



Universal Human-Rights Protection for Sexual Minorities: Analysing Domestic Non-Recognition in Nigeria, Kenya and Malawi

Ugochukwu Godspower Ehirim¹

¹Faculty of Law, Delta State University, Abraka (Oleh Campus), Nigeria

Correspondence: ehirim.ug@delsu.edu.ng

Article Info

Article history:

Received Sept 5th, 2026

Revised Oct 12th, 2026

Accepted Oct 20th, 2026

Keyword:

Constitutional rights;
Criminalisation; Heterosexuality;
LGBTQ+ rights; Sexual
orientation.

ABSTRACT

This article examined the protection of sexual minorities' rights in Nigeria, Kenya and Malawi against universal legal guarantees of dignity, equality, non-discrimination, privacy and freedom of expression. Using doctrinal legal research, it analysed constitutional provisions, criminal statutes, international human rights instruments, case law and scholarly literature, drawing comparisons from other jurisdictions. The study traced the historical development of rights protection and considered the continuing influence of inherited anti-sodomy legislation and public morality arguments in the three common-law jurisdictions. It found persistent tension between universal human rights commitments and domestic laws penalising consensual same-sex conduct, although judicial decisions have provided some protection for association and non-discrimination rights. The analysis highlighted contrasting approaches in the United Kingdom, South Africa and other jurisdictions that have recognised broader sexual minority protections. The article concluded that Nigeria, Kenya and Malawi should reconsider laws restricting consensual sexual conduct, interpret constitutional protections more inclusively and strengthen compliance with their applicable international human rights obligations.



© 2026 The Authors. Published by Punggawa Legacy Center. This is an open access article under the CC BY license (<https://creativecommons.org/licenses/by/4.0/>)

INTRODUCTION

The evolution of man in history has experienced the relationship and co-existence of diverse individual rights in the society. The contemporary definition of human rights identifies the dignity attaching a human as a complex mingle between a person's identity and such a person's rights (Quinan et al., 2020). The question of sex as a status attaches every human at birth, however the definition of one's sexual expression is a preference that has engaged informed debates locally and internationally. This has given impetus to the search for a unified definition of terms such as: sexual minorities, sexual orientation, gender identity, and related concepts. Sexual minorities implicate a group of persons whose sexual expression is at variance with heterosexuality, including gay, lesbians, and bisexual persons against the backdrop of the generally populous heterosexual community of persons (Romer v Evans, 1996). Sexual minorities' rights resonate with the general human rights protections available to individuals whose sexual characteristics or orientation, and gender identity differ from the dominant heterosexuals in a given community. Postulation of sexual minorities liberties interrogates how constitutional doctrines of human freedoms, including dignity, equality, protection from violence, non-discrimination, and privacy apply to the community of non-heterosexual persons

The energies channeled into attempts to rationalise the rights to individuals' sexual expressions demonstrate the elastic ability of rights theories to accommodate contingencies that have challenged the human rights concept as an authentic global norm. The ever-evolving landscape of human experiences involving state actors, international rights advocates and conservative stakeholders intensify the debates over specific definitions of human rights concept. To this end, scholars are unable to agree on universal

constituent of human rights, particularly in respect of some less theoretical aspects such as the rights to sexual expression. Yogyakarta Principles in its preamble stated the rights inherent in sexual expression and gender preferences to implicate “each person’s capacity for profound emotional, affectional and sexual attractional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender (Park, 2018).” The lack of consensus on sexual minorities rights in its various manifestations has posed a critical challenge to the sustenance of the old theories in the face of a desperate imperativeness to re-calibrate the entire human rights theories for the purpose of inclusivity by a bottom-up approach (Chase, 2016). The struggle for inclusivity implicating liberalisation of human rights, particularly in Africa has gained impressive momentum in recent years (Aloamaka & Kore-Okiti, 2023). The exclusion of some classes of persons from the umbrella of human rights is not inherent to the universal framework of human rights and has been the flash point of agitation. Notwithstanding the merit of the argument for inclusivity, the beneficiaries of the normative privilege who constitute the powerful majority have mobilised intensive push-back campaigns which have manifested in the penalisation of these non-heterosexual, natural sexual tendencies in Nigeria, Kenya and Malawi. The choice of Nigeria, Kenya and Malawi demonstrates the countries’ shared common law heritage and united defence for African values.

The Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948 advocates inclusion in diversity. (United Nations General Assembly, 1948) The efficacy and general applicability of transnational legal framework has at all material times been limited by the principle of state sovereignty. However, the UDHR provides in Article 2 that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” Although, it may be argued that the UDHR did not specifically address issues of sexual orientation and gender identity, some scholars contend that the scope of the Article 2 encompasses the idea of sexual minorities’ rights as the essence of diversity is the recognition of the inherent dignity of every human (Braun, 2020). On the basis of inclusivity, rights of sexual minorities as fundamental rights have been the bases of legal challenges of discriminatory laws across the globe, and demand for equal protection of all persons before the law. In *Secretary for Justice v Yau Yuk Lung Zigo and Lee Kam Chueu* (2007) (Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen, 2007) the Hong Kong Court of Final Appeal, nullified a statutory provision which criminalised homosexuality and declared it unconstitutional. Czechoslovakia and Hungary led Europe in the decriminalisation of sexual preferences comprised in the ancient Buggery or Sodomy Laws by 1961 (Narayan, 2006). Former British colonies inherited the Sodomy Laws as Victorian Morality following their relationships with their colonial masters. Long after the end of colonialism, Nigeria, Malawi and Kenya are among African countries that have stuck with these laws in contravention of their constitutions and international treaties to which they subscribe (Constitution of the Kenya, 2010). This article investigates why despite being signatories to international treaties prohibiting discrimination on ground of sex, the focus countries retain the practice of discrimination against sexual minorities; and whether sodomy laws themselves are consistent with the constitution of the Nigeria, Malawi and Kenya. The common denominator with the focus countries in this study is the Received English Law (which includes buggery) in contradistinction with other African countries colonised by France.

The concept of sexual orientation may differ in many material particulars with gender identity. The distinction is important because assignment of sex is a natural phenomenon. It follows that when the law refers to sex in any instrument, it is meant that identity assigned to one at birth, rather than by choice (Constitution of Nigeria [CFRN], s. 42). By the laws of Nigeria, sexual orientation can elicit diverse penal and civil consequences, especially when such orientation results in same-sex relationships. Sexual orientation resonates with a person’s manifest amorous attraction which could be to a man, woman, neither, or both. However, gender identity refers to the biological-sex personality with which an individual identifies. While sexual orientation deals with attraction (romance), gender identity focuses on (inherent) personality. Gender identity is used to describe a situation where a person identifies with a sex other than that which was assigned to such a person at birth. For example, a gay’s gender identity is male, his sexual orientation is male but a transgender has an imprecise gender identity which obfuscates their sexual orientation. It is to avoid these construction complexities that Nigeria’s Same-

Sex Marriage (Prohibition) Act (2013) was silent on sexual orientation and gender identity and instead circle on prohibition of same-sex amorous relationships, gay, and lesbians.

This paper is structured into eight main sections, each dealing with a distinct aspect of the discourse. The foregoing section lays the foundation for the work by way of introduction. The paper concludes by aligning the laws of the countries impeding the sexual liberties of individuals with the greater ideals of international norm and contemporary legal thoughts on human rights in pursuit of a just and equitable world for all persons. Sexual minorities properly so called are group of persons whose sexual expressions, orientations or practices are different from those of heterosexuals. They may go with the appellation of LGBTQ+.

RESEARCH METHODS

This article adopts a doctrinal research approach in dealing with the subject matter. The authors reviewed existing literature -from historical times to the present milieu- on the issue of sexual minority rights in the select countries. Leveraging primary and secondary sources, the article analyses constitutions, statutory provisions, international instruments, and case law while taking advantage of soft law and relevant scholarly publications as secondary sources to provide deeper understanding of the application of the relevant laws and instruments bearing on the rights under discourse. Data was selected using the approach of exclusion and inclusion. By this mechanism, diverse relevant data were identified by engaging the SLR framework (Paul & Criado, 2020). A total of a ninety-four (94) material literature were collated, including statutes, case law, books, articles, and internet sources. Internet sources were sourced by imputing the keywords into academic databases like Google Scholar, Academia, ResearchGate, and Scopus. A meticulous data-content analysis was thereafter engaged to have the materials sifted and considered on a one-on-one basis according to relevance (Ehirim, 2026, p. 51). Accordingly, statutes, soft laws and case laws with binding forces on the select countries are highlighted. The reference to countries outside the focus countries is for comparative purposes of comprehensive analysis of the practical legal realities in the focus countries resulting in constructive recommendations in the conclusion.

RESULTS AND DISCUSSION

The Emergence and Recognition of Human Liberties on the African Continent

The idea of 'human liberties' developed in antiquity from the postulations of natural rights. It could be argued that human right is as ancient as human civilisation and has been a topical question for centuries. These set of rights apply in contemporary society as legal rights which is a generic term for the amalgam of moral human rights, universal rights and constitutional liberties. Whereas the principal moral rights refer to life, liberty, equality, privacy, free speech, association, and presumption of innocence with which all individuals are endowed at creation, the universal rights are those rights declared in the international bills of rights (Roberts, 2014), while constitutional rights are the liberties a sovereign state recognises as inuring in favour of its citizens. In Nigeria, constitutional rights are contained in Chapter IV of the CFRN (1999). Awhefeada and Mrabure (2023) contend that the concept of human rights emanated from the traditional theory that there are rights, natural to man which every human being everywhere and at all times should have and enjoy because they are natural humans. The foregoing conception tends towards the universalism of human rights. The use of 'should' reveals what in practical terms is ideal but not absolutely realisable, in all circumstances.

According to Dlamini (1995), human rights are 'the rights which all human beings have or should have equally by virtue of being humans irrespective of race, gender, age, noble or ignoble descent, social class, national origin or ethnic or tribal affiliation; and regardless of wealth or poverty, occupation, talent, merit, religion, ideology or other personal idiosyncrasy. They are inalienable and cannot be transferred, forfeited or lost by having been usurped or by failure to exercise or assert them, for whatsoever length of time (Dlamini, 1995, pp. 3–4). The detailed conception of human rights by Dlamini exudes a pragmatic lack of distinction between 'human rights' and 'fundamental human rights.' When human rights are 'fundamental' they implicate the recognition of such set of rights by a sovereign state capable of its own interpretation of rights in accordance with its unique historical and political values. Consequently, in exercise of unfettered sovereignty, the Indonesian Constitutional Court gave a 'radical' definition to human rights (claimed as fundamental rights) in construing the Indonesian

Blasphemy Act in 2010. The court held that rights to freedom of religion is not coterminous with the freedom to elect or switch individual's religion or liberty of self-expression in public places (Asma, 2014).

Human rights which are inherent in humans live and die with them and so may be conceived with reference to time and space of human development. Fundamental human rights particularises a set of human rights that are capable of enforcement by sovereign judicial decrees. These rights are provided for and codified in the constitution of countries and such other instruments that bear relevance to the rights of humans such as applicable conventions (*Uzoukwu v Ezeonu*, 1991; Okeke, 2023). The dividing line between human rights and fundamental human rights in respect of any society is enforceability guaranteed by statute. Unless the existence, continued existence and enforceability are guaranteed under the nation's constitution, rights cannot, with reference to any given nation or political society, be described as fundamental. The foregoing postulation on the distinction between human rights and fundamental human rights is impregnable given the supremacy clauses and inconsistency principles in the various constitutions of nation-states (CFRN, s 1 (3); Ehirim, 2023, p. 29).

By and large, fundamental right is the modern name for what is hitherto described as 'natural rights' and which is identified by reason of state's obligation to uphold them by judicial decrees (Gasiokwu et al., 2026). Human rights have evolved as a result of historic struggles which shaped the limits of the powers of the modern state against its citizens. The struggles which identified with stages of human development have been described in their generations (Baroni, 2024). Human rights contestations therefore would remain a work in progress for as long as they identify with humans' continued demand for liberty. The first generation of rights, the traditional civil and political rights, dealt with the protection of citizens from the arbitrary actions of the state. Political and civil rights merely require the state to refrain from meddling with some rights and liberties of individuals without further obligations. The human rights movement in its generations has evolved into the fifth generation with a potential for further generations (Al-Fatih & Aduya, 2024). To this extent, Raj's (2000) conception of human right expressed exclusion in its brevity. The definition presents human rights as exclusively demandable from the state and its agents. The trajectory and fundamental nature of human rights make human rights' claim sustainable against private persons as well as the bureaucracies. (Constitution of the Federal Republic of Nigeria, 1999, §§ 6(6)(b), 46(1)) Again, Raj's definition in its emphasis on 'freedoms from' and not 'freedoms to', excluded social and economic rights which have become equally enforceable in some African states, such as South Africa. In *Government of the Republic of South Africa v. Grootboom* (2000), the South African Constitutional Court stated the enforceability of fundamental freedoms of humans in their generations in the country in the following words, 'our constitution entrenches both civil and political rights and social and economic rights. All rights in our Bill of Rights are inter-related and mutually supporting'.

Human rights have become one of the necessary defining indices of modern societies. According to Trithart (2021), the UDHR is the reference point for the evolution of individual freedoms globally. Other transnational covenants that helped to shape global consciousness on inherent human liberties includes: the International Convention on Civil and Political Rights, 1966 (ICCPR) and the International Convention on Economic, Social and Cultural Rights, 1976 (ICESCR). (Together, the UDHR, ICCPR and ICESCR constitute the International Bill of Human Rights.) The truth is that: the prominence of the UDHR at the global scene notwithstanding, the European Convention on Human Rights, 1950 was the most impactful international instrument bearing on Africa's consciousness of human rights. The content of the human rights and freedoms enshrined in the European Convention filtered into the constitutions of African countries of common law origin such as Nigeria, Kenya and Malawi because of their colonial link with Great Britain, particularly judicial precedents (). Thus, the fundamental freedoms enacted as part of the Constitutions of Common Law African countries are a rehash of the rights and freedoms contained in the European Convention on Human Rights. (Constitution of Kenya, 2010, ch. IV; Constitution of Malawi, 1994, ch. IV; Constitution of Tanzania, 1985, ch. I) This has been made possible by colonialism and the procedure of received laws, particularly at common law (). Another critical international human rights instrument which has emerged to influence human rights approach in Nigeria, Kenya and Malawi is the African Charter on Human and People's Rights (ACHPR). (The ACHPR was ratified by Kenya in 1992, Malawi in 1989 and Tanzania in 1986; 54 African Union member states, including Nigeria, Kenya and Malawi, have ratified it.) ACHPR's domestication by most African countries has made the instrument integral to municipal laws

(Falana, 2017, p. 256). In *General Sani Abacha v. Chief Gani Fawehinmi* (2000, p. 228), the Supreme Court of Nigeria pronounced on the status of the ACHPR in municipal jurisprudence as an understanding among concerned African States to safeguard and enhance the human liberties and dignity of their citizens and other citizens within their territorial borders. In a similar development, in *Zimbabwean Human Rights NGO Forum v. Zimbabwe* (2006), the African Commission held that Article 2 of the ACHPR which provides for non-discrimination applies equally to all persons, including LGBTQ persons in Zimbabwe. Kenya has incorporated the ACHPR and ICCPR principles into its municipal corpus through the constitution. (Constitution of Kenya, 2010, arts. 2(5)–(6); Fundamental Rights [Enforcement Procedure] Rules, 2009, § 3(b)) To this end, liberties without express provisions in the constitution but which are integral to transnational customary law are directly enforceable in Kenya. (International law inconsistent with the Kenyan Constitution is invalid to the extent of the inconsistency; Constitution of Kenya, 2010, art. 2(4).) Consequently, Hassinen (2020, pp. 191–204) argues that Kenya’s covenant to enforce all rights protected under international law and treaties includes sexual minorities rights.

The Rights of Sexual Minorities in History and the Rise of Homophobia

Sexual freedoms are as old as creation. Sexual relationship has its origin in the institution of marriage and has through the generations become deeply rooted in contemporary society. Marriage itself is anchored on sexual attraction primarily for pro-creation, (See Genesis 1:26–28, King James Version, for the religious account of marriage.) gratification or companionship (Umbu & Agada, 2021, p. 174). Traditional African societies were generally heterogenous in terms of gender, sex and intimate relationships. Non-heterosexual erotic relationships were noticeable, as exceptions to the general rule, across Africa but none of the parties in such relationships were allowed to live at the margins (Brown, 2023). Accordingly, there were some men who had ‘boy-wives’ while some women had ‘female-husbands’ and non-cisgenders bridged the gap between terrestrial and celestial realms bringing solutions to the spiritual needs of the people in pre-colonial African societies (Msibi, 2011). The Meru tribe in Kenya are well known for man-man marriage and men adorning women attire (Epprecht, 2005). The traditional Kalenji ethnic nationalities of Kenya practice woman-woman marriage till date (Blessol, 2013, pp. 220–228). Same-sex practices were also indigenous to Malawi. Local terminologies such as ‘Mathanyula’ (anal sex) are pointers to the cultural practices of homosexuality in Malawi (Mwakasungula, 2013). In all incidents of queer sexual orientation and gender identity in history, such sexual tendencies were natural with the persons involved and without external motivations. In February 2010, Davis Mpanda, a 60-year-old man was charged with ‘buggery and was handed a ten-year imprisonment term by the South Lunzu Magistrates’ Court in Malawi. At the trial, Mpanda informed the Court that he was ‘naturally’ born to sexually desire males only (Mwakasungula, 2013, p. 363). It is safe to assert that sexual behavior attaches humans in like manner as ethnicity or race as to make penalising persons because of their sexual inclinations akin to penalising such persons for something they could do nothing about.

Beyond Africa, same-sex eroticism is not a recent phenomenon. The ancient Han Dynasty of China which held sway between 206 BC and 200 AD demonstrate bonds of loyalty with same-sex sexual intimacy (Wah-Shan, 2001, p. 29). Krishna et al. (2023) contend that non-heterosexual behaviour was recognised under Hindu Scriptures. The position implicates that such sexual inclinations are not novel to India. Homosexuality and other forms of non-binary eroticism have been ordinarily accommodated and even celebrated in diverse parts of Indonesia from time immemorial. These may be referred to as the third gender which harmoniously co-exist with heterosexuals among the Bugis of Southern Sulawesi (Idrus, 2016, p. 32). These genders were identified by local names to show their integration into traditional lexicon.

Erotic homosexual behaviour is not alien to Africa. However, the received English laws institutionalised penal system that criminalised same-sex eroticism in British-African territories. It is contended that what is rather un-African in the raging campaign for the liberalisation of sexual liberties is homophobia. This homophobia is associated with attempts by modern states to outlaw homosexuality when the powerful influence of the church was brought to bear in the legislation of the English Buggery Act (1533) which criminalised homosexuality in United Kingdom. The church became the spring board of homophobia propelled by Great Britain with the penalty for the offence being ‘death’ in 1558 and penal servitude of between 10 years and life imprisonment by 1861. (Offences Against the Person Act, 1861, § 76) Thus queer erotic tendencies were regarded as too abominable to be named in judicial

circles (Coke, 1669). The common law heritage of Nigeria, Kenya and Malawi encompass the jurisprudence criminalising of all forms of sodomy with the infamous English phrase of ‘unnatural offences’ (ReportOut, 2023, p. 7). (British colonial criminal law was extended through the Indian Penal Code of 1862 and the East Africa Order in Council of 1897, including its § 377 provision on offences against the order of nature.)

International Approach to Agitations for liberalisation of Sexual Minorities’ Rights

Customary international norm has provided formidable signposts for acknowledgement of sexual minorities’ liberties within the global legal framework. International law in its broad construction gives prominence to individual-human welfare over state sovereignty (Muthmainnah, 2016, p. 13). The acknowledgement accorded individual human freedoms by global bills of rights is not qualified by the sexual preferences of persons, no matter their creed or nation (Trithart, 2021, pp. 3–52). (Universal Declaration of Human Rights, 1948, art. 7; United Nations Charter, 1945, arts. 1(3), 55; International Covenant on Civil and Political Rights, 1966, arts. 2, 4(1), 26; European Convention on Human Rights, 1950, art. 14; African Charter on Human and Peoples’ Rights, 1981, arts. 2–3; Arab Charter on Human Rights, art. 11; American Convention on Human Rights, 1969, art. 24) International norms have shown commitment towards the abrogation of inequality and discrimination. Accordingly, derogation from these ideals by national governments provokes international responses which attaches the defaulting state-party with liabilities. (International Covenant on Civil and Political Rights, 1966, art. 26; Arab Charter on Human Rights, art. 11; African Charter on Human and Peoples’ Rights, 1981, art. 3; American Convention on Human Rights, 1969, art. 24) Article 1 of the UDHR states that all humans are born free, equal in dignity and rights. The relevance of this enactment to sexual minorities is fundamental. It prohibits inhuman treatments against any such persons owing to their sexual proclivities. Furthermore, Article 26 of the ICCPR elaborates on the equality of all persons before the law as well as non-discrimination in the application of all protections afforded by law. The Article 26 proscribes discrimination against anyone on any ground such as sex, race, language, colour, religious, political or other opinion, social or national origin, birth, property, or other status.

The Human Rights Committee (HRC) has interpreted ‘non-discrimination’ to mean the abolishment of ‘discrimination in law or in fact in any field regulated and protected by public authorities (*LRF v. Zambia*, 2000). The African Commission on Human Rights and People’s Rights adopted the approach of the HRC in *Legal Resources Foundation (LRF) v. Zambia* (2000), in declaring the Zambian constitutional amendment which disenfranchised a sect of the elite political class from standing for election as discriminatory (Phiri, 2022, pp. 419–438).

Similarly, Article 12 of the UDHR provides for the rights to privacy. The recognition of this right cuts across all aspects of an individual’s private life including but not limited to sexual manifestations and gender preferences (Ssenyonjo, 2023). The issue of sex preferences is within the realm of human privacy liberties. Any restrictions in respect of how and the choice of whom eroticism should be expressed would in the words of Eskridge (1996, p. 25) tantamount to ‘Apartheid of the closet’. The right to have sex without fear of criminal liabilities accords with sexual minorities’ human liberties and resonates with the agitations for the decriminalisation of same-sex relationships and other rights of expression by persons of gender orientation in Nigeria, Kenya, Malawi and the Commonwealth Caribbean. In September 1999, the European Court gave judicial backing to the right to privacy as a fundamental right in the case of *Smith and Grady v. United Kingdom* (1999). Relying on Article 8 of the European Court of Human Rights (ECtHR), the court abolished laws prohibiting gays and lesbians from enlistment with the military. The court gave an elaborate interpretation of privacy, extending it beyond closed doors and into public domain. Similarly, in *Salgueiro da Silva Mouta v Portugal* (1999), the court in express affirmation of sexual orientation as a prohibited category for discrimination set aside a Portuguese court decision that denied a custody rights of a father over his son on the ground of the father’s homosexual inclination.

Soft laws of international status have also developed to clear ambiguations tending towards inequality, discrimination and invasions of the privacy realms of individuals, especially in the area of sexual inclinations. The Yogyakarta Principles and the Yogyakarta Principles Plus 10 provide detailed framework for interpreting sexual orientation and gender identity as human rights (Carpenter, 2021). The instruments have become reliable aids in the global definition of violation of sexual minorities’ rights (ICJ, 2023). The Resolution 275 of the African Commission on Human and People’s Rights on

Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed sexual orientation or gender identity re-enacts the commitment of the African Charter to protect the human rights of all persons to non-discrimination, equality, life, dignity and freedom from torture (ICJ, 2023). Similarly, the 8 March Principles for a Human Rights-Based Approach (HRBA) to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Abuse, HIV, Homelessness and Poverty offer a clear and operational framework and practical guide for stakeholders in the legal community, including legislators and judges pertaining to the attachment of criminal liabilities to sexual orientation (Deneke, 2024). Principle 16 of the 8 March Principles particularly states that:

Consensual sexual conduct irrespective of the type of sexual activity, the sex/gender, sexual orientation, gender identity or their marital status, may not be criminalised in any circumstances.

However, while it is true that soft laws and committee findings are persuasive instruments for the construction of ‘sex’ in relation to individuals; and whereas the UDHR and ICCPR provisions are statutorily binding on state parties under the principle of *pacta sunt servanda*, by the hierarchy of laws, only a constitutionally-established sovereign courts’ recognition of rights make them enforceable. the campaign for the recognition of human rights of sexual preferences has been forceful in some countries. In 1961, the state of Illinois in the United States of America (USA) led the revolution for decriminalising homosexuality and repealing all anti-sodomy laws (CNN Library, 2019). Other states of the USA showed no commitment towards sexual rights, with particular reference to non-heterosexual marriage until the USA’s apex court judgement in *Obergefell v Hodges* (2015). In *Obergefell v Hodges* (2015), the Supreme Court recognised the individual’s right to sexual preferences and so, legitimised same-sex marriage. The USA’s influence in world politics makes the judgment a boost to non-heterosexual rights agitators in Africa and other parts of the globe. In a prior suit filed with the Committee on Human Rights (HRC) (*Toonen v. Australia*, 1994), Nicholas Toonen was a gay Australian resident in Tasmania contended that Sections 122 and 123 of the state of Tasmania (Criminal) Code which prohibit unnatural sexual intercourse and indecent practice between males was discriminatory and a violation of his rights. *Toonen* relied on the provisions of ICCPR (Art. 17 (1)) on privacy rights of individuals. The HRC rendered a decision to the effect that the abolition of consensual, adult homosexual union under Tasmanian Law was a discrimination, on ground of sexual orientation. The case illuminated the hitherto translucent areas of sexual rights which were enacted by international bills of rights without particularity.

Consequently, in the case of *Bostock v. Clayton County* (2020), the apex court in the USA stated that employment on the basis of sexual orientation or gender identity is unconstitutional for violating the Civil Rights Act of 1964. The reasoning in *Bostock* followed the Australian case of *Edward Young v Australia* (2003), in which the Australian Federal Department of Veteran Affairs declined to entertain Mr. Young’s request for pension on the ground that he lived with a male partner contrary to the law which defined a couple to be two adults of the opposite sex. The Human Rights Committee found merit in his petition stating that the state-party infringed the 26th Article of the ICCPR when it withheld pensions from Mr. Young on the grounds of his sex or sexual inclination.

The United Kingdom fully liberalised sexual minorities’ rights by enacting the Marriage (Same-Sex Couples) Act (SSCA) for England and Wales. The Act broadened the operative ‘common law’ meaning of marriage to include same-sex marriage (Marriage [Same Sex Couples] Act, 2013, § 1(1)) and expressly nullifies the common law presumption that a child born to a woman during her marriage is the child of her husband. (Marriage [Same Sex Couples] Act, 2013, sched. 4, pt. 2) Umbu and Agada (2021, p. 179), postulate that the literal application of these set of laws may lead to manifest absurdity. The authors observe that where a child is born to women of same-sex in a legally recognised marriage, the legal conclusion in the circumstances would be thoughtless and bizarre as to who the child’s father is because a female husband is incapable of biologically fathering a child. They conceived fathering as limited to sexual intercourse. It is safe to argue with respect, that the authors appear obsolete with evolving technology and medical procedures which could ‘produce’ children without natural sexual intercourse. Thus, the SSCA balances all interests on sexual inclination and gender preferences in UK, obviating the unnecessary exposure of religious bodies or persons opposed to such rights to litigation. (Marriage Act, 1949, § 26A) Prior to 2013, same-sex union was not recognised in UK as a marriage but as a civil partnership. In *Wilkinson v. Kitzinger and Others* (2006), the couple, Celia Kitzinger and

Sue Witkinson both British professors of same-sex got statutorily wedded in August, 2003 in the British Columbia domain, Canada. The union was not recognised by the British Marriage Act (1973). It was, however, recognised under the Civil Partnership Act. The Petitioner filed a suit challenging Section 11(c) of the Matrimonial Causes Act 1973 and Chapter 2 of Part 5 of the Civil Partnership Act as being in violation of his liberties under the Human Rights Act (1998). The High Court of England and Wales declined to recognise same-sex union as a marriage. Conversely, in *Goodwin v United Kingdom* (2002) the European Court of Human Rights (ECtHR) upheld argument in favour of gender identity. The applicant claimed an infringement of his rights as enshrined in the Articles 8 (right to privacy), and 12 (right to marry) of the European Convention on Human Rights, among other reliefs. Applicant sought judicial clarification on the legal status of transsexuals in the UK in the light of the treatments meted out on them in matters of employment, social security, pensions and marriage. ECtHR held the UK in violation of Articles 8 and 12 of the ECHR.

Likewise, in *Marta Lucia Alvarez Giraldo v Colombia* (1999), an inmate at a women's prison was denied the privilege of intimate visits by her same-sex partner. She petitioned the Inter-American Commission on Human Rights alleging violation of right and abusive intrusion into her private life in contravention of the non-discrimination, equitable principles enacted in Article 11(2) of the American Convention. The petition succeeded against Colombia thereby advancing the argument that rights to sexual preferences should not be denied even when the beneficiary is in lawful custody.

South Africa leads Common-Law-Africa on the liberalisation of sexual minorities rights, by decriminalising all consensual sexual acts between adults. In *Lesbian and Gay Equality Project and Others v. Home Affairs and Others* (2005), the Constitutional Court of South Africa held that same-sex couples have a right to be lawfully married and be so recognised. The reasoning of the court is gathering legitimacy across the Southern African Development Community (SADC). On 4 October 2023, the Supreme Court of Mauritius decreed as unconstitutional, every law in Mauritius penalising voluntary same-sex relationships between adults. In *Ah Seek and Another v State of Mauritius* (Paurobally, 2023, pp. 24–27) Ah Seek challenged Section 250 of the Criminal Code of Mauritius (1838) which penalises anal sex between consenting male adults. He contended that the section is incompatible with the 1968 Mauritius Constitution and violates his personal right to sexual inclinations. The court found that although the constitution was not particular about sexual preferences, sex qualified as one of the seven grounds on the basis of which discrimination is forbidden as provided for by Section 16 of the Constitution. The court found in favour of Ah Seek and the gay community.

Recognition and Enforcement of Sexual Minorities' Rights

1. Nigeria

Nigeria criminalises sexual orientation and its associated conducts. This has created tension and consigned persons of gender identity to insecurity and physical harm, eroding their rights to privacy, dignity of the human person, and freedom of association (CFRN, Cap IV). Abimboye (2015) records an unprecedented number of rights violation of gays in Nigeria which manifests in the form of threat to life, jungle justices, blackmail and extortion, battery and assault, arbitrary arrests and illegal detentions. The realities may disclose more astounding figures contrary to Abimboye's postulations because Nigeria is poor with statistics. Most champions of sexual minority rights have been mobbed and others made to pay with death (Arimoro, 2020, pp. 142–67). The Nigerian Criminal Code (The Criminal Code has been in operation in Nigeria since 1916.) is a relic of the British Colonial Rule in Nigeria which imported Victorian morality into the countries *corpus juris* like India and Bangladesh of South Asia (Mendes, 2019). (Colonial provisions corresponding to § 377 persisted in India, Pakistan and Bangladesh; the manuscript also records Singapore's later repeal of its comparable provision.) However, in the recent case of *Navtej Singh Johar v Union of India*, the Indian apex court expunged anti-sodomy laws from Indian statute books thereby decriminalised all consensual sex among adults including homosexuals.

The Same Sex Marriage (Prohibition) Act (2013) expanded the frontiers of intolerance of sexual orientation thereby increasing the repression of the sexual rights of queer erotic persons in Nigeria. The discrimination has occasioned great harm and injustice on the targets (Gil et al., 2021). Nigeria's Criminal and Penal Codes (2004) prescribe up to fourteen-year imprisonment for those convicted of consensual homosexual acts. It has been stated that these penal provisions are mere deterrents since the records reveal no one who has been convicted under the provisions. Sections 214 and 215 of the Criminal Code Act (CC) (2004) proscribe 'unnatural offences' which implicates sexual unions

conducted in unnatural manner. Unnatural offences may be conceived as: (i) sexual relations between persons against the order of nature; and (ii) consensual sexual gratification between man and man or woman against order of nature. It may also include bestiality. The foregoing legal provisions restrict sexual relations to heterosexuality, abrogating one's choice of association (CFRN, s. 40). It is obvious that the law has not afforded indices for the determination of what is natural or unnatural, particularly given the fact that queer sexual eroticism is truly a natural feeling to persons that exhibit them. Leaving these facts to be determined by public morality has occasion great injustice on victims because of the imprecise jurisprudential construction of 'public morality'. The Nigerian CC inhibits the freedom to private rights of the queer erotic persons. Section 42 (1) of the CFRN enacts the freedom from discrimination on the basis of sex while Section 45(1) (a) of the CFRN provides that nothing in the foregoing sections shall invalidate any law reasonably justifiable in a democratic society in the interest of public morality. The omnibus ground of public morality has been deployed as a sword against persons of sexual orientation in Nigeria, taking back with impunity what other provisions of the CFRN has donated. It is posited that public morality should not be invoked to defeat citizen's private rights except in extreme cases where such citizen's acts are disruptive of public order. Nigeria is not the only country that qualifies enjoyment of human liberties. Shahabi and Shahidi (2018, p. 511) demonstrate that Article 7 (3) of the Constitution of the Netherlands provides for 'Good Morals' as condition for derogation of rights to freedom of the media and expression. The use of the phrase 'Good Morals' implicates the existence of certain moral parameters with which citizen's activities are weighed if the state must sustain the derogation from human rights. Consequently, any reasons advanced for the derogation from a citizen's liberties should be capable of being subjected to judicial scrutiny. The Spanish Constitution (1978, Art. 16) permits the derogation of rights 'if necessary to maintain public order.' The proviso in the foregoing constitutions, that is public morality, good morals and public order are united in ensuring orderliness and cohesion in the society and should not be lightly invoked to defeat express statutory provisions. Issues of sexual preferences are most private with marginal quotient of disrupting public order.

Religious and moral biases exert great influence on values and laws in Nigeria, particularly with respect to sexual orientation (Martins, 2022). The two prominent religious groups in Nigeria, that is, Islam and Christianity conceive queer sexual inclinations as sinful and so rally the society against any such 'manifestations of evil.' Nigeria appears to be a secular state in theory. The Sharia law adopted by the Muslim Northern States of the Nigerian federation enacted tougher sanctions for sexual deviants. The zero tolerance of Sharia law in Nigeria to homosexuality is a pattern prevalent in most Muslim dominated countries (Caroll & Mendos, 2017).

In April 2017, fifty-three men were arrested for celebrating a gay wedding. They were charged with '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 (USDS, 2017). The clamp down has continued unabated despite claims of non-compliance with the organic law (Bakam, 2022; Ehirim et al., 2025). In August 2023 there was another hit on queer persons in Nigeria. Over one hundred persons were arrested at Ekpai, near Warri on the allegation of attending same-sex wedding ceremony. Sixty-nine of them were eventually arraigned in court (*COP v Ohwonohwo*, 2023). As at January 2024, the Delta State Director of Public Prosecution was yet to volunteer an opinion on the charge. The restriction of the right to association and invasion of the privacy of persons on the grounds of sexual orientation in Nigeria is disproportionate, showing no unified judicial standard. Treatments of homosexuals in Nigeria varies as the interpretations given by clerics on religious matters. In October 2023, seventy-six persons were arrested on the allegation of organising a homosexual party in Gombe State (Amnesty International, 2023). Persons of sexual orientation are tagged immoral and Nigerian government conceives the obligation to protect 'public morality' as a sufficient excuse to justify the clamping down on the individual rights regarding sexual preferences by the enactment and enforcement of the SSMPA. The Act defined marriage in Section 7 to mean a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law (SSMPA, 2013, s. 7). Rights activists have engaged conscious efforts to challenge and dismantle discriminatory laws in Nigeria, particularly the SSMPA (Schmitz et al., 2022). The point has, however, been made that SSMPA is not discriminatory as it applies to all and every person within Nigeria with equal force.

2. Kenya

Claim in fundamental rights is positive in nature and necessarily statutory in all modern states, including Kenya. In 2015, the Kenyan government set up a commission to review Kenyan Constitution 2010 (KC) to bring it up to speed with evolving legal landscape. The failure of the amended constitution to accommodate sexual minority rights has rendered the expression of such rights illusory, exposing victims to conflicts with legitimate state actors. The Kenya Film Classification Board disbanded 'I am Sammie', a documentary for the reason that the film promoted same-sex relationship (Reid, 2022). Rafiki, a love movie of the two girls whose fathers are politically opposed to each other, was also banned in 2020 (Reid, 2022). Thereby raising the bar against any appearance of LGBTQ rights in Kenya.

Three provisions of the extant constitution are relevant to the sexual minorities rights discourse though they are not particularly so stated. The KC (Art. 2: 5 & 6) integrates universal customary law and global human liberties as integral to the laws of Kenya. The wins recorded by the foregoing provision on 'inclusive' human rights evaporated with the KC (Art. 2:4) which nullifies all laws which are inconsistent with the KC. The premium placed by the constitution on sexuality is manifest in the assignment of meaning to marriage in the KC. The KC defined marriage to be a union between a man and a woman. It provides that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties (KC, 2010, Art. 45). As a follow-up to heterosexual marriage provided for by the constitution, the Penal Code of Kenya (PC) (PC, 2006), proscribes consensual, non-binary erotic relationships. Section 162 of the PC enacts 'unnatural offences' whereas section 165 expressly criminalises homosexuality in the following words:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private is guilty of a felony and is liable to imprisonment for five years (PC, 2006, s. 165).

The term 'order of nature' is contentious and admits of ambiguity. The literal interpretation portends that sexual intercourse is against the order of nature if the approach adopted negates procreation probabilities (*Lawrence v Texas*, 2003). Consequently, it is safe to argue that the PC did not out-rightly prohibit homosexuality or homosexual expressions, rather conducts and elements of non-heterosexual life-style are proscribed. (Penal Code of Kenya, 2006, § 162) Logically, homosexuality may be conclusive with ordinary attraction of a man to another man whether or not there is 'unnatural carnal knowledge'. It appears to be the intendment of the lawmaker to imply by the tenor of the PC that a person may be gay without infringing any laws until he gets involved in carnal knowledge as gay. Penetration is the only hard proof of unnatural carnal knowledge. In *Gligah and Atiso v. The Republic*, the Ghana Supreme Court correctly stated the law by holding that proof of penetration is made out where the act went beyond what is known as brush work. To that extent, penetration is deemed to have occurred and carnal knowledge taken to have been completed.

Associated act of queer eroticism such as lesbianism which is a distinct sexual manifestation (Soltys, 2024, p. 29), is tacitly allowed under the PC. This is because only women could be lesbians and women have no natural capacity for heterosexual penetration (*R v. Jacobs*, 1817). (*R v. Jacobs*, 1817, Russ & Ry 311, addressed the scope of intercourse under the offence of buggery.) This is so even when such lesbians simulate penetration by use of unnatural gadgets. It needs to be noted that the phrase 'unnatural carnal knowledge' does not apply exclusively to sexual minorities as may be conceived. The phrase could be construed to include the act of sodomy whether of a female or male, as well as felatio (*Khanu v. Emperor*, 1925, A/R Sind 286, addressed oral penetration under § 377 of the Indian Penal Code.) with a female or male. The ambivalent interpretative meaning of 'unnatural carnal knowledge' calls to question the gender-particularity in the wordings of Sections 162 and 165 of the PC. It is contended that lack of gender-neutrality in the drafting of the provisions exposes fundamental bias against the male folk. It is gender discriminatory in contravention of the express provision of Article 27 of the KC which guarantees equal protection to all persons by the law and prohibits discrimination on ground of sex. (Constitution of Kenya, 2010, art. 27(1), (4)) In 2016, Eric Gitari, a sexual minority rights activist sought to enforce his right to privacy and non-discrimination by challenging the Kenyan anti-sodomy laws. The suit was consolidated with another filed by the Gay and Lesbian Coalition of Kenya and the Nyanza, Rift Valley and Western Kenya Network (*EG & 7 Ors v. Attorney-General*,

2016). The Nairobi High Court held that Sections 162, 163 and 165 of the PC which admittedly penalised non-heterogenous erotic conducts between adults are not in violation of the rights of the petitioners to non-discrimination, health, fair trial, security of person, freedom of conscience, human dignity or privacy. The court further declared that criminalising same-sex conducts was needful to preserve constitutional values, the customs and norms of Kenyan people.

The foregoing decision contradicts other decisions by Kenyan judiciary upholding sexual minorities' fundamental rights. In *Non-Governmental Organisations, Co-ordination, Board (NGO Board) v. Eric Gitari and Five Others* (2023) the Kenyan apex court ruled that respondents were entitled to non-discrimination on the grounds of sexual inclination notwithstanding the fact that sexual inclination was not expressly articulated in Article 27 of the KC. (See also *Registered Trustees of the Initiative for Equal Right v. Federal Republic of Nigeria*, 2023, Suit No. FHC/L/CS/196/2020, Federal High Court, Lagos Division.) The court noted that incorporation of an body to pilot the rights of LGBTQ individuals (an association right) cannot be accommodated under the offence of carnal knowledge against the order of nature which is a crime in Kenya. The court drew a distinction between discrimination with respect to registration and association rights, and a criminal sexual activity against the order of nature. One Supreme Court panelist gave a dissent to the effect that the principle of non-discrimination does not in the circumstances extend to protect persons engaged in non-binary sexual conducts. (Justices Ouko and Ibrahim dissented; the majority decision was three to two.) The dissent/minority judgment has garnered more commendation from the Kenyan elite and policy makers. The truth is that the drafters of the KC did not purpose to protect the right to non-discrimination to extend to queer erotic conduct. This is evident in the wording of Article 45(2) of the KC which restricted the right to marry to consenting heterosexual adults.

3. Malawi

Malawi aligns with Nigeria and Kenya against ventilation of queer erotic inclinations by excessive deployment of policing powers (Ehirim et al., 2024). The Malawi Constitution of 1994 (MC) contains expressive Bill of Rights. (The 1964 and 1966 constitutions of Malawi contained no bill of rights.) Sections 5, 199 and 200 of the constitution clearly enacted the supremacy of the constitution. Section 5 of the constitution provides that: 'any act of government or any law that is inconsistent with the provisions of this constitution shall, to the extent of such inconsistency, be invalid'. Section 199 provides that: 'this constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this constitution'. The legal system has in spite of the constitutional provisions operated in internal disharmony, elevating inconsistencies between the constitution and Malawi's Penal Code (MPC). This is so because some rights guaranteed by the constitution are taken away by the MPC.

Malawi is a state-party to diverse transnational conventions and treaties promoting equality, non-discrimination, privacy and human dignity. Section 211 of the MC directly incorporates all international customary laws and conventions to which Malawi is signatory as domestic law. The legal system distinguishes between customary international law from international agreements, imposing legislative conditions for post-Constitution agreements. This implicates that UDHR and ICCPR which are pre-Constitution instruments apply directly to Malawi to uphold the rights of individuals to non-discrimination and privacy (Art. 17: 1). The constitution prohibits 'Discrimination of persons of any form is prohibited...all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property or other status' (MC, 1994, s. 20:1). There is no express mention of sexual orientation as a prohibited ground for discrimination, however, the 'other status' category is construed in different international treaties to comprise sexual orientation. Furthermore, a community reading of Sections 19 and 21 of the MC reveal a deliberate derogation from the freedom to privacy guaranteed under the MC (s. 21). (Constitution of Malawi, 1994, § 19) The freedom of a person to private life and human dignity transverses areas like searches of a person or his property, interference with private conversations as well as medical or scientific examinations without consent. (Constitution of Malawi, 1994, § 44)

Homosexuality is a crime in Malawi. Section 153 of the MPC 2010 deals with 'unnatural offences' to the effect that anyone who: '(a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of any animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature shall be guilty of a felony and shall be liable to imprisonment

for fourteen years, with or without corporal punishment'. Indecent practices between males are proscribed under Section 156 of the MPC. The gender bias against males in the creation of criminal offences in most African countries has been dealt with by Malawian Parliament. (Penal Code of Uganda, 1950, §§ 145–148; Criminal Code Act [Nigeria], 1990, § 214; Penal Code of Kenya, 2009, § 162) Sonani (2011) argues that the revised MPC 2010 engendered gender inclusivity. Section 156 of the MPC criminalises indecent practices between males to while Section 137A of the MPC criminalises female same-sex erotic activities. The section provides that: 'any female person who, whether in public or private, commits any act or gross indecency with another female shall be guilty of an offence and liable to a prison term of five years. (Penal Code of Malawi, 2010) The gap of inequality before the law has continued to widen between the queer erotic identities and heterosexuals.

In *Republic v. Steve Monjeza Soko and Tiwonge Chimbalanga Kachepe* (2009), a gay couple conducted a public wedding contrary to the laws. They were indicted and charged with Buggery under Section 153(a) and (c) of the MPC (Brown, 2023, p. 513). The judge, resident magistrate Nyakwawa Usiwa-Usiwa in handing a maximum 14-year term to the couple stated that, 'Malawi is not prepared to see its sons getting married to its sons.' Malawi has fortified its intolerance to sexual minorities' rights by declaring sex to be such as assigned at birth and criminalising same-sex marriage (Angotti et al., 2019, pp. 71–90). The truth is that statutory sex assignment at birth no longer defines contemporary perception of gender. According to Lord Justice Thorpe,

To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage ... indeed in the context of the institution of marriage as it is today, it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seems right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth (*Corbett v. Corbett*, 1970). (See also *I v. United Kingdom*, Application No. 25680/94, para. 36, discussing medical transition and legal sex in marriage.)

Recognition of Sexual Minorities Rights: A Comparative Approach

The question of sexual minorities' rights has become a topical issue globally. Reid (2022) states that majority of the countries which criminalise queer erotic behaviours are in Africa. Nigeria, Kenya and Malawi are cahoots with Ghana, Tanzania and Uganda in upholding anti-sodomy laws which stifle sexual minorities' rights. Most of the countries leverage public morality to criminalise non-binary sexual inclinations in line with their common law backgrounds (Ehirim, 2025). Commonwealth member states in South-Asia such as India, Pakistan and Bangladesh retain certain sections in their penal codes which criminalise unnatural relationships and 'any other acts of gross indecency.' Similarly, the Commonwealth-Caribbean countries do not countenance sexual minorities' rights notwithstanding international appeals to do so. In the recent case of *Javin Kelvin Vinc Johnson v. The Attorney-General of Saint Vincent and the Grenadines* (2024), the Supreme Court of Eastern Caribbean dismissed a consolidated claim filed by Messrs Javin Johnson and Sean Macleish which challenged the constitutionality of Sections 146 and 148 of the Criminal Code of Saint Vincent and the Grenadines (2009) as infringing Sections 1(c), 3, 5, 7, 9, 10, 12 and 13 of the Constitution of Saint Vincent and the Grenadines (Laws of Saint Vincent and the Grenadines, 2009, ch. 10) as well as the fundamental rights of claimants to privacy, protection from inhuman treatment, freedom of expression, and protection from discrimination. The court held that although claimants' constitutional rights to freedom of expression were infringed by the state, such infringements were reasonably justifiable in a democratic society given the duty of the state to protect public morality and health. Public morality therefore becomes the identical variable among countries that criminalise LGBTQ+ rights across the globe. This strong justification collapses when jurisdictions like Spain, the UK, and the USA are considered.

The foregoing decision highlights the conflict created when express grant of human rights by statutes and conventions are denied on the justification of public morality, which concept is subjectively defined. This shows the elastic strife between cultural relativism and universalism in human rights jurisprudence (Chimakonam & Agada, 2020). Many countries in Europe have shown tendencies to hinge on morality to derogate from constitutional rights of citizens (Mlynarska-Sobaczewska, 2019). It is evident that the USA and Europe have made conscious efforts to expunge moral statutes from their law books but regretfully, most African countries stick with moralistic laws on the grounds that those mores underpin their societal cohesion in accordance with Delvin's disintegration thesis. To this end, progressive constitutions, like the Spanish Constitution unlike the CFRN, adopt the use of 'Public

Order' instead of 'Public Morality' or 'Good Morals' as justification for derogation from rights. Hence, Spain has allowed sexual minorities' rights, including same-sex marriage to flourish (Trindade & Gonzalez-Salzburg, 2024). On 2 March 2023, Spain made a law to further liberalise sexual rights. The new statute allows gender transformation by any person in civil register without proof of undergoing the mandatory two-year hormonal treatment or other medical procedures as previously stipulated by law (Gasiokwu et al., 2026).

In contrast with Nigeria, Kenya, and Malawi, non-binary persons are protected from unequal treatments under the discrimination-by-perception provisions of the Equality Act and other laws such as employment statutes, hate crime and human rights laws in the United Kingdom (UK) (Equality Act [EA], 2010; Gender Recognition Act [GRA], 2004). Gender re-assignment is legal under the law (EA, 2010, s. 7). The GRA (2004) guarantees unmitigated legal rights to transgender in UK. The Act gives a transgender the right to obtain a Gender Recognition Certificate (GRC) that legally recognises the preferred gender identity and alters the birth certificate in accordance with new gender preference. (GRA, 2004, s. 9: 1). In *Bostock v Clayton County* (590 US 644, 2020), the US Supreme Court found against discrimination of gay and trans workers at work places. The court held that persons of such sexual inclinations are protected by federal civil rights laws. The historic judgment ends stigmatisation of non-binary persons working in the military.

The courts are empowered to determine matters before them on the merits. The claims of discrimination, breach of privacy, and inequality have been veritable grounds to project LGBTQ+ rights. To this end, where the claim to right of equality by a person of gender preference collides with the private rights of another citizen, the court may decide otherwise. Thus, in *Lee v Ashers Baking Company Limited* (2018), Lee, a queer space activist, challenged a Christian bakery which declined to bake with inscription 'support gay marriage' after having paid for the cake. It was to be used at a gay wedding ceremony. The bakery refused to deliver, apologised and opted to make refunds. The UK's Supreme Court held that the bakery owners had not refused to serve Lee because he was gay but because they objected to promoting a message that they profoundly disagreed with. Similarly, in *303 Creative LLC et al v Elemis et al* (2023), the apex court deferred to a Christian web constructor who refused the job of designing website to advertise same-sex weddings for reasons of religious convictions. The court held that Lorie Smith, the web designer was protected under the First Amendment's free speech provisions to withhold her services from advocates of same-sex weddings. The judgment appears to protect business owners who wish to refuse services to any persons on the basis of sexual identity and could be extended to origin, colour and race. The decision is an invocation of religious liberty to license discrimination. The Court of final appeal struck down the Colorado Civil Rights Law (Anti-Discrimination Act) which compels businesses and corporations to accord gay couples equal treatments as being in violation of the rights of free expression. The court reasoned that 'forcing a web designer to create expressive designs speaking messages with which the designer disagrees is against the First Amendment (Schoen, 2019, pp. 1–34). Conversely, South Africa has liberalised and recognised sexual minorities' rights without limitations. The amendment of the Civil Union Act (2006), (Constitution of Spain, 1978, art. 16) completely dismantled sodomy laws in the country. In *Minister of Home Affairs & Anor v. Fourie & Anor* (2006), (Civil Union Act No. 17, 2006) the applicant challenged the Marriage Act (s. 30) which defined marriage according to common law conception by recognising only monogamous heterosexual marriages. The Constitutional Court of South Africa (CC) nullified Section 30 of the Marriage Act for being inconsistent with the Constitution and declared it unconstitutional. Also, the CC had in the earlier case of *National Coalition for Gay and Lesbian Equality & Anor v. Minister of Justice & Ors* (1998), (Marriage Act No. 25, 1961, § 30; Interpretation Act [Nigeria], § 18; Same-Sex Marriage [Prohibition] Act [Nigeria], 2014, § 7) decreed all laws abolishing consensual sexual relationships between men as unconstitutional, null and void.

CONCLUSION

This article has discussed the emergence of human rights in Africa with bias for the sexual minorities. It is posited that the introduction of Buggery or Victorian laws disrupted the harmony and tolerance that was enjoyed by every member of the African society, particularly in Nigeria, Kenya and Malawi. The LGBTQ+ rights as currently constituted derive from customary international law which, like other international instruments, are made subject to the constitution in Nigeria, and Kenya. Practice

and construction of these sovereign constitutions strengthen the implementation of ‘moral laws’ that derogate from sexual minority rights. Despite the constitutional provisions for non-discrimination in these countries, specific laws such as the Criminal Code, Penal Code, SSMPA and case law have evolved to neutralise the fundamental rights enabling non-binary persons to live their sexual and reproductive lives to the fullest, and without intimidation. It is a fact that human rights are universal and in this globalised era Nigeria, Kenya and Malawi cannot afford to sustain its morality statutes which have been jettisoned in England from where they emanated.

Consequently, Nigeria, Kenya and Malawi should prioritise private rights of citizens and expunge all laws inhibiting the full enjoyment of sexual liberties from their statute books as was the case in USA and UK. The countries’ judiciaries should give broad interpretations to the constitutional provisions on dignity of the human person, equality before the law, and the right to privacy in ways that accommodate sexual minority freedoms. An independent judiciary would be a veritable mechanism for statutory decriminalisation, upholding of treaty obligations, and inspiration for constitutional amendments to make the freedom to non-discrimination and other liberties to all persons, including persons of queer sexual preferences, realisable within the framework of international customary law and human rights architecture. This is, however, without prejudice to the countries’ status as sovereign states under the law of nations.

REFERENCES

- Abacha v Fawehinmi*, [2000]6 NWLR (Pt. 660) 228.
- Abimboye, M. (2015). Nigeria recorded 105 cases of rights abuses against gays in 2014. *Premium Times* (Lagos, 19 May), 1.
- African Charter on Human and Peoples’ Rights (1981).
- Al-Fatih, S., & Aduya, Z. F. (2024). The beginning of the human rights 5th generation: A lesson from COVID-19 outbreak in Indonesia. *Jambe Law Journal*, 7(1), 59–89.
- Aloamaka, P. C., & Kore-Okiti, E. T. (2023). Human rights perspective on sexual orientation and gender identity: A global analysis. *Journal of Perspectives in Gender Development*, 3(1), 13.
- Alston, P., & Goodman, R. (2013). *International human rights: The successor to international human rights in context: Law, politics and morals: Text and materials*. Oxford University Press.
- Amnesty International. (2023). Nigeria: Authorities Must End Witch Hunt After More Than 70 Arrested for Attending Gay Party. <https://www.amnesty.org>.
- Angotti, N., McKay, T., & Robinson, R. S. (2019). LGBT visibility and Anti-Gay backlash: Unintended consequences of responses to HIV/AIDS in Malawi and Senegal. *Sociology of Development*, 5(1), 71–90.
- Arimoro, A. (2019). The criminalisation of consensual Same-Sex sexual conduct in Nigeria: A critique. *Journal of Human Rights and Social Work*, 4(1), 257–266.
- Asma, U. (2014). Blasphemy in Secular Democracy: The Case of Indonesia. In C. S. Grenda, C. Beneke and D. Nash, (eds). *Profane: Sacrilegious Expression in a Multicultural Age*. University of California Press.
- Atuguba, R. A. (2019). Homosexuality in Ghana: Morality, Law, Human Rights. *Journal of Politics & Law*, 12(4), 114.
- Awhefeada, U. V., & Mrabure, K. O. (2023). Prevailing human rights issues in the Nigerian extractive industry: A critical and comparative discourse. *Journal of Law, Ethical and Regulatory Issues*, 26(1), 1–11.
- Bakam, A. (2022). Homosexuality: Bauchi sharia court sentences septuagenarian, two others to death. *Punch*. Lagos, 1 July, 1.
- Baroni, M. J. L. (2024). Fourth generation human rights in view of the fourth industrial revolution. *Philosophies*, 9(2), 39.
- Blessol, G. (2013). LGBTI-Queer Struggles Like Other Struggles in Africa, In: S. Ekine and H. Abbas (eds), *Queer African Reader*. Fahamu Books, 220–28.
- Bostock v Clayton County*, 590 U. S. 644 [2020].
- Braun, T. (2020). Dignity in Diversity: Dismantling the Criminalisation of Sexual Orientation and Gender Identity Using the Right to Dignity. In: A. Gattini, R. Carciandia and P. Webb (eds). *Human Dignity and International Law*. Brill Nijhoff.

- Brown, S. (2023). Visibility or impact? international efforts to defend LGBTQI rights in Africa. *Journal of African Human Rights Practice*, 15(1), 508, 513.
- Caroll, A., & Mendos, L. R. (2017). *State sponsored homophobia: A world survey of laws criminalising Same-Sex sexual acts between adults*. ILGA, may. ilga.org/downloads/2017/ILGA-State-Sponsored-Homophobia-2017-WEB.pdf.
- Carpenter, M. (2021). Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles Plus 10. *Culture, Health & Sexuality*, 23(4), 516–32.
- Chase, A. T. (2016). Human rights contestations: Sexual orientation and gender identity. *The International Journal of Human Rights*, 20(6), 4.
- Chimakonam, J. O. & Agada, A. (2020). The sexual orientation question in Nigeria: Cultural relativism versus universal human rights concerns. *Sexuality & Culture*, 24(6), 1705–19.
- Christine Goodwin v United Kingdom*, (Application No. 28957/95, judgment rendered on 11 July 2002).
- Civil Union Act No. 17 (South Africa) (2006).
- CNN Library (2019). LGBT Rights Milestones: Fast Facts. <https://edition.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>.
- Coke, E. (1669). *Third part of the institutes of the laws of england*, 4th edn. a. Crooke et al.
- Commissioner of Police (COP) v Maxwell Ohwonohwo & 68 Ors. Suit No: EHC/ M/ 33c/ 2023. 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.
- Constitution of Kenya (2010).
- Constitution of Malawi (1994, as amended).
- Constitution of Spain (1978).
- Constitution of the Federal Republic of Nigeria (1999, as amended).
- Corbett v Corbett* [1970] 2 All ER 33 paragraph 155.
- Criminal Code Act (Nigeria) (2004).
- Deneke, S. (2024). A human Rights-Based approach for effective criminal justice response to human trafficking. *Journal of International Humanitarian Action*, 9(4). <https://jhumanitarianaction.springeropen>.
- Dlamini, C. R. M. (1995). Human Rights in Africa: Which Way South Africa? Butterworths.
- EG & 7 Ors v Attorney General: DKM & 9 Ors* (interested parties); Katiba Institute & Anor (Amicus Curiae) Petitions 150 and 234 of 2016 (consolidated).
- Ehirim, U. G. (2023). Sexual orientation and gender identities in Nigeria: The fundamental human rights of LGBT+ persons to sexual liberty in perspective. *Journal of Perspectives in Gender Development*, 3(1), 29.
- Ehirim, U. G. (2025). Public morality and constitutionalism in restricting LGBTQ+ rights: A legal analysis of Nigeria, ghana, and Uganda. *International Journal of Constitutional and Administrative Law*, 1(1), 42–68.
- Ehirim, U. G. (2026). Navigating the investment and securities act 2025: A comparative legal framework for cryptocurrency regulation in Nigeria. *Revista Amazonia Investiga*, 15(87), 48–66.
- Ehirim, U. G. et al. (2024). Strengthening human rights protection in Nigeria: Safeguards under the police act 2020. *Khazanah Hukum*, 6(3), 263–293.
- Ehirim, U. G. et al. (2025). Constitutional Safeguard for Preservation of Democratic Political Culture and the Legitimacy of Political Porting in Nigeria. *Udayana Journal of Law & Culture*, 9(1), 1–23.
- Epprecht, M. (2005). Hidden histories of African homosexualities. *Canadian Women Studies [Les Cahiers De la Femme]*, 24(2). <https://cws.journals.yorju.ca>.
- Equality Act (United Kingdom) (2010).
- Eskridge, W. (1996). Challenging the apartheid of the closet: Establishing conditions for lesbian and gay intimacy, norms and citizenship 1961 – 1981. *Hofstra Law Review*, 25(1), 855.
- Falana, F. (2017). *Nigerian law on socioeconomic rights*. Legaltex Publishing Company Limited.
- Gasiokwu, P. I., Ohwomeregwa, O. B., & Ehirim, U. G. (2026). Sexual minorities' rights in Kenya, Malawi and tanzania: Reality or rhetoric?. *Open Journal for Legal Studies*, 9(2), 63–82. <https://doi.org/10.32591/coas.ojls.0902/02053e>
- Gender Recognition Act (United Kingdom) (2004).

- Gil, R. M., Freeman, T. L., & Matthew, T. (2021). Lesbian, gay, bisexual, transgender, and queer (LGBTQ+) communities and the Coronavirus disease 2019 pandemic: A call to break the cycle of structural barriers. *Journal of Infectious Diseases*, 224(11), 1810–20.
- Giraldo v Colombia*, (Case No. 11.656, Report No. 71/99 (Admissibility) of 4 May 1999).
- Gligah & Alisco v the Republic* [2010] SCGLR 870, 879.
- Hassinen, S. (2020). Sexual-Minority Rights & Activism, In: N. Chessman, K. Kanyinga and G. Lynch (eds), *The Oxford Handbook of Kenyan Politics*. Oxford University Press.
- Idrus, N. I. (2016). Gender Relations in an Indonesian Society: Bugis Practices of Sexuality and Marriage (Brill), 7, 32.
- International Commission of Jurists (ICJ) (2009). *Sexual orientation, gender identity and international rights law: Practitioners guide no. 4* (ICJ).
- International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966).
- International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1966).
- Johnson v A-G, Saint Vincent & The Grenadines* (Suit No: SVGHCV 2019/0110, Judgment Delivered by the Eastern Caribbean Supreme Court on 16 February 2024).
- Khanu v Emperor A/R* [1925] Sind 286
- Krishna, R. A. A., Amirthavarshini, D., & Rebekah, J. C. (2023). LGBTQ rights and legislation in India: The status quo. *Journal of Integrated Research in Law*, 3(1), 3.
- Lawrence v Texas* 519 US 558 [2003].
- Legal Resources Foundation (LRF) v Zambia, (Communication 211/98 [7 May 2000]63, 70).
- Lesbian and Gay Equality Project v Minister of Home Affairs*, [2005] ZACC 19.
- Makofane, K. (2013). Unspoken Facts: A History of Homosexualities in Africa, Culture, Health & Sexuality, 15(1), 114–16.
- Marriage (Same Sex Couples) Act (United Kingdom) (2013).
- Marriage Act (United Kingdom) (1949).
- Martins, O. U. (2022). Impact of Religion and Culture on LGBTQ in Nigeria: A Critical Analysis. A Paper Delivered at the International Conference on LGBT Studies Held at Berlin, 9–11 December.
- Mendes, L. R. (ed). (2019). *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).
- Miller, A. M., & Vance, C. S. (2004). Sexuality, human rights, and health. *Health and Human Rights*, 7(2), 5–15.
- Minister of Home Affairs & Anor v Fourie & Anor* [2006] 1 SA 524 (cd).
- Mlynarska-Sobaczewska, A., Kubuj, K., & Mezykowska, A. (2019). Public morality as a legitimate aim to limit rights and freedoms in the national and international legal order. *Contemporary Central and East European Law*, 1(133), 13.
- Morel, S. (2023). Spain approves gender Self-Determination with trans equality law. *Le Monde*. Madrid, 17 February, 2023. <https://www.lemonde.fr>.
- Mpungu, P. (Reporter), Kenya's High Court Upholds Ban on Same-Sex Relations. *Aljazeera*. <https://www.aljazeera.com/ajimpact/kenya-law-gay-sex-crime-190524171340308.html>.
- Msibi, T. (2011). The lies we have been told. on (Homo) sexuality in Africa. *Africa Today*, 58(1), 54–77.
- Muthmainnah, Y. (2016). LGBT human rights in Indonesian policies introduction: Realism versus liberalism in ethical arguments. *Indonesian Feminist Journal*, 4(1), 13.
- Mwakasungula, U. (2013). The LGBT Situation in Malawi: An Activists Perspective. In C. Lennox and M. Waites (eds). *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth*. University of London Press.
- Narayan, P. (2006). Somewhere over the rainbow: International human rights protection for sexual minorities in the new millennium. *Boston University International Law Journal*, 24, 313–17.
- Nartey v Gati* [2010] SCGLR 74.
- Navtej Singh Johar v Union of India* [2018] INSC 790.
- NGO Board v EG & 5 Ors*, (Supreme Court Petition No. 16 2019, Judgment Delivered 24 February 2023).
- Obergefell v Hodges* 135 S. Ct. 2584 [2015].

- Okeke, O. E. (2023). Pro-Justifiability 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 & Jurisprudence*, 14(1), 109–10.
- Park, A. (2018). Yogyakarta principles plus 10: A demand for recognition of SOGIECSC. *North Carolina Journal of International Law*, 44, 223.
- Paul, J., & Criado, A. R. (2020). The art of writing literature review: What do we know and what do we need to know?. *International Business Review*, 29(4).<https://doi.org/10.1016/j.ibusrev.2020.101717>
- Paurobally, S. (2023). Consent, Sodomy and Constitutionality. The E-Newsletter 131. Department of Public Prosecution, Mauritius, 24 – 27.
- Penal Code of Kenya, ch. 63 (2006 revision).
- Penal Code of Malawi (2010 revision).
- Phiri, C. (2022). The right to run for election in Zambia: A preserve of the educated class. *Journal of African Law*, 66(3), 419–38.
- Polymenoupoulou, E. (2018). LGBTI Rights in Indonesia: A Human Rights Perspective. *Asia-Pacific Journal of Human Rights and Law* 19, 3.
- Quinan, C. L., Molitor, V., den Brink, V. & Zimenkova, T. (2020). 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 & Law*, 1(1), 1–25. <https://doi.org/10.19164/ijgsl.v1i1.971>.
- Raj, M. S. (2000). Awakening of Human Rights. In: C. J. Nirmal (ed). *Human Rights in India*. Oxford University Press.
- Rao, R. (2020). *Out of time: The queer politics of Post-Coloniality*. Oxford University Press.
- Regina v Henn and Derby* [1981] AC 850.
- 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.
- Reid, G. (2022). Progress and setbacks on LGBT rights in Africa – an overview of last year. *Daily Maverick*. Johannesburg, 22 June.
- The Republic v Steve Monjeza & Anor* (Criminal Case No. 359 of 2009, Malawi).
- Reverend Christopher R. Mtikila v the United Republic of Tanzania*, (App 011/2011 14 June 2013) (Judgment).
- Roberts, C. N. J. (2014). The contentious history of the international bill of human rights. *Australian Journal of Human Rights*, 20(2), 213–217. <https://doi.org/10.1017/CB09781139135675>
- Romer v Evans* 517 U.S. 620, 1996
- R v Jacobs* [1817] Russ & Ry 311
- Sahara Reporters (2024). Kano Government Bans Movies Promoting Cross-Dressing Amid Campaign Against Bobrisky, Other Cross-Dressers. 4 April. <https://saharareporters.com>.
- Saharay, H. K. (2002). *The constitution of India: An analytical approach*, 3rd edn. Eastern Law House.
- Salgueiro da Silva Mouta v Portugal*. Application No. 33290/96, Judgement delivered 21 December 1999.
- Same-Sex Marriage (Prohibition) Act (Nigeria) (2013).
- Schmitz, R. M., Coley, J. S., Thomas, C. & Ramirez, A. (2022). The cyber power of marginalised identities: Intersectional strategies of online LGBTQ+ Latinx activism. *Feminist Media Studies*, 22(2), 271–90.
- Schoen, E. J. (2019). Masterpiece Cakeshop: A Case Study Brought to You by the US Supreme Court. *Rohrer College of Business Faculty Scholarship* 40,1–34.
- Secretary for Justice v Yau Yuk Lung Zigo and Lee Kam Chuen*. Final Appeal No. 12, 2006 [criminal], paragraph 29, Judgment of final appeal of the Hong Kong Special Administrative Region delivered 17 July 2007.
- Shalabi, M., & Shalidi, N. (2018). ‘Good Morals’ and ‘Public Order’ as Source of Law Principles and Rules: A Study of How to Transit from the Negative Function of Legal Institutions to the Positive One. *Law Quarterly: Journal of the Faculty of Law and Political Science*, 48(3), 511.

- Smith & Anor v United Kingdom*. Application No. 33985/96 and 33986/96, Judgment delivered 27 September 1999.
- Soltys, D. (2024). The emergence of lesbian theory of law – why and how the lesbian theory of law has been developed. *Bratislava Law Review*, 8(1), 27–29.
- Sonani, B. (2011). Malawi tells off donors. *The Nation*. 10 February.
- South Africa v Grootboom*, [2000]11 BCLR 1169 (CC).
- Ssenyonjo, M. (2023). Sexual Orientation and the Criminalisation of Private Consensual Sexual Acts between Adults of the Same Gender. *International Human Rights Law Review*.
- Toonen v Australia*, Communication, No. 488/1992, U.N. doc. CCPR/C/50/D/488/1992 [1994].
- Trindade, A. A. C., & Gonzalez-Salzburg, D. (2024). *International law of human rights*. Oxford University Press.
- Trithart, A. (2021). *A UN for all' UN policy and programming on sexual orientation, gender identity & expression, and sex characteristics*. International Peace Institute, 3–52.
- Umbu, E. I. & Agada, J. N. (2021). The right to freedom of marriage and the constitutionality of the prohibition of Same-Sex marriage in Nigeria. *Nigerian Bar Journal*, 11(1), 174.
- United Nations Charter (1945).
- United Nations Human Rights Office of the High Commissioner (2023). *The permanent shadow: Colonialism, sexual orientation and gender identity in Kenya and zimbabwe*. ReportOut Response to UN Office of the High Commissioner Call for Input, May.
- United States Department of State (USDS) (2017). 2017 Country Reports on Human Rights Practices – Nigeria. Department of State. <https://www.refworld.org/docid/53284a92b.html>.
- Universal Declaration of Human Rights, G.A. Res. 217 A (III) (1948).
- Uzoukwu v Ezeonu* [1991] 6 NWLR (Pt. 200), 708.
- Wah-Shan, G. (2001). Homosexuality and cultural politics of tongzhi in Chinese societies. *Journal of Homosexuality*, 40 (3–4), 29.
- Washburn, R. A. (2015). Freedom of marriage: An analysis of positive and negative rights. *Washington University Jurisprudence Review*, 8(1). <https://openscholarship.wustl.edu/lawjurisprudence/vol8/iss1/4>.
- Wilkinson v Kitzinger*, [2006] EWHC 2022 (Fam.).
- Yohanna, T. A. (2020). The Role of Religion in Fueling Homophobia in Nigeria. Grassroots Researchers Association. <https://www.grassrootsresearchers.org>.
- Young v Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000. Decision on 18 September 2003.
- Zimbabwean Human Rights NGO Forum v Zimbabwe*, [2006] AHRLR 128.