NIGERIA'S SAME SEX MARRIAGE PROHIBITION ACT: FLYING IN THE FACES OF CONSTITUTIONAL AND AFRICAN CHARTER RIGHTS *

ABSTRACT

This paper examines the prohibition of same-sex marriage in Nigeria under the Same Sex Marriage (Prohibition) Act 2013 (SSMPA), in spite of the provisions of the Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999) and the African Charter Act, both of which guarantee every citizen and person rights to freedom from discrimination and human dignity. With the aid of the theory of proportionality, this paper assesses the constitutionality of the provisions of the SSMPA in their limitation of the constitutional and African Charter Act rights of citizens and persons at the sub-constitutional level in Nigeria. It elucidates that the claim of legal validity cannot be made for the SSMPA because of its inconsistency with the legal/hierarchical order, as its precepts take for granted the constitutional values—and are not derived from the basic norms—which require citizens to be treated equally and for persons to enjoy certain absolute fundamental rights. Aside from advocating for the repeal of the SSMPA, this paper recommends the adoption of the broad and comprehensive approach in the interpretation of the provisions of sections 34(1) and 42(1)(a) & (b) of the CFRN 1999. The alternative, however, is for the alteration of the relevant provisions of the CFRN 1999 and African Chater to explicitly allow the derogation of the rights to freedom from discrimination and human dignity on the basis of sexual orientation.

Keywords: Same-sex marriage, Discrimination, Human dignity, Constitution, Legal/Hierarchical order

INTRODUCTION

In December 2013, the Same Sex Marriage (Prohibition) Bill was harmonised by a Conference Committee of the Nigerian National Assembly, after the Senate and House of Representatives passed versions of the Bill on 29 November 2011 and 2 July 2013, respectively. On 7 January 2014, former president Goodluck Jonathan signed the Bill into law. Two earlier versions of the Bill—the 2006 and 2008

versions—had respectively failed to pass in both houses in 2007 and 2009.[1] The Same Sex Marriage (Prohibition) Act 2013 (SSMPA)[2] prohibits and criminalises gay and lesbian activities, homosexuality and same-sex marriage or civil union in Nigeria. The focus of this paper is on the prohibition of same-sex marriage or civil union in Nigeria in spite of the provisions of the Constitution of the Federal Republic of Nigeria (CFRN) 1999,[3] and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[4] both of which guarantee every citizen and person the rights to freedom from discrimination and human dignity.

Part 2 of this paper offers a theoretical and conceptual analysis on same-sex marriage and relationship. In part 3, I examine the legal validity of the SSMPA in relation to the CFRN 1999 as well as the African Charter Act, situated within the notion of legal and hierarchical order. Part 4 examines the prohibition and criminalisation of same-sex marriage or civil union in Nigeria despite the constitutional right to freedom from discrimination, while part 5 adopts comparative constitutional law analysis to elucidate the legal support for the right to same-sex marriage or civil union in Nigeria and interrogates the idea that human dignity is central to the discourse on homosexual relationship. Part 6 examines the absolute nature of the rights to freedom from discrimination and human dignity under the CFRN 1999, and part 7 adopts the proportionality tests to determine the extent to which the SSMPA can place limitation on the rights to freedom from discrimination and human dignity. The paper concludes, in part 8, by recommending the expansive approach in the interpretation of fundamental rights, including the rights to freedom from discrimination and human dignity.

* **Ekokoi Solomon** (PhD) Senior Lecturer in the Department of Public Law, Faculty of Law, University of Uyo, Nigeria. Email: ekokoisolomon@uniuyo.edu.ng; ekokoisolomon@yahoo .com. **Editorial Comment**: A wrong version of this article was published in error in Volume 12, 2022 of the Journal.

[1] Kaleidoscope Trust, 'Nigeria: Same Sex Marriage (Prohibition) Act' (Kaleidoscope Trust Briefing, January 2014) 3.

[2] National Legislative Bodies (17 December 2013) <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&skip=0&query=Same+Sex+Marriage+prohibition+act&coi=NGA> accessed 20 August 2021.

[3] Cap C23 Laws of the Federation of Nigeria (LFN) 2004 (CFRN 1999).

[4] Cap A9 LFN 2004 (African Charter Act).

SAME-SEX MARRIAGE: A THEORETICAL AND CONCEPTUAL ANALYSIS

As noted by Green, it did not take long for Africa to catch up with Europe and North America in terms of the State's recognition of same-sex relationships.[5] In Africa, scholarly discourses on same-sex marriage or union can be viewed from the legal, social and cultural, and religious perspectives. While the legal and normativity debates focus whether there exists the right to marry[6] and whether persons who engage in same-sex relationships are entitled to social benefits,[7] the social and cultural debates focus on the issues of egalitarianism,[8] love and respectability.[9] The religious discourse on same-sex relationship is aptly captured by Bently. According to him, 'although unspoken, there is a general understanding among Christians [and Muslims] of what Christian [and Muslim] sexuality looks like and this does not include the image of a same-sex couple living in a lifelong, committed relationship.'[10] Aside from the need for some African countries to identify and declare themselves as either a Christian or Muslim nation, the other is the 'emerging debates over homosexuality and same-sex relationships, [to enable them] almost exclusively to condemn those relationships.'[11]

On the African continent, South Africa led the way in recognising same-sex marriage. Before the country's epoch-making legalisation of same-sex union in November 2006, there were scholarly contributions to the debate. One of the discourses is that by Robinson and Swanepoel in their journal paper, 'Same-Sex Marriage in South Africa: The Road Ahead'.[12] For them, the legal uncertainty on same-sex marriage, which existed in South Africa despite clear constitutional provisions prohibiting discrimination against citizens on the basis of sexual orientation, was fundamentally a function of the difference between marriage and same-sex relationship. Accordingly,

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[5] M. C. Green, 'Law, Religion, and Same-Sex Relations in Africa' (2021) 36 (1) *Journal of Law and Religion* 69.

[6] M. Judge, A. Manion and S. de Waal (eds), *To Have and to Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008) 12.

[7] D. Bilchitz and M. Judge, 'The Civil Union Act: Messy Compromise or Giant Leap Forward?' in M. Judge, A. Manion and S. de Waal (eds), *To Have and to Hold: The Making of Same-Sex Marriage in South* Africa (Fanele 2008) 26.

[8] ibid.

[9] R. Robson, 'On Rupture and Rhyme: Perspectives on the Past, Present, and Future of Same-Sex Marriage' in M Judge, A Manion and S de Waal (eds), *To Have and to Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008) 193, 201.

[10] W. Bentley, 'A Decade of the Same-Sex Debate in the Methodist Church of Southern Africa (2001-2011)' (2014) 2.

[11] Green (n 5) 67.

[12] J. A. Robinson and J. Swanepoel, 'Same-Sex Marriage in South Africa: The Road Ahead' (June 2004) 7(1) *Potchefstroom Electronic Law Journal*.

they proposed legal reform, through legislation, to accommodate same-sex union.[13] In the aftermath of the legalisation of same-sex marriage in South Africa, various arguments have been put forward as the rationale for legalising same-sex marriage. In 2007, a special issue on the theme 'Sexuality and the Law' was published.[14] The authors of all six papers in the volume—Goldblatt and Pantazis, Robson, de Vos, Bilchitz and Judge, Barnard, and Picarra—focused on the significance of the South African Civil Union Act of 2006, and agreed that legalising same-sex marriage is about the equal treatment of persons with the potential to bring about a progressive change in family law.

For Judge, Manion and de Waal, the legalisation of same-sex union in South Africa is predicated on 'the role and function of marriage' in society.[15] Bonthuys, on her part, examined the legalisation of same-sex marriage from a cultural perspective. She argued that the legalisation of same-sex marriage in South Africa does not go far enough because the legislation ignores customary law and those affected by it, as it focuses on the 'urban, middle-class people who have the social and economic wherewithal to flout the norms of their families and their religious and cultural communities.'[16] McCormick approached the issue of same-sex marriage by adopting the queer critical discourse. She rejected the idea that the legal status quo on same-sex marriage in South Africa has far-reaching implications for family law, and posited that a more highly valued social arrangement for people with different sexuality require 'perspectives that ask socially relevant questions that are not confined to the limitations of a human rights discourse.'[17]

In the Nigerian context, there is paucity of scholarly literature on same-sex marriage. The few academic works on the subject either adopt a certain narrow degree of legal,[18] philosophical[19] or moral[20] perspective, or elucidate the role of religion as

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[13] ibid.

[14] Special Issue (2007) 23(3) *South African Journal on Human Rights.*

[15] M. Judge, A. Manion and S. de Waal (eds), *To Have and to Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008) 12.

[16] E. Bonthuys 'Possibilities Foreclosed: The Civil Union Act and Lesbian and Gay Identity in South Africa' (2008) 11 (6) *Sexualities* 726, 723.

[17] T. McCormick, 'A Critical Engagement? Analysing Same-Sex Marriage Discourses in To Have and to Hold: The Making of Same-Sex Marriage in South Africa (2008) – A Queer Perspective' (2015) 46 *Stellenbosch Papers in Linguistics Plus* 99, 107.

[18] E. I. Umbu and J. N. Agada, 'The Right to Freedom of Marriage and the Constitutionality of the Prohibition of Same Sex Marriage in Nigeria' (2021) 11(1) *Nigerian Bar Journal* 173.

[19] N. Chukwu, 'The Nigerian Same Sex Marriage (Prohibition) Act, 2013 and the Concept of Justice, Law and Morality (2018) 7(1) *International Journal of Language, Literature and Gender Studies* 24.

the basis for the prohibition of same sex marriage in Nigeria.[21] This paper, however, contributes to the literature on same-sex marriage in Nigeria by providing a perspective that seeks to resolve the normative issues pertaining to the rights to freedom from discrimination and human dignity in favour of constitutionalism. Using the theory of proportionality, I examine the constitutionality and validity of certain provisions of the SSMPA and the limitations they place on the constitutional and African Charter Act rights of citizens and persons at the sub-constitutional level in Nigeria. By means of the hierarchical/legal order theory,[22] I argue that the provisions of Nigeria's SSMPA cannot be imbued with legal validity, as their precepts take for granted certain constitutional values—and are not derived from the basic norms—which require citizens of Nigeria to be treated equally and enjoy certain absolute fundamental rights. Not only is it imperative to highlight the concept of constitutional values because of its central role in promoting a truly democratic constitution and society,[23] but also because it embraces virtues of a wide magnitude required of a pluralistic and inclusive society, which must adhere to the principles of constitutionalism and ensure that the values of constitutionalism trickle down and percolate society for the betterment of every citizen. Thus, I make the point that because the CFRN 1999 was conceived as a 'living document', its interpretation must, in the light of present-day realities, continue to forge and keep up with evolving social conditions.

It has been argued that there is no international human rights law for the protection of the right of gays and lesbians to marry in accordance with their interest. According to Obiajulu Nnamuchi, this is because 'global consensus on same-sex marriage as a human right is lacking'.[24] Perhaps, to drive home his point—regarding the lack of international consensus on the right of gays and lesbians to enjoy the social benefit of marriage—he noted that the failure or refusal of the United Nations General Assembly to adopt the 'Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity', signifies

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[20] C. Akpan, 'The Morality of Same Sex Marriage: How Not to Globalize a Cultural Anomie' (2017) 13(1) *Online Journal of Health Ethics* <http://dx.doi.org/10.18785/ojhe.1301.02> accessed 19 August 2021.

[21] A. Arimoro, 'When Love is a Crime: Is the Criminalisation of Same Sex Relations in Nigeria a Protection of Nigerian Culture? (2018) 39 *Liverpool Law Review* 221, 228-229.

[22] T. Olechowski, 'Legal Hierarchies in the Works of Hans Kelsen and Adolf Julius Merkl' in U Müβing (ed), *Reconsidering Constitutional Formation II: Decisive Constitutional Normativity* (Springer International Publishing AG 2018) 353.

[23] S. Moreau, 'Equality Rights and Stereotypes' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 283.

[24] O. Nnamuchi, 'Nigeria's Same Sex Marriage (Prohibition) Act and the Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?' (2019) 25(1) *Southwestern Journal of International Law* 120, 127.

the resolve of the international community to permanently shelve the instrument and abandon the idea for an international legal framework to protect the right of gays and lesbians to marry.[25] Nnamuchi asserted that the advocacy for the right of gays and lesbians to marry as a human right is an issue of elevating the cultural values of certain Western countries that are prepared to 'wilfully exert [their power] over aid-recipient countries'.[26] It is obvious that Nnamuchi adopted the international law approach in his examination of the issue of same-sex marriage in Nigeria. Accordingly, he noted that his 'thesis is consistent with the current state of international law.'[27]

Contrariwise, this paper examines the issue of same-sex marriage or civil union in Nigeria using comparative constitutional law approach, with reliance on the interpretation of the courts.[28] This is 'with a view to finding principles rather than extracting rigid formulae, with the purpose of seeking rationales rather than rules',[29] to aid in the determination of issues bordering on same sex marriage or civil union in Nigeria. This is necessitated by the fact that comparative law offers veritable guidance in developing legal principles, considering that a Nigerian jurisprudence on same-sex marriage or civil union is yet to fully emerge. After all, it is expected that '[n]ational law [should] provide the first line of protection for human rights',[30] as it provides more incentive for the enforcement of fundamental rights. In other words, human rights are better protected at the municipal level than at the international arena. According to Stephens,

> *domestic remedies are viewed as more efficient and more responsive to individual needs than the remedies available in an international system. As a result, international law often requires that the parties exhaust any remedies offered by national courts before seeking review by an international body.*[31]

In critiquing the enforcement of human rights in the context of international law, Tony Evans notes that 'focusing so singularly on international law elevates the legal

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[25] ibid 138-141, 154.
[26] ibid 125.
[27] ibid 127.
[28] A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (13th edn, Pearson Education Limited 2003) 9.
[29] H. Klug, 'South Africa: From Constitutional Promise to Social Transformation' in J. Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 266, 289.
[30] B. Stephens, 'National Courts' in DP Forsythe (ed), *Encyclopedia of Human Rights* (Vol 4 Oxford University Press 2009) 41.
[31] ibid.

approach beyond its potential, offers a distorted view of progress in providing protection for human rights, obfuscates the structural roots of human rights violations and overlooks the inconvenient fact that international law is politically motivated.'[32] It important to note that the focus of this paper is on fundamental human rights rather than the more general notion of human rights. To that extent, the argument focuses around rule-based rights as against natural rights.

Unlike international law, the constitutional law of Nigeria—much like the constitutional law of comparable constitutional democracies—seeks to promote the fundamental rights of citizens (and persons) devoid of the political. This, perhaps, explains why the preamble to the CFRN 1999 declares, among other things, the equality of all Nigerian citizens. The CFRN 1999 also guarantees certain fundamental rights—some of which are guaranteed to Nigerian citizens, and others to all persons who legitimately live within the territorial boundary of Nigeria.[33] Therefore, even though the debate on same-sex marriage or civil union can be viewed from the perspective of contemporary international legal regime, or the lack thereof, there is little or no doubt that the resolution of the issues, which the debate has generated, to a large extent, requires the application or enforcement of domestic legal framework anchored on constitutionalism.

Still, it must be acknowledged right away that constitutional rules are considerably different from one jurisdiction to the other.[34] This is a classic demonstration of how Hart's rule of recognition has influenced the new wave constitutionalism which, according to Dejo Olowu, promises 'the gradual ascendency of global culture of human rights and the rule of law',[35] and rejects the legal instruction of human conduct based on religious and/or cultural sentiments. Importantly, the new wave constitutionalism has moved away from the mere protection of civil and political rights, significantly extending the frontiers to guarantee economic, social and cultural rights, with humanity and the preservation of human dignity, through the application of the rule of law, as its focus.[36]

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[32] T. Evans, *The Politics of Human Rights: A Global Perspective* (Pluto Press 2001) 55.
[33] O. Oyelowo, *Constitutional Law in Nigeria* (Kluwer Law International BV 2019) 139, 144.
[34] D. Dyzenhaus, 'The Idea of a Constitution: A Plea for *Staatsrechtslehre*' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 9.
[35] D. Olowu, *An Integrative Rights-based Approach to Human Development in Africa* (Pretoria University Law Press 2009) 78, 79.
[36] ibid 82-83.

THE CONSTITUTION, AFRICAN CHARTER ACT AND SSMPA:

THE NOTION OF LEGAL/HIERARCHICAL ORDER

In Nigeria, the National Assembly is vested with the legislative powers of the Federation,[37] which is to be exercised to promote the 'peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List'.[38] Marriage is one of the items under the Exclusive Legislative List,[39] and the SSMPA is a product of the exercise of the legislative competence of the National Assembly. Sections 1 and 2 of the SSMPA prohibit and deny official recognition to same-sex marriage or civil union in Nigeria respectively. Section 7 of the SSMPA defines same-sex marriage as 'the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purpose of same sexual relationship'.[40] It further defines civil union as 'any arrangement between persons of the same sex to live together as sex partners, and includes such descriptions as: (a) adult independent relationships; (b) caring partnerships; (c) civil partnerships; (d) civil solidarity pacts; (e) domestic partnerships; (f) reciprocal beneficiary relationships; (g) registered partnerships; (h) significant relationships; and (i) stable unions.'[41] Section 5 of the SSMPA criminalises same-sex marriage or civil union and the actions of a person who administers, witnesses, abets or aids same-sex marriage or civil union or promotes same-sex activities.

The foregoing provisions are, indeed, far-reaching in terms of the limitations they impose on the rights of gays and lesbians to marry, as well as the denial of the social benefit to enjoy consensual relationships.[42] Accordingly, an international human rights organisation, the Human Dignity Trust, posits that 'the definition of the types of relationships regulated by the SSMPA is broader than mere marriage and could capture any type of committed, caring and emotional partnership of same sex people who happen to be living together.'[43] It thus appear that these provisions are not only confrontational to the principle of equality, but place limitations on the constitutional and African Charter Act rights of Nigerian citizens and persons lawfully living in

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[37] CFRN 1999, s 6(1).
[38] CFRN 1999, s 4(2).
[39] CFRN 1999, Second Schedule, Exclusive Legislative List, item 61.
[40] SSMPA, s 7 para 3.
[41] SSMPA, s 7 para 5.
[42] On 5 April 2022, a Bill was introduced in the House of Representatives to amend sections 4 and 5 of the principal Act, to prohibit cross-dressing, except 'in the course of a stage play or any bona fide public entertainment.'
[43] Human Dignity Trust, 'Nigeria: Same-Sex Marriage (Prohibition) Act, 2013' (1 April 2014) 3.

Nigeria to be free from discrimination,[44] to enjoy private and family life,[45] to freely associate,[46] and to be free from human indignity.[47]

Even though the SSMPA was legitimately enacted and signed into law as an act of the National Assembly, can its provisions operate to deny Nigerian citizens or persons lawfully living in Nigeria their constitutional and African Charter Act rights? Going by Hans Kelsen's pure theory of law, which expounds the logical unity of the legal order, the validity of norms must derive from the basic norm.[48] To ensure the 'logical unity of the legal order and [determine] whether a norm belongs to the legal order …, a lower norm cannot contradict or violate a higher norm from which it derives validity.'[49] In a constitutional order with a written constitution as the basic and fundamental law, acts that contradict or violate the constitution may be held unconstitutional, if they are challenged in court. In Nigeria, the CFRN 1999, as the fundamental law, establishes the basic norms and logical unity of the legal order,[50] as well as empowers the courts to determine the validity of a norm within the legal order.[51] However, the fact that the provisions of the SSMPA—a lower norm, which appears to contradict a basic norm that is established under the CFRN 1999—have not been held to be unconstitutional does not mean the norm they create is not in conflict with the basic norm of the Constitution, neither does it mean that the higher norm under the CFRN 1999 has been invalidated. According to Suri Ratnapala,

> *conflicting norms may operate simultaneously in the practical sense. There are unconstitutional laws that no one has tested in a court. There are regulations in the statute book that are ultra vires the parent statutes. These may never be annulled, for want of challenge. This does not mean that the higher order norms are invalidated. The conflicting norms will have practical operation despite their logical inconsistency. What the pure theory says is that logically they cannot remain in conflict within the same legal order because all norms derive their validity ultimately from the same basic norm.*[52]

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[44] CFRN 1999, s 42(1).
[45] CFRN 1999, s 37; see also, African Charter Act, art 18(1).
[46] CFRN 1999, s 40.
[47] CFRN 1999, s 34(1(a); see also, African Charter Act, art 5.
[48] H Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts, Part II' (1935) 51 *Law Quarterly Review*, 517.
[49] S Ratnapala, *Jurisprudence* (2nd edn, Cambridge University Press 2013) 79.
[50] CFRN 1999, s 1(1) & (3).
[51] CFRN 1999, s 4(8).
[52] Ratnapala (n 49) 80.

In *Federal Republic of Nigeria v Osahon & 7 Ors*,[53] the Supreme Court of Nigeria held that '[t]he Constitution of any country is the embodiment of what [the] people desire to be their guiding light in governance, their supreme law, [and] fountain of all their laws'.[54] Thus, it is safe to assert that the values and aspirations of the Nigerian people, under a constitutional democracy, are embodied in the CFRN 1999, albeit the hue and cry regarding the document's legitimacy or the lack of it. For this reason, therefore, constitutionally guaranteed rights are not to be treated insouciantly vis-à-vis the provisions of other legislation. This is equally applicable to rights guaranteed under domesticated international instruments. One of such international instruments is the African Charter, which gives citizens of member states of the African Union rights that are enforceable by municipal courts. The National Assembly has domesticated the African Charter as a municipal law.

In *Abacha & 3 Ors v Fawehinmi*,[55] the Supreme Court of Nigeria held that if there is a conflict between the provisions of the African Charter Act—a statute with international flavour that has been made part of Nigerian law—and any other domestic statute, the provisions of the African Charter Act will prevail over the provisions of ordinary domestic statutes.[56] This is because, first, it is presumed that the legislature does not intend to breach Nigeria's international commitments to respect the rights of citizens,[57] and second, the African Charter Act possesses 'a greater vigour and strength than any other domestic statute.'[58] Therefore, it is also safe to state that the constitutional principle of equality of citizens under the law, which is articulated in the 'right to freedom from discrimination' under the CFRN 1999, on the one hand, as well as the 'right to human dignity or freedom from inhuman and degrading treatment' under the CFRN 1999 and the African Charter Act, on the other hand, cannot be justifiably limited by an ordinary act of the National Assembly, including the SSMPA.

PROHIBITION OF SAME-SEX MARRIAGE AND THE RIGHT TO FREEDOM FROM DISCRIMINATION

The principle of equality ensures that no member of society is made to feel undeserving of equal treatment and consideration. The notion of equality entails that law or administrative action should not be used against one group of persons and not others, who belong to another group, as this will be discriminatory. In the Canadian case of *Andrews v Law Society of British Columbia*, discrimination was defined as:

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53 [2006] 1 All NLR 374.
54 ibid 388 (per Belgore JSC).
55 [1999-2000] All NLR 351.
56 ibid 365.
57 ibid.
58 ibid.

> *a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to members of society.*[59]

From the foregoing definition, discrimination means differential treatment that is demeaning to the human person. This happens when a law or conduct unjustifiably treats some persons or group of persons as inferior or lesser humans. In *EG & 7 Ors v Attorney General*,[60] one of the two issues for determination was whether section 162 of the Kenyan Penal Code, which provides for unnatural offences, is unconstitutional for violating the rights of homosexuals pursuant to articles 27 and 28 of the Kenyan Constitution (which guarantee the freedom from discrimination and human dignity respectively). The High Court of Kenya held that section 162 of the Penal Code was not unconstitutional in so far as both the natural and literal interpretation of the language used in the section does not target a particular group of persons. [61]

The basic standard in the interpretation of a constitution is to ascertain the intention of its framers. This can be achieved by examining the preamble, which provides for who is adopting the constitution, why it is being adopted and what is being adopted, as well as 'describes the core values that the [c]onstitution exists to achieve'.[62] In Nigeria, the preamble to the CFRN 1999 articulates the principle of equality of citizens as one of its core values or morals. One specific expression of the equality principle is the 'right to freedom from discrimination' in section 42(1) of the CFRN 1999. The section provides that:

> *a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person –*
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> *(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative*

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[59] [1989] I SCR 143 (per McIntyre J).

[60] Constitutional and Human Rights Division, Petition No. 150 of 2016, *DKM & 9 others* (Interested Parties); *Katiba Institute & another* (Amicus Curiae) para 296 <http://krnyalaw.org/caselaw/cases/view/173946/> accessed 17 November 2021.

[61] ibid, para 296.

[62] E. Chemerinsky and M. S. Paulsen, 'Interpretation: The Preamble' *Constitution Center* <https://constitutioncenter.org/interactive-constitution/interpretation/preamble-ic/interps/37> accessed 20 November 2021; see also, L Orgad, 'The Preamble in Constitutional Interpretation' (2011) 8(4) *International Journal of Constitutional Law* 714, 723-731.

> *action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or*
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> *(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.*[63]

The section further provides that '[n]o citizen of Nigeria shall be subjected to any *disability* or *deprivation* merely by reason of [the] *circumstances of his birth*.'[64] On the whole, the provisions on the right to freedom from discrimination under the CFRN 1999 prohibit the express or practical application of any law, or any executive or administrative action of government that creates or is capable of imposing disabilities or restrictions against, and according privilege or advantage in favour of, citizens of Nigeria on the basis of their belonging to a community of people, ethnic or religious group, place of origin, sex or holding certain political views, as well as the circumstances of their birth.

Neither the CFRN 1999 nor the Interpretation Act defines the word 'sex'. The lack of statutory definition of sex as used in the CFRN 1999 is regrettable, as it has given rise to the argument that gays and lesbians (homosexuals) are not guaranteed the right to freedom from discrimination in section 42(1) of the CFRN 1999, and therefore cannot enjoy the right to marry.[65] To be clear, the word sex, as used in section 42(1) of the CFRN 1999 is a generic term that includes sexual and gender identity, sexual category and sexual characteristics. This position was clearly noted in an Indian case, wherein identical constitutional provisions to those in section 42(1) of the CFRN 1999 came up for judicial review. In *National Legal Services Authority v Union of India & Ors*, the Supreme Court of India noted that '[t]he discrimination on the ground of sex under [a]rticles 15 and 16 [of the Indian Constitution], therefore includes discrimination on the ground of gender identity.'[66] Also, in *Bostock v. Clayton County*, a consolidated suit that was decided on 15 June 2020, the United States (US) Supreme Court addressed the issue of sex from a more conceptual point of view. In providing illumination on the issue of non-discrimination based on sex, as provided under Title VII of the Civil Rights Act of 1964, the Court held that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex. According to the Court:

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63 CFRN 1999, s 42(1)(a) & (b) (emphases added).
64 ibid, s 42(2) (emphases added).
65 Umbu and Agada (n 18) 181-182.
66 (2014) 5 SCC 438 (per Radhakrishnan J).

> *There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It cannot be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. … We agree that homosexuality and transgender status are distinct concepts from sex. But, as we have seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.*[67]

Therefore, it is unjustifiable to impose limitations on citizens by law (including the SSMPA) or executive or administrative action of government on the basis of sex, except on any of the grounds clearly provided under the CFRN 1999 with respect to:

(a) appointment to any office of State, or
(b) membership of the armed forces of the Federation, or
(c) membership of the Nigeria Police Force, or
(d) an office in the service of a corporate body established by any law in Nigeria.[68]

Notably, marriage does not fall within any of the exceptions provided in the CFRN 1999 as a basis to derogate the equality principle, and limit the right to freedom from discrimination at the sub-constitutional level.

Under the African Charter Act, the right to freedom from discrimination on the ground of sexual orientation can be invoked from the provision that every individual is entitled to the rights guaranteed under the Charter 'without distinction of any kind such as race, ethnic group, colour, sex language, religion, political or any other opinion, national or social origin, fortune, birth or other status'.[69] Clearly, the phrase 'other status' is indicative that the grounds for non-discrimination under the African

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[67] 590 U. S. ____ (2020) 18-19.
[68] CFRN 1999, s 42(3).
[69] African Charter Act, art 2.

Charter Act are exhaustive and not frozen in time, and can evolve. Indeed, the logic of the provisions is expansive and open-ended to include sexual orientation.[70]

This position is reinforced by the African Commission on Human and Peoples' Rights (African Commission) adoption of Resolution 275 in May 2014, in which it explicitly condemns discrimination and other human rights violations based on sexual orientation and gender identity. In restating the import of article 2 of the African Charter, the African Commission emphasises that the provisions protect the rights of all persons, and admonishes members states of the African Union to end all acts of violation, whether by state or non-state actors, against 'persons on the basis of their imputed or real sexual orientation or gender identities'.[71]

Yet, the SSMPA imposes disabilities or restrictions against a category of citizens (homosexual) and accords privilege or advantage in favour of another category (heterosexual). This is so because, on the one hand, the SSMPA imposes disabilities or restrictions through the prohibition and criminalisation of same-sex marriage or civil union, thereby denying gays and lesbians the benefits of entering into marriage or civil union contract;[72] denial of the right to solemnise marriage or civil union contract in a church, mosque or any place of worship in Nigeria;[73] and criminalisation of any person who associates, participates, aids or supports the celebration of same-sex marriage or civil union in Nigeria.[74] On the other hand, the SSMPA accords a privilege or advantage in favour of heterosexual people, by recognising '[o]nly a marriage contracted between a man and a woman'.[75] Legislative provisions such as these establish nothing but the classic case of discrimination, by imposing disabilities or restrictions against certain persons and according privilege or advantage in favour of others on the basis of their sex or sexual orientation.

Certainly, the above provisions of the SSMPA, with regard to imposing disabilities and according privilege, satisfy the standard set by the court on what amounts to

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[70] Anonymous, 'Sexual Orientation under the African Charter on Human and Peoples' Rights' *Pambazuka News: Voices for Freedom and Justice* (22 November 2010) <https://www.pambazuka,org/governance/sexual-orientation-under-african-charter-human-and-peoples%E2%80%99-rights> accessed 30 June 2022.

[71] African Commission on Human and Peoples' Rights, Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity – ACHPR/Res.275(LV)02014 (Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April – 12 May 2014).

[72] SSMPA, s 1(1) & (2).

[73] ibid, s 2(1).

[74] ibid, s 5.

[75] ibid, s. 3.

disability in relation to the right to freedom from discrimination under the Nigerian Constitution. In *Uzoukwu v Ezeonu II*, the Court of Appeal, in interpreting the provisions of section 39(2) of the CFRN 1979, which is *pari materia* with the provisions of section 42(2) of the CFRN 1999, held that it is not sufficient to allege discrimination merely on the basis of circumstances of birth 'without the proof of any disability or deprivation'.[76] According to the Court, 'not only that there was disability or deprivation, the action giving rise to this must, it seems, be the action of the state or its agencies.'[77] Indeed, not only are gays and lesbians deprived of the social benefit of marriage or civil union by virtue of the provisions of the SSMPA, the disability or deprivation is a consequence of an act of the National Assembly.

THE RIGHT TO SAME-SEX MARRIAGE HINGES ON THE RIGHT TO HUMAN DIGNITY

As earlier alluded to, in international law, there is no treaty or declaration that provides for the right of same-sex persons to marry. Rather, international law instruments use broad and fluid language to prohibit discrimination against persons, based on the principle of the universality of rights.[78] This raises the question whether the universality of rights principle extends equally to homosexuals, as human beings who are entitled to rights.[79] Conversely, this is not the case with national or municipal laws. For instance, the African Charter Act provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.'[80] Also, the CFRN 1999 provides, in express terms, that '[e]very individual is entitled to respect for the dignity of his person, and accordingly … no person shall be subject to … degrading treatment'.[81] The provisions of both the African Charter Act and CFRN 1999, with regards to the dignity of the human person, appear to be absolute in character—as we shall see later in this paper—due to the rigid, unyielding and precise wording of the provisions. The operative words being 'every individual' and 'shall'. Besides, there are no provisions that justify the limitation of the right to human dignity under both instruments.

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[76] [1991] 6 NWLR (Pt 200) 703.
[77] ibid.
[78] See Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) GAOR 3d Sess); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976, UNGA Res 2200 A(XXI)).
[79] D. Sanders, 'Sexual and Gender Diversity' in DP Forsythe (ed), *Encyclopedia of Human Rights* (Vol 4 Oxford University Press 2009) 433.
[80] African Charter Act, art 5.
[81] CFRN 1999, s 34(1)(a).

Under US constitutional law, whereas there is no specific constitutional rule that can be applied to argue the case of gays and lesbians to enjoy the right to marry, there are, however, constitutional principles that make gay and lesbian marriage permissible under certain conditions. For instance, as Engel notes, the central word in the constitutional debate on gay and lesbian rights in the US is dignity, even though the word is not contained in the US Constitution. Whereas, in many countries with written constitutions, there are explicit provisions that protect human dignity, which have provided the basis for which gay rights claims have been litigated.[82] This offers a clear distinction between Nigerian and US constitutional law in relation to the right of gays and lesbians to marry, as the former entails explicit rules that protect and guarantee the right to human dignity or freedom from inhuman treatment. It highlights the distinction between Nigerian and US constitutional law in terms of rule-based versus principle-based rights respectively,[83] which perhaps explains the apparent inconsistent decisions on the issue of same-sex marriage in the US.

In *United States v Windsor*[84] and *Obergefell v Hodges*,[85] for example, the US Supreme Court struck down section 3 of the federal Defense of Marriage Act (DOMA), which defined marriage as a union between one man and one woman, and state bans on same-sex marriage respectively, as unconstitutional for violating the Fourteenth Amendment of the US Constitution.[86] According to the majority decision of the US Supreme Court in *Windsor*—a case that pitched a federal legislation, DOMA, against the right of gays and lesbians to marry, when the state law recognises such marriage—going by the state law in place, there is a conferment of 'dignity and status of immense [social] import.'[87] Therefore, same-sex marriages are equally 'worthy of dignity in the community [as] with all other marriages.'[88] For this reason, the Court held that for denying marriage to gays and

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[82] S. Engel, '*Masterpiece Cakeshop* on Gay Rights Versus Religious Liberty' in D. Klein and M. Marietta, *SCOTUS 2018: Major Decisions and Developments of the US Supreme* Court (Springer Nature Switzerland AG 2019) 61.

[83] See *Olaniyan v University of Lagos* [1985] 2 NWLR (Pt 9) 599, 625 (Oputa JSC) ('A rule determines the outcome of a dispute in one particular way while a principle merely inclines the outcome one way or the other …. A rule makes certain legal results depend upon the establishment of certain factual situation stipulated in the antecedent part of the rule. This means that once the factual situation is proved to exist, the rule will apply in its entirety. Rules therefore apply in all or nothing dimension. Either the case falls within the ambit of the antecedent portion of the rule in which case it must be dealt with as the rule dictates or it does not, in which case it is not affected by the rule.'

[84] 570 US 744 (2013).

[85] 576 US __ (2015).

[86] Equal Treatment Clause, s 1.

[87] *Windsor* (n 84) 18 (per Justice Kennedy).

[88] ibid 20.

lesbians, DOMA diminishes their 'dignity and integrity'.[89] Also, in *Obergefell*, in affirming the right to marry for gays and lesbians, the US Supreme Court held that marriage promises 'nobility and dignity to all persons, without regard to their station in life.'[90] The Court further held that gays and lesbians were only seeking 'for equal dignity in the eyes of the law. [And] [t]he Constitution grants them that right'.[91]

It should be noted that the decisions in both *Windsor* and *Obergefell* were premised on the need to promote the principle of human dignity rather than a specific and express rule in the US Constitution. Contrarily, in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*[92]—a case that sought to resolve the conflict between a principle-shaped constitutional right of 'equal treatment' under the Fourteenth Amendment and a rule-shaped constitutional right of 'free exercise of religious belief' under the First Amendment of the US Constitution, 'the [human] dignity doctrine seemed to have reached its limit',[93] as it could only survive the inference from the equal treatment clause of the Fourteenth Amendment in contrast to the express constitutional rule of free exercise of religious belief under the First Amendment. So much so that in *Masterpiece*, the 'dignity jurisprudence' of the US Supreme Court appears to have 'hit a substantive dead end'.[94]

Human Dignity as an Amalgam of Rights

In Nigeria, the right to human dignity is a combination or amalgamation of rights, which comprises freedom from torture, inhuman or degrading treatment, slavery or servitude and forced or compulsory labour. Of relevance to the present discourse is the right to freedom from inhuman or degrading treatment—the kind that deprives the individual of human dignity. This right is guaranteed in both the CFRN 1999 and the African Charter Act. While section 34(1)(a) of the CFRN 1999 provides for the right to freedom from inhuman or degrading treatment, article 5 of the African Charter Act takes it further, as it provides for the inherent dignity of the human being and the recognition of his or her legal status as a person.[95] Degrading treatment means treating a person in a manner that diminishes his or her intellectual, moral or social worth and capacity.[96] It also includes the diminishing of their legal personality.

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89 ibid 22.
90 *Obergefell* (n 85) 3 (per Justice Kennedy).
91 ibid 28.
92 584 US __ (2018).
93 Engel (n 82) 65.
94 ibid 70.
95 African Charter Act, art 5.
96 B Garner (ed), *Black's Law Dictionary* (8th edn, Thomson West 2004) 456.

This is exactly what the SSMPA seeks to do by prohibiting and criminalising same-sex marriage or civil union. This raises the question: what is marriage? Marriage is a social aspect of human life that promotes the sexual satisfaction, economic and social status, as well as the acceptability of persons in society. According to the *New Encyclopaedia Britannica*,

> [m]arriage is important as the accepted institution for the expression of adult sexuality. A mutually satisfying sex life is important to both men and women, although social scientists point out that marital roles involve much more than this. Romantic love is only one of the reasons people marry. Social and economic security, and indeed social pressures, can be equally important.[97]

Universally, a married person 'acquires a status over and above what he/she would have had if single.'[98] This is equally true in the African context where people marry for a variety of reasons, including the need for family life, which is guaranteed both under the CFRN 1999 and the African Charter Act.

Under the CFRN 1999, the right to private and family life is guaranteed in section 37. However, the African Charter Act attests to this right more appropriately, as it provides that '[t]he family shall be the natural unit and basis of society [and] shall be protected by the State',[99] which shall have the responsibility of assisting the family to promote the traditional values recognised by the community. It should be noted that the African Charter Act does not define the kind of family it refers to. However, in 'recognising … that fundamental human rights stem from the attributes of human beings,' together with the conscious effort to 'eliminate all forms of discrimination',[100] the idea of family—and by implication marriage—in the sense used in the African Charter Act, must be construed to be all encompassing, as the concept of family has evolved from a social unit borne out of gender status to contract. This suggests that law should be less concerned with a person's gender than it is with voluntary agreement among persons.

The idea of voluntary agreement by individuals raises the issue of choice, which is central to personal liberty. This is because it entails the most intimate and personal decisions a person can make in a lifetime—choices that are essential in promoting the dignity of the individual.[101] The idea of promoting human dignity through choice

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[97] The New Encyclopaedia Britannica, 'Family and Kinship' (15th edn, PW Goetz (ed), Encyclopaedia Britannica 2015) 59, 64.
[98] E. Chianu, *Marriage and Divorce Law* (Mindex Publishing Co Ltd 2023) 535 para 27.07.
[99] African Charter Act, art 18(1).
[100] Preamble to the African Charter Act, paras 5 and 8.
[101] 505 US 833 (1992).

provided the basis for the landmark decision of the highest court in India in *Navtej Singh Johar v Union of India*.[102] In the *Johar* case, the Supreme Court of India was asked to determine whether section 377 of the Indian Penal Code (IPC), which criminalises homosexual acts in India, is unconstitutional and violates, among others, the rights protected in article 14 (equality before the law) and article 15 (non-discrimination on grounds of sex) of the Indian Constitution. The Court noted that homosexual conduct among consenting adults is worthy of constitutional affirmation, as it emanates from personal choice. The Court further noted that homosexuals 'possess the same human, fundamental and constitutional rights as other citizens do, [and] that equality is the edifice on which the entire non-discrimination jurisprudence rests.'[103] Consequently, the Court held, among other things, that:

(i) section 377 of the IPC subjects homosexuals to discrimination and unequal treatment, thus making it liable to be partially struck down for violating article 14 of the Indian Constitution,[104]

(ii) section 377 of the IPC amounts to unreasonable restriction that cannot be accepted as reasonable basis for the limitation of the fundamental right of expression of choice of homosexuals, as consensual homosexual relationship is not in any way harmful to public decency and morality,[105]

(iii) homosexuals have fundamental rights to live with dignity, with the assurance of the cardinal constitutional values of fraternity; that they are entitled to equal protection under the law, and 'to be treated in society as human beings without any stigma being attached to any of them',[106] and

(iv) section 377 in so far as it criminalises homosexuality between consenting adults is unconstitutional.[107]

NATURE OF THE RIGHTS TO FREEDOM FROM DISCRIMINATION AND HUMAN DIGNITY

There is a general presumption of the constitutionality of legislation duly enacted by a competent body authorised to do so.[108] To that extent, there is the presumption of the

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[102] WP (Crl) No 76 of 2016 D. No 14961/2016.
[103] ibid, para 240 (per Dipak Mishra, CJI).
[104] ibid, para 253(xv).
[105] ibid, para 253(xvi).
[106] ibid, para 97 (per Nariman J).
[107] ibid.
[108] J Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 29, 143-144.

constitutionality of the provisions of the SSMPA, which prohibits and criminalises same-sex marriage or civil union in Nigeria. However, for this presumption not to be rebuttable, the provisions of the SSMPA must be expressly or impliedly permissible under the CFRN 1999.[109] In other words, the provisions of the SSMPA cannot transgress the law of the Constitution. Accordingly, in so far as the CFRN 1999 forbids or does not permit an act or conduct, any law prescribing such an act or conduct is unconstitutional and void to the extent of the inconsistency contained in that law.[110]

This is more so the case where a legislation limits constitutional rights that appear to be absolute in nature. Rights are absolute in nature when their protection is equal to their scope and their limitation cannot be constitutionally justifiable.[111] In Nigeria, the rights to freedom from discrimination and degrading treatment appear to be rights that are equal in their protection as well as scope, and cannot be limited on the basis of protecting other rights or the public interest. In other words, the rights to freedom from discrimination and human dignity appear to be without exceptions and require no balancing.[112]

It is important to highlight the foregoing point because the enforceability of a legislation limiting the constitutional rights of persons hinges on the nature of the rights, which the legislation is alleged to transgress. For, where the constitution does not grant the legislature the power to legislate on a matter, the presumption of constitutionality of legislation becomes inapplicable. As we shall see below, this principle holds true for the SSMPA as the legislation appears to confront the right of citizens not to be discriminated against on the basis of their values, as well as the right of persons not to be treated in a degrading manner as to diminish their humanity. In US constitutional law, freedom from discrimination and human dignity are relative constitutional rights, with 'no explicit textual [constitutional] guarantee that government authorities must treat persons with dignity or especially that individual citizens must treat each other equally or without discrimination'.[113] The situation becomes more intricate when relative constitutional rights conflict with absolute constitutional rights such as the right to free exercise of religious belief under the

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[109] B Nwabueze, *The Presidential Constitution of Nigeria* (C Hurst & Co (Publishers) Ltd 1982) 281.
[110] CFRN 1999, s 1(3).
[111] A Barak, *Proportionality: Constitutional Rights and their Limitations* (Trans. by D Kalir, Cambridge University Press 2012) 27.
[112] *The Public Committee Against Torture in Israel v Prime Minister* (1999) HCJ 5100/94 IsrSC 53(4) 817.
[113] Engel (n 82) 67.

First Amendment. Aharon Barak refers to this kind of scenario as a 'constitutional accident [in] which one of the rights loses its full constitutional scope.'[114]

In Nigeria, the rights to freedom from discrimination and degrading treatment are absolute constitutional rights. This is because the provisions that protect the rights—both under the African Charter Act and CFRN 1999—do not vest in the State or persons any authority to place limitations on the rights. According to article 3 of the African Charter Act, '[e]very individual shall be entitled to equal protection of the law', while section 45 of the CFRN 1999, which deals with the 'restriction on the derogation from fundamental rights', provides that:

> *(1) Nothing in sections 37, 38, 39 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society–*
>
> *(a) in the interest of defence, public safety, public order, public morality or public health; or*
> *(b) for the purpose of protecting the rights and freedom of other persons.*
>
> *(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution.*

In essence, therefore, going by the foregoing provisions together with the provisions in section 42(3) of the CFRN 1999, both the protection and scope of the constitutional right to freedom from discrimination in section 42(1) and the constitutional right to human dignity in section 34(1)(a) are equal, and cannot be justifiably limited by any law in Nigeria under a democratic government.

PROPORTIONALITY OF THE SSMPA's LIMITATION OF FUNDAMENTAL RIGHTS

In Nigeria, the constitutionality of the SSMPA is yet to be tested in court. This is because the courts have avoided the constitutional scrutiny of the SSMPA by applying legal technicalities;[115] relevant agencies of the Nigerian State have failed or

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[114] Barak (n 111) 88.

[115] O. Affi, 'Nigerian High Court Avoided Constitutional Scrutiny of Anti-Gay Laws: *Mr. Teriah Joseph Ebah v Federal Republic of Nigeria'* (9 December 2019) *Legal Grounds: Reproductive and Sexual Rights in Sub-Saharan African Courts and the Reprohealthlaw Blog* 2.

refused to effectively prosecute cases that border on the SSMPA; homosexuals and civil society organisations have not been courageous and/or are unwilling to institute legal actions to challenge the religious stereotyping, which the SSMPA appears to promote,[116] by invoking the jurisdiction of the courts regarding the limitation of the rights of homosexuals in Nigeria;[117] or a combination of the foregoing factors.

In *Ebah v Federal Republic of Nigeria*,[118] a Federal High Court in Abuja, in upholding the preliminary objection of the respondent against the applicant's suit brought under the Fundamental Rights (Enforcement Procedure) (FREP) Rules 2009, held that the applicant lacked legal standing to bring the action because he failed to show that he is a homosexual. Not only is the court's analysis artificial, considering the preamble to the FREP Rules, it also runs contrary to established precedent.[119] On 27 October 2020, the Lagos Judicial Division of the Federal High Court struck out the first criminal prosecution under the SSMPA against 47 Nigerian men,[120] who were arrested at a birthday party in Egbeda, for want of diligent prosecution.[121]

Besides the legal technicalities involved in the cases identified above, instituting the actions at the Federal High Court meant that the courts lacked jurisdiction.[122] Nevertheless, it would appear that the legislative standards as conceived and expressed in the SSMPA are hostile to certain provisions of the CFRN 1999 and the African Charter Act. In view of the need to align legislative standards with constitutional norms, how can such a confrontation be resolved? According to Barak, 'the rule of law is satisfied whenever [a] constitutional conflict is resolved through the use of the rules of proportionality, whose effects are felt at the sub-constitutional level'.[123] For Barak, proportionality entails the rules of determining the necessary conditions for the limitation of a constitutionally protected right, for the purpose of examining whether a law or administrative action of government is constitutionally permissible.[124]

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116 Arimoro (n 21).
117 CFRN 1999, s 46(1) & (2).
118 (Unreported) Suit No: FHC/ABJ/CS/197/2014, 22 October 2014.
119 *Fawehinmi v Akilu* [1987] 4 NWLR (Pt 67) 797, 846-848 (SC) paras A-H; see also *Babalola v Attorney General, Federation & Ors* [2018] LPELR-43808,12-14(CA)paras D-B.
120 Charge Sheet No. FHC/L/311c/2019.
121 American Bar Association, 'Nigeria v Egbeda 47' (Trial Fairness Report, A Clooney Foundation for Justice Initiative, November 2020) 2-5.
122 SSMPA, s 6.
123 Barak (n 111) 86.
124 ibid 3.

Therefore, the rules of proportionality can be applied to allow a law, if justifiable, place limitation on constitutional rights within a democratic system.[125] This suggests that to determine the constitutional permissibility of the provisions of Nigeria's SSMPA, in their confrontation of the principle of equality and their limitation on constitutional rights, they must be scrutinised using the tests of proportionality. This is because in a constitutional democracy, legislative enactments are products of resolutions of competing constitutional rights and principles.[126]

In *Harksen v Lane NO and Others*,[127] the South African Constitutional Court applied the proportionality tests, wherein it noted that where an attack is made on the provisions of a statute, on the claim that they offend article 9(3) of the South African Constitution (which is similar to the provisions of section 42(1) of the CFRN 1999), it is necessary to determine:

> *(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to 'discrimination,' does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.*

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[125] ibid 2.

[126] J. Rivers, 'A Theory of Constitutional Rights and the British Constitution' in R Alexy, *A Theory of Constitutional Rights* (Trans. by J Rivers, Oxford University Press 2010) xx.

[127] (1997) 11 BCLR 1489 (CC).

> *(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.*[128]

Emerging from the persuasive authority above, is that the discriminatory act brought about by law or conduct, which imposes limitation, disability or restriction on fundamental rights, is constitutionally reprehensible if it is unfair, not balanced and cannot be justified. But where the law or conduct is fair, balanced and necessary, then the law or conduct cannot amount to discrimination. Therefore, the use of legislative authorisation at the sub-constitutional level to limit constitutional rights will be constitutionally permissible only if: (i) it justifiably promotes a legitimate or proper purpose, (ii) it creates a balance between legitimate or proper purpose and the limitation on constitutional rights, and (iii) the measures taken in limiting constitutional rights are necessary.

Legitimate Purpose

To discover whether a statute limiting constitutional rights justifiably promotes a legitimate or proper purpose, recourse must be had to the constitutional text in a view to ascertaining the extent to which legislative limitation of constitutional rights is permissible.[129] The South African Constitution, for example, allows legislative limitation of constitutional rights in relation to, among other things, 'the importance of the purpose of the limitation.'[130] Thus, in *S v Jordan*,[131] the South African Constitutional Court applied the above constitutional directive in its review of the constitutionality of the prohibition on running of brothels. The Court held that the prohibition was intended to protect and promote morality in society, thus the purpose of the law is proper in a democratic society, as it seeks to regulate the sex trade.

Nevertheless, regarding the potential danger, which the limitation of constitutional rights portends, Woolman and Botha admonish the judicial branch to 'remain on guard that less overt or pernicious forms of discrimination—or state support for particular traditions, religions or worldview that marginalise smaller, more vulnerable groups—may be countenanced in the name of a new, ostensibly unproblematic purpose.'[132] In Nigeria, there is no similar provision in the CFRN 1999 that permits the limitation of constitutional rights on the basis of the importance of the purpose. Rather, specific provisions limiting constitutional rights on a case-by-case basis are

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[128] ibid, para 48 (emphases added).
[129] Barak (n 111) 246-250.
[130] Constitution of the Republic of South Africa, No 108 of 1996, art 36(1)(b).
[131] 2002 (6) SA 642.
[132] S. Woolman and H. Botha, 'Limitations' in S. Woolman, M. Bishop and J. Brickhill (eds), *Constitutional Law of South Africa* (2nd edn, Juta Law Publishers 2002) 78.

provided in addition to the general provisions in section 45 of the CFRN 1999. For example, in the case of the right to freedom from discrimination, on the one hand, it is only permissible to restrict the constitutional right in relation to the membership of the armed forces of the Federation and the Nigeria Police Force or appointment to any office of State, as well as service in a corporate body established by any law in Nigeria under section 42(3) of the CFRN 1999 and nothing more. As for the right to human dignity in section 34(1)(a) of the Constitution, on the other hand, the provisions are adamant as to the absolute nature of the right.

Balance

There are two approaches in the interpretation or construction of fundamental rights, namely the narrow and strict approach, as well as the broad and comprehensive approach. While the former approach is usually adopted in the interpretation of rule-based rights, the latter is used in the construction of principle-based rights.[133] With regards to the principle of proportionality, the interpretation of fundamental rights entails the approach of interpretative and constitutional balancing.[134] To that extent, there is the need for a balance between the purpose of a legislation (benefit to public interest) and the limitation on constitutional rights (harm to constitutional rights). Interpretative balancing is used 'to determine the purpose of the interpreted law',[135] and to provide 'solution that reflects the values of democracy and the limitations that democracy imposes on the majority's power to restrict individuals and minorities in it.'[136]

In contrast, constitutional balancing is designed to determine the constitutionality of the interpreted law. It is not designed to interpret the sub-constitutional law but to determine its validity. The process and the rules developed are used to 'resolve the tension between the benefit obtained in the realisation of the law's purpose, and the harm caused to the constitutional right.' [137] Ultimately, however, constitutional balancing recognises conflicting principles or values within a democratic society and ensures the resolution of such conflict.[138]

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[133] R. Alexy, 'Constitutional Rights, Balancing, and Rationality' (June 2003) 16(2) *Ratio Juris* 131, 131-132.
[134] Barak (n 111) 347.
[135] ibid.
[136] ibid 346.
[137] ibid 347.
[138] ibid 346.

Necessity

The proportionality test of necessity entails the use of the less restrictive means in limiting constitutional rights. This supposes that the use of sub-constitutional means to advance the legitimate or proper purpose and rational connection of limiting constitutional right must, of necessity, be done using means other than legislation, except it cannot be achieved otherwise. Therefore, 'the [legislature], accordingly, should begin with the lowest "step" possible, and then progress slowly upwards until reaching that point where the proper purpose is achieved without a limitation greater than is required of the human right in question.'[139] In essence, in the attempt to promote a legitimate or proper purpose, the legislature should adopt measures that will equally satisfy the rational connection for the limitation and scope of constitutional rights.

The foregoing position has been established by the highest courts in comparable jurisdictions with written constitutions, namely Germany and South Africa, where the proportionality approach has been applied by the courts to determine the constitutionality of the limitation on constitutional rights. For example, the Federal Constitutional Court of Germany held that the regulation, which prohibited the sale of certain candies containing cocoa powder that were primarily made from rice, had a proper purpose and that there was a rational connection between the purpose and the law. Yet, the Federal Constitutional Court held that the regulations limited the constitutionally protected right of the candy manufacturers to freely engage in their occupation. It further held that the measure adopted under the regulation was disproportionate and not necessary, as the same purpose could have been achieved by requiring the manufacturers to include a warning label on the product, which would result in a lesser harm to the constitutional right of the manufacturers.[140]

In *S v Makwanyane*,[141] the South Africa Constitutional Court examined the constitutionality of a statute that recognised the death penalty. The Court held, among other things, that the statute was unconstitutional for its disproportionality, and that the state failed to prove that the purpose of the statute could not be achieved through the measure of life sentence, which limits the constitutional right to life to a much lesser degree. Also, in *S v Manamela*,[142] the South African Constitutional Court examined a statute that created a reverse onus in cases involving the acquisition of stolen goods by providing that anyone accused of acquiring stolen goods bears the burden of proving that the goods were not stolen. While the Court held that protecting the community from dealing with stolen goods was a proper purpose for which the

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139 *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrLR 1 CA 6821/93.
140 BVerfGE 53, 135.
141 1995 (3) SA 391 (CC).
142 2000 (3) SA 1 (CC).

law was enacted, it held that the necessity of the law was not satisfactory, as its purpose could have been achieved by limiting the scope to cover only high value property.

In Nigeria, in relation to the prohibition and criminalisation of same-sex marriage or civil union, the measures adopted by the National Assembly to advance the protection of the public from the display of gay and lesbian (homosexual) activities should have been less limiting, to the extent of merely limiting the scope of the constitutional right to freedom from discrimination. This is because the purpose of limiting homosexual activities in the public domain can be achieved by adopting a lesser measure to limit the scope of the constitutional right of homosexual persons without resorting to outright prohibition and criminalisation of same-sex marriage or civil union.

CONCLUSION

The idea of 'normal sexuality' is a social construct borne out of religious and perhaps cultural sentiments. Therefore, I have argued that the idea of 'normal sexuality', which the SSMPA appears to endorse, lacks validity, as it confronts and prohibits absolute rights under the CFRN 1999 and the African Charter Act. In conclusion, I examine how the constitutional and African Charter Act rights to freedom from discrimination and human dignity can be extended to protect same-sex persons in Nigeria beyond the preceding analysis. This can be realised, basically, through judicial interpretation. Thus, paving the way for dispensing with the SSMPA, which is constitutionally problematic, other than by its repeal by the National Assembly.

Similar to sections 34(1)(a) and 42(1) of the CFRN 1999 are sections 7 and 15(3) of the Botswana Constitution, both of which guarantee the rights to freedom from inhuman or degrading treatment and discrimination on the basis of, among other things, sex (but not sexual orientation) respectively. It should be noted that the provisions in the constitutions of both countries regarding the right to freedom from discrimination are unlike those of the South African Constitution, which provides in section 9(3) that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

However, in Botswana, through judicial interpretation of the constitution, the ambit of 'discrimination on the basis of sex' has been extended to include sexual orientation. This is predicated on the policy of courts to adopt the broad and comprehensive approach, as against the narrow and strict approach, in the

interpretation or construction of written constitutions.[143] For example, in *Attorney General v Dow*, [144] the Botswana Court of Appeal adopted the broad and comprehensive approach to expand the interpretation of the provisions of section 15(3) of the Botswana Constitution so that the word 'sex' is construed beyond male or female or gender. According to the court, the Constitution cannot be allowed to become 'a lifeless museum piece'. As such, courts must continue to breathe life into the document, as it is their duty 'to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society, which is part of the wider and larger human society governed by some acceptable concept of human dignity.'[145]

Also, in *Attorney General v Letsweletse Motshidiemang*,[146] the Botswana Court of Appeal applied the broad and comprehensive approach in the interpretation of the Botswana Constitution to uphold the earlier decision of a lower court, which decriminalised same-sex relations among consenting adults. Accordingly, the court held that '[t]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.'[147] It should be noted that while the decision in the *Dow* case was based on the understanding that the categories of discriminatory treatment contained in section 15(3) of the Botswana Constitution were not forever closed,[148] as the classes mentioned were mere highlights of some vulnerable groups or classes that are highly likely to be affected by discriminatory treatment,[149] the *Motshidiemang* case was predicated on the decisional autonomy of every person to effectively express choice, including choices regarding sexual and other social relations.[150]

The foregoing principle is not alien to the jurisprudence of Nigerian courts, as the Supreme Court of Nigeria has advocated the adoption of the beneficial interpretation of the Constitution to ensure that the construction of its provisions is, at all times, vibrant and accentuate the advancement of a dynamic society, rather than a reflection

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143 Alexy (n 133).
144 [1992] BLR 119, 129–132 CA (per Amissah JP).
145 ibid, para 166 (A-E).
146 (2021) Civ. App. No. CACGB-157-19 (delivered on 29 November 2021).
147 ibid, para 114.
148 *Attorney General v Dow* (n 144) para 158.
149 E. K. Quansah, 'Same-Sex Relationships in Botswana: Current Perspectives and Future Prospects' (2004) 4 *African Human Rights Law Journal* 201, 209.
150 G. Bhatia, 'Notes from a Foreign Field: "The Time has Come"–The Botswana High Court and the Decriminalisation of Homosexuality' in *Indian Constitutional Law and Philosophy* (12 June 2019) <https://indconlawphil.wordpress.com/2019/06/12/notes-from-a-foreign-field-the-time-has-come-the-botswana-high-court-and-the-decriminalisation-of-homosexuality/> accessed 29 October 2021.

of something anachronistic that cannot stand the test of time.[151] It is on this note—with respect to the issue of same-sex marriage or civil union—that sections 34(1)(a) and 42(1)(a) & (b) of the CFRN 1999 should be beneficially interpreted to give life to their provisions.

[151] *Federal Republic of Nigeria v Osahon* (n 53) 400 (per Acholonu JSC).