

NIGERIA’S SAME SEX MARRIAGE (PROHIBITION) ACT AND THREAT OF SANCTIONS BY WESTERN COUNTRIES: A LEGITIMATE CASE OF HUMAN RIGHTS ADVANCEMENT OR WHAT?

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“Between Europe, America and Africa there is a huge culture gap. Some of the things that are considered fundamental rights abroad also can be very offensive to African culture and tradition and to the way we live our lives here.”

– Labaran Maku, Nigeria’s Minister for Information, Dec. 9, 2011.

“If the U.S. or any other foreign country wants to strip us of aid because we still hold on tightly to our values, then so be it. We are Africans, not Americans. We do not influence other countries when they are making their laws, so it is ridiculous that they’ll attempt to influence the way we make our own laws. Africans view homosexuality as immoral. It has never been condoned in Africa, and it will certainly not be tolerated here in Nigeria.”

– Tosin Omole, Nigerian Pastor, Dec. 9, 2011.

“The wealthier States, therefore, while providing various forms of assistance to the poorer, must have the highest possible respect for the latter’s national characteristics and timehonored civil institutions. They must also repudiate any policy of domination. If this can be achieved, then ‘a precious contribution will have been made to the formation of a world community, in which each individual nation, conscious of its rights and duties, can work on terms of equality with the rest for the attainment of universal prosperity.’”

– *Pacem In Terris*, Encyclical of Pope John XXIII, ¶ 125, April 11, 1963 (quoting John XXIII’s Encyclical Letter *Mater et Magistra*, AAS 53 (1961) 443).

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ABSTRACT

Political posturing and grandstanding aside, no international human rights instruments exist—not a single legal framework—that accord human rights recognition to homosexual or same-sex marriage. The closest the global community has ever come to recognizing this genre of interest as a human right is the adoption by a human rights group of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. Significantly, since this adoption in 2006, the United Nations has not come forth to project the Yogyakarta Principles as setting a universal human rights standard. Regardless, international law does not prohibit individual States from elevating homosexual marriage or any other contentious human rights claim to the status of a right within their respective domestic realms as part of legitimate exercise of national sovereignty. But there is no principle of international law which entitles these same States to compel other nations to accept their own municipal interpretations of, or ideas about, sexual “rights.” Therefore, attempts by these States to impose sanctions on, or otherwise denounce, those nations whose worldview regarding homosexuality is irreconcilably at odds with theirs, is a violation of the human rights of the people in the maligned nations to self-determination – the right to conduct their affairs in accordance with the dictates of their own value system.

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I. INTRODUCTION AND PRELIMINARY BACKGROUND

When Pope John XXIII issued the encyclical *Pacem in Terris* in 1963, the global community did not think of it as having any relevance to homosexuality. Yet, the prophetic message of the Papal document now resonates in global discourse more than half a century after its publication. The Papal pronouncement stated in bold terms that:

A new order founded on moral principles is the surest bulwark against the violation of the freedom, integrity and security of other nations, no matter

what may be their territorial extension or their capacity for defense. For although it is almost inevitable that the larger States, in view of their greater power and vaster resources, will themselves decide on the norms governing their economic associations with small States, nevertheless these smaller States cannot be denied their right, in keeping with the common good, to political freedom No State can be denied this right, for it is a postulate of the natural law itself, as also of international law It is only with the effective guaranteeing of these rights that smaller nations can fittingly promote the common good of all mankind, as well as the material welfare and the cultural and spiritual progress of their own people.¹

These pointed remarks obviously targeted the arrogance and condescending attitudes of powerful, wealthy nations in their dealings with developing countries, mostly in Africa, Asia and South America.

The thorny subject of abortion provides just one illustration of the manifestation of Pope John's concerns in modern international relations. In broad terms, it is strange that Africa, the most impoverished part of the world, is nonetheless the only region with an established human rights framework that also explicitly recognizes abortion as a human right.² Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) requires States Parties to take all appropriate measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the [fetus]."³

1. Encyclical of Pope John XXIII, *De pace omnium gentium in veritate, iustitia, caritate, libertate constituenda [Pacem in Terris]* [*On Establishing Universal Peace in Truth, Justice, Charity, and Liberty*], 55 ACTA APOSTOLICAE SEDIS [AAS] 257, 291 (1963) (Vatican) (quoting with approval Pope Pius XII, Nuntius radiophonicus, datus pridie Nativ. D.N.I.C. anno 1941 [Broadcast Message, Christmas 1941] (Dec. 24, 1941), in 34 ACTA APOSTOLICAE SEDIS [AAS] 1, 16-17 (1942) (Vatican), <http://www.vatican.va/archive/aas/documents/AAS-34-1942-ocr.pdf>), translated in The Holy See, *Pacem in Terris*, VATICAN (Apr. 11, 1963)).

2. See African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf [hereinafter African Charter]; PIERO A. TOZZI, INT'L L. GROUP ORGS. LEGAL STUDIES SERIES, INTERNATIONAL LAW AND THE RIGHT TO ABORTION 2-4 (2010) (noting that the African Union Convention on the African Charter on Human and People's Rights on the Rights of Women is the "one hard law regional treaty that mentions abortion"), <https://c-fam.org/wp-content/uploads/International-Law-and-the-Right-to-Abortion-FINAL.pdf>; *The World's Abortion Laws: 2018*, CTR. REPRODUCTIVE RTS., <http://worldabortionlaws.com/map/> (showing that the majority of African countries allow abortions in order to save the life of the mother or for health reasons if at all) (last visited Oct. 16, 2018).

3. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c), opened for signature July 11, 2003, OAU Doc. CAB/LEG/66.6 [hereinafter Maputo Protocol], <http://www.achpr.org/files/instruments/court->

To be sure, the African Charter on Human and Peoples' Rights is "the single exception" to the otherwise complete lack of abortion rights in any binding treaty law.⁴ That is, there is no equivalent provision in any other regional or international human rights framework. The Universal Declaration of Human Rights (UDHR),⁵ International Covenant on Civil and Political Rights (ICCPR),⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷ European Convention on Human Rights,⁸ American Convention on Human Rights⁹ and even the women-centered global human rights instrument, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰ are silent on the right to abortion. So, why would Africa, a region perennially lampooned as showcasing an atrocious human rights record, suddenly position itself as the pace-setter in the protection of human rights by recognizing abortion, a universally controversial procedure, as a human right? This question becomes even more poignant considering that domestic statutes in the vast majority of African countries maintain strict anti-abortion stipulations.

The Guttmacher Institute, for example, reports that approximately ninety percent of African women of childbearing age reside in countries where the legal system restricts access to abortion.¹¹ Why, then, would these same countries embrace a regional abortion-friendly human rights framework

establishment/achpr_instr_proto_court_eng.pdf (entered into force Nov. 25, 2005), *reprinted in* Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001).

4. TOZZI, *supra* note 2, at 2 ("No global UN treaty contains the word 'abortion,' nor can a 'right' to abortion be inferred from the 'ordinary meaning of the words of any such treaty.'").

5. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

6. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

7. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, *as amended by* Protocols Nos 3, 5, 8, and 11 (entered into force 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 respectively) [hereinafter European Convention on Human Rights].

9. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, S. TREATY DOC. NO. 95-21, 1144 U.N.T.S. 123, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82doc.6 Rev. 1, at 25 (1992), https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.

10. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

11. FACT SHEET, ABORTION IN AFRICA: INCIDENCE AND TRENDS, GUTTMACHER INST. (2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-africa.pdf.

when the provisions conflict so starkly with domestic legal regimes?¹² Are these countries operating out of a conviction or an internalization that abortion is consistent with African values and therefore worthy of recognition as a human right, or are there some other forces at play? The Human Life International (HLI) provides a useful response to this question:

The Maputo Protocol is a classic Trojan Horse. It appears to be one thing – a gift to the African people – but is actually another thing which is far deadlier. The Maputo Protocol was written in large part by the London based International Planned Parenthood Federation, or IPPF, the largest abortion-promoting organization in the world. The values of this group are not African in any way, shape or form. IPPF has no regard for national or local traditions and customs in its efforts to legalize abortion worldwide. It has stated in its *VISION 2000* Strategic Plan that the objective of its affiliated organizations is to: ‘Campaign for policy and legislative change to remove restrictions against safe abortions.’¹³

Portraying the Maputo Protocol as a non-home-grown, even fraudulent legal framework, the HLI continued:

Since the people never want abortion, IPPF and other pro-abortion groups must resort to deception. The Maputo Protocol is the ideal instrument to legalize abortion all over Africa. The Protocol allegedly is an instrument to fight female genital [cutting] [FGC], but in all of its 23 pages, it mentions [FGC] *in only one sentence*.¹⁴

The HLI’s point is that outside powers conceived the right to abortion in the Maputo Protocol off the shores of Africa and then imposed the Protocol upon the region against the wishes of the African people.

Archbishop of Mbarara, Paul Bakyenga, warned of the Maputo Protocol’s imposition on African countries at the Ugandan Catholic Bishops’ Conference in 2006, stating that “[n]ever before has an international protocol gone so far,” and that the Ugandan Catholic Bishops’ Conference “believe[d] strongly that the people of Africa ha[d] no wish to see such a protocol introduced into their laws.”¹⁵ Despite Archbishop Bakyenga’s strong warning,

12. As of December 2017, thirty-six out of fifty-four countries ratified the Maputo Protocol. *Ratification Table: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, AFR. COMM’N HUM. & PEOPLE’S RTS., <http://www.achpr.org/instruments/women-protocol/ratification> (last visited Sept. 8, 2018) [hereinafter *Ratification Table*].

13. HUM. LIFE INT’L, THE MAPUTO PROTOCOL I (2007).

14. *Id.*

15. Paul Bakyenga, Archbishop of Mbarara, UGANDA CATHOLIC BISHOPS’ CONFERENCE, *Open Letter to the Government and People of Uganda*, in L’OSSERVATORE ROMANO (Vatican), Feb. 8, 2006, at 10; *see id.* at 14.

the Ugandan government ratified the Maputo Protocol on July 22nd, 2010.¹⁶ Yet, the question remains: Why would the Maputo Protocol, the one binding multilateral treaty to explicitly acknowledge abortion as a human right, be adopted in a region that, more than any other, limits access to abortion?

The dissonance between the positions of the Ugandan people, represented by the statements of the Church and the government, is explicably based on gross underdevelopment¹⁷ and extreme poverty in the country – in Uganda 34.6% of the population live below \$1.90 per day, the international poverty line.¹⁸ Political scientist Adam Branch affirmed that, “[s]ince the mid-1990s, Uganda has enjoyed an influx of foreign aid amounting to [eighty percent] of its development expenditures and has been the beneficiary of a number of generous donor initiatives.”¹⁹ As a major aid-dependent nation, therefore, Uganda lacks the luxury of independent action, free of coercion from its Western benefactors. This evokes the maxim, “he who pays the piper dictates the tune,” as most third world countries, not just Uganda, assume obligations under international human rights regimes out of fear of losing foreign aid rather than from a commitment to the imperatives of the frameworks.

Human rights scholars Adamantia Pollis and Peter Schwab are quite adamant, insisting that “[r]atification of the various covenants and conventions . . . is an assertion of membership in the world community and not a commitment to the implementation of these rights or to their legitimacy.”²⁰ Therefore, widespread ratification of a human rights instrument does not translate to a consensus on the terms of the provisions. Nevertheless, because ratification of such instruments provides *prima facie* evidence of agreement to be bound by the terms of such frameworks, powerful nations are undeterred in forcing their values on less powerful nations as the on-going politics of homosexuality and homosexual marriage clearly demonstrate.

The title of a report published by *The Guardian* in 2011 is quite telling of the power Western countries willfully exert over aid-recipient countries:

16. See *Ratification Table*, *supra* note 12.

17. U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2016, at 200 (2016), http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf.

18. *Id.* at 219.

19. ADAM BRANCH, DISPLACING HUMAN RIGHTS 84 (2011) (citing William Reno, *Uganda's Politics of War and Debt Relief*, 9 REV. INT'L POL. ECON. 415, 428 (2002)).

20. Adamantia Pollis, *A New Universalism*, in HUMAN RIGHTS 9, 15 (Adamantia Pollis & Peter Schwab eds., 2000).

“Gay rights must be criterion for U.S. aid allocations.”²¹ *The Guardian*’s report centered on a memorandum issued by President Obama’s administration, which directed officials to “consider how countries treat their gay and lesbian populations when making decisions about allocating foreign aid.”²² In other words, Obama was prepared to use the economic might of the United States to force the hands of the political leadership in aid-receiving countries.

While this tactic is hardly objectionable in cases of clear human rights abuses, withholding aid is acutely disconcerting when used to compel a country to abandon its core values when those values do not yield implications adverse to human rights, like the proscription of same-sex marriage in traditional societies. The swift condemnation by Western countries of Nigeria’s Same Sex Marriage (Prohibition) Act of 2014 should be viewed within this context.²³ In 2014, U.S. Secretary of State John Kerry quickly pointed out that “the United States [was] ‘deeply concerned’ by a law that ‘dangerously restricts freedom of assembly, association, and expression for all Nigerians.’”²⁴ The U.N. High Commissioner for Human Rights, Navi Pillay, was similarly forceful when she remarked that “[r]arely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights[.]”²⁵

Not to be outdone, the group “Aids-Free World” rushed a letter to the U.N. Secretary-General, expressing its dismay over the law, particularly the clause that seemingly affected the organization’s operation, *to wit*, “[a] person or group of persons who . . . supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.”²⁶ The organization petitioned the U.N. to ask that the Nigerian government vacate its newly assumed Security Council seat “until such

21. Karen McVeigh, *Gay Rights Must be Criterion for US Aid Allocations, Instructs Obama*, GUARDIAN (Dec. 6, 2011, 7:03 PM), <https://www.theguardian.com/world/2011/dec/07/gay-rights-us-aid-criteria>.

22. *Id.*

23. *See Same Sex Marriage (Prohibition) Act, 2014*, CTR. L. FED’N NIGERIA, <https://www.lawnigeria.com/LawsOfTheFederation/Same-Sex-Marriage-Prohibition-Act,-2014.html> (last visited Sept. 8, 2018).

24. Associated Press, *Nigeria Passes Law Banning Homosexuality*, TELEGRAPH (Jan. 14, 2014, 8:28 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html>.

25. *UN Human Rights Chief Denounces ‘Draconian’ Anti-Homosexuality Law in Nigeria*, UN NEWS (Jan. 14, 2014), <https://news.un.org/en/story/2014/01/459642-un-human-rights-chief-denounces-draconian-anti-homosexuality-law-nigeria>.

26. Okoro Chinedu, *NGO Petitions UN Over Same-Sex Act*, CAJ NEWS AFR. (Jan. 14, 2014), <https://allafrica.com/stories/201401140777.html>.

a time as the Member State was no longer acting in violation of its international obligations.”²⁷ Britain even more categorically warned that “[t]he U.K. opposes any form of discrimination on the grounds of sexual orientation.”²⁸ Earlier, the British government had “threatened to cut aid to African countries that violate the rights of gay and lesbian citizens.”²⁹

But what exactly does the “right of gay and lesbian citizens” mean? When understood as quintessential civil and political (CIPO) rights such as freedom of association or expression, both of which are proscribed by Section 4 of Nigeria’s Same Sex Marriage (Prohibition) Act, it is arguable that legal challenges could be mounted against the statute on the ground that the statutory language is overly broad. But even at that, a counter argument could be advanced, relying on Article 19(3) of the ICCPR, to the effect that freedom of expression could be restricted for purposes of respecting “the rights or reputations of others” and “protection of national security or of public order . . . or of public health or morals.” In other words, the argument is far from settled. But not so regarding the substance or major goal of the statute, namely, criminalization of a “marriage contract or civil union entered into between persons of same sex”³⁰ and affirmation of the traditional definition of marriage as “[o]nly a marriage contracted between a man and a woman.”³¹ Legal challenges to these latter items seem likely unsustainable.

This delineation is essential to proper contextualization of the central theme or thesis of this paper – that is, repudiation of homosexual matrimony as a human right. The paper argues that since global consensus on same-sex marriage as a human right is lacking, any attempt to denounce nations like Nigeria, which restrict marriage to heterosexual couples, or deny assistance to them on the basis of such restriction amounts to a violation of human rights, specifically the right to self-determination – the right of sovereign nations to govern themselves according to the dictates of their values and culture.³² This thesis is consistent with the current state of international law. Aside from elevating the practice of one’s culture to the status of a human right, Article 15 of the ICESCR imposes an obligation on States Parties to take steps which are “necessary for the conservation, the development and the diffusion of . . . culture” in their respective jurisdictions.³³ For traditional societies, this is obviously a very important obligation under international

27. *Id.*

28. *Nigeria Passes Law Banning Homosexuality*, *supra* note 24.

29. *Id.*

30. Same Sex Marriage (Prohibition) Act (2014), § 1 (Nigeria).

31. *Id.* § 3.

32. See U.N. Charter, art. 1, ¶ 2; ICCPR, *supra* note 6, art. 1; ICESCR, *supra* note 7, art. 1.

33. ICESCR, *supra* note 7, art. 15.

law, and compliance is compatible with proscription of homosexual matrimony – precisely the kind of legislative action that is represented in Nigeria’s Same Sex Marriage (Prohibition) Act.

This paper consists of four sections. Following this introduction, section II projects autonomy as a fundamental principle upon which justification could rest for according human right status to particular action or conduct. The principal argument of the section is that although the concept of autonomy bestows liberty upon competent adults to act or pursue their individual goods as they deem fit, the liberty guarantee is not absolute and can be restricted on justifiable grounds such as morality, public good, national security and so forth. These exceptional grounds, contends the section, are sufficiently robust to encompass prohibition of gay matrimony.

In section III, the paper adopts a theoretical and empirical approach to analyzing the often-contentious issue of universality vis-à-vis relativity of human rights – in this case, regarding same-sex marriage. Considering that there is minimal relevance to the overall goal of this paper in engaging in a comprehensive discussion of the controversy, the section adopts a parochial approach, focusing specifically on the question of whether there is a universal agreement or an international consensus regarding homosexual matrimony as a human right. Relying on the jurisprudence of the U.N. Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the U.S. Supreme Court, the section argues that, whilst certain aspects of the rights of homosexual population such as private sexual acts, have been recognized as human rights, there is no recognition of same-sex marriage as a human right.

Having established that international law does not recognize gay matrimony as a human right, section IV (the Conclusion) holds that there is no legitimate basis for Western countries to threaten sanction or denounce nations like Nigeria that, in exercise of their right to self-determination, chose to proscribe same-sex marriage.

II. INDIVIDUAL AUTONOMY AS THE FOUNDATION OF HUMAN RIGHTS: ANY LIMITS?

*Tarasoff v. Regents of the University of California*³⁴ is indisputably, indelibly etched in the annals of American jurisprudence and even beyond. Widespread analysis of the decision in academic journals and recurrent citations throughout the common law world vividly attest to its seminal status in reconciling the conflicting interface between confidentiality of medical information and public interest. The judgment also has a compelling human

34. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

rights resonance. This magisterial stipulation by judge Tobriner that “[t]he protective privilege ends where the public peril begins,” is not only a powerful restatement of a foundational human rights principle, but it also speaks profoundly to the tentacles or ambits of the rights of individuals as an integral member of a larger society.³⁵ In other words, the case’s significance rests in its recognition that the principle of respect for autonomy or the right to autonomy, although a core human rights principle, is not without limits. It is the circumscription of the tentacles or ambit of this principle that makes it relevant to the issue of same-sex marriage and, *a fortiori*, the centerpiece of this section.

Before dissecting the precise application of this circumscription, a clear understanding of the thrust of the term “autonomy” is warranted. The term was derived from the Greek word “autos” (self) and “nomos” (rule) and was originally used in reference to self-rule or self-governance of Greek city states.³⁶ But over the years, autonomy has been reconceptualized and its application extended to individuals, encapsulating diverse concepts such as “self-governance, liberty rights, privacy, individual choice, freedom of the will, causing one’s own behavior, and being one’s own person.”³⁷ The principle of respect for autonomy, strictly speaking, projects the individual as a lord over his or her own affairs. It mandates that every adult individual of sound mind is entitled to make decisions, take actions or otherwise pursue his good without let or hindrance from any person or institution, except where the decisions, actions, or pursuit of good detrimentally impact a third party.³⁸

In defense of this principle, nineteenth century English philosopher John Stuart Mill argued that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”³⁹ This dovetails with the classic postulation of philosopher and physician John Locke that “all men are naturally in . . . a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit . . . without asking leave, or depending upon the will of any

35. *Id.* at 347.

36. TOM. L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 57-58 (5th ed. 2001).

37. *Id.* at 58.

38. THOMAS HOBBS, LEVIATHAN 262 (Crawford B. Macpherson ed., Penguin Books 1985) (1651) (equating autonomy to being a freeman, defined a freeman as “he, that in those things, which by his strength and wit he is able to do, is not hindered to [do] what he has a will to”).

39. JOHN STUART MILL, ON LIBERTY 10-11 (Paul Negri & Kathy Casey eds., Dover Publ’ns thrift ed. 2002) (1859).

other man.”⁴⁰ This Lockean argument, which Mill endorsed, holds that as autonomous agents, human beings are entitled to organize and lead their lives in a manner they deem fit and to engage in actions or associations that they consider promotive of their interests without interference by a third party, provided that the manner they choose to operationalize the entitlement does not negatively impact the interests of others.⁴¹

This principle grounds a constellation of human rights such as the right to personal liberty, right to life, right to self-determination, respect for human dignity, right to privacy, right to assembly/association, freedom of expression and so forth, making autonomy or liberty the most important of all human rights. If there is one word that best captures the meaning of autonomy, it is “liberty” or “freedom” (to act as one pleases), which political philosopher Thomas Hobbes defines as the absence of opposition or external impediments to action.⁴² Its supreme position in human rights law is highlighted in this plea by Patrick Henry, one of the most influential U.S. founding fathers, in 1788: “Liberty the greatest of all earthly blessings – give us that precious jewel, and you may take everything else.”⁴³

That is to say, there is nothing that is of more importance or better treasured than liberty:

The liberty to independently direct one’s own actions makes it possible for human beings to be valued, in the Kantian sense, as ends in themselves, and not merely as means to another’s end. And this is so whether we are talking about collective or individually-directed courses of action, or in the political realm or one’s private life. Liberty is the foundation of all human rights, the fountain from which other human rights draw nourishment. When we say that a person has a right to this or that, we mean, in essence, that the person has liberty to do anything he chooses.⁴⁴

40. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER OF TOLERATION* 2 (Paul Negri & Tom Crawford eds., Dover Publ’ns thrift ed. 2002) (1689).

41. See *Lochner v. New York*, 198 U.S. 45, 58 (1905) (stating that legislation by State actors needs to have “a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor”).

42. HOBBS, *supra* note 38, at 261.

43. Patrick Henry, Address at the Virginia Convention (June 5, 7, 1788), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 199, 200 (Ralph Ketcham ed., 2003).

44. Obiajulu Nnamuchi, “*Circumcision*” Or “*Mutilation*”? *Voluntary Or Forced Excision? Extricating The Ethical And Legal Issues In Female Genital Ritual*, 25 *J.L. & HEALTH* 85, 106 (2012); see IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 44 (Mary Gregor & Jens Timmermann eds., rev. ed. 2012) (1785) (“[f]or all rational beings stand under the law that

What the passage is saying is that, constructed as “liberty to act according to individual preferences,” the principle of respect for individual autonomy could be relied upon as a basis for the claim that adults of sound mind are free to engage in private homosexual sex with other consenting adults. Certainly, some people might squabble with this claim. Nonetheless, such opposition would readily lose steam when subjected to the full beam of the principle of autonomy:

[T]he point being made is that in secular morality (as opposed to religious/Christian morality) or as a matter of human rights *stricto sensu*, even in absence of legislative or judicial [authority], the right to follow one’s sexual preferences cannot be abridged unless operationalizing the right detrimentally impacts the right of another person.⁴⁵

It was on this basis that the U.S. Supreme Court struck down a Texas statute criminalizing private homosexual sex between two consenting adults as unconstitutional in *Lawrence v. Texas*, holding the statute to be violative of the Due Process Clause.⁴⁶ Strikingly, it was this decision, as will be seen in section III of this paper, that triggered the chain of events that crystalized into the recognition of same-sex marriage in the U.S. as a human right in 2015.⁴⁷ One way to interpret the decision of the Court is to characterize it as a strict application of the principle of autonomy not to abridge individual liberty even when in conflict with public interest or morality. This is consistent with the rugged individualistic ethos of the country where, as in the rest of Western culture, the individual is seen as “an isolated and autonomous” agent whose actions are driven primarily by self-preservation and must be respected.⁴⁸ More pointedly, as canvassed by anthropologist Asmarom Legesse, “[i]n the liberal democracies of the Western World the ultimate repository of rights is the human person. The individual is held in a virtually sacralized position” and “concern with the dignity of the individual, his worth, personal autonomy and property” is sacrosanct.⁴⁹

But this cosmology is not universally shared. Non-Western societies cling to a different moral view of the individual and his role in society, which

each of them is to treat itself and all others *never merely as a means*, but always *at the same time as an end in itself*.”).

45. See Obiajulu Nnamuchi, *Hands Off My Pudendum: A Critique of Human Rights Approach to Female Genital Ritual*, 15 QUINNIPIAC HEALTH L.J. 243, n.151 (2012).

46. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

47. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

48. Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, in TOWARD A HUMAN RIGHTS FRAMEWORK 1, 7 (Peter Schwab & Adamantia Pollis eds., 1982).

49. Asmarom Legesse, *Human Rights in African Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHT 123, 124 (Kenneth W. Thompson ed., 1980).

underscores the controversy regarding gay matrimony in different parts of the world. What we have, therefore, is a dichotomy of moralities, whether morality is constructed on an individualistic or communalist platform, how each morality conceptualizes personhood and the relationship between the individual and the community. To be sure, in the West:

[P]ersonhood seeks to protect the freedom of individuals to define themselves in contradistinction to the value of the society in which they happen to live. The premise of such freedom is an individualistic understanding of human self-definition: a conception of self-definition as something that persons are, and should be, able to do *apart from society*.⁵⁰

This view of personhood and its impact on social relationship is at variance with African cosmology. The major dividing line between African morality and that of the West is that Africa is communitarian oriented. The community, not the individual, is the basic social unit of an African society. Person or personhood in African ontology is “defined in terms of affinity to family, clan, village and so forth, to which the individual owes his existence” and this “affinity or relationship not only gives individuals their identities but also structures their very existence.”⁵¹ African philosopher John Mbiti explicated this relationship quite clearly:

Only in terms of other people does the individual become conscious of his own being, his own duties, his privileges and responsibilities towards himself and towards other people. When he suffers, he does not suffer alone but with his corporate group: when he rejoices, he rejoices not alone but with his kinsmen, his [neighbors] and his relatives . . . Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: ‘I am, because we are; and since we are therefore I am.’ This is the cardinal point in the understanding of the African view of man.⁵²

In essence, the interest of the individual in African society is submerged or integrated within that of the community and streamlined to form a coherent whole – one interest designed to serve the goal of the community. This is not to suggest that the principle of respect for individual autonomy is completely ignored in Africa. Autonomy is accorded recognition but not as exalted as in the West. A cardinal distinction from Western morality is that community or

50. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 761 (1989) (emphasis added), reprinted in MADELEINE SCHACHTER, INFORMATIONAL AND DECISIONAL PRIVACY 778, 783 (2003).

51. See Obiajulu Nnamuchi, *Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question*, 14 CHI.-KENT J. INT’L & COMP. L. 24, 41 (2014).

52. JOHN S. MBITI, AFRICAN RELIGIONS AND PHILOSOPHY 106 (2d. rev. ed. 1990).

public good is prioritized over that of the individual. In other words, as philosopher Ifeanyi Menkiti noted, “the reality of the communal world takes precedence over the reality of individual life histories whatever these may be,”⁵³ and this is the reason “group rights” are “stressed over individual rights” in Africa.⁵⁴ It is this diminished state of autonomy or nullification of “excessive individual autonomy,”⁵⁵ which underlies African morality, that accounts for the dichotomy between African and Western ontological frameworks regarding the place of man in society.

This is not a novel argument. As far as Africans are concerned, this worldview has strands of support in international law. Article 29 of the UDHR is quite illustrative: Everyone has duties to the community in which alone the free and full development of his personality is possible.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Note the striking similarity between the language of Article 29(1) – duties to the community as definitive of personhood – and the postulation by Mbiti above, *to wit*, “[o]nly in terms of other people does the individual become conscious of his own being.”⁵⁶ Both speak to the submergence and collapsing of individual good into that of the community. Aside from Article 29(2) of the UDHR, the ICCPR restricts individual autonomy by explicitly subjecting many of its rights to exceptions such as public health or morals or the rights and freedoms of others.⁵⁷ Along a similar trajectory, Article 27(2) of the African Charter on Human and Peoples’ Rights stipulates that the “rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”⁵⁸ And in Nigeria, the Constitution places limitation on human rights in the interest of defense, public safety, public order, public

53. Ifeanyi A. Menkiti, *Person and Community in African Traditional Thought*, in *AFRICAN PHILOSOPHY* 157, 172 (Richard A. Wright ed., 3d ed. 1979).

54. Rhoda E. Howard, *Group Versus Individual Identity in the African Human Rights Debate on Human Rights*, in *HUMAN RIGHTS IN AFRICA* 159, 161 (Abdullahi Ahmed An-Na’im & Francis M. Deng eds., 1990).

55. Peter Kasenene, *African Ethical Theory and the Four Principles*, in *CROSS-CULTURAL PERSPECTIVES IN MEDICAL ETHICS* 347, 351 (Robert M. Veatch ed., 2d ed. 2000).

56. MBITI, *supra* note 52, at 108.

57. ICCPR, *supra* note 6, art. 12, 14, 18, 19, 21, 22.

58. African Charter, *supra* note 2, art. 27(2) (“The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”).

morality or public health or for the purpose of protecting the rights and freedom of other persons.⁵⁹ The import of these provisions is to show that autonomy restrictions are grounded not only on African morality but also international law. Noted African philosopher and bioethicist Peter Kasenene summed up the argument coherently, stating that “[t]he community will restrict the free action of [the] individual for his or her own good. The good of the individual and of the group is more important than personal freedom or autonomy.”⁶⁰

III. UNIVERSALITY OR RELATIVITY OF HUMAN RIGHTS: EMPIRICAL AND THEORETICAL ANALYSIS

There may perfectly properly be different answers to some human rights issues in different states on different facts. I think the Strasbourg court should recogni[z]e this . . . [U]nder the pressure of the Strasbourg court, the law of human rights has got[en] too big.

– John Laws, former Lord Justice of Appeal (U.K.), 2013

One might attempt to reconcile universalist and relativist strands of moral analytical frameworks from the premise that, at its core, human beings everywhere share universal values, that the norms (at least at a broad, general level) are the same, and that differences observed in various cultures only exist at the lower level – that is, on the particularities or specifics of the norms. What we reckon as difference in attitudes, beliefs or practices relate to the variegated ways each culture implements or operationalizes the norm. In other words, norms or rights can be universal at the macro level, yet relative at the micro level in the way the norms are operationalized and in what each society considers the right or wrong way of implementing them. This may be illustrated with respect for the right to life and respect for the right to marriage. There is no organized society that does not respect these prescriptions.

It is beyond dispute that every society accords recognition to a right to life in this general sense, the effect of the recognition being that no one may be deprived of his life except under “justifiable circumstances,” as permitted by law. These exceptional circumstances that are considered “justifiable” are always narrowly defined, and it is within this narrow construction that relativism of moral or cultural beliefs and practices manifest themselves. Consider, for illustrative purposes, this question: Does having a right to life also

59. CONSTITUTION OF NIGERIA (1999), § 45.

60. Kasenene, *supra* note 55, at 352.

imply a right to die? Unlike the more general question (whether there is a right to life?) in respect to which there is a general consensus (universal morality), on this narrower question (right to die), the answer varies across cultures. Therefore, one particular right can have a universalist aspect as well as a relativist dimension. Contemporary expressions of the right to die include physician-assisted suicide and euthanasia.

While euthanasia (“mercy” killing) is recognized as encompassed within the right to life in some societies, such as Netherlands, Belgium, Luxembourg and Colombia,⁶¹ and six states in the United States of America (Oregon, Vermont, Washington, California, Colorado and Montana) and Washington D.C.,⁶² the vast majority of the world, including the rest of the U.S. states, morally regard such actions differently – holding a contrary view and a basis upon which prohibitory legal frameworks exist in those societies.

Morality, in the sense of what is right and wrong, also varies even across different communities in the same society. For instance, a 2012 Pew Research Center poll shows that, in contrast to trends in more secular parts of the United States, the majority of the residents of Southern states (Bible belt states) oppose same-sex marriage.⁶³ While fifty-six percent of the people in Alabama, Kentucky, Louisiana, Oklahoma and Texas oppose same-sex marriage, only about thirty-five percent favor it.⁶⁴

Regarding marriage or the right to marry, the second of the two instances mentioned previously, there is no society that does not respect the institution of marriage or the right of its members to marry each other. There is some consensus on the broad outline of the right, deriving from the notion that the institution, because it promotes procreativity and community cohesion, provides the best means of perpetuating society. Nonetheless, on its specific contours, what really counts as a morally defensible marriage, there is no universal agreement. Is marriage an exclusive preserve of heterosexuals? Are homosexuals also entitled to marry? Just a few years ago, the response to both questions could have been the same regardless of geography or culture. But not anymore. Beginning in Western Europe and spreading to North America, an increasing number of countries are altering their views regarding

61. Rita L. Marker & Kathi Hamlon, *Frequently Asked Questions: Euthanasia and Assisted Suicide*, PATIENTS RIGHTS COUNCIL, http://www.patientsrightscouncil.org/site/frequently-asked-questions/#_edn8 (last visited Dec. 31, 2017).

62. Each of these U.S. states consider physician-assisted suicide to be a morally justifiable action. See *Physician-Assisted Suicide Fast Facts*, CNN (Aug. 13, 2018, 2:27 PM), <http://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html>.

63. *Behind Gay Marriage Momentum: Regional Gaps Persist*, PEW RES. CTR. (Nov. 9, 2012), <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/>.

64. *Id.*

the definition of marriage, with some (albeit a small minority) positioning homosexual and heterosexual marriages as moral equivalents.

Rather than douse the debate, equating what was once called the “sin of Sodom” with the traditional understanding of the institution of marriage is raising more questions than answers, one of which is particularly of great value to human rights scholarship and which was broached earlier in this section. The question is whether human rights are universal in the sense that what counts as a human right in “Country A” equally retains that character in “Country B”? Or are there some norms on which there is some cross-cultural consensus, accepted as human rights globally, whilst in others agreement is far from being achieved? Philosopher Charles Taylor, for instance, found that, presumably all cultures share moral “condemnations of genocide, murder, torture, and slavery, as well as of, say, ‘disappearances’ and the shooting of innocent demonstrators.”⁶⁵

Yet, there are some other actions whose foundations are still being debated, years after gaining recognition as human rights, such as the right to abortion in the U.S. Although it has been more than four decades since the U.S. Supreme Court handed down the controversial ruling in *Roe v. Wade*,⁶⁶ recognizing the right to abortion, the contours of the right are still being debated.⁶⁷ Attempts in various U.S. states to whittle down the force of the judgment by promulgating laws restricting abortion in varying ways signals quite strongly that there is an absence of national consensus on the status of abortion as a human right in the U.S.⁶⁸ Justice Rehnquist’s dissent in *Roe* is undoubtedly representative of the opinion of many Americans today:

65. Charles Taylor, *A World Consensus on Human Rights?*, 43 DISSENT 15 (1996), reprinted in THE PHILOSOPHY OF HUMAN RIGHTS 209, 411 (Patrick Hayden ed., 2001).

66. *Roe v. Wade*, 410 U.S. 113 (1973), overruled in part by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873, 878 (1992) (abandoning the trimester framework standard for analyzing government regulations on access to abortions and adopting a new, less rigid standard).

67. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007) (finding that the Partial-Birth Abortion Act of 2003, which prohibited termination of late term pregnancy, was not unconstitutionally vague and imposed no undue burden on the right to abortion); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding that a Nebraska law that criminalized partial-birth abortion was unconstitutional as it placed an undue burden on a woman’s right to have an abortion and because the Act failed to provide an exception in cases where the woman’s health was threatened); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade* in holding that the Pennsylvania Abortion Control Act of 1982, which required a married woman seeking an abortion must sign a statement indicating that she has notified her husband, except where certain exceptions apply, was unconstitutional).

68. See, e.g., *Casey*, 505 U.S. 833 (1992). *Casey* questioned the Pennsylvania Abortion Control Act of 1982 which, unlike *Roe v. Wade*, mandated that women seeking abortion give informed consent, required minor seeking an abortion to obtain parental consent or judicial waiver (the provision included a judicial waiver option), compelled married women to notify husbands prior to

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental[.]' Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe.⁶⁹

This lack of universality regarding the right to abortion is buttressed by a finding by the Pew Research Center in 2015, which showed that of 196 countries whose legal frameworks were studied, only fifty-eight permit abortions on request (for any reason) while 137 countries do not allow this exception.⁷⁰ This finding incontrovertibly dilutes the claim that abortion is a universal human right. Is the situation the same with the claim that homosexual matrimony is a human right? If the answer is affirmative – as this section seeks to show – then, a follow up question would be, what does the discord mean in the field of human rights? These questions are examined under three headings, namely, the jurisprudence of the HRC, European Court of Human Rights, and the U.S. Supreme Court.

A. *The Human Rights Committee*

Established under Article 28 of the ICCPR, the HRC is a body of independent experts responsible for overseeing the implementation of the ICCPR, with a mandate to examine reports submitted by States Parties (on the measures they have adopted which give effect to the rights recognized by the ICCPR and on the progress made in the enjoyment of those rights).⁷¹ The HRC also issues concluding observations on the reports it examines, publishes general comments on the provisions of the ICCPR, and considers inter-

obtaining abortion and required abortion-providing clinics to supply certain information to a woman seeking an abortion along with a 24-hour waiting period. *Id.* The original Abortion Control Act was found unconstitutional in part but remain largely still in force. See Pennsylvania Abortion Control Act of 1982, *invalidated in part by Casey*, 505 U.S. 833; *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. 833 (1992) (overruling *Thornburg* on the same point as *Roe v. Wade* – the rigid trimester framework); *Elizabeth Blackwell Health Ctr. For Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995); *Fischer v. Dep't of Pub. Welfare*, 482 A.2d 1148 (Pa. Commw. Ct. 1984).

69. *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

70. *Worldwide Abortion Policies: Circumstances Under Which a Woman Can Legally Obtain an Abortion*, PEW RES. CTR. (Oct. 5, 2015), <http://www.pewresearch.org/interactives/global-abortion/>; <http://www.pewresearch.org/interactives/global-abortion/>.

71. ICCPR, *supra* note 6, art. 40.

State complaints⁷² as well as individual complaints from residents of States which have ratified the Optional Protocol to the ICCPR.⁷³

Relying on its mandate under the Optional Protocol, the HRC has made a number of pronouncements which have far-reaching significance to the subject of this paper. In *Toonen v. Australia*, the author, an activist for the promotion of the rights of homosexuals in Tasmania, challenged two provisions of the Tasmanian Criminal Code, namely Sections 122(a) and (c), and 123, which criminalized various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private.⁷⁴ The HRC concluded that the challenged provisions violated Article 2(1) and 17(1) of the ICCPR, which, respectively, bar discrimination and offer protection against arbitrary or unlawful interference with the privacy of the individual. Curiously, the HRC undertook an expansive view of the interpretation to be accorded to the term “sex,” as a prohibited ground under Articles 2(1) and 26, to include sexual orientation, and ordered the repeal of the offending provisions of the Tasmanian Criminal Code.

Unlike the previous case, which involved the rights of a gay male, this second case, *Joslin v. New Zealand*, was brought by lesbian couples who claimed a violation of Articles 16, 17, 23 and 26 of the ICCPR in that the failure of the New Zealand Marriage Act to provide for homosexual marriage discriminated against them directly on the basis of sex and indirectly on the basis of sexual orientation.⁷⁵ Disagreeing with the authors of the complaint, the HRC held that the complaint had to be considered in light of the provisions of Article 23(2) (affirming the right of men and women of marriageable age to marry and to found a family), which, unlike other general provisions of the ICCPR, uses the term “men and women” (not “everyone,” “all persons,” or “every human being”) to recognize marriage as only the union between a man and a woman. The distinction between this case and *Toonen v. Australia* is that, while the HRC had objections to laws that interfere with private homosexual sex between consenting adults, the Committee was not prepared to expand the privacy right recognized in *Toonen* to include same-sex marriage, as demonstrated in the HRC’s *Joslin* decision.⁷⁶

72. *Id.* art. 41.

73. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

74. *Toonen v. Australia*, Communication 488/1992, U.N. Human Rights Committee [UNHCR], 226 (Mar. 31, 1994).

75. *Joslin v. New Zealand*, Communication 902/1999, U.N. Human Right Committee [UNHRC], 214 (July 17, 2002).

76. Compare *id.*, with *Toonen supra* note 74.

In another case, *Fedotova v. Russian Federation*, the author, an openly lesbian woman and an activist in the field of lesbian, gay, bisexual and transgender (LGBT) rights in the Russian Federation, complained that in 2009 she, together with other individuals, tried to hold a peaceful assembly in Moscow (the so-called “Gay Pride”) but was prevented from doing so and that a similar initiative to hold a march and a “picket” to promote tolerance towards gays and lesbians in the city of Ryazan in 2009 was also interrupted by the Police.⁷⁷ The author’s argument, *to wit*, that her right to freedom of expression guaranteed under Article 19 as well as her rights under Article 26 (which bars discrimination) of the ICCPR had been violated by Russian authorities. The HRC agreed. This decision is consistent with *Toonen* but differs from *Joslin* in terms of the contours of sexual rights the HRC is willing to extend to homosexual couples.

The conclusion to be drawn from the jurisprudence of the HRC seems to be that the body is opposed to legal and policy frameworks that discriminate against LGBT population solely on the basis of their sexual orientation and preferences and would not hesitate to strike down such discriminately regimes. Regarding homosexual matrimony, however, the HRC’s position is that there is no inequality or discrimination where a State retains the traditional definition of marriage⁷⁸ – a view that is consistent with an earlier clarification that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].”⁷⁹ Stated differently, the HRC would not disturb a same-sex marriage proscriptive domestic framework of a State Party to the ICCR and its Optional Protocol. At any rate, it is noteworthy that, although the HRC is not a judicial body, its views under the Optional Protocol have “some important characteristics of a judicial decision”⁸⁰ and, therefore, should be seen as “an authoritative determination” by a quasi-judicial body “established under the Covenant itself [and] charged with the interpretation of that instrument.”⁸¹

77. *Fedotova v. Russian Fed’n*, ¶ 2.1, U.N. Doc. CCPR/C/106/D/1932/2010 (2012).

78. Mark Fowler, *Same-Sex Marriage: What does Human Rights Law Say About Claims of Equality?*, ABC NEWS (Aug. 31, 2017, 11:55 AM), <http://www.abc.net.au/news/2017-09-01/what-does-human-rights-law-say-about-marriage-and-equality/8856552>.

79. U.N. Hum. Rts. Comm., General Comment No. 18: Non-Discrimination, ¶ 13, U.N. Doc. HRI/GEN/1Rev.9(Vol. I) (1994).

80. U.N. Hum. Rts. Comm., Draft General Comment No. 33 on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 11, U.N. Doc. CCPR/C/GC/33 (2008).

81. *Id.* ¶ 13.

B. *The European Court of Human Rights*

The European Court of Human Rights (ECtHR) was established under Article 19 of the European Convention on Human Rights to ensure the observance by States Parties of the provisions of the Convention.⁸² All Member States of the European Council are Parties to the Convention and “accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights.”⁸³ Established in 1949, the Council of Europe is a completely separate entity from the European Union (EU) and has larger membership – forty-seven compared to the EU, which has just twenty-eight members.⁸⁴ Every Member State of the Council of Europe is required to respect its obligations under the Statute of the Council of Europe (also known as the Treaty of London,⁸⁵ the European Convention on Human Rights and all other conventions to which it is a Party, including compliance with the decision of the ECtHR.⁸⁶ The ECtHR hears inter-State complaints as well as individual complaints and issues advisory opinion. Based in Strasbourg, France, the Court became operational in 1959 and has delivered more than 10,000 judgments,⁸⁷ distinguishing it as the most productive regional human rights adjudicatory institution. It is to some of these judgments, the ones which are of profound importance to the human rights of LGBT population, that we now turn.

One such decision is *Dudgeon v. United Kingdom*, a case brought by a homosexual man from Northern Ireland. In *Dudgeon*, the question was whether Section 11 of the Criminal Law Amendment Act of 1885, which criminalized homosexual sex, whether in private or public, violated Article 8 of the European Convention (respect for privacy and family life).⁸⁸ The Court held that there was a violation of Article 8. However, in a more recent case, *Chapin and Charpentier v. France*, the applicants, two homosexual males, argued that France’s restriction of marriage to individuals of the

82. European Convention on Human Rights, *supra* note 8, at 234.

83. EUR. PARL. ASS., *Resolution 1031 Hono[r]ing of Commitments Entered into by Member States when Joining the Council of Europe*, ¶ 9 (Apr. 14, 1994), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16442&lang=en>.

84. *What is the European Convention on Human Rights?*, EQUAL. & HUM. RTS. COMM’N, <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> (last updated Apr. 19, 2017).

85. Statute of the Council of Europe, art. 3, *open for signature* May 5, 1949, E.T.S. 1 (entered into force Aug. 3, 1949).

86. EUR. PARL. ASS. *Resolution 1031*, *supra* note 83, ¶ 1.

87. *European Court of Human Rights*, INT’L JUSTICE RES. CTR., <http://www.ijrcenter.org/european-court-of-human-rights/#History> (last visited Dec. 31, 2017).

88. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 14 (1981).

opposite sex infringed Article 12 (right to marry) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.⁸⁹ They contended that the restriction discriminated against them on the basis of their sexual orientation.⁹⁰ The Court disagreed, holding that Article 12 does not compel the French government to recognize same-sex marriage.⁹¹ Relying on its earlier holding in *Schalk and Kopf v. Austria*, the Court affirmed that there was no European consensus on the issue of homosexual marriage and that, notwithstanding Article 12, the decision as to whether or not to permit same-sex marriage lies within the domestic competence of States Parties.⁹²

In a subsequent case, *Oliari v. Italy*, the ECtHR approved its decision in *Schalk and Kopf*, holding that, although European attitude toward same-sex marriage is changing, with some States Parties recognizing such marriages, neither Article 8 (privacy guarantees) nor Article 12 (in conjunction with Article 14) could be interpreted to mean that States Parties are under an obligation to open marriage to gay couples, and that such decisions are left for the domestic legislative regime of each contracting Party.⁹³

C. *The United States Supreme Court*

An apt point to initiate a discussion on the jurisprudence of the U.S. Supreme Court in the realm of homosexuality and homosexual matrimony is *Bowers v. Hardwick*.⁹⁴ In *Bowers*, respondent Hardwick, whose act of consensual homosexual sex with another adult male in his bedroom was observed by a police officer, argued that the Georgia statute criminalizing consensual sodomy violated his fundamental rights. The Supreme Court disagreed, holding that the Georgia statute was constitutional and that the United States Constitution did not confer a fundamental right upon homosexuals to engage in sodomy. The Court explained that none of the fundamental rights announced in the Court's prior cases involving family relationships,

89. Chapin & Charpentier v. France, 40183/07, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-163436>.

90. *Id.*

91. Note that, under Law of May 17, 2013, homosexual partners could now marry in France. Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 opening marriage to same-sex couples] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2013, art. 1.

92. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409. The Court unanimously found no Article 12 violation, explaining that the Article did not impose an obligation to grant same-sex couples' access to marriage. *Id.* at 411-12.

93. *Oliari v. Italy*, App. Nos. 18766/11 & 36030/11, 65 Eur. H.R. Rep. 957, 960 (2015).

94. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

marriage, or procreation, had any resemblance to the right asserted by Hardwick in this case of homosexuals to engage in acts of sodomy.⁹⁵ On this point, Justice White, writing for the majority, emphasized that “any claim that [prior] cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.”⁹⁶

Nearly two decades later, in *Lawrence v. Texas*, the U.S. Supreme Court reversed its prior holding in *Bowers*, declaring instead that a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct did violate the Due Process Clause.⁹⁷ Although homosexual sex was not ascribed the status of a fundamental right, for the first time ever the Supreme Court held that intimate sexual relationship between consenting adults is protected by the Fourteenth Amendment, concluding that laws making same-sex intimacy a crime “demean the lives of homosexual persons.”⁹⁸ This holding laid the foundation for the gradual but steady evisceration of sodomy prohibitory frameworks in the U.S. Fast-forward to 2013, to the case of *United States v. Edith Windsor*, a case which challenged the constitutionality of § 3 of the Defense of Marriage Act (DOMA).⁹⁹

One of the questions presented for determination before the U.S. Supreme Court was whether DOMA, which defined the term “marriage” under federal law as a “legal union between one man and one woman,” deprived same-sex couples who are legally married under state laws of their Fifth Amendments rights to equal protection under federal law? A bitterly split

95. *Id.* at 190-91 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)) (“[In *Carey*,] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with childrearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut*, [381 U.S. 479 (1965)], and *Eisenstadt v. Baird*, [405 U.S. 438 (1972)], with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion.”).

96. *Id.* at 191 (referencing the case law mentioned *supra* note 95).

97. *Lawrence v. Texas*, 539 U.S. 558 (2003).

98. *Id.* at 575.

99. *United States v. Windsor*, 570 U.S. 744, 752 (2013). Section 7 of the Defense of Marriage Act of 1994 amended 1 U.S.C. § 3 to state that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act of 1994, Pub. L. No. 104-199, § 7, 110 Stat. 2418, *declared unconstitutional in part by* *United States v. Windsor*, 570 U.S. 744 (2013).

Supreme Court¹⁰⁰ answered this question in the affirmative, effectively abrogating § 3 of DOMA as unconstitutional despite the overwhelming support of DOMA by the people through their elected representatives in Congress. On the significance of this decision, a recent paper surmised:

A sharply [bifurcated] court speaks to different conceptualization of human rights, informed by individual beliefs or value systems of the justices. The history of DOMA, a widely popular legislation that had the support of 85 senators and 342 representatives, is quite revealing as to what the statute expresses: 'moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' But the gentlemen in black robes (at least the majority) know better, or so they think, explaining why *Windsor* . . . has succeeded in opening a new frontier of controversy in traditional values and, what some might call, new-age human rights. At stake is the precise limit or boundary of human rights, the process that would determine it, and who ultimately determines it.¹⁰¹

This search for the "precise limit or boundary of human rights," in terms of whether same-sex marriage is a human right in the United States, is continuing despite the more recent decision in *Obergefell v. Hodges*.¹⁰² There, the question before the U.S. Supreme Court was whether denying the right of same-sex couples to marry or to have marriages lawfully performed in another State given full recognition amounts to a violation of the Fourteenth Amendment. A similarly bitterly divided Court held that the Fourteenth Amendment's guarantee of Equal Protection required a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

This controversial decision, handed down on June 26, 2015, overturned *Baker v. Nelson*¹⁰³ – a case in which the Supreme Court dismissed an appeal from a ruling of the Minnesota Supreme Court, which had determined that a state law limiting marriage to persons of the opposite sex did not violate the

100. *Windsor*, 570 U.S. at 770-75. The *Windsor* decision was reached 5-4, with a slim majority of Justices agreeing that DOMA violated the Fifth Amendment.

101. See Nnamuchi, *supra* note 51, at 77-78. All the five liberal justices, two of whom were appointed by Obama, voted to strike down the traditional family value-oriented statute (Sonia Sotomayor, Stephen G. Breyer, Elena Kagan, Anthony Kennedy and Ruth Bader Ginsburg) in contrast to the four conservatives on the Court (Chief Justice John Roberts, Samuel A. Alito, Antonin Scalia and Clarence Thomas) that filed scathing dissent to the majority opinion.

102. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2013).

103. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2013).

United States Constitution.¹⁰⁴ In effect, *Obergefell* compelled states, for the first time ever, to recognize same-sex marriages as equivalent to heterosexual ones. The Court held that the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extended to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. According to the Court, the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex may not be deprived of that right and that liberty.¹⁰⁵

Significantly, all four conservative members of the Court, namely justices Roberts, Scalia, Thomas, and Alito, offered separate dissenting opinions. Chief Justice Roberts' conclusion was quite apposite in its dismissal of the majority opinion as unconstitutional:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it. I respectfully dissent.¹⁰⁶

Projecting *Obergefell v. Hodges* as unconstitutional is a theme that runs through the dissenting opinions of all the conservative members of the Court. But Justice Antonin Scalia authored by far the most scathing attack on the majority opinion. Assailing the decision as a "threat to American democracy,"¹⁰⁷ he wrote that the question whether to legalize same-sex marriage or otherwise belongs to the people, through their elected representatives, not an unelected Supreme Court.¹⁰⁸ Justice Scalia argued that prescription regarding marriage is not enshrined in the Federal Constitution, a reason that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."¹⁰⁹

Moreover, Justice Scalia elucidated:

104. *Obergefell*, 135 S. Ct. at 2604-05.

105. *Id.*

106. *Id.* at 2626 (Roberts, C.J., dissenting).

107. *Id.* at 2626 (Scalia, J., dissenting).

108. *Id.* at 2624 (Scalia, J., dissenting); *see id.* at 2629 (Roberts, C.J., dissenting) (arguing that "[t]hose who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges").

109. *Id.* at 2628 (Scalia, J., dissenting) (quoting *United States v. Windsor*, 570 U.S. 744, 745-76 (2013)).

When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue. But the Court ends this debate, in an opinion lacking even a thin veneer of law.¹¹⁰

Just as Justice Scalia predicted, the controversy regarding mainstreaming same-sex marriage into American life has shown no sign of abating. However, owing to renewed infusion of resources to the gay agenda from different quarters (Hollywood, academia, mass media, and so forth), attitudes toward the subject are gradually changing. Although a Pew Research Center polling in 2001 found that Americans opposed same-sex marriage by a margin of 35-57%, recent data shows that a majority of Americans (62%) now support same-sex marriage, while only 32% oppose it.¹¹¹ Strikingly, the ideological split in the Supreme Court witnessed in the *Obergefell* decision (with liberal Justices voting in support of upholding same-sex marriage whereas the conservative-leaning Justices vehemently opposed the ruling) is reflected among the general population.

About seven-in-ten Democrats (73%) and Independents (70%) favor same-sex marriage, while a smaller share of Republicans favor same-sex marriage (40%).¹¹² Journeying outside the U.S. to the rest of the world, what do we find? A recent survey found that acceptance of same-sex marriage is geographically and culturally determined. While there is a broader acceptance of same-sex marriage in more secular societies of North America, the European Union and some parts of Latin America, widespread rejection permeates the rest of the world, particularly in predominantly Muslim

110. *Id.* (Scalia, J., dissenting).

111. *Changing Attitudes on Gay Marriage: Public Opinion on Same-Sex Marriage, Fact Sheet*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

112. *Id.*

nations, Russia and countries in Africa as well as those in Asia.¹¹³ In the Middle East, acceptance rates range from forty percent in Israel to two percent in Tunisia.¹¹⁴ Similar patterns appear in Africa, where a relatively high acceptance rate of thirty-four percent was recorded in South Africa (the only country in Africa to recognize same-sex marriage) vis-à-vis eight, four, three, three and one percent respectively in Kenya, Uganda, Ghana, Senegal and Nigeria.¹¹⁵ This low level of tolerance of same-sex marriage in traditional societies is a pointer to heterogenous conceptualizations of human rights in different societies – embraced in the West but shunned in other regions of the world. So, what is the basis for castigating non-receptive countries, acting in accordance with their shared sense of culture and morality, as human rights violators?

Considering that the focal point of this paper is Nigeria and since, as evident from the preceding discussion, there is no international consensus on same-sex marriage as a human right, recourse must be had to key regional and domestic legal frameworks applicable in the country. The starting point of our analysis is the African Charter on Human and Peoples' Rights.¹¹⁶ In this connection, the charge given to African experts gathered in Dakar, Senegal in 1979, is quite helpful, "to prepare an African human rights instrument based upon an African legal philosophy and responsive to African needs."¹¹⁷ The experts were commissioned to prepare a legal regime that unambiguously reflects an "African conception of human rights."¹¹⁸

That the experts internalized the seriousness of this charge is evident in the various provisions of the Charter. The Preamble was quite explicit as to

113. *The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries*, PEW RES. CTR. (June 4, 2013) [hereinafter *The Global Divide on Homosexuality*], <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf>.

114. *Id.* at 22.

115. *Id.* at 23. South Africa is unlike many other countries in Africa in this respect. While homosexual acts are legal and discrimination based on sexual orientation is illegal in South Africa, however, in 2013, sixty-one percent of those surveyed by the Pew Research Center still believed society should not accept homosexuality. *Id.* at 3.

116. African Charter, *supra* note 2.

117. Yougindra Khushalani, *Human Rights in Africa and Asia*, 4 HUM. RTS. L.J. 403, 436 (1983), cited in James Silk, *Traditional Culture and the Prospect for Human Rights*, in HUMAN RIGHTS IN AFRICA 308 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990).

118. Meeting of Experts, Dakar, OAU Doc. CAB/LEG/67/3, Rev. 1, at 1 (1979), quoted in *Organization of African Unity and Human Rights*, Amnesty International, AI Index IOR 63/001/1991, at 8 (June 30, 1991), <https://www.amnesty.org/download/Documents/196000/ior630011991en.pdf>; see El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua, *Human Rights in Africa: A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819, 836 (1996) (quoting Amnesty International, *The Organization of African Unity and Human Rights*, *supra*).

the concept of human rights in the region, requiring special consideration to be taken of the “virtues of [the] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights”¹¹⁹ as well as the duty of States Parties “to promote and protect human and people’ rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.”¹²⁰ These provisions are very important because they speak to the specifics of the human rights to be protected in Africa; that is, one that is founded on African values.

Similar thinking undergirds the European Convention on Human Rights.¹²¹ Regarding the Eurocentric nature of the regional human rights system in Europe, parties to the European Convention on Human Rights are in agreement that “[g]overnments of European countries [are] likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law” and, as such, are resolved “to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration [on Human Rights].”¹²² The term “certain of the Rights” of the UDHR was not fortuitous, and this is quite significant—it reflects quite explicitly an indication that not all human rights will be accorded recognition, only those that are consistent with European beliefs and cultural heritage.¹²³

As such, Nigeria and other African countries are on firm grounds in institutionalizing and pursuing an indigenous or Afrocentric concept of human rights, one that is consistent with the region’s cosmology and epistemology. In light of the cacophony of approaches to same-sex marriage across the globe, there are no grounds to argue that Africa is not at liberty to chart its own cause of action, particularly given the obligations of States Parties to the African Charter on Human and Peoples’ Rights.

Regarding the African Charter on Human and Peoples’ Rights, three provisions are noteworthy. The first is Article 17(3), which imposes an

119. African Charter, *supra* note 2, at 246.

120. *Id.*

121. *See* European Convention on Human Rights, *supra* note 8.

122. European Convention on Human Rights, *supra* note 8, at 222, 224; *see* Nnamuchi, *supra* note 51, at 45 (elaborating on this point).

123. *See* Nnamuchi, *supra* note 51, at 45-46 (“There is no doubt, as legal scholar James Hart explains, that the reference in the Preamble to Europe’s ‘common heritage of political traditions, ideals, freedom and the rule of law . . .’ was an explicit indication ‘that one of the [European Convention on Human Rights] intentions is to delineate and embody the political and ethical culture of Western Europe’ and, presumably, not that of any other peoples. To this extent, therefore, one could rightly characterize the [European Convention on Human Rights] as the first treaty-based challenge to the universality of human rights.”).

obligation upon States Parties to promote and protect the morals and traditional values recognized by the community.¹²⁴ Implicit in this stipulation is the question of whether the moral and traditional values of communities in Africa accord same-sex marriage the status of a human right? A response to this question is provided by Article 27(2) – the second noteworthy provision – which requires that the “rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”¹²⁵ What is at stake, therefore, is the communitarian underpinning of African society, the idea that individual interests are subsumed under collective will, a common morality which supersedes and nullifies contrary individual preferences.

Communitarianism or communalism is definitive of morality amongst the people, a point underscored by an observation made a few years ago, that the community will restrict individual autonomy in appropriate cases since the common good takes precedence over personal freedom or autonomy. In other words, the concept of individual autonomy, which is at the base of several key decisions of the U.S. Supreme Court involving the relationship between individual liberty and law enforcement authority of the government – such as *Griswold v. Connecticut*, which held for the first time that marital privacy regarding use of contraceptives is a constitutionally protected right,¹²⁶ *Lawrence v. Texas*, establishing, again for the first time, the right to consensual homosexual sex as a constitutional right encapsulated within the right to privacy,¹²⁷ and *Obergefell v. Hodges*¹²⁸ – does not attract the same seal of approval or importance in Africa. As argued elsewhere:

Had these cases been decided in a communal setting, the operational prism being that of communities insulated from the assault of modernity, the result would have certainly been different. The reason is because the ethics of communitarianism prescribes that ‘your business is my business’ and vice versa, and this powerfully dilutes the force of privacy in individual lives. It

124. African Charter, *supra* note 2, art. 17(3) (“The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”).

125. *Id.* art. 27(2) (“The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”).

126. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); *see Eisenstadt v. Baird*, 405 U.S. 438, 453-54, n.10 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled on other grounds by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

127. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

128. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015).

would be odd in these societies to defend allegations of what is generally perceived as wrongdoing on the basis of one's privacy interests.¹²⁹

Indeed, although in Western morality, individual autonomy is regarded as the basis of social relationships, the reverse is the case in Africa. Paternalism is the norm, acclaimed as being consistent with Africa communitarian ethos – rooted as it is, “not in individual claims against the state, but in the physical and psychic security of group membership.”¹³⁰ This understanding is the reason Article 29(7) of the African Charter, the last of the three key provision, imposes a duty upon every individual to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society.

This stipulation echoes the injunction by judge Tobriner in *Tarasoff v. Regents of the University of California*, which was alluded to in section II of this paper, that “[t]he protective privilege ends where the public peril begins.”¹³¹ The question then becomes whether, in light of the remarkable distinction between Western and African conceptualizations of the status of individual preferences versus that of the community, same-sex marriage is consistent with African morality and value system? The response is not far-fetched. A recent Pew Research poll found dastardly poor support for homosexuality in Africa, ranging from eight percent of the population in Kenya to one percent in Nigeria,¹³² underscoring burgeoning legislative response to the social upheaval, an instance of which is Nigeria's Same Sex Marriage (Prohibition) Act of 2014 as well as other criminalization statutes in several other African countries. Out of the fifty-four countries in Africa, twenty-two allow same-sex sexual acts¹³³ whereas more than half (thirty-three) have prohibitory regimes, twenty-three of which apply to women.¹³⁴ Regarding same-sex marriage, it is significant to note that South Africa remains a pariah, the lone country in Africa that has legalized the practice.¹³⁵ Even more striking, only twelve percent of U.N. Member States recognize homosexual marriage.¹³⁶

129. Nnamuchi, *supra* note 51, at 43.

130. Howard, *supra* note 54, at 166.

131. *See Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 442 (Cal. 1976).

132. *The Global Divide on Homosexuality*, *supra* note 113, at 1.

133. *See* AENGUS CARROLL & LUCAS RAMÓN MENDOS, STATE-SPONSORED HOMOPHOBIA 26 (12th ed. 2017), https://ilga.org/sites/default/files/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

134. *Id.* at 37.

135. *Id.* at 196.

136. *Id.* at 68.

Where then lies the validity of the claim that same-sex marriage is a universal human right?

IV. CONCLUSION

When the U.S. Supreme Court heard *Washington v. Glucksberg* in 1997, the Justices had no idea that their opinion would, in later years, prove eminently relevant to the current global homosexual marriage debacle. Yet, one of the cardinal principles upon which the Court's decision was based bears strongly on the question of whether homosexual marriage should be accorded the status of a fundamental human right:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'¹³⁷

What the U.S. Supreme Court was saying, in essence, was that to succeed in establishing a claim as a fundamental human right, the applicant was tasked with establishing that the claim in question was embedded in national psyche, beliefs and practices as to be undeniable as part and parcel of the nation's cosmology. In the instant case, because appellants were unable to meet this burden, in the sense of satisfying the Court that assisted suicide was consistent with the history and tradition of the United States, their claim failed. The Court's elucidation is quite helpful:

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.¹³⁸

This case, described in *Obergefell* as "the leading modern case setting the bounds of substantive due process,"¹³⁹ reflects the proper

137. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1992) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 309, 325 (1937); and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.")).

138. *Id.* at 728; see *District Att'y for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009); *United States v. Salerno*, 481 U.S. 739, 751 (1987); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

139. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

contextualization of Nigeria's Same Sex Marriage (Prohibition) Act and the vitriolic response from Western powers. Applying the *Glucksberg* standard to Nigeria raises a very simple question, *to wit*, is homosexual marriage compatible with the tradition or culture – in short, the way of life – of the various ethnic groups in Nigeria? Put differently, is there any shared value, some sort of common morality, that validates same sex union in the country? Recall the Pew Research findings, which found that only one percent of the population in Nigeria approve of same-sex marriage.¹⁴⁰

Moreover, judging from the nation's history and near unanimous support of the government in enacting the Same Sex (Prohibition) Act, the response to these questions seems resoundingly negative. In other words, to assert homosexual matrimony as a human right is to lay claim to an 'entitlement' that lacks foundation in the history, experience or morality of the people of Nigeria. This response in a national newspaper is an accurate portrayal of the view of the vast majority of Nigerians:

[T]he hostile reaction of Europeans and the United States to the recent signing into law of the bill that [proscribes] marriages and sexual relations between people of the same sex has not taken into consideration the socio-cultural differences between people of different racial backgrounds, and more importantly the religious beliefs of our people . . . We value the bilateral and multilateral relationships between Nigeria and its international partners and we believe that no unnecessary pressure will be brought to bear on us to accept what our people consider to be abhorrent . . . [T]he US and EU should respect the sensibilities of those in the majority who abhor the practice of same sex relations.¹⁴¹

Driving this point home, Phillip Adeyemo, an Anglican Bishop, added the following:

I think the president has rekindled the hope of the citizenry in his ability to protect the country's sovereignty and its cultural values by his signing of the same-sex marriage prohibition bill into law. The signing to me has put to rest the dictatorial tendencies of some countries trying to meddle in the internal affairs of the nation. We commended in strong terms President Goodluck Jonathan for having the zeal and political will to sign this bill into law, in the interest of the people of the country.¹⁴²

140. *The Global Divide on Homosexuality*, *supra* note 113, at 2.

141. Victoria Ojeme, *Gay-Marriage Law: Canada Cancels Jonathan's Visit*, VANGUARD (Jan. 20, 2014, 1:53 AM), <https://www.vanguardngr.com/2014/01/gay-marriage-law-canada-cancels-jonathans-visit/>.

142. *Same-Sex Marriage Law: Xtian Leaders Commend Jonathan*, VANGUARD (Jan. 26, 2014, 4:12 PM), <http://www.vanguardngr.com/2014/01/sex-marriage-law-xtian-leaders-commend-jonathan/>.

Significantly, despite massive outpouring of support throughout the country for the prohibitory regime, Western countries were undeterred in threatening the country with sanctions. This brazen display of arrogance and ethnocentrism, the idea that the “West is right” (documented in section I of this paper) represents a disturbing phenomenon in inter-State relationships – disturbing because of the demonstrative lack of respect for the wishes of Nigerians implicit in the language used by the threatening nations. In this, there is an important lesson for the population as well as the political leadership in the country. The Igbo have a saying, *onye me onwe ya ka nwata, e me ya ka nwata*, meaning, “if you act like a child, you are bound to be treated like a child.” It is precisely because political leadership in the country has, for decades, been in the hands of people whose conduct leaves much to be desired – indeed, child-like – that it is possible for Western countries, even small insignificant ones, to attempt to force the country’s action, and thus to thwart the will of the people. That is the most philosophically astute way of explicating threats upon threats issued against the country for exercising its right to self-determination, to govern itself according to the dictates of its culture and values, just as European and North American countries, which have arrogated to themselves the power to determine which values should count as human rights and which should not.

Recall that Russia has one of the most draconian anti-homosexual legislative frameworks in the world. Aside from explicitly prohibiting same-sex marriage, the law in Russia prohibits the spread of propaganda of “nontraditional sexual relations” amongst minors.¹⁴³ The law defines homosexual propaganda as anything “aimed at the formation of nontraditional sexual behavior” and imposes stiff penalties upon violators, such as fines up to \$150 for individuals and up to \$30,000 for companies including media organizations.¹⁴⁴ Not only was there no credible threat of sanctions against Russia, the country was allowed to host the February 2014 XXII Olympic Winter Games in Sochi. There is no doubt that had the event been scheduled to take place in Nigeria or any other country in Africa with same-sex prohibitory legal framework, it would have been cancelled by the powers that be. This evokes the doctrine of “might is right,” in that different standards are being applied to different countries, depending on the extent of sociopolitical and economic independence of the country – and not on a strict interpretation of what constitutes human rights. This is troubling.

143. *Russian Politician Behind Anti-Gay Law Champions President Putin’s Conservative Cause*, ASSOCIATED PRESS, <http://www.foxnews.com/world/2013/08/09/russian-politician-behind-anti-gay-law-champions-president-putin-conservative/> (last updated Jan. 13, 2015).

144. *Id.*

The conclusion of this paper is quite straightforward: Despite political grandstanding and posturing from several quarters, same-sex marriage as a human right is unknown to international law. Section III of this paper showed that although certain expressions of homosexuality, such as private homosexual sex, have been upheld as human rights, no international adjudicatory body or legal framework has decreed that there is a right to gay matrimony. Moreover, despite foreign pressure, many States continue to criminalize sodomy and same-sex marriages. That a few countries have independently accorded recognition to such marriages is irrelevant to the question of whether such marriages represent a globally shared value or a universal human right. The holding by the ECtHR in *Schalk and Kopf v. Austria*, that there is no European consensus on the issue of homosexual marriage and, therefore, States are at liberty to decide whether to permit same-sex marriage or otherwise,¹⁴⁵ as well as the decision of the HRC in *Joslin v. New Zealand* to the effect that the ICCPR does not recognize gay marriage, represents the current position of international law.

Accordingly, the claim that the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity “affirm binding international legal standards with which all States must comply”¹⁴⁶ and constitute “an authoritative statement of the human rights” of homosexual population,¹⁴⁷ lacks merit. The global consensus is that the Yogyakarta Principles do not establish a human rights standard, neither do they impose legally binding obligation on States. That was the basis for the criticism of Vernor Muñoz, U.N. Special Rapporteur on the Right to Education when he presented his report to the organization in 2010, for relying on the Yogyakarta Principles as setting a human rights standard.¹⁴⁸ This denunciation of the Report by the representative of Malawi (on behalf of African Group) reflects the sentiment of most States:

[The Special Rapporteur] had sought to: over-step the terms of his mandate; introduce ‘controversial concepts’ that were not recognized under international law; create new human rights; relied on information from non-credible sources that was not verified; failed to incorporate information provided by Member States; selectively quoted from the work of the treaty bodies in

145. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409.

146. *About the Yogyakarta Principles*, YOGYAKARTA PRINCIPLES, <http://yogyakartaprinciples.org> (last visited Dec. 22, 2017).

147. *The Yogyakarta Principles Plus 10*, YOGYAKARTA PRINCIPLES (Nov. 10, 2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

148. Vernor Muñoz (Special Rapporteur on the Right to Education), *Rep. of the U.N. Special Rapporteur on the Right to Education*, ¶¶ 23, 67, U.N. Doc. A/65/162 (July 23, 2010).

a manner that distorted their views; and sought to propagate controversial principles (the Yogyakarta Principles) that were not endorsed at the international level. Each of these criticisms was in contravention of the Code of Conduct and if left unchecked, would undermine the entire system of special procedures.¹⁴⁹

For these reasons, the Report was overwhelmingly rejected by the Third Committee of the General Assembly of the U.N. and permanently shelved. Therefore, while Western countries are within their legislative and jurisprudential competence to stamp homosexual marriage with the imprimatur of human rights in their respective territories and even to rely on the Yogyakarta Principles if they choose, it does not follow that they are at liberty to compel countries whose culture and morality are irreconcilably opposed to such marriages to act likewise. As affirmed by the HRC in *Leo Hertzberg v. Finland*,¹⁵⁰ “public morals differ widely” and since there “is no universally applicable common standard . . . a certain margin of discretion must be accorded to the responsible national authorities.”¹⁵¹ The blatant failure of Western countries to abide by this prescription, on a subject in which there is no global consensus nor support under international law, does nothing to advance human rights; instead—and this is the central argument of this paper—the action undermines the human rights of the people in those countries, such as Nigeria, to self-determination.

149. *Majority of GA Third Committee Unable to Accept Report on the Human Right to Sexual Education*, INT’L SERV. HUM. RTS. (Oct. 26, 2010), <http://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education>.

150. *Hertzberg v. Finland*, Communication 61/1979, U.N. Doc. CCPR/C/OP/1, at 124 (1985).

151. *Id.* ¶ 10.3.