that inaugurated ECOWAS, a community of 15 states, namely Nigeria, Ghana, Togo, Benin, Senegal, Burkina Faso, Cape Verde, Ivory Coast, The Gambia, Guinea, Mali, Guinea Bissau, Liberia, Niger, and Sierra Leone. The Revised ECOWAS 1993 Treaty sought to incorporate human rights values into the ECOWAS constitutive document. The ECOWAS Court of Justice was established by article 15 of the 1993 treaty.⁴⁵

The ECOWAS Court of Justice has since its inception entertained cases relating to human rights violation despite its more general mandate which focuses on inter-state dealings.⁴⁶ Some of the human rights violation cases decided by the court include *Manneh v The Gambia*,⁴⁷ *Koraou v Niger*⁴⁸ and *Essien v the Republic of The Gambia and Another*.⁴⁹ In the *Manneh* case, the complainant who is a citizen of The Gambia challenged his arrest and detention by the National Intelligence Agency of The Gambia, insisting that his fundamental human rights under articles 4, 5, 6 and 7 of the African Charter had been violated. He demanded his immediate release and compensation to the tune of 5 million US dollars. He was represented by leading Nigerian human rights activist lawyers, Femi Falana, Chinedum Agwarambo and Sola Egbeyinka.⁵⁰ The Court held that articles 2, 6 and 7(i) of the African Charter had been violated⁵¹ and ordered The Gambia to release Manneh and pay him

⁴⁵ S Ebovrah & A Tanoh *Compendium of African sub-regional human rights documents* (2010) 183.

⁴⁶ Article 4 of the ECOWAS Treaty which spells out the aims and objectives of the organisation makes it explicitly clear that the ECOWAS is given more to promoting inter-state affairs than rights protection for citizens of member states.

⁴⁷ (2008) AHRLR 17 (ECOWAS 2008).

⁴⁸ (2008) AHRLR 131 (ECOWAS 2007).

⁴⁹ (2007) AHRLR 131 (ECOWAS 2007).

⁵⁰ *Manneh* (n 47 above) para 2-3.

⁵¹ *Manneh* (n 47 above) para 41.

the sum of 100,000 dollars as damage.⁵² Article 2 of the African Charter stipulates that the rights guaranteed by the African Charter shall be enjoyed by citizens of member states without discrimination on the grounds of race, ethnic group, color, sex, language, religion, politics, national or social origin, fortune, birth or other status. Article 6 guarantees right to liberty and security of the person while article 7(i) guarantees the right to fair hearing.

The *Koraou* and *Essien* cases are similar to the *Manneh* case in that they exemplify the resolve of the ECOWAS Court of Justice to defend the fundamental human rights of citizens of member states. The *Koraou* case involves Hadijatou Koraou, a national of Niger, who alleged that she was sold into slavery at the age of 12 and was for many years the domestic help and sex slave of her master.⁵³ The applicant contended before the ECOWAS Court that she had suffered discrimination sexually and socially as a result of a repugnant tradition. According to her argument, the *sadaka* tradition of selling a woman to a man as a sex slave as well as a concubine amounts to a form of discrimination exclusively based on sex. The applicant contended that this practice for which she was a victim offends the spirit of articles 2 and 18(3) of the African Charter. Equal protection and equality before the law as guaranteed under article 3 of the Charter was not extended to her.⁵⁴ The Court held that Koraou had suffered discrimination and awarded her CFA 10,000,000 as damage.⁵⁵ In the *Essien* case, the Court affirmed its competence to hear a labour dispute involving Prof Etim Moses Essien, the Republic of The Gambia and the University of The Gambia. The applicant alleged that by not paying him the amount due him for his one year expert technical service, The Gambia and the University of The Gambia violated his right to equal pay for equal work done, thus violating articles 5 and 15 of the African Charter and a further breach of article 23 of the Universal Declaration

⁵² *Manneh* (n 47 above) para 44.

⁵³ For a detail facts of the case, see (n 48 above) para 1-15.

⁵⁴ *Koraou* (n 48 above) para 62.

⁵⁵ *Koraou* (n 48 above) para 96.

of Human Rights.⁵⁶ The defendants objected to the application. One of the grounds upon which the defendant submitted their objection is the competence of the court to entertain the case.⁵⁷ The preliminary objection to the jurisdiction of the court failed and the court pointed out that non exhaustion of local remedy was not a condition precedent to accessing the ECOWAS Court.⁵⁸

The ECOWAS Court presents a strong judicial platform for prospective homosexual litigants and other interested parties to challenge the constitutionality of Nigerian laws criminalising consensual adult homosexual conduct. An added advantage of the ECOWAS Court for the cause of prospective homosexual litigants is the fact that the need to exhaust local judicial remedies is not a requirement before the Court. Furthermore, the judges are not national ones but come from a broader pool.

7.3.1.3 The African Commission on Human and Peoples' Rights

The ACmHPR like the ECOWAS Court of Justice has entertained Nigerian petitions relating to human rights violation.⁵⁹ The Commission has further

⁵⁶ *Essien* (49 above) para 1.

⁵⁷ *Essien* (n 49 above) para 6. Counsel to the defendants argued persuasively before the court that local remedial channels of litigation have not been exhausted before the applicant approached the instant court, as such the court lacked the jurisdiction to entertain the matter. They anchored their stance on the provision of article 56(5) of the African Charter.

⁵⁸ *Essien* (n 49 above) para 28.

⁵⁹ See for instance the case of *Constitutional Rights Project & Anor v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 60. This case readily comes to mind. The case involves the annulment of elections by the military government of General Sani Abacha. The ACmHPR held that the action of the military government was contemptuous of the people and constituted a violation of articles 1, 6, 9, 13 and 20(i) of the African Charter. *Social and Economic Rights Centre (SERAC) & Anor v Nigeria* (2001) AHRLR 60 (ACHPR 2001). The case involved the struggle of the Ogoni people of Nigeria to protect their environment from the impact of oil exploration in the Niger Delta region of Nigeria. The applicants accused the military government of Nigeria of negligence and complicity in the anti-environmental practices of Shell Petroleum Development Corporation (SPDC). The communication alleged that the government of Nigeria had not taken steps to hold SPDC accountable for the severe damage to the Ogoni environment caused by oil exploration. The applicants submitted that instead of taking steps to clean up the environment to avert a health crisis, the government had brutally cracked down on the Movement for the Survival of the Ogoni People (MOSOP), the organisation championing the cause of the Ogoni people and their environment. The cracked down by the security forces led to the arrest and detention of the officials of the MOSOP. The applicants submitted that the activities of the government and SPDC amounted to a violation of articles 2, 4, 14, 18(i), 21 and 24 of the African Charter. The ACmHPR held that the Nigerian military

extended its adjudicatory mandate to other African countries.⁶⁰ Despite the giant strides made by the Commission in the area of human rights protection, the violation of human rights on the basis of sexual orientation has not been fairly accommodated by it.⁶¹ The closest the African Commission came to entertaining any case relating to rights violation of sexual minorities or legality of sodomy laws is the *Curson* case which was curiously withdrawn by the applicant.⁶² The politics surrounding the withdrawal of the *Curson* petition before the African Commission clearly shows that there is reluctance on the side of homosexual rights activists and NGOs in Africa to challenge the prevailing state of homophobic laws and culture before the African Commission.⁶³ This reluctance seems to be anchored on the shaky premise that the time is not yet ripe to approach the African Commission with the homosexual right petition.⁶⁴ Ibrahim captures this pessimism vividly when he posited that ‘if the African Commission were to hold that LGBT rights are un-African or takes some form of a cultural relativist stance in a binding decision, it effectively will set the clock back on the discourse that has effectively picked up momentum over the last decade’.⁶⁵ Murray and Viljoen also seem to share this sentiment. They suggest that caution and a measure

government was under obligation to protect the environment from degradation caused by oil exploration in line with the requirement of the ICESCR to which Nigeria is a state party. The ACmHPR further deplore the brutal steps taken by the Nigerian government to suppress the Ogoni people. The African Commission ordered the government of Nigeria to halt further military actions against the Ogoni people, and compensate the victims of the military action and take steps towards reversing the environmental and social crises in the Niger Delta. See also the case of *Civil Liberty Organisation v Nigeria* (2000) AHRLR (ACHPR 1995).

⁶⁰ See *Amnesty International v Sudan* (2000) AHRLR 279 (ACHPR 1999), *Avocates Sans Frontiers v Burundi* (2000) AHRLR 293 (ACHPR 2000), *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000), *Gunme & Ors v Cameroon* (2009) AHRLR 72 (ACHPR 1995), *Katangese Peoples’ Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995), *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005).

⁶¹ R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 29.

⁶² Viljoen (n 37 above) 265.

⁶³ See, section 4.5.1 of chapter 4.

⁶⁴ AM Ibrahim ‘LGBTI rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 264

⁶⁵ Ibrahim (n 64 above) 272.

of restraint should be taken in any attempt at utilising judicial mechanism of the AU to seek protection for sexual minorities as a negative pronouncement might do more harm than good.⁶⁶

Despite the procedural difficulty of complaints to the African Court and the thorny issue of locus standi,⁶⁷ I am of the opinion that testing the legality of African homophobic legislation before the African Commission has become necessary. The success of the ECtHR in expanding the frontiers of LGBT rights should encourage gay rights activists and NGOs to explore litigation tools in the struggle for LGBT equality before the AU. The history of the ECtHR which Paul Johnson presents revealed that the European Court initially rejected claims of rights violation on the basis of sexual orientation brought before it by homosexuals.⁶⁸ The seeming recalcitrant stance of the ECtHR did not deter homosexuals from persistently petitioning their claims to rights before the ECtHR. Johnson notes that it took 26 agonising years of consistently petitioning the ECtHR before the Court passed a judgment affirming the rights of homosexuals under the ECHR. Johnson concludes that this persistency showed by gay rights activists before the ECtHR should serve as a fertile source of inspiration to African states.⁶⁹

Nigerian sexual minority rights activists should seize the initiative like Curson to petition the ACmHPR on the legality of the country's multiple sodomy laws. NGOs working on sexual minorities rights should bring petitions related to sexual minority rights before the African Commission.

The judicial mechanism to test the compatibility of Nigerian sodomy laws with the human rights provision of the 1999 CFRN and other regional and international human rights instruments are readily available, and have been discussed in this section. A shock decision in any of the courts, domestic

⁶⁶ Murray & Viljoen (n 61 above) 111.

⁶⁷ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 24-25.

⁶⁸ P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 252-254.

⁶⁹ Johnson (n 68 above) 279.

or regional may be all that is required for Nigeria to decriminalise homosexuality in line with the international trend towards LGBT equality. Unlike the ECOWAS Court, there is need for litigants before the African Commission to exhaust the local judicial remedies available to them before approaching the Commission.

7.3.2 The legislature and its role towards decriminalisation of consensual adult same-sex conduct

The role of the legislature in a democratic setting cannot be ignored. As the institution saddled with law-making responsibilities under the 1999 CFRN, the Nigerian legislature at federal and state levels can play a decisive role in moving Nigeria towards an era of greater equality for sexual minorities and decriminalisation of consensual adult homosexual conduct. The legislature at the federal level, precisely the Senate and the House of Representative can make a great statement by entertaining and passing legislative measures that acknowledge the dignity of LGBT persons in line with international human rights documents like the ICCPR and ICESCR.

The idea of legislative intervention in the matter of recognition of consensual adult homosexual conduct in Nigeria, or the very idea that the Nigerian legislature will ever come close to debating homosexual rights, is by no means a fantasy. Positive developments in the Western world vis-à-vis gay rights have made it impossible for non-Western issues to ignore the LGBT question. This is why Africa has responded firmly to the international trend, albeit negatively in the direction of increased criminalisation. As I showed in chapter two of this work, the Nigerian legislature at federal level has debated the LGBT question, which debate led to the signing into law of the SSMPA. The very fact that the matter was debated on the floors of the Senate and House of the Representatives indicates that the silence over the LGBT question has been shattered even if the legislative response has thus far been anything but constructive.

Lagos State has confirmed the possibility of legislative reform in Nigeria in the direction of decriminalisation of consensual adult homosexual conduct. Section 259 of the Lagos State Criminal Justice Administration Law, by omitting any reference to homosexual offences, effectively decriminalises consensual adult homosexual conduct in the territory of Lagos. Section 259 stipulates life imprisonment for non-consensual anal, vaginal and oral intercourse. The attempt to commit this felony attracts a jail term of 14 years under section 260. The law no longer views anal sex as a specific sexual offence tied to homosexual persons but regards it generally by making non-consensual anal sex a criminal offence.

It is hereby suggested that other federating states in Nigeria should follow the Lagos example by repealing their extant criminal codes that criminalise consensual adult same-sex conduct. The National Assembly should also review the SSMPA. There is also the need for the National Assembly to amend the 1999 Constitution to expressly include sexual orientation as a ground for non-discrimination, similar to the South African model of section 9(3) of the CRSA. This will give prospective LGBT litigants more impetus to initiate fundamental rights actions challenging discriminatory sodomy laws and cases of actual abuses of LGBT rights.

7.3.3 Decriminalisation through executive action

The 1999 CFRN gives the President of Nigeria enormous executive powers. The Constitution grants the President powers to determine the general direction of domestic and foreign policies in consultation with the vice-president and minister.⁷⁰ The President also has powers to appoint chairmen and members of federal bodies like the Council of State, National Security Council and Federal Character Commission.⁷¹ By extension the Nigerian President who is the head of the executive branch of government has powers to appoint federal

⁷⁰ See section 148(2)(a) 1999 CFRN.

⁷¹ Section 154 1999 CFRN.

bodies established by an act of the legislature. At the very least, members of the executive should refrain from instigating and fomenting hatred within the polity. Under the executive's power to decriminalise consensual adult homosexual conduct in Nigeria, I recommend for more frequent submission of state reports to the ICCPR human Rights Committee and the need for the Nigerian to ratify the First Optional Protocol of the ICCPR. I identify the Nigerian Police and other state institutions vested with investigative and prosecutorial powers in homosexual offences.

7.3.3.1 Regular state reporting to the Human Rights Committee of the ICCPR relating to sexual orientation and ratification of the First Optional Protocol to the ICCPR

State parties to the ICCPR are obliged to submit regular reports to the HRC on compliance level with the rights provision of the ICCPR.⁷² The last time Nigeria complied with this obligation as a state party to the ICCPR was in 1996 at the 56 session of the HRC held from 18 March to 4 April 1996.⁷³ Nigeria informed the Committee that rights provided in the ICCPR have been fully replicated in the Nigerian Constitution. The Nigerian government supplied the Committee with details of the extent to which it has complied with and implemented the Covenant.⁷⁴ Nigeria did not, however, report any issue related to sexual minorities before the HRC. Nigeria has not submitted any further report to the HRC for appraisal since 1996. Discriminatory laws against sexual minorities have been enacted since 1996 and targeted at citizens on the basis of their sexual orientation.⁷⁵ It is recommended that the Nigerian government should submit its state reports to the HRC more regularly, and consistently feature the plight of sexual minorities in these reports. This will enable the HRC to make more positive remarks and

⁷² E Mose & T Opsahl 'The Optional Protocol to the International Covenant on Civil and Political Right (1981) 21 *Santa Clara Law Review* 272.

⁷³ See HRC CCPR/C/92/Add.1 (26 February 1996).

⁷⁴ As above, para 3-189.

⁷⁵ See section 2.4.4 of chapter 2 of this thesis.

recommendations in their Concluding Observations on sexual orientation rights in the same way that the HRC has recommended to other countries with similar sodomy law as Nigeria.

One of the key duties of the Human Rights Committee of the ICCPR is to receive and consider individual communications on alleged violations of rights under the ICCPR.⁷⁶ It is, however, the First Optional Protocol to the ICCPR that gives the HRC the competence to consider individual communications.⁷⁷ Nigeria has not ratified the First Optional Protocol to enable the HRC entertain complaints from prospective homosexual litigants. It is the recommendation of this researcher that Nigeria should ratify the Protocol to enable interested parties to gain access to the HRC in the likely event that they exhaust domestic judicial remedies in their quest for affirmative judicial pronouncement on their rights to equality before the law.

7.3.3.2 The Nigerian Police and the burden of homophobia

The Nigerian Police is a very important institution of state created by the Nigerian Constitution and saddled with the responsibilities of safeguarding lives and properties of citizens.⁷⁸ As I showed in previous chapters of this thesis, the Nigerian Police is in the fore front of unleashing homophobic mayhem on real and perceived homosexuals in Nigeria.⁷⁹ It is hereby recommended that the Nigerian Police should adopt policies refraining from clampdown, arbitrary arrest and abusive prosecution of alleged homosexuals.

7.3.3.3 The role of prosecutors in Federal/State Ministries of Justice in homosexual trials

Aside from the Nigerian Police, the Department of Public Prosecution (DPP) of the federal and state governments wield enormous powers in the prosecution

⁷⁶ Mose & Opsahl (n 72 above) 273.

⁷⁷ Mose & Opsahl (n 72 above) 273.

⁷⁸ See section 214(1) of the CFRN 1999.

⁷⁹ See sections 1.1 and 1.2 of chapter 1 and sections 3.2 and 3.3 of chapter 3 of this thesis.

of criminal offenders in Nigeria. The act of adult homosexuality, more often than not is done consensually. From this researcher's experience as a senior Nigerian federal prosecutor, it is often a herculean task to prove the guilt of a criminal defendant in trials where the offence is committed and mutually consented to. The Nigerian Constitution in this regard gives prosecutors the leverage to exercise the powers of *nolle prosequi* on behalf of the Attorney General of the federation or states in cases where there are paucity of evidence in a criminal trial.⁸⁰ Homosexual offences belong to that category of offences that are difficult to secure convictions in a court of law as shown in some of the identified homosexual trials in Nigeria that led to discharge and acquittal on the ground of lack of evidence and corroboration.⁸¹ It is hereby recommended that prosecutors should decline to prosecute cases related to adult homosexuality where consent is mutually given.

7.3.4 The National Human Rights Commission

One body established by an act of the legislature which holds promises for the advancement of LGBT rights in Nigeria is the National Human Rights Commission (NHRC). Though the NHRC is set up by the executive, it is however, aimed at being an autonomous body responsible for human rights protection. An activist NHRC supported by the executive can more effectively implement LGBT-friendly measures.

The NHRC was established by the National Human Rights Commission 1995 Decree no 22 (as amended by the NHRC Act 2010). The Preamble to the NHRC invoked the United Nations Charter's declaration on the dignity and equality of all human beings, the human rights provisions of the 1999 Constitution and International Convention on the Elimination of all forms of Racial Discrimination and the African Charter.

⁸⁰ See sections 211(3) and 174(3) of the CFRN 1999. For a detail discussion of the powers of *nolle prosequi* and powers of a Nigerian prosecutor, see BO Igwenyi 'Jurisprudential appraisal of *nolle prosequi* in Nigeria' (2016) 4 *Global Journal of Politics and Law Research* 10-16.

⁸¹ See the cases of *Bauchi Sharia Commission v Ibrahim Marafa* and *Bauchi State Government v Usman Sabo & Anor* in section 2.8.2 of chapter 2 of this thesis.

The Preamble to the NHRC Act empowers the body to ‘provide a forum for public enlightenment and dialogue on ... allegations of human rights violation by public officers and agencies and to reaffirm the sacred and inviolable nature of human and other fundamental rights’. Section 2 of the Act creates a governing council of the NHRC to be chaired by a senior retired judge, with a representative each from the ministries of justices, foreign affairs and internal affairs, three representatives of human rights groups registered in Nigeria, three representative from the media, three representatives of other interested parties, and the executive secretary of the NHRC. The President of Nigeria appoints the chairman and members of the NHRC who report to the former and recommends prosecution where necessary.⁸² The Act thus empowers the Nigerian President to influence the direction of the human rights debate through executive action, through what he does and what he omits.

The decisions of the NHRC are not themselves effective. They are mere recommendations made to the executive for implementation. Some of the problems obstructing the effective discharge of the duties of the NHRC are undue subordination of the NHRC to the executive arm of government, reluctance on the part of the executive to implement decision of the NHRC and inadequate powers to compel state agencies to appear before it.⁸³

The NHRC has shied away from entertaining cases related to homosexual rights abuse just like the Nigerian courts. The NHRC is a government agency. The Nigerian government is anything but sympathetic to LGBT rights. Given NHRC’s relative lack of independence, it will prefer not to adopt an activist posture for fear of attracting the ire of the government.⁸⁴

⁸² Section 5(b) National Human Rights Commission Act 1995.

⁸³ The Observatory for the Protection Human of Rights Defenders ‘Nigeria: Defending human rights, not everywhere, not every right’ April 2010 available at www.omct.org/files/2010/05/20688/nigeria_mission_report.pdf (accessed 3 July 2016).

⁸⁴ The Observatory for the Protection Human of Rights Defenders (n 64 above) A one-time executive secretary of the NHRC Mr Bukhari Bellow was removed from his position on the order of the Nigeria justice minister following Mr Bello’s criticism of security agencies for their harassment of media operators. He also criticised the third-term bid of then president Olusegun Obasanjo. He was removed in June 2006.

However, the important role the NHRC can play in the decriminalisation process is not in doubt despite the burden of non-independence that it carries. It is the body saddled with the responsibilities of advancing human rights in the country. The NHRC only has to adopt homosexual rights as human rights and secure the backing of the executive for it to engage the society and gradually change the society's anti-homosexual mindset. Unfortunately, executive support for LGBT advancement in Nigeria is virtually absent, as I have demonstrated in previous chapters.

The challenges before the NHCR are enormous, yet surmountable. As a first step towards asserting its independence, the NHRC must adopt an activist stance over the LGBT rights projection. That this is achievable in the face of a hostile population the Kenya Human Rights Commission (KHRC) has demonstrated.⁸⁵ Despite the prevailing anti-homosexual sentiment in Kenya, the KHRC has adopted homosexual rights as human rights and actively advocates decriminalisation in Kenya.⁸⁶ The relevance of national human rights commissions in the fight for equal treatment for homosexual persons was demonstrated by the landmark South African sodomy case.⁸⁷ The South African Human Rights Commission (SHRC) co-initiated the case and was the second applicant at the Constitutional Court of South Africa. The judgment delivered in the case on 9 October 1998 by Ackermann J declared the criminalisation of private consensual adult same-sex conduct unconstitutional.

⁸⁵ See, section 6.5.1 of chapter 6 for details on the pro-LGBT stance of the KHRC.

⁸⁶ The KHRC stated in its pro homosexuality stance that 'the criminalisation of homosexuality is a legacy which has now passed its use by date. The colonial laws from which the criminalisation of homosexuality emanates, have no place in a world where central to the stability of a society is the need to respect cultural variety. For such reasons, convicting those who have been found to engage in homosexuality activity has no place in a modern society.' Quoted in J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 49. See generally The Kenya Human Rights Commission (2011) *The outlawed amongst us: A study of the LGBTI community's search for equality and non-discrimination in Kenya*.

⁸⁷ See, *National Coalition of Gay and Lesbians Equality & the South African Human Rights Commission* case (n 7 above).

The constructive role that the NHRC can play in the struggle to advance LGBT rights is not in dispute. What immediately strikes one are the enormous challenges to be overcome by the NHRC if the lot of LGBT persons is to change drastically for the better. The magnitude of the task at hand arises because of the profound social conservatism of the overwhelming majority of Nigerians. But, then, the NHRC by its very definition as a custodian of human rights has been called to participate in what Heyns calls 'legitimate resistance' and which he also compares to the anti-apartheid and anti-Nazi struggles.⁸⁸ The major denomination here is the stern rejection of injustice. In speaking out for LGBT rights the NHRC is promoting justice. Although the task before it is daunting, this same task is surmountable.

7.3.5 The role of civil society groups in the agitation for decriminalisation of consensual adult homosexual conduct in Nigeria

Featuring prominently in South Africa's laudable experience of decriminalisation of consensual adult homosexual conduct and the eventual rights recognition for sexual minorities is the indefatigable role played by a cohesive civil society movement.⁸⁹ Experiences in Kenya, Uganda and Botswana show that a well-organised civil society with a good sexual minorities rights campaign strategy can play a vital role in placing the issue of sexual minorities' rights on the front burner.⁹⁰

Nigeria-based sexual minorities rights NGOs would have to seize the initiative, and challenge the continued existence of laws criminalising consensual adult homosexual conduct in the judicial institutions discussed above. Political lobbying for equal rights for the Nigerian LGBT community can also be made possible by well organised NGOs through mass sensitisation and education programmes in the media. It is true that the Nigerian environment

⁸⁸ CH Heyns 'A "struggle approach" to human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 33.

⁸⁹ See section 6.2 of chapter 6 of this thesis for a detailed rendition of South Africa's experience and perspective on the recognition of rights for sexual minorities.

⁹⁰ See section 6.5 of chapter 6 of this thesis.

is hostile to the LGBT community, but then the recognition of sexual minorities' rights in Nigeria is one victory that was never going to be won with ease, similar to the long-fought victory over apartheid in South Africa and the desegregation victory in the United States of America. Knowledge of how rough the road ahead is will prepare pro-homosexual civil society groups for the onerous challenge that confronts them in today's homophobic Nigeria. Even within the civil society community, sexual minorities rights advocacy groups are marginalised,⁹¹ let alone the larger Nigerian society.

Mercifully, the burgeoning Nigerian LGBT advocacy groups are fully conscious of the challenges ahead and are determined to fight for the destigmatisation of consensual adult homosexual conduct and its eventual removal from the criminal statutes of the Federal Republic of Nigeria. In 2002 there was just one reported LGBT rights organisation in Nigeria. Today there are about 10 active LGBT rights organisations.⁹² These organisations include Women's Health and Equal Rights Initiative, Queer Alliance Nigeria, House of Rainbow, Lawyers Alert, Youths Together, Nigerian Humanist Movement, the Bisi Alimi Foundation, Global Rights Nigeria and the Independent Project for Equal Rights.

These pro-LGBT civil society groups should seek to accelerate the process of attitudinal change which is vital for the social acceptance of homosexual behavior as a non-threatening and natural expression of human sexual diversity. Through influencing government policy-making processes, LGBT rights advocacy, awareness workshops and sensitisation campaigns and lobbying of the relevant legislative and judicial authorities, the Nigerian LGBT rights advocacy groups can hope to achieve for the Nigerian LGBT

⁹¹ See Women's Health and Equal Rights Initiative Nigeria Shadow report on human rights violation, discriminatory laws and practices against lesbian, bisexual and sexual minority women at the 67th session of the Committee for the Elimination of all Forms of Discrimination against Women (CEDAW), Geneva, 3-21 July 2017.

⁹² Katherine Purvis 'Bisi Alimi on LGBT rights in Nigeria' The Guardian 9 February 2016 available at <https://www.theguardian.com/global-development-professionals-network/2016/feb/09/bisi-alimi-on-lgbt-rights-in-nigeria-it-may-take-60-years-but-we-have-to-start-now> (accessed 18 October 2017).

community the rights recognition victory which organised LGBT rights groups helped mastermind in the West and in places like South Africa on the African continent. This agenda is laudable, but it will be absolutely necessary for the LGBT rights groups to present a common front and refuse to be intimidated by the coercive instruments of the state as well as the blackmail of the highly conservative society in which these pro-LGBT groups operate. As the prominent Nigerian gay rights activist Bisi Alimi correctly notes: 'If we come together and take a leadership role, things will move faster.'⁹³ Also, very importantly, the LGBT civil society groups should submit more shadow reports to the various committees of the UN treaty-based systems on the plight of sexual minorities in Nigeria. This will place the committees in a better position to make observations and positive recommendations towards decriminalisation to the Nigerian government.

The task before the Nigerian LGBT organisations is a daunting one, but the experience of South Africa and other LGBT-friendly nations clearly shows that a cohesive and determined civil society is indispensable in the fight for rights recognition for sexual minorities.

⁹³ Purvis (n 92 above).

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