THE JUDICIARY AND THE PROTECTION OF THE HUMAN RIGHTS OF HOMOSEXUALS IN NIGERIA

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DECLARATION

I, Ovye Affi, do hereby declare that the work contained in this mini-dissertation is entirely my work, except where it is attributed to other authors or sources. This work has not been submitted for a degree at any other university.

Signed: ……  …….

Date: ……31 August 2019…….

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ABSTRACT

Some Nigerian statutes proscribe consensual adult homosexual conduct. As a result, homosexuals have been under increasing human rights violations, including arbitrary arrest, police brutality and denial of access to healthcare services. The Constitution of the Federal Republic of Nigeria 1999 (CFRN) (amended) provides for the rights of every individual to liberty, dignity, privacy, freedom from discrimination and freedom of association. The Courts in Nigeria are bestowed with the power of constitutional interpretation and the duty to protect individuals against human rights violations. However, Nigerian courts have failed to protect the rights of homosexuals in Nigeria against the rights limiting provisions of legislation which criminalise consensual adult homosexual conduct. Legal scholars such as Ronald Dworkin encourage the adoption of the moral reading of the human rights provisions of the constitution. Ronald Dworkin and other proponents of the moral reading of the constitution are of the view that judges need to interpret the constitution in a manner that will protect the rights and liberties of all persons, including minorities. Constitutional moralists say the interpretation of the constitution to satisfy the wishes of the majority could lead to breaches of the rights of members of minority groups. Courts in other jurisdictions have variously applied the moral reading of the constitution and consequently arrived at decisions protecting the rights of homosexuals. In this research, I shall critically study the theory of the moral reading of the constitution in order to understand how the moral reading of the constitution could lead to the protection of the rights of members of minority groups. Thereafter, I shall examine the court system in Nigeria in order to understand how the courts could come to the aid of homosexuals, whose rights have been put on the line by the existence of statutes which criminalise consensual adult homosexual conduct(s). Furthermore, I shall carry out a study of how courts in other jurisdictions have applied the moral reading of the constitution to arrive at decisions that protect the rights of homosexuals and establish whether Nigerian courts could learn some lessons on the protection of the rights of homosexuals from the decisions of courts in other jurisdictions.

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ABBREVIATIONS

CFRN - The Constitution of the Federal Republic of Nigeria of 1999 (amended)

CAC – Corporate Affairs Commission of Nigeria

SSMPA – The Same Sex Marriage Prohibition Act of Nigeria of 2013

CAMA – Companies and Allied Matters Act of Nigeria of 1990

IPC – Penal Code of India of 1860

Chapter One

Introduction

1 Background

In Nigeria, sexual conduct between persons of same-sex is tagged as one of the unnatural forms of sex and same is criminalised, notwithstanding the fact that persons involved are adults and the conducts are consensual.[1] In other words, Nigerian law treats homosexuals as outcasts and strips them of their autonomy to live sexually fulfilling lives. Furthermore, the Same-Sex Marriage (Prohibition) Act (SSMPA) prohibits same-sex marriages in Nigeria.[2] In addition, the registration of clubs or associations which promote same-sex relationships is prohibited,[3] and a person who supports, abets or sustains same-sex clubs or relationships is liable to imprisonment for a term of ten (10) years.[4]

Research has shown that most sexually active species of plants and animals display homosexual tendencies,[5] and that homosexuality is as natural as heterosexuality because sexual orientation is a natural disposition of man, which is triggered by hormones, and same is often uncontrollable.[6] Assuming sexual orientation is a matter of choice, individuals should be allowed to make sexual choices without interferences, as such choices are personal and do not interfere with the rights of others. In other words, statutory coercion of homosexuals to conform to heterosexual conduct amounts to denying homosexuals of their personhood and humanity and all the fundamental rights attached therewith.

1.1 Problem statement

[1] Criminal Code Act of Nigeria of 1916 (Criminal Code) sec 214; Penal Code Act of Nigeria of 1960 (Penal Code) secs 284 & 405. The Criminal Code is applicable in states that used to form part of the Southern Region of Nigeria while the Penal Code is applicable in states that used to form part of the Northern Region of Nigeria.
[2] The Same-Sex Marriage (Prohibition) Act of Nigeria of 2013 (SSMPA) sec 5.
[3] SSMPA (n 2) sec 4(1).
[4] SSMPA (n 2) sec 4(1) & (2).
[5] *Johar v Union of India & 2 Others W. P (Criminal) No. 76 of 2016 (Johar) Chandrachud J. para 28.*
[6] JM Bailey et al 'Sexual orientation, controversy and science' (2016) 17 *Psychological Science in the Public Interest* 45 at 68.

The Criminalisation of consensual same-sex conduct in Nigeria has the effect of heightening social prejudices against homosexuals. The criminalisation of same-sex relationship has also led to the arbitrary arrest and brutal treatment of individuals who are perceived to be homosexuals, by security personnel, individuals and groups. For instance, on 13 February 2014, fourteen young men were arrested and beaten by a mob, on allegation of being gay. When the men were taken to the police station, it was alleged that policemen further beat and tortured the men.[7] Similarly, on 26 August 2018, about fifty-seven boys were arrested and beaten during a police raid in Lagos on the grounds that they were suspected to be gays.[8] Related to this is the fact that there have been reports of the unwillingness of healthcare providers to provide necessary healthcare services for homosexuals, especially as it relates to the peculiar needs of homosexuals.[9]

The homophobia in Nigeria is generally influenced by religion.[10] However, chapter four of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) (amended), provides for a range of human rights and guarantees.[11] As such, all laws should ordinarily conform to the constitutional muster of the protection of human rights, as opposed to unempirical socio-cultural and religious beliefs.

Studies conducted by Ayeni[12] and Akogwu[13] regarding legislation prohibiting homosexual activities in Nigeria all arrive at the conclusion that such legislation breaches the fundamental rights of homosexuals in Nigeria. However, such studies mostly rely on international human rights principles to advocate for a shift towards the protection of the rights of homosexuals, with no clear cut theoretical roadmap to be followed by Nigerian

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[7] B Walkins 'Gay men dragged from homes, beaten by Nigerian mob' *Digital Journal* (Abuja) 15 February 2014 http://www.digitaljournal.com/news/world/gay-men-dragged-from-homes-brutally-beaten-by-nigerian-mob/article/371008 (accessed 4 March 2019).
[8] B Nwafor 'Police arrests 57 suspected homosexuals in Lagos' *Vanguard News* (Abuja) 27 August 2018 https://www.vanguardngr.com/2018/08/police-arrests-57-suspected-homosexuals-in-lagos/ (accessed 4 March 2019).
[9] K Okanlawon, A Adebowale & A Titilayo 'Sexual hazards, life experiences and social circumstances among male sex workers in Nigeria' (2012) 15 *Culture, Health and Sexuality* 22 at 27-28.
[10] Human Rights Watch '"Tell me where I can be safe": The impact of Nigeria's Same-Sex Marriage (Prohibition) Act' Human Rights Watch Report (2016) https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act# (accessed 14 March 2019).
[11] The Constitution of the Federal Republic of Nigeria of 1999) (amended) (CFRN) secs 33-45.
[12] 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 at 228-232.
[13] A Akogwu 'Assessing the human rights implications of the Nigerian law dealing with sexual orientation' Ph.D thesis, University of Pretoria, 2018 at 127-177 (on file with the author).

courts in reaching decisions that will protect and uphold the rights of homosexuals, against the rights limiting effects of laws that criminalise homosexual activities. Nigerian courts are yet to test the constitutionality or otherwise of laws criminalising homosexual conducts, as cases on this subject were terminated preliminarily, on technical grounds.[14]

This study will highlight how the application of the theory of constitutional morality to the discourse on laws criminalising homosexual conduct and their resultant breaches of the rights of homosexuals, could change the narrative and consequently lead to judicial decisions upholding the rights of homosexuals, in consonance with the human rights values of the CFRN.

1.2 Research questions

The main research question is: To what extent can Nigerian courts protect the rights of homosexuals in Nigeria against the negative impact of laws criminalising homosexual conduct? This question leads to the following sub-questions:

1. How will the moral reading of the Constitution positively influence the decisions of courts in Nigeria towards the protection of the rights of homosexuals?

2. How have courts in other jurisdictions applied the moral reading of the constitution to protect the rights of homosexuals?

1.3 Significance of the research

It has been established that despite the raging homophobia in Nigeria, there exists many homosexuals in Nigeria, who carry out homosexual conducts underground, with about 865, 642 and 358 males who are involved in homosexual prostitution in Lagos, Kano and Port Harcourt, respectively.[15] Consequently, the rights of the relatively large population of homosexuals in Nigeria ought to be protected.

[14] AC Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on Teriah Joseph Ebah vs. Federal Government of Nigeria' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 238 at 242.
[15] Okanlawon, Adebowale & Titilayo (n 9) 23.

Studies have shown that statutes that criminalise homosexual conduct breach the rights of homosexuals in Nigeria and that there is a need to protect the rights of homosexuals in Nigeria against the rights limiting provisions of laws criminalising homosexual conducts.[16] Since the legislature has enacted laws criminalising homosexual conduct and the executive is saddled with the duty of implementing the laws as they are, then homosexuals in Nigeria can only turn to the judiciary for the protection of their rights. This is more so because the judiciary is the arm of government constitutionally saddled with the duty of interpreting laws and ensuring that laws are in tandem with the provisions of the CFRN.[17] However, the Nigerian courts are yet to make substantive pronouncement on the constitutionality or otherwise of statutes that criminalise homosexual conduct in Nigeria. The courts in a number of cases relied on technical grounds to strike out cases on this subject.[18] This research seeks to provide the judiciary with a pathway for reaching decisions on the merits, which will protect the rights of homosexuals in Nigeria.

If Nigerian judges are given the leeway to reach decisions on the constitutionality or otherwise of statutes that criminalise homosexual conducts in Nigeria as they want, then the Judges would be clouded by their socio-cultural and religious sentiments. However, if Judges are to abide by the constitutional value of the protection of the rights of citizens, then the Nigerian courts will protect the rights of homosexuals. The moral reading of the constitution has been tested by courts in other jurisdictions and it worked perfectly, in ensuring that the rights of homosexuals are protected. The Indian Supreme Court in *Johar v Union of India & 2 Others (Johar case)*[19] applied the moral reading of the constitution in declaring that portions of statutes which criminalise consensual same-sex conduct between adults are unconstitutional.

This research will illustrate how Nigerian courts can apply the moral reading of the constitution to declare, as unconstitutional, the provisions of laws criminalising

[16] Akogwu (n 13) 127-177.
[17] Unpublished: LI Uzuokwu 'Constitutionalism, human rights and the judiciary in Nigeria' Unpublished Ph.D thesis, University of South Africa, 2010 135 (on file with the author).
[18] Onuora-Oguno (n 14) 242.
[19] *Johar (n 5).*

consensual adult homosexual conduct, because such laws breach the rights of homosexuals under the CFRN.

1.4 Literature review

The CFRN vests the judicial powers of the Federation in the Courts,[20] and anyone who alleges that any of his rights have been violated, is being violated or is likely to be violated in any State in Nigeria may apply to a High Court for redress.[21] The judiciary is saddled with the role of protecting and enforcing the rights of individuals and ensuring the supremacy of the constitution.[22] Highlighting the relationship between the constitution and the judiciary, Uzuokwu posits that the constitution itself is just a document containing principles and that the constitution will not be useful or relevant in the absence of the judiciary, which breathes life into the constitution.[23] Consequently, it is part of the role of the judiciary to make decisions interpreting the rights of persons in Nigeria as contained in the CFRN.

Many scholars have indicated that laws prohibiting consensual adult homosexual conduct are injurious to the fundamental rights of homosexuals in Nigeria. Both Akogwu[24] and Ayeni[25] agree that statutes which criminalise consensual homosexual conducts breaches the rights of homosexuals and are inimical to and constitute breaches of Nigeria's international human rights obligations. The first research question seeks answers to how the courts can protect the rights of homosexuals in Nigeria.

Proponents of the moral reading of the constitution believe that, political morality is at the heart of the constitution and that the morality embedded in constitutional provisions must be taken note of, in the interpretation of constitutional provisions.[26] In other words, a moral reading of the constitution will entail digging into the constitution to understand the reason a particular provision was made. According to Dworkin, inherent in broad and

[20] CFRN (n 11) sec 6(1).
[21] CFRN (n 11) sec 46(1) & (2).
[22] Uzuokwu (n 17) 135.
[23] Uzuokwu (n 17) 136.
[24] Akogwu (n 13) 127-177.
[25] Ayeni (n 12) 228-232.
[26] R Dworkin *Freedom's law: The moral reading of the American Constitution* (2005) 2.

abstract provisions of the constitution are the political intentions and morality of society.[27] Consequently, constitutional provisions must be interpreted with the understanding that they invoke moral principles about political decency, in order to protect the rights of individuals. Beteille on the other hand posits that the operation of a carefully written constitution is likely to become arbitrary, erratic, and capricious, in the absence of constitutional morality, because the impersonal rule that comes with constitutional morality settles competition for power among parties, factions and political leaders.[28]

However, legal realists question the precision with which the judiciary could inspect and understand the morality behind constitutional provisions, as enacted by the legislature,[29] and consequently see nothing moral about allowing judges to apply their understanding of a certain set of moral principles which could upturn an enactment made by the elected representatives of the people.[30] Dworkin however, counters the position of the legal realists and explains that constitutional morality entails the development of a coherent strategy of interpreting the constitution and that the moral reading of the constitution does not lead to the imposition of the moral convictions of the judges.[31] Dworkin further explained that there is a measure of objective understanding of the moral intention of constitutional provisions and that on a daily basis, lawyers and judges instinctively treat the constitution as expressing moral requirements that can only be applied to real cases through moral judgments.[32]

The second research question seeks to know whether the application of the theory of the moral reading of the constitution could lead to judicial decisions protecting the fundamental rights of homosexuals in Nigeria.

Nigerian courts refrained from determining, on the merits, the question as to whether homosexuals in Nigeria have rights which ought to be protected. In *Teriah Joseph Eba v Federal Government of Nigeria (Teriah case)*,[33] the Applicant challenged the validity of

[27] As above.
[28] A Beteille 'Constitutional morality' (2012) 13 *Oxford Scholarship Online* 1 at 4.
[29] R Berger 'Ronald Dworkin's the moral reading of the American Constitution: A critique' (1997) 72 *Indiana Law Journal* 1099 at 1099.
[30] As above.
[31] Dworkin (n 26) 3.
[32] As above.
[33] *Teriah Joseph Ebah v Federal Government of Nigeria Suit No. FHC/ABJ/CS/197/2014 (Teriah).*

the Same-Sex Marriage (Prohibition) Act 2013, on the grounds that it breached the rights of homosexuals. However, the Court struck out the suit preliminarily, on the ground that the Applicant lacked legal standing to institute the suit. Similarly, in *Pamela Aide v Corporate Affairs Commission (Pamela case)*,[34] the question before the court was whether the Corporate Affairs Commission of Nigeria (CAC) did not breach the Applicant's right to freedom of association, when the Commission refused to register a lesbian club proposed for registration by the Applicant. The Court refused to look into the question as to whether lesbians have rights to form associations and simply held that the CAC rightly refused to register the association because the Same-Sex Marriage (Prohibition) Act 2013 was still in force and it is against public policy to sanction the registration of an association which promotes illegal conducts, in this case, lesbianism.

Courts in other jurisdictions have made decisions on the merits, in cases seeking the protection of the rights of homosexuals. In some of the cases, the guiding principle was that of constitutional morality. In *Johar case*,[35] the Supreme Court of India applied the moral reading of the constitution as against popular morality in declaring portions of criminal legislation prohibiting consensual adult homosexual conduct unconstitutional. The Supreme Court of India explained that the Constitution has as one of its values, the protection of human rights. As such, asymmetrical attitudes of individuals which do not breach the rights of others should be sustained and fostered and that doing the contrary will breach the rights of individuals.[36]

1.5 Methodology

This study will largely adopt the desktop review method. A desktop review of primary sources of literature such as the CFRN and the various laws that criminalise homosexual conducts in Nigeria shall be conducted. Furthermore, textbooks, peer reviewed journal articles, scholarly dissertations, court decisions and other secondary materials shall be consulted, reviewed and analysed.

[34] *Pamela Aide v Corporate Affairs Commission Suit No. FHC/ABJ/CS/827/2018 (Pamela).*
[35] *Johar (n 5) Misra CJI. paras 111-124.*
[36] *Johar (n 5) Misra CJI. paras 117-119.*

1.6 Limitations of the study

First, there is limited statistical data and materials in general, on homosexuals in Nigeria because legislation proscribes homosexuality as well as the promotion of homosexual associations in Nigeria

Furthermore, this research is limited to Nigeria, save the reference to few judicial cases from other jurisdictions.

Finally, this research is limited to judicial remedy against the breach of the rights of homosexuals and does not consider legislative and executive means of putting an end to the violation of the rights of homosexuals.

1.7 Overview of chapters

In chapter 1 of this research, I made an overview of the research by setting out, amongst other things, the problem, research questions and the methodology.
In chapter 2, I discussed in details, the moral reading of the constitution and how it could be applied to ensure the protection of rights. Chapter 3 highlights the functions and powers of the Nigerian courts and the attitude of the courts to the protection of the rights of homosexuals. Chapter 4 illustrates how courts in other countries applied the moral reading of the constitution and consequently reached decisions protecting the rights of homosexuals. In chapter 5, I set out the research findings and conclusions. I also made recommendations in chapter 5.

Chapter Two

The moral reading of the constitution

2 Introduction

Curious minds ask what human rights are and what makes them binding and enforceable? Furthermore, inquisitive persons would want to know what judges faced with human rights related disputes think and what the judge should do where the majority in the society supports a law which appears to breach the rights of members of a minority group, such as homosexuals in Nigeria? In answering these questions, we shall take a voyage through the theory of the moral reading of the constitution as developed by Ronald Dworkin. Furthermore, this chapter shall examine how the moral reading of the constitution is capable of leading to the progressive realisation of rights and the accommodation of differences in a democratic society.

2.1 The Constitution and fundamental rights in Nigeria

The Constitution of a state is the organic or *grundnorm* of the state, in the sense that it is the foundation of all other laws and institutions, as well as the instrument upon which such laws and state institutions derive their legitimacy. The constitution is the instrument that apportions rights and obligations to individuals and groups within the state. The Supreme Court of Nigeria had this to say about the nature of the constitution:

> A Constitution of any country is what is usually called the organic law or grundnorm of the people. It is the formulation of all the laws from which the institutions of state derive their creation, legitimacy and very being. It is the unifying force in the nation, apportioning rights and imposing obligations on the people who are subject to its operation.[37]

Since the Constitution is the paramount law of the state, the Supreme Court of Nigeria rightly stated in *A.G Federation v Abubakar (Abubakar case)*,[38] that where the provision of any law is inconsistent with the provisions of the constitution, the said provision shall

[37] *A.G. Federation v Abubakar (2007) 10 NWLR (Pt. 1041) 1 at 118–119 paras G-A (Abubakar).*
[38] *Abubakar (n 37) 97 para E.*

be null and void to the extent of its inconsistency with the Constitution and that the court has not hesitated to so pronounce.

Realising the importance of fundamental human rights, the drafters of the CFRN made provision for fundamental human rights in the CFRN.[39] By so doing, the drafters of the CFRN ensured the supremacy of fundamental rights against any rights limiting provisions of statutes or of individual or governmental action. In other words, it is the intention of the drafters of the CFRN that human rights should not be eroded.

Although it is the function of the legislature to enact or amend the constitution, the interpretation of the CFRN is the function of the judiciary and the judiciary is expected to interpret the CFRN in line with established principles of constitutional interpretation and the demands of justice.[40] In *Abubakar case*, the Supreme Court of Nigeria observed that to ensure the proper administration of justice, Judges must note the changing circumstances of a progressive society for which the constitution was designed, in order not to attain unconstitutional results.[41] In other words, courts must take cognizance of the principle of law encapsulated in a constitutional provision rather than the literal meaning of the words used, in order that the constitutional provision should not be construed so as to defeat its evident purpose.[42]

However, Nigerian courts have failed to protect the rights of homosexuals in Nigeria, on the grounds that homosexual conducts are criminal in Nigeria.[43] It is in light of this that it has become expedient to look into the postulations of Dworkin's theory of the moral reading of the constitution, in order to establish whether a moral reading of the fundamental rights provisions of the CFRN could lead to judicial decisions to the effect that homosexuals in Nigeria are human beings with vested rights, which ought to be acknowledged, respected and protected.

2.2 The theory of the moral reading of the constitution

[39] CFRN (n 11) secs 33-45.
[40] *Abubakar (n 37) 171 paras E-F.*
[41] *Abubakar (n 37) 120-121 paras C-C.*
[42] As above.
[43] *Pamela (n 34) 16-17.*

The moral reading of the constitution brings morality into the heart of constitutional law,[44] and is built on the general premise that:

> Government must treat all those subject to its dominion as having equal moral and political status: it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designed in the document…[45]

Based on the above moral premise, the moral reading of the constitution proposes that [i] some constitutional provisions, particularly the human rights provisions set out abstract terms; [ii] the abstract terms have hidden in them, moral principles of political decency that are important to the existence of the citizens of a state and which in fact limits the powers of the state; [iii] these moral and political principles are applicable to present circumstances and circumstances that could occur in the future; and [iv] judges, lawyers, citizens should interpret and apply the abstract constitutional provisions with the understanding that they are invoking some moral principles of political decency upon which the society stands.[46] Ronald Dworkin, one of the foremost jurists and proponents of the moral reading of the constitution however observed that political morality or decency is however uncertain as power brokers compete among themselves as to what is politically moral. Consequently, Dworkin posits that there must be an ultimate authority in each state, with the final authority for determining the moral principles encapsulated in abstract constitutional provisions.[47] In Nigeria, the judiciary is the authority, the ultimate custodian of the moral reading of the constitution. It is however wrong to say that only judges have the power to inquire into, understand and apply the moral principles embedded in constitutional provisions because the moment lawyers, administrators and ordinary citizens begin to follow any coherent strategy of interpreting the constitution, then they are already engaged in the moral reading.[48] The moral reading is intrinsic in human judgments, which often apply abstract moral requirements to concrete cases.

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[44] JA Beyer 'Freedom's law: The moral reading of the American Constitution. By Ronald Dworkin. Cambridge: Harvard University Press, 1996. 389 pp.' (1997) 22 *Auslegung* 153 at 153.
[45] As above.
[46] Dworkin (n 26) 2.
[47] As above.
[48] As above.

Surprisingly, individuals, including judges whose decisions are clearly influenced by the moral reading do not openly accept that their decisions are influenced by the moral reading of the constitution, rather, they try to explain their decisions in other incomprehensible ways and consequently dismiss the moral reading as 'extreme'.[49]

There is however some form of disconnect between the actual constitutional practice and mainstream constitutional theory. Theorists argue that it is inconsistent with morality to usurp the moral sovereignty of the people and place it in the hands of some professional elites to determine.[50] Conservative politicians impose on the public the view that judges are by the moral reading of the constitution, entitled to change laws made by the peoples' representatives, through judicial fiat.[51] Conservative politicians despise the moral interpretation of the constitution and rather argue that the constitution could be amended to fit changing circumstances, rather than interpreting the constitution in a manner that will expand the constitutional provisions. However, Dworkin refutes this stand by drawing attention to the fact that judges merely interpret the constitution in a manner that brings to light the moral principles embedded in the constitution and that judges do not change constitutional provisions.[52] At its best, Dworkin explains the moral reading as performing the following function:

> Its role remains hidden when a judge's own convictions support the legislation whose constitutionality is in doubt – when a justice thinks it morally permissible for the majority to criminalise abortion, for example. But the ubiquity of the moral reading becomes evident when some judge's moral convictions of principle - identified, tested, and perhaps altered by experience and argument - bend in an opposite direction, because then enforcing the Constitution must mean, for that judge, telling the majority that it cannot have what it wants.[53]

Following from the above, it could be gleaned that the assumption that the moral reading of the constitution is anti-democratic because it allows an appointed judge to impose his will over the law made by the representatives of the people, is false. Instead, the moral reading of the constitution promotes democracy in the sense that it allows for the will of

[49] Dworkin (n 26) 3-4.
[50] Dworkin (n 26) 4.
[51] As above.
[52] As above.
[53] Dworkin (n 26) 5.

the majority and at the same time, ensures that the actions of the majority, which are arbitrary and negatively affect the rights of the minority are curtailed,[54] consequently, protecting and giving all persons space, in a democratic state. While emphasising the role of the moral reading of the constitution and constitutional morality in maintaining democratic equilibrium and protecting human rights, Beiteille noted that:

> In the absence of constitutional morality, the operation of a constitution, no matter how carefully written, tends to become arbitrary, erratic and capricious. It is impossible in a democratic order to insulate completely the domain of law from that of politics. A Constitution such as ours is expected to provide guidance on what should be regulated by the impersonal rule of law and what should be settled by the competition for power among parties, among factions, and among political leaders.[55]

It is now important to look at the moral reading of the constitution in practice.

2.3 The moral reading of the constitution in practice

The first step to take by a judge in interpreting a constitutional provision is to ask if the said provision lays down a general and abstract principle or specific principle.[56] A judge could ask for example, does the right to be treated equally seek to lay down a general principle or standard that could be applicable to various circumstances as at the time the constitution was enacted and in future? Where the answer is that the provision establishes a general principle of political morality, then it will become necessary to ask a further question, vis: which general principle did the drafters of the constitution intend to establish by the said constitutional provision?[57] In doing this, the interpreter or judge will dig into history to ascertain the possible reason for inserting the said provision into the constitution.[58] For example, the Fourteenth Amendment of the American Constitution came to being because of the racial discrimination prevalent at the time and the need to protect black persons and treat them with equal dignity and respect. Finally, the interpreter has the task of finding out the best conception of the moral principle behind the constitutional provision. As Bayer aptly captures it, 'one cannot resolve a

[54] Dworkin (n 26) 6-7.
[55] Beteille (n 28) 78.
[56] G Basham 'Freedom's politics: A review essay of Ronald Dworkin's freedom's law: The moral reading of the American Constitution' (2014) 72 *Notre Dame Law Review* 1235 at 1244.
[57] Dworkin (n 26) 9.
[58] Basham (n 56) 1244.

constitutional question about what equal protection requires without resolving the corresponding question of what the moral notion of equality requires'.[59] In doing this, judges must seek the best conception of what the general principle identified earlier requires. Taking our example further, the judge would then dig deeper to understand that treating all persons with equal dignity and respect does not only mean treating blacks with respect.[60] It also includes, for example, the need for women to be treated with the same dignity and respect as men, and that homosexuals need to be treated with dignity and respect in the same manner as heterosexuals.

Dworkin however warns that the moral reading does not permit judges seeking to know the best interpretation of the moral principle embedded in a constitutional provision to read their personal political preferences into the constitution and that in carrying out the moral reading, judges ought to be disciplined by 'constitutional integrity',[61] which restrains judges in the following manner:

> First, it requires that judicial decisions be consistent with the dominant lines of constitutional precedent and with the structural design of the constitution as a whole. Second, it insists that judges decide constitutional cases on the basis of principle, not policy or political accommodation. Finally, it demands that judges be willing to apply the relevant principle consistently in other cases in which it is fairly implicated.[62]

What this means is that law is not the content of the statute alone, but encompasses the principle of political morality that best explain and justify the law. In deciding constitutional cases, integrity demands that judges attempt to identify the principles in the constitutional provisions and in past judicial decisions interpreting the constitution's abstract language, in order to re-apply the same principles, in a quest to make the law coherent and predictable.[63]

2.4 Criticisms of the moral reading of the constitution

[59] Beyer (n 44) 153.
[60] Basham (n 56) 1244.
[61] Dworkin (n 26) 10.
[62] Basham (n 56) 1245. .
[63] As above.

Dworkin himself agrees that the moral reading is discreditable on some grounds, however, Dworkin argues there is no better alternative to the moral reading.[64] Critics say that 'the moral reading is an "extreme" view, which a sensible scholar should not promote',[65] and that the moral reading 'turns judges into philosopher kings'.[66] The criticisms of the moral reading are largely on two grounds. The anti-moral reading scholars say that: [i] the moral reading is undemocratic and promotes judicial law making; and [ii] morality is an unscientific measure of interpreting statutory provisions.

2.4.1 Judicial law-making

A major ground for criticism of the moral reading of the constitution is that the moral reading permits judges to engage in law-making, which is the function of the legislature.[67] Dworkin alluded to this criticism when he stated:

> Conservative politicians try to convince the public that the great constitutional cases turn not on deep issues of political principle, which they do, but on the simpler question of whether judges should change the constitution by fiat or leave it alone… They said they took an "active" approach to the Constitution, which seemed to suggest reform, and they accepted John Ely's characterization of their position as a 'non-interpretative' one, which seemed to suggest inventing a new document rather than interpreting the old one.[68]

Furthermore, some legal scholars have argued that the moral reading, by its very nature, is against one of the basic features of a democracy, the separation of powers. To this end, Berger states:

> Judicial review is not mentioned in the constitution; its proponents have argued that it is a necessary interference from the separation of powers and the division of our federal system. Someone had to decide conflicting "boundary" claims, but that was only a power to "interpret," and not to rewrite, the constitution."[69]

[64] Dworkin (n 26) 38.
[65] Dworkin (n 26) 3.
[66] Dworkin (n 26) 11.
[67] CFRN (n 11) sec 4.
[68] Dworkin (n 26) 4.
[69] Berger (n 29) 1099.

Ordinarily, the legislature makes laws; the executive executes laws, while the judiciary interprets laws.[70] It is therefore out of place for judges to go above their mandate of interpreting what the law says to find a meaning outside the express intention of the legislature.[71] Critics of the moral reading say unelected judges ought not to impose their subjective views on the public, as law,[72] especially due to the fact that democratic theory demands that judges defer to whatever practical constructions of the constitution the political branches of government adopt.[73] Consequently, some constitutional lawyers have rejected the moral reading and advocated two alternatives. The first alternative agrees that the human rights provisions of the constitution set out moral principles of political decency but that the judiciary should not have the final say on what the laid down principles are.[74] The second alternative is that of the Originalists, who are of the view that the fundamental human rights provisions of the constitution should not be interpreted as setting down moral principles – and consequently necessitating a judicial voyage into the intended principles – but should be interpreted as having the effect the drafters expected their words to have.[75] Dworkin distances himself from the second alternative as one which is capable of translating a 'mistake' in the wordings of constitutional provisions 'into enduring constitutional law'.[76] However, Dworkin embraces the first alternative as one which 'concedes that the moral reading is right', especially in view of the fact that the moral reading is not strictly about judicial interpretation, but rather a theory of constitutional interpretation which could be applied by anyone.[77]

In a similar vein, scholars have criticised the moral reading for allowing judges to set aside legislation made by democratically elected representatives of the people, in the course of interpreting the fundamental rights provisions of the constitution.[78] Dworkin responds to this by saying that the best form of democracy is communal and not statistical. He therefore argues that every member of the society must be seen as a

[70] CFRN (n 11) secs 4(1), 5(1) & 6(1).
[71] Basham (n 56) 1237.
[72] Beyer (n 44) 156.
[73] Basham (n 56) 1241.
[74] Dworkin (n 26) 12.
[75] As above.
[76] Dworkin (n 26) 12, 13 & 31.
[77] As above.
[78] Dworkin (n 26) 14 & 15.

partner in democracy and decision-making.[79] Dworkin posits that communal decisions could be taken for issues that affect the community, but that nothing stops a person from deciding how to live his personal life.[80] Where however, the majority insist on imposing their will on the private lives of individuals, the courts must come in to protect the individual will, especially because the complex reaction between 'different phenomena– impact, influence and ethically vulnerable participation– is a complex matter' that is better managed by the courts, rather than through political debate in parliament.[81]

2.4.2 Morality is an unscientific measure of interpreting statutes

Dworkin himself appears to question the notion that morality should guide the law, especially because of the fact that law is objective and determinable while morality is subjective, when he stated that:

> But the moral reading nevertheless seems intellectually and politically discreditable. It seems to erode the crucial distinction between law and morality by making law only a matter of which moral principles happen to [be to] the judges of a particular era.[82]

In a similar vein, other legal scholars have disapproved of the intrusion of morality into constitutional interpretation. They view morality as subjective because two or more persons can have different notions of morality on the same subject. Berger agrees with Ely who stated that:

> Our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles… that could plausibly serve to overturn the decision of our elected representatives.[83]

To illustrate the point clearly, Berger illuminated on the falsity of some arguments made by Dworkin. According to Dworkin, the First amendment to the American Constitution encapsulates the moral principle that: it is wrong for government to censor what an individual says.[84] However, Berger is of the view that it amounts to secular and

[79] Dworkin (n 26) 25.
[80] Dworkin (n 26) 26.
[81] Dworkin (n 26) 30.
[82] Dworkin (n 26) 4.
[83] Berger (n 29) 1099.
[84] Berger (n 29) 1100.

unscientific reasoning to say that 'censorship is wrong' or 'morally unjust' without more.[85] On the contrary, Berger strongly claims that freedom of political speech is not protected on moral grounds but because of the empirically tested need for a viable democracy to thrive. In other words, citizens can better benefit from a democratic government when there is criticism of the government of the day, which can only be encouraged by freedom of speech.[86]

Another ground of criticism of the moral reading is that the moral reading wrongly postulates that the intention of the legislature does not properly capture the moral principle sought to be codified in the constitutional provision. In other words, Judges who interpret the letters of the constitution know the principle codified better than the legislature, and as such, proponents of the moral reading propose that Judges should re-write the constitution in their judgments, to feature the correct moral principle of political decency.[87] However, this view is totally inconsistent with the legal principle that the purpose of judicial interpretation is not to defeat the law, but to give effect to the law.[88]

Furthermore, it has been argued that in promoting the moral reading of the constitution, Dworkin was beclouded by philosophical abstractions and consequently advocated for the application of the best moral interpretation of the fundamental rights provisions of the constitution, without necessarily noting that each case that comes before a court ought to be adjudicated upon the facts and evidence and not a static 'principle of political morality' behind the constitutional provision.[89] To critics of the moral reading, this discredits Dworkin's postulations because the moral principles suggested by Dworkin cannot be applicable to certain facts. For example, even though persons are entitled to a right to freedom of speech, such freedom ought to abide by the requirement of truth. Applying a general moral principle of freedom of speech without more will be inconsistent with other people's sense of moral justice, where, for example, the facts of the case show that a person relying on his right to free speech actually expressed false information. This situation aptly captures the point that 'political morality is inherently uncertain and

[85] As above.
[86] As above.
[87] Berger (n 29) 1108-1109.
[88] *R.T.E.A.N & Others v Ajewole & Others (2016) LPELR–41271 (CA) 22-26 paras A-C.*
[89] Berger (n 29) 1109-1110.

controversial' and unsuitable for erecting a principle thereon.[90] It is in illustration of this that Sunstein stated thus:

> Most judges are not comfortable with the largest questions of political morality, and they may well go wrong if they try to decide on "the point" of constitutional guarantees. Decisions about "the point" are deeply contentious and exceptionally difficult. Moreover, facts are important to constitutional judgments, and the fact-finding capacity of judges is very limited. Judges know that they may not produce social reform even when their cause is worthy and they seek to do so. In the circumstances, it is usually best for judges to resolve concrete cases rather than to choose among abstract theories, and to make their decisions on the basis of modest, low-level, relatively particularistic principles which diverse people can converse.[91]

2.5 The moral reading of the constitution and the accommodation of differences in a democracy

As shown above, one of the major criticisms of the moral reading of the constitution is that it leads to a situation where appointed judges could declare as unconstitutional and void, laws enacted by a parliament consisting of the democratically elected representatives of the people. Put differently, the moral reading of the constitution has been criticised as one which approves of subverting the will of the majority of the people. However, the moral reading of the constitution recorgnises democracy and in fact, enhances democracy. For Dworkin, democracy is not about imposing the will of the majority on the minority, but also availing everyone, including the minority, an opportunity to entertain their own convictions, within their individual sphere. Only a moral reading of the constitution can guarantee the enjoyment of the rights of the minority. Dworkin's understanding of constitutional democracy, which promotes the accommodation of differences in a state, is discussed below.

2.5.1 The majoritarian premise of democracy

The majoritarian premise, according to Dworkin, is one which states that final decisions reached in the community or state should be those favoured by majority of persons in the society, provided that the persons had sufficient time and information to reflect before

[90] Berger (n 29) 1101.
[91] CR Sunstein *Legal reasoning and political conflict* (1996) 48-49.

taking the decision. However it 'does not deny that individuals have important moral rights that the majority should respect. It is not tied to some collectivist or utilitarian theory according to which such rights are nonsense'.[92] Dworkin explains further that in the United States of America, the majority, as represented by the legislature, should not be the final judge when the question arises as to whether its power should be limited in favour of the protection of individual rights.[93] Even though the majoritarian premise favours exceptions in the interest of the protection of individual freedoms, the majoritarian premise morally considers the exception as a loss to and an unfair treatment of the majority, whose power of decision-making become an alternative foregone in the circumstance.[94] However, the claim that the views of the majority should make up the collective decision of the society is based on moral grounds. Consequently, the majoritarian premise which criticises the moral reading of the constitution for relying on morality is in fact, at par with the moral reading.[95]

2.5.2 The constitutional conception of democracy

The constitutional conception of democracy rejects the majoritarian premise which insists that decisions should be taken to favour the views of the majority. Rather, the constitutional democratic formula conceives democracy as a system where 'collective decisions be (are) made by political institutions whose structure, composition and practices treat all members of the community, as individuals, with equal concern and respect'.[96] To this end, the constitutional conception of democracy advocates for democratically elected system of government, which aim is to ensure the equal status of citizens, rather than majoritarian rule.[97] Dworkin argues that the constitutional conception of democracy promotes the accommodation of differences under two sets of rights and freedoms, which are liberty and equality.

Liberty

[92] Dworkin (n 26) 16.
[93] As above.
[94] Dworkin (n 26) 17.
[95] Dworkin (n 26) 19.
[96] Dworkin (n 26) 17.
[97] As above.

Ordinarily, the majoritarian premise suggests that the majority should superimpose their will on the minority. However, democracy envisages that people take actions collectively. Collective action could be seen from two standpoints: statistical and communal. According to Dworkin, collective action is said to be statistical when it involves things members of a group do on their own, 'with no sense of doing something as a group'.[98] That could be exemplified in the case of petroleum products marketers who individually hoard their products, with the resultant effect of a price hike.[99] In such a circumstance it could be said that the actions of petroleum products marketers resulted in a price hike to the benefit of individual marketers. On the other hand, collective action is said to be communal, where individuals come together and 'merge their separate actions into a further unified act that is together theirs'. This is exemplified in the following statement: 'The basketball team which played collectively well, as a team'.[100] According to Dworkin, the statistical collective action supports the majoritarian premise of democracy, while communal collective action supports the constitutional conception of democracy.[101]

In communal collective action, members of the group take responsibility for the decisions of the group, notwithstanding the fact that they may have voted against the action. Communal collective action, therefore, requires that the three conditions for moral membership of the group are met for each of the members.[102]

The first is the structural condition to moral membership of a political community, which envisages that the members of the political community share a similar historical and territorial heritage, and sometimes a similar culture, language, values and trust.[103] The second condition of moral membership of a political community is the relational condition which involves the manner in which members of the community are treated. Members of a political community must be given an opportunity to participate in collective decision making and also independence from such collective decisions.[104] This

[98] As above.
[99] I Olawuyi 'NNPC warns oil marketers against hoarding as queues return to stations' *Pulse news online* (Abuja) 18 December 2017 https://www.pulse.ng/news/local/fuel-scarcity-nnpc-warns-oil-marketers-against-hoarding-as-queues-return-at-stations/kj2yvqv (accessed 13 August 2019).
[100] Dworkin (n 26) 20.
[101] As above.
[102] Dworkin (n 26) 23-24.
[103] Dworkin (n 26) 24.
[104] As above.

participation includes voting rights, freedom of speech and equality of opportunities. The third condition for moral membership of a political community envisages that each member is a partner in the political community and as such, the political community must treat its members with respect. The community should be careful in selecting the conducts it regulates, so as not to attempt to control the personal views and convictions of its individual members. As Dworkin rightly puts it:

> An orchestra's conductor can decide, for example, how the orchestra will interpret a particular note: there must be a decision of that issue binding on all, and the conductor is the only one placed to make it. No musician sacrifices anything essential to his control over his own life, and hence to his self-respect, in accepting that someone else has that responsibility, but it would plainly be otherwise if a conductor [of an orchestra] tried to dictate not only how a violist should play under his direction, but what standards of taste the violist should try to cultivate. No one who accepted responsibility to decide questions of musical judgment for himself could regard himself as a partner in a joint venture that proposed to decide them for him.[105]

In essence, Dworkin believes that collective decisions in a democracy must have a limit. What affects other members of the public could be decided upon communally. However, the community must not impose on individual members, decisions contrary to their personal or private convictions, where the subjects of the decisions are within the personal space of individual lives. Consequently, Dworkin states that:

> People who take personal responsibility for deciding what kind of life is valuable for them can nevertheless accept that issues of justice – about how the different and sometimes competing interests of all citizens should be accommodated – must be decided collectively, so that one decision is taken as authoritative for all. There is nothing in that proposition that challenges an individual's own responsibility to decide for himself what life to live given the resources and opportunities that such collective resources leave for him. So he can treat himself as bound together with others in a joint effort to resolve such questions, even when his views lose. But it would be otherwise if the majority purported to decide what he should think or say about his decisions, or what values or ideals should guide how he should think or say about its decisions, or what values or ideals should guide how he votes or the choices he makes with the resources assigned to him… A genuine political community… must provide circumstances that encourage

[105] Dworkin (n 26) 20.

> them [its members] to arrive at beliefs on these matters through their own reflective and finally individual conviction.[106]

It is in the spirit of the above reasoning that Basham argued that 'the principle that that government may not prohibit flag burning' as a form of protest is rooted in the deeper moral principle of political decency which provides that government should not 'prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[107]

Equality

Again, it is apt to start by reminding ourselves that the majoritarian premise argues that equality is best served when the decision of the majority prevail over that of the minority However, this proposition is faulty. Rather, allowing minority some liberty within their individual space better serves the dictates of equality.

In discrediting the majoritarian premise of equality as the promotion of the will of the majority, Dworkin rightly punctured the majoritarian premise using two conclusions: [i] in a political community, equality of influence is unrealisable due to economic and social reasons; and [ii] most times, appointed officials, as a result of their status, wield more influence over certain things, than other members of the political community.[108] Dworkin continued by saying that since members of the community do not consider the arrangement that produces such appointed officials as promoting inequality, then there is nothing promoting inequality in an arrangement that gives judges appointed by elected officials, authority or influence over constitutional adjudication.[109]

Be that as it may, Dworkin argued that communal decision making and constitutional conception of democracy promotes equality in the political community because it removes the argument about political equality from the realm of individual citizens against one another and places the argument as one which focuses on citizens as a collective unit, on the one hand and the government, on the other hand. That way, political equality 'is

[106] Dworkin (n *26*) 27.
[107] Basham (n 56) 1241.
[108] Dworkin (n 26) 27 - 28.
[109] Dworkin (n 26) 28.

the state of affairs which the people rule their officials… rather than vice versa'.[110] In that light, the majoritarian argument that judges damage political equality because they interpret constitutional provisions to strike down statutes made by the people's elected representatives is dislodged.[111] Under the constitutional or communal conception of democracy, judicial decisions striking out human rights limiting statutory provisions, is a rights oriented approach for curbing government's encroachment into the rights and liberties of the individual members of the political community. Consequently, it is clear that the constitutional conception of democracy exposes the weakness of the majoritarian conception of democracy which argues that judicial review of statutes is a usurpation of the collective (statistical) power of the people.

It is therefore evident from the foregoing that the moral reading of the constitution, which relies on the communal or constitutional rather than the majoritarian or statistical conception of democracy accommodates difference and consequently leads to the protection of the rights of minorities in the political community.

2.6 Conclusion

It is ascertained in this chapter that the CFRN is the ultimate law to which all laws in Nigeria genuflect to for survival. This chapter has also illuminated on the fact that although anyone can interpret constitutional provisions, the judiciary is the final arbiter on issues relating to the interpretation of the constitution and determination of constitutionality of laws, as well as individual and governmental action. It is also argued in this chapter that the framers of the CFRN included the fundamental rights provisions into the constitution in order to ensure that human rights are considered part of the ultimate law and given maximum protection. In this chapter, we also explored Dworkin's theory of the moral reading of the constitution which charts the course for judges in their quest to validly interpret the human rights provisions of the CFRN and ensure that the rights of all Nigerians, including homosexuals, are protected.

[110] As above.
[111] As above.

It is therefore necessary to examine the judicial system and the powers of Courts in Nigeria, with a view to understanding how Judges in Nigeria could apply the moral reading of the constitution to protect the rights of individuals. That will be done in chapter three.

Chapter Three

The judiciary as the protector of the rights of homosexuals in Nigeria

3 Introduction

In this chapter, we shall study the judiciary in Nigeria. We shall be looking at the courts system in Nigeria in order to ascertain the functions, powers and jurisdiction of the various courts, especially as it relates to the protection of the rights of individuals Nigeria. CFRN has provisions which are dedicated to the protection of the fundamental rights of individuals.[112] Generally, courts in Nigeria have the power to declare provisions of statute which are inconsistent with the CFRN as unconstitutional, null and void. Given that 'the Court is said to be the last hope of a common man',[113] especially as it relates to the protection of fundamental rights, we shall examine the extent to which Nigerian courts have protected the rights of homosexuals in Nigeria.

3.1 The court system in Nigeria

The court system in Nigeria is broadly divided into two groups of courts; the inferior courts and the superior courts of record. The superior courts of record are the courts specifically mentioned in the CFRN,[114] while inferior courts and tribunals are not specifically mentioned in the CFRN. For the purposes of this work we will be looking at the superior courts of record in Nigeria as they are the courts with jurisdiction with respect to suits seeking the enforcement of fundamental rights,[115] and the declaration of statutory provisions which are contrary to the CFRN as unconstitutional.[116] The CFRN lists the superior courts of record to include [i] The Supreme Court; [ii] The Court of Appeal; [iii] The Federal High Court; [iv] The High Court of the Federal Capital Territory, Abuja; [v] The High Court of a State; [vi] The National Industrial Court; [vii] The Sharia Court of Appeal of the Federal Capital Territory; [viii] The Sharia Court of Appeal of a State; and [ix] The Customary Court of Appeal of the Federal Capital Territory; [x] The Customary Court of Appeal of State.

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[112] CFRN (n 11) secs 33–45.
[113] *Federal Civil Service Commission & Others v Laoye (1989) LPELR-1264 (SC) 89 paras B-E.*
[114] CFRN (n 11) sec 6(1)-(6).
[115] CFRN (n 11) secs 46(1), 233(1), 237(1), 251(1) & 271(1).
[116] *Attorney General of Cross River State & Another v Ojua (2010) LPELR9014 (CA) 28 para C; Cadbury Nigeria PLC v F.B.I.R. (2010) 2 NWLR (Pt. 1179) 561 at 579 paras B-D.*

3.2 Courts with jurisdiction to protect the rights of individuals in Nigeria

Generally, by virtue of Section 6(1) of the CFRN, the courts in Nigeria have the power to adjudicate on and resolve disputes between competing interests within Nigeria. Section 46(1) & (2) of CFRN specifically provides that the High Court shall have original jurisdiction to hear and determine fundamental rights issues.

Although the High Courts should have original jurisdiction over fundamental rights cases, it must be stated that the Federal High Court and the High Court of a State are not the only courts with original jurisdiction and that other courts with concurrent jurisdiction with the Federal High Court and the High Court of a State could have jurisdiction in limited circumstances where the subject matter of the fundamental rights violation falls exclusively in the sphere of the jurisdiction of such courts of coordinate jurisdiction. For example, where the fundamental rights violation arises from an industrial or employment scenario, the National Industrial Court has the power to determine such fundamental rights enforcement dispute.[117]

The decisions of the High Court and other courts of coordinate jurisdiction are subject to appeal to the Court of Appeal, while the decisions of the Court of appeal are subject to appeal to the Supreme Court.[118] Noting the importance of the protection of fundamental rights, the drafters of the CFRN ensured that the quorum of the Supreme Court is increased by two justices, when determining appeals bothering on fundamental rights enforcement. Consequently, when determining appeals against the decision of the Court of Appeal bothering on enforcement of fundamental rights, the Supreme Court can only exercise jurisdiction if it is constituted of at least seven Justices of the Supreme Court, as opposed to five Justices in other civil cases.[119]

3.3 Powers of Nigerian courts to declare rights limiting statutory provisions as unconstitutional

[117] CFRN (n 11) sec 254C(1)(d).
[118] CFRN (n 11) secs 46(1), 233(1) & 237(1).
[119] CFRN (n 11) sec 234.

In determining whether Nigerian Courts have power to declare rights limiting statutory provisions of legislation as unconstitutional it is necessary to review the powers which the CFRN vests on Courts generally. Section 6(1) and (2) of the CFRN bestows judicial powers on the courts in Nigeria. Furthermore, the CFRN clearly stipulates that the judicial powers of the courts shall extend to the 'inherent powers and sanctions of the court' and that the judicial powers shall be exercised in resolving disputes between 'any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person…'[120]

Furthermore, the CFRN bestows on the judiciary the power to inspect laws made by the legislature and to determine whether such laws were made in accordance with the dictates of the CFRN. Section 4(8) of the CFRN provides thus:

> …the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law…

By virtue of the provisions of Section 4(8) of the CFRN, it is clear that the judiciary is the guardian of the CFRN and constitutionalism as the Courts are saddled with the duty to determine whether the Acts of the National Assembly and the Laws of the House of Assemblies of States are consistent with the provisions of the CFRN. Since Section 1(3) of the CFRN provides that laws that are inconsistent with the CFRN are void to the extent of their inconsistency with the CFRN, then, it is the duty of the courts, being an adjudicatory body to make the declaration of inconsistency, in line with Section 1(3) of the CFRN.

In *Attorney General of Lagos State v Attorney General of the Federation*,[121] the court reiterated that the Courts have the power to declare, as null and void, statutory provisions or actions of the executive arm of government which are inconsistent with the CFRN. The Court in very clear and unmistakable terms held that the President of Nigeria has no power under the law to suspend or withhold, for any period whatsoever, the statutory

[120] CFRN (n 11) sec 6(6).
[121] *(2004) 18 NWLR (Pt. 904) 1 at 92 paras F-H.*

funds due and payable to Lagos State Government in respect of Local Government Councils in Lagos State.

Furthermore, the power of the Courts to scrutinise or review the constitutionality of legislation transcends the realm of principal legislation and includes subsidiary legislation such as Orders, Regulations and Rules made pursuant to principal legislations. Where a subsidiary legislation is inconsistent with the provisions of the CFRN or principal legislation, the courts have the power to declare them as unconstitutional.[122] As a general rule, subsidiary legislation made by public agencies and authorities, including the Bye-Laws of Local Government Councils are subject to the reasonableness test, to be applied by the Courts.[123] In *Powell v May,*[124] Lord Goddard C.J. observed that:

> In our opinion it beyond the powers of a country council to enact a bye-law which prohibit…that which the general statute enable to do…

Whenever a court reviews the validity of any legislation, the court has the power to either make a pronouncement validating the legislation or make a pronouncement invalidating the legislation.

3.4 The legal regime criminalising homosexual conducts in Nigeria

The Criminal Code Act of Nigeria of 1916 (Criminal Code)[125] and the Penal Code Act of Nigeria of 1960 (Penal Code)[126] criminalise and prescribe punishment for engaging in unnatural offences. Section 214 of the Criminal Code provides:

> Unnatural offences
>
> Any person who –
>
> (1) has carnal knowledge of any person against the order of nature;
> (2) has carnal knowledge of an animal; or
> (3) permits a male person to have carnal knowledge of him or her against the order of nature,

[122] E Malemi *The Nigerian Constitutional Law* (2015) 248.
[123] Malemi (n 122) 250.
[124] *(1946) KB 330 at 338.*
[125] Criminal Code (n 1) sec 214.
[126] Penal Code (n 1) secs 284 & 405.

is guilty of a felony and is liable to imprisonment for fourteen years.

Sections 284 and 405 of the Penal Code collectively criminalise 'unnatural offences' in a similar fashion with Section 214 of the Criminal Code and both the Criminal Code and the Penal Code did not prescribe definitions for what is meant by 'against the order of nature'. Consequently, majority of persons have unscientifically and without evidence tagged homosexual conducts as one of the unnatural offences.[127]

As if the offences contained in the Penal Code and Criminal Code are not enough, the National Assembly of Nigeria further enacted the SSMPA. The SSMPA criminalises homosexual conducts, homosexual marriages, registration of homosexual associations and support or advocacy for same sex conducts or relationships.[128] Sogunro aptly captures the impact of the provision of the SSMPA which prohibits the registration of same-sex organisations and rendering support or funding to same-sex organisations, as one creating the 'crime of advocacy', which targets homosexual rights advocates.[129] Consequently, Sogunro argues that the said provision of the SSMPA is out of tune with the internationally known convention that 'even where a right is denied under law, there is often the legal recognition of the right to advocate against the existing law on behalf of those claiming a right'.[130]

3.5 The courts in Nigeria and the protection of fundamental rights

The CFRN has provided for a wide range of fundamental rights, which are justiciable. Therefore, it is necessary to consider whether the Courts in Nigeria have favourably interpreted the entitlement of persons to some of the rights.

3.5.1 Right to freedom from discrimination

Section 42 of the CFRN provides for the right to freedom from discrimination on grounds including sex. The Courts in Nigeria have severally maintained that every person is entitled to freedom from discrimination on the grounds listed under Section 42 of the

[127] Johar (n 5) Chanchadrud J. paras 28–35.
[128] SSMPA (n 2) secs 4(1) & 5(1) & (2).
[129] A Sogunro 'Citizenship in the shadows: Insights on queer advocacy in Nigeria' (2018) 45 *College Literature* 632 at 634.
[130] As above.

CFRN. However, the Courts have also held that in reasonable circumstances, where the differences in treatment will ensure justice and fairness, differential treatment is allowed. In *Anzaku v Governor of Nasarawa State*, the Court of Appeal of Nigeria held that:

> The Nigerian democratic Constitution in its language exhibits how much value it places on the worth of each and every one of the citizens. It does not and will not condone nor indeed tolerate class or ethnic, e.t.c. discrimination whether by any law of the land or any action on the part of the executive or administrative authority or person or the state in sharing advantages and even disadvantages, based on sex, race, place of origin, ethnic, religious or political affiliation…
>
> Fairness and justice demands that people who are similarly circumstanced should be treated equally by the State. Yet, there is no discrimination where special restrictions imposed upon a class, or special advantages accorded to it are reasonably designed to reflect real substantial differences between it and other classes or groups. It is indeed unfair and unjust to treat unequal things equally.[131]

In *Mojekwu v Mojekwu (Mojekwu case)*,[132] the Supreme Court frowned at a cultural practice of Oli-ekpe which denies female children of a deceased the opportunity to inherit the deceased property but the property are rather inherited by male relatives of the diseased. The Court consequently declared the Oli-ekpe cultural practice as unconstitutional as same is against the constitutionally protected right of freedom from discrimination on grounds of sex.[133]

The Court in *Mojekwu case* applied the moral reading of the constitution to shift from the norm practiced and enjoyed by the majority, in order to protect females from obvious discrimination on grounds of sex, which is perpetuated by the society, especially the dominant male folk, who are viewed as superior to females and who stand to gain from the discriminatory Oli-ekpe cultural practice.

3.5.2 Right to dignity

Section 34 of the CFRN provides for the right to dignity and prescribes that no person should be subjected to torture or to inhuman or degrading treatment, slavery or

[131] *Anzaku v Governor of Nasarawa State (2005) 5 NWLR (Pt. 919) 449 at 485 paras A-G.*
[132] *(1997) 7 NWLR (Pt. 512) 263.*
[133] *Mojekwu v Mojekwu (1997) NWLR (Pt. 512) 263 at 305 paras A-C.*

compulsory labour. The Appellate Courts in Nigeria have emphasised in numerous decisions that all persons in Nigeria are entitled to the right to dignity. In *Nemi v Attorney General of Lagos State (Nemi case)*,[134] the Court of Appeal of Nigeria explained that everyone– including persons sentenced to death– is entitled to dignity. The Court held thus:

> Does it mean that a condemned prisoner can be lawfully starved to death by prison authorities? Can he be lawfully punished by a slow and systematic elimination of his limbs one after another, until he is dead? Could his legs be soaked with petrol and set on fire under a pot to boil rice by someone wearing a smiling face while this is going on since he is as good as dead and without fundamental rights? Would any of these amounts to inhuman treatment and torture? Is a condemned prisoner not a person or individual?... For to end the life of a condemned prisoner, it must be done according to the due process of law.[135]

Ordinarily, a person sentenced to death is doomed and not worthy to live in the open society. However, the Court in *Nemi case* applied the moral reading of the constitution and held that provided that person is a human being, he must be treated as one with dignity and should be free from torture and degrading treatment. Since the moral reading of the constitution presupposes that everyone should enjoy fundamental rights on the same footing, then provided that a person sentenced to death is a human being, the rights of such a person to dignity must not be breached through inhuman and degrading treatment.

3.5.3 Right to privacy and family life

This right is recognised by many international and national legal instruments. It is provided under Section 37 of the CFRN. Commenting on the purport of the right to privacy, Eivazi stated:

> Privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs…[136]

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[134] *(1996) 6 NWLR (Pt. 452) 42.*
[135] *Nemi v Attorney General of Lagos State (1996) 6 NWLR (Pt. 452) 42 at 54 paras E-G.*
[136] S Eivazi 'Employees email privacy and the challenge of advancing technology' (2002) 11 *The Commonwealth Lawyer* 1 at 26.

The Nigerian courts have, on numerous occasions, protected the rights of persons to privacy. In *Anozia v Nnani (Anozia case)*, the Court of Appeal of Nigeria held that the courts shall not allow an intrusion of the privacy of individuals when the Court held that:

> It is unimaginable for a court to order two unwilling adults or senior citizens to submit to DNA test, in defiance of their fundamental rights to privacy for the purpose of extracting scientific evidence to assist the Appellant to confirm or disprove his wish that the 2nd defendant – a 57 year old man – is his child, of an illicit amorous relationship.[137]

The Court in *Anozia case* clearly applied the moral reading of the constitution to reach a finding that any action that will forcefully interfere with a person's personal and private life should be seen as a breach of the right to privacy.

3.5.4 Right to peaceful assembly and association

Section 40 of the CFRN provides for the right to freedom of assembly and association. Just as it is the case with other civil and political rights, the Courts in Nigeria have from time immemorial, protected the right to freely associate, and held that persons have the right to freely associate. That was the position reached in *Chukwuma v COP*[138] and *B.P.E. v N.U.E.E*.[139] Since all persons have the right to freely associate, it is only reasonable and in accordance with the moral reading of the constitution that courts ensure that all persons are permitted to freely associate, provided the purpose of such association does not intrude and interfere with the rights of other persons.

3.6 Attitude of Nigerian Courts to the protection of the rights of homosexuals

There has been minimal litigation around the subject of the entitlement of homosexuals to rights enjoyed by persons. As at the time of this research, the researcher was aware of only two cases seeking the protection of the rights of homosexuals in Nigeria. In both cases, the courts refrained from determining, on the merits, the question as to whether homosexuals in Nigeria have rights which ought to be protected. To fully understand the attitude of Nigerian courts to cases seeking the protection of the rights of homosexuals in

[137] *Anozia v Nnani (2015) 8 NWLR (Pt. 1461) 241 at 254 paras F-G.*
[138] *(2005) 8 NWLR (Pt. 927) 278 at 287 paras B-C.*
[139] *(2003) 13 NWLR (Pt. 837) 382 at 410 paras. C-D.*

Nigeria, we shall summarise the decisions of the Federal High Court of Nigeria in *Teriah case* and *Pamela case.*

3.6.1 *Teriah* case

In *Teriah case*, the Applicant, who did not state whether she was a homosexual or not, instituted the suit at the Federal High Court, seeking answers as to whether the SSMPA infringes the provisions of the Constitution providing for the rights to [i] freedom from discrimination; [ii] liberty; [iii] freedom of association; [iv] dignity; and [v] privacy and whether the said provisions of the SSMPA are accordingly null and void.[140]

The Respondent filed a preliminary objection on the ground that the Applicant lacks legal standing to institute the Action. The Court upheld the preliminary objection of the Respondent and held that the Applicant having failed to show that he is a same-sex person, then the Applicant failed to show, as required by Section 46 of the CFRN that his right has been, is being or likely to be contravened by the provisions of the SSMPA. As a result, the Court held that the Applicant has no legal standing to institute the action.[141] According to the Court, only persons whose rights have been, is being or likely to be infringed have access to the court to enforce those rights.

Section 36 of the CFRN provides that '… a person shall be entitled to a fair hearing…' When the moral reading of the constitution is applied to Section 36 of the CFRN it would be clear that the drafters of the CFRN really meant that all persons must be entitled to a fair and meritorious determination of their disputes. This is more so in the case of fundamental rights disputes where the preamble to the Fundamental Rights Enforcement (Procedure) Rules 2009 clearly states that technicalities such as legal standing should not defeat the fair determination of cases by the Courts. Consequently, to protect the right to fair hearing under the CFRN in accordance with the theory of the moral reading of the constitution, all suits complaining of rights violation must be heard and determined meritoriously, regardless of whether the Applicant does not belong to the group whose members' rights are being violated. This is more so in the cases of homosexual rights

[140] *Teriah (n 33) 3.*
[141] *Teriah (n 33) 19-20.*

violation because the SSMPA clearly criminalises homosexual conducts as well as support and advocacy for homosexual persons and associations. That means any Applicant for protection of human rights who admits to being homosexual or supporting homosexuals in the affidavit in support of the action could be criminally prosecuted under the SSMPA. From the foregoing, it is apt that courts should waive the requirement of legal standing and admit suits seeking the protection of the rights of homosexuals in the same manner courts admit suits seeking the protection of the rights of heterosexuals.

3.6.2 *Pamela* case

In *Pamela case*, the Applicant applied to the Corporate Affairs Commission (CAC),[142] for the registration of 'The Lesbian Equality and Empowerment Initiative' (The Lesbian Association). However, the CAC, relying on Section 30 of the Companies and Allied Matters Act (CAMA),[143] refused to reserve the name and consequently register the lesbian association on the grounds that the registration of a lesbian association is contrary to public policy as the SSMPA proscribes the registration of gay clubs and associations.[144] Consequently, the Applicant approached the Court seeking a determination as to whether the refusal to register the lesbian association breaches the Applicant's rights to freedom of association and freedom of expression as enshrined in the CFRN.

The Court in determining the suit held that persons generally have the rights to freedom of expression and freedom of association. However, the Court shied away from determining if homosexuals also have these rights. Rather, the Court simply restricted itself to the facts of the case and the issue before it and held that the CAC did not breach the rights of the Applicant because Section 4(1) of the SSMPA criminalises the registration of gay clubs and association and consequently, it is contrary to public policy to allow the registration of a gay club.[145]

[142] The Corporate Affairs Commission is the government body charged with the power to register businesses, companies and associations in Nigeria.
[143] Section 30 of the Companies and Allied Matters Act of Nigeria of 1990 provides that the Corporate Affairs Commission has the power to refuse the registration of a company which activities are undesirable, offensive or otherwise contrary to public policy.
[144] *Pamela (n 34) 8-9.*
[145] *Pamela (n 34) 18-21.*

The Court in *Pamela* case made a blanket statement to the effect that the rights to liberty and association under Sections 39 and 40 of the CFRN, respectively, could be limited by Section 45(1) of the CFRN which provides that rights could be limited where the exercise of the rights 'is in conflict with public safety, public order, and public morality'.[146] The Court then went further to say that it is on the basis of public morality as provided under Section 45(1) of the CFRN that Section 4(1) of the SSMPA was enacted to proscribe the registration of gay clubs.[147]

It is important to consider the provisions of Section 45(1) of the CFRN to see if the decision of the Court to the effect that the protection of public morality under Section 45(1) of the CFRN can validly accommodate Section 4(1) of the SSMPA, is correct. Section 45(1) of the CFRN provides thus:

> Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –
>
> (a) In the interest of defence, public safety, public order, public morality and public health; or
> (b) For the purpose of protecting the rights and freedom of other persons.

Clearly, for a limitation of the rights provided under Sections 37, 38, 39, 40 and 41 of the CFRN to be valid on grounds of public morality– as provided by Section 45(1) of the CFRN– such limitation must be reasonably justifiable in a democratic society. As such, any court relying on a statutory provision to limit any right provided in the CFRN on grounds of public morality must show that the statutory provision limiting the right is reasonable in the circumstances, by applying the reasonability test to the statutory provision. In *Pamela case*, the Court did not determine the reasonableness of Section 4(1) of the SSMPA as a ground for limiting the rights of same sex persons on the ground of public morality. Rather, the Court simply made a blanket statement that:

[146] *Pamela (n 34) 16.*
[147] *Pamela (n 34) 17.*

> Strictly speaking, it is on the basis of the protection of public morality as provided by section 45 of the 199 CFRN that some laws were enacted by the National Assembly to safeguard same. The Same Sex Marriage (Prohibition) Act of 2013 is an example of these laws.[148]

The researcher believes that had the Court in *Pamela case* determined the reasonableness of Section 4(1) of the SSMPA in a democratic society, the Court would have reached a different conclusion in *Pamela case*. This is more so because research has shown that most sexually active species of plants and animals display homosexual tendencies,[149] and that homosexuality is as natural as heterosexuality because sexual orientation is a natural disposition of man, which is triggered by hormones, and same is often uncontrollable.[150] In other words, statutory coercion of homosexuals to conform to heterosexual conducts amounts to denying homosexuals of their personhood and humanity and all the fundamental rights attached therewith. Consequently, it is inconceivable that a natural disposition of a class of persons, albeit a minority, should be proscribed on grounds of public morality, as homosexual acts between two or more consenting adults pose no harm to anybody.

The moral reading of the constitution abhors discrimination, encourages liberty, freedom from discrimination and promotion of dignity of all persons, including members of minority groups.[151] Had the Court in *Pamela case* applied the moral reading of the constitution in interpreting the constitutional provisions implicated in the case, the Court would have reached a different conclusion. That is, the Court would have held that all the provisions of the SSMPA which infringe on the rights of homosexuals and their associates to dignity, liberty, freedom from discrimination and freedom of association are unconstitutional, null and void and consequently order the CAC to register the lesbian association. As Basham suggests, the application of the moral reading of the constitution permits that only acts that infringe on the rights of others should be proscribed and that government ought not to prohibit an act simply because the majority do not like the act.[152]

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[148] As above.
[149] *Johar (n 5) Chandrachud J. para 28.*
[150] Bailey (n 6) 68.
[151] Dworkin (n 26) 17, 20, 24 & 27.
[152] Basham (n 56) 1241.

3.7 Conclusion

It is understood that some courts in Nigerian have the power to declare, as unconstitutional, statutory provisions which breach the rights of persons. The courts in Nigeria have actually protected the rights of Nigerians from time-immemorial. However, the Nigerian courts have failed to protect the rights of homosexuals in Nigeria and consequently declare, as unconstitutional, statutory provisions that breach the rights of homosexuals in Nigeria. It is hoped that when new opportunities arise, the courts in Nigeria will rise up to the occasion and protect the rights of homosexuals in Nigeria.

To carry out this mandate, Nigerian courts could gain inspiration from the decisions of courts in other jurisdiction. Consequently, it is necessary to, in the next chapter, examine how courts in other jurisdictions applied the moral reading of the constitution in declaring as unconstitutional, provisions of statutes that criminalise consensual adult homosexuals conduct.

Chapter Four

Constitutional morality in practice: The protection of the rights of homosexuals in other jurisdictions

4 Introduction

As seen in Chapter three, Nigerian courts have failed to make decisions on the merits, as to whether homosexuals have the right to freely lead sexually fulfilling lives, without interferences to their rights. However, municipal courts in other countries have declared that homosexuals are human beings who have rights enjoyed by non-homosexuals and that the rights of homosexuals ought to be respected and protected. In reaching such decisions, the Supreme Court of India applied the principles of the moral reading of the constitution, as discussed in chapter two. In this Chapter, we shall consider how the moral reading of the constitution influenced the decision of the Supreme Court of India where the rights of homosexuals were in issue, and how the Supreme Court of India interpreted the rights of homosexuals to liberty, equality, dignity and privacy, and consequently declared as unconstitutional provisions of legislation which criminalise homosexual conduct.

4.1 The moral reading of the constitution as the base of the Judgment in *Johar case*

Johar case was commenced by a writ petition, wherein the petitioners sought declarations that individuals have the right to sexuality, right to sexual autonomy and right to choice of sexual partner and a further declaration that Section 377 of the Indian Penal Code (IPC) is unconstitutional, because it breaches the aforementioned rights.[153] Section 377 of the IPC operative as at the time of the judgment reads thus:

> 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.

Homosexuality was, before *Johar case*, categorised as an unnatural offence and homosexuals were usually prosecuted under the provisions of Section 377 of the IPC.

[153] *Johar (n 5) Misra CJI. para 10.*

The writ petition in *Johar case* was referred to a three-Judge bench, before whom counsel for the Petitioners argued that the earlier decision of a two-man panel of the Supreme Court in *Suresh Kumar Koushal and Another v Naz Foundation and Others (Koushal case)*[154] was determined according to the will of the majority and not on deeply thought out constitutional basis.[155] Consequently, the three-man bench instead of relying on the precedent in *Koushal case* referred the case to a five-Judge panel of the Indian Supreme Court, consisting of Misra CJI, Khanwilkar J, Nariman J, Chandrachud J and Malhotra J.

Before setting out to reach its decision in *Johar case*, the court noted the fact that human beings are different and they act differently and that the choices of individuals should not be unjustly restricted when same does not unreasonably interfere with the public good. The Court *per* Dipak Misra CJI was also clear that in the judgment, the court has a duty to protect minority views and opinions in the society. His Lordship stated:

> The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental constitution forming the nonconcrete substratum of our fundamental rights that has eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindsets and bigoted perceptions. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves a truly free society. The first step on the long path is the acceptance of diversity and variegated hues that nature has created has to be taken now by vanquishing the enemies of prejudice and injustice and undoing the wrongs done so as to make way for a progressive and inclusive realization of social and economic rights embracing all and to begin a dialogue for ensuring equal opportunities for the “less than equal” section of the society.[156]

The decision of the court to ensure that minority opinions are protected is in line with the constitutional conception of democracy, a facet of the moral reading of the constitution, which advocates that [i] true liberty is the freedom to have a personal view and express it, even though the majority of people are opposed to it; and [ii] true equality requires that

[154] *(2014) 1 SCC 1.*
[155] *Johar (n 5) Misra CJI. para 10.*
[156] *Johar (n 5) Misra CJI. para 3.*

the law protects all persons with dissenting opinions and protects dissent from overbearing and unreasonable interference from power of the majority or government – usually, protection by the courts.[157]

To achieve its end of protecting the rights of minorities, and homosexuals in particular, the Court in *Johar case* adopted the moral reading of the constitution as advocated by Ronald Dworkin. The Court rejected the majoritarian premise and advocated a constitutional conception of democracy. The Court explained that the constitution has embedded in it, the idea of an identity for every human being and that a human being is guaranteed his identity as human only where he is treated with dignity and allowed to make his personal choices and preferences. The Court observed thus:

> It has to be borne in mind that search for identity as a basic human ideal has reigned the mind of every individual in many a sphere… But search for identity, in order to have apposite space in law, sans stigmas and sans fear has to have the freedom of expression about his/her being which is keenly associated with the constitutional concept of "identity with dignity". When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to sub-serve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay. The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another's choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy as a seminal facet of Article 21, is not dented. At the core of the concept of identity lies self-determination, realization of one's own abilities, visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms values and principles that are, to put in a capsule, "constitutionally permissible".[158]

By taking the argument on individual identity and dignity from the realm of natural feelings and dispositions of an individual to the realm of the choice of an individual – from being born a homosexual to having a choice to become homosexual – the Court in *Johar case* applied the three-level test of determining the intention behind an 'abstract' human rights

[157] Dworkin (n 26) 27-28.
[158] *Johar (n 5) Misra CJI. para 9.*

provision of the constitution, in line with the moral reading of the constitution as conceptualised by Dworkin.[159] First, the court asked itself: is there a deeper moral principle of political decency behind the constitutional provision on identity and dignity of the human person? The Court found the answer to be in the affirmative. Secondly, the court asked: which general principle of political decency does the constitutional provision on identity and dignity seeks to set down? The Court found the answer to be that the constitutional provision sought to set down the principle that everyone should be allowed to be who he is or what he wants to be, as dictated by his bodily feelings. Finally, the court in *Johar case* asked itself the question: what is the best conception of constitutionally protected identity and dignity? The court then found out that being free to do as one's body sexually dictates transcends the realm of natural feelings into the realm of reasoned and informed choice. Consequently, the court found out that 'both [natural] orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another's choice' and the individual's sexual choices and preferences are 'constitutionally permissible'.[160] In other words, the best conception of the abstract human rights constitutional provisions on identity and dignity of the human person is that the human person – including homosexuals – should be free to express and practice their natural sexual feelings and dispositions as well as the sexual dispositions chosen or adopted in the course of socialisation. And that where an individual expresses what he sexually feels, professes or practices, the law should protect him provided he seeks the valid consent of his sexual partners.

4.2 *Johar* case and the rights of homosexuals under the Constitution of India

The decision in *Johar* case was to the effect that laws criminalising consensual adult homosexual conduct breach three broad categories of rights of homosexuals, which includes, the right to liberty and dignity, the right to privacy and the right to equality and freedom from discrimination. The decisions on each of the categories of rights are summarised below.

[159] Dworkin (n 26) 8-10.
[160] *Johar (n 5) Misra CJI. para 9.*

4.2.1 Right to Equality and freedom from discrimination

Article 14 of the Constitution of India provides that:

> The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

Decisions reached before *Johar case* provided a formula for determining whether a statute which provides for different treatment of a class of persons is discriminatory or not. For a statute to be held not-discriminatory [i] the differences in treatment of persons which the statute creates must be based on an intelligible differential; and [ii] the differential must have a reasonable nexus with a legitimate government objective.[161]

In its lead judgment delivered by Misra CJI., the Supreme Court of India held that at best, the purpose of Section 377 of the IPC is to protect women and children from exploitative sexual conducts and that since Section 375 IPC prohibit exploitative forms of sexual intercourse with women and children, then Section 377 IPC does not achieve any legitimate objective. In other words, Section 377 arbitrarily interferes with the rights of homosexuals to live sexually fulfilling lives in consonance with their identity and individuality, through consensual adult sexual activities, which are not harmful to anyone.[162]

However, Chanchadrud J. in his concurring decision in *Johar case* faulted the rationale behind attaching a formula for determining discrimination. In other words, Chanchadrud J. based his decision on the moral reading of the constitution and held that courts faced with an issue of equality should simply look into the facts of the case in order to see whether it corresponds with the constitutional moral value of ensuring equality of all persons. Chanchadrud J. observed that:

> The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights… What it ignores is that Article 14 contains a powerful statement of values – of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard

[161] *Deepak Sibal v Punjab University (1989) 2 SCC 145.*
[162] *Johar (n 5) Misra CJI. paras 235-237.*

> against arbitrariness in state action… Article 14 has a substantive content on which together with liberty and dignity, the edifice of the constitution is built.[163]

The Supreme Court went further to analyse the provisions of Section 377 of the IPC and came to the conclusion that although the provision does not clearly refer to homosexuality and heterosexuality, the provision penalises some form of sexual expression among heterosexuals and criminalises every form of sexual intercourse among homosexuals. The Court also questioned the fact that the word 'unnatural' was never defined in the IPC and explained that based on some previous decisions, heterosexuality is socially constructed as 'natural', based on the fact that heterosexual conducts could lead to procreation, while homosexuality is viewed as unnatural because it cannot lead to procreation. However, there is no scientific base for stating that sex is exclusively for procreation, especially in a developing world where sex is recreational. Consequently, Section 377 of the IPC is based on the unscientific conclusion that non-procreative sex is frowned upon.[164] The Constitutional Court rejected the view that law should interfere with the private sexual feelings of citizens because 'if it is difficult to locate any intelligible differentia between natural and unnatural', then it cannot be said that a 'classification between individuals who supposedly engage in natural intercourse and those who engage in carnal intercourse against the order of nature can be legally valid'.[165] Consequently, the Constitutional Court concluded that the 'indeterminacy and vagueness of the term 'carnal intercourse against the order of nature' renders Section 377 constitutionally infirm as violating the equality clause in Article 14'.[166]

The Constitutional Court *per* Misra J. held that there is no reasonable basis upon which the law should criminalise consensual sexual conducts between adults as such conducts are not harmful to anyone or society.[167]

Furthermore, the discrimination and segregation against homosexuals as a result of the existence of anti-gay laws pushes homosexuals out of the public health system.[168]

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[163] *Johar (n 5) Chanchadrud J. para 27.*
[164] *Johar (n 5) Chanchadrud J. paras 28-35.*
[165] *Johar (n 5) Chanchadrud J. para 29.*
[166] As above.
[167] *Johar (n 5) Misra CJI. paras 239-240.*
[168] *Johar (n 5) Chanchadrud J. para 87.*

Healthcare systems do not provide key tools and sensitisation outreaches for homosexuals and as a result, there is high prevalence of sexually transmitted diseases such as HIV/AIDS in homosexual populations.[169] Since the healthcare system is open to heterosexuals and provides sexual tools and sensitisation for heterosexuals, it follows that homosexuals are being discriminated against in that regard and the Court in *Johar case* rightly reached the conclusion that anti-gay laws breach the rights of homosexuals to freedom from discrimination.

4.2.2 Rights to liberty and dignity

The concurring decision of Chanchadrud J. began by digging into the moral principle of political decency embedded in the constitutional provisions for liberty and dignity. Chandrachud J explained that the role of human rights provisions for liberty and dignity as contained in the constitution is to promote differences in the society in order to create a safe and happy environment for all. His Lordship stated:

> Section 377 exacts conformity backed by the fear of penal reprisal. There is an unbridgeable divide between the moral values on which it is based and the values of the Constitution. What separates them is liberty and dignity… Does the Constitution allow a quiver of fear to become the quilt around the bodies of her citizens, in the intimacies which define their identities?[170]

Chanchadrud J. then explained that since the Constitution permits homosexual citizens to live their lives and become whom they want and do what they feel like doing in a dignified manner, free from fear and oppression, then Section 377 of the IPC which criminalises homosexual activities is against the values of the Constitution and 'must be remedied'.[171] The learned Jurist further stated that:

> The Constitution brought about a transfer of power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets. In the beliefs, ideas and ways of living of her citizens. Democratic as it is, the Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve of societal conflict. Our ability to recorgnise others

[169] *Johar (n 5) Chanchadrud J. para 89.*
[170] *Johar (n 5) Chanchadrud J. para 4.*
[171] *As above.*

> who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril.[172]

The Supreme Court of India per Chanchadrud J. went further to specifically account for the evil of statutory provisions criminalising consensual adult homosexual activities as one that promotes 'rule by the law' which provides 'legitimacy to arbitrary state behaviour' instead of 'rule of law' which has the advantage of facilitating 'equality, liberty and dignity'.[173] The Court further explained the negative effects of laws criminalising consensual adult homosexual conducts on the liberty and dignity of homosexual members of the community, thus:

> Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has learnt the authority of the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgender have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail… The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.[174]

Chanchadrud J. concluded by adopting the moral reading of the constitution's doctrine of progressive realisation of rights and explained that although society has failed to recognise the rights of homosexuals in the past, it was high time such rights are recognised. Chanchadrud J. emphatically stated that 'sexual orientation is recorgnised under the Constitution' and 'Section 377 of the Penal Code is unconstitutional in so far as it penalises consensual relationship between adults of the same gender' because the 'constitutional values of liberty and dignity can accept nothing less'.[175]

4.2.3 Right to privacy

The Court began the discussion on the right to privacy by laying the foundation that privacy is a fundamental right and that expression of one's sexual orientation is a facet of the right to privacy.[176] The Court *per* Chanchadrud J. relied on the moral reading of the

[172] *Johar (n 5) Chanchadrud J. para 5.*
[173] As above.
[174] *Johar (n 5) Chanchadrud J. para 6.*
[175] *Johar (n 5) Chanchadrud J. para 7.*
[176] *Johar (n 5) Chanchadrud J. paras 54-55.*

constitution and consequently cited with force the decision in *Puttaswamy v Union of India*, where the court rejected the majoritarian premise of constitutional morality thus:

> I am in agreement… that the right to privacy cannot be denied even if there is a minuscule fraction of the population which is affected. The majoritarian concept does not apply to constitutional rights and the courts are often called up to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy.[177]

The Court then observed that Section 377 of the IPC restricts sexual minorities to a life in the 'closet' by implying that their sexual acts are 'unnatural'.[178] The Court held that consensual adult sexual activity 'is a natural expression of human sexual competencies and sensitivities' a denial of which amounts to 'a denial of the distinctive human capacities for sexual experience outside of the realm of procreative sex'.[179]

The Court deprecated the argument that the right to sexual orientation or sexual privacy is not provided for in the Constitution of India. The Supreme Court of India adopted the moral reading of the constitution, which allows Judges to choose the best conception of the intention of the legislature, and held that:

> The exercise of natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities. Emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right and be protected under the Constitution as fundamental to liberty and as a soulmate for dignity.[180]

Having established the fact that sexual minorities have a right to sexual privacy and freedom to exercise their sexual orientation, the court went further to warn that rights of sexual minorities to privacy should not be restricted to the 'closet' or the secrecy of their rooms, because:

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[177] *Johar (n 5) Chanchadrud J. para 55.*
[178] *As above.*
[179] *As above.*
[180] *Johar (n 5) Chanchadrud J. para 59.*

> The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.[181]

4.3 *The National Coalition* case and the rights of homosexuals in South Africa

The decision in *The National Coalition for Gay and Lesbian Equality v The Minister of Justice & Another (National Coalition case)*[182] is one which ensured the protection of homosexuals in South Africa. It was the first of its kind in Africa, and as expected, it opened the floodgate for homosexual rights litigation in Africa and is indeed a decision worthy of note by Nigerian Courts.

The Witwatersrand High Court *per* Heher J. made some declarations of constitutional invalidity and referred the said declarations or decisions to the South African Constitutional Court for confirmation, in accordance with Section 172(2)(a) of the South African Constitution of 1996.[183] In particular, the Constitutional Court of South Africa was requested to confirm that, portions or provisions of [i] Section 20A of the Sexual Offences Act 1957; [ii] Schedule 1 of the Criminal Procedure Act 1977 and Schedule to the Security Officers Act, which included the offence of 'sodomy' or 'unnatural sexual act' are unconstitutional, and consequently null and void. For ease of reference, I shall, in this work, refer to all the South African legislation mentioned in the *National Coalition case*, which prohibit homosexuality and subjects homosexuals to specific treatment as 'Laws criminalising homosexuality in South Africa'.

In reaching its decision in the *National Coalition case*, the Constitutional Court of South Africa considered the provisions of Section 8 of the Interim Constitution of South Africa (interim Constitution) and Section 9 of the South African Constitution of 1996 (1996 Constitution) and came to the conclusion that both Constitutions forbid discrimination on the ground of sexual orientation and that discrimination on any of the grounds mentioned in the Constitution are unfair unless otherwise established.[184] To set the pace for

[181] *Johar (n 5) Chanchadrud J. para 62.*
[182] *National Coalition for Gay and Lesbian Equality & Another v The Minister of Justice & 2 Others [1999] ZACC 17 (National Coalition).*
[183] *National Coalition (n 182) paras 1 & 2.*
[184] *National Coalition (n 182) para 10.*

determining whether laws criminalising homosexuality in South Africa are discriminatory, the court stated:

> The offense of sodomy, prior to the coming into force of the interim constitution, was defined as "unlawful and intentional sexual intercourse *per anum* between human males", consent not depriving the act of unlawfulness, "and thus both parties commit a crime". Neither anal nor oral sex in private between a consenting adult male and a consenting adult female was punishable by the criminal law. Nor was any sexual act, in private, between consenting adult females so punishable.[185]

It was on the basis of the different treatment given to homosexuals and heterosexuals by the laws criminalising homosexuality in South Africa that the court proceeded to reach its findings that laws criminalising homosexuality in South Africa are unconstitutional as they breach a number of rights of homosexuals.

In reaching its decision, the Court heavily relied on the moral reading of the constitution. The Court observed that the state does not frown at the promotion of morality, as 'the Bill of Rights is nothing if not a document founded on deep political morality'.[186] However, the Court maintained that a state's recognition of differences– in sexual orientation– does not amount to immorality.[187]

Furthermore, the Court adopted the distinction between statistical conception of democracy and communal or constitutional conception of democracy to explain the need to accommodate differences in sexual orientation, when the court held that:

> At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behavior that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.[188]

[185] *National Coalition (n 182) para 16.*
[186] *National Coalition (n 182) para 136.*
[187] *As above.*
[188] *National Coalition (n 182) para 134.*

Drawing from the communal conception of democracy, the Court emphasised that setting aside laws which criminalise homosexuality in South Africa will lead to a win-win situation for both homosexuals and heterosexuals.[189] The Court maintained that setting aside such laws would allow homosexuals to express their sexual preferences without fear and allow persons who for religious or moral perceptions are opposed to homosexuality to freely hold unto and express their views without imposing such views on homosexuals through state sanction.[190] According to the court, when both homosexuals and heterosexuals are allowed to express their views and preferences, then, everyone would be granted 'full moral citizenship' of the society in accordance with the moral reading of the constitution.[191]

Of great importance is the approach of the Court to the right to privacy. The Court observed that the right of homosexuals to privacy is more about the homosexual taking control of what he does with his body than where homosexuals carry out their sexual conduct. The Court observed:

> It has become a judicial cliché to say that privacy protects people, not places. Blackburn J in Bowers, Attorney General of Georgia v. Hardwick et al made it clear that the much quoted "right to be left alone" should be seen not simply as a negative right to occupy a private space free from government intrusion but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalization.[192]

The excerpt above reveals that the Court applied the three steps test of the moral reading of the constitution. The Court first determined that the constitutional right to privacy sets out a general moral principle. Secondly, the Court found out the moral principle behind the constitutional right to privacy to be the right to carry out activities in ones' quiet space without hindrance. The Court went further to seek the best conception of the constitutional right to privacy and came to the conclusion that the right to privacy is not limited to the liberty to carry out activities in ones' confined space, but further entails the right to freely air out ones' divergent views on issues affecting his personal life, without fear of sanction.

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[189] *National Coalition (n 182) para 137.*
[190] *As above.*
[191] *National Coalition (n 182) para 127.*
[192] *National Coalition (n 182) para 116.*

4.4 Constitutional morality, rights of homosexuals and lessons for Nigerian courts from the decision in *Johar* case

Evidence abound that homosexuals in Nigeria undergo both physical and mental torture, as well as the breaches of their fundamental rights because of anti-homosexual legislation.[193] On 13 February 2014, fourteen young men were arrested and beaten by a mob, on allegation of being gay. It was alleged that police officers also got involved in beating and torturing the homosexual men,[194] and up till date, no one has fished out the members of the mob or the policemen who infringed the rights of the said homosexuals. Similarly, on 26 August 2018, about fifty-seven boys were arrested and beaten during a police raid in Lagos on the grounds that they were suspected to be gay.[195] Ordinarily, beating a person suspected to have committed an offence is illegal and unconstitutional as the CFRN guarantees the dignity of all persons and prohibits torture or degrading treatment.[196] However, no one gets punished for beating and torturing alleged homosexuals, possibly because of the mass homophobia in Nigeria. Related to this is the fact that there have been reports of the unwillingness of healthcare providers to provide necessary healthcare services for homosexuals, especially as it relates to the peculiar needs of homosexuals.[197] Homosexuals, just like all other persons in Nigeria are human beings and are entitled to fundamental rights as provided by the CFRN.[198]

In chapter one of this work, we studied the moral reading of the constitution as conceived by Ronald Dworkin. We understood that the moral reading of the constitution proposes that abstract provisions of the Constitution such as the fundamental rights provisions, are to be interpreted by the courts in a manner that will reflect the best conception of the intention of the legislature. The big question to ask at this point is: Did the drafters of the CFRN envisage that the fundamental rights contained in Sections 33 to 44 of the CFRN should be denied a group of people simply because they carry out sexual acts in a manner different from other persons living in Nigeria? The researcher

[193] Ayeni (n 12) 228-232.
[194] Walkins (n 7).
[195] Nwafor (n 8).
[196] CFRN (n 11) sec 34.
[197] Okanlawon, Adebowale & Titilayo (n 9) 27-28.
[198] CFRN (n 11) secs 33-45.

answers this question in the negative and urge everyone to answer the question in the negative, because: [i] the fundamental rights provisions of the CFRN contain either of the following phrases: 'every person',[199] and 'every individual',[200] which means everyone is entitled to fundamental rights; and [ii] every person does things in a manner different from other persons– While Mr. A prefers to have sex while standing Mr. B prefers sex while lying on the bed– consequently, the drafters of the CFRN did not intend to criminalise anyone who exercises his sexual preferences, without breaching the rights of other members of the society.

As seen in chapter three of this work, Nigerian courts failed to state whether or not homosexuals are entitled to the fundamental rights enshrined in the CFRN.[201] However, the researcher believes that if the Courts in Nigeria apply the moral reading of the constitution as explained in chapter two of this work and as adopted in *Johar case*, in determining the constitutionality or otherwise of laws criminalising consensual adult homosexual activities, the courts will come to the conclusion that such laws are unreasonable and therefore unconstitutional to the extent that the laws coerce willing and consenting adults to abandon their identity, liberty and dignity; their homosexual self, in order to conceal a true and natural phenomena– diversity in humanity.

Ordinarily, decisions of courts in other countries do not serve as precedents for Nigerian Courts. However, where the decisions in question emanate from countries which have similar constitutional provisions with the CFRN, then such decisions could persuade the Nigerian courts into reaching similar decisions on similar facts.[202] The researcher argues that the decision in *Johar case* ought to serve as a persuasive authority to Nigerian courts in determining the rights of homosexuals or the constitutionality of laws criminalising homosexual conducts for three reasons. First, both Nigeria and India were colonised by Britain and have similar legal systems. Secondly, the fundamental rights provisions in the CFRN are similar to the fundamental rights provisions in the Constitution of India. Lastly, the provision criminalising 'unnatural offence' and 'offences against the

[199] CFRN (n 11) secs 33, 35, 36, 38, 39, 40,
[200] CFRN (n 11) secs 34, 41, 42, 43,
[201] Onuora-Oguno (n 14) 242; Teriah (n 33); Pamela (n 34).
[202] *Ogagu v The State (1994) 9 NWLR (Pt. 366) 1 at 43; Attorney General of the Federation v Attorney General of Lagos State (2013) 16 NWLR (Pt. 1380) 247 at 298 paras G-H.*

order of nature' under the Nigerian Criminal Code and Penal Code[203] are similar to the provisions criminalising unnatural offenses, against the order of nature under the IPC, especially in view of the fact that the penal legislation in both jurisdictions do not define what is meant by 'against the order of nature'.[204]

Consequently, the researcher is of the opinion that an application of the moral reading of the constitution as in *Johar case* would guide courts in Nigeria to reach robust decisions declaring the Criminal Code, the Penal Code, the SSMPA and any other legislation criminalising consensual adult homosexual conducts, as unconstitutional. This is more so because anti-gay legislation breaches the fundamental rights of homosexuals in Nigeria.

4.5 Conclusion

This chapter captures the real essence of the moral reading of the constitution as a means to an end– the protection of the rights of citizens. The decision in *Johar case* illustrates how the moral reading of the constitution could be applied in order to reach decisions to the effect that legislation criminalising homosexual conducts breach the rights of homosexuals. The researcher compared the constitutional and legal framework of India (at the time of *Johar case*) and the constitutional and legal framework currently in operation in Nigeria and the two are similar. Should Nigerian courts apply the moral reading of the constitution as exemplified in *Johar case*, it is most probable that Nigerian Courts will arrive at decisions declaring Nigerian laws criminalising consensual adult homosexual activities as unconstitutional. That is because anti-gay laws breach the rights of homosexuals and are contrary to the fundamental rights provisions of the CFRN.

From the foregoing, the researcher shall, in the next chapter, state the findings of this research work and the conclusions reached, and as well make necessary recommendations.

Chapter Five

[203] Criminal Code (n 1) sec 214; Penal Code (n 1) secs 284 and 405.
[204] Penal Code of India of 1860 sec 377.

Summary of findings, conclusions and recommendation

5 Summary of findings

Firstly, this research revealed that laws criminalising consensual adult homosexual conduct do breach the fundamental rights of homosexuals to privacy, dignity, liberty and freedom from discrimination. It was also revealed that homosexuals face challenges to healthcare due to persecution on grounds of their sexual orientation.

Furthermore, it was also revealed that Nigerian Courts have, in a number of cases, failed to protect the rights of homosexuals by declaring statutory provisions or conducts that infringe on the rights of homosexuals as unconstitutional.

Finally, this research revealed that courts in other jurisdictions have applied a specific theory of constitutional interpretation– the moral reading of the constitution– to arrive at decisions protecting the rights of homosexuals.

5.1 Conclusions

The following conclusions have been reached at the end of this study:

Firstly, the Nigerian courts have the power to declare rights limiting statutory provisions as unconstitutional, null and void.[205]

Furthermore, the Nigerian courts have failed to protect the fundamental rights of homosexuals.

Lastly, the Nigerian courts could apply the moral reading of the constitution to arrive at decisions which protect and promote the rights of homosexuals and consequently declare statutory provisions that criminalise consensual adult homosexual conduct as unconstitutional, null and void. This is more so because the moral reading of the constitution allows the Court to interpret the human rights provisions of the constitution in such a manner as to ensure that all segments of the population– majority and minority

[205] CFRN (n 11) sec 1(3).

alike– are given a chance to exist and live sexually fulfilling lives, provided the exercise of a person's rights does not infringe the rights of others.

5.2 Recommendations

In view of the foregoing findings and conclusion, it is submitted that the following recommendations should be considered and implemented:

5.2.1 To judges and heads of the various courts in Nigeria

Firstly, Judges should make efforts to build their knowledge on the subject of minority rights, especially on sexual minority rights. Judges must be able to appreciate what it means to be a homosexual and the myriad of social prejudices, injustices and human rights violations suffered by homosexuals in order to appreciate cases seeking the protection of rights of homosexuals.

In a similar vein, the heads of the various courts should make available increased opportunity and funding for continuous education of Judges especially on emerging trends in human rights and sexual minority rights in particular.

Furthermore, judges need to imbibe the culture of judicial activism and not unnecessarily stick to old precedents which are not tenable in the prevailing circumstances. Through judicial activism and the continuous development of the boundaries of law, the courts in Nigeria will set a new path by reaching decisions which protect the rights of homosexuals and consequently declare homosexual rights limiting statutory provisions as unconstitutional, null and void.

5.2.2 To the National Human Rights Commission of Nigeria

The National Human Rights Commission (The Commission), being the governmental agency charged with human rights related issues must rise up to the challenge, clearly spell out that the laws criminalising consensual adult homosexual conduct breach the rights of homosexuals and consequently call for the repeal of such laws.

Furthermore, the Commission should endeavor to organise workshops and seminars on the subject of homosexual rights and invite Judges as participants. This will educate Judges and the public in general on the need to protect the rights of homosexuals.

Lastly, the Commission should endeavor to file *amicus curia* briefs in cases which seek the protection of the rights of homosexuals, in order to enlighten the courts and set out the clear human rights position to the courts and consequently seek the protection of the rights of homosexuals.

5.2.3 To Lawyers and non-governmental organisations working on homosexual rights issues in Nigeria

Firstly, non-governmental organisations (NGOs) should ensure the strategic and systematic public awareness about homosexual orientation and the need for the protection of the rights of homosexuals. This could be through formal education or through print, electronic and social media. This awareness drive should be targeted at lawyers and Judges.

Furthermore, NGOs should systematically amplify minority rights issues in discussions on human rights at various forums and specifically point out the need to allow all persons, including minorities, to practice what they believe in, provided their practices do not infringe the rights of others.

NGOs and individual homosexuals should institute strategic impact court actions seeking reliefs that will result in the protection of the rights of homosexuals and vigorously pursue and prosecute such court actions to the Supreme Court. That way, the constitutionality of the various laws criminalising consensual adult homosexual conduct would be tested.

Finally, lawyers who institute and prosecute actions seeking the protection of homosexual rights should argue the claims in line with the theory of the moral reading of the constitution. Lawyers should cite and rely on decisions of courts in other countries which applied the moral reading of the constitution in holding that laws which criminalise consensual adult homosexual conducts breach the rights of homosexuals.

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