THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

Integrating a Human Rights Based Approach to Issues of Homosexuality in Nigeria: A Critique of the Same-Sex Marriage (Prohibition) Act 2014

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Abstract:
The aspiration expressed in the Universal Declaration of Human Rights: '[a]ll human beings … born free and equal in dignity and rights', appears to clash with cultural standings on homosexuality and dignity in Nigeria. At the base of human rights violations meted out on homosexuals lies cultural justifications. Indeed, the assertion that homosexuality is 'unafrican', hence its criminalization representing the legitimate interest of all Nigerians may not be totally correct against the state of play that our post-independence constitutional legal framework towed the path of the western liberal ideology that allows a breeding ground for individual autonomy to thrive. How can a Constitutional provision that protects the right of one to choose and to live in a way one wants, so long as he does not harm his neighbour, now provide a prohibitory inoculation to such constitutional guarantee? Can a valid claim to an African morality not offend the concept of western morality and globalization in the heated contention and unending debate between cultural relativism and universality of human rights? The thesis of this work is to appraise the Nigeria Same-Sex Marriage (Prohibition) Act 2014 and to critique same for violating the Constitution of the Federal Republic of Nigeria using the universal concepts of liberty, privacy protection, equality and non-discrimination to challenge violations of individual rights on grounds of sexual orientation. On the other hand, granted that some conducts are adjudged immoral, sinful and unafrican by the majority, what part does this judgment play to make harmless consensual conducts and choices criminal by the state legislators? There should be a shift in the majority's attitude towards the direction of accommodating benign differences because when a right is considered a fundamental right, it is no longer a matter of popular vote as it makes no difference that the majority of the citizens do not approve of it. The application of privacy, equality and non-discrimination principles in Nigeria will help sexual minorities to achieve equal rights. This article concludes that the Nigeria's Same-Sex Marriage (Prohibition) Act 2014 is unconstitutional.

1. Introduction

There is at present, no international or domestic legal instrument that specifically recognize sexual orientation as a listed ground for non-discrimination but the practice has been to develop expressions and interpretations geared at protecting the vulnerable minority in the society. This is made manifest in opinions expressed at international, regional and domestic levels seeking support to include sexual orientation under the non-discrimination clauses.[i] "It is undisputed under international human rights law that adult consensual activity in private is covered by the concept of 'privacy.'"[ii] In a factually similar case, the European Court of Human Rights held that laws that criminalized sexual acts between consenting adult males constituted an "unjustified interference with [the applicant's] right to respect for his private life" and thus breached Article 8 of the European Convention.[iii] Most recently, the UN Committee on Economic, Social and Cultural Rights, which monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), stated that "'Other status' as recognized in article 2(2) [of the ICESCR] includes sexual orientation" and gender identity.[iv]

The need to challenge in Nigeria, dominant ideologies and perception with a human rights sword in a society that is not respecting and loving to homosexuals even in the face of constitutional human rights provisions safeguarding same, necessitated this article. This article in stressing the worth of humanity and the reciprocal obligation on government to respect same, tries to situate the universal elements of human rights principles that will justify the basis for accommodating sexual rights. This work also identified key obstacles to human rights enjoyment and stresses that justifications to human rights violations and criminalization of harmless conducts based on the contingent firm defence, to wit: religious, cultural and moral justifications amounts to an aberration on human rights.[v] The criminalization of same-sex relationship in Nigeria embodied in the Same-Sex Marriage (Prohibition) Act 2014 would have been valid and unimpeachable if the Nigeria grundnorm was based on the African communitarian system and orientation as against the wholesome and unreflective entrenchment of western style constitutions better known for placing ultimate consideration on individualism as against communitarianism.[vi]It is argued in this article that Nigeria do not have the legal ground to enact a law prohibiting private consensual and harmless conduct autonomous to an individual, having derived her Constitution unreflectively from the constitutions of western civilizations as against her 'communitarian' African orientation.

In an ever changing world and emerging realities, this article concludes that there is now need to accommodate and redefine African perceptions and balance it with the effect of western globalization on previously otherwise held views, this by extension means that there is need to integrate a human rights based approach to issues of homosexuality. The opinion expressed in this article is that the Same-Sex Marriage (Prohibition) Act 2014 is an affront to the human rights of homosexuals in Nigeria as it contains disturbing provisions that violates fundamental rights and therefore, unconstitutional. In view of the above, this article calls on government, the people and religious institutions to view homosexuality as a human rights issue[vii] and to make a case for the decriminalization of the Same-Sex Marriage (Prohibition) Act 2014 in Nigeria that dehumanizes, discriminates[viii] and punishes one as a result of ones expressed sexuality.[ix]

2. Conceptual Clarification: A Clash of Ideologies

The nature, character and content of human rights are determined by environmental factors and globalization. As noted '[h]uman rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions....'[x]The notion of international human rights is understood to be the rights to which one has by virtue of being human. The human rights debate as defended by Africa is that their non-participation in drafting the Universal Declaration of Human Rights made the Charter not to represent their legitimate interest, hence the agitation to have traditional value system and orientation added to the body of human rights for an enriched universal acceptance. A traditional value system that is peculiar for its rich communitarian doctrines was abandoned for a system that places emphasis on individual autonomy, begging the question of how Africa implicated herself by unreflectively entrenching in her constitutions, individual ideologies as against the traditional value system.

The Constitution of the Federal Republic has in its body of rights, provisions that suggests that the ultimate beneficiary of rights is the individual person. And the provisions are clear as to when such rights can be encroached by the government to wit: in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons. The provisions emphasize independence of man over his affairs and things that concern him. This is the western orientation that places emphasis on individualism to which some Africanist thinkers like Mbiti, Menkiti and Legesse roundly disagrees and opines that it flies in the face of the African communitarian spirit of 'i am because we are'[xi] as propounded by Mbiti.[xii] Regrettably, the Constitution of the Federal Republic of Nigeria did not speak the voice of the African communalism in its rights provisions but that of the western individual orientation that places the individual in a revered and sacralized position.

A conceptual issue in any study of human rights recognition, is the extended and inconclusive debate on whether the concept of human rights is universal or culturally relative to each particular social context.[xiii] The preamble to the Universal Declaration of Human Rights reaffirms the faith as to a common standard of achievement for all peoples and all nations. The universal acceptance of human rights by States is a '*prima facie* indication that the underlying moral vision is attractive.'[xiv]Human rights have taken a centre stage in the international plane that violations of same is of heavy concern. Overtime, universalism of human rights comes under the attack of national sovereignty, cultural, and religious autonomy. States government accused of human rights violation always seek refuge under 'state sovereignty' and that internal affairs should not be a subject of interference. The human rights debate in relation to the cultural argument of incorporating traditional values into the body of human rights and the threat it poses to the universally accepted provisions of rights will be x-rayed along the lines of autonomy of the individual and the legal, moral and cultural justification of making moral or immoral conduct criminal. According to Foucault, sexuality discussion can be seen as a focal point that captures a wide array of meaning making on a set of key issues for any society.[xv] There are several amusing ideas that emerge in the criminalization of same-sex relationship in Nigeria, which ideas will highlight the imagined ideal relationship between the individual and the state.

2.1. The State, Enforcement of Morals and the Boundaries of the Law

To determine the question whether "man is free only when he lives as his society defines his freedom",[xvi] the nature, limit, extent, mutuality and reciprocity of rights and duties and the rationale for the existence of the state and her citizens must be understood and resolved. The two mainstream theories of the origin of the state are, viz: natural origin and social contract theories. Aristotle and Plato[xvii] saw the state as an inevitable logical consequence of man's expanding natural needs. According to Plato who saw the state as a natural necessity and a logical consequence of man's expanding natural economic needs, "a state, ... arises out of the needs of mankind...then as we have many wants and many persons are needed to supply them, one takes a helper for one purpose and another for another;...and they exchange with one another...under the idea that the exchange will be for their good...".[xviii] In essence, the inevitable growth and expansion of man's needs and desire led to the expansion of the family and the supply of daily needs. Social contract theorists[xix] trace the origin of the state to an agreement entered into by free and consenting individuals. Hobbes in his version of the state depicted man as an anti-social being who lived a predatory life in a state of nature prior to the formation of the contract and that the state was formed for man's self-preservation.[xx]John Locke agreed with Hobbes to the extent that the state is a product of social contract and argued that man is a social rather than an anti-social being by nature.[xxi] He asserted that in a state of nature all men were equal and free, and that peace, goodwill, mutual assistance and preservation reigned under the guidance of reason which is the law of nature.[xxii]

Given the above, it means that man do not only predate the state but also has some inalienable rights, hence the need to reconcile the sovereignty of the state with the inalienable rights and autonomy of the individual. First, the state has a duty to respect, protect and fulfill the fundamental rights and interests of her citizens. Next, the citizens have not only the right to enjoy their fundamental rights but also the duty to contribute to the upkeep and well-being of their state. For according to Locke, 'the fundamental law of nature is self-preservation, therefore no human law which violates or contravenes it, is valid.[xxiii] To secure the above view, the citizens reserve

the right 'to rid themselves of those who invade this fundamental, sacred, and unalienable law of self-preservation for which they entered into society'.[xxiv] On this philosophy, the July 4, 1776 Declaration of America's independence was built thus:

- We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, government are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government... to affect their safety and happiness[xxv]

Locke's version of the social contract theory has been the inspiration in the struggle for freedom and independence and the foundation upon which many democratic societies were founded. Hence most states' constitutions are fashioned in the form of a social contract created by the people to guide them in their social and political interactions with one another. The preamble of the 1999 Constitution of Nigeria[xxvi] reads:

- We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved ... to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice... do hereby make, enact and give to ourselves the following Constitution...

Now that the role of the state has been determined, there is need to mend the chasm between individual morality and communal moralities in the interest of cohesion, viability and protection of human rights. Should freedom accorded citizens be violated by the state, as a result of societal, traditional or religious prejudice, by mandating that the activities of the individuals, of a private and harmless nature, be investigated, prohibited, criminalized and punished by the law? As noted by Caron, 'the legal enforcement of morals raises the conflicts between individual ethics and social morality'[xxvii] and that 'it is too easy to reject changes in the name of "social decay" without due consideration for the underlying nature of each society'.[xxviii]This article holds the opinion that there are some societal behaviours that the state should be willing to accommodate and tolerate in the interest of cohesion and stresses the need to separate sin from crime and law from morality.

Following the historical Report of the Committee on Homosexual Offenses and Prostitution,[xxix]Devlin's[xxx] celebrated public debate with Hart and publications opposed the Reports philosophical basis on legal enforcement of morality.[xxxi]On the report of the Committee as to the function of law not to concern itself with 'private immorality', Devlin was of the thought that the report "requires special circumstances to be shown to justify the intervention of the law..."[xxxii]

Regarding criminal law, the Committee was of the opinion that:

- [I]ts function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.[xxxiii]

Lord Devlin's critique[xxxiv] of the Committee's report and questions: (a) has society the right to judge morals? Or, is there such a thing as public morality, or are morals a matter of private judgment? (b) If public morality is found to exist, then has society a weapon to enforce its judgment? If the answer to (b) is yes, then the cases the society has weapon to enforce its judgment[xxxv] was aptly articulated and addressed by the Wolfendon Report where it stated that:

- There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[xxxvi]

The above postulation is further strengthened by Mills' postulations on the legal enforcement of morality wherein he stated that immorality as such is not a crime:

- the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.... To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[xxxvii]

The cause of justice is not served when individual sovereignty and freedom of choice and actions regarding one's life, especially harmless actions are criminalized. Having identified that private harmless actions ought not to be the business of the law, the question then is, does the society have the right to pass judgment on matters of private morality? Assuming but not conceding that they have such right based on their parochial inclination and prejudices, does the societal disapproval of such harmless, private moral or immoral action entail the right to set the machinery of law in motion against the individual who commits such act? The answer depends on who you ask.

2.2. The Human Rights Debate

An essential divergence of human rights' universality is the African scholars debate and perception of human rights not as universal but that human rights should be culturally relative to the people it purports to bind. The agitation as exposed in the human rights debate has been to recognize the peculiarity of Africa's experiences within a context which stresses the universality of inalienable human rights. Some African scholars have argued for the integration of traditional values into the body of human rights, thereby stressing for an "African" concept of human rights.[xxxviii]

Donnelly, a chief advocate of human rights as universal argues that human rights are universal rights in the sense that they are held universally by all human beings.[xxxix] While it could be said that he disagreed with cultural relativist view as advocated by Cobbah,[xl] he however expressed the challenge human rights as universal faces in the realm of its implementation and enforcement which is always relative, largely a function of where one has the (good or bad) fortune to live.[xli] Cobbah had expressed that the troubling questions facing Westerners and non-Westerners alike pertain to whether contemporary international human rights instruments, given their Western biases, could be said to apply to peoples from non-Western cultures.[xlii] Donnelly countered this idea and stated that "human rights ideas and practices arose not from any deep Western cultural root but from the social, economic, and political transformations of modernity. They thus have relevance wherever those transformations have occurred, irrespective of the pre-existing culture of the place."[xliii] Rhoda Howard equally acknowledged the fact that the cultures and values characteristic of indigenous African societies do not negate the need for rights in Africa and that the western citizens of Europe and North America torn abruptly from their rural communities and into cities and factories at similar stages of economic change.[xliv]

Regrettably, the human rights provisions (international, regional and domestic), as signed by African leaders may appear to be mere rhetoric fraught with implementation challenges, as Donnelly observed, states refusal to implement same added to the gross and systematic violations that occur daily[xlv]negates the final document of the UN Conference on Human Rights in Vienna, Austria, in June 1993, bearing the title 'Vienna Declaration and Programme of Action'. Paragraph 3 thereof states that:

- All human rights are universal, indivisible and inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Disobedience to the universalism of human rights at the domestic level readily finds justification on state sovereignty and this has led Freeman to criticize:

- Cultural relativism underlies the assertion that external agents should not interfere with the internal affairs of nation-states on grounds of sovereignty. The philosophy of cultural relativism further asserts that outsiders are not competent to solve problems that are internal to another culture. This allegation is often raised in support of the argument that a particular interpretation of human rights, or even the basic notion of human rights, may be alien to a particular culture. Such a culture, continues the argument, should not be judged by standards derived from external sources. This extreme version of cultural relativism exceeds the boundaries of international law.[xlvi]

The defence to cultural relativism operated in Legesses' mind which inspired him to challenge the philosophy of the United Nation's Universal Declaration of Human Rights as being a western product. Speaking of the Universal Declaration of Human Rights, he stated, "...unfortunately, this particular document is not entirely satisfactory because it is a statement of values that derive directly from the liberal democracies of the western world. The basic document was formulated before most of the Third World, and nearly all of Africa, achieved independence. As a result, the Declaration is universal in its intent but not in its derivation".[xlvii]

Asmarom legesse noted thus:

- One critical difference between African and Western traditions concerns the importance of the human individual. In the liberal democracies of the western world, the ultimate repository of rights is the human person. The individual is held in a virtually sacralized position. There is perpetual, and in our view obsessive concern with the dignity of the individual, his worth, personal autonomy and property[xlviii]

Legesse went further to posit:

- No aspect of Western civilization makes an African more uncomfortable than the concept of the sacralized individual whose private wars against society are celebrated. If we turn the situation around and view it from an African perspective, the individual who is fighting private wars against his society is no hero. That is precisely the kind of individual whom an African would accuse of witchcraft..[xlix]

The position of Legesse makes the study of personhood in Africa imperative. African scholars like Mbiti and Menkiti have in their works captured the status of the individual as that predicated on the community and the people, for in their absence, no other ground exists for the individual's standing as a person.[l] Menkiti makes a case against the western abstraction of the lone individual and argues that it is the community that defines the person hence the reality of the communal world taking precedence over the reality of the individual life histories. The notion of personhood is acquired not merely as a consequence of birth but attainment and societal acceptance and incorporation.[li] According to Menkiti, 'the African view of man denies that persons can be defined by focusing on this or that physical or psychological characteristic of the lone individual. In the African view, it is the community which defines the person as person...'[lii]Menkiti's view leaves one guessing as to whether becoming a member of the society is a determinant of a person's humanity and whether the society has the sole power to decide who should or should not live in it.If a person needs societal approval to live in a community, what gives the community the legitimate authority to decide over the affairs of a person and what qualifies a man's reasoning and orientation as superior to another man's reasoning and orientation? His view runs contrary to human rights principles. In his view, it appears a mad man for instance is not a person in the community's stratification whereas human rights principles disagree with his view and ensures the basic rights of a mad man are safeguarded for his benefits.

Arendt had noted:

- Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community into which one is born is no longer a matter of course and not belonging no longer a matter of choice … This extremity, and nothing else, is the situation of people deprived of human rights. We become aware of the existence of a right

> to have rights … and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation.[liii]

Menkiti concludes by saying that whereas the African worldview presupposes the 'ontological independence of the human society flowing from the society to the individual, the western worldview moves from individual to the society'.[liv]This cultural distinction of African and Western worldview has led Nnamuchi to query in his work whether universal norms should actually bind people of all cultures? He noted further 'Perhaps, a few of the rights might appeal to all persons and all cultures, such as the right to life, whereas others might be contested. Even prior to this recent attempt at dialogue on the content of human rights, there has always been disagreement at the international level as to what constitute "true" human rights'.[lv]

The implication of the above differences in cultureand universal human rights is to the effect that human rights promoting non-discrimination, privacy and liberty are in contention as it faces strong resistance from African cultural societies. How can human rights be universal when it flies in the face of differences in cultural ideologies? The effect of these conflicts are readily felt in the field of human rights and homosexuality, as any discussion on universality of rights meets strong opposition on cultural fronts. Arguments on universality holds that if cultural justifications be allowed in the sphere of human rights, it will pose a threat as to what rights are guaranteed homosexuals. This is against the backdrop that the notion of some African human rights have been held to be repugnant to natural justice, equity and good conscience. Women, today are fighting against discrimination meted out on them as a result of 'traditional values' held onto as against emerging realities of women emancipation and human rights.[lvi]For instance, it is perceived in Africa that homosexuality is a Western construct, quite alien to Africa, therefore some of the conducts perceived as Western in nature are tagged un-African, which showcases in the strong schism between African traditional values and principles of international human rights. This clash between culture and human rights trickles down and affects cultural standings on homosexuality, leading to serious human rights violations with cultural justifications. If all the important ingredients of ideal fundamental human rights form part of the African philosophy, does the argument discrediting the western notion of rights showcase that it lacked the basic tenets common to humanism and universal brotherhood? What would Africa do in this impasse? Should Africa return to the African traditional past, where people lived in extended family system, where life was communal? Should Africa take the benefits of civilization without taking the burdens or should Africa shut its eyes to civilization? Will a return to the pre-colonial African society be possible? Can a modern African state be reduced to villages, hamlets and small family groups?

This article holds that industrialization and globalization began to separate man from the communal society when man began to move away from the community to the urban areas while embracing unreflectively the white man's western culture and discarding his own traditional African culture.

2.3. Civilization and Attitudinal Change: How Africa Was Implicated

The incursion of western civilization and ideas led to a distortion of the cherished peculiar African values. The respect for communal autonomy began to give way to right to individual self-determination, claims to respect for privacy and right of persons to participate in decisions affecting their own welfare and a strong commitment to equal treatment of all persons. This societal change in ideology began to have adverse impact on African values and orientation. The things that had hitherto been culturally hidden from view and roundly unspoken of,as a result of suffocation of freedom of expression in order to maintain public morality began to be exposed. Human rights began to take precedence thereby bridging the gap between culture, legal rights and societal acceptance. As people migrated from feudal societies into industrialized cities, they began to practice various forms of personal autonomy and a decline in cultural heritage began to set in.

The literary works of Chinua Achebe plays a significant role in exposing how Africa embraced the western culture with its domino-effect on all the facets of the socio-cultural aspect of the African system. The clash of cultures and ideologies between the African and the western systems finds expression in the novels 'Arrow of God' and 'Things Fall Apart' and captures a variety of uncertainties about the African culture.

In 'Arrow of God', Achebe showcases the character of Ezeulu and his son Oduche and how Ezeulu (a chief priest and custodian of culture and tradition) sent his son to go and learn the Whiteman's ways. It is captured thus:

- ...his mind turned from the festival to the new religion. He was not sure what to make of it. At first he had thought that since the white man had come with great power and conquest it was necessary that some people should learn the ways of his deity. That was why he had agreed to send his son, Oduche, to learn the new ritual. He also wanted him to learn the white man's wisdom....[lvii]

He had told his son:

- the world is changing... i do not like it. I want one of my sons to join these people and be my eye.[lviii]

Ezeulu understood that the world was changing and that he could not stop the world from changing but he wanted to shape the changes. This unreflective move led to a violation of the dignity of African tradition and a struggle against cultural imperialism when Ezeulu's son, Oduche attempted to kill the sacred python highly revered in the community as a deity. This led Ezeulu to reconsider his prior judgment as noted:

- but now Ezeulu was becoming afraid that the new religion was like a leper. Allow him a handshake and he wants to embrace.... but what would happen if, as many oracles prophesied, the white man had come to take over the land and rule? In such a case it would be wise to have a man of your family in his band....[lix]

When questioned as to his wisdom of sending his son to learn the white man's ways, he retorted:

- how does it concern you what i do with my sons?. do you not know that in a great man's household there must be people who must follow all kinds of strange ways?...[lx]

'Things Fall Apart' on its part portrays the significance of Okonkwo's death as the death of the African culture which is a consequence of Africa's indiscriminate embrace of alien values. Okonkwo's struggle for freedom and restoration of cultural pride led him to attempt to seek an end to globalization. According to Cornell, citing Frantz Fanon's thoughts on post-colonial nationalism:

- The struggle for freedom does not give back to the national culture its former value and shapes; this struggle which aims at a fundamentally different set of relations between men cannot leave intact either the form or the content of the people's culture. After the conflict there is not only the disappearance of colonialism but also the disappearance of the colonized man.[lxi]

The death of African culture heralded globalization and the formulation of the entire concept of human rights leaving considerable room in its interpretation, for emerging realities.

3. Global Perspective on Sexual Orientation and Human Rights

According to Banki Moon:

- We know how controversial the issues surrounding sexual orientation can be. In the search for solutions, we recognize that there can be very different perspectives. And yet, on one point we all agree -- the sanctity of human rights. As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity[lxii]

The UN General Assembly has a mandate to initiate studies and make recommendations for the purposes of "assisting in the realization of human rights and fundamental freedoms of all *without distinction* of race, sex, language or religion."[lxiii] The origin of international human rights law is linked to the adoption of the UDHR by the General Assembly in 1948 establishing a common standard for "basic civil, political, economic, social and cultural rights that all human beings should enjoy".[lxiv]

Core international human rights treaties to wit: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965), the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD,2006), and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED, 2006)[lxv] all in their treaty body General Comments interpreting their various treaty provisions, address specific issues of human rights concern pertaining to sexual orientation.[lxvi]

The ICESCR Committee on Economic, Social and Cultural Rights (CESCR), have also addressed human rights concerns affecting sexual minorities in their General Comments. They have interpreted their various treaty provisions on non-discrimination and forcefully includes sexual orientation as a ground for non-discrimination.[lxvii]Innovative about CESCR General Comment interpretation is that in the non-discrimination provision 'sexual orientation' is interpreted as falling under 'other status'.[lxviii]

The Committee on the Rights of the Child (CRC Committee), the treaty body charged with interpreting Convention on the Rights of the Child has admonished that sexual orientation be included as one of the prohibited grounds of discrimination.[lxix]

The Committee on the Elimination of Discrimination against Women (CEDAW) in articulating the possible vulnerable grounds of discrimination has considered sexual orientation as one of vulnerable grounds.[lxx]

The General Comment No. 2 of the Committee against Torture (CAT Committee), as established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stated that:

- The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of […] sexual orientation, transgender identity […][lxxi]

In the United States, it appears they have chosen to use the courts and not the Congress as a vehicle to import sexual orientation protection, as all major decisions regarding homosexuality so far came from the courts. However, it is the position of this article that once a matter is considered fundamental, the court need not wait on the parliament to pronounce on it. This, in no doubt is a path to judicial activism as the letters of the law should be given interpretations least unfavourable to the citizens, guaranteeing them their freedom of action in line with the states aspiration. This article will hereunder examine how the United States Supreme Court have interpreted the basic principles of autonomy, liberty, privacy protection and equality to give protection to homosexuals.

The United States Supreme Court in a 5-4 ruling first considered homosexual sodomy in *Bowers v. Hardwick,*[lxxii]while upholding the constitutionality of a Georgian law criminalizing oral and anal sex in private between two consenting adults. Although the legality of the invasion of privacy was not contested in the court as the court ruled that the Due Process Clause 'right to privacy' recognized in *Griswold* and *Roe* does not prevent the criminalization of homosexual conduct between consenting adults. The Court in *Lawrence v. Texas*[lxxiii] overruled *Bowers v. Hardwick*, struck down the sodomy law in Texas, holding that Texas law classifying consensual, adult homosexual intercourse as illegal sodomy violated the privacy and liberty of adults.

It is noted that the 'Equal Protection Clause' appears to be the frequently litigated provision which has led to various Supreme Court interpretations[lxxiv] forming ground breaking decisions such as *Roe v. Wade*[lxxv], and the most recent decision of *Obergefell v. Hodges.*[lxxvi] As well, privacy protection was not expressly stated in the Constitution but has found inroads through court decisions affirming its implied nature in the Equal Protection Clause of the Fourteenth Amendment.[lxxvii] In *Roe v. Wade*[lxxviii], the court applied privacy rights founded in the Fourteenth Amendment's guarantee of personal liberty that would allow women to terminate unwanted pregnancies to upturn most abortion laws in the United States. The decision in *Roe v. Wade* on privacy and autonomy has been used in

cases not connected to reproductive rights. In 1992, same Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[lxxix], reaffirmed the constitutional protection of personal decisions relating to marriage, procreation, and a person's right to be free from unwarranted governmental intrusion into matters fundamentally affecting that person.[lxxx]

In the sphere of marriage, the constitution has been interpreted to protect the right to marry, as well as the right to live a homosexual lifestyle. Should it also be interpreted to protect right of homosexuals to marry? The Massachusetts court decision has established that same-sex couples have the constitutional right to marry and that anything less, such as civil unions, would confer impermissible second-class status.[lxxxi] This decision did not go down well as it was doubtful as at then what the decision of the Supreme Court of the United States will be. In *United States v. Windsor*[lxxxii]subsequently, the court invalidated provisions of the Defense of Marriage Act which defined marriage as a union between one man and one woman and held same to be unconstitutional under the Due Process Clause and the Equal Protection Clause. In a revolutionary decision of the Supreme Court, upturning *Baker v. Nelson*[lxxxiii] and reaffirming the Massachusetts court decision in *Goodridge* held in *Obergefell v. Hodges*[lxxxiv] that ban on same-sex marriage violated the Due Process Clause and the Equal Protection Clause of the 14th Amendment. The liberties protected by this Clause 'extend to choices that are central to a person's dignity and autonomy, including intimate choices about personal beliefs and identity'.[lxxxv]

The famous dissenting opinion of Justice Brandeis in *Olmstead v. United States*[lxxxvi] deserves reproduction:

- The makers of our constitution understood the need to secure conditions favourable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope and include.... the right to be left alone – the most comprehensive of the rights and the most valued by civilized men.[lxxxvii]

4. Nigeria's Same-Sex Marriage (Prohibition) Act 2014, The Nigerian 1999 Constitution, and Nigeria's Human Rights Obligation

The Same Sex Marriage (Prohibition) Act 2014[lxxxviii] was assented to by the former president Good luck Jonathan in early January of 2014. The Act in its provisions which appears to prohibit same sex marriage obviously has nothing to do with same sex marriage but deals mostly on criminalizing same sex relationship and behaviours and prohibiting any form of services rendered to anyone perceived to be a homosexual. Although same-sex behaviours were already prohibited in the Criminal and Penal Codes,[lxxxix]as part of the vestiges of colonialism, the argument against the passage of the Act continue to rage, that criminalizing same-sex conduct touches on human rights, chief amongst which are equality and privacy, and targets the vulnerable minorities in the country. The government in reaction to the fall outs from the Act said "it is a law that is in line with the peoples cultural and religious inclination".[xc]

In what could be interpreted as a reaction to homophobic statements from these political leaders, a mob armed with wooden clubs and iron bars in Abuja, screaming that they are going to 'cleanse' the society of gay people dragged 14 young men from their respective homes and assaulted them.[xci] And just recently in Ondo State, one Akinnifesi Olubunmi was clubbed to death on allegation of being gay.[xcii]

The Act, as has been established, contains disturbing and endangering provisions which goes to affect the enjoyment of the fundamental human rights as universally entrenched and constitutionally guaranteed and it is the view of this article that the Act contravenes the Nigerian 1999 Constitution and touches on the rights to privacy, equality, non-discrimination, liberty, freedom of expression and of association. The Act violates the principle of universality enshrined in the Universal Declaration of Human Rights, the African Charter on Human and People's Rights,[xciii]and many other international and regional instruments. As Article 1 of the UDHR explains: "All human beings are born free and equal in dignity and rights". The Act, in section 5 prescribes a ten (10) year prison term for those who assist others in homosexual activity. The threat of jail term for those who support homosexual rights protection will be enough to silence those supportive activities that may seek to advocate and challenge the constitutionality of the Act. The Act's language does not only criminalize the act of assisting others in same-sex sexual activity, but, more broadly, those who support the propagation of homosexuality, which could be interpreted to include anything that espouses a viewpoint that does not condemn the homosexual persons. Though it remains to be seen how Nigerian courts would interpret a challenge on the constitutionality of the Act, the threat alone is a strong deterrent thereby inoculating against activities geared towards rolling back the Act and recognizing the rights of homosexual persons.

The constitutionality of the Act was however, albeit tenuously challengedin *Teriah Joseph Ebah v. Federal Government of Nigeria.*[xciv]The Petitioner asked the Federal High Court in Abuja to declare the sections referring to the prohibition and invalidity of same-sex relationship null. The petitioner claimed that the Act violated fundamental rights of Nigerian citizens protected under the Nigerian Constitution, as well as under the relevant articles of the African Charter on Human and Peoples' Rights (African Charter). The Federal High Court dismissed the case on the ground that the complainant lacked the required *locus standi* to present the claim on behalf of other Nigerians because he, himself, had not suffered from the action of the Federal State under the Act.[xcv] The decision of the Federal High Court can be faulted on the ground that the innovative provisions of the extant Fundamental Rights (Enforcement Procedure) Rules, 2009 provides in its preamble especially paragraphs (d) and (e) amongst other things that:

> (d) the court shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.
>
> (e) the court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*....

It however remains speculative how the courts will interpret specific human rights claims pertaining to homosexual rights in Nigeria, having thrown out without hearing on the merits what would have been a litmus test to the constitutionality or otherwise of the Act.

The Court of Appeal in *Nwali v. EBSIEC,*[xcvi] in interpreting the scope of section 37 'privacy rights' of the 1999 Constitution, while acknowledging the enumerated five types of privacy to be protected, accepted the non-restrictive approach and interpreted 'privacy of citizens' thus:

- For the above reasons, i interpret the phrase 'privacy of citizens' generally, liberally, and expansively to include privacy of citizens' body, life, person, thought, belief, conscience, feelings, views, decisions (including his plans and choices), desires, health, relationships, character, material possessions, family life, activities et cetera.[xcvii]

Hence no unlawful and arbitrary intrusion into a person's privacy is allowed by the law. It is the view of this research that any unlawful invasion of a person's privacy is an attack on his dignity as a human being, his plans, choices, desires, feelings, etc. and also should be seen as discriminatory where such invasion is not in accordance with the constitutional provision but is on the sole purpose of distinguishing a person's sexual orientation.

The decision of the court in *Agbakoba v. Director General SSS*[xcviii] is pertinent and gives a better approach to the interpretation of constitutional and or fundamental rights protection provisions. The court, *Per* Ayoola, JCA (as he then was) stated:

- The Constitution is an organic document which must be treated as speaking from time to time. It can therefore only describe the fundamental rights and freedoms it guarantees in broad terms. It is for the courts to fill the fundamental provisions with the contents such as would fulfill their purpose and infuse them with life. A narrow and literal construction of human rights provisions in our Constitution can only make the Constitution arid in the sphere of human rights. Such approach will retard the realization, enjoyment and protection of those rights and freedoms, and it is unacceptable.

These considerations inherently operated in the mind of the courts in *Nwali v. EBSIEC*

- "While the rest of the civilized world is expanding the boundaries of freedom and reaping the consequence of such expansion in stability and economic and social development, it will be sad were we, in this jurisdiction, to define the boundaries of freedom so narrowly as to become meaningless."[xcix]

The constitutional argument put up in justification of human rights infringement rests solely on whether it can be justified as derogation that is 'reasonably justifiable in a democratic society in the interest of public order, public morality or public health or for the purpose of protecting the rights and freedom of others.[c]Section 45 of the Nigerian 1999 Constitution lends credence to this argument. It provides that:

(1) 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 or public health; or
(b) For the purpose of protecting the rights and freedom of other persons

The understanding accorded the above section is that it limits the extent to which individuals may enjoy their fundamental human rights. It therefore means that as much important as fundamental rights are, the violation of either of the ones protected under the forgoing sections can be excused at the instances of laws which are reasonably justifiable in the interest of defence, public safety, public order, public morality, public health and for the purpose of protecting the rights and freedom of other persons. The true position therefore is that it gives legitimacy to laws that restrict certain human rights provided they are reasonably justifiable. The test of reasonableness is subject to the overriding interpretation of the courts.[ci] In view of the foregoing, it is left for the courts to determine whether expression of sexual orientation grounds justification on ground of public morality as to suspend the rights afforded under sections 37, 38, 39, 40 and 41 of Chapter IV of the Constitution of Nigeria. Section 41 of the Constitution of Nigeria on movement restriction would pass the reasonability test if activated during the Ebola outbreak in Nigeria in the interest of public safety and public health, and sections 39, 49 and 41 will be reasonably justifiable in the interest of defence and public order to quell the Boko Haram, pro-Biafra and Shiites uprising in Nigeria. It is the position of this article that one's autonomy and self-determination which entails for the right of persons to take decisions affecting their own welfare should be balanced against the States legitimate interest to regulate the public and private affairs of its citizens. This position is a direct attack on the African communalism and the conceptualization of individual and privacy rights under the western/universal perspective. The conception of privacy under the African orientation is at variance with the principles of human rights enunciated in Chapter IV of the Constitution of Nigeria. This article does not agree with the position as elucidated by Nnamuchi to the effect that:

- the ethics of communitarianism prescribes that "your business is my business" and vice versa, and this powerfully dilutes the force of privacy in individual lives. It would be odd in these societies to defend allegations of what is generally perceived as a wrongdoing on the basis of one's self-contrived privacy interests. This underscores the uncompromising resistance, by the representative of traditional societies to homosexual and sexual/reproductive rights agenda of powerful forces at the UN. Not that privacy is unknown in traditional societies; instead, the point is that in such societies, the line between "my business" and "your business" is indelibly blurred. Indeed, in Africa, even love making and associated privileges are not matters exclusively within the private domains of the individuals concerned.[cii]

One begins to question at this point, how the relationship between an individual and the community, or society in Africa, is framed to interfere in the individual's freedom to sexual orientation and practices. Contrary to the above expression by Nnamuchi, the idea and practice of sexuality is hinged on the fundamental human rights idea of autonomy, privacy, non-discrimination and that of an individual who is not interested as to how his neighbour meets his libidinal needs and thus deserving protection under the law. This was better articulated in the following statement:

- Personhood seeks to protect the freedom of individuals to define themselves in contradistinction to the value of the society in which they happen to live. The premise of such freedom is an individualistic understanding of human self- definition: a conception of self-definition as something that persons are, and should be, able to do apart from society.[ciii]

The criminalization of homosexuality goes to affect freedom of choice and privacy between consenting adults and cannot be said to affect national security or public health and the possible defence on 'rights and freedom of others' is tenuous and weak as no harm has been done to another as a result of one's sexuality. Whatever may be justifications for legislations on obscenity, it is argued that they do not reach into the privacy of one's own home. Justifications based on section 45 (1) (a) 'public morality' crops up to protect the corruption of the sensibilities of children. The Child Rights Act protects children and gives adequate protection and enforcement to the fundamental rights given to children.

Section 8 of the Child Right Act provides:

> 8 (1) Every child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in subsection (3) of this section.
> (2) No child shall be subjected to any interference with his right in subsection (1) of this section, except as provided in subsection (3) of this section.
> (3) Nothing in the provision of subsections (1) and (2) of this section shall affect the rights of parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards.

Subsection 3 above is tied to the overall best interest and evolving capacity of the child in question.[civ]Protection provided on "best interest" is such that parents have no absolute right over the child as it has been held that where parental care violates rights of a child, the government steps in. This was the decision in *Prince v. Massachusetts*[cv]where the Supreme Court of the United States held that the government has broad authority to regulate the actions and treatment of children.

More so, section 33 (1) of the Child Rights Act provides that:

- A person who exploits a child in any other form or way not already mentioned in this Part of this Act which is prejudicial to the welfare of the child commits an offence.

Ipso facto, the law protects the right to privacy of the child and his rights from any form of sexual abuse or exploitation. Sexual abuse and exploitation could be extended to mean exposure of nudity and child pornography, sexual orientation or indoctrination.

It is interesting to point out that sections 35 and 42 of the Constitution as well as Article 2 of the African Charter does not contain a 'derogation' or 'restriction' clause and the African Commission[cvi] has warned strongly that no 'State Party to the Charter should avoid its responsibility by recourse to the limitations and restrictions in the Charter being used to justify violations of human rights.'[cvii]

5. Conclusion: Nigeria's Human Rights Obligation

The realization of the rights as guaranteed both under the international, regional and domestic human rights instruments largely depends on State action. Having affirmed the indivisibility, universality and equality of all human rights[cviii], the obvious challenge that States in the international sphere have is the domestic application/implementation of her international and regional treaty obligations as well as keeping faith with them.

Article 26 of the Vienna Convention states that:

- Every treaty in force is binding upon the parties to it and must be performed by them in good faith.[cix]

The Limburg Principles[cx] have stressed that States parties should act in good faith to fulfill the obligations they have accepted. Flowing from the above, article 2(1) provides for a concerted national effort that will ensure compliance with the obligations. It enjoins States parties:

- To take steps... by all appropriate means, including particularly the adoption of legislation to achieve progressively the full realization of the rights... individually and through international assistance and co-operation...[cxi]

States parties are expected to use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures[cxii] and where there are legislations that violate the enjoyment of the fundamental rights guaranteed[cxiii], as is the case with the Act, that it be amended or abolished.[cxiv]

Article 2(2) of the Limburg Principles maximally addressed the issue of non-discrimination which is central to this article, calling on States parties to eliminate discrimination by abolishing without delay, any discriminatory laws, regulation and practices and also prohibit discrimination in any field of public life.[cxv] Notable in the interpretation of article 2(2) is the fact that human rights provision be made subject to judicial review and other recourse procedures.[cxvi] In essence, the role of human rights lawyers, activists, media advocates and defenders should be to approach the courts to test the constitutionality of the Same-Sex Marriage (Prohibition) Act on grounds that it violates the principles of human rights enshrined in the Constitution. Regrettably, the Act provides a difficult environment for human rights defenders as any activity that seems to fester the propagation of homosexual relationship attracts a punishment of imprisonment for 10 years.[cxvii]

The Maastricht Guidelines[cxviii]succinctly explained the further obligation of government regarding the implementation of human rights. The provision reads:

- Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligation to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights.[cxix]

According to the Maastricht Guidelines, the obligation to respect, protect and fulfil has in it fabrics intended to realize the enjoyment of each particular right in Nigeria. The obligation to respect requires Nigeria to refrain from interfering with the enjoyment of rights. This means that for example, the right to privacy is violated if Nigeria through the law enforcement agencies engage in abusive and

unwarranted invasion of people's homes in order to clamp down those not of heterosexual orientation. In the same vein, the obligation to protect, according to the Maastricht Guidelines requires Nigeria to prevent violations of rights by third parties. Therefore, in the realm of employment for example, Nigeria should ensure that they, and private employers of labor adhere to standards that are not discriminatory as to amount to violation of the right to work or the right to just and favourable conditions of work. Finally, the obligation to fulfil requires Nigeria to take appropriate legislative, administrative, judicial and other measures towards the full realization of such rights. In Nigeria, the obligation to fulfil requires measures to be taken to decriminalize the Same-Sex Marriage (Prohibition) Act 2014 because the Act by criminalizing private consensual conduct between adults impinges on their autonomy andamounts to a violation of basic human rights to wit: privacy, liberty, equality etc.

The difficulties that work against the total domestic enjoyment of the rights as guaranteed stems from the obvious constitutional provisions holding international treaties to ransom. It is no longer news that the realization and implementation of human rights depends largely on state actions. Therefore, States should ensure that their domestic laws are not inconsistent with their international obligations.[cxx] Nigeria, with the constitutional provision requiring the domestication of treaties, thus affording her ample time to regularize her national laws should not be seen blowing hot and cold in the sphere of her human rights obligations.

Section 12 of the Constitution of the Federal Republic of Nigeria provides:

- No treaty between the Federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

The purport of this section brings in the element that although Nigeria may have been signatory to a treaty, until the treaty is ratified by the National Assembly only then, can it be recognized in Nigeria. International law obligation as propounded in the 'Bangalore Principles'[cxxi] is to the effect that it is within the proper nature of dualist countries like Nigeria to have provisions of international conventions incorporated by legislation into the domestic law, the 'Bangalore Principles' is however of the opinion that there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law is inconsistent with international obligations or draw such inconsistency to the attention of the appropriate authorities due to the supremacy of the national laws. Using the African Charter on Human and Peoples' Rights as case study, the National Assembly enacted same and thereby incorporated it into the domestic law of the country.[cxxii] Having been incorporated into the domestic law of Nigeria, the challenge is on how the courts will interpret and enforce obvious provisions of privacy, equality and non-discrimination to recognize sexual orientation as a ground for non-discrimination.[cxxiii] It has been rightly acknowledged that "there is room for the courts to be innovative in giving effect to all the African Charter rights irrespective of nomenclature or categorization".[cxxiv]

The innovative Fundamental Rights (Enforcement Procedure) Rules (FREP Rules) 2009[cxxv] deriving its just powers from the Constitutional provision of section 46(3) gave the Chief Justice of Nigeria unfettered discretion to make rules for the purposes of the jurisdiction of the courts over Chapter four of the Constitution.

It is the argument of this research that flowing from the constitutional powers given to the Chief Justice of Nigeria in section 46(3) and the enactment of the FREP Rules 2009, that the Rules appears to have in the view of this article make a mockery of section 12(1) of the Constitution on domestication of treaties entered into by Nigeria with regards to human rights actions instituted in our courts. The FREP Rules now enjoins courts to have recourse to international treaties brought before it and it could be interpreted to mean whether such treaties have been domesticated or not, thus, giving the courts rooms for judicial activism, 'for the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms...'. The FREP Rules sets out to adumberate on what the courts should consider when seized of human rights actions upon activation of section 46(1) of the Constitution by an applicant. The relevant provisions of the preamble to the FREP Rules will be reproduced hereunder. Paragraph 1 provides:

The Court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially whenever it ...applies or interprets any rule.

Paragraph 3 enumerated the overriding objectives:

(a) The Constitution, especially Chapter IV, as well as the African Charter shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them.

(b) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Courts shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form part of larger documents like constitutions. Such bills include;

(i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system,

(ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system....

The gravamen of this article is to counter cultural and other stereotyped justifications to issues of homosexuality by using human rights principles of equality, privacy, liberty and non-discrimination. The article also makes a case for the decriminalization of the Same-Sex Marriage (Prohibition) Act 2014 as it is unconstitutional. This article concludes that a heightened awareness of human rights recognition in the international and domestic communities; greater constitutional protections; domestic incorporation of international law under Nigeria's Constitution; and judicial effort has to be put in place so that homosexual Nigerians do not have to live in fear and, instead, can achieve the legal equality to which they are constitutionally entitled.

6. References

i. UN Declaration on Human Rights and Sexual Orientation http://www.ohchr.org/EN/NewsEvents/ Pages/DisplayNews.aspx?NewsID=11167&LangID=En and Gender Identity, UN Doc A/63/635 (UNGA 22 December 2008); the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity 2011; Report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity by the United Nations High Commissioner for Human Rights (UNHCHR), UN Doc A/HRC/19/41 (UNHCHR 17 November 2011); the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity 2014; the Report of the United Nations Special Rapporteur on the right to education, UN Doc. A/65/162, 23 (23 July 2010); The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, http://www.yogyakarta principles.org/principles_en.htm (accessed 1 January 2016); General Comment 20 UN Doc E/C.12/GC/20, 32 (ESCR Committee 2 July 2009) non-discrimination provision that interpreted 'sexual orientation' as falling under 'other status', General comment 13 UN Doc CRC/C/GC/13, 60 and 72(g) (Committee on the Rights of the Child 18 April 2011) that admonished that sexual orientation be included as one of the prohibited grounds of discrimination; General Comment 2 UN Doc CAT/C/GC/2, 21 (Committee against Torture 24 January 2008) that stated that protection of certain minority or marginalized individuals or populations applied to all persons, regardless of sexual orientation or transgender identity; General Recommendation 28 UN Doc CEDAW/C/GC/28 18 (Committee on the Elimination of Discrimination against Women 16 December 2010)in articulating the possible vulnerable grounds of discrimination has considered sexual orientation as one of vulnerable grounds. (accessed 15 December 2015)

ii. Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/488/1992. Para 8.6

iii. Dudgeon v. United Kingdom, European Court of Human Rights, 23 September 1981. Para 63. Article 8 provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."

iv. CESCR, General Comment 20, para. 32, E/C.12/GC/20, 10 June 2009.

v. The idea of this article is not to create new rights for homosexuals but rather to locate their rights within the existing corpus of traditional human rights already guaranteed.

vi. It is not news that the Nigerian Constitution is modelled on the American Constitution notorious for its liberal idealogy.

vii. From Vatican City: Catholic bishops meet to debate possible changes in the church's approach to issues such as divorce and homosexuality. Available online http://edition.cnn.com/2015/10/05/europe/vatican-5-questions-will-synod-change-anything/ (accessed 10 0ctober 2015)

viii. Archbishop Desmond Tutu equated the discrimination against gay people in Uganda with the horrors of Nazi Germany and the apartheid era in South Africa. 'Desmond Tutu condemns Uganda's proposed new anti-gay law' The Guardian 23 February 2014 http://www.theguardian.com/world/2014/feb/23/desmond- tutu-condemns-uganda-proposed-anti-gay-law (accessed 29 December 2015). For example, the Hawaii Supreme Court specifically mentioned Hawaii's custom and practice with respect to recognition of same-sex unions in reaching its decision on same-sex marriage in Baehr v. Lewin, which ruled that Hawaii's ban on same-sex marriages presumptively violated the State Constitution's prohibition of sex discrimination. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

ix. The High Court of Delhi at New Delhi in Naz Foundation v. Government of NCT and Ors, 160 (2009) DLT 277 at 15 found that a provision of the Indian Penal Code which criminalized consensual same sex conduct was a violation of the right to live with dignity and the right of privacy, both of which were protected by the Constitution.

x. Judgement of the Inter-American Court in Karen Atala and Daughters v Chile, IACHR (23 July 2008) Ser L/Doc 22 Rev 1 para. 83.

xi. Mbiti., J. 'African Religious and Philosophy', (New York: Doubleday, 1970), p.141.

xii. One wonders if Africa has issues with freedom and equality of all persons as propounded by the west.

xiii. B., Ibhawoh, "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State", Human Rights Quarterly, Vol. XXII, No.3 (2000), p. 19.

xiv. J. Donnelly, Universal Human Rights in Theory and Practice (Cornell University Press: 1989), p. 23

xv. Foucault, M. 'The History of Sexuality. Vol I. An Introduction'. (New York: Pantheon Books, 1978), p. 42.

xvi. J., Donnelly, "The Relative Universality of Human Rights", Human Rights Quarterly, Vol. 29, No.2 (2007), p.294

xvii. Aristotle, Politics, Book 1, Ch 2, 1252a 24 – 1253a 18 Great Books, Vol.8, pp. 445-446. And Plato, The Republic, Book II, Great Books, Vol. 16, p.316

xviii. Plato in Great Books, p. 316

xix. Thomas Hobbes, John Locke and Jean-Jacques Rousseau

xx. Hobbes, Chs. 13-17 in Great Books, Pp 85-100

xxi. Locke, in Great Books, Pp. 25-29.

xxii. Ibid

xxiii. Locke, in Great Books, p. 56.

xxiv. Locke, in Great Books, p.59.

xxv. The Declaration of the Independence and the Constitution of the United States of America, p.1.

xxvi. Modeled after the preamble of the 1787 United States of America's Constitution.

xxvii. Y., Caron, "The Legal Enforcement of Morals and The So-Called Hart-Devlin Controversy", Mcgill Law Journal, Vol 15, No.1 (1969), p. 35.

xxviii. Ibid.
xxix. Popularly referred to as the Wolfenden Report, which was formed in 1954 following the conviction of famous men in Britain including Lord Montagu, Michael Pitt-Rivers and Peter Wildebood for homosexual offences and its report published on 4 September 1957.
xxx. Lord Patrick Devlin, a leading British Judge. It was reported however that in May 1965 following evolving realities of the time that Devlin was one of the signatories of a letter to The Times calling for the implementation of the Wolfenden Report. See "Law on Homosexuals", The Times (The Times Digital Archive) (56318), 11 May 1965, p.13.
xxxi. See Y., Caron, above, note 27, Pp.23-28, where Lord Devlin opinion was that the legal enforcement of morality was necessary to protect the moral structure of society, and that the test of morality was the reasonable man's opinion, Professor Hart suggests that 'harm to others" is the only purpose for which the law may be imposed on individual liberty.
xxxii. P., Devlin, The Enforcement of Morals (London:1965), p.11, herein after cited as Devlin.
xxxiii. Devlin, Pp.87-89, (quoting Report ofthe Committee On Homosexual Offences and Prostitution 13 (1957) [hereinafter Wolfenden Report]).
xxxiv. Devlin argues that there is a public morality and the society has the right to enforce this morality by law, hence there is no theoretical limit to a society's legislation of its morality. Granted, morality/societal values can influence the law either in a positive or negative way, same way law can change or influence morality/societal values. For example, societal acceptance of slavery led to the enactment of laws used to strengthen slavery but when societal rejection of same became rift, the law was equally used as an instrument of social change to abolish slavery. It is a given, albeit not meant to be so, that laws are made as a result of either societal acceptance or rejection of a conduct as moral or immoral, but it is the opinion of this article as well as the wolfenden Committee Report that matters of private morality especially of harmless conduct between consensual adults should not be the business of the law. Also when a law violates constitutional and human rights provisions, it remains for the courts to pronounce it unconstitutional.
xxxv. Devlin, above, note 32., pp. 7-8.
xxxvi. Ibid, Wolfendon Report, quoted in Caron Yves, above, note 27.
xxxvii. Mill, J.S., On Liberty (London: John W. Parker and Son, 1859). Pp.21-22.
xxxviii. Scholarly works buttressing this viewpoint include Josiah A.M. Cobbah, "African Values and the Human Rights Debate: An African Perspective" Human Rights Quarterly, vol.9, (1987), pp. 309-31; Asmarom Legesse, "Human Rights in African Political Culture," in Kenneth W. Thompson, ed., The Moral Imperatives of Human Rights: A World Survey (Washington, D.C.: University Press of America, 1980), pp. 123-38; Adamantia Pollis and Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," in Pollis and Schwab, eds., Human Rights: Cultural and Ideological Perspectives (Praeger, 1979), pp. 1-18; Rhoda E. Howard, "Group versus Individual Identity in the African Debate on Human Rights," in Abdullahi Ahmed AN-NA'IM and Francis Deng, eds., Human Rights in Africa: Cross-Cultural perspectives (Washington D.C, The Brookings Institution, 1990), pp. 159-183.
xxxix. J. Donnelly, 'The Relative Universality of Human Rights', Human Rights Quarterly, Vol.29 (2007), p.283.
xl. J.A.M Cobbah, 'African Values and the Human Rights Debate: An African Perspective' Human Rights Quarterly, Vol.9 (1987), pp.309-331.
xli. Donnelly, above note 39.
xlii. Cobbah, above note 40, p.309.
xliii. Donnelly, above note 39, p.287.
xliv. Rhoda E. Howard, "Group versus Individual Identity in the African Debate on Human Rights," in Abdullahi Ahmed AN-NA'IM and Francis Deng, eds., Human Rights in Africa: Cross-Cultural perspectives (Washington D.C, The Brookings Institution, 1990), p.167.
xlv. Donnelly, above note 36, p.283.
xlvi. M. Freeman, 'The Philosophical Foundations of Human Rights' Human Rights Quarterly, Vol. 16, No. 3 (1994)., p. 495
xlvii. Legesse, Human Rights in African Political Culture, in Kenneth W. Thompson, ed., the moral imperatives of human rights: a world survey (washington D.C.: University of American press, 1980), P.123
xlviii. id, p.124
xlix. ibid
l. I.A. Menkiti "Person and Community in African Traditional Thought", in Richard A.Wright, African Philosophy: An Introduction, (Washington D.C.: University of America Press, 1979), p.157
li. Ibid
lii. Id. P.158. The African view of a person was summed up by John Mbiti thus: 'i am because we are, and since we are, therefore i am'. See Mbiti, J., African Religions and Philosophies (New York: Doubleday and Company, 1970), p. 141
liii. H. Arendt The origins of totalitarianism, (New York: World Publishing Co. 2nd edition, 1951) 293-294.
liv. Menkiti, above, note 50.
lv. O. Nnamuchi, "Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question", Chicago-Kent Journal of International And Comparative Law, Vol. 14, No.1,(2014), pp. 54, 55.
lvi. It is un-African for a woman to break kola nut or pour libation, it is also un-African for a woman to express her opinion in public meetings of a village general assembly and many more inhuman and obnoxious practices meted out on women. This

inequality had continued to permeate the fabric of African customary practice until the Supreme Court in Nigeria recently in an epoch making decision used the case of Ukeje v. Ukeje(2014) 38 W.R.N 1, as a vehicle to incorporate equality of women in the customary practice in Nigeria.

lvii. C. Achebe, Arrow of God (Heineman London: 1974), p.42

lviii. Id, p.45

lix. Id, p.42

lx. id p.46

lxi. Cornell, D., 'At the Heart of Freedom: Feminism, Sex and Equality', (Princeton: Princeton University Press, 1998), p.156.

lxii. Secretary-General, Ban Ki-Moon, "Secretary-General's remarks at event on ending violence and criminal sanctions based on sexual orientation and gender identity" (10 December 2010), online: The United Nations <http://www.un.org/ >. (last accessed 15 December 2015).

lxiii. Charter of the United Nations, 26 June 1945, Can T S 1945 No 7, at art 1(3)

lxiv. Office of High Commissioner for Human Rights (OHCHR), "International Human Rights Law", online: United Nations Human Rights <http://www.ohchr.org >.Universal Declaration of Human Rights, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810,(1948).[UDHR]. (last accessed 15 December 2015)

lxv. OHCHR, "Human Rights Treaty Bodies", online: United Nations Human rights http://www.ohchr.org/ . (last accessed 15 December 2015).

lxvi. General Comment 20 UN Doc E/C.12/GC/20, 32 (ESCR Committee 2 July 2009) non-discrimination provision that interpreted 'sexual orientation' as falling under 'other status'; General comment 13 UN Doc CRC/C/GC/13, 60 and 72(g) (Committee on the Rights of the Child 18 April 2011) that admonished that sexual orientation be included as one of the prohibited grounds of discrimination; General Comment 2 UN Doc CAT/C/GC/2, 21 (Committee against Torture 24 January 2008) that stated that protection of certain minority or marginalized individuals or populations applied to all persons, regardless of sexual orientation or transgender identity; General Recommendation 28 UN Doc CEDAW/C/GC/28 18 (Committee on the Elimination of Discrimination against Women 16 December 2010)in articulating the possible vulnerable grounds of discrimination has considered sexual orientation as one of vulnerable grounds.

lxvii. The body in the following General Comments, interpreted sexual orientation as ground for non-discrimination, viz: General Comment No 14: The Right To The Highest Attainable Standard of Health, UN Doc E/C.12/2000/4(2000) at para 18; General Comment No.15: The Right to Water, UN Doc E/C.12/GC/2002/11 (2005) at para 13; General Comment No. 18: The Right to Work, UN Doc E/C.12/GC/18 (2006), para 12(b)(i); General Comment No.19: The Right to Social Security, UN Doc E/C.12/GC/19(2008), para 29; General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art.2 ,para. 2), UN Doc E/C.12/GC/20(2009), para 11.

lxviii. Ibid at para 32.

lxix. Committee on the Rights of the Child [CRC Committee], General Comment No 3 (2002): HIV/AIDS and the Rights of the Child (2003), UN Doc CRC/GC/2003/3, at para 8; CRC Committee, General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child (2004), UN Doc CRC/GC/2003/4, at para 6

lxx. CEDAW Committee, General Recommendation 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28 (2010) at para 18; CEDAW Committee, General Recommendation 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequence of marriage, family relations and teir dissolution, UN Doc CEDAW/C/GC/29 (2013), at paras 16,17 &24.

lxxi. Committee Against Torture (CAT Committee), General Comment No 2: Implementation of article 2 by States parties, UN Doc CAT/C/GC/2 (2008) at para 21

lxxii. Bowers v. Hardwick 478 U.S. 186 (1986), while importing morality, Justice Burger in his concurring opinion concluded that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millenia of moral teaching". Apparently, considerations and recourse was had to privacy protections but was discarded. Whereas 17 years later Justice O'Connor in Lawrence v. Texas relying on an equal protection guarantee stated that "if heterosexuals can engage in what has been called sodomy, homosexuals should also be allowed to engage in the same behavior." Quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court in Lawrence asserted: "Our obligation is to define the liberty of all, not to mandate our own moral code." The Lawrence majority further stated that "religious beliefs, conceptions of right and acceptable behavior, . . . respect for the traditional family . . . [and] profound and deep convictions accepted as ethical and moral principles" may not be used by the majority through "the power of the State to enforce its views on the whole society through operation of the criminal law."

lxxiii. Lawrence v. Texas 539 U.S. 558 (2003). The Court held that the State lacked a legitimate interest in regulating the private sexual conduct of consenting adults.

lxxiv. There appears to be a doctrine in US whereby the Constitution is seen as a 'living consitution' and dynamic in nature as to take into account the challenges in contemporaneous societies when interpreting key constitutional phrases. This was as propounded by Oliver Wendell Holmes.

lxxv. Roe v. Wade 410 U.S. 113 (1973), the court while importing privacy rights under the Due Process Clause of the 14th Amendment extended it to a woman's autonomous decision to have an abortion but that it must be balanced against the states legitimate interest in regulating abortion to the third trimester of pregnancy.

lxxvi. Obergefell v. Hodges 576 U.S. (2015)
lxxvii. See Griswold v. Connecticut 381 U.S. 479, 485 – 486 (1965). where a Connecticut law criminalizing the use of contraceptives was said to violate the right to marital privacy.
lxxviii. Above, note 54
lxxix. Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) 505 U.S. 833.
lxxx. Ibid at 851
lxxxi. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).
lxxxii. United States v. Windsor 570 U.S. (2013)
lxxxiii. Baker v. Nelson 291 Minn. 310 (1971) where marriage license to same-sex couples was denied on ground that it violates the United States Constitution.
lxxxiv. Obergefell v. Hodges, above, note 76.
lxxxv. Ibid. While reading the lead judgment, Justice Kennedy was of the opinion that the framers of the constitution "did not presume to know the extent of freedom in all its dimensions and so they entrusted future generations a charter protecting the rights of all persons to enjoy liberty as they learn its meaning."
lxxxvi. Olmstead v. United States, 389 U.S 347 (1928).
lxxxvii. Ibid
lxxxviii. Hereinafter referred to as the Act. In January 2014, the Nigerian President signed the Same-Sex Marriage (Prohibition) Act into law.
lxxxix. Section 214 of the Criminal Code classifies same sex conduct as "unnatural offences" and provides as follows: Any person who – (a) has carnal knowledge of any person against the order of nature, or... (c)Permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years. Section 284 of the Penal Code provides that: Whoever has carnal knowledge against the order of nature with any man (or) woman ….. shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.
xc. Statement by the presidential spokesman Reuben Abati to Associated Press news agency. Available at http://www.bbc.com/news/world-africa-25728845 (last accessed 10 October 2015).
xci. Available online at http://www.pmnewsnigeria.com/2014/02/16/reports-mob-attacks-suspected-gays-in-abuja/ (accessed 06 November 2015)
xcii. Available online at http://dailypost.ng/2016/03/15/tiers-condemns-murder-of-akinnifesi-olubunmi-over-alleged-homosexualism/ (accessed 20 March 2016). This articlein seeking to find out who assaulted those 14 young men and the murderers of Akinnifesi submits that those who held the wooden club include the Nigerian government that uses the law to terrorize the vulnerable; a government that appropriates more on budget to save/defend lives and guarantee liberties yet lack the moral will and moral courage to defend the human rights of her citizens under homophobic attack based on cultural justification as against the constitutional guarantee of freedom; every legislator, judge and lawyer who feeds on prejudice and hatred and enacts and interpretes a law on those grounds; Every preacher who preaches the bible as against compassion and salvation, and stay silent against the lynching of souls; every human being who stands by, without joining the fight to defend the abuse of human rights and humiliation all held that wooden club.
xciii. The African Charter in its preamble enjoins that historical tradition and the values of African civilisation be taken into consideration and article 22(1) recognized the peoples right to 'economic, social and cultural development with due regard to their freedom and identity....'
xciv. Mr Teriah Joseph Ebah v Federal Government of Nigeria Suit FHC/ABJ/CS/197/2014.
xcv. ibid
xcvi. Nwali v. EBSIEC (2014) 50 W.R.N
xcvii. Ibid at p.72
xcviii. Agbakoba v. Director General SSS (1994) 6 NWLR (pt 351) 475
xcix. Nwali v. EBSIEC above, note 96.
c. Under section 45 of the Nigeria's Constitution 1999.
ci. See Director of SSS v. Agbakoba (1999) 3 NWLR (Pt 595) 340.
cii. O. Nnamuchi, "Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question", Chicago-Kent Journal of International And Comparative Law, Vol. XIV, No.1,(2014), p.43.
ciii. Madeleine Schachter, Informational and Decisional Privacy 783 (2003). Quoted in Nnamuchi, above note 40.
civ. It may be argued whether the 'best interest' of the child will be adequately protected by the child either having two fathers or mothers? In Karen Atala and Daughters v Chile IACHR (23 July 2008) Ser L/Doc 22 Rev 1., a case concerning Mrs Atala and her three daughters. When Mrs Atala and her husband decided to separate after nine years of marriage, both parties agreed that their daughters should remain with Mrs Atala. However, when Mrs Atala the following year moved in with a new, female, partner, the girls' father filed a complaint with a local court claiming that the children would be harmed if they continued living in their home with their lesbian mother and her new partner. The case made its way through the Chilean courts, and the Supreme Court handed down judgment in May 2004. In this judgment, three of the five justices on the bench

characterised the daughters as being in a 'situation of risk' that placed them in a 'vulnerable position in their social environment, since clearly their unique family environment differ[ed] significantly from that of their school companions'. The Inter-American Commission and later the Inter-American Court found that Chile was in violation of the right to equality and non- discrimination, therefore, any regulation, act or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation

cv. Prince v. Massachusetts 321 U.S. 158 (1944)

cvi. It is however clear that the African Charter prioritizes culture over universalism but with emerging realities, cultural priority is challenged. Moreso the rights to privacy, liberty, dignity and equality are fully protected under the Charter. Query: What is the position of the African Charter to issues of homosexuality? Should South Africa be sanctioned for passing laws inconsistent with the African Charter?

cvii. Legal Resources Foundation v. Zambia, African Commission on Human and Peoples' Rights, Comm. No. 211/98 (2001).

cviii. See the Vienna Declaration and Programme of Action (1993)

cix. Vienna Declaration on the Law of Treaties (1969), United Nations, Treaty Series, Vol. 1155, p.331

cx. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN doc E/CN.4/1987/17 Annex; and Human Rights Quarterly, Vol.9 (1987), pp. 122-135

cxi. ibid

cxii. Ibid, Para. 17

cxiii. Para. 70 re-affirms that the failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

cxiv. Ibid, para. 18

cxv. Ibid, paras. 37 and 40

cxvi. Ibid, para. 35

cxvii. See sections 4(1) and 5(3) of the Act.

cxviii. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) Human Rights Quarterly, Vol. 20 691-705

cxix. Ibid, para 695. It went further to state that the obligation to respect requires States to refrain from interfering with the enjoyment of the rights as guaranteed in the covenant, the obligation to protect requires States to preventviolations of such rights by third parties whereas the obligation to fulfill requires States to take appropriate legislative, administrative, judicial and other measures towards the realization of such rights.

cxx. This is part of the Concluding statement of the Judicial Colloquim held in Bangalore, India from 24-26 February 1998 popularly known as the "Bangalore Principles".

cxxi. Ibid

cxxii. Chap 10, LFN 1990

cxxiii. The Supreme Court held in Nemi v. State (1996) 7 NWLR (PT 452) 42 that absence of enforcement procedure in the African Charter does not constitute an impediment to the enforcement of the rights contained in it.

cxxiv. O. Nnamuchi, "Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria", Journal of African Law, Vol. 52, Issue 1 (2008) p.20

cxxv. Hereinafter referred to as "The FREP Rules".