

The implications of Isaiah Berlin's radical conception of liberty for sexual minority rights protection in Nigeria

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Summary

In this article Isaiah Berlin's radical conception of liberty with an emphasis on negative liberty is highlighted. The author interrogates the discriminatory laws stifling the lives of Nigerian sexual minorities, such as the Same-Sex Marriage (Prohibition) Act of 2013, the Nigerian Penal Code, and the Nigerian Criminal Code. He argues that Berlin's radical view of freedom has positive implications for the protection of the human rights of LGBT persons in Nigeria. Siding with the universalist view of human rights against the relativist claims upon which the continued unjust subjugation of sexual minorities largely depends, the article proposes that the internalisation and institutionalisation of the ethical liberalism championed by Berlin will help foster social tolerance and the legal protection of sexual minorities in Nigeria.

Key words: *sexual minorities; liberty/freedom; human rights; universalism; relativism*

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1 Introduction

The philosophy of human rights, which explicates a vision of a world where everyone is equal regardless of race, gender, disability, sexual orientation or any other criteria, belongs firmly in the liberal tradition. This tradition is the evolved project of religious, legal, and humanistic concerns rooted in Christianity and the juridical and ethical codes of the Greco-Roman world.¹ The theocentric perspective of law and morality, as for centuries represented in the concept of natural law, gave way to an anthropocentric view of humanity, law and morality with the coming of the Enlightenment and the momentous events of the French Revolution of 1789 and the Declaration of Independence of the United States of America in 1776. The universal human rights clause enshrined in the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen was defended by such outstanding liberal thinkers as John Locke, JS Mill, JJ Rousseau and Immanuel Kant.

An outstanding liberal political thinkers of the twentieth century is Isaiah Berlin. Broadening the horizon of liberalism and at the same time recognising the value of pluralism, Berlin declared liberty (freedom) a supreme good in both the private and public spheres. Indeed, liberty for Berlin is the demand of radical individualism.² Neither the state nor community allegiances can interfere with this liberty of the individual. He delineated the spheres of public and private morality with his concept of positive and negative liberty, the former conceived in conservative terms and the latter as the very embodiment of radical freedom. This article highlights Berlin's radical individualism in relation to the sexual minority rights question in Nigeria while drawing on religious, cultural and legal issues that illuminate the conversation surrounding the anti-sexual minority rights stance of the Nigerian government and, indeed, of the majority of Nigerians. The main thrust of the article is to present Berlin's liberal perspective as a viable model for the de-stigmatisation of sexual minorities in Nigeria. Part 2 of the article is devoted to the definition of key terms. Part 3 presents Berlin's advocacy of radical autonomy and proposes that the embrace of Berlin's advocacy can lay the foundation of social change that favours the protection of sexual minority rights. Part 4 provides a survey of the predicament of sexual minorities in contemporary Nigeria. Part 5 contrasts the international model of rights recognition for sexual minorities with what obtains in Nigeria, and argues that Berlin's model of liberty can help move

1 P Hayden (ed) *The philosophy of human rights* (2001) 3.

2 I Berlin *Freedom and its betrayal: Six enemies of human liberty* (2014) 5-6. In one of his most famous declarations on liberty, Berlin writes of radical liberty: 'This is the liberty which was preached by the great English and French liberal thinkers ... the right freely to shape one's life as one wishes, the production of circumstances in which men can develop their natures as variously and richly, and, if need be, as eccentrically, as possible.'

Nigeria in the direction of tolerance of sexual minorities. Part 6 expatiates on the Berlinian model and asserts the state's obligation to sexual minorities, while part 7 discusses the sexual minority question in the context of the conflict between universalism and cultural relativism against the backdrop of Berlinian liberalism.

2 Definition of key terms

2.1 Liberty and freedom

The terms 'liberty' and 'freedom' often are used interchangeably, as also they are employed in this article. Patterson distinguishes three aspects or dimensions of liberty, namely, the personal, sovereign and civic dimensions.³ Personal liberty is the ability of the individual to act according to their desires while also respecting the right of others to act according to their desires.⁴ Sovereign liberty is absolute to the extent that the individual acts according to their desires without regard to other individuals, while civic liberty is the ability of the individual to participate in political activities.⁵ It is then evident that the absence of coercion is at the heart of the understanding of liberty or freedom. Kant understands freedom in terms of the individual's ability to make rational choices independent of external pressure.⁶ Mill is of the opinion that the only reason to limit an individual's freedom is the harm the individual's actions can cause to other individuals.⁷

2.2 Sexual minorities

Sexual minorities '[a]re those despised and targeted by "mainstream" society because of their sexuality, victims of systematic denials of right because of their sexuality'.⁸ They are stigmatised as they transgress gender roles, being non-conformists.⁹ Self-identification, behaviour and attraction (romantic, sexual or emotional) determine people's categorisation as sexual minorities.¹⁰ Sexual minorities may be gay (male same-sex attraction/homosexuality); lesbian (female same-sex attraction/homosexuality); bisexual (attraction to both sexes);

3 O Patterson *Freedom in the making of Western culture* (1991) 3-5.

4 Patterson (n 3) 4.

5 As above.

6 See generally I Kant *Groundwork for the metaphysics of morals* trans AW Wood (2002).

7 JS Mill *On liberty* (2003) 80-83.

8 J Donnelly *Universal human rights in theory and practice* (2003) 229.

9 As above.

10 See RC Savin-Williams & KM Cohen 'Developmental trajectories and milestones of lesbian, gay, and bisexual young people' (2015) 27 *International Review of Psychiatry* 357-366; S Winter 'Transpeople, transprejudice and pathologization: A seven-country factor analytic study' (2009) 21 *International Journal of Sexual Health* 107-113; JA Greenberg *Intersexuality and the law: Why sex matters* (2012) 101-102.

transgender (male or female identification with the opposite gender).¹¹

3 Berlin's radical conception of human freedom

Berlin's usage of the term 'freedom' or liberty has its origin in the Enlightenment era in which thinkers such as Immanuel Kant and Jean-Jacques Rousseau formulated their theories of freedom. Kant viewed freedom as the individual's capacity to make rational choices as an autonomous being;¹² Rousseau affirmed human freedom as the inalienable right of all human beings not to be coerced by authority symbols such as the state.¹³ Berlin agrees with the Enlightenment liberal tradition that emphasises individualism but points out that whereas thinkers such as Wilhem von Humboldt emphasised a 'negative' or radical kind of liberty, others, such as Rousseau, framed liberty in terms that encourage authoritarianism.¹⁴ While criticising the pseudo-liberal spirit of anthropocentric eighteenth century thinkers such as Helvetius, Rousseau and Maistre, Berlin hails the notion of liberty proclaimed by English and French liberal thinkers such as Locke, Tom Paine, Wilhelm von Humboldt and Madame de Staël.¹⁵ Berlin feels that his conception of liberty advances the liberal tradition of Locke, Paine and others who advocated strong individualism.

Berlin provides a detailed exposition of his notion of positive and negative liberty in his seminal essay 'Two concepts of liberty'¹⁶ and the book *Freedom and its betrayal*.¹⁷ Berlin draws a line between the private and public spheres and forbids the public sphere to encroach on the private sphere.¹⁸ The latter is the domain of the individual which disallows interference from any authority, be it the state, the church or community. For Berlin, such interference leads to frustration and the restriction of personal liberty that is implied in frustration. Human beings are free to pursue their desires as completely as they wish, as long as they do not trespass on the private spheres of others. Berlin writes:¹⁹

The only barrier to this is formed by the need to protect other men in respect to the same rights, or else to protect the common security of them all, so that I am in this sense free if no institution or person interferes with me except for its or his own self-protection.

11 Savin-Williams & Cohen (n 10).

12 Kant (n 6).

13 See, generally, JJ Rousseau *The social contract* trans M Cranston (1968).

14 Berlin (n 2) 5.

15 As above.

16 See generally I Berlin 'Two concepts of liberty' in H Hardy (ed) *Liberty* (2008).

17 See generally Berlin (n 2).

18 Berlin (n 2) 181-198.

19 Berlin (n 2) 6.

This is negative description of liberty, the doctrine that promotes the idea of unshackled agency. Negative liberty views coercion in whatever form as bad, 'in so far as it frustrates human desires ... although it may have to be applied to prevent other, greater evils, while non-interference, which is the opposite of coercion, is good as such, although it is not the only good'.²⁰ Positive liberty is another good. It seeks to discover limitations to negative liberty in the field of action. According to Berlin, positive liberty asks questions such as the following: 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'²¹ Positive liberty thus is conservative, pro-community, and restrictive. While negative and positive liberty are both types of freedom, the latter narrows the scope of the former in its emphasis on internal self-mastery or perfection at the expense of external independence from restrictive situations. For example, a man in Nigeria with gay tendencies who decides to subsume his sexual identity in the majority heterosexual prescription to achieve a sense of belonging panders to positive liberty. He seeks mastery over a self perceived to be in conflict with the self, preferred by the society. The same man is said to embrace negative liberty when he decides to be who he is, without society prescribing how he must live.

Berlin realises that positive liberty easily sacrifices the individual for the satisfaction of the collective. While playing down personal happiness, it emphasises moral perfection. He recognises the fact that all too often society can hide behind exaggerated claims of the public or collective good to invade the private sphere. Indeed, society can even go so far as to tell individuals that they do not know what is good for them and, therefore, should allow themselves to be guided for their own good.²²

Berlin firmly rejects coercion, convinced that often it is premised on the notion of otherness. If A is different to or behaves differently from B and it is within the powers of B to exert pressure on A, B then tries to make A conform to B's standards. Given this danger, Berlin advocates the authenticity of the self, the willingness to confront external threats to individual freedom rather than to concentrate on the kind of internal self-mastery which led Immanuel Kant to a liberalism that all but eliminated the private pursuit of happiness.²³

Berlin, of course, does not reject value pluralism in applauding negative liberty. There are other goods besides negative liberty,²⁴ for example the desire to belong and the yearning for community. Berlin has defended himself as a liberal pluralist committed to the liberal

20 Berlin (n 16) 175.

21 Berlin (n 16) 169.

22 Berlin (n 16) 179.

23 See I Kant *Fundamental principles of the metaphysics of ethics* trans TK Abbott (1946). In this book, Kant proposes a rigid perfectionist ethic that overlooks human emotions and desires.

24 G Crowder *Isaiah Berlin: Liberty and pluralism* (2004).

agenda.²⁵ Berlin's chief concern is to protect the private sphere which is the only sphere of comprehensive autonomy for the individual. It is within this private sphere that individuals can realise their aims and come to terms with the very notion of a purposeful life. Berlin insists that freedom is a privilege. This privilege ensures that one is not 'obliged to account for his activities to any man so far as this is compatible with the existence of organised society'.²⁶ Philip Pettit presents the Berlinian notion of negative liberty succinctly:²⁷

He makes the *priori* assumption – an assumption expressive of how we conceptualise freedom – that you cannot make yourself free by accommodating yourself to restrictive constraints, only by challenging them ... if we are to be faithful to this assumption in looking after your freedom, we must try to ensure that the doors associated with your different options are all open.

The above expresses the kernel of radical liberty. In subsequent sections we show how this radical conception of individual liberty can spur Nigerians towards legal reforms of anti-homosexual conduct laws and a more welcoming attitude towards sexual minorities.

4 Lesbian, gay, bisexual and transgender rights in Nigeria

As in most African countries, Nigeria does not accept sexual minority rights as fundamental human rights. The anti-lesbian, gay, bisexual and transgender (LGBT) stance of Nigeria follows in the wake of an emerging consensus that sexual minority rights are human rights. Ezekiel-Hart argues that sexual minority rights should be regarded as human rights since sexual minorities are human beings and '[s]exual orientation is an enduring emotional, romantic, or sexual attraction that one feels towards women, towards men, towards both or towards oneself'.²⁸ Chiroma, Kulliyah and Magashi, on the other hand, insist that the 1999 Constitution of the Federal Republic of Nigeria (as amended) does not recognise sexual orientation as a basis for human rights affirmation and that the anti-gay marriage laws of Nigeria, *a fortiori*, are valid.²⁹ At the global level sexual minority rights increasingly are being recognised and protected. There has been a steady progression in the tolerance and acceptance of sexual minorities since the landmark ruling by the European Court of Human Rights (European Court) in *Dudgeon v United Kingdom of Great Britain*

25 R Jahanbeglo *Conversations with Isaiah Berlin* (2000) 70.

26 I Berlin *Four essays on liberty* (1969) 1x.

27 P Pettit 'The instability of freedom as non-interference: The case of Isaiah Berlin' (2011) 121 *Ethics* 702.

28 J Ezekiel-Hart 'A discourse on alternative sexual orientation in schools and homes in Nigeria' (2014) 4 *African Journal of Education and Technology* 1.

29 M Chiroma, AL Kulliyah & AI Magashi 'Same-sex marriage versus human rights: The legality of the 'anti-gay and lesbian law' in Nigeria' (2015) 4 *International Law Research* 11-23.

and Northern Ireland³⁰ which struck down Northern Ireland's Anti-Buggery Offences Against the Person Act, 1861. On the African continent, affirmative actions have been recorded that support the claim that sexual minority rights are human rights. South Africa blazed the trail in Africa, with South African courts strongly affirming the constitutional guarantee of the rights of sexual minorities.³¹ In Kenya and Uganda, sexual minorities had cause to celebrate rare judicial pronouncements affirming constitutional provisions that forbid discriminatory practices.³² Instructively, the Ugandan Constitutional Court in 2014 struck down the much-impugned Anti-Homosexuality Act, 2014, which broadly restricted the rights of sexual minorities while prescribing harsh penalties for offenders.³³

Nigeria inherited anti-sodomy laws introduced by the British in the colonial era. The Criminal Code of Southern Nigeria³⁴ and the Penal Code of Northern Nigeria³⁵ penalise homosexual acts. Nigeria's anti-LGBT stance culminated in the signing into law of the 2013 Same-Sex Marriage (Prohibition) Act (SSMPA) by President Goodluck Jonathan in January 2014. The SSMPA affirms the penalties contained in the Criminal Code and the Penal Code even as it introduces fresh penalties.³⁶ In addition, the SSMPA proscribes the registration of gay

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- 30 ECHR (23 September 1981) Ser A 45. Other notable decisions taken by the European Court and international bodies such as the United Nations Human Rights Committee (UNHRC) that favoured sexual minorities include *Karner v Austria* Application 40016/89; *L and V v Austria* Application 39392/98; *Modinos v Cyprus* Application 15070/89; *Toonen v Australia* Communication 488/1992/UN Doc CCPR/C/50/D/488/1992/ (1994); *X v Colombia* Communication 1361/2005; *Young v Australia* Communication 941/2000 UN Doc CCPR/C/78/D/9411 2000 (2003). See sec 5 for a longer discussion.
- 31 See important legal victories such as *Farr v Mutual & Federal Insurance Company Ltd* (2000) (3) SA 684 (C); *Fourie & Another v Minister of Home Affairs & Others* (2005) (3) SA 429 (SCA); *Geldenhuys v National Director of Public Prosecution* (2008) ZACC 21; *J & B v Director-General, Department of Home Affairs* (2003) 5 BCLR 463 (CC); *Mark Gory v Kolver* (2007) (14) SA 97 (CC); *Minister of Home Affairs v Fourie* (2006) 1 SA 524 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality & Others v Minister of House Affairs* (2000) (2) SA 1(CC); *Satchwell v The President of the Republic of South Africa* (2002) (16) SA ICC; *Suzanne du Toit & Another v The Minister for Welfare and Population Development* (2000) 10 BCL 1006 (CC).
- 32 See *Eric Gitari v Non-Government Organisations Co-Ordination Board & 4 Others* (2015) Petition 440 of 2013 Kenya Law Reports 2016; *Mukasa & Another v Attorney-General* (2008) AHRLR 248 (UgHC 2008).
- 33 See E Biryabarema 'Uganda court overturns anti-gay law that halted Western aid' Reuters 1 August 2014, <http://in.reuters.com/article/2014/08/01/uganda-homo-sexuals-idINL6NOQ731V20140801> (accessed 11 February 2015).
- 34 See secs 214 & 215. Sec 214 of the Criminal Code punishes homosexuality between two consenting adults with a 14-year prison term.
- 35 Sec 284. Under the Penal Code, the punishment for the offence of homosexuality is also a 14-year prison term. However, 12 other states in Northern Nigeria, namely; Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara, enacted the Shari'a Penal Code laws which penalise homosexuality with the death penalty. See D Ottosson *Homophobia: A world survey of laws prohibiting same-sex activity between consenting adults* (2008) 29.
- 36 See secs 1 & 2.

clubs, societies and gay-affiliated organisations.³⁷ The SSMPA also makes a public display of romantic affections a criminal act with a harsh punishment.³⁸ Venturing into a same-sex marriage or civil union attracts a 14-year prison term under the SSMPA.³⁹ At organisational and associational level, the Act forbids any form of fraternity on the part of the heterosexual public with homosexually-related activities.⁴⁰ By this provision it amounts to a crime for a heterosexual to be sympathetic to sexual minority causes. This ruling somewhat places sexual minority rights activism in Nigeria in a precarious situation.

The SSMPA received presidential endorsement despite seemingly being in conflict with the 1999 Nigerian Constitution, which explicitly guarantees the right to privacy.⁴¹ The discriminatory provisions of the Act are in defiance of anti-discriminatory provisions of regional and international treaties such as the African Charter on Human and Peoples' Rights (African Charter),⁴² the International Covenant on Civil and Political Rights (ICCPR)⁴³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁴

Similar to the situation in most African countries Nigeria is socially conservative.⁴⁵ When signed into law the SSMPA was supported by the overwhelming majority of Nigerians. For instance, in 2014,

37 Sec 4(1) of the Act provides: 'The registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.'

38 Sec 4(2) states: 'The public show of same-sex amorous relationships directly or indirectly is prohibited.'

39 Sec 5(1).

40 The SSMPA punishes the registration of homosexual clubs and allied matters with a ten-year prison term. Specifically, sec 5(2) of the Act states: 'A person who registers, operates or participates in gay clubs, societies and organisations, or directly or indirectly makes a public show of a same-sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment.' Sec 5(3) further widens the scope of prohibition imposed on heterosexual participation in same-sex affairs by extending this limit to marital solemnisation. It states: 'A person or group of persons who administers, witnesses, abets, or aids the solemnisation of a same-sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment'.

41 Sec 37.

42 Art 2 states: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex ...' The reference to 'sex' can be said to validly cover sexual orientation and the protection of the privacy of sexual minorities. Indeed, the landmark case of *Dudgeon v United Kingdom* was decided on the premise of the right to privacy. See ECHR (22 October 1981) Ser A 45. The ruling asserted that same-sex relations constitute an intimate part of private life.

43 See art 17.

44 See art 2(2).

45 Nigeria's social conservatism stems for the most part from the strong adherence to Christianity and Islam, both of which strongly champion traditional values. See MA Ojo 'Sexuality, marriage and piety among Charismatics in Nigeria' (1997) 27 *Religion* 65-79; see also J Onuche 'Same-sex marriage in Nigeria: A philosophical analysis' (2013) 3 *International Journal of Humanities and Social Science* 93.

according to a public opinion poll conducted by Gallup to measure the inclination of Nigerians towards the SSMPA, 87 per cent of respondents supported the criminalisation of homosexuality. Similarly, another survey by a NOI Poll in 2015 showed 87 per cent support for the SSMPA.⁴⁶ This is clear proof of the social conservatism of Nigerians. The Act was passed in the face of strong condemnation on the part of the international community, mostly Western nations, human rights groups and LGBT organisations. At the heart of the social conservatism that breeds homophobia is the African idea of marriage, life and continuity.⁴⁷ It is believed that one of the greatest catastrophes an individual can experience is an inability to procreate. Marriage, therefore, is an institution that ensures continuity and the reverse flow of life. For example, African cosmogony allows that a dead person can return to the world through their children or grandchildren.⁴⁸ Since marriage between people of the opposite sex alone produces offspring in the natural condition heterosexuality is privileged. Underlining this African conception of the marriage institution, Onuche defines marriage as a contract 'between a man and a woman, which aims primarily at the self-sustenance or continuity of the lineage'.⁴⁹ Marriage is regarded not only as a private project but, more importantly, as a community affair.⁵⁰

So powerful is the heterosexist attitude of Nigerians that even rights activists shy away from the problem of discrimination against sexual minorities.⁵¹ The fear of being stigmatised as promoters of conduct socially disapproved of compels many rights activists to avoid sexual minority rights advocacy while focusing on other aspects of human rights advocacy. Adibe highlights four dominant Nigerian perspectives that encompass both the rejectionist reaction and the push for sexual

46 See Ngozi Okonjo-Iweala Polls 'Ngozi Okonjo-Iweala Polls' www.noi-polls.com/documents/Perceptions_of_Nigerians_on_LGB_Rights_-_Poll_Report_Final_June2015..pdf (accessed 15 August 2017); compare F Endong & P Calvin 'Christian resistance to gay-proselytism in a secular Nigeria: Anathema or social heroism?' (2015) 8 *European Review of Applied Sociology* 10.

47 Onuche (n 45) 91-98.

48 Many African scholars agree that the concept of reincarnation is culturally rooted in Africa. Onyewuenyi, Majeed and Edet agree that Africans take reincarnation seriously while disagreeing on the specific form reincarnation takes. While Majeed and Edet think that the whole person is reincarnated in the new-born baby, Onyewuenyi believes that it is only the vital force or life essence of the dead that returns to the phenomenal world in the new-born baby. For the debate on reincarnation, see IC Onyewuenyi *African belief in reincarnation: A philosophical reappraisal* (1996); HM Majeed *Reincarnation: A question in the African philosophy of mind* (2017); M Edet 'Innocent Onyewuenyi's philosophical re-appraisal of the African belief in reincarnation: A conversational study' (2016) 5 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 75-99; A Ada 'Exploring the question of reincarnation in African philosophy within intracultural and intercultural contexts' (2017) 7 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 142-147.

49 Onuche (n 45) 91.

50 As above.

51 Onuche (n 45) 96.

minority rights, namely, the religious, nationalist, human rights and denialist perspectives.⁵²

The religious perspective derives its force from the Judeo-Christian and Islamic traditions which mostly are interpreted as forbidding homosexuality.⁵³ The nationalist perspective⁵⁴ considers the international clamour for the defence of the rights of homosexual men and women to be a form of Western imperialism that should be resisted through an appeal to nationalist sentiments. The uncompromising stance of Europe and America when the Nigerian Senate passed the anti-homosexual marriage Bill in 2011 indeed irritated many Nigerians.⁵⁵ The denial perspective gives rise to the mantra that homosexuality is alien to Africa and must, therefore, be a lifestyle imported from the decadent West.⁵⁶

These perspectives are hollow as they fail to grasp the universal dimension of human rights and emerging scientific evidence for the genetic basis of homosexual behaviour.⁵⁷ Wilson and Rahman speculate that about 5 per cent of men and 1 per cent of woman worldwide are born gay.⁵⁸ Religion plays a substantial role in the social lives of Nigerians. Therefore, it is no wonder that many Nigerians reject homosexuality on the basis of their religious convictions. When the homosexuality issue flared up in the Anglican community after the American Episcopal Church had ordained a gay bishop in 2003, the Church of Nigeria reacted furiously by threatening to break away from the Church of England. Nigeria is estimated to represent approximately 25 per cent of the world's Anglican population.⁵⁹ However, Punt has pointed out that unbiased

52 J Adibe 'The politics of same-sex marriage in Nigeria' (2012) 1 *Journal of African Union Studies* 102.

53 As above.

54 Adibe (n 52) 102-103.

55 Adibe (n 52) 104.

56 This notion has been largely discredited by recent research that confirms that homosexuality in Africa predated the advent of colonialism. This confirmation supports the stance that homosexuality is a fact of human existence, not a phenomenon unique to one race or continent. Ajibade and Ojoade's study of Yoruba oral literature and proverbs shows that homosexuality existed in Yorubaland long before the coming of the British colonial masters. Gaudio's study of the Hausa people of Northern Nigeria not only confirms the existence of homosexuality in precolonial times, but also its tolerance by society. See GO Ajibade 'Same-sex relationships in Yoruba culture and orature' (2013) 60 *Journal of Homosexuality* 965; JO Ojoade 'African sexual proverbs: Some Yoruba examples' (1983) 94 *Folklore* 201-213; RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009).

57 See G Wilson & Q Rahman *Born gay: The psychobiology of sex orientation* (2005) 84. Prenatal sex hormones influence sexuality. Auditory oto-acoustic emissions (OAE) research has shown that the cochlea in lesbian women is male-patterned while the OAE of gay men is similar to that of heterosexual men although the brains of gay persons show evidence of higher masculinisation levels. This argues for the biological basis of sexual orientation.

58 Wilson & Rahman (n 57) 23.

59 J Anderson 'Conservative Christianity, the global south and the battle over sexual orientation' (2011) 32 *Third World Quarterly* 1590.

interpretation of the Bible is very rare,⁶⁰ implying that the Bible does not lend support to homophobia given that the gospel of Christ is a gospel of love and not hate.

The nationalist and denial perspectives of the majority of Nigerians is incompatible with the human rights perspective which insists that sexual minority rights are fundamental human rights by virtue of the gay or lesbian person being a human being with rights to privacy and family life. Resolution 275 of the African Commission on Human and Peoples' Rights (African Commission) condemns the violation of the human rights of sexual minorities by both state and non-state actors, and calls on African governments to take actions that guarantee the rights of sexual minorities in line with the human rights provisions of the African Charter. The denial perspective in particular fails to come to terms with the fact that there have always been homosexuals in Africa, as Igwe argues using the Igbo tribes as a case study.⁶¹

From the foregoing, there is no doubt that the overwhelming majority of Nigerians oppose sexual minority rights. But on what grounds do they base their opposition? The appeal is basically to religious and cultural sentiments which, in this matter of sexual minority rights, completely ignore the 'other' side, the personal stories of homosexual men and women who suffer for doing no wrong. The LGBT question eminently is a human rights question. Nigerian Christians cite the condemnation of homosexuality in the Bible to justify homophobia. The Old Testament prescribes the death penalty for homosexuality, while the New Testament merely forbids it.⁶² In very strong language, Obasola notes that 'the culture of homosexuality, which is a form of sexual perversity, has enveloped the world'.⁶³ He finds justification for such a blatant anti-gay stance in biblical condemnation of homosexuality, citing the story of the destruction of the cities of Sodom and Gomorrah by God over the inhabitants' indulgence in homosexual practices. Indeed, Muslims also cite the story of Sodom and Gomorrah to justify their anti-LGBT stance. In the Qu'ran, Surat Al-Anbiya, verse 74-75, reminds Muslims how Allah saved Lot from the people of Sodom and Gomorrah who practised abomination (homosexuality). Opponents of sexual minority rights in Nigeria, such as Obasola, also contend that homosexuality is incompatible with African traditional culture,⁶⁴ in spite of the growing

60 J Punt 'The Bible in the gay debate in South Africa: Towards an ethics of interpretation' (2006) 93 *Scriptural* 423.

61 See Onuche (n 45) 93.

62 See Leviticus 20:18 and Romans 1:26-27; 1 Tim 1-10 (New Living Translation, Holy Bible).

63 K Obasola 'An ethical perspective of homosexuality among the African people' (2013) 1 *European Journal of Business and Social Sciences* 76.

64 Obasola (n 63) 83.

body of research that confirms the existence of homosexuals in pre-colonial Nigeria, and in Africa in general.⁶⁵

5 Towards greater protection of LGBT rights in Nigeria: The international model in light of Berlin's theory of negative liberty

The chief pillar of Berlin's conception of negative liberty is respect for the sphere he calls the 'private'. Indeed, Berlin considers the affairs of men and women in their privacy sacred and not to be interfered with by authority, whether this authority is represented by the state, the church, the community or even a peer group. For Berlin, respect for privacy is part of one's fundamental human rights, as pointed out earlier. It is instructive that the process of the decriminalisation of consensual homosexual relations in the West and other parts of the world started with particular reference to the sanctity of the private sphere.⁶⁶

Legal reforms and interventions drew inspiration from treaties such as ICCPR and the European Convention of Human Rights (European Convention). The first notable case on sexual minority rights decided at the European Court of Human Rights (European Court), which became a benchmark for similar interventions, is *Dudgeon v United Kingdom*.⁶⁷ Under the cover of the false use of the Drugs Act of 1971 the police invaded Dudgeon's house and found a diary that recorded homosexual activities. Dudgeon was questioned but not charged. Dudgeon then approached the European Court with the claim that the existence of the Northern Ireland buggery law, which prescribed sentences as great as life imprisonment for the act of homosexuality and ten years' imprisonment for an attempt, even though rarely enforced, unjustifiably interfered with his privacy. Dudgeon claimed that such interference violated article 8 of the European Convention. Dudgeon was victorious. The Court found that a 'reasonable case of discrimination and interference with privacy could be sustained even for a law that a state did not directly enforce'.⁶⁸

65 See K Essien & S Aderinto "Cutting the head of the roaring monster": Homosexuality and repression in Africa' (2009) 30 *African Study Monographs* 125. Essien and Aderinto note: 'The continent of Africa is vast, and likewise, African culture is not monolithic but diverse. If Africa is home to thousands of ethnic groups and nationalities, then one should also expect variations in African sexual experience (both heterosexual and homosexual).'

66 S Lee *Law and morals: Warnock, Gillick, and beyond* (1986) 26. At a time when the international gay lobby was still very weak, the Wolfenden Committee recommended the decriminalisation of private gay relations on the grounds that the law has no duty to regulate the private sphere. This is a position consistent with negative liberty.

67 *Dudgeon* (n 30).

68 M Hollander 'Gay rights in Uganda: Seeking to overturn Uganda's anti-sodomy laws' (2009) 50 *Virginia Journal of International Law* 241.

*Toonen v Australia*⁶⁹ is a similar case that came before the Human Rights Committee of ICCPR. The Australian challenged sections 122(a), 122(c), and 123 of the Tasmanian Criminal Code which criminalised consensual adult same-sex relations. As was the case with the Northern Ireland law, the Tasmanian laws were not actively enforced. Toonen claimed that the discriminatory laws subjected the LGBT community of Tasmania to constant ridicule and harassment from the larger community. He insisted that the Tasmanian laws violated article 17 of ICCPR, to which the Human Rights Committee agreed.⁷⁰

*Modinos v Cyprus*⁷¹ also involved discriminatory laws that were not enforced but the existence of which caused gay persons such as Modinos constant apprehension. The European Court upheld the petition of Modinos. In *Lawrence v Texas*⁷² two petitioners who were taken unawares by the police while engaging in consensual sex successfully challenged the Texas law punishing homosexual relations with a maximum fine of \$500.⁷³

In South Africa, during the apartheid era, the Immorality Act 5 of 1927 criminalised sodomy in South Africa. The Act was repealed and replaced by the Sexual Offences Act 23 of 1957 which also criminalised male homosexual relations,⁷⁴ prescribing a maximum fine of R4 000 or two years' imprisonment or both⁷⁵ for an infringement, and prohibiting relations between adult men and boys below the age of 19 years.⁷⁶ Female same-sex acts were later prohibited under the Act, and specifically relations between women and girls below the age of 19 years.⁷⁷ Given its experience with discrimination, it is not surprising that the discriminatory anti-gay laws of South Africa not only were discarded but the 1996 Constitution outlawed discrimination in post-apartheid South Africa on the grounds of sexual orientation.⁷⁸ Legal interventions since the adoption of the 1996 Constitution have ensured that sexual minorities in South Africa enjoy many rights unknown to LGBT communities in Nigeria and other countries. Such court pronouncements include the

69 Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

70 *Toonen* (n 69) paras 1, 2 & 8.

71 ECHR (22 April 1993) Ser A 259. For an extensive discussion on decided cases of the ECtHR on sexual orientation protection, see M Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 214-222.

72 539 US 558, 572-573, 576 (2003).

73 For a detailed analysis of the *Texas* case, see MP Allen 'The underappreciated first amendment importance of *Lawrence v Texas*' (2008) 65 *Washington and Lee Law Review* 1046.

74 Secs 20(A)(1) & 20(A)(2).

75 Sec 22(g).

76 Sec 14(1)(b).

77 Sec 14(3)(b).

78 See sec 9(3) of the Constitution of the Republic of South African, 1996.

affirmation of the rights of gay persons to marriage equality;⁷⁹ the right to a family;⁸⁰ rights to joint adoption of children;⁸¹ and the right not to be discriminated against in places of employment,⁸² among others.⁸³

While anti-sodomy laws remain in force in Kenya, it is hoped that the 2010 Constitution opens up space for the eventual repeal of these discriminatory laws.⁸⁴ In Uganda, the Constitutional Court overturned the harsh anti-gay Bill signed into law by President Yoweri Museveni on 1 August 2014. Judge Steven Kavuma cited the failure of parliament to form a quorum when it voted to pass the anti-gay Bill which was later signed into law in February 2014.⁸⁵

So far there has been no serious challenge in Nigerian courts seeking to overturn the SSMPA.⁸⁶ This static situation could change at any time as local sexual minority rights movements draw inspiration from positive developments elsewhere. The message of the Yogyakarta Principles is clear with regard to the application of international human rights law to issues concerning the violation of sexual minority rights. The Principles declare that '[a]ll human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full

79 *Fourie v Minister of Home Affairs; Lesbian and Gay Equality Project V Minister of Home Affairs* 2006 (1) SA 524 (CC). The Constitutional Court judgment overruled opposition to the Civil Union Act 17 of 2006 of the ANC-dominated parliament. The Act, however, seeks to assuage the feelings of those opposed to gay marriage. It lifts the legal burden off marriage officers who may not be comfortable with the solemnisation of gay marriages due to their conscience.

80 See *National Coalition for Gay and Lesbian Equality & Others V Minister of Home Affairs* 2000 (2) SA 1 (CC).

81 *Du Toit V Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

82 *Langemeat v Minister of Safety and Security* 1998 (3) SA 312 (T).

83 Jivan gives an erudite account of the legal reform in homosexuality laws of South Africa. See generally U Jivan 'From individual protection to recognition of relationships: Same-sex couples and South African experience of sexual orientation reform' (2007) 11 *Law, Democracy and Development* 26; also see H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 234.

84 See CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 458. Finerty is of the opinion that '[t]he combination of heightened awareness of LGBT human rights in the international community; greater constitutional protections and domestic incorporation of international law under Kenya's new Constitution; and sympathetic justices on the Kenya Supreme Court has created a crucial opportunity for Kenya's anti-sodomy laws to be repealed'.

85 See Biryabarema (n 33).

86 In the case of *Joseph Teriah Ebah v Federal Government of Nigeria* Suit FHC/ABJ/CS/197/2014, Judge Abdul Kafarati dismissed Mr Ebah's challenge to the constitutionality of the SSMPA on the ground that he (Ebah) lacked *locus standi*, being married and not having suffered any personal injury from the implementation of the anti-gay marriage law. For a detailed discussion of this case, see AC Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Republic of Nigeria*' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 238-244.

enjoyment of all human rights.⁸⁷ The Yogyakarta Principles further enjoin states to entrench the core tenets of universality and the inviolability of human rights in their various national constitutions and other domestic human rights legislation, including amending laws that are inconsistent with the enjoyment of rights.⁸⁸

The internationalisation of the sexual minority rights movement has created awareness about LGBT issues in Nigeria although social conservatism remains strongly rooted in society. We agree with Ebobrah that legislative intervention by way of initial decriminalisation of consensual adult gay relations and the subsequent repeal of discriminatory laws are the fastest route to provide succour for sexual minorities in Africa. Ebobrah sees this project as a type of Africanisation of human rights, by which he means Africans taking the legal initiative to repeal sodomy laws put in place by the colonial masters.⁸⁹ Such a bold step will require courageous judges. Sixty years ago few Europeans looking into the future would have predicted the almost comprehensive rights sexual minorities enjoy in Europe today.⁹⁰

Berlin has given us negative liberty as the insistence on respect for the individual and the way they choose to live their lives without interference by the state or society. The celebration of this liberty

87 See sec 1.

88 Sec 1(A).

89 ST Ebobrah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 125-126. There has recently been some progress at the level of the African Commission which adopted Resolution 275 at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014. The African Commission itself is the regulatory framework established by the African Charter on Human and Peoples' Rights, which entered into force on 21 October 1986. The Preamble to the African Charter states that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African people'. The adoption of Resolution 275 indicates how seriously the African Commission views sexual minority rights protection. The Resolution strongly condemned state and non-state actors involved in the persecution of sexual minorities and invited African governments to prioritise sexual minority rights protection. However, the African Commission's work suffered a setback with the revocation of the observer status granted the Coalition of African Lesbians (CAL) on 25 April 2015 in a move seen as the African Commission bowing to pressure by the Executive Council of the African Union. See K Kiunguyu 'Africa: Coalition of African Lesbians' observer status revoked by the African Commission on Human and Peoples' Rights' *AllAfrica* 4 September 2018 <https://allafrica.com/stories/201809050051.html> (accessed 10 September 2018).

90 See P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 251-255. Johnson eruditely observes that the discriminatory laws criminalising consensual male homosexuality in Europe between 1950 to 1980 (even in the operational era of the European Convention) held sway. He further asserts that for 25 years, the European Commission on Human Rights turned down any claim relating to the criminalisation of homosexual sex, that such criminalisation does not violate the rights guaranteed under the European Convention. According to Johnson, this scenario of despondency that existed before the ground-breaking case of *Dudgeon* is similar in every aspect to the plight of LGBTs in contemporary Africa.

means the emancipation of sexual minorities in Nigeria. The embrace of the Berlinian model of liberalism can have a far-reaching impact on LGBT rights in Nigeria and place the country in the category of nations that fought for and won rights recognition for sexual minorities. We have seen in this section the progress made at the international level where international law norms now favour tolerance and acceptance of sexual minorities. Yet, these norms will have no significant impact in Nigeria if they are not applied by the executive working together with the legislature and the judiciary. The promulgation of multiple anti-LGBT laws, the signing into law of the anti-homosexual marriage Bill in 2014, the reluctance of the judiciary to intervene on the side of sexual minorities, and the overwhelming support for the SSMPA and popular antipathy towards homosexuality clearly show that the problem fundamentally is one of attitude. For judges to begin to muster courage to entertain legal challenges to the plethora of anti-gay laws in Nigeria, a sense of a real national momentum towards greater acceptance of sexual minorities would have to exist. We argue that the social attitudinal change necessary for a less hostile LGBT environment in Nigeria to emerge can be effected with the internalisation of Berlin's negative liberty perspective.

While it is true that the general human rights of citizens in contemporary Nigeria are routinely violated,⁹¹ to the extent that it may be argued that the predicament of sexual minorities is not exceptional, we note the difference in the rights violations suffered by citizens at the hands of government agencies and security forces and those suffered by sexual minorities. Sexual minorities suffer double jeopardy as they are victims of the general rights violations and the rights violations stemming from the social rejection of their sexual orientation.

6 Radicalising the Nigerian LGBT question using Berlin's negative liberty as yardstick

In understanding the rights relationship between sexual minorities in Nigeria and the Nigerian state (together with the overwhelming majority being in opposition to LGBT rights), one has to start with Blackburn's analysis of moral rights upon which legal rights depend for ultimate validation. While explicating the question of rights, Blackburn made four distinctions, namely, claim-right; liberty-right; power-right; and immunity-right. The claim-right and liberty-right confer on the right holder freedom from outside interference with regard to a specific privilege or benefit, while the power-right and

91 See V Ojatorotu & F Allen 'From "authoritarian rule" to "democracy" in Nigeria: Citizens' welfare a myth or reality' (2009) 1 *Journal of Alternative Perspectives in the Social Sciences* 152; JA Dada 'Human rights under the Nigerian Constitution: Issues and problems' (2012) 2 *International Journal of Humanities and Social Sciences* 33.

immunity-right justify the rights holder's claim to non-interference by an external party.⁹² In applying this analysis to the Nigerian situation, it becomes clear that in enacting the SSMPA the Nigerian state has violated the privileges of LGBT persons and subverted their claim-right. The immunity right of LGBT persons, therefore, secures to them the right to sue the Nigerian state. If the state is liable for the denial of the liberty-rights of LGBT persons, we can radicalise Berlin's negative liberty further in defence of the thesis that sexual minority rights are fundamental human rights.

Berlin is advocating radical or negative liberty as the one bulwark against the invasion of the private sphere by authoritarian forces. For Berlin true liberty cannot be separated from 'the right freely to shape one's life as one wishes, the production of circumstances in which men can develop their natures as variously and richly, and, if need be, as eccentrically as possible'.⁹³ It is instructive that Berlin is ready to endorse 'rebellion' on the part of the oppressed if this is the only way for them to secure their right-claim. Of course, 'rebellion' here does not mean recourse to violence; it means the willingness to stand up and defend one's right even in the face of oppression. LGBT persons in Nigeria should be free to shape their lives as they deem fit. Berlin even supports 'eccentricity' on the part of the individual as long as his expression of eccentric conduct does not pose a danger to others.⁹⁴ But, then, homosexuality can hardly be categorised as eccentric behaviour. Homosexual men and women are as psychologically and physiologically normal as heterosexual men and women.⁹⁵ Homosexual men and women happen to have only a nature different from that of the heterosexual majority. It is the inalienable right of sexual minorities to 'develop their natures as variously and richly' as possible without fear of being assaulted, stigmatised, or even killed.

The story of the Nigerian Ethan Regal (not his real name), which was carried in *The News* magazine on 20 November 2014, illustrates the plight of the gay Nigerian. About being gay, Regal writes:⁹⁶

When I was a young boy in Lagos, Nigeria, I had a mysterious, unexplainable tingling sensation whenever I saw an attractive guy. The stories I heard regarding romance involved a boy and girl. So I thought to myself: Maybe I'm a girl deep down. That seemed like the only explanation for my attraction. I kept thinking that maybe God made a mistake ... I

92 S Blackburn *Oxford dictionary of philosophy* (2005) 319.

93 Berlin (n 2) 5-6.

94 Berlin (n 2) 6.

95 In the 20th century, it was widely believed that homosexuality was a trait of mental disorder. See GM Hereck 'Sexual orientation differences as deficits: Sciences and stigma in the history of American psychology' (2010) 5 *Perspectives on Psychological Sciences* 693-699. More recent studies, however, have shown that a biological basis of homosexuality exists; see eg Academy of Science of South Africa *Diversity in human sexuality: Implications for policy in Africa* (2015) 14.

96 'Living in Nigeria as a gay man: One person's story' *The News* 20 November 2014 <http://thenewsnigeria.com.ng/2014/11/201living-in-nigeria-as-a-gay-man-one-persons-story/> (accessed 8 February 2015).

never had issues with my body. I wasn't interested in getting rid of my penis or growing breasts. I just thought that in order to be with a boy I had to be a girl.

Regal laments the forced invisibility of sexual minorities in Nigeria and the overwhelming homophobia. As a boarding student he was physically and emotionally bullied for being 'feminine'. He has lived with the fear of possible rejection by his family since the age of nine when it began to dawn on him that he might be different from other males. He expresses the frustration of most homosexual people in Nigeria at the scarcity of willing partners. Even when meeting other gay men online he is always mindful of his security.

Regal's fears are not mitigated by the horrific videos of gay men being brutalised that he comes across online from time to time. He talks with considerable emotion about two young men who were beaten to death with planks and sticks.⁹⁷ Crowds had gathered to watch the unfolding spectacle without as much as raising a voice of protest. From all indications the crowd approved of the murder. Confronted by an overwhelmingly homophobic society and threatened with painful death at the hands of homophobic men who pose as homosexual to lure gay men into death traps, Regal is contemplating living a sexless life. But to live a sexless life is nothing more than living in denial. He concludes:⁹⁸

I have argued with some homophobic Nigerians and from what I noticed they hate gays because they were told to hate us by their religion ... they have zero clue what it is like to be gay, which from my perspective gives them a better reason not to judge. Besides isn't it a sin to judge? ... I know I'm not safe, none of us are ... do we want to spend our lives sexless? If we get into a relationship do we want it to be hidden forever? Most of us want to have kids. How do we get there? That's why I'm speaking up.

Evidently, sexual minorities in Nigeria experience many difficulties. They are compelled by their hostile environment to live in denial. Gay men even marry heterosexual women just to please society while leading secret lives. The case of Adeniyi Raji made headlines when the British Home Office moved to deport him back to Nigeria in June 2018. Raji narrated how he had to marry a heterosexual woman to escape societal pressure and how his clandestine homosexual lifestyle was discovered by his wife.⁹⁹ Raji later fled to Britain when his life was threatened following the publication of his name and pictures in the national newspapers. In the case of Kenny Badmus, a well-known Nigerian brand expert, his wife thought that God would change his sexual orientation. Badmus's sexual orientation did not change and

97 As above.

98 As above.

99 See O Bowcott 'Gay asylum seeker faces deportation from UK to Nigeria' *The Guardian* 11 June 2018 <https://www.theguardian.com/world/2018/jun/11/gay-asylum-seeker-faces-deportation-from-uk-to-nigeria> (accessed 10 September 2018).

the marriage eventually failed.¹⁰⁰ Those courageous enough openly to declare their sexual orientation are victimised or forced to move to Europe or America where the LGBT environment is far more welcoming.¹⁰¹

In the first drafts of his seminal essay 'Two concepts of liberty' Berlin notes:¹⁰²

I am said to be free to the degree to which no human being interferes with my activity. This is the classical sense of liberty in which the great English philosophers, Hobbes, Locke, Bentham, Paine, and indeed Mill, used it.

Since sexual minorities in Nigeria cannot live according to their 'nature', it is reasonable to say that they are in a state of bondage and require liberation. The liberation of sexual minorities in Nigeria will cost the heterosexual majority nothing, a fact Regal alludes to in his story. It simply means moving society towards greater equality for all. In such a society value pluralism, which Berlin endorses, will not be denied since granting sexual minorities their rights to live according to their nature will not require any special privileging that may be detrimental to the heterosexual majority. The rights of sexual minorities are just as valid as the rights of heterosexual persons.

Scholars such as Jason Ferrell have argued that Berlin's negative liberty seeks to emerge as the absolute good to the exclusion of other non-libertarian goods such as a sense of community. Whereas Berlin favours greater rights for the individual, he pretends to be committed to value pluralism. To Ferrell 'this is an especially notable problem given Berlin's inability to defend his own liberal beliefs'.¹⁰³ The implication for sexual minority rights protection in Nigeria is the highlighting of the struggle between the universalist view of human rights and the relativist view which is discussed in detail in the next section. The universalist view embraces sexual minority rights as human rights that should be vigorously enforced. The relativist view asserts that cultural nuances must determine the reactions of communities to the sexual minorities issue. The former leans towards libertarian absolutism while the latter favours pluralism. Consequently, the cultural relativist sees nothing wrong with Europe and America embracing a sexual minority rights regime while Africa rejects it.

Even if it is accepted that Berlin's preference for negative liberty clashes with his willingness to acknowledge value pluralism, as Ferrell asserts, there is no doubt that Berlin genuinely envisages an open

100 See D Ogbече 'I lost contract with FG after my ex-wife revealed I was gay – Nigerian homosexual Kenny Badmus' *Daily Post* 8 December 2015 www.dailypost.ng/2016/12/08/lost-contract-fg-ex-wife-revealed-gay-nigerian-homosexual-kenny-badmus (accessed 10 September 2018).

101 The well-known Nigerian sexual minority rights activist and blog writer Bisi Alimi has migrated to Europe to live a life of dignity. See 'Bisi Alimi' *Wikipedia* http://en.wikipedia.org/wiki/Bisi_Alimi (accessed 8 February 2015).

102 Berlin (n 2) 181-182.

103 J Ferrell 'Isaiah Berlin: Liberalism and pluralism in theory and practice' (2009) 8 *Contemporary Political Theory* 296.

society where people with divergent standpoints can be sympathetic enough to enter their different worlds and work for the progress of society. Berlin notes with his characteristic eloquence: 'If I am a man or woman with sufficient imagination ... I can enter into a value system which is not my own, but which is nevertheless something I can conceive of men pursuing.'¹⁰⁴ However, this tension in Berlin does not affect the harmonious relationship between sexual minority rights defence and negative liberty. As noted earlier, the claim-right of sexual minorities, which grants them immunity from wrongful interference by the state and community, does not advocate a special privileging in a value-plural environment; this claim-right rather seeks equal treatment of sexual minorities and heterosexual persons alike, freedom from discrimination in matters related to a free expression of love and access to health services, and the workplace. The SSMPA consolidates the discriminatory provisions in the legal codes of Nigeria and makes discrimination against sexual minorities a major goal of the state.

The negative conception of liberty has goals that are human, unlike the positive conception which focuses attention on self-mastery and loses sight of the external threat to the private sphere. Berlin's commitment to negative or radical liberty is unequivocal. While praising Mill's libertarian leanings, he yet finds cause to criticise Mill for elevating the demands of self-mastery over the need for unconstrained living. He writes as follows about the questions of the essence of liberty:¹⁰⁵

Two aspects of it may be noted. The first is that, amongst the defenders of 'negative' liberty – the liberty confuses two distinct ideals. One is that all coercion, in so far as it frustrates human desires, is bad as such ... and liberty, which is the opposite of coercion is good as such (although it is not the only good). The other is that men should seek to develop a certain type of character of which Mill approved – original, imaginative, independent, non-conforming to the point of eccentricity.

Berlin's contention is that as soon as the liberal defender of human rights begins to emphasise matters such as originality and independence, the more urgent matter of resistance to coercion and other forms of interference is relegated to the background. He believes that even a totalitarian environment can produce men of originality and independence but that only an open society can guarantee freedom from coercion. The concentration on internal constraints at the expense of external constraints emboldens authority at all levels to deny people their rights by extolling the virtues of community. This is the kind of repressive thinking behind the enactment of the anti-gay law. It insists on sexual minorities giving up their claim-right for full membership of the community. This full

104 I Berlin 'My intellectual path' in H Hardy (ed) *The power of ideas* (2000) 12.

105 Berlin (n 2) 190.

membership is precisely what negative liberty understands as interference. Enlarging the horizon of human rights, Berlin asserts:¹⁰⁶

Liberty consists in the preservation of an area within which human personality is to have the fullest possible play. Unless a man can pursue ends because they are his ends, make acts of choice which, even if they lead to disaster, are nevertheless felt by him as his acts, the pursuit of goals which are, at any rate for him, absolute in that they are not means to other ends, but that alone which makes all other acts worth doing, which gives him life such values as it has in his own eyes ... that is liberty.

It is the radical liberty which stands between the individual and authority. Berlin adds:¹⁰⁷

Every plea for civil liberty, for individual rights, for the preservation of individual variety and spontaneity against the encroachment of public authority, or the leveling tendency of custom or organised propaganda, stems from this central conception.

Berlin's emphasis on the preservation of 'individual variety' and 'spontaneity' recalls the pain of Regal who cannot understand why society will not let them be, especially in light of the fact that homosexuality has a biological basis.¹⁰⁸ The attempt to legalise 'normality' with the enactment of anti-gay laws is a dubious one. As Regal notes, homophobic individuals have no justification to decide that homosexuality is in itself wrong. Human conduct, as experience proves, cannot conform to one particular pattern. Nature permits variety in all spheres of life; homosexuality may be a minority conduct-type but it is a conduct-type all the same. As long as sexual minorities are not breaking the law, the Nigerian state should allow them live with regard to their own type of spontaneity.

Indeed, negative liberty has imposed on the state the duty to protect its sexual minorities because they have made a valid claim to non-interference in their private sphere. While sexual minorities are immune from any valid counter-claim by the state, the latter is liable, having failed to protect a vulnerable minority. The capacity of custom and tradition to destroy variety and spontaneity brings us to the question of how far cultural relativism can go in denying sexual minority rights in Africa, in general, and in Nigeria, in particular. Is homosexuality really a Western phenomenon? Are human rights universal? What is the relationship between human rights and sexual minority rights? These are some of the issues we propose to discuss in the next section.

106 Berlin (n 16) 190.

107 As above.

108 See Wilson & Rahman (n 57). The book discusses homosexual biological determinism in some detail.

7 The universalist and relativist argument

The twenty-first century has witnessed the most rapid spread of ideas and attitudes. This phenomenon is closely linked to economic globalisation. Nigeria, as other African countries, has been heavily influenced by socio-political developments in other parts of the world, especially in the West. In the face of increasing acceptance of sexual minority rights in the West and the subsequent push for radical equality, African countries such as Nigeria and Uganda reacted by tightening their anti-gay laws.¹⁰⁹ The increasing internationalisation of the sexual minority-rights movement gained traction with the gradual conviction on the part of sexual minority-rights activists that discrimination on the basis of sexual orientation is as morally indefensible as discrimination on grounds of race and sex. Indeed, the United Nations (UN) became a battleground between universalists and cultural relativists. An attempt by some nations led by the European Union (EU) to obtain a statement condemning violence and discrimination on the basis of sexual orientation led to the adoption of a rival non-binding statement supported by many African and Arab countries.¹¹⁰ The rival non-binding statement had difficulties with the terms 'sexual orientation' and 'gender identity'. Nevertheless, the pro-gay lobby achieved victory on 28 December 2010 when, by a vote of 93 to 55, with 27 abstentions, the UN General Assembly bi-annual resolution condemned violence and discrimination targeted at minority groups, including sexual minorities.¹¹¹

Just as groups lobbying for sexual minority rights in the West have extended their reach to Africa, so have conservative pro-traditional family groups in the West.¹¹² This development brought to the fore the question of the universality of sexual minority rights. The question has become even more urgent given that most Africans believe that the gay sub-culture is a Western imposition on Africa. However, the African continent is still divided as to this contention.¹¹³

On the other hand, cultural relativism is a type of relativism concerned with variations in particularist customs and practices, as well as belief systems, across geographical borders and linguistic groups.¹¹⁴ According to Teson, cultural relativism is the view that, with respect to human rights, local customs in their religious, political, and legal aspects determine the applicability of human rights.¹¹⁵

109 While Nigeria successfully enacted the SSMPA, Uganda's attempt ultimately failed as its anti-gay law was successfully challenged in the Constitutional Court. See Biryabarema (n 33).

110 Anderson (n 59) 1600.

111 Anderson 1598.

112 Anderson 1597.

113 See generally S Tamale (ed) *African sexualities: A reader* (2011).

114 FR Teson 'International human rights and relativism' (1985) 25 *Virginia Journal of International Law* 869-870.

115 FR Teson 'International human rights and cultural relativism' in Hayden (n 1) 380.

Donnelly concurs, adding that cultural relativism constantly threatens to become absolute.¹¹⁶ Absolute cultural relativism rejects standards that account for similarities and differences among diverse peoples.

On the other hand, the universalist viewpoint appropriates objective moral standards and promotes these standards as 'having a special kind of importance [and] urgency ... that makes them more than disparate or simply subjective demands'.¹¹⁷ Recognising the fact that human rights may be circumscribed and relativised by cultural peculiarities, out of which the notion of rationality itself partly grows, Donnelly distinguishes conceptual universality from substantive universality and other forms of non-conceptual, empirically applicable, universality.¹¹⁸ Conceptual universality is empty, more or less, as it merely asserts *a priori* that human beings by virtue of their humanity have certain inalienable rights. Conceptual universality is too general to grapple with the problems people face in their everyday lives. For Donnelly, conceptual universality requires substantive universality to ground it in reality.¹¹⁹ Other types of non-conceptual universality includes anthropological universality; functional universality; international legal universality; overlapping consensus universality; and ontological universality.¹²⁰

For the purpose of this article, international legal universality is the most relevant in view of its implications for the protection of human rights and, therefore, sexual minority rights, in different parts of the world.

Teson supports the relative universality thesis of Donnelly but rejects the claim of cultural relativism on the premise that relativism promotes discrimination. He acknowledges the tension that may arise between national sovereignty and international human rights law when governments point to local customs to justify their undermining of international law. Teson certainly supports international legal universality as a type of relative universality which seeks an agreement between local peculiarities and the necessity for a universal standard in measuring human dignity. For Teson, the place of birth and the cultural environment of a person are not to be given priority in determining their moral worth.¹²¹ For instance, the human rights of a Third World-woman are just as admissible as those of a woman from the First World. He concludes that '[i]f the initial conditions are not morally distinguishable, the requirements of universalisability fully

116 J Donnelly 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 294.

117 E Kamenka 'Human rights: Peoples' rights' in J Crawford (ed) *The rights of peoples* (1988) 127.

118 Donnelly (n 116) 282.

119 As above.

120 Donnelly (n 116) 282-293.

121 Teson (n 115) 387.

apply to statements about individual rights, even when the agents are immersed in different cultural environments.¹²²

Taylor believes that the term 'human dignity', which justifies scholars such as Donnelly and Teson in their shift to universalist dogmatism, has been faulted by Onuma who regards the term as Western-specific rather than universal in the true sense. Quoting Onuma, Taylor shows a preference for a universal understanding in terms of the pursuit of spiritual and material well-being.¹²³ It is worth noting that neither Taylor nor Donnelly disputes the validity of the term 'universal'. Taylor is anxious only to avoid the African charge of Western cultural imposition masquerading as the universal value. He points out that while Africans and other non-Western groups are willing to support some universal values, they remain wary of the very atomistic conception of the human person in Western societies which 'seems to give pride of place to autonomous individuals, determined to demand their rights, even (indeed especially) in the face of widespread social consensus'.¹²⁴

Donnelly is not altogether mindful of the point raised by Taylor as he notes that Western states sometimes pressure non-Western states to tow particular lines, a step he considers counter-productive.¹²⁵ Still, he points out that the human rights defence bent in the West was not a cultural outgrowth. For him, human rights ideas and practices arose 'from the social, economic, and political transformations of modernity'.¹²⁶ Consequently, Donnelly has no problem making sexual minority rights a category of human rights.¹²⁷

Kant argued that the state as an entity regulated by law is founded on three rational principles which are decisive for the nature of the universality of human rights. The first principle is the liberty of every member of society as a man. The second relates to the equality of every member of society with every other as a subject. The third postulates the independence of every member of the commonwealth as a citizen.¹²⁸ This argument is consistent with the assertion of negative liberty, when Berlin writes that '[t]he desire not to be impinged upon, not to be dictated to, to be free from the arbitrary deprivation of rights and liberties, has been a mark of high civilisation both on the part of individuals and communities'.¹²⁹ This is the desire 'to be left alone, to live one's life as one chooses, the very sense of privacy, of the area of personal relationships as sacred in its own rights; the belief that it is more worthy of a human being to go to the

122 As above.

123 C Taylor 'A world consensus of human rights?' in Hayden (n 1) 410.

124 Taylor (n 123) 414.

125 Donnelly (n 116) 291.

126 Donnelly (n 116) 287.

127 J Donnelly 'Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights' in Hayden (n 1) 547.

128 See Hayden (n 1) 111.

129 Berlin (n 16) 192.

bad in his own way than to the good under the control of a benevolent authority'.¹³⁰

This radical conception of freedom obviously allows that sexual minorities are humans, free and equal citizens of the state and, therefore, free to live as they choose as long as they do not cause harm to others. The very fact that there are sexual minorities in Africa, just as they are to be found in the West and other parts of the world, is empirical evidence that homosexuality is not a phenomenon imported into Africa by the West. Igwe and others have supplied evidence showing that there were homosexuals in Africa even before the coming of European colonisers.¹³¹ Africa's uncompromising anti-gay stance has been traced to colonial era anti-sodomy laws. The British and, to a lesser extent, the French and German colonial authorities made sodomy a punishable offence. About the discriminatory laws of the colonial powers, Human Rights Watch observed that colonial legislators and jurists introduced the laws without recourse to the socio-cultural and ethno-religious peculiarities of the colonised societies.¹³²

These discriminatory laws of the British Empire owed their origin to section 377 of the Indian Penal Code which criminalises 'carnal intercourse against the order of nature with any man, woman or animal', and punishes infringements with imprisonment of up to life.¹³³ This version of the law became entrenched in African countries such as Nigeria, Ghana, Botswana, Lesotho, Malawi, The Gambia, Mauritius, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Uganda, Tanzania, Zambia and Zimbabwe.¹³⁴

Indeed, it is ironic that the anti-LGBT laws being championed in Africa today by Africans are a direct heritage of colonialism which in its time oppressed the African people. The ample evidence in favour of the presence of homosexual persons all over the world completely discredits the hypothesis of homosexuality being a phenomenon alien to Africa. If Africans are humans, like European and Americans, if being human means the capacity to enjoy fundamental rights, then sexual minorities in Nigeria, in particular, and Africa, in general, are entitled to a minimum of rights that fall under 'sexual minority rights'.

The challenge now facing Nigeria is the challenge of legal reforms towards decriminalisation and an attitudinal change in society. Mercifully, sexual minority rights activism in Nigeria can always refer to the international template to find its bearing. The path of reform and decriminalisation followed by countries in the West and in South

130 As above.

131 See Onuche (n 45) 93. See also WN Eskridge 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1419-1420.

132 Human Rights Watch 'This alien legacy' 17 December 2008 <http://www.hrw.org/en/reports/2008/12/17/alien-legacy?Print=> (accessed 22 December 2008).

133 As above.

134 As above.

Africa presents an international template as one that can lead to the protection of sexual minority rights in Nigeria.

8 Conclusion

The evaluation of the human rights regime in the West is inextricably linked to the emergence of a liberal philo-legal tradition. This philo-legal tradition in part is a secularised Judeo-Christian discourse and in part a modernisation of the juridical and moral norms of ancient Rome.¹³⁵ Isaiah Berlin is a key thinker in the Western liberal tradition. His distinction between positive and negative liberty and his subsequent preference for negative liberty is a radical endorsement of the fundamental human rights to privacy, the very basis of the legal victories in Europe that ushered in the era of interventional sexual minority rights.

In this article I show how Berlin's radical conception of liberty has positive implications for the protection of sexual minority rights with the emphasis on the sanctity of the private sphere and, therefore, freedom from coercive interference. It is suggested that the internationalisation of sexual minority rights can influence a move towards legal reforms and decriminalisation of colonial era anti-gay laws in Nigeria in spite of the prevailing social conservatism. Fortunately there is an existing international template which Nigeria can follow on the way to granting sexual minorities their right to privacy. Donnelly reports Waaldijk as identifying the pattern in the European success story of gay liberation as commencing from decriminalisation of sex between adults of the same sex and the equalisation of ages of consent, the introduction of anti-discrimination legislation, the introduction of legal partnership to legal recognition of gay parenthood.¹³⁶ This same pattern of liberation is possible in Nigeria. However, this possibility can be hastened and transformed into actuality if a liberal environment exists which nurtures the people's sense of tolerance and fairness. The article argues that the Berlinian model of liberalism can create precisely the conditions that bring about a tolerant attitude. Such a tolerant attitude not only motivate the wider population to abandon the stigmatisation of sexual minorities, but also will influence the work of politicians and judges, with positive implications for sexual minority rights protection.

135 Hayden (n 1) 3.

136 Donnelly (n 127) 566.