IJCAL
INTERNATIONAL JOURNAL OF CONSTITUTIONAL AND ADMINISTRATIVE LAW
e-ISSN : P-ISSN :

# Public Morality and Constitutionalism in Restricting LGBTQ+ Rights: A Legal Analysis of Nigeria, Ghana, and Uganda

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## Abstract

Civil liberties are the cornerstone of modern democracies, yet many African nations continue to impose legislative restrictions on sexual freedoms under the guise of public morality. Nigeria, Ghana, and Uganda have enacted stringent anti-LGBTQ+ laws, often justified by appeals to sovereignty, tradition, and moral conservatism. This study critically examines the legal and constitutional legitimacy of such restrictions, exploring their consistency with international human rights frameworks. Employing a normative legal research method based on primary and secondary legal sources, this paper analyzes statutory provisions, judicial precedents, and constitutional interpretations in the three countries. Findings reveal that the reliance on public morality as a justification for derogating LGBTQ+ rights lacks a solid constitutional foundation and conflicts with internationally recognized human rights standards. The case of RTIER v FRN in Nigeria highlights a judicial shift towards recognizing sexual minorities' rights, offering a model for Ghana and Uganda. Furthermore, comparative insights from South Africa and India demonstrate how progressive constitutional interpretations can reconcile local moral values with universal human rights principles. The study concludes that while cultural relativism remains influential, constitutional safeguards and judicial activism play a crucial role in upholding fundamental human rights. It advocates for legal reforms that balance moral considerations with constitutional imperatives, ensuring equal protection for all citizens, irrespective of sexual orientation.

**KEYWORDS**: *LGBTQ+ Rights; Public Morality; Constitutionalism; Human Rights; Legal Restriction.*

## Introduction

Human Rights as a legal term is an amorphous concept and therefore must be confined within limits for a meaningful discourse. Human Rights are universal. They attach to individual persons merely because they are humans and natural. Diverse legal theories have evolved to justify the beneficial advantage of human freedoms to the modern man. Awhefeada and Mrabure conceive that the rights of all men evolved from the propositions of natural law and positivism.[1] The Nigerian Court of Appeal lent credence to the natural law roots of the rights of humans. Nasir, JCA observed in the case of Uzoukwu v Ezeonu,[2] that:

> *Due to the development of constitutional law in this field, distinct differences have emerged between "Fundamental Rights" and "Human Rights". It may be recalled that human rights were derived from and out of the wider concept of Natural Rights. They are rights which every civilised society must accept as belonging to each person as a human being. These are Human Rights. Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country, that is, by the constitution.*

The notion of fundamental human rights (FHR) has crystallised as the bedrock of emerging civilisations. In attempting to define fundamental human rights, Dakas made two broad classifications or groupings; these are: lex-lata and aspirations. According to him, human rights are demands or claims which are protected by law and have become part of the lex-lata while others remain aspirations to be attained in the future.[3] Ogbu[4] and Ehirim[5] agree with Dakas on those rights which have been legislated as statute *(lex lata)* but conceive future aspirations, that is, the human rights that ought to be, yet are not still enacted as statute, as lex ferenda.

The foregoing postulation attempts an incorporation of diverse generations of subjective rights in one definition.[6] Regrettably, some of these generation of rights remain imaginary as breaches afford no remedies to victims in Nigeria, Ghana and Uganda.[7] International law is the primary reference to the evolution of human liberties

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[1] U.V Awhefeada and K.O Mrabure, "Prevailing Human Rights Issues in the Nigerian Extractive Industry: A Critical and Comparative Discourse," *Journal of Law, Ethical and Regulatory Issues* 26, no. 1 (2023): 1–11.

[2] Court of Appeal, "Uzoukwu v Ezeonu," Pub. L. No. JELR 73835 (CA) (1991), 6.

[3] G.J Dakas, "The Implementation of the African Charter on Human and People's Rights in Nigeria," *University of Jos Journal* 3, no. 39 (1990).

[4] O. N. Ogbu, *Human Rights Law and Practice in Nigeria*, 2nd ed., vol. 1 (Enugu: Snaap Press, 2013).

[5] Ugochukwu Godspower Ehirim et al., "Strengthening Human Rights Protection in Nigeria: Safeguards Under the Police Act 2020," *Khazanah Hukum* 6, no. 3 (December 31, 2024): 269–93, https://doi.org/10.15575/kh.v6i3.39569.

[6] A. V. Cornescu, "Evolution of the Concept of Subjective Rights in the Main Law Schools and Great Philosophical Trends," *Annals Juridical Science Series* 4 (2010): 154–68; A. V. Cornescu and Dny Prava, "The Generations of Human Rights," in *Days of Law: The Conference Proceedings* (Masaryk University: Masaryk University Press, 2010).

[7] Dejo Olowu, "Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non Justiciable Constitutional Guarantees," *Saskatchewan Law Review* 69, no. 1 (2006).

in modern societies. The International Bill of Human Rights targets the recognition and enforcement of the dignity and freedom of man, anywhere in the world without discrimination.[8] Article 2 of the United Nations Universal Declaration of Human Rights (UDHR) provides that:[9]

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*[10]

International law generally holds individual's welfare paramount to state sovereignty.[11] Countries are, by their subscription to international instruments, obligated to promote policies that guarantee and prioritise human rights. However, the realist approach to modern state governance has shown that global ethical values such as human rights are considered a low priority. Consequently, fundamental human rights properly so called are such that are positive, subjective and enforceable, in the ordinary law courts.[12] They are formulated in accordance with the spirit and letters of the organic law of the sovereign state.

Crawford argues that sovereign countries consider 'beliefs and cultures' peculiar to them in formulation of policies or rights that solely lean towards national interest or the comfort of some conservative groups.[13] The Indonesian Constitutional Court has shown that a sovereign country's court can define human rights in line with national interest and different from the Western ideals. Thus, in upholding the Indonesian Blasphemy Act in 2010, the court held that the liberty in respect of choice of religion is not the same as the right to change one's religion or freely express oneself [in another religious outfit] in public square.[14]

What constitutes FHR has been codified and given a place of pride in the Nigerian Constitution.[15] While some rights have been expressly listed in the Nigerian Constitution,[16] others draw their existence from necessary implication. Accordingly, the FHR expressly stipulated by the CFRN are the rights to: life, dignity of human person; personal liberty; fair hearing; privacy; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; freedom of

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[8] V. B. T. Sepulveda et al., *Human Rights Reference Handbook* (Costa Rica: University of Peace, 2010).
[9] *Universal Declaration of Human Rights*, 1948.
[10] Manisuli Ssenyonjo, "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa," *Netherlands International Law Review* 64, no. 2 (July 2017): 259–89, https://doi.org/10.1007/s40802-017-0091-4.
[11] Y Muthmainah, "LGBT Human Rights in Indonesian Policies," *Indonesian Feminists Journal* 4, no. 1 (2016): 13.
[12] See Section 46(1) of the "Constitution of the Federal Republic of Nigeria" (1999).
[13] N.C. Crawford, *Argument and Change in World Politics; Ethics, Colonisation and Humanitarian Intervention* (Cambridge University Press, 2002).
[14] A Asma et al., "Blasphemy in Secular Democracy: The Case of Indonesia," in *Profane Sacrilegious Expression in a Multicultural Age* (University of California Press, 2014), 223–48.
[15] O.E. Okeke, "Pro-Justiciability Approach Towards Enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 14, no. 1 (2023): 109–10.
[16] Constitution of the Federal Republic of Nigeria.

movement; freedom from discrimination; and own immovable property in Nigeria.[17] Sexual rights are expressly unknown to the CFRN. However, by necessary implication, they are integral and inextricably tied to the right to life, dignity of human person, privacy, right to freely express oneself, right to freely assemble and associate with others, and freedom from discrimination.

The recognition of human liberties through the ages is a result of civil struggles. The agitation for the accommodation of sexual liberties and gender identity continues to win global appeal. Mulia posits that diverse international human rights instruments prescribe six basic principles upon which the fulfilment of human sexual rights is anchored.[18] These are:

1. The principle of protection for the sake of the development of children;
2. The principle of non-discrimination;
3. The principle of pleasure and comfort;
4. The principle of responsible freedom;
5. The virtue to respect and recognise human right; and
6. The virtue of fulfilment of liberties.

Sexual rights was the epicentre of discourse at Cairo in Egypt at the International Conference on Population and Development which held in 1994.[19] The Conference distilled principles of sexual rights and categorised them as follows:

1. The right to sexual pleasure without the concern of infectious diseases, undesired pregnancy or bodily harm;
2. The right to sexual expression and the right to make sexual decisions consistent with personal, ethical and social values;
3. The right to treatment, information, education and sexual health;
4. The right to bodily integrity and the right to choose when, how and whom to become sexually active with and be involved in a sexual relationship with full consciousness;
5. The right to enter into a relationship, including marital relationships with free and complete consciousness as adults and without concern;
6. The right to privacy and confidentiality in obtaining reproductive and sexual health care; and
7. The right to express sexuality without discrimination and freedom in reproduction.[20]

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[17] U.G Ehirim, "Sexual Orientation and Gender Identity in Nigeria: The Fundamental Human Rights of LGBTQ Persons to Sexual Liberty in Perspective," *Journal of Perspectives in Gender Development* 3, no. 1 (2023): 31.

[18] M Mulia, *Mengupas Seksualitas: Mengerti Arti, Fungsi, Dan Problematika Seksual Manusia Era Kita* (Indonesia: Opus Press, 2015).

[19] 179 Countries, including Nigeria and Ghana, attended the Conference

[20] United Nations Populations Fund (UNFPA), "Report of the International Conference on Population and Development Held in Cairo" (Cairo, 1994).

Fundamental human rights recognised by sovereign states should apply to citizens without discrimination and with all sense of equality.[21] Braun conceives the elastic ambience of equality as implicating non-discrimination which extends to sexual preferences and gender fixations, encompassing the essence of diversity and recognising the inherent worth of every individual.[22] The CFRN, however, provides for restrictions and conditions for derogation from rights of citizens.[23] It is argued that restriction of rights as envisaged by Section 45 of the CFRN is not coterminous with prohibition of rights.[24] The Federal High Court stated in Solomon Okedara v Attorney-General of the Federation,[25] that:

> *The restriction on freedom of speech as contained in Section 24(1) of the Cybercrimes Act was necessary in a democratic society as it relates to the interest of defence, public safety, public order, public morality or public health pursuant to Section 45 of the Constitution.*[26]

The reasons for a departure from an individual's right should be weighty and not based on the perceived sentiments or dislikes of an influential elite majority. Thus, one recurring reason for derogation from citizens' rights in Africa, particularly Nigeria, is public morality. The new media has been at the vanguard of promoting what appears to be a mob morality projected under the guise of public morality. The result is that it has become too risky to express peculiar sexual identity in Nigeria no matter how natural such expression may attach to the particular person.

This paper has been discussed under eight main subheadings and numbered for purpose of clarity. The first main division is this introduction which lays-out the foundation for the discourse. This is followed by the global attempts to recognise and protect LGBTQ+ Rights. The third subheading is Nigeria's approach to LGBTQ rights. This is followed by Ghana's approach to LGBTQ Rights and the Uganda's approach in the fourth and fifth segments respectively. The sixth subhead deals with public morality and law dovetailing into the evaluation of the case of RTIER v FRN & Anor in the seventh sub-heading. The eighth sub-head concludes the paper with far reaching suggestions.

In this paper, the terms 'lesbian', 'gay', 'bisexual', 'trans-sexual', 'transgender', 'intersexual', 'queer' and 'homosexual' with the acronym of LGBTQ are used to describe persons of sexual orientation.[27] These are persons whose sexual urge appears perverse or 'unnatural' to persons of 'normal' sexual inclinations who are unfortunately

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[21] *Section* 17(1) and (2)(a) and (b) of the CFRN. See also, *Section* 42 of the CFRN.

[22] T Braun, "Dignity in Diversity: Dismantling the Criminalisation of Sexual Orientation and Gender Identity Using the Right to Dignity," in *Human Dignity and International Law*, ed. A Gattini, R Garciandia, and P Webb (Brill Nijhoff, 2020), 138–52.

[23] *Section* 45 of the CFRN

[24] See *Din v African Newspapers of Nigeria Limited* [1990] LPELR – 947 (SC).

[25] *Solomon Okedara v Attorney-General of the Federation* [2019] LPELR – 47293.

[26] See, also, *Trustees of National Association of Community Health Practitioners of Nigeria & 2 Ors v Medical and Health Workers Union of Nigeria* [2008] 2 NWLR (Pt 1072) 575, 603.

[27] A Miller, "Sexual Rights Words and Their Meanings: The Gateway to Effective Human Rights Work on Sexual and Gender Diversity," *Yogyakarta Meeting*, 2006.

in the majority. A plus (+) sign may attach to the acronym to reflect its expansive scope. The United Nations has grouped the LGBTQ+ persons under the umbrella of sexual minorities.

## Method

The method used in this research is normative. The research is based on intensive desktop and library outcomes, review and analysis of relevant literature and extant law covering the subject matter. Accordingly, primary and secondary source materials are called in aid. The Constitution of the focus countries and other statutes and judicial pronouncements bearing on the discourse are reviewed. The interpretation of available data revealed human rights violations in Nigeria, Ghana and Uganda. The comparative analysis lent focus on the impunity that has become a common denominator for suppressing minority sexual rights against best global practices.

## Result & Discussion

### Global attempts to recognise and protect LGBTQ+ rights

The modern notion of FHR is aptly and succinctly ventilated in the American Constitution of 1776 which became the spirit behind the recognition of rights globally which resulted in the Universal Declaration of Human Rights (UDHR). The UDHR is a pivotal instrument in contemporary discourse on FHR. The UDHR emphasises in Article 1, that all individuals are born free and equal in dignity and rights. The principle of equality is a spring board for all arguments against discriminatory laws anywhere around the globe.[28] The provision proscribes discrimination under whatever colouration. The mention of 'sex' and 'other status' clearly envisages the evolution of LGBTQ+ community. The foundation principle of equality expressed in the UDHR resonates with the LGBTQ+ community's struggle for recognition and acceptance, underscoring the importance of dismantling systemic discrimination anchored on sexual preferences and gender fixation.[29]

UDHR, in Article 3, underlines the right to life, security and liberty of persons thereby fortifying the argument against violence and various forms of dangerous acts against LGBTQ+ persons, including torture.[30] The UDHR in Article 12, guarantees the right to privacy. The recognition of an individual's freedom to privacy implicates the right to define one's space within one's sexual preferences and gender personality without fear of molestation. Other international bills of human right with similar provisions have been interpreted to accommodate the guarantee for LGBTQ+ rights.[31]

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[28] The comprehensive wording of Art. 2 of the Universal Declaration Human Rrights leaves no grounds for exclusion of anybody howsoever.

[29] P.C. Aloamaka and E.T Kore-Okiti, "Human Rights Perspective on Sexual Orientation and Gender Identity: A Global Analysis," *Journal of Perspectives in Gender Development* 3, no. 1 (2023): 15.

[30] Article 5 of the Universal Declaration of Human Rights prohibits torture and inhuman or degrading treatments

[31] International bills of human right refer to the international human rights documents namely: UDHR, ICESR and ICCPR.

Another important Instrument is the European Convention on Human Rights (ECHR).[32] The ECHR exerts great influence on the recognition of some fundamental rights guaranteed in modern states which were hitherto part of the British Empire. Consequently, the ECHR rights-content was visible in the Nigerian Constitution at independence and the Republican metamorphoses as well as the 1979 and the current CFRN. Former British colonies, though not part of Europe maintained their ties with Britain which has from inception adhered to the ECHR. To this end, the fundamental rights enshrined in various constitutions of Nigeria, Ghana, Uganda, and other common wealth members-states of Africa are but a rehash of the rights and liberties proclaimed in the ECHR.[33] A large chunk of the rights enacted in the ECHR are contained in the African Charter of Human and People's Rights. The binding nature of the ACHPR was demonstrated by the Nigerian Appellate Court in Gani Fawehinmi v Sani Abacha & Ors.[34] In the case, Appellate Court categorically stated that the ACHPR is not only binding on Nigeria, it takes precedence in any event of conflict with Nigerian municipal laws.[35]

The ever-evolving landscape of human rights has made it imperative for the evolution of a more explicit framework to accommodate sexual liberties of Queer sexual personalities. The Yogyakarta Principles is a prominent soft law on the interpretation to be accorded international human rights instrument in respect of LGBTQ+ persons.[36] The principles were not however, endorsed by state parties but are, however, developed by a group of individuals with expertise in human rights and related global interests which are consistent with the UDHR and sundry international treaties. It provided framework for understanding how existing human rights standards intersect with sexual rights.[37]

Quinan, et al argue that the central concern of the Yogyakarta Principles is the recognition of the complex intersection between a human-person's identity and such persons rights.[38] Yogyakarta Principles comprise twenty-nine action points or ideals which cover a broad spectrum of human rights issues which includes equality, the right

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[32] ECHR was promoted by the council of Europe and was signed in Rome in November 1960 for the purpose of giving legal content and binding force to some rights and freedoms proclaimed in the UDHR.

[33] Ehirim et al., "Strengthening Human Rights Protection in Nigeria."

[34] *Fawehinmi v Abacha & Ors* [1996] 9 NWLR (Pt. 475) 7.10. See African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A, Laws of the Federation of Nigeria (LFN) 2004.

[35] This decision is disturbing in the light of the express provision of the CFRN in Section 1(3) which declares the supremacy of the CFRN

[36] Dominic McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law," *Human Rights Law Review* 16, no. 4 (December 2016): 613–68, https://doi.org/10.1093/hrlr/ngw030.

[37] A Park, "Yogyakarta Principles Plus 10: A Demand for Recognition of SOGIECSC," *North Carolina Journal of International Law* 44 (2018): 223.

[38] C L Quinan et al., "Framing Gender Identity Registration Amidst National and International Developments: Introduction to 'Bodies, Identities, and Gender Regimes: Human Rights and Legal Aspects of Gender Identity Registration,'" *International Journal of Gender, Sexuality and Law* 1, no. 1 (July 30, 2020), https://doi.org/10.19164/ijgsl.v1i1.971.

to privacy, protection from torture and violence, access to justice and the freedom to seek protective residence.[39] Thus, the principles harmonises the traditional templates on human rights with the peculiar challenges encountered by LGBTQ+ persons on daily basis. It affirms mechanisms to eradicate stereotypes and biases regarding sexual preferences and gender personality that restrict or prevent individuals from engaging in public life.[40]

From the foregoing, it is evident that international law and global institutions recognise and strengthen the sexual liberties of individuals irrespective of race, creed or origin.[41] Where rights have been violated on the excuse of sexual preference, such violations have been declared illegal and unlawful. In *Toonen v Australia*,[42] the United Nations Human Rights Commission (HRC)'s jurisdiction was activated on an alleged violation of the communicator's freedoms to privacy enshrined in Article 17(1) of the UDHR. The HRC declared that the proscription of consensual, adult homosexual acts under Tasmanian Law was discrimination on account of sex and therefore an infringement of the ICCPR Treaty. The decision illuminated the 'other status' phrase in Article 2 of the ICCPR to encapsulate sexual preferences. *Obergefell v Hodges*[43] is also a landmark case which had defined global perception on sexual orientation. In Obergefell case, the United States of America (USA)'s Apex Court upheld the constitutionality of same-sex marriage and upturned the ban on consensual adult homosexual acts in the entire country. The court granted reliefs against the infringement of human dignity and liberty of expression in favour of a transgender. In *September v Subramoney*,[44] September, a female transgender was imprisoned in men's prison facility. She applied to the defendant as the foremost authority in the prison facility to be allowed to enjoy her gender personality even in prison in order to enjoy her human dignity, equality and freedom of expression. The application was refused. Her application to enforce her FHR was successful against the facility authorities. Also, in *Bostock v Clayton County*,[45] the foremost Court of the USA stated that discriminatory employment rationalised on sexual preference or gender personality infringes Article VII of the Civil Rights Act of 1964. The legal victory decisively extended legal protections to LGBTQ persons in the workplace.

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[39] Morgan Carpenter, "Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles Plus 10," *Culture, Health & Sexuality* 23, no. 4 (April 1, 2021): 516–32, https://doi.org/10.1080/13691058.2020.1781262.

[40] E Polymenopoulou, "LGBTI Rights in Indonesia: A Human Rights Perspective," *Asia Pacific Journal on Human Rights and the Law*, 2018, 19.

[41] A Trithart, "A UN for All' UN Policy and Programming on Sexual Orientation, Gender Identity and Expression, and Sex Characteristics," International Peace Institute, 2021, https://www.ipinst.org/2021/02/un-policy-programming-on-sexual-orientation-gender-identity-expression-and-sex-characteristics.

[42] *Toonen v Australia*, Communication No. 488/19992, UN DOC CCPR/C/50/D/488/1992 (1994).

[43] *Obergefell v Hodges* [2015] 576 US.

[44] *September v Subramoney* (EC 10/2016) [2019] ZA EQC 4.

[45] *Bostock v Clayton County, 590 US [2020]*

## The Nigeria's Approach to sexuality and LGBTQ Rights

The reality of LGBTQ persons is a phenomenon in antiquity. It is as old as creation itself. The existence of persons with queer sexual orientation was recognised under the Hindu Scriptures.[46] In Indonesia, gay tourism flourished at tourists destinations creating the perception of its institutionalised acceptance.[47] The Buganda linguistics show that the phrase kulya ebisiyaga translated as 'engaging in sodomy' has been used in antiquity, prior to contacts with the Arabs and Europe.[48] Hence, ample evidence reveal that contrary to impressions that LGBTQ is a western ideology, the colonialists did not import homosexuality into Africa, they rather introduced abhorrence of it and normative machinery of surveillance and regulation for suppressing such instincts. Atuguba agrees with the foregoing historical assertion on sodomy. In his words, 'Judging by historical affiliations, the present criminalisation of sodomy in Ghana is inspired by the colonial laws of her former colonial rulers, the British'.[49] The British intolerance to sodomy is attributed to Common Law even before the legislation of the Buggery Act of 1533.[50] The British approach was inspired by Christian religious morality and 'sin' consciousness which conceived sodomy in the light of '...a detestable and abominable sin, among Christian not to be named, committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast'.

Nigeria is a highly religious society.[51] Religious and moral biases exert remarkable influence on attitudes and laws in respect of sexual orientation.[52] The two most influential religion in Nigeria, that is, Islam and Christianity perceive LGBTQ+ persons as sinners.[53] The law does not and should not set out to legislate against sin. The pendulum of law hovers at the via media as there is no universal moral standard between the extremes of maximum and minimum religious or moral requirements.

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[46] R.A.A Krishna, D Amirthavarshini, and J.C Rebekah, "LGBTQ Rights and Legislation in India: The Status Quo," *Journal of Integrated Research in Law* 3, no. 1 (2023): 3.

[47] Baden Offord and Leon Cantrell, "Homosexual Rights as Human Rights in Indonesia and Australia," *Journal of Homosexuality* 40, no. 3–4 (May 21, 2001): 233–52, https://doi.org/10.1300/J082v40n03_12.

[48] S Nanyonga-Tamusuza, *Baakisimba: Gender in the Music and Dance of the Buganda People of Uganda* (Routledge, 2005).

[49] Raymond A. Atuguba, "Homosexuality in Ghana: Morality, Law, Human Rights," *Journal of Politics and Law* 12, no. 4 (November 28, 2019): 113, https://doi.org/10.5539/jpl.v12n4p113.

[50] The Buggery Act of 1533 was the foremost anti-sodomy law which punished sodomy as a capital offence by its 1558 version

[51] Osita Nnamani Ogbu, "Is Nigeria a Secular State? Law, Human Rights and Religion in Context," *The Transnational Human Rights Review* 1, no. 1 (January 1, 2014): 135–78, https://doi.org/10.60082/2563-4631.1003.

[52] Oguejiofo C.P. Ezeanya et al., "A Critical Analysis of the Impact of Religion on the Nigerian Struggle for Nationhood," *HTS Teologiese Studies / Theological Studies* 78, no. 4 (June 13, 2022), https://doi.org/10.4102/hts.v78i4.7225.

[53] T.A Yohanna, "The Role of Religion in Fueling Homophobia in Nigeria," *Grassroots Researchers Association* (blog), 2020, https://www.grassrootsresearchers.org.

Consequently, the Nigerian society has shown its abhorrence of sexual orientation in diverse ways thereby subjecting LGBTQ+ persons to unprecedented tension. Abimboye conceives a record breaking number of rights violation of gays in Nigeria which takes the form of threat to life, jungle justices, blackmail and extortion, battery and assault, arbitrary arrests and illegal detentions.[54] Abimboye's figures fly in the face of current realities and graduated orchestrated repression of LGBTQ+ rights in Nigeria. Regrettably, most cases of attack on LGBTQ+ persons go unrecorded since such are largely unreported on daily basis. The experience has been awful for Queer sexual personalities in Nigeria since the dawn of the 21st century resulting in most cases to:

1. The criminalisation of LGBTQ persons
2. The criminalisation of association of LGBTQ persons
3. The criminalisation of gender expression of trans people
4. The criminalisation of sexual activities between males
5. The criminalisation of sexual activities between females
6. The dehumanisation by way of public 'flogging' of persons with sexual orientation
7. Death penalty.[55]

The Nigerian Criminal Code[56] which remains a relic of the British Colonial Rule in Nigeria criminalised certain aspects of sexual expressions.[57] This state of affairs aligns with South Asian countries such as India, Pakistan and Bangladesh which have similar colonial experiences.[58] However, the Supreme Court of India recently in Navtej Singh Johar v Union of India,[59] decriminalised all voluntary sexual activities among adults, including homosexuals.

In 2013, the Nigerian Government enacted the Same Sex Marriage (Prohibition) Act (SSMPA)[60] which enlarged the frontiers of the repression of the sexual liberties of Queer personalities in Nigeria. The Law was applauded by various religious sects and average Nigerians, particularly those in the law enforcement agencies. It is argued that the law which targets a particular sect earlier described as sexual minorities is discriminatory. When laws are made and enforced in discrimination, the result is

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[54] M Abimboye, *Nigeria Recorded 105 Cases of Rights Abuses against Gays in 2014* (Lagos: Lagos, 2015).
[55] Augustine Edobor Arimoro, "Crime or Human Right?: The Criminalization of Same-Sex Relationship Conundrum in Nigeria," in *Research Anthology on Inclusivity and Equity for the LGBTQ+ Community*, ed. Information Resources Management Association (IGI Global, 2022), 69–88, https://doi.org/10.4018/978-1-6684-3674-5.ch005.
[56] Criminal Code has existed in Nigeria since 1916
[57] Augustine Edobor Arimoro, "The Criminalisation of Consensual Same-Sex Sexual Conduct in Nigeria: A Critique," *Journal of Human Rights and Social Work* 4, no. 4 (December 2019): 257–66, https://doi.org/10.1007/s41134-019-00091-3.
[58] L.R Mendes, *State Sponsored Homophobia: A World of Survey of Laws Criminalising Same-Sex Sexual Acts Between Adults* (International Lesbian, Gay, Bisexual, Trans and Intersex. Association (ILGA), 2019).
[59] *Navtej Singh Johar v Union of India* [2018] INSC 790.
[60] Same Sex Marriage (Prohibition) Act 2013. The act came into force in 2014.

violence, inequality and exclusion which has led to the deprivation of basic rights such as the right to privacy, education and healthcare to LGBTQ+ individuals.[61]

In Bauchi State, thirty-eight men were arrested and tortured for being suspected gay. In the same state in January 2014, five men were charged before the Sharia court for forming a gay club.[62] Thousands of adherents of Islam protested to the court, armed with stones, demanding death sentences for the suspected gay.[63] A twenty-eight-year-old was tried and convicted for sodomy.[64] He was sentenced to a fine of three hundred Naira (N300) with 20 lashes of horse whip in public glare. While Nigeria's Criminal and Penal Codes prescribe about 14years incarceration for persons convicted of voluntary homosexual acts, the Islamic law adopted by the Muslim States of Northern Nigeria federation establish harsher sanctions. Comstock argues that the invocation of Sharia law in Nigeria to questions of homosexuality follows the pattern in other Muslim dominated states.[65] In May 2014, the Police arrested 26 suspects in Asaba, Delta State alleging lesbianism.[66] Also, in Delta State an angry mob stripped an intersex man naked. It took police intervention to bring the intersex into protective custody. In April 2017, 53 persons were rounded-up for celebrating gay marriage. They were arraigned in court for 'belonging to a gang of unlawful society'. The case afforded the government the opportunity to bring the first formal charges against its citizens under the SSMPA.[67]

The resentment of Nigerians grew against LGBTQ+ persons for their resilience in the face of repression. Consequently, more persons were arrested and charged to court in 2018, 2019 and up until 2021. In June 2022, 3 persons were sentenced to death through stoning by a the Bauchi State Sharia Court for same-sex sexual acts.[68] In August 2023 there was another hit on queer persons in Nigeria. Over one hundred persons were arrested at Ekpan, near Warri on the allegation of attending same-sex wedding ceremony. Sixty-nine of them were eventually arraigned in court.[69] While suspects were

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[61] Raul Macias Gil et al., "Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Communities and the Coronavirus Disease 2019 Pandemic: A Call to Break the Cycle of Structural Barriers," *The Journal of Infectious Diseases* 224, no. 11 (December 1, 2021): 1810–20, https://doi.org/10.1093/infdis/jiab392.

[62] BBC News, "Nigeria Islamic Court Tries Gay Suspects in Bauchi," *BBC News*, 2024, https://www.bbc.com/news/world-africa-25749308.

[63] S Edeh, *Anger as Suspected Homosexuals Escape Lynching in Bauchi* (Lagos: Lagos, 2014).

[64] Human Rights Watch, "Nigeria: Same Gender Marriage Ban Would Attack Rights," n.d., https://www.hrw.org/news/2011/11/01.

[65] Comstock Audrey L, "Gay Rights and U.S. Foreign Aid: A Look at Nigeria and Uganda," *The Journal of International Relations, Peace Studies, and Development* 2, no. 1 (2016): 2.

[66] Human Dignity Trust, "Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and Its Impacts," 2016.

[67] United States Department of State, "2017 Country Reports on Human Rights Practices – Nigeria," 2017, https://www.refworld.org/reference/annualreport/usdos/2014/en/98380.

[68] A Bakam, *Homosexuality: Bauchi Sharia Court Sentences Septuagenarian, Two Others to Death* (Lagos: Lagos, 2022).

[69] Editorial, 'Police Arrest Over 100 Gay Suspects Holding Wedding in Delta' *Vanguard* (Lagos, 29 August 2023). https://www.vanguardngr.com. See also, *EHC/ M/ 33c/ 2023: Commissioner of Police v*

in police custody, they alleged various forms of infraction of their privacy such as coercive anal inspections without their consents or the presence of their lawyers. It is disturbing that the police hurriedly rushed the defendants to court to obtain a remand order against them while awaiting the report of the State Director of Public Prosecutions (DPP). The remand order was made despite the right of defendants to immediate bail in the circumstances. As at January 2024, the DPP is yet to volunteer an opinion on the charge. In October 2023, seventy-six persons were arrested on the allegation of organising a homosexual party in Gombe State.[70] Persons of sexual orientation are tagged immoral and Nigerian government has copiously advanced the argument of protecting public morality as a strong reason for clamping down on the personal liberties of Queer sexual personalities through the instrumentality and enforcement of the SSMPA.

The plight of LGBTQ+ Persons in Nigeria has given momentum to conscious efforts to challenge and dismantle discriminatory laws in Nigeria, particularly the SSMPA.[71] The success of the legal battles signals hope and symbolizes a move towards equality before the law on matters of sexual rights.

## The Ghana's approach to sexuality and LGBTQ rights

Ghana has a shared experience with Nigeria and Uganda on sexual orientation and gender identity. Ghana's Constitution prohibits discrimination of all kinds. Reid observes that some police personnel are specially trained to handled LGBTQ+ cases because of the sensitivity required.[72] It is, however, illegal to engage in same-sex relationship in Ghana.[73] In May 2021, 21 persons were arrested in the Volta Region who were suspected to be LGBTQ+. Activists have engaged in legal battle to prevent the enactment of the Human Sexual Rights and Ghanaian Family Values Act which is projected to be one of the harshest legislations in Africa against LGBTQ+ rights. Amanda Odoi challenged the constitutionality of the Human Sexual Rights and Ghanaian Family Values Bill arguing that the Bill, if passed, would scare donor agencies and financial aids to Ghana. The Ghana Supreme Court declined the invitation to block the anti- LGBTQ Bill thereby endorsing the bill.[74]

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*Maxwell Ohwonohwo & 68 Ors.* (A Ruling of Honourable Justice C. E. Achilefu, Judge at High Court No. 1 Effurun Delta State on Monday, 4 September 2023 Remanding Defendants to Prison Custody)

[70] Amnesty International, "Nigeria: Authorities Must End Witch Hunt After More Than 70 Arrested for Attending Gay Party," 2023, https://www.amnesty.org.

[71] Rachel M. Schmitz et al., "The Cyber Power of Marginalized Identities: Intersectional Strategies of Online Lgbtq+ Latinx Activism," *Feminist Media Studies* 22, no. 2 (February 17, 2022): 271–90, https://doi.org/10.1080/14680777.2020.1786430.

[72] G Reid, "Progress and Setbacks on LGBTQ Rights in Africa – An Overview of the Last Year," *Daily Maverick*, 2023.

[73] E Arhin, "Re: President Akufo-Addo Has Approved Gay Marriage," n.d., https://presidency.gov.gh/index.php/briefing-room/press-release/635-re-president-akufo-addo-has-approved-gay-marriage-2.

[74] C Unini, "Ghana Supreme Court Rejects Bid to Block Anti- LGBTQ Bill," 2023, https//www.thenigerialawyer.com.

Ghana has anti-LGBTQ+ provision in the Criminal Code. Section 104 of the Criminal Code which penalises 'unnatural carnal knowledge' makes sexual orientation and gender identity illegal.[75] The Ghana anti-LGBTQ Bill is designed for the promotion of proper human sexual rights in such a manner as to promote the Ghanaian family values. Section 2 of the Bill prohibits Queer individual's engagement, sexual intercourse, marriage; surgery for sexual re-assignment or any procedure that alters the sex assigned at birth. Any marriage other than heterosexual marriage is void under the Bill.[76] The Bill appears to re-echo the obvious. Statutory marriage in Ghana is absolutely between a man and a woman.[77] Section 68 (2) of the Marriage Act mandates the registrar of marriage or his designate to address the couple as husband and wife. Same-sex couples are prohibited from adopting children in Ghana under the Children's Act of 2016.[78] The Bill further penalises any promotion, propaganda, and advocacy of Queer activities in Ghana.[79] It prohibits funding or endorsement of Queer projects and prescribes 5-10 years' imprisonment for persons convicted of the offences. Any Queer organisation or association in existence prior to the enactment of the Bill is dissolved.[80]

Article 17 of the Ghana Constitution of 1992 has provided some level of shelter for minority interests. The section provides for equality for all humans and proscribes discrimination. The Ghana Supreme Court was invited by some minority agitators to interpret the section which they claim was being violated by the discrimination meted against them in connection with their sexual orientation. In *T. T. Nartey v Godwin Gati*,[81] the Supreme Court held that lawful discrimination was permissible so long as it was not done on grounds of gender, colour, race, religion, ethnic origin, creed or economic or social status as set out in Article 17 (2), in as much as it was reasonable and aimed at a legitimate purpose. The court however did not address the status of LGBTQ+ persons specifically and particularly in respect of their social status.

## The Uganda's Approach to sexuality and LGBTQ rights

Uganda is known for operating the most stringent set of anti- LGBTQ statutes prescribing death penalty for 'aggravated homosexuality'. Gay parties in Uganda meet the stiffest police resistance which often lead to arrests and assaults of the LGBTQ+ persons. In May 2023, President Museveni endorsed the Anti-Homosexuality Act 2023. The statute creates new criminal offences, including homosexuality and voluntary same-sex sexual activity between adults. 'Aggravated homosexuality' is a

[75] See Section 104 of the Criminal Offences Act, 1960 (Act 29) as amended. See also, the penetration requirement in Section 99 of the Act.
[76] See Section 10 of the Bill for the Promotion of Proper Human Sexual Rights and Ghanaian Family Value. (The Bill)
[77] See also, Section 68 (2) of the Ghana Marriage Act, 1884-1985 Cap 127
[78] Section 86k (a) of the Children's (Amendment) Act 2016 (Act 937). The section is headed 'Restrictions on Intercountry Adoption'.
[79] Section 12 of the Bill.
[80] Section 15 of the Bill.
[81] *T. T. Nartey v Godwin Gati* [2010] SCGLR 74

capital offence in Uganda.[82] It is criminal to engage in LGBTQ Rights advocacy.[83] Non-Governmental-Organisations face prohibitive fines if convicted of promoting homosexuality in Uganda. Section 16 of the Act provides for extra territorial jurisdiction of the Ugandan Courts over the offences created in the Act while making the offences extraditable.[84] The Act also nullifies all international instruments that 'promote' homosexuality in Uganda.[85] The implication of the Section 18 of the Act is that for the purpose of enforcement of the Act, Uganda ceases to recognize and be bound by the International Bills of Right and other Treaties which by necessary implication promote the liberties of Queer sexual personalities.

Prior to the enactment of the Uganda Homosexuality Act 2023, several anti-LGBTQ+ sections are extant in Uganda's Penal Code Act of 1950.[86] Sections 145, 146 and 147 of the Penal Code criminalises consensual acts of 'carnal knowledge against the order of nature' and 'gross indecency'. Section 145 of the Penal Code, particularly prescribes imprisonment for life and imprisonment for seven years upon conviction for the act or attempt to commit the proscribed acts in the maximum. The Uganda Penal Code provisions against 'unnatural' consensual relationship is similar in context to Section 377 of the Criminal Codes of British-South-Asian countries of Pakistan, Bangladesh and India. The section criminalises 'un-natural relationships' and any other acts of 'gross indecency'.[87] LGBTQ persons appear to be helpless in Uganda as Section 15 (6) (d) of the Equal Opportunities Commission Act 2007 bars the Commission from investigating LGBTQ complaints.[88] The court is yet to decide on the suits challenging the provision which bar the commission from taking the complaints of sexual orientation persons on immoral grounds. However, attempts by citizens to challenge the anti-LGBTQ+ provisions in India was quashed at the Supreme Court of India in the case of *Kumar Kaushal v Naz Foundation*.[89] Similarly, in 2019, the High Court of Kenya stated that anti- LGBTQ+ statutes in the Criminal Code were not discriminatory and thereby upheld them.

Conversely, most countries have come to terms with the discriminatory ratio against anti-LGBTQ+ laws and have taken bold steps to repeal them. In 2019, Indonesia repealed the Penal Code of 1974 which criminalised same-sex relationships.

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[82] Same-sex sexual activity carries a sentence of life imprisonment upon conviction and ten years' imprisonment for attempt to commit the offences. See Clause 4 of the of the Bill Supplement No 13 to the Uganda Gazette No. 45, Volume CII. The Sexual Offences Bill was gazette on 14 January 2011.

[83] LGBTQ Rights Advocacy carries the punishment of 20 years' imprisonment.

[84] Section 17 of the Act.

[85] Section 18 of the Act.

[86] The Code became Penal Code Cap 120, Laws of Uganda 2000.

[87] See also Sections 214 and 217 of the Criminal Code Act (Nigeria) Cap C38 LFN 2004; Section 405 of the Penal Code Act Cap P3 LFN 2004. The laws criminalise same-sex consensual relationship and gross indecency. See also Section 347 of Cameroun Penal Code.

[88] A Jjuuko, "The Incremental Approach: Uganda's Struggle for the Decriminalisation of Homosexuality," 2023, https://sas-space.sas.ac.uk.

[89] *Kumar Kaushal v Naz Foundation* [2012] quashed by the Supreme Court of India. https://orina.net/context/wp-content/uploads/2012/04/Naz-SC-Transcript-2012-final.pdf.

Singapore has repealed Section 377 of the 2007 Penal Code which criminalised carnal intercourse 'against the order of nature' though it retains Section 377A which criminalises acts of 'gross indecency' between male persons. In 2020, Gabonese Parliament abandoned the 2019 law which was anti-LGBTQ+. All former Portuguese colonies in Africa have decriminalised same-sex conducts. South Africa is, however, the foremost African Country to permit same-sex relationships. In *Minister of Home Affairs & Anor v Fourie & Anor*,[90] the applicant challenged the constitutionality of the Common Law definition of marriage. The definition is codified in the Marriage Act No. 25 of 1961 and did not contemplate same-sex couples for the purpose of celebration of marriages.[91] The Constitutional Court of South Africa held that the definition of marriage at common law which has been codified by Section 30 of the Marriage Act is unconstitutional for being inconsistent with the constitution. The Court's decision inspired the enactment of the Civil Union Act No. 17 of 2006, giving liberty to same-sex couples.

## Public Morality and Law in democratic society: Nigeria in perspective

Morality is an imprecise concept relating to normative values which aim to complement virtue and reduce vices in individual's and social life generally. Norms of morality are the stipulations of some social groups.[92] Kant postulates that while morality governs a person's inner life and motivation, the law regulates the person's external relations.[93] Kantian thesis falls short of establishing a valid and practical explanation of the relation between these two vehicles of social control. The relationship between morality and law is more fluid and complex than Kant conceived. Morality in this sense has been qualified as 'Good Morals' which is used as a twin pillar to 'Public Order' in some jurisdictions. Shahabi and Shahidi conceive that there is no substantive difference between 'Good Morals' and 'Public Order' except that while public order is statutory, 'Good Morals' implicate legal propositions that are non-statutory.[94] 'Good Morals' is a reflection of the confluence between human liberties and the statute. Article 7 (3) of the Constitution of the Netherlands indicates 'Good Morals' as a condition for derogation of rights pertaining to freedom of the media. The use of the clause 'Good Morals' portends that there are certain moral parameters that

[90] *Minister of Home Affairs & Anor v Fourie & Anor* [2006] ZACC 19.

[91] See Section 9 of the Constitution of the Republic of South Africa 1996 which prohibited discrimination against same-sex partners.

[92] Amima Alistar, "The Relation Between Law and Morality," *Proceedings of the 12th International RAIS Conference, April 3-4, 2019* 3, no. 4 (2019).

[93] Katrin Flikschuh, "Metaphysical Elements of Justice," *History of Political Thought* 20, no. 2 (1999): 250–71.

[94] نگار شهیدی», اخلاق حسنه «و »نظم عمومی «چون منبع اصول و قواعد حقوقی تأملی بر چگونگی and مهدی شهابی گذار از کارکرد سلبی به کارکرد ایجابی نهادهای حقوقی", □□□□□ □□□□ □□□□□□□ □□□□□□□□, 48 )□□□□ □□□□ □□□□□□□(, no. 3 (September 2018), https://doi.org/10.22059/jlq.2018.224687.1006856.

are not good enough to sustain the derogation of human rights. Consequently, any reasons advanced for the derogation of a person's liberties must pass the test of judicial scrutiny. The Spanish Constitution allows for derogation of rights 'if necessary to maintain public order'.[95] It is posited that 'Public Order' should only be resorted to as justification for derogation from citizens' rights where the acts, dispositions or rights sought to be curtailed are disruptive. Such should be of public nature, not expressive of private proclivities as in cases of sexual orientation. It suffices that both morals/ public order and law are sources of the rule of law. The marriage between both norms is one of inconveniences.

Generally, people practice morality to develop interpersonal relationships but they abide by the law to maintain order in the society as established by legal rules.[96] Morality is related to law in many ways but the fundamental aim of law is to rectify the moral deficiencies associated with the circumstances of legality. The gap between law and morality may be blurred in some situations where both are inseparable.[97] Public morality is conceived as the minimum standard of conduct owed to others in order to obviate imposition of individual harm and societal cost. Public morality, like public interest, is a relative term often used by the elite to promote their selfish interests vis-à-vis political stability and social order. Suffice it to say that public morality is not superior to private morality in a quantitative sense; it nonetheless differs and is superior in a formal sense. Violations of personal morality are generally not sanctionable by the legal system.[98] Personal or private morality is the maximum freedom allowed every individual but which must be consistent with the integrity of the society. It should not be the business of the law to penalise behavioural patterns within the ambit of private morality. Private morality should be identified and respected as much as possible. Delvin disagrees with attempts to classify homosexuality as private morality to remove it from the realm of law enforcement.[99]

While Europe and the United States of America make frantic efforts to get rid of moral statutes in their books, African countries like Nigeria, Ghana and Uganda have refused to reason in like manner as they believe that those mores are best galvanise their societies together in line with Delvin's disintegration thesis. Africa as a continent has a historic distaste for homosexuality and bestiality. Consequently, Okere argues that the issue of homosexuality presents no moral equivocation to natural law and African customary sexual relations but also repulsive to the sensibilities of most Africans.

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[95] See Article 16 of the Spanish Constitution 1978.

[96] Willy Moka-Mubelo, *Reconciling Law and Morality in Human Rights Discourse: Beyond the Habermasian Account of Human Rights*, vol. 3, Philosophy and Politics - Critical Explorations (Cham: Springer International Publishing, 2017), https://doi.org/10.1007/978-3-319-49496-8.

[97] Xhemajli Haxhi, "The Role of Ethics and Morality in Law: Similarities andDifferences," *Ohio Northern University Law Review* 48, no. 1 (2021): 3.

[98] Tyson John M, "Morals, Ethics, and Laws: What Commonalities Remain?," *Liberty University Law Review* 14, no. 1 (2019).

[99] Simon Lee, *Law and Morals: Warnock, Gillick, and Beyond* (Oxford ; New York: Oxford University Press, 1986).

Okere's support for the concept of collectivist culture which diminishes the peculiarities and sanctity of individual citizens is regrettable. The postulation is tainted with hasty generalisation and bereft of empirical substance. This is because neither Nigeria nor Africa has a monolithic or universal culture as to be so united in stigmatising homosexuality. Okere validated his postulation that morality has had and continues to have a refining influence on positive law in Nigeria with a panoramic review of the Nigeria corpus juris.[100] It is posited that the laws put forward by the author derive their validity from universal practices rooted in superior morality rather than African customs, without more.

The ink that has flown in the argument for and against the liberties of LGBTQ personalities in the aftermath of the enactment of the SSMPA highlights the conflict between cultural or traditional values or cultural values, religious beliefs and the generational evolution of human rights across the globe.[101] Chimakonam and Agada aptly describe the development as contention between universalism and cultural relativism in human rights.[102] Universalism advances the argument for unmitigated global applicability of certain rights such as sexual with equal force. Conversely, cultural relativists argue against the imposition of Western LGBTQ+ ideals on Africa as a kind of cultural colonialism. Cultural relativists, which are in majority see the LGBTQ liberties as bizarre, an affront to African culture. The group emphasis the primacy of cultural values, sovereignty and constitutional basis of human rights. This portends that whatever rights are not expressly stated in the constitution cannot be enforced by necessary implication.

Similarly, Ghana has evinced too formidable resilience and grip to morality and culture. Religious leaders, traditional leaders and some legal luminaries are united in the promotion of the argument of culture, morals and values in the proposition of comprehensive legislative onslaught against perverse sexual conduct antithetical to public morality.[103] The current state of the law shows that the country is not perturbed by international advocacy to decriminalise voluntary adult same-sex conducts. The resistance to international pressure and the recent Supreme Court blocking of the move to stop the passage of anti-LGBTQ law by the Ghanaian Parliament reveals a determination to be insulated from the pressure and agitation for the incorporation of

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[100] B.O Okere, "The Relationship of Law and Morality: Dichotomy or Complementarity," *Nigeria Judicial Review* 9 (2010): 9–12.

[101] Carmen H. Logie, Amaya Perez-Brumer, and Richard Parker, "The Contested Global Politics of Pleasure and Danger: Sexuality, Gender, Health and Human Rights," *Global Public Health* 16, no. 5 (May 4, 2021): 651–63, https://doi.org/10.1080/17441692.2021.1893373.

[102] Jonathan O. Chimakonam and Ada Agada, "The Sexual Orientation Question in Nigeria: Cultural Relativism Versus Universal Human Rights Concerns," *Sexuality & Culture* 24, no. 6 (December 2020): 1705–19, https://doi.org/10.1007/s12119-020-09705-9.

[103] The National Coalition for Proper Human Sexual Rights and Family Values, an amalgamation of Christian, Muslim Organisations; Traditional Rulers, Leaders of Thoughts and Institutions was inaugurated on 18 December 2013 with mandate to proffer researched response to the menace of LGBTQ in Ghana.

same-sex marriages into the country's domestic law.[104] The public statements of Ghana's leadership has not helped the argument. Ghana's fury driven by the will to enforce morality has resulted in the elevation of its cherished moral values to override international conventions recognising LGBTQ rights. In the same vein, Uganda has leveraged on the ideals of morality, religion and culture to strengthen the repression of LGBTQ conducts. The Ugandan anti-LGBTQ legislation aims to primarily provide a broad-based legal framework to preserve the values and traditions of Ugandans against attempts at the imposition of sexual promiscuity.[105]

Anti-LGBTQ laws in Uganda are also known as the Victorian Morality Laws.[106] This is because their strength is in the sentiment of morality, not law properly so called. Be that as it may, good laws should be obeyed as much as good morals. In limiting free moral autonomy and compelling obedience, the law is in itself essentially immoral. The law and public morality converges at the point of citizens' rights which should not be lightly divested. There is no gainsaying the fact that when a fundamental right offends public morality or common good, the public morality or interest outweighs such personal right.[107] Nevertheless, the CFRN is the organic take-off point on any legal voyage to discover what constitutes public morality in Nigeria and it is a critical role for the judiciary to perform.[108] Thus, in Equality v Minister of Justice, the South African Constitutional Court held,

> *The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded upon deep political morality. What is central to the character and function of the state, however, is that the dictates of the morality which it enforces and the limits to which it may go are to be found in the text and spirit of the constitution itself.*[109]

Public morality must therefore be interpreted to serve the object and purpose of the CFRN on maintenance of social order. The social order of the Nigerian State is established on the virtues of equality, freedom and justice[110] which should not be compromised. Section 17 (2) of the CFRN provides that:

1. every citizen shall have equality of rights, obligations and opportunities before the law;

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[104] Africa News, "Homosexuality Not on Ghana's Agenda – President Akufo-Addo," *Africa News*, 2017, https:///wwwafricanews.com.

[105] See the Memorandum to the Bahati Bill (Uganda anti-LGBTQ Law) which was gazette as Bill Supplement No 13 in No. 45 at Volume CII of Uganda Gazzette, 25 September 2009.

[106] Jjuuko, "The Incremental Approach: Uganda's Struggle for the Decriminalisation of Homosexuality."

[107] *Nasiru Bello v Attorney-General of Oyo State* [1986] 3 NWLR (Pt 45)825.

[108] A Arimoro, "The Clash Between Human Rights and Morality: A Critical Role for the Judiciary Towards Decriminalisation of Same Sex Relationships," in *Global Perspectives on the LGBT Community and Non-Discrimination* (IGI Global, 2022), 26–30.

[109] *Equality v Minister of Justice* [1999] 1 SA 6.

[110] Equality is fairness and justice but justice is the noblest and most splendid of concepts which sees that each man receives that which is due to him, no more less. See J.A Yakubu, "The Equal and Unequal Scales of Justice," *University of Ibadan Journal of Private and Business Law* 3 (2002): 195.

2. The sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced; and
3. Governmental actions shall be humane.

Consequently, public opinion, however weighty, should not take the place of public morality. In *S v Malwanyane*,[111] the Constitutional Court of South Africa held as follows:

> *Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The very reason for establishing (the constitution) and for vesting the power of judicial review in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and social marginalised people of our society.*

## RTIER v FRN & Anor.

This case is the foremost challenge to the constitutionality of the SSMPA. The Plaintiff is a registered non-governmental organisation with the object to galvanise the interests and fight for 'sexual minorities' rights in Nigeria.[112] By an originating summons, plaintiff contested the constitutionality of certain 'offensive' sections of the SSMPA which implicate the proscription of the very essence of plaintiff's existence. The law rendered plaintiff's members' ability to associate freely illusory and illegal. Plaintiff specifically challenged the provisions that:

1. Prohibits the incorporation and maintenance of gay associations;
2. Punishes the incorporation and running of gay organisations and public show of amorous relationship with ten years imprisonment; and
3. Punishes the solemnisation, administration, witnessing or anchoring of same-sex marriage or encourages the incorporation of gay associations, with ten years imprisonment.

Consequently, it was contended for the plaintiff[113] that the specific provisions of the SSMPA violates fundamental rights guaranteed under the CFRN.[114] Plaintiff's

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[111] *S v Malwanyane & Anor* [1995] ZACC 3 (CCT3/94); *Patrick Reyes v The Queen* [2002] 2 A. C. 235, 246.

[112] The Registered Trustees of the Initiative for Equal Right (RTIER) v Federal Republic of Nigeria (FRN) (Suit No: FHC/L/CS/196/2020, Judgment Delivered 5 October 2023 by A. Lewis-Allagoa [Judge] of the Federal High Court, Lagos Division).

[113] Plaintiff was represented by Oba Nsugbe, Queen's Counsel (QC) and Senior Advocate of Nigeria (SAN) who led Chizelu Emejulu in the matter.

[114] See *Sections* 39(1) and 40 of the CFRN fundamental rights to freedom of expression: assembly and association. See also, Articles 8, 9 and 10(I) and II of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation of Nigeria (LFN) 2004 (ACHPR).

object depends heavily among others, on the following interactions which were criminalised by the SSMPA:

1. the assistance of staff and volunteers to organise meetings and initiatives;
2. The ability to liaise with stakeholders and constituents of the LGBTQ+ community;
3. The freedom to advertise their services and promote their activities to the LGBTQ+ community through social media and other means; and
4. The willingness of third parties to provide meeting and office spaces.

It was the case for respondents that the SSMPA was valid having been enacted in consonance with Section 45 of the CFRN.[115] Section 45(1) of the CFRN stipulates that:

> *Nothing in Sections 37, 38, 39, 40 and 41 of this Constitutions shall invalidate any law that is reasonable justified in a democratic society –*
>
> 1. *In the interest of defence, public safety, public order, public morality or public health; or*
> 2. *For the purpose of protecting the rights and freedom of other persons...*

Respondents argue that the issue of homosexuality falls within the ambit of public morality as majority of Nigerians disapprove of same-sex sexual activities. They demonstrated instances of restriction of the liberties to free expression by the instrumentality of Criminal Defamation, Cybercrimes Act and Sedition Laws.[116] Thus, they urged court to dismiss the case of the plaintiff. The courts had in *Olawoyin v Attorney-General of Northern Nigeria*,[117] considered cases when restrictions may be placed on fundamental rights of citizens. In considering when a legal restriction is not excessive, the court laid down the following requirements:[118]

1. The restriction shall be defined by statute. This requirement is fulfilled where there is a formal law or regulation made by legislature in a sufficiently express and unambiguous language. Ambivalent or vague provisions does not suffice.
2. The restriction must pursue a constitutionally recognised objective. These objectives are the interest of defence, public safety, public order, public morality, public health, rights and freedom of other persons.
3. The restriction must be necessary and proportionate. Such restriction should be the requisite, least restrictive means to protect constitutional objectives.

The statements of the National Human Rights Commission (NHRC) which attended at the hearing of the suit as amicus curiae was to the effect that:

> *...in terms of criminalisation and discriminatory law enforcement, the government actively sponsors this discrimination while, in other cases, it passively neglects its duty to provide protection to gay and lesbian equal to that received by*

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[115] Respondents were represented by Messrs Olaide Oduoluwo- Balogun and Oludare Ibiola.

[116] See *Chukwuma v Commissioner of P*olice [2005] 8 NWLR (Pt 927) 278, 287 (CA). See also, Article 18 of the ICCPR.

[117] *Olawoyin v Attorney-General of Northern Nigeria* [1961] All NLR 269.

[118] *Abdulkareen v Lagos State Government* (LSG) [2016] All FWLR (Pt 850) 101.

> *their heterosexual counterparts...these state actions have resulted in serious and oftentimes violent violations of political and social rights as well as basic rights to life, health, and dignity of persons and individuals.*[119]

The trial Federal High Court (FHC) agreed with defendants on the position that the freedoms enshrined under Section 39 of the CFRN are no absolute rights and therefore are subject to some limitations in accordance with Section 45 of the CFRN.[120] To this end, the UDHR contains provisions which allow derogation from human rights in a democratic society. The Nigerian apex Court had earlier in the case of *Ude v Nwara*[121] stated that any statute which tend to take away the liberty of a citizen must be construed against the legislature. In *Awolowo v Federal Minister of Internal Affairs*, the court held that the provisions dealing with the liberty of citizens is the primary duty of the court of law to promote their observance. Consequently, Lewis-Allagoa J, following a line of decided cases, was persuaded by the arguments of plaintiffs and the independent position of the NHRC. The court called in aid the Appellate court's decision in *Abdulkareem v Lagos State Government* (LSG)[122] and held as follows:

> *Fundamental Human Rights are not ordinary rights, they are elevated rights, some of them have their origin in international convention or treaties. They are so special a class of rights and no persons shall be deprived of the enjoyment of any such rights except by the proper observance of due process of law.*

The court found that the fact that the plaintiffs are persons naturally predisposed to LGBTQ preferences as human beings by no choice of theirs, criminalising or totally prohibiting such natural predisposition rather than restriction was an over-kill, excessive or disproportionate action by law. Consequently, the court rejected the argument of public morality as justification for prohibition or repression of human rights, particularly the freedoms of expression, assembly and association of LGBT persons in Nigeria and struck down Sections 4(1), 5(2) and 5(3) of the SSMPA declaring them unconstitutional, null and void for being inconsistent with the provisions of Sections 39 and 40 of the CFRN; and Articles 9 and 10 of the ACHPR.

## Lessons from RTIER v FRN & Anor.

The following lessons may be taken out from the judgment in RTIER v FRN & Anor.

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[119] Messrs E. Daffe and Oludare Ibilola represented the NHRC. The Public Interest and Development Law (SPIDEL) of the Nigerian Bar Association was represented as *amicus curiae* by M. O. Ubani.

[120] *Din v African Newspapers of Nigeria Limited* [1990] LPELR 947 (SC); *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & 2 Ors v Medical and Health Workers Union of Nigeria* [2008] 2 NWLR (Pt 1072) 575, 603.

[121] *Ude v Nwara* [1993] 2 NWLR (Pt 277) 638

[122] *Awolowo v Minister of Internal Affairs* [1962] L. L. R. 177; *Adebayo v Kolawole* [1985] 6 N. C. L. R.323.

1. The thin line between restriction and prohibition of rights should be identified and respected. Outright prohibition of fundamental rights whether by legislation or policy framework should be roundly resisted.
2. Public morality should be distinguished from public opinion. While public morality should be discovered from the letters and spirit of the CFRN which is itself a product of superior morality, public opinion may be articulated on social media platforms.
3. FHR as guaranteed under the CFRN should apply to all individuals with equal alacrity without reference to sexual orientations.
4. Sections 4(1), 5(2) and 5(3) of the SSMPA no longer represent the law in Nigeria, especially as no appeals have been filed against the decision of the FHC in the matter. Accordingly, prohibitions on the registration and sustenance of gay organisations; punishments for the incorporation and administration of gay associations and public show of amorous relationship with ten years imprisonment; and punishments for the solemnisation, administration, witnessing or anchoring of same-sex marriage or supports for the registration of gay organisations, with ten years imprisonment have been set aside. On the strength on the decision, LGBTQ+ community may meet anywhere in Nigeria and express their sexual rights without any fear of molestation or penalty.

## Conclusion

Public morality as justification for enactment of laws which tend to derogate from citizens' rights is not a myth or a blanket shield. The courts can, in very deserving cases probe the claim to public morality, good morals or public order rationale for legislations that define human dignity. The status of fundamental human rights provisions on the hierarchy of statutes makes it imperative for reasons advanced for divesting citizens of their rights to be properly interrogated. There is nothing magical about the phrases: public morality, good morals or public order until they are subjected judicial scrutiny. The Ghana and Ugandan laws that take away the liberties of citizens of Queer sexual inclinations and gender personalities on grounds of African family values or other mores as against express provisions of the Constitution and other Statutes may not survive the fire of judicial probe. The case of RTIER v FRN & Anor has provided the opportunity to re-emphasis the position that citizens' rights should not be lightly taken away. Where there is a conflict between culture, traditions and religious beliefs on the one hand and citizens' right on the other hand, citizens' rights should prevail. Fundamental Human Rights are superior morality which must be held sacrosanct within public and private domains. To do otherwise would endanger the very foundations of a civilised society. To this extent, the decision in RTIER v FRN & Anor is a bold statement by the judiciary. It is a springboard which offers a glimmer of hope to the LGBTQ+ community in the focus African countries.

## Acknowledgement:

The author acknowledges Chizelu Emejulu, Esq who supplied the certified true copy (CTC) of the decision in RTIER v FRN & Anor. No funding has been received for this work. There is no conflict of interest.

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