THE AFRICAN MORAL PERSPECTIVES ON HUMAN RIGHTS AND THEIR INFLUENCES ON ANTI-GAY LAWS IN NIGERIA AND KENYA

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Abstract

African moral perspectives on human rights are reflective of moral systems that are exclusive to African social philosophies. This paper asserts that there is an African conception of human rights based on the moral systems in Africa, which are a product of social philosophies on the continent. The paper analyzed the compliance of anti-gay laws in Nigeria and Kenya with human rights principles enshrined in the constitution of both countries and in the Universal Declaration of Human Rights 1948. It found the anti-gay laws inconsistent, and in gross violation of constitutional and international law standards. It further argued that despite the unimpressive development of the African conception of human rights, it has little or no influence on the anti-gay laws, especially as the anti-gay laws are a product of colonialist legacies. The paper concluded that for laws to achieve social justice, they have to be of a sound juristic process.

Keywords**:** Human Rights, Anti-Gay Laws, Moral Perspectives, Social Philosophy

Introduction

Africa is a continent that has not evolved much. Rather it has only consolidated on its system of political and social institutions, adapting some practices as are necessary for an integration into a globalized world. African societies are yet to be comfortable with the concept of individual liberty as expressed by the quite advanced social institutions of the West. As individual liberty is many times associated with Western humanism, African communalism defines the political and social reactions to external influences, and on the whole, cultural integration is a phenomenon that is only appreciated only at the level of the fast declining African middle class. Africa's political institutions are a product not just of colonialism, but also of post-colonialist influences and a history rooted in communitarian concerns. Following the many micro-narratives of Africa's history, human rights have been interpreted in Africa in ways only reflective of societies in early phases of development. There has been such scholarship that claims

that human rights are non-existent in Africa, hence the negative political kickbacks to free speech despite the advent of democracy on the continent.[1]

An author at the Nordiska Afrikainstitutet has asserted that claims by some African scholars whether conservative or liberal, that human rights in Africa were contrived by imperialism and colonialism, and that as some claim in the West too, that human rights are products of the West, are not historically correct and that such claims are unscientific.[2]

This paper contends that despite the brutal history of slave trade on the continent, facilitated by its rulers, and the savagery of military rule which was a product of post-colonial governance issues, there is an understanding of human rights in Africa, however the notion of human rights in Africa is hardly humanistic.[3] Earlier authors have written that human rights are essential to the development of Africa.[4] Quite an agreeable fact that for any society in its earliest phases of development, human rights are essential.

For any civilization to thrive, there ought to be a realization that human rights allow for a process that involves equitable practices. In contradistinction to the struggling societies of the global south, the global north has made giant strides in social development partly owing to the recognition that the rule of law, which is a platform through which human rights can be actualized, is imperative for a coherent system of development.[5]

Many authors have overemphasized that the African conception of human rights are communitarian. This could be the major reason for the points of conflict that occur between Africa and the West when questions relating to the correct practices of human rights arise.

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[1] Appiagyei-Atua, EI-Obaid Ahmed EI-Obaid & Kwadwo, Human Rights in Africa -A New Perspective on Linking the Past to the Present, 41 McGill L.J. 819 (1996).

[2] Shadrack B.O Gutto, *Human and People's Rights in Africa, Myths Realities and Prospects,* 12 Nordiska Afrikainstitutet 6 (1990).

[3] The idea that human rights do not exist in Africa might stem from the perception that there is only one notion to the concept of human rights, a notion subject mostly to the definition that is given by the humanistic social philosophy of the West, and without conforming to that notion, human rights do not exist. There should be an allowance for a variance that includes a notion defined by other social philosophies, however such is perceived.

[4] Appiagyei-Atua, EI-Obaid Ahmed EI-Obaid & Kwadwo, Human Rights in Africa -A New Perspective on Linking the Past to the Present, 41 McGill L.J. 819 (1996).

[5] It could be observed that in the societies of the global south, Africa included, developmental differences can be spotted between a society that takes the rule of law seriously than another society that sees the rule of law as unnecessary, between a society that sees that institutions are independent from the people that occupy them, and another that fails to see that institutions are independent from the individuals that occupy them.

African Moral Perspectives on Human Rights

There is a component of the communal perspective to the African conception of human rights, and which is the moral system. Morality can be derived from a social philosophy, and the standards of the social philosophy are applied in judgment, when there is a conflict between private and public morality. The extent to which the standards of social philosophy is applied in judgment of private morality is amplified when the social philosophy is communalistic, rather than an individual centric social philosophy like the humanism that characterizes the developed societies of the West. One of the influences on the perspectives of human rights in Africa that is rarely discussed is the influence of the moral systems. In fact, the influence of morality on the subject of human rights in Africa is very much underemphasized.

In the context of human rights, there is hardly a way that the moral perspective of the social philosophy of African societies would not impact the notion of human rights on the continent, if it has been established that the social perspective of human rights is shaped largely by a social philosophy, since human rights in themselves are a product of the existence of society. One of the reasons why it cannot be said that human rights do not exist in Africa, is that it has been expressed many times that rights are inalienable to the state of being human, because a human would most probably be born in a society of other humans, and it would be necessary for that human who was born to be preserved in the entirety of their wellbeing. Africa's history before colonial times have seen within the complexity of various ethnic arrangements, various political systems that have engaged democratic concepts. There was also in the socio-religious system, practices that expressed human rights in the traditional form, which has been attributed to the cultures of African societies.[6] For instance, there is a Yoruba proverbial expression that, it is the same way that the free citizen was born, that the slave also was born, which connotes that the slave must also enjoy some privileges of the freeborn, the only difference being that the slave is bound to their master. From the ancient Yoruba proverb, it could be seen that there is recognition of the concepts of human rights even in African cultures. It could be conceived that the consciousness and the sensitivity to human rights cannot be dissociated from the developmental stage of a civilization. It could also be safely conceived that social philosophies are largely an indication of the developmental phase of a people.

[6] Appiagyei-Atua, EI-Obaid Ahmed EI-Obaid & Kwadwo, *Human Rights in Africa -A New Perspective on Linking the Past to the Present,* 41 McGill *L.J. 821 (1996).*

The contemporary notion of human rights seems to be defined along the lines of humanistic aspirations, and if human rights appear to be slightly above the understanding of those societies still struggling with the contemporary notion of human rights, then it would be because of the variance of the social philosophy. One of the problems that Africa has with the contemporary notion of human rights is the fact that Africa has a bad habit of documenting a foreign concept for the use of adapting it to local policy without interrogating the concept. Also the act of documenting something for the purpose of adapting it to policy without putting in place, the structures through which the adapted concept becomes workable, breeds redundancy. For instance, the constitutional framework of African states in which the legal questions of human rights are settled, seem to have been derived from the Universal Declaration on Human Rights 1948.[7] It would appear that African states should not have a problem when it comes to securing the enforcement of human rights, unfortunately, the fractured political history of many African states that has experienced autocratic regimes, and the affected constitutionality has put the development of the sensitivity to human rights in a very disadvantaged position.

From a historical viewpoint, the African socialist moral perspective that is used in the interpretation of human rights, construe a point that could be summarily taken as an attempt to preserve traditional structures, and perhaps the society from perceived external influences that could rupture the psychological layers of society. This point could also radically effect a reconsideration of culture. African socialist morality is important to the examination of the conception of human rights in Africa. The perspectives on human rights in Africa have come a long way. This is to also imply that human rights are not just a set of Western principles projected through the mechanism of the United Nations, and that happened on the continent at an inopportune moment in the social development of the continent, as some African human rights scholars assert. This is to imply that unlike some Western human rights claim that human rights do not exist in Africa, human rights in Africa has always been a conscious expression of the social conceptualization of the significance of human existence. Two scholars, Howard and Donnelly have asserted that traditional African societies had no notion of human rights, because fundamental human rights, as they know it have a universal application and scope, which are inalienable to the human person, and not to the collective of a society. So they believed that the

[7] Since the Universal Declaration on Human Rights 1948 pre-dated many African constitutions, and the international covenant expresses the principles enshrined in the United Nations Charter, it would be safe to conclude that the UDHR is the document on which the constitutional framework of human rights of African states is built upon.

notion that these African traditional societies had, was in its finest conception, that of human dignity and not of human rights.[8]

The argument of these scholars seem to define human rights from the standpoint of an abstract conception of the subject and not from the end human rights hope to justify. Human rights justify human dignity. In fact the whole essence to human rights is such that within the society of other humans, the dignity of each individual existence can be expressed. In defense of the argument that human rights existed in traditional African society, and that the perspective to human rights was communitarian, human rights are best understood from what they exist to achieve, or what purpose they serve in the contemplation of human existence. Social theories have long shown that there is a connection between the aspirations to preserve society and the construct of such mechanisms of society that would check the excesses of human liberties. The end should be that societies and values must not be eroded by the vagaries of individual aspirations. What makes the conception of human rights vary across social systems, is ethical relativism.

Ethical relativism according to Alston and Goodman is the proposition that the representation of moral principles varies among human beings.[9] Ethical relativism does not contend the existence of moral principles. The point that ethical relativism makes on the reaction to human rights is that it varies the response and the conception. Why the conception of human rights is different in Africa is mostly because of the difference in the moral system. Alston and Goodman argue that the conception of human rights set into cultural notions about the state, society and the individual are not easily interpreted into the backdrop of one society to another.[10] The position is very appropriate in the light of the view that the notion of human rights in Africa is quite parallel to that of the West. There are two positions to be considered when evaluating the current position of human rights in Africa. Firstly, ethical relativist influence on human rights are significant to the point that the conception of human rights in Africa is quite different in its concerns from the notions of human rights in the West. Secondly, the social theory that societies that are still grappling with developmental issues cannot effectively treat such things like human rights issues and democratic governance with the urgency that they require.

[8] J Donnelly, *Cultural Relativism and Universal Human Rights,* 6 HUM. RTS. Q**.** 400 (1984).
[9] Philip Alston & Ryan Goodman, International Human Rights 535, Oxford University Press (2013).
[10] Philip Alston & Ryan Goodman, International Human Rights 535, Oxford University Press (2013).

This social theory will also look at how economic development aids the institutional enforcement and perspective of human rights. This second position would be further elaborated on in subsequent parts of this work. In noting the difficulties of the development of human rights in light of the African reality, Claude Ake observed that:[11]

> *First we have to understand that the idea of legal rights presupposes social atomization and individualism, and a conflict model of society for which legal rights are the necessary mediation. However, in most of Africa, the extent of social atomization is very limited mainly because of the limited penetration of capitalism and commodity relations. Many people are still locked in natural economies, and have a sense of belonging to an organic whole, be it a family, a clan, a lineage or an ethnic group.*

It appears that every society has a system of morality.[12] A society's moral system is influenced by certain factors that informs the culture and the trends of existence in such a society. Globalization cannot be ignored in this regard, although the cultural integration that globalization allows have limits. In the end, cultural integration develops culture along the lines of its own elements. The extent to which human rights is influenced by morality in Africa is to examine the fine points of ethical relativism in Africa and its dynamics in the workings of legal systems on the continent. Ethical relativism has shown that the humanistic liberalism of the West and the communalistic philosophy of Africa are parallel grounds in the conception of human rights. It could have been argued that the lack of the understanding of human rights in Africa is the major reason for the flawed translation of human rights norms in legal systems on the continent, but that would be to deny the principles of the moral system behind human rights norms, the variance of their existence. As argued earlier, the variance of the principles of the moral system behind human rights are the reason why the notions of human rights differ from one another.

In looking closer at the differences of the notions of human rights across societies based on the varying principles of moral systems and the social philosophies, there should not be a point where it should be concluded that the varying principles of moral systems and the social philosophies, from

[11] Claude Ake, *The African Context of Human Rights*, Human Rights And Justice, January 1987, 87.
[12] Philip Alston & Ryan Goodman, International Human Rights 535, Oxford University Press (2013).

which human rights are conceived are excluded from development. Just like societies and the quality of their social contract are evaluated based on the extent of their development, so should a society develop its conception of human rights along the lines of its social and economic advancement. The African conception of human rights can only develop along the lines of social and economic advancement. Two questions come to mind in identifying the unifying link between the idea that the conception of human rights is decided by the varying principles of moral systems and the social philosophies, and the idea that societies that are still grappling with developmental issues cannot effectively deliver on the enforcement of human rights:

a) Do societies that are still grappling with developmental issues, have sound principles of moral systems and social philosophies?
b) Are societies still grappling with developmental issues equipped with judicial systems that attempt to reform the social perspectives on human rights?

African Moral Influences on Anti-Gay Laws in Nigeria and Kenya

There are certain things to consider about the constitutionality of the act of making laws that discriminate and seeks to make a public concern what should be, according to humanistic logic, a private affair. It is either there is a poor understanding of what the fundamental rights enshrined in the constitutions of both countries are about, or there is a confusion at the legislative and executive levels on the boundaries of these rights. There could also be a poor reflective attitude on the legislative process. The implication of a poor reflective attitude on the legislative process is that laws that do not take into consideration the interests of the entirety of the collective would be made. Therefore, a good reflective attitude on the legislative process would include sound deliberation on the importance of the legislation and what it hopes to achieve in its enactment.

A good reflective attitude on the legislative process would isolate sentimental opinions of any kind, religious or political, and whatever bias from the legislative process, in ensuring the objectivity and the utility of the legislation. Sexual orientation is a private, or individual concern, since it concerns the individual more than it does the society, however from a political perspective, many times, the making of laws in Nigeria and Kenya aligns either with a religious sentiment or a political one, and legislative functions seem to be dispensed with other interests other than the consideration of the general interest. The liberty of minorities, even of people with different sexual orientation, is the liberty of the society.

Gay people in Africa have suffered being dealt with as a criminal category. This might either come as a sharp resistance to what has been perceived as a cultural invasion, as some African people still deny that sexual orientation is not an affectation of a foreign decadent culture, or as some reaction to something thought as inherently dangerous in the long term. Whichever way it has been perceived, there is a little understanding and sympathy to the plight of the gay minority. According to Human Rights Watch, there are about 38 countries on the continent that have made homosexualism a criminal offence.[13] Anti-gay laws are not just a trend on the African continent but it seems to have a root in British colonial laws which seem to have been largely influenced by religious considerations, in fact over 80 countries in the world still outlaw consensual gay sexual relations.[14] Over half of the countries that outlaw consensual gay sexual relations were British colonies.[15]

In fact there has been a concerted persecution from both the government and the people of many African states against this different sexually oriented minority. A critical observation of the relationship between the conceptions of human rights based on African moral systems, and the present disposition of many African states to the rights of the homosexual minorities point to a divergence. A divergence that stems from the fact that the present vehement stand against homosexual practices in Kenya and in Nigeria, is derived from a colonial juristic legacy. While the conceptions of human rights based on African moral systems seek to reconcile individual concerns with social tradition. According to Seth Wekesa, the anti-gay laws derive from European models.[16]

The making of the anti-gay laws in Kenya and Nigeria has exposed a disturbing trend in the progressive curve of the conception of human rights in Africa. There is a certain rigidity to legal development and it is also to the effect that the moral system of religious institutions bear heavily on social and legislative perspectives. For instance in Northern Nigeria, adultery and alcoholism are offences under the law, also in Kenya, there is a law that regulates the practice of witchcraft. It states that:[17]

> *Any person who holds himself out as a witchdoctor able to cause fear, annoyance or injury to another in*

[13] Gupta Aloka, *This Alien Legacy, the Origin of Sodomy Laws in British Colonialism* 4, Human Rights Watch (2008)
[14] Human Rights Watch, supra note 4.
[15] Human Rights Watch, supra note 4.
[16] Seth Muchuma Wekesa, A Constitutional Approach to the Decriminalization of Homosexuality In Africa: A Comparison Of Kenya, South Africa And Uganda 2 (June 2016) (Unpublished LLD thesis, University of Pretoria, Pretoria).
[17] Witchcraft Act, (1948) Section 2.

> *mind, person or property or who pretends to exercise any kind of supernatural power, witchcraft or sorcery or enchantment calculated to cause such fear, annoyance or injury shall be guilty of an offence and liable to imprisonment for a term not exceeding five years*.

There is also the issue of an extant influence of colonial laws, on African laws, more specifically in Nigeria and Kenya, many of which have been repealed by the colonialists in their countries, since it is only appropriate that laws must develop along social perspectives and tailored alongside the demands of a dynamic human culture. Laws must develop with the advancement of human knowledge, technology and civilization, and this is the problem with the position of Nigeria and Kenya on anti-gay laws. There is a confusion on the insistence of both countries to hold on to their anti-gay laws. This confusion is predicated on the pressure of liberal Western powers on Nigeria and Kenya to take a liberal and non-confrontational view of same sex relations in their countries, but the pressure is misconceived by Nigeria and Kenya as a bared-faced attempt to interfere and control their social policy-making processes. This misconception of the gesture of Western powers are not far from the suspicion of the attempt to control underdeveloped African states through the mechanism of foreign aid, and a defensive reaction to the strong-arm methods of the West in their foreign relations. The position of the governments of Kenya and Nigeria are quite express on the anti-gay stance. A former president of Kenya, Daniel Arap Moi had once given a very negative position on homosexuality, despising it upon the very strength of his conscience, Christianity and culture, and such is the way many African leaders feel about gay rights. They feel that no rights can be granted for what they feel is morally repugnant.[18]

An Analysis of Kenya's Anti-Gay Laws

When on the 27th of August, 2010, Kenya got a new constitution[19] which repealed the one that had been in force since the independence of Kenya in 1963,[20] and which appeared to have in its deliberation, the social aspirations of the citizenry. Curiously, some minority rights are yet to be guaranteed, which is that of the lesbian, gay, bisexual, transgender and Queer (LGBTQ)

[18] Reuters, Kenya's Moi Joins the Attack on Gays in Africa, Reuters, September 30, 1999, available at http://www.glapn.org/sodomylaws/world/kenya/kenews001.html . (Last visited 01 June, 2019).

[19] BBC News Africa, *Kenya President Ratifies New Constitution* (Aug. 27, 2010), available at http://www.bbc.co.uk/news/world-africa-11106558. (Last visited 02 June, 2019)

[20] Courtney E. Finerty, *Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws* 45 Corn. Int. Law Journal, 432 (2012).

community in Kenya.[21] This exposes a more intrinsic problem in the connection of constitutionality to the realities of the social acceptance. In fact Kenya's penal code criminalizes gay sexual relations, describing it in its very words as "carnal knowledge of a person against the order of nature".[22] The Kenya Penal Code provides a sentence of up to fourteen years for the offence. This makes gay sexual relations a serious offence in Kenya, and armed with the provisions of the Kenya Penal Code, the persecution of the LGBTQ in Kenya becomes a legitimate affair. The laws criminalizing gay sexual relations is one that concretizes the social feelings of prejudice and murderous disapproval of gay people in Kenya.[23]

The law allows the harassment of the LGBTQ in Kenya to the point where it is wondered if they are excluded in the constitutional provisions that grants the protection of fundamental human rights. The law denies the LGBTQ people in Kenya the justice that should have been provided with as humans and as Kenyan citizens. Many people agree in the international community with the logic that if humans have fundamental rights which are enshrined in international law and which must be protected, then sexual orientation and sexual identity should never be grounds for discrimination.[24] There is a dissonance in the provisions of the Kenyan constitution and the anti-gay laws, since the Kenyan constitution provides a comprehensive Bill of Rights for people within Kenya,[25] and it includes international law in the law of Kenya.[26] The LGBTQ have experienced significant police persecution and harassment, in Kenya, they have suffered illegal detention without being informed of their offences. Sometimes they are arraigned on false charges in court.[27] Gay people have also suffered attacks and lynching from the hands of other Kenyan citizens.

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[21] Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of the LGBTQ Community's Search for Equality and Non-Discrimination in Kenya* 19 (2011).
[22] The Penal Code, (2009) Cap. 162 .
[23] Pew Research Center, *World Publics Welcome Global Trade—But Not Immigration*; 47-Nation Pew Global Attitudes Survey, Pew Research Center 35 (Oct. 4 2007), available at http://www.pewglobal.org/files/pdf/258.pdf. (Last visited 02 June, 2019).
[24] S*ee* U.N. High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, 15, 19, U.N. Doc. A/HRC/19/41 (2011).
[25] International Lesbian, Gay, Bisexual, Transgender & Intersex Association, Brussels, *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults*, 9 *Part IV*.A (2011).
[26] *See infra* Part IV.B
[27] International Lesbian, Gay, Bisexual, Transgender & Intersex Association, Brussels, *State-Sponsored Homophobia: A World Survey Of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults* 9 (2011).

One of the most psychologically debilitating things for this sexually different minority in Kenya is the fact that they face extreme social stigmatization from their immediate society, and even family members. There was the serious risk of being disowned by one's family if discovered to be gay.[28] The responsibility on Kenyan courts in discharging the discrimination against this vulnerable minority has not been made, perhaps because the constitution does not specifically mention sexual identity as one of the grounds on which discrimination is not allowed. When confronted with the rationality of the criminalization of gay people, Kenyan law enforcement officers have expressed something close to a confusion of the essence of the anti-gay laws. There is a strong belief that homosexuality is one of the invasive effects of Western culture, and it is often used as an argument against homosexualism in Kenya.[29] The argument that the resistance of homosexualism is a reaction of African moral perspectives on homosexualism is not correct, since anti-gay laws were a product of Western colonization, and the puritanical content of their old laws. The existence of colonial laws alongside customary laws allowed instances when there had to be a determination of the superiority of the laws that would be applied to judging the moral repugnance of an act.[30] In such instances, the colonial laws were taken to be more significant, since the colonialists considered many African traditional practices as heathen.

The essence of recognizing that the anti-gay laws had Western roots is to refute the argument that the position of the law is derived from an African conception of human rights. That although the negative integration of mostly misunderstood influences is giving the African conception of human rights a new description according to its manifestations, the African conception of human rights have become quite rigid and unyielding in the way it addresses emerging social issues. The consequences are now that the humanity of such a minority as the LGBTQ in Kenya, is under social criticism and attack since stripping a people of their rights is denying them their humanity. The view of the government in establishing the oppression of the LGBTQ in Kenya is as gross a violation of the fundamental principles of human rights as the Apartheid regime was in South Africa. The oppression of the LGBTQ in Kenya is reflective of the state of minority rights in Africa. The further implication of the existence of anti-gay laws are that gay people would not be able to come out to report gross violations of their rights for the fear that their situation would be made worse, as they

[28] Id. at 27

[29] David McKenzie, *We Live in Fear' Say Gays in Kenya* CNN (May 15, 2008) available at http://edition.cnn.com/2008/WORLD/africa/05/15/gay.kenya/index.html (Last visited 02 June, 2019).

[30] Courtney E. Finerty, *Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws* 45 Corn. Int. Law Journal, 436 (2012).

face the risk of imprisonment and of being harassed by law enforcement agents.[31]

The reluctance of Kenya in resolving the incongruity of its anti-gay laws with the position of its constitution on fundamental human rights was amplified in a reported delay at a Kenya's court of superior jurisdiction on giving a decision that could potentially repeal Kenya's anti-gay laws.[32] The reason given that there were too many cases that had to be determined, presents a lack of urgency and low prioritization of the safety of gay people in Kenya. The subsequent move of the judiciary on the anti-gay laws reflected a worrisome setback to the possibility of a repeal of the anti-gay laws as Kenya's High Court reportedly gave a ruling that upheld the anti-gay laws.[33] Botswana on the other hand has decriminalized its own anti-gay laws in the spirit of reconciling with the fundamental principles of human rights enshrined in the Universal Declaration of Human Rights 1948 (UDHR), and in its constitution.

An Analysis of Nigeria's Anti-Gay Laws

Nigeria, like other African countries that have criminalized homosexualism, predicates the anti-gay laws on the same jurisprudence of morality that has been used in the defense of hounding gay people. The social perception of the Nigerian state has always been violently homophobic, with mob lynching and the cyberbullying of gay people. It was on the 7th of January 2014, when Goodluck Ebele Jonathan, the president of Nigeria at the time, assented to the Same-Sex Marriage (Prohibition) Act, 2013. There were many parts of the legislation that were not in line with the constitutional position on fundamental human rights, and which also were not in accordance with the requirements of human rights treaties that Nigeria is a signatory to, and which it has ratified. Accordingly, the Same-Sex Marriage (Prohibition) Act, 2013, specifically ran afoul of human rights principles, enshrined not only in the Nigerian Constitution, but as well other international human rights instruments, which have now become customary international law, and which guarantees the freedom from arbitrary arrest and detention, fundamental rights to dignity, nondiscrimination, equality, privacy, and freedom of expression and association.[34] It is important to note

[31] Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study Of The LGBTQ Community's Search For Equality And Non-Discrimination In Kenya* 19 (2011)

[32] Aljazeera, *Kenya Court Delays Decision on Anti-Gay Sex Law* (Feb. 22, 2019). Available at www.aljazeera.com/news/2019/02/kenya-court-delays-decision-anti-gay-sex-law190222081216276.html (Last visited on 5 June, 2019).

[33] Reuben Kyama & Richard Pérez-Peña, *Kenya's High Court Upholds a Ban on Gay Sex*, The New York Times, (New York) May 24, 2019.

[34] Human Dignity Trust, *Nigeria: Same-Sex Marriage (Prohibition) Act, 2013* Human Dignity Trust 1 (2014).

that, it is legal consensus that laws that are not in agreement with constitutional provisions are not valid, however no court of law in Nigeria is yet to give a position that secures the rights of gay people as against the provisions of the Same-Sex Marriage (Prohibition) Act.

The Constitution of the Federal Republic of Nigeria, 1999 as amended, provides that all persons shall have a right to associate freely, and shall have the capacity to belong to or form any group, political, or trade group, or any other association, for the protection of their interests.[35] This constitutional provision is clear enough on the freedom to associate, and the constitution also provided the exception to which the association of people with a different sexual orientation do not qualify. The 1999 Constitution provided for the protection of the privacy of the person,[36] which if viewed correctly, a person's sexual orientation is a private concern, one that has no implications for the direction of the ethical pursuits of the society.

The Same-Sex Marriage (Prohibition) Act, just like its Kenyan counterpart, apart from the rights it has deprived gay people, also puts their lives in grave risk since it instigates a societal disapproval more intense than ever, as it prioritizes the persecution of gay people through the instrumentality of a legal mechanism. There is some other effect of the Same Sex Marriage Prohibition Act 2013 that has been identified by experts, apart from its contravention of fundamental human rights, which is that it poses an actual risk to the effective prevention and treatment of HIV/AIDS, and it also undermines the attempts to contain the spread of the virus.[37] The provisions of the Same-Sex Marriage (Prohibition) Act, 2013, are clear on its intent. They identify firstly the kind of relationships that are legally recognized.

The Same Sex Marriage Prohibition Act (SSMPA) accepts as valid, only marriages that are contracted between a man and a woman.[38] It fails to accept the idea of the multiplicity of gender, viewing gender from a binary perspective. The SSMPA prohibits the marriage or civil union of people of the same sex.[39] The Universal Declaration of Human Rights (UDHR), which is a foremost human rights instrument, and whose provisions have become customary international law, provides that every human is born equal and with liberties. It also believes that all humans are endowed with the capacity for reason, and conscience.[40] This initial recognition of humanity is important because whatever must exist as law should first

[35] The Constitution of the Federal Republic of Nigeria, 1999 Section 40.
[36] The Constitution of the Federal Republic of Nigeria, amended, (1999), Section 37.
[37] Human Dignity Trust, *Nigeria: Same-Sex Marriage (Prohibition) Act, 2013* Human Dignity Trust 1 (2014).
[38] Same-Sex Marriage (Prohibition) Act, (2013), Section 3.
[39] Same-Sex Marriage (Prohibition) Act, (2013), Section 1(1).
[40] Universal Declaration of Human Rights, 1948 Article 1.

recognize the dignity and personhood of the subjects involved. The UDHR further stresses equality of all humans, and states that all are entitled to the protection of the law without any prejudice or bias.[41] This is what the SSMPA is contrary to as a law that seeks to isolate a minority and sanction them for their different sexual orientation.

The SSMPA invalidates any marriage or civil union of people of the same sex, making it illegal and denying such marriage rights and privileges that would be due to a marriage that is deemed valid.[42] This provision of the law seems not to have any purpose as it erodes the legal essence of consent and that of a private life which is does not constitute a threat to the rights of other people. It places emphasis on the polarity of gender as the basis for the right to contract a conjugal relationship, rather than emphasizing the right to a conjugal relationship on the basis of being human. The state of being human is what grants rationality to the concept of human rights, rather than the differences of humans. The other rights that are attributable to a category of persons, like the rights of children, the rights of people living with physical challenges and the rights of women, are basically rights that are categorized on the grounds of capacity and of advantage. The rights attributable to individual humans are rights that are fundamental to the human person regardless of their gender. Therefore whatever justifies the existence of the individuality to the point where it advances the harmless cause of a demographic minority, is appropriate for legal recognition as a right. The provision of the SSMPA that invalidates any marriage or civil union of people of the same sex is in further breach of the provision of the UDHR that states that:[43]

> *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law, against such interference and attacks.*

The SSMPA further provides that any marriage contracted or civil union between persons of the same sex and that is certified by a document in a foreign country is not valid in Nigeria, and any privileges conferred by such document cannot be enforced by Nigerian courts.[44] The SSMPA prohibits the performance of any ceremony in the place of worship, either mosque or church or any other such place in Nigeria whatever it is called, in respect of marriage or civil union of persons of the same sex.[45] The Act also

[41] Universal Declaration of Human Rights, (1948), Article 1.
[42] Same-Sex Marriage (Prohibition) Act, (2013), Section 1(2).
[43] Universal Declaration of Human Rights (1948), Article 12.
[44] Same-Sex Marriage (Prohibition) (2013) Act, Section 1(3).
[45] Same-Sex Marriage (Prohibition) (2013) Act, Section 2(1).

invalidates any certificate that could be issued to the effect of proving the conjugal relationship of people of the same sex. [46] The registration of gay clubs[47] and the public display of affection of people of the same sex is as well prohibited by the SSMPA.[48] Examining closely the criminalization of same sex relationships in the SSMPA, one would find that the severity of the nature of such offences as provided for in the SSMPA is expressed in the penalties attached to the provisions. For instance, if people of same sex contracts to be in a marriage or a civil union, the SSMPA prescribes a maximum sentence of fourteen years.[49]

The other offences as provided for by the SSMPA have prescribed maximum penalties ranging from ten years to fourteen years. This is surprising because one would think that the purpose of legislation is to address crucial social problems, since the test for the relevance or the appropriateness of a piece of legislation is determined by what it seeks to achieve, and what problem it hopes to address in the society, it could be concluded that the SSMPA has failed to be relevant and appropriate in the context of social justice especially for gay people, and in guaranteeing that fundamental human rights would be treated as sacrosanct. Despite the fact that Nigeria has been noted as a country by several international organizations such as Amnesty International, that has not done much in safeguarding human rights. It further has gone lower in the consideration of the international organizations as a country that does not really give much value to the sacrosanct nature of fundamental human rights. Nigeria has once shown that it likes to be a trailblazer in African politics, especially as reflected by the history of its foreign policy through the instrumentality of the African Union, yet the enactment of the SSMPA is a sign that the country needs to seriously reflect on the philosophy of its development.

The question, whether societies that are still grappling with developmental issues like weak institutions and the non-application of the rule of law in the adjudication and the enforcement of law have sound principles of moral systems and social philosophies, is a question that demands an adequate answer. What are sound moral systems? Sound moral systems are ethical spheres of operation that are consistent in all their manifestations. These ethical spheres must be expressed in all the elements that constitute it. In the determination of a sound moral system in a society, it should be examined whether the judicial system, the legislative processes and the operation of law express the moral system in place. The test for the soundness of the moral system is the consistency in the expression of legal and institutional

[46] Same-Sex Marriage (Prohibition) Act, (2013) Section 2(2).
[47] Same-Sex Marriage (Prohibition) Act, (2013) Section 4(1).
[48] Same-Sex Marriage (Prohibition) Act, (2013) Section 4(2).
[49] Same-Sex Marriage (Prohibition) Act, (2013) Section 5(1).

behavior. A sound social philosophy should emanate from a sound moral system and should be well articulated in the light of the moral system in place. If Nigeria and Kenya are countries that are struggling with developmental issues, it would be safe to say that the moral systems in place in both countries are not sound enough and the social philosophies not well articulated, since usually, social justice is seen as utopian in these countries and fundamental human rights are confined to the pages of the constitution. In respect to the enactment of the anti-gay laws, there is no communitarian justification for the existence of such laws, they exist only as instruments of persecution and of legalized harassment of a minority.

Many societies still grappling with developmental issues find it difficult to have judicial systems that attempt to reform the social perspectives on human rights, because in such kinds of societies, the executive often meddles in the business of the judiciary, and this causes the judiciary to be hardly independent in the dispensing of its functions, hence there is a conflict in which the judiciary rarely comes out victorious. The rule of law is an important element of reformation in regards to the social perspective of human rights in developing societies, and if the rule of law is rarely present in the judicial workings of developing societies, then it could impede the progression of the realization of human rights. If in developing societies, justice could be bought in the courts of law, fundamental human rights cannot be secured, and the society's confidence will not be established in the functionality and effectiveness of the judicial system. Societies that are still developing, have not just economic challenges, but also challenges of the interaction of ethical systems and legal processes. The challenge of obtaining social justice in the courts of law are serious impediments for the advancement of human rights in these societies. These challenges are what are reflected in the stance of Nigeria and Kenya on the issue of anti-gay laws. The inadvertent promotion of violence on gay people, and the non-recognition of gay rights are matters stemming from a bigger issue of a lack of respect for human life, dignity and a denial of the capacity of the individual to make choices. This might be one of the failures of social development in the countries with such kinds of laws that target the freedom of minority groups.

Conclusion

The treatment of gay people in the context of law and discrimination in Nigeria and Kenya, have put a question mark on what exactly the role of the law is in the society, and the perception of the state on how individual choices could be a serious threat to order and public morality. The violently negative perception of the Nigerian and Kenyan state on homosexuality, and what it portends for society, raises a further question as to the extent of the will of the government of both countries in protecting the interests of its

citizens within the social contract. The current position of Botswana on the protection of gay rights as reflected in its decriminalization of anti-gay laws, show that some developing countries are ready to progress along the trajectory of socio-legal development. The failure to realize that minority rights are also rights, is one of the serious issues in the political setting of many African countries struggling with stability and could be a major challenge in the decriminalization of the anti-gay laws in Kenya and Nigeria. One of the ironies of the anti-gay laws in both countries is that they seem to affect the lives of poor and the middle class more, since lack of the rule of law is a serious challenge in Nigeria and Kenya. The opulent class in the societies of both countries, who happen to be politicians need not worry about the anti-gay laws if they are of a different sexual orientation, since they could easily evade prosecution.

There are more gay people coming out of their closets now in Nigeria and Kenya, probably in defiance and in protest of the anti-gay laws. The internet has proven to be an effective medium in which a stronger community of gay people are being forged in both countries to advance their common interests, and it is a signal that the anti-gay laws have failed and that the contemplation of the laws were impractical. One way the anti-gay laws have shown to be impractical is that, if by the numbers in which many people have declared their sexual identities to be within the description of the LGBTQ, then the prisons would be full. One of the reasons that proves that there was not much juristic thought behind the making of the anti-gay laws is the fact that the grounds that the governments of both countries have used in the defense of the anti-gays laws do not align with legal logic and they fail the standard sociological tests that evaluates the efficiency of laws. The grounds for the defense of the anti-gay laws are steeped in moral considerations and in ignorant assumptions of what homosexualism is, and what it hopes to achieve. The problem with such grounds of defense is that they undermine the essence of juristic processes, also they make for a poor juristic process.

The mechanistic operation of law is founded upon the ground that the juristic process was a rigorous one, and therefore if the juristic process that brought about the making of a law was a rigorous one, it would achieve what it was made to achieve without having to question whether it would serve justice. On the other hand, laws that were made based on a weak jurisprudential foundation would do much injustice. A law that seeks to address some social issues, must have a full grasp of whatever it seeks to address. As the anti-gays laws are a product of a system that understands little about what it means to be gay. They cannot do much justice. The African moral perspectives on human rights have little influence on the position of these anti-gay laws, since the anti-gay laws are a product of Africa's colonial past and the legal heritage of Africa's colonial past are still

very much in operation today. Still African moral perspectives must develop to be able to accommodate the dynamic trends of societies across the continent. The anti-gay laws are very much a reflection of the need for significant reforms within the legal systems of Nigeria and Kenya, as the vestige of colonialism in the legal systems do not allow much effective interaction of the legal systems with the dynamic trends brought about by globalization and democratic freedom in both countries.