SAME SEX MARRIAGE (PROHIBITION) ACT, 2013: PRIVACY AND FAMILY LIFE.

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BENIN CITY

NOVEMBER 2022

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A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF BENIN, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF BACHELOR OF LAWS (LL.B) DEGREE OF THE UNIVERSITY OF BENIN, BENIN CITY.

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NOVEMBER 2022

CERTIFICATION

I, Uchechi Blessing UCHENWOKE, with Matriculation Number LAW1604756, hereby certify that apart from references to other persons' works which have been duly acknowledged, the entire work is a product of my personal research, and this project has neither in whole nor in part been presented for another degree elsewhere.

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APPROVAL

We certify that this project was written and completed by Uchechi Blessing UCHENWOKE with Matriculation number LAW1604756 in partial fulfilment of the requirements for the award of a bachelor of laws (LL.B) degree.

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DEDICATION

This project is dedicated to God Almighty for the strength to successfully complete this work and to my family and also to the family of Onyema Timothy, for being my source of strength, hope and comfort.

ACKNOWLEGEMENT

Alas! No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude by Alfred North Whitehead.

To God my eternal redeemer and father whose unfailing love and tender mercies have kept me indeed am most grateful.

I acknowledge my both amazing parents Mr. and Mrs. Josephat Uchenwoke and Mr. and Mrs. Onyema Timothy, the best parents anyone could wish for. Also to my lovely, blessed and wonderful siblings, Peace, Favour, Immaculate, Julia, Timothy, Esther, and Divine – Favour, Emanuel and Emanuella you people are the best gifts I could ever ask for, I love you guys so much.

I won't fail to appreciate my Project Supervisor, Prof. Micheal Attah, who has played a fatherly role towards me right from 100 level up till now and who under his supervision I have learnt that what is worth doing is worth doing well. I could not have imagined having a better supervisor. God bless you tremendously because you are a good man and a saint sent from heaven.

To my 'inner circle (Achievers)' Emmanuella Adeoti, Amoo Oladipupo, Imadomwonyi Osariemen, Owobu Jessica, Odikaesieme Obinna, Etaghene Blessing, Omope Precious, Eneh Ejovwoke for their support and keen interest towards my academic work. God bless you all.

During my sojourn in school, I met some wonderful persons who were family than friends, Mrs Ikwuka kelechi Abasiette Alaukra, Ejituru Okoroeni, Chukwu Joshua, Akuza Jude, Isaac Chioma, Mary Oluwatoyin, Nzebor Samuel, Chigbogu Vincent, Ndubuisi Henry, Emanuella Emefoh, Alasa d Great and Awojinrin Kelvin.

To Uchenwoke Ogechi my beautiful and super mum, an angel inform of human, I love you so much, and I thank you for being there through the thick and thin. You gave me a shoulder to cry on and reason to laugh. Thanks for everything my precious mum, may God bless you abundantly and may you see a reason to laugh and see that all your efforts were not in vain, Amen.

The intellectual build –up of the head of department, Family Law and Jurisprudence law and all the lecturers that taught me Family Law course are highly acknowledged suffice to say that without their exceptional teachings, this project would never have been achieved.

To everyone who added a block or two to what I have become today, I say I love you all, you are always on my mind.

God bless you all richly.

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ABSTRACT

Marriage is the world's oldest institution. The definition of marriage varies according to different cultures. It is considered a cultural universal. In terms of legal recognition, most sovereign states and other jurisdictions limit marriage to opposite-sex couples or two persons of opposite gender (heterosexual) in the gender binary, and a diminishing number of these permit polygyny and frown at polyandry in their customs, and forced marriages.

In modern times, a growing number of countries and other jurisdictions have lifted bans on and have established legal recognition for same –sex marriage a practice which is not a new phenomenon. Same sex practice is not a new phenomenon. Same sex activities either between male and male or female adults were considered as acts or activities carried out between two consenting adults as purely private affairs in society. Nations of the world are at disparity whether or not to embrace same sex marriage, an act some have described as 'alien' and 'immoral' and others believe it to be within their individual private right. The successful passing of the Same Sex Marriage (Prohibition) Act, 2013 by the National Assembly in Nigeria further stresses the non-acceptance of the deplorable act in Nigeria. The Act criminalizes not only the union, but also any contract entered into by same gender or club set up for the same gender activities. This work attempts a critical concept of same sex marriage in a jurisdiction such as Nigeria and compares with more developed jurisdictions such as the United States and Canada.

With the advent of globalization and the incessant call by the international community or other nations of the world, with particular reference to Nigeria to legalize same sex marriage into their system, this thesis attempts also to analyze the legal and moral intention for the enactment of the same sex marriage (Prohibition) Act, 2013 by the Nigeria government, an act which prohibit and

criminalize all forms of same sex relationship in Nigeria and to examine whether the Act, violate the inherent right of human beings to engage in a union that is best for them.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

There is respect for marriage as a universal institution everywhere. It is widely acknowledged that marriage is a union between a man and a woman, meaning that it involves people of different sexes (a heterosexual relationship). Although the concept of marriage has been defined above, it appears-worrisomely so-that the sanctity of its restriction to opposite sex has been expanded in many other civil law jurisdictions to accept same-sex unions and other unnatural kinds of heterosexual alliances.

Same sex relationships are not a recent development. In spite of this, there remains disagreement among countries about whether to legalize same-sex unions. Conservatives view the term “same sex” as alien and immoral to the institution of marriage, whilst liberals view it as simply a matter of individual freedom protected by numerous international laws.

The 2013 Same Sex Marriage (prohibition) Act has been approved by the National Assembly. This Act makes all gay behavior illegal. Same-sex marriage was made illegal by the British government in 1553. In order to protect the practitioner’s privacy, this was done out of pure moral obligation. The civil partnership Act, 2004, was nonetheless enacted by the British government in 2004. The marriage (same sex couples) Act, 2013, and this act both automatically accept same-sex couples as marriage partners.

The majority of African nations, including Nigeria, do not recognize same-sex unions. By signing the Same Sex (Prohibition) Act, 2013, into law, this is obviously established. However,

by enacting such laws within their respective jurisdictions, Britain and other western states have throughout time continued to accommodate and recognize homosexuality.

1.2 Statement of Research Problem

Lesbian and homosexual men's rights have been the focus of significant judicial, political, and legislative activity over the past 30 years. In numerous nations both inside and outside of Europe and America, same-sex couples have long sought access to civil unions and marriage. Many of these legal challenges aimed to amend the (heteronormative) laws in favor of same-sex relationships. Legal arguments pertaining to homosexuality have typically been made in two contexts: the prohibition of discrimination, primarily to ensure that specific lesbians and gay men are not subjected to discrimination; and the recognition of same-sex relationships and the extension to homosexual partners of the benefits and rights that are accorded to married heterosexual partners. While certain nations, like South Africa, Denmark, the Netherlands, Belgium, Spain, Canada, America, and Europe, among others, have legalized same-sex marriage and union. Despite the argument that such criminalization is unconstitutional and against fundamental human rights enshrined in the Nigerian Constitution and international human rights legislation, countries like Nigeria have taken a firm stance against it by criminalizing same sex marriage. As a result, research into same-sex marriage in Nigeria is necessary.

1.3 Aim and Objectives

The aim of this study is to appraise the Same Sex marriage (prohibition) Act, 2013 at the background of the constitutionally guaranteed right to privacy and family life.

The objectives are to:

(1) Explain the concept of marriage, types, characteristics and historical perspectives of marriage in Nigeria and in other jurisdiction.

(2) Trace the evolution, movement and bases of Same-Sex family arrangements in Nigeria and in other jurisdiction.

(3) Appraise the Same-Sex Marriage (Prohibition) Act 2013 as well as its implications for domestic relationships in Nigeria.

(4) Analyze the position of the law on Same-Sex in other jurisdictions

1.4 Scope of the Study

This essay will concentrate on marriage in general and the adoption of same-sex relationships to include what can be considered marriage in nations where it is legal as a component of what is attainable as marriage.

In keeping with other western nations, this essay will always emphasize the British viewpoint on same-sex marriage. Consequently, a comparison of the pro and con of adopting two people of the same sex into a pair is provided. The Nigerian perspective will also be emphasized in this essay as it relates to the legality of same-sex marriage in our country, and other African nations will also be consulted.

1.5 Research Methodology

The study used the doctrinal method of research. Therefore, Information of this study was sourced from both primary sources of law and secondary sources. Primary sources such as statutes, case law and judicial decision and Secondary sources including textbooks, journal articles, newspaper articles, and other internet materials.

1.6 Findings

The study made the following findings

(i) Marriage only recognizes statutory marriage and customary law marriage (including Islamic marriage).

(ii) Relevant statutes define marriage with heterosexual characteristics.

(iii) Same-Sex marriage is viewed as being against African cultural precepts

(iv) Historically, even though Africa has been conservative, in Europe and the Americans, there have been experiments with diverse liberal family conceptions.

(v) Concisely trace the evolution of same sex marriage in Nigeria and other jurisdictions.

(vi) Recognize the pressures to adopt same sex marriage as viable in Nigeria, and other African countries by the 'progressive' countries in Europe.

(vii) The Same Sex Marriage (Prohibition) Act, 2013 out rightly prohibits the existence of same sex marriage and denies the benefits of marriage to its participants.

(viii) Statutes in Nigeria (including Criminal and Penal Codes) in promoting family life maintaining exclusivity to heterosexual relationships.

1.7 Contribution to Knowledge

Same Sex Marriage (Prohibition) Act, 2013 has been condemned as violating or negating rights to privacy and family life because it prevents individuals from defining their family forms. This assertion can be challenged on the ground that this very right, being contended for, can be derogated from where the state bids to protect public morality which is definable only by reference to autochthonous norms and values of the people.

1.8 Conclusion

Throughout history, marriage has been universally recognized as a legally binding agreement between a man and a woman that requires both emotional and sexual faithfulness as well as childbearing. A same-sex marriage would alter this, though. Redefining marriage is redefining values since it is also a moral problem. As a result, when marriage is redefined, society as a whole will be significantly impacted. The challenge of new moral issues, like same-sex marriage, has sparked centuries-long debates about the legal enforcement of morality. These discussions are still going strong today. In his book "The Enforcement of Morals, " Lord Devlin made the case that public morality serves as the foundation of every human community and that the law, particularly the criminal law, must view it as its primary duty to uphold this public morality. He continued by saying that the public's perception should determine whether the law should be applied in a certain situation by means of specific criminal penalties. He argued vehemently that, for the integrity of society, behavior that causes a generalized sensation of reprobation-a blend of intolerance, wrath, and disgust-deserves to be stopped through legal coercion.

According to this study, the majority of Nigerians strongly feel that gay activity and same sex marriage would be promoted in Nigeria if there were no laws against them. These Nigerians have backed the 2013 Same-Sex Marriage (Prohibition) act. There are many who disagrees with the Act's enactment, though. The primary issue with the Act is that it infringes some human rights. The majority of survey participants disagree that the Act infringes human rights.

It is obvious that the urge to uphold human rights cannot be permitted to corrupt the moral standards, cultural traditions, or Nigerian society. The state is given the authority to "defend, maintain, and promote the Nigerian cultures which enhance human dignity and are consistent

with the fundamental objectives as outlined in this chapter" under section 21(a) of the Federal Republic of Nigeria 1999 constitution.

In accordance with Article 17(3) of the African Charter on Human and Peoples' Rights and the Constitution of the Federal Republic of Nigeria 1999, the same sex marriage (prohibition) Act of 2013 prohibits marriage between people who are not biologically related. Therefore, the Act upholds Nigeria's moral and religious values rather than violating any human rights.

CHAPTER TWO

THE MARRIAGE INSTITUTION

2.1 Introduction

Marriage has often been described as an institution created by God[1] and entered into by man.[2] Marriage is the foundation of society. The constituents of marriage receive deservedly serious attention in all societies. However, culture and religion which differ from society to society play larger roles than the law in shaping the content and definition of marriage in these societies. In Nigeria and other African societies, as well as Asia, Europe and the Americas, marriage is recognized as a social institution which enjoys remote antiquity.

This Chapter analyses the institution of marriage as recognized in cultures all over the world. It provides a conceptualization of the term "marriage" which forms the basis of the study, the characteristics of marriage, its purpose and relevance. Furthermore, it analyzes same sex marriage including its history, its position as being in contradiction of the traditional view of marriage and concludes by presenting a jurisprudential perspective of same-sex marriage.

2.2 The Marriage Institution

Marriage being a universal institution which is recognized and respected all over the world, the sanctity of marriage is a well-accepted principle in the international community. The institution of marriage is an important expression of social status which is governed by the social and religious norms of society. This institution has several incidents, including custody of children, inheritance and the right to property upon divorce or death.

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[1] King James Version, Matthew 19:4-6.
[2] In this context man means both the male and female gender.

A graphical exposition on the development of the institution of marriage was given by Mohammed J.S.C in *Okonkwo v Okagbue,*[3] when he stated that:

"It (i.e. marriage) originated in the form of irregular unions. There were marital unions through capture, slavery and purchase. Many of such primitive customs have gradually given way to the accepted form of marriage by agreement".

John Mbiti further confirms that marriage is a social obligation[4] when he said that for Africans, marriage is the focus of existence, a duty, a requirement from the corporate society and "a rhythm of life in which everyone must participate", and failure to get married implies that such person has rejected society and society rejects him in return. When regarded in such social terms, as the historian Creteny puts it, it is "a complex and often lengthy process; but in legal terms, marriage comes into existence in a moment and is independent of the parties' social relationship[5]

Admist these societal regulation of the institution of marriage, the law has on different occasion had cause to resolve difficult social and moral issues such as; what do we mean by 'a man' and 'a woman'? Can a transsexual marry? Different legal systems have ground rules governing such matters, the content of those rules however differ greatly from country to country and from time to time.

2.3 The Definition of Marriage

The Holy Book in the Book[6]of Genesis states that *"a man leave his father and his mother and shall cleave into his wife, and they shall be one flesh"*. This shows that marriage has been ordained by God himself right from creation or from prehistoric times. However, one could

[3] Nwachinemelu Okonkwo v Lucy Okagbue & Ors [1994]9 NWLR (pt. 368) 301 at 346.
[4] JS Mbiti, African Religious and Philosophy Ibadan: Heinmann, 1969) 42.
[5] Stephen M Creteny, *Family Law*. (London: Oxford University Press 2003) 10.
[6] Chapter 2 s 24.

assert that there is no universal definition of marriage because marriage is whatever the parties to a marriage take it to mean. Nevertheless, several statutes, academicians and jurists have attempted to proffer a definition of the term.

In the case of *Singer v Hara,*[7] marriage was defined as the legal union of one man and one woman as husband and wife.

However, the classic definition of marriage is as stated by Lord Penzance in *Hyde v Hyde* and *Woodmanse,*[8] where he opined that marriage in Christendom is the voluntary union for life of one man and one woman to the exclusion of all others". The above definition of marriage by Lord Penzance which is the classic definition of marriage in English law refers to a statutory marriage, and from that definition can be gleaned 4 conditions for the validity of marriage viz:-

i. It must be voluntary

ii. The marriage must be for life

iii. It must be monogamous

iv. Lastly, it must be between two persons of opposite sex.

An identical definition of a Christian or monogamous marriage is contained in the *Interpretation Act,*[9] where it is defined as "a marriage which is recognized by the law of the place where it is celebrated as the voluntary union for life of one man and one woman to the exclusion of all others during the continuance of the marriage". Black's Law Dictionary[10] also defines marriage as the ceremony or process by which the legal relationship of husband and wife is constituted.

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[7] II Wash. App. 247, 522p. 2. d 1187, 1193.
[8] [1886] LR, R & D 130 at 133.
[9] The Interpretation Act, Cap 123, LFN 2004, s 3.
[10] Black's Law Dictionary (9th edn) 204.

Thus, it can be succinctly said that for a marriage to be recognized in the eyes of the law and the Nigerian society, it has to be heterosexual i.e. between members of the opposite sex. Thus, in the Nigerian case of *Meribe* ***v*** *Egwu,*[11] Madarikan JSC asserted thus

In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a woman to woman marriage and where there is proof that a custom permits such an association, the custom must be repugnant by virtue of the proviso to Section 14(3) of the Evidence Act and not to be upheld.

2.4 Types of Marriage

Broadly speaking there are two (2) types of marriage in Nigeria, there is:-

i. Traditional or Customary marriage and

ii. Marriage under the Act.

A traditional or customary marriage is one conducted in accordance with the customs of the bride and groom's families. In Nigeria this could involve the paying of bride price, giving of gifts, and so many others. The only marriage law known to Nigeria was the customary law, which varied from tribe to tribe but recognized same concepts, principles and formalities.

Marriage under the Act is a marriage that has been performed in compliance with the Marriage Act. The Registrar's Certificate is proof that notice of the marriage has been given with no objections and the intending couple are free to solemnize the marriage. Anyone who has an objection to the marriage is free to make an objection by registering this objection with the

[11] [1976] 10 SC 181 at 186.

Registrar, and after the expiration of 21 days from the day of publication of notice. Under the Nigerian Marriage Act 1914, marriage can only take place at a registered religious body (church/mosque) or the office of the Registrar. Not all churches or mosques are licensed places for celebration of marriages.

Marriage in Nigeria is thus governed by both statutory law and customary law.

2.5 Legal Characteristics of Marriage

The legal characteristics of marriage can be gleaned from yet another angle viz a to critical analysis of the classic definition of marriage as given in *Hyde v Hyde*[12] by Lord Penzance when he said that "I conceive that marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others". This definition refers to statutory marriage. It has been asserted that the definition involves three conditions namely: it must be voluntary, the marriage must be for life and it must be monogamous[13].

However, there is a fourth condition that can be implied from all these definitions. The condition is that marriage must be between heterosexual couples. This is however subject to the new trend of gay couples who are advocating for the protection and enforcement of the right to get married.

At this point, it is apposite to briefly discuss the preconditions for a valid marriage as enunciated by *Lord Penzance in Hyde v Hyde*

The Marriage Must be Voluntary**: -** This is a very important requirement for the validity of a statutory marriage. Thus, a marriage can be annulled if there was no true consent on the part of

[12] [1866] L.R. 1 P. & D. 130.
[13] PM Bromley, *Family Law* (4th edn, London: Butterworth 1971) 12.

one of the parties. *Section 3(1) (d) of the Matrimonial Causes Act*[14] provides that a marriage is void where the consent of either of the parties is not real consent because it was obtained by duress or fraud, or that the party was mistaken as to the identity of the other party, or as to the nature of the ceremony performed, or that the party is mentally incapable of understanding the nature of the marriage contract. In *Valier v Valier,*[15] Lord Merrivale, P., stated that as a marriage is a voluntary union based upon the parties' consent.

The Marriage must be Life**: -** Lord Penzance was referring to the view traditionally held in Western Europe based on the accepted Christian tradition and culture. This statement does not mean that marriage is indissoluble, as divorce by judicial process has been possible in England for over eight years prior to this decision. The court of Appeal in *Nachimson v Nachimson*[16] held that it must be the intention of the parties when they entered into the marriage that it should last for life.

The Marriage must be Monogamous**: -** This means that neither spouse may celebrate another marriage so long as the original union subsists. *Section 370 of the Criminal Code*[17] makes it an offence punishable by 7 years imprisonment for a party to a valid marriage to contract another marriage while the former valid marriage is subsisting.

The Marriage Must involve Two (2) Persons of the Opposite Sex**: -** This means that a valid marriage must involve a man and a woman. In *Corbett v Corbett,*[18] the court in applying the three criteria of chromosomal, gonadal and genital tests refused to recognize the new sex of a

[14] Laws of the Federation of Nigeria Cap M7 2011.
[15] [1925] 133 L.T. 830.
[16] [1930] 21 C. A.
[17] Laws of the Federation of Nigeria Cap C38, LFN 2011.
[18] [1970] 2 ALL E.R. 33.

person who underwent sex change operation. Thus Omrod J. held that the marriage which was earlier celebrated between the parties (2 men) was void.

2.6 Legal Sanctity of Marriage

Every society makes laws that regulate and promote the institution of marriage. Sanctity of marriage is an idea that has been preserved from time immemorial. It is a principle recognized and enforced by law as part of our fundamental human right to love and be loved by one another.

In Nigeria, the law presumes the existence of a marriage even though there may not be strict proof that the marriage has been celebrated unless the contrary is satisfactorily proved based on the presumption of regularity (Omnia praesumuntur rise esse acta). This suggests that the law actually favors the party asserting a lawful marriage and that the absence of any evidence of the marriage's regularity will not change this.

In a number of cases, the judiciary has recognized this legal position. In *Onwudinjoh v Onwudinjoh*[19] A court in Nigeria has upheld the validity of a marriage between one Jeremiah and Agnes. The defendants, children of Chinelo, contended that the religious ceremony was not a valid marriage. Despite the doubts raised by the defence, Ainley CJ applied the presumption in favor of marriage. Also, In *Akwudike v Akwudike*[20] The question concerned the legality of a marriage performed at St. Mary's Catholic Church in Port Harcourt. Idigbe J (as he was then known) determined the marriage to be valid on the grounds that everything necessary to ensure the validity of the marriage should be presumed in the absence of clear-cut evidence to the contrary. This includes evidence that the marriage was performed in this country in accordance with church rules and that the parties to it have lived as husband and wife and cohabited together.

[19] [1957/58] 1 ENLR 1.
[20] [1963] 7 ENLR 5.

He added that cohabitation and reputation create a presumption of marriage. When a man and a woman have been recognized as being man and wife for a significant amount of time and have lived together as such, unless the contrary is proven in court, the law assumes that the cohabitation was the product of a legal marriage.

The law also forbids some transactions that compromise the sacredness of the institution of marriage. A court that prevents people from getting married or discourages marriage is invalid because it goes against public policy. Finally, the law also declares void a promise to marry by a married man to a person who knows him to be already married as being contrary to public policy and an encouragement or advancement of immorality.[21]

2.7 Purpose and Relevance of Marriage

As has been established in the preceding discussion, Divorce, illegitimacy, cohabitation and same sex marriage are cankerworms that have eaten deep into the very foundation of the marriage institution. Marriage is a scared institution which confers status which in turn gives rise to certain rights and obligations in the society. It is found in almost all societies and at all stages of development. Despite the above assertion, the relevance of marriage cannot be belittled. Thomas Aquinas said that man is naturally a political animal but much more by nature, he is a conjugal animal.[22] The Aristotelian definition of man is justified by necessity, fundamental as it is natural, that makes the family rather than the state, the primary and indispensable social unit namely the preservation of the human race.[23]

The marriage institution has certain core values. Some of which includes;

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[21] *Re Fentem* [1950] 2 ALL ER 1073.
[22]Thomas Aquinas, *Summa Theologica* (London: Washbourne, Burns, 1912) 12.
[23] The American Ecclesiastic Review (1962) 14.

Married couples are more recognizable in society. This gives them the chance to take part in their children's upbringing, as well as to develop moral and personal discipline and a secure household life. Married women in particular benefit from stability, protection, recognition of the paternity of their children, shared parenting duty, and emotional support. A normative commitment to the institution of marriage itself benefits both partners jointly.

Marriage acknowledges that a couple might have children who society would consider as legitimate and legal heirs to the family's property and other assets. Additionally, it promotes and protects children's wellbeing. The family unit fosters the development and well-being of kids. Marriage is primarily the place where children learn virtue and socialization from both their parents and siblings.

Marriage guarantees a stable domestic structure, which upholds civil society and advances the general welfare of the state. Families are miniature communities unto themselves, and virtues learned within the home are essential in all spheres of social life.

A healthy marriage culture promotes good government and protects political freedom. Families that are strong and well-bred help to lessen the amount of societal vices that have afflicted our society.

2.8 The Concept of Same Sex Marriage

The 21st century has seen a surge of marriage ideologies that favor gender-neutral language over gender-specific vocabulary. All significant English dictionaries, sociologists, and anthropologists have revised their definitions of marriage to include same-sex relationships as a result of this. Despite the widespread belief that marriage is a union of a man and a woman, and despite the widespread acceptance of same-sex marriage in the west, there seems to be a strong and

overwhelming tendency indicating the contrary. The cohabitation of two people of the same sex with the accompanying sexual activity between them with the goal of forming a marriage bond is referred to as a same-sex marriage. There are numerous immoral relationships in it. Same sex marriage is between two persons of the same biological sex. It can be consummated either as a secular civil ceremony or in a religious setting. Critics of same sex marriage say it is immoral and unnatural. Supporters say there is nothing immoral about it, as far as it is covered by human right's doctrine. However, many individuals are unaware that same-sex marriage has existed since the early Roman Empire and is not a new phenomenon. Many people also mistakenly think that same-sex marriage is only a phenomena of the west and are unaware that it is allowed and practiced in other cultures, including sub-Saharan Africa. The legal recognition of same sex marriage is sometimes referred to as 'marriage equality' or 'equal marriage'.[24]

Gender Recognition Act 2004 allows a person who has lived for at least two years to receive a gender recognition certificate officially recognizing their new gender. There are records of same sex marriage dating back to the first century. Same sex marriage is legally performed and recognized in 30 countries (nationwide or in some jurisdictions) with the most recent being Chile in March 2022, and Switzerland starting 1 July 2022. The term "homo" is of Greek origin and it means "one" or "of the same" and "sexual" means being connected to the activity of sex.[25] *Section284 of the Criminal code Act*[26] and *Penal Code*[27] respectively make provisions for sodomy which is somewhat related to homosexuality. Some religious institutions hold that homosexual behavior is unhealthy and unnatural. Given the foregoing, it follows logically that

[24] CP Kefalas, *Marriage Equality and the Golden Rule*, (the Washington Post 2012) 16.
[25] *Oxford Advanced Learners Dictionary* (7th edn, Oxford University Press).
[26] Cap C38 Laws of the federation of Nigeria 2011.
[27] Penal Code P3 Laws of the Federation of Nigeria 2011

the term "homosexual" should be used more broadly to describe all types of relationships, rather than its incorrectly limited use to describe just male relationships.

2.8 Forms of Same Sex Relationship

Same sex practices have been classified into forms on the basis of gender. This classification although without radical difference, may seem the same, as most writers use them interchangeably. While marriage conducted between members of the female sex are referred to as lesbian marriage, marriage conducted between members of the male gender is referred to as gay marriage which is most times referred to as marriage between homosexuals.[28]

According to Lawrence J. Hatter,[29] A homosexual is someone who, in adulthood, is motivated by a preference romantic attraction to members of the same sex and typically (though not always) has open relationships with them. Transsexuals are included in this category. They are people who have had sex modifications biologically changed their genders. They believe they are the antithesis of their sexual sex. The change of Bruce Jenner, a well-known American male athlete, into Caitlyn Jenner in July 2015 is a clear illustration of this.

Bisexual is a phrase that is frequently used to describe sexual orientations that differ. A person who has a sexual preference for people of both sexes is said to be bisexual. In other words, they find both male and female genders attractive. Additionally, they are capable of having sex with either sexes.

Although the practice of homosexuality has spread across both the male and female genders. Not all individuals who engage in homosexual activity necessarily identify themselves as

[28] James Harper and John Harper, (3rd edn, New York: Harper Collins Publishers 2000).
[29] Lawrence J Hatter, *Changing Homosexuality in the Male* (1st edn, McGraw Hill Book Co. Inc.1970).

homosexuals. Reasons for this are not far-fetched as the stigma attached to being identified as homosexual is so immense that it becomes difficult to identify with society.

2.9 Same Sex Coupling

This phrase describes the union or coming together of people who are attracted to one another and who are of the same sex is described by this expression. This union may take the shape of an intimate relationship involving the same sex, cohabitation, a domestic partnership, a civil union, or marriage. Since they are not regarded as a couple under the law, the majority of same-sex couples in Nigeria live together. There have been debates over whether cohabitation in Nigeria should be legalized and accorded the same status as marriage.

Therefore, *Section 166 of the evidence Act 2011*[30] which provides for the presumption of customary law marriage based on cohabitation has been advocated by many as a welcome development even though it represents only half of the question. Indeed with respect to same sex coupling there has been a dramatic change in the law's attitude. As Munby J. noted in *Singh v Entry Clearance Officer, New Delhi*[31]

Within my professional life time we have moved from treating such relationship as pervasions to be stamped out by the more or less enthusiastic enforcement of repressive criminal law to a ready acknowledgement that they are entitled not merely to respect but also, in principle to equal protection under the law.[32]

In *Fitzpatrick v Sterling Housing Association*[33] the House of Lords held that a same sex partner should be recognized as a member of his cohabitant's family.

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[30] Act No 18 of 2011.
[31] [2004] ECWA Civ 1075, para 62.
[32] Ibid.
[33] [1999] 3 W.L.R 1113; [1999] 4 ALL ER 705.

In South Africa today, the political terrain and constitutional system favor same sex marriages.[34]

The following are a few examples of the different types of same sex coupling:-

Cohabitation is defined as the living together and having sexual relationship without being married.[35] It is an emotional and physical intimate relationship which includes a common living place and which exists without legal or religious sanction. Though in Nigeria, our society frowns against it. Since, it is against our African ethos for persons to cohabit without being legally married. It is mostly prevalent in the urban areas due to the density population and little or no accommodation availability. As in the case of *Taiga v Moses Taiga*[36] the court of Appeal ruled that a finding of marriage based on the cohabitation of the parties would be illegal.

Domestic Partnership is a non-marital relationship between persons of the same or opposite sex who live together as a couple for a significant period of time[37]. It is usually referred to as a relationship of homosexuals. The couples would register their partnership and this registration would constitute a public declaration of the union between the couple.[38] These partnerships agreements contain provisions for the adoption rights, health benefits and other legal rights normally granted to married couples.

Civil partnership is also referred to as civil union. It is a legally recognized form of partnership similar to marriage. It is a marriage-like relationship often between members of the same sex

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[34] On 30 November, 2004 the Supreme Court of Appeal of South Africa declared that under the constitution, the common law concept of marriage must be changed to include same sex partners. The case was brought by Marie Fourier and Cecilia Bonthuys, a lesbian couple seeking the right to marry. In the ruling Judge Edwin Cameron stated that the definition of marriage should be altered to read, "Marriage is the union of two persons to the exclusion of others for life".

[35] Oxford Advanced Learners Dictionary (n 24).

[36] [2005] EWCA Civ 1013.

[37] Black's Law Dictionary (n 10).

[38] <http://wiki-answers.com/Q/whatisdomesticpartnership> accessed 19 April 2022.

recognized by civil authorities within a jurisdiction.[39] In many civilized countries such as Denmark, civil union has been established by law in order to give same sex couples rights, benefits and responsibilities similar to opposite sex civil marriage. In the case of *Baker v State,*[40] the Vermont Supreme Court in December 1999, held that denying gay couples the benefits of marriage amounted to unconstitutional discrimination. Several months later, the legislature passed a civil law which took effect on July 1, 2000. Vermont became the first state in the United State to recognize civil unions.

Section 7 of the Same Sex Marriage (Prohibition) Act 2013 (hereinafter referred to as the Act) defines civil union as,

"any arrangement between persons of same sex to live together as sex partners, and shall include such descriptions as adult independent relationships, caring partnerships, civil solidarity pacts, domestic partnerships, reciprocal beneficiary relationships, registered partnerships, significant relationships, stable unions", etc.

By virtue of *Section 1(1)-(3) of the Act,*[41] Nigerian courts will not recognize and cannot enforce a right based on a registered partnership relationship contracted abroad. Civil partnership is not known to Nigerian Law and so a right based on it will fail since a legal right based on a non-existent phenomenon is definitely no right. The person purporting to bring the action has no legal basis for such an action to thrive on. The *United Kingdom Civil Partnership Act (2004)*[42] is an example of a civil partnership law. It affords same sex partners recognition in the eyes of the law

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[39] Ibid.
[40] 744A-2d864 (Vt. 1999).
[41] Same Sex Marriage (Prohibition) Act 2013.
[42] Meikel James, 'Civil Partnership Down by 18%' (The Guardian, 6 April 2016) <http:// www.guardian.co.U.K/life> accessed 20 April 2022.

but instead of husband and wife, they are termed "civil partners". After registration civil partners enjoy most rights that homosexual couples enjoy.

2.10 Emergence of Same Sex Marriage from a Historical Perspective

It can be challenging to pinpoint exactly when same-sex behaviors first started. This is because same-sex relationships are stigmatized and even illegal in various parts of the world. Thus, the legal recognition of same-sex couples and the extension of their rights to them is a relatively recent development. Documents from Mesopotamia illustrate a wide range of marriage customs, such as polyandry and male lovers of rulers. None of the recorded laws of Mesopotamia, including the Code of Hammurabi, contain restrictions against same sex unions despite the fact that marriages are well regulated.[43]

The practice of sodomy (anal male contact) in Sodom and Gomorrah was described by God as an abomination in the bible, which is where homosexuality also has its roots. In the book of Leviticus, it was stated;

You shall not lie with a mankind, as with a womankind; it is an abomination[44].

Also in Romans 1:27-28, it was recorded that,

"…for even their women did change the natural use into that which is against nature. And likewise also the men, leaving the natural use of women, burned in their lust one toward another; men with men working that which is unseemly and receiving in themselves that recompense of their error which was meet".

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[43] William N Eskridge, 'Symposium on Sexual Orientation and the Law' [1993] (79)(7) *Virginia Law Review*, 1419-1513.
[44] KJV, Leviticus 18:22.

Furthermore, societal attitudes towards same sex relationship have varied over time and place from expecting well males to engage in same sex relationships, to casual integration, through acceptance, to seeing the practice as a minor sin, repressing it through law enforcement and judicial mechanism and to prescribing it under death penalty.[45]

A broad view of homosexuality's recorded history in many societies and prehistoric civilizations will be adopted for the purposes of this book. By doing this, it would be possible to have a deeper understanding of the history of homosexuality.

2.10.1 Greece

The first recorded appearance of a deep emotional bond between adult men in Ancient Greek culture was in the Iliad[46] of 800BC. It is stated that the Greek culture is often promoted as the most accepting of homosexuality.

In his introduction to the Edward Fitzgerald famous adaptation of Omar Khayyam's "Rubaiyat", the editor remarks that Fitzgerald (1809-1883) found himself a homosexual in a society that while it admired and respected a civilization (that of classical Athens) that gloried in, and boasted of its homosexuality, itself found the behavior so offensive as to be virtually unmentionable.[47] Greek philosophers held the view that homosexuality fosters a sense of camaraderie in the armed forces. They think that having a lover or lovers in one's unit would make one fight harder to defend it; yet, they think that having passive anal sex will make one turn into a woman and will cause one to be discharged from the military. In Greek homosexual

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[45] Gwen J Broude and Sarah J Greene, 'Cross – Cultural Codes in Twenty Sexual Attitudes and Practices' [1976] (15)(4) *Ethnology*, 409-429.
[46] The Iliad is an epic poem in dactylic hexameters which is traditionally attributed to Homer.
[47] World History of Male Love, 'Homosexual Traditions, Male Love in Ancient Greece' (February 2000) <http://www.gay-art-history.org/gay-history/gay-customs/greek-homosexuality/greek-homosexuallove.html/> accessed 22 April 2022.

relationships, there existed a distinction between playing an active role and a passive or penetrative one. The passive character was easily favored by society, and those who played it—typically slaves and women—were made fun of. Paiderastia (pederasty), which translates to "boy love," was the most typical kind of same-sex partnerships between wealthy men in Greece. It was a relationship between an older male and an adolescent youth. A boy was considered a "boy" until he was able to grow a full beard. In ancient Greece the older man was called erastes and the younger boy was called pederasty. The older man would educate, protect, love and provide for his younger lover. The active polarization corresponded with masculinity, higher social status, and adulthood. At which time the young man would court a deserving youth of his own and also may take a wife. The passive role was associated with feminists, lower social status and youth. For ancient Greece, Men had wives and children, and would often engage in sex with other men. Older men would have sex with younger men to welcome them in the "adult life".[48]

The term, homosexuality as it is used in today's modern language is not applicable to Greek antiquity. First is that the Greeks were bisexuals. Also, homosexuality and gay as sexual identities are recent developments emerging only in the 20th century. Furthermore, passion and erotic love between two adult men (the model for modern gay relationships), were generally considered unusual and held up to ridicule.[49] In ancient Greece, relations between adult men and women were considered highly problematic and usually associated with social stigma. Given the importance in Greek society of cultivating the masculinity of the adult male and the perceived feminizing effect of being the passive partner, sexual orientation was seen as a sign of weakness rather than strength.

[48] Samer Alhato, "History of Homosexuality".
[49] World History of Male Love (n 45).

2.10.2 Africa

Therefore, it is evident from the aforementioned that homosexuality in Africa has long been a reality. And it appears to have existed ever since same-sex individuals entered into contracts. However, after the Europeans gained control of most African territories in early 20th century, the practice died down.[50] Ironically, the notion and practice of same-sex relationships have spread more widely throughout time, which has prompted the formation and expansion of several groups and associations devoted to defending, upholding, and enforcing the rights of homosexuals worldwide. These organizations have also had an impact on law in a number of nations, either by provoking the government or forcing it to compromise with them. Though this issue of homosexuality was suppressed in Africa by European explorers and colonialists, homosexual expression in native Africa was also present and took a variety of forms.[51] Stephen Murray and Will Roscoe who are anthropologists reported that women in Lesotho engaged in socially sanctioned long term relationships.[52] The belief of many Africans that homosexuality is unknown to our culture is a belief with social consequences evident in the stigmatization of people who are involved in homosexual activities and in some cases victimization. Evans Pritchard[53] recorded that male Azande warriors in the north Congo routinely took on male lovers between the ages of ten and twenty who helped with household tasks and participated with sex with their husbands. This practice died however with the advent of colonialism. The adult males paid the families of the boy bride price just as would have being done for a female bride.

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[50] Walter Rodney, *How Europe Underdeveloped Africa* (London and Tanzanian: Bogle – L'Ouverture Publications 1973) 40.
[51] Francis Yaw Daah, 'Supporting Homosexuality for International Aid, its Implication on Ghanaian Cultural Values' <http://francisyawdaah. Blogspot.co.uk> accessed 25 April 2022.
[52] S Murray and others, *Boy Wives and Female Husbands: Studies of African Homosexualities*, (New York, St. Martin's Press 1998) 183.
[53] EF Evans Pritchard, 'Sexual Inversion among the Azande' [1970] (72) (6) *American Anthropologists, New Series*.

Khnumhotep and Niankhknum[54] are the first recorded homosexual couple in history, an Egyptian male couple that lived around 2400BC.

Zimbabwe is a country known worldwide for its strong resistance against same sex marriage. Little is known about the homosexual practices among its people.

In Esan land, this was also practiced. In *Helina Odigie v Iyare Aika,*[55] The plaintiff demanded the return of her child from the defendant's custody. Being a childless couple, the plaintiff married the defendant when she was just 10 years old. The defendant got pregnant for another man after meeting him. The plaintiff was informed of the connection. She covered all of the prenatal and postpartum fees. The child was then taken with the biological father as he left the community. The woman filed a lawsuit in the conventional court to get her child back. The court determined that because the Custom violated natural justice, morality, and equity, it could not be upheld. However, there is scant or no proof that this was done by Yoruba people.

2.10.3 United States of America

Prior to European colonization, there was a widespread kind of same-sex eroticism that was centered on the two spirit people among the Native Americans. The two spirits is usually used to indicate a person whose body houses a masculine and feminine spirit,[56] usually claimed to have been received from God. They were commonly known as shamans and are believed to be more powerful than ordinary tribe members of the same sex. When the Spanish conquerors saw that the aboriginal people openly practiced sodomy, they were shocked and created laws to stop such abhorrent behavior. The first known homosexual political organization in the United States was

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[54] Ibid.

[55] Unreported Suit No U/24A/79 delivered on the 23rd March, 1982.

[56] Delaware, *Review of Latin American Studies* [2002] (3) (3) DeRLAS Journal, 10.

the Mattachine society, founded in November of 1950 in Los Angeles.[57] This underground emancipation movement was the brainchild of Harry Hay, a musicologist. By 1953, under President Eisenhower, homosexuality became, by executive order, a necessary and sufficient reason in itself to dismiss a federal employee from his or her job. The Mattachine society drew tremendous support after one of its founders, Dale Jennings was arrested for "led and dissolute behavior" in February 1952. The Metropolitan community church in 1968 is the largest gay and lesbian religious organization in the United States of America and by far the largest in the south.[58] Public officers also stated closing down establishments where gay people gathered, due to the widespread of a number of immune deficiency related illness in the gay male populations of the major cities. This led to growing tensions between the gay communities and various branches of government. In 1986, in *Boers v Hardwick,*[59] the U.S Supreme court held that states have a right to criminalize even private and consensual sexual behavior. As of February 2012, 42% of America precisely 21 states had various forms of legal same sex partnership (full marriage, civil union or domestic partnership). The other 29 states have either banned such recognitions by laws or their state constitutions.

However, as the lesbian, homosexual, bisexual, and transgender (LGBT) movements have grown, things have altered in the USA. Most recently, a new law was passed after a decision was made in favor of gays. In *Obergefell v Hodges*[60] the Supreme Court of the United States of America held that the 14th Amendment requires a state to license a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of the states.

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[57] <www.slu.edu/organization/.../reading.homosexuality%20in%america.pdf> accessed 25 April 2022.
[58] Ibid.
[59] 478 US 186 (1986).
[60] 576 US 135 (2015).

2.11 Same Sex in Contradiction with Marriage

Marriage is a pre-legal, pre-state institution, it existed prior to the existence of states and legal systems. This reality has long been recognized in international law. The 1948 Universal Declaration of Human Rights calls the family, the natural and fundamental group unit of society. These well-known international legal principles recognize and establish several significant truths that have an impact on things other than just state creations. Marriage is not created by the state (or, more specifically, the law), any more than it is created by children, air, or land. Instead, it acknowledges these pre-existing social facts and institutions and controls them in ways that are meant to safeguard the fundamental institutional resources and advance the common good. These international human rights law standards also acknowledge the complementary contributions that both sexes—men and women—make to the vital social institutions of marriage and the family. Same sex unions do not make the contributions to society that are made by heterosexual marriages. The public purposes for which marriage has been created are best achieved by dual gender unions. Marriage is therefore, unique as no other companionate relationship provides the same great potential for benefitting individuals and society. As was already said, the primary goal of marriage, aside from social integration and status change, is procreation. A family is a group of people who live together under one roof and who are responsible for each other when they need support from him. Thus, a couple becomes family once they get married. Wait L.J in *Fitzpatrick v Sterling Housing Association Ltd*[61] stated that the question is more what a family does than what a family is. A family unit is a social organization which functions through linking its members closely together. The functions may be procreative, sexual, sociable, economic, and emotional. This is what the society uses to control, support reproduction and human sexual

[61] Sterling Housing Association (n 31).

interactions. This entails that family is a social group characterized by common residents' economic cooperation and sexual reproduction.

In Nigeria, a clan of persons related by blood or marriage makes up a normal family. Other systems exist in the west where single parenthood, communal living, and homosexuality are also sporadic occurrences across the nation.

2.12 **Analysis of Same Sex Marriage from Jurisprudential Point of View**

Jurists have voiced their opinions on the same-sex relationship debate and have in one way or another based those opinions on morality or human rights. Morality and law are both systems of rules with normative elements. They both organize and control social behavior. However, they are both distinct from one another in that morality is a persuading system and law is a coercive order. The sanctions of law are intended to generate a specific mode of conduct, but moral sanctions are not so intended.[62] Again, in the last resort, rules of law are enforced by power external to the person required to obey, but, moral rules, in the last resort, are enforced by internal force, i.e., by the conscience of the person required to comply. The reason for the difference between the two systems then, lies in the kind of enforcement as to whether it is internal or external to the addressee i.e., to be eventually exerted by the state or community or to he exercised by the self will only of the addressee.[63]

The point therefore is, should law be employed to enforce moral rules and values? It is vital and helpful to take into account the opinions of renowned jurists like John Stuart Mill, the 1957 Wolfenden committee Report, Hart's and Devlin argument, and other viewpoints in order to find a solution to this problem (looking at same sex relationships from a moral standpoint).

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[62] Funso Adaramola, *Basic Jurisprudence* 2nd Ed. (2nd edn, Lagos: Nayee Publishing Co Ltd 2003) 73.
[63] ibid

2.12.1 John Stuart Mill's Harm Principle

Mill holds the liberal view on the matter,[64] he classified morality into two categories – "public" and "private" morality. He argued that rules of private morality concern the individual and his conscience alone. Private morality is presumed to harm no one else, such as in cases of drug abuse, private drunkenness, private greed, and homosexuality between two consenting adults.[65] He viewed these matters on individual liberty and based on the following grounds:

i. The value of the personal freedom of the individual;
ii. The moral value of not being coerced to choose to do right i.e., the value of the individual's conscience and personality;
iii. The misery that would result from criminal punishment of such immoralities; and
iv. The likely impotence of the law leading to its ridicule, particularly regarding the difficulty of detection and the chances of successful prosecution[66].

Others hold the view that the law should not be concerned with one's own morals. The Wolfenden Report's finding was based on Mill's contention. The question of whether the mere fact that a behavior is viewed as immoral by some standards warrants making it illegal has also been a hot topic in recent years. According to Mill, the only reason for which authority can legitimately be used against the desire of any member of a civilized community is to avoid harm to others. His own good either physical or moral, is not a sufficient warrant, as an individual can do anything he wishes as long as his actions don't harm others.[67] So the state or any other social body has no right to coerce or restrict the individual causes harm to others. Crucially, the

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[64] John Stuart Mill, *Liberty* (4th edn, London: Longman, Roberts and Green 1999) 21-22.
[65] Adaramola, *Basic Jurisprudence,* 92.

[66] Ibid, 92.
[67] Adaramola, *Basic Jurisprudence,* 93.

individual's own physical or moral harm is not justification for construction of their liberty. The harm principle therefore holds that the actions of individuals should not interfere with the freedom of others to prevent harm to other individuals. Mills articulated this principle on liberty, where he argued that, "the only purpose for which power can be rightfully exercised over members of a civilized community against his will, is to prevent harm to others".[68] He believed that maintaining individual liberty over majority rules would be beneficial to everyone in the society because the state would not have to waste time, energy and resources policing people. This principle is against the tyranny of the majority, as people in the majority should not be allowed to exert control over minority groups or individuals. Stephen disagreed with Mill's theory in that he believed there were no discernible differences between actions or behaviors that hurt another person and those that hurt oneself. As a result, he made an argument based on what he called the "grossly form of vice," or "the majority rule," which holds that the majority is always right at the expense of the minority. Also, it has also been criticized on the ground that it appears to be narrow; as his thought was only on physical harm, negating harms like spiritual, psychological harm amongst others.[69]

In On Liberty, John Stuart Mill argues that interference in self-regarding conduct is illegitimate except where that conduct may cause harm to others. Mill's statement of this principle explicitly rejects other possible reasons for intervention. His own good, either physical or moral, is not a sufficient warrant. Mill however, defines the boundaries of liberty without reference to the prevailing morality. This is not because Mill lacked moral conviction: on the contrary, he was not afraid to judge certain private actions as immoral. He was, however, unwilling to use such judgments as a guide to society's jurisdiction. In some ways, Mill believed in the value of

[68] Mill (n 64).
[69] Ibid.

customary social values: the traditional moral rules against theft, adultery, violence and so on have considerable utility. They can also act as a yardstick for judging when other-regarding actions deserve public disapproval.

On questions of social morality, of duty to others, the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still often right; because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practiced, would affect themselves. But this is restricted to other-regarding conduct involving 'duty to others'. Moral judgment of self-regarding actions – such as taking offence at personal choices – cannot justify interference.

Moral choices are insufficient justification for society to get involved in someone else's private affairs. Mill vehemently upholds this idea and categorically rejects any sort of legal moralism. The Harm Principle, according to some philosophers, excludes too much, and governments might legitimately control people for other reasons.

2.12.2 Wolfenden Committee Report, 1957

The committee was set up on 24th August 1957 after WWII, arrests and prosecutions for homosexuals increased. For example Alan Turing, the cryptographer who helped to break the German Enigma Code, was victimized for his homosexuality. Charged with 'gross indecency' he was forced to choose between prison or hormone treatment. He lost his job. His death in June 1954 was treated as suicide. This and other cases led the government to set up this department committee.[70] It was also set up, to consider the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts and the law and practice

[70] 'The Wolfenden Report on Male Homosexuality 1957' <http://www.bl.uk/learning/timeline/item107413.html_accessed> 17 May 2022.

relating to offences against the criminal law in connection with prostitution and solicitation for immoral purpose. The committee in line with Mill's 'Harm Principle' stated that there is a realm of private morality which is not the business of the law, it's not the function of the law to intervene in private lines of a citizen, rather to preserve public order and decency.[71]

Homosexual conduct in public places should continue to be a crime, but it should no longer be a criminal offence when done in private, the House of Lords committee on legal affairs has ruled. According to the committee, "it is not proper for law to concern itself with what a man does in private unless it is contrary to the public good".

The recommended age of consent by the committee was twenty-one years old. So in the view of the committee, if two same sex individuals who are above twenty-one years of age engage in a homosexual act in private the law should not criminalize such act for it took place in private and with consent[72]. The committee also made recommendations to clean up the street of London and other major cities of prostitutes by introducing much higher penalties for soliciting and also to prevent loitering in public places for the purpose of prostitution.[73] The drafters of the report asserted that unless the legislative was willing to equate crime and sin, there must remain a realm of private morality and immorality which is not the law's business.[74] In spite the recommendations of the report, it was not until July 1967 that homosexuality finally became legal in England and Wales.[75]

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[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Adaramola, *Basic Jurisprudence,* 92.
[75] 'The Wolfenden Report on Male Homosexuality 1957' <http://www.bl.uk/learning/timeline/item107413.html_accessed> 17 May 2022.

2.12.3 Hart and Devlin Debate

In the enforcement of morals,[76] He reacted to the Wolfenden Committee's recently released report on homosexual offenses and prostitution, which called for decriminalizing adult consenting gay behavior in England. Although he first supported it, he later changed his mind after testifying before the Committee, advocating for a relaxation of the rules prohibiting consenting adult homosexual behavior and answering its questions by separating out issues of public importance from merely private immoralities. But upon reflection, he was afflicted by the gravest doubts about whether a principle based on this distinction or indeed any principle could provide a rational ground for opposing the very idea of moral legislation.[77] According to him, "it was wrong to talk of private morality or the law not be being concerned with immorality as such or to try to set rigid bounds to the party of which the law may play in suppression of vice… there can be no theoretical limits to legislations against morality".[78]

Devlin interpreted the committee's position to mean, no act of immorality should be made a criminal offence unless it is accomplished by some other features such as indecency, corruption or exploitation. He disputed this position and argued that a society is a "community of class" including ideas about morality and without shared ideas on politics, morals and ethics, no society can exist. Since recognized morality is necessary to society, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. Hence, in order to preserve itself, society reserves the right to legislate against any type of immorality which could lead to its disintegration.[79]

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[76] P Devlin, *The Enforcement of Morals* (London: New York Oxford University Press 1965) 2.
[77] Devlin, *The Enforcement of Morals,* 6.
[78] Devlin, *The Enforcement of Morals,* 14.
[79] RWM Dias, Jurisprudence (5th edn, Indian: LexisNexis Publication, 2013) 111.

According to Devlin, the reason for the moral condemnation of an act is irrelevant to the question is whether the act ought to be forbidden by law. The sheer fact of its condemnation makes the act a threat to public morality. Whatever threatens public morality imperils social cohesion. In connection with this claim, Devlin suggested an analogy between public morality and private morality. According to him a recognized morality is as important to society as a recognized government, also contravention of the morality is comparable to treason.[80] Society may legitimately forbid immorality for the same reason it may forbid subversion; self-protection. It was in the context of this analogy that Devlin set forth his central challenge of the Wolfenden Report's reliance on a principle of political morality fashioned from a distinction between public and private morality, as the suppression of vice is as much the law's business as the suppression of subversive activities, it is no more possible to define one of private subversion activity[81].

Devlin's moderate view was met with much opposition. The first response came from Hart, who disputed Devlin's cases saying that it is assumed that immorality jeopardize society when in fact there is no evidence of that proposition.[82] While Hart conceded that some shared immorality is essential to the existence of society, he questioned Devlin's leap from there to the proposition that a claim in the society's morality is tantamount to implying that society is equal to its morality.

Hart differs that social disintegration would be the effect of legally tolerating acts widely believed to be grossly immoral, a claim that Hart's strategy was to show that this thesis must either be interpreted as an "empirical" one in which case no evidence exist to confirm it or a putative necessary truth which it rest on. That is to say it is Hart's contention that divergence in

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[80] Devlin (74).
[81] Ibid.
[82] HLA Hart, *Law, Liberty and Morality* (Stanford California, Stanford University Press 1963) 50.

morality need not culminate in the disintegration of society, and that there is no evidence that if some moral principles changed, all morality would be abandoned in society.[83] "The untenable idea that a society is identical with its morality as that is at any given point in history, such that a change in its morality as that is at any given moment in history, he said, is one that needs to be addressed," he said, so that a change in its morality is tantamount to the destruction of the society".[84] In place of Devlin's justification for full enforcement of morality, Hart developed his own argument for partial enforcement of morality based on a distinction he drew between immorality which affronts public decency and that which merely distress others in the knowledge that immoral acts are taking place.[85] In Hart's view, society may for instance, outlaw the public expression of bigamy or prostitution because such could be considered as an affront to public decency, a nuisance while would not be justifiable to outlaw purely private manifestations of these types of behavior or of consensual homosexual behavior in private even though some might claim to be distressed by the private behavior, as well. At this point, Hart viewed as a matter of balancing the distress from the knowledge that something is immoral is taking place with individual liberty.[86] Addressing the question of when the law should impose a specific morality. He claimed that civilization might keep people from hurting themselves. Hart in some respect went further than Mill; he acknowledged the difficulty in defining 'harm to others' and proceeds that the law may be used in a paternalistic way to prevent people from harming themselves.[87]

[83] Ibid.
[84] Hart (n 82).
[85] Ibid.
[86] Ibid, 54.
[87] Ibid, 55.

2.13 Conclusion

This chapter concludes by analyzing the concept of marriage as the heterosexual marriage, its forms, the characteristics, and the legal sanctity. It recognizes the concept of Same Sex marriage and its forms, in extension, the history and jurisprudential view on the subject matter from the wolfenden committee report, 1957, Hart and Devlin and John Stuart Mill's Harm Principle. It could be recognized that the debate created varying views and as discussed above, the concept of same sex marriage negates traditional approach to marriage in Nigeria. Also, it is quite challenging to state the history of same-sex marriage, but some countries have been discussed above to know the history of same-sex marriage from these countries such as Greece, Africa, and United State of America.

CHAPTER THREE

THE NIGERIAN PERSPECTIVE ON SAME SEX MARRIAGE

3.1 Introduction

Nigeria is a sovereign State with federating units which is governed by a federal constitution which is the nation's ground norm.[1] The issue of marriage has long since been settled through legislation in Nigeria. So the issue of gender neutrality in marriage and marriage law does not arise in Nigeria, as the country affirms marriage to be an association or union between heterosexual couples.[2] Therefore, any association or union between or among same sex in Nigeria is a crime.[3] The *Same Sex Marriage (Prohibition) Act 2013,* which is the extant law in Nigeria prohibits and criminalizes marriage contract or civil union between persons of same sex.[4]

The reason of prohibiting and punishing homosexual activities in Nigeria is basically hinged on the custom, religion, and Africa traditional way of life. Reuben Abati[5] after the Same Sex Marriage (Prohibition) Act was signed into law stated the following:

"This is a law that is in line with the people's cultural and religious inclination. So it is a law that is a reflection of the beliefs and orientation of Nigerian people…Nigerians are pleased with it".

This chapter scrutinizes the Nigerian perspective on Same-sex marriage. In doing this we aim at first examining the legal and moral position in Nigeria and laws prohibiting same sex in Nigeria such as Nigeria Criminal Code, Nigeria Penal Code and Sharia laws as well as analysis of *same*

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[1] Constitution of the Federal Republic of Nigeria, 1999 (as amended), s 1.
[2] Same Sex Marriage (Prohibition) Act 2013, s 3.
[3] Criminal Code Act C38, 2011, s 214; Armed Forces Act 2010 Cap A20 LFN 2011, s 81(1).
[4] Same Sex Marriage (Prohibition) Act 2013, s 1.
[5] Spokesman to Former President Goodluck Jonathan.

sex marriage (Prohibition) Act, 2013. This Chapter also seeks to discuss the right of privacy and family life under Section 37 and 45 of the constitution of the federal republic of Nigeria and lastly the same sex marriage inform of customary woman to woman.

3.2 The Legal and Moral Position in Nigeria

Nigeria's legal system is built on moral principles that have been codified into law and are subject to penalties since it is essential for every society to uphold agreed moral standards. It is essential for the survival and development of society.

Same sex marriages and homosexual activities were quietly practiced in Nigeria even though the *Criminal Code*[6] and the *Penal Code*[7] were against it. Due to the alarming rate at which homosexual activities has gone viral the Same Sex Marriage (Prohibition) Act 2013 was enacted. The Federal Cabinet forwarded the Bill to the National Assembly on January 18, 2007, in an effort by the Nigerian legislature to make same-sex marriage illegal. The measure was passed by the Senate on November 29, 2011, and the President signed it on January 7, 2015. This Act aims to forbid same-sex weddings or civil unions, their solemnization, and all other matters linked to them. As was expected, this Act has elicited a range of responses from governments, civic society, and individuals. This has been everything from open criticism of the Act and demands that it be withdrawn and destroyed to support for the Act. It is depressing to see that most of the criticism comes from abroad. According to a group of New York Lawyers, an act that would outlaw same sex marriage in Nigeria would violate international treaties and the African Charter on Human and People's Right[8]. David Cameron the British Prime Minister said that no assistance or aid would be given to any country that opposed same sex marriage. They anchored

[6] Cap C38 Laws of the Federation of Nigeria, 2011.
[7] Cap P3 Laws of the Federation of Nigeria, 2011.
[8] <www.frostillustrated.com/full/php> 2 June2022.

their decision on the fact that such a law would trample upon the fundamental rights of homosexuals and gay people.[9]

3.3 Legislations Prohibiting Same Sex Marriage in Nigeria

Though the *Same Sex Marriage (Prohibition) Act, 2013* by the National Assembly may be making waves and drawing a lot of attention, it is not the first the law proposed or even passed by the Nigerian legislature to prohibit immoral acts such as homosexuality in Nigeria.

Some other laws currently in Nigeria that criminalize same sex relationships includes:

i. The Nigerian Criminal Code Act.

ii. The Penal Code Act.

iii. Sharia Law.

iv. The Same Sex Marriage (Prohibition) Act.

3.3.1 The Nigerian Criminal Code Act

In the year 1861, King Dosunmo of Lagos ceded Lagos to British control and Lagos became a Crown Colony. As a result, the British introduced the British criminal justice system to Lagos in the year 1863. The indigenous laws still applied in the protectorate. The British enacted the Criminal Code in 1904 after securing their control of the North. In the year 1914, the Northern and Southern protectorates were merged. This resulted in a situation in which three Criminal Justice systems were in operation throughout the country. The English Criminal law in Lagos, the Criminal Code in the North and the indigenous Criminal law customs in the South.[10]

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[9] Oga the law, 'same sex marriage (prohibition) Bill 2011: what exactly are the issues?' <www.diary-of-a-smart-lawyer.com> accessed 2 June 2022.

[10] Olanrewaju Olamide, 'Historical Evolution of Nigeria Criminal Law' <https://wwwdjetlawyer.com/historical-evolution-nigerian-criminal-law/> accessed 4 June 2022.

In Nigeria today, the Criminal Code Act[11] is applicable to the southern part of Nigeria. Having established the historical perspective of the code, it is imperative to look at the relevant provisions of the code which criminalize homosexuality as contained in the Criminal Code Act. They are contained in *Chapter 21* of the Criminal code and are known as "*Offences against Morality*". The section that is of extremely important to this project is *Section 214 of the Act*, which provides for the unnatural offences.

Section 214 provides for unnatural offences. It provides thus:

Any person who –

i. Has carnal knowledge of any person against the order of nature; or

ii. Has carnal knowledge of an animal; or

iii. Remote a male person to have carnal knowledge to him or her against the order of nature;

iv. Is guilty of a felony and is liable to imprisonment for fourteen years.

This section prohibits and seeks to punish penetrative sex (anal sex) between a man and a woman and a man and another man. It also provides for punishment for penetrative sex between a man and lower animals (bestiality). In the case of *Magaji v Nigerian Army*[12], the Court of Appeal held while interpreting section 81(1) (a) of the Armed forces Decree No. 105 (as amended) which is similar to section 214 of the Criminal Code Act, held that "penetration of any other orifice (apart from the vagina) such as amusement and mouth comes within the ambit of the phrase "against the order of nature".

Another section important to this discourse is *section 215 of the Code*, which provides;

[11] Cap C38 Laws of the Federation of Nigeria 2011.
[12] [2014] 16 NWLR (Pt. 1089) 338.

An attempt to commit any of the offences laid out in *Section 214* is a felony and any person found guilty of such would be liable to imprisonment for 7 years. The offender cannot be arrested without warrant.

The above section seeks to punish all attempts made at engaging in anal sex. As the *mens rea* to commit the offences defined in the preceding section is enough to commit a crime against morality. However a warrant is needed before the offender can be arrested by law enforcement agencies.

Section 217 provides:

Any male person who, where in public or private, commits any act of gross indecency with another male person, or procures another male persons to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person, with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for three (3) years. The offender cannot be arrested without warrant.

This implies that it is not a valid defense to assert that one did not engage in anal and oral sex, and that even if one engages in other forms of sexual activity with a male other than anal sex, he will still be found guilty of a crime. The punishment is similar to *Section 215*, it also punish the 'attempt' to engage in those kind of sexual activities and the punishment is three years imprisonment. This implies that the completion of an unnatural offense occurs at the point of penetration. The passive party's lack of consent is not a requirement for the crime, and the agent is guilty once penetration is established. Following the above provisions of the Act, it can be

gleaned that these provisions simply corroborates and gives credence to the definition of marriage by Lord Penzance in *Hyde's case.*[13]

3.3.2. The Penal Code Act

This is a pre-independence legislation though however came into force in 1960. The Penal Code Act is applicable to northern Nigeria. In Bauchi, Jigawa, Kastina, Kebbi, Sokoto, Yobe, and Zamfara states the Penal Code provides thus, 'The offence of lesbianism is[14] committed by the unnatural fusion of the female sexual organs and or the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement'.

The relevant sections of the Code here are *Sections 284, 285, 405, 407 and 408.*

> Section 284 provides:
>
> "Whosoever has carnal intercourse against the order of nature with a man, woman or any animal shall be punished with imprisonment for seven years of which may extend to fourteen years and shall also be liable to fine".

Like section 214 of the Criminal Code Act, this section seeks to punish all forms of penetrative sex; generally between a man and another man and a man and an animal.

Section 285 provide thus:

> whosoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of that actually, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine, provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian, or a person or persons entrusted with his care or education shall not be deemed to be consent within the meaning of this section.

[13] [1866] LR 1 PD 130.
[14] Penal code, s 352.

> The above section is similar to Section 218 of the Criminal Code Act to the extent that it prohibits and seeks to punish “gross indecency”.

Another section for consideration is section 405(2)(e) which provide thus; the term ‘vagabond’ shall include any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession.

Section 405(3) also provide that:

> “An incorrigible vagabond shall mean any person who after being convicted as a vagabond commits any of the offences which would render him liable to be convicted as such again”.

Section 407 provides that:

> “Whosoever is convicted as being a vagabond shall be punished with imprisonment which may extend to two years or with fine which may extend to four hundred and fifty naira or both”.

And section 408 provide thus “ whosoever is convicted as being an incorrigible vagabond shall be punished with imprisonment which may extend to three years or with fine which may extend to six hundred naira or with both”.

The aforementioned clauses aim to identify and penalize male transvestites and gay prostitutes. Cross-dressers and prostitutes are classified as "incorrigible," and their conviction and detention act as deterrence when they refuse to conform. If found guilty, "vagrants" face a sentence of two years in prison, albeit they have the option of paying a fine instead. On the other hand, an

"incorrigible vagabond" who is proven guilty faces a three-year prison sentence. They still have the option of paying a fine, though.

3.3.3 Sharia Law

Apart from the Penal Code the Sharia Law has been made applicable in 12 states in Northern Nigeria[15]. The *Sharia Penal Code* prohibits same sex relationships. For instance *Section 130 of Zamfara Sharia Penal Code Law*, 2000 although prescribed punishment, the punishment varies from states to states that the Sharia Law has been made applicable. For instance, *section 129 of Kano State Sharia Penal Law, 2000* and *Section 131 of Zamfara Sharia Penal Code Law* considers marital status in prescribing punishments, with unmarried offenders liable to receive hundred lashes of the cane and one-year imprisonment and married offenders receiving the harshest punishment possible, namely; stoning to death. *Kebbi Sharia Penal Code Law, 2000* in *section 134* prescribes the death sentence but leave room for reprieve by adding immediate after 'or any other means decided by the state'. The *Zamfara Sharia Penal law*, in *section 135* provides that; whosoever commits the offence of lesbianism shall be punished with canning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months.

The Criminal Code Act, Penal Code Act and the Sharia Law, are not without shortcomings. For instance, Section 214 of the Criminal Code when read percipient reveals that lesbianism was not captured or contemplated, nor is it construable by implication from the section. The law talks about having 'Carnal knowledge' and carnal knowledge is complete when there is penetration. However, a woman cannot penetrate another woman nor can she penetrate a man, or an animal. Therefore lesbians are not within the contemplation of that section. Also there was no express

[15] The 12 states include: Bauchi, Borno, Gimme, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.

and direct prohibition of same sex relationship or civil union in any of the provisions of the Codes and Sharia laws.

3.3.4 Analysis of the Same Sex Marriage (Prohibition) Act, 2013

Nigeria as a country has made her position known to the world by enactment of the *Same Sex Marriage (Prohibition) Act, 2013*. Nigeria's laws tend to prohibit all forms of homosexual activities expressly. The legal jurisprudence in the world has gradually altered the legal framework of marriage. This followed a bill for 'an Act to prohibit marriage or civil union entered into between persons of same sex, solemnization of same and for others matters related therewith'. The bill was sponsored by Senator Damingo Obende and 25 other senators[16]. Senator Damingo argued that though some countries of the world had already legitimized same sex marriage, that there was an urgent need for Nigeria to act fast to avoid a situation where same creeps into the country. In his words:

> "Opening the legal door to same sex marriage in Nigeria will be morally and ideologically unsound when others, traditionally shunned intuitions as incest remain illegal. The problem with same sex marriage is not the slippery slope; the primary assertion is that just as most Nigerians should maintain that incest is socially unacceptable practice, so too should they disallow same sex marriage"[17].

The bill went through the first reading on 13th July, 2011 and the second reading on 27th of September 2011. It was later assented to by President Goodluck Jonathan on the 7th January 2014 and it became known as the Same Sex Marriage (Prohibition) Act, 2013. And the Act interestingly has only eight (8) sections.

Section 1 provides

(1) A marriage contract or civil union entered into between persons of same sex:

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[16] Vanguard, 'Same sex marriage ungodly, unacceptable' <https://www.vanguardngr.com/2011/09/same-sex-marriage-ungodly-unacceptable-senate/> accessed 5 June 2022.
[17] Ibid.

(a) Is prohibited in Nigeria; and

Nigeria has never reckoned with contracts between same –sex couples. For marriage to be valid it must be a man and a woman. Marriages between same-sex couples are void ab initio, have no legal backing in Nigeria and therefore needs no further prohibition.

(a) Shall not be recognized as entitled to the benefits of a valid marriage.

This is the position of the law in Nigeria presently (save customary practices that exist from time immemorial) and requires no restatement. In practical terms, criminalization of same sex marriage or union will restrict same sex couples from access to medical and healthcare services, educational services and employment opportunities available to other people of different sexual orientation. It will also deprive spouses of such marriage from benefitting from their marriage such as inheritance, succession, administration of estates, etc.

Section 1 (2) provides;

A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefits accruing there-from by virtue of the certificate shall not be enforced by any court of law.

Such foreigners or Nigerians married abroad would be unable to lay claims to their rights such as property, freedom from discrimination, insurance etc., because of the provisions of this bill because the provision of this clause is contrary to Nigeria's obligation in the international law as a member of the civilized world. It is also disrespectful to foreign nationals or Nigerians legally married within the enabling laws of other nations. This negate the provisions of Section 43 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Section 2 (2) provides that;

> No marriage certificate issued to persons to persons of same sex in a marriage or civil union shall be valid in Nigeria.

Section 3 provides

Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.

The *Same Sex Marriage (Prohibition) Act, 2013* also makes clear that only marriages and civil unions between men and women are recognized in Nigeria.

Section 4 (1) provides

The Registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited.

It further prohibits the registration and maintenance of gay organizations, societies and clubs, as well as the "public show of same amorous relationship directly or indirectly as stated below of section 4 subsection 2. The section here is also among the sections that can be justifiably restricted as provided by section 45 of the constitution.

Section 4 (2) provides

The public show of same sex amorous relationship directly or indirectly is prohibited.

This section 4 contradicts Section 40 of the Constitution which clearly provides that "Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests".

The whole idea of this section is to promote public decency and to shun any form of support for gay right in Nigeria.

Section 5 (1) a person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment.

(1) A person who registers, operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.

(2) A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.

This provision is also laden with ambiguity as to the meaning of abetting and aiding. Lawyers and human rights activists who defend the rights of gay people would be offending the provisions of this clause as their actions are capable of being construed as supporting the registrations, operations and sustenance of same sex societies and organizations. Family members may be guilty of aiding and abetting, clergies who take confessions may be victims of this Act for refusal to report a member who confesses to them, professionals such as doctors, nurses and laboratory technicians can also be proscribed for failure to report any incident of ailment resulting from same sex relationships. The list of persons who can be proscribed is endless because the law is not precise in its definition. Moreover, any violation of the above mentioned offences makes a person liable to be charged with criminal offences and liable to a prison sentence.

Section 6 provides

The High Court of a State or of the Federal Capital Territory shall have jurisdiction to entertain matters arising from the breach of the provisions of this Act.

Critics have argued that vesting the High Court in the state with jurisdiction over the provisions of this Act is a deliberate ploy to ensure that persons arraigned in court are remanded in prisons custody pending formal application for bail brought before the High court.

Section 7 provides

"Marriage" means a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law;

'Court" means High Court of a state or of the Federal Capital Territory;

"same sex marriage' means the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship;

"Witness' means a person who signs or witnesses the solemnization of the marriage; and

"Civil union" means any arrangement between persons of the same sex to live together as sex partners, and includes such descriptions as:

(a) Adult independent relationships;

(b) Caring partnerships;

(c) Civil partnerships;

(d) Civil solidarity pacts;

(e) Domestic partnerships;

(f) Reciprocal beneficiary relationships;

(g) Registered partnerships;

(h) Significant relationships; and

(i) Stable unions.

It should be noted that the Same Sex Marriage (Prohibition) Act, 2013 does not define what should be understood as gay clubs, societies and organizations. Neither does it specify what 'public show of same sex amorous relationships directly or indirectly" clearly means and what should be considered as such.

Section 8 provides

This Act may be cited as the Same Sex Marriage (Prohibition) Act, 2013.

The signing into law of this Act by Former President Goodluck Jonathan was followed by a great wave of public opinion with a great majority of Nigerians behind the Federal government. To the majority of Nigerians this Act is simply a victory for the Nigeria people. The legislation was seen to be in accordance with the cultural beliefs of the various ethnic nationality that makes up Nigeria.

The Act is needed not only because it accords with the principle of justice, but also because it evidences the interrelationship of law and morality as both gear towards maintaining order in the human society.[18]

Labaran Maku in support of the Act said that "In relation to same-sex marriage, there were fundamental differences within our country and so we are trying to look into it and see what position Nigeria will take. But definitely, the problem with same sex marriage as at now is that

[18] Chukwu Ngozi, 'The Nigeria Same Sex Marriage (Prohibition) Act, 2013 and the Concepts of Justice, Law and Morality' [2015] (7)(15) *LALIGENS,* 3.

both sections of Nigerian society, traditional society, Muslim community, Christian community that virtually make up nearly 100 percent of the Nigerian population are still opposed to the idea of same sex marriage. And in nations, it is not easy for you to enforce a value that is strange to your own society.[19]"

Nigerians from all walks of life mostly agree on homosexuality being alien to Africa culture and moral values. In a survey conducted by the Pew Research Centre (2013) on attitudes to homosexuality. It was reported that 98% of Nigerians were against homosexuality, the rationale being it is incompatible with culture and moral values.[20] The attitudes towards homosexuality mainly rest on morality. This is because same sex practice is conceived largely as an unnatural act.

3.4 Right to Privacy and Family Life

There has been divergent views that the extant legal framework contradicts national and international principles of fundamental human rights, such as the right to privacy, dignity, equality and non-discrimination, the right to health and the right to found family.[21]

Adebanjo is of the opinion that the right to private and family life is a fundamental human right and must be respected. And by criminalizing same sex relationships and marriage and the public show of same sex amorous relationships under *section 4(2) of the Act* violates the right to privacy guaranteed by *section 37 1999 constitution* to all citizens.[22]

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[19] Talatu Usman, 'Nigerian to Defend Ban on Same-Sex Marriage in letter to UN-Maku' (Premium, 2013) <http://www.premiumtimes.ng.com/news> accessed 7 June 2022.
[20] Pew Research Center, 'The Global Divide on Homosexuality' <www.pewglobal.org> accessed 1 May 2022.
[21] Adetoun Teslimat Adebanjo, 'Culture, Morality and the Law: Nigeria's anti-gay law in perspective' [2015] (15)(4) *International Journal of Discrimination and the Law*, 263.
[22] Ibid.

The legal system is believed to be in violation of Article *12 of the Universal Declaration on Human Rights (the UDHR)* which provides that, "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 or attack".

The International Covenant on Civil and Political Rights (ICCPR) [23] also guaranteed such right for individuals. Thus, homosexuals are also entitled to this right, which covers citizens' homes, correspondence, telephone and telegraphic communication. In the case of *Toonen v Australia,*[24] The issues were the rights to privacy and non-discrimination. The facts were that Nicholus Toonen, a homosexual man, challenged the criminalization of homosexuality in Tasmania, Australia. He sent a communication to the Human Rights Committee of the ICCPR, arguing among other things *that section 122(a) and (c) and 123 of the Tasmania Criminal Code* (criminalizing sexual contract between men) violated his right under Article 17 (privacy) and 26 (non-discrimination) of the ICCPR. This ultimately cost him his job. The Human Rights Committee agreed with the complaint, finding that *sections 122 and 123 of Tasmania Criminal Code* (which criminalized sexual relations between consenting adults of the same sex) violated the complaint's right to privacy, causing Australia to review the criminalization of homosexuality in Tasmania and overhaul that law.

Another element of the right to private life is the right to family life. This is guaranteed to all persons under Article 16 of the *Universal Declaration on Human Rights (UDHR)*, which provide that:

[23] art 17.
[24] Human Rights Committee Communication No. 488/1992.

Men and women of full age, without any limitation due to race, nationality or religion have the right to marry and to fund a family. They are entitled to equal rights as to marriage during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The Family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

Article 23 of the *The International Covenant on Civil and Political Rights (*ICCPR) provide for same as stated above. It means therefore that as long as the contracting parties are of full age and have given their free and full consent they can marry without any limitation or restrictions. In case of *Vallianatos and others v Greece,*[25] the European Court of Human Rights held that the legal recognition of different-sex civil partnership, to the exclusion of same-sex civil partnership was incompatible with Article 8 of the European Convention on Human Rights.

Notwithstanding the postulations above, it is important to note that *Section 37 of the Nigerian Constitution* is among the five restrictive fundamental rights provided in *section 45* of the constitution. It reads:

(1) Nothing in section 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society.

(a) In the interest of defense, public safety, public order, public morality or public health or

(b) For the purpose of protecting the rights and freedom of other persons.

Hence, the provision of *section 45* is to the effect that right of private and family life can be restricted in a democratic society to protect public safety, public order, public morality or public

[25] (Application No.29381/09 and 32684/09) European Court of Human Rights, 7 November 2013.

health. This therefore mean that the Act, is not at variance with section 37, as it seeks to protect on public morality and the cultural values.

Also, *Article 12 of the Universal Declaration on Human Rights (UDHR) and Article 17 of ICCPR* respectively cannot also be used entirely to assert that the anti-gay laws in Nigeria violate rights to privacy. This is based on *Article 29(2)* which provides that:

In the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

It is important to state that *section 42 of the 1999 constitution* is supreme to other laws. This is based on the supremacy of the constitution and its provisions, which shall have binding force on any authorities and persons throughout the Federal Republic of Nigeria.[26] And if any other law is inconsistent with the provisions of this constitution, this Constitution shall prevail and that other laws shall, to the extent of the inconsistency be void.[27]

In international law a country is obligated to honor treaty provisions, besides the various human rights instruments, there is another human rights instrument which calls for close examination [28] which provides:

> Persons belong to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belong go minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. Persons belong to minorities have the right to establish and

[26] CFRN 1999, s 1(1).
[27] Ibid, s 1(3).
[28] Declaration on the Rights of Persons Belong to National or Ethnic, Religious and Linguistic Minorities, United Nations General Assembly, New York, adopted on 18th December, 1992, Resolution A/RES/47/135; arts 2(1), (5) and 4(2), <https://www.ohchr.org/EN/> accessed 7 June 2022.

> maintain, without any discrimination , free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or Linguistic ties. States shall take measured to create favorable conditions to enable persons belonging to the minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards.[29]

The point here is where these persons who practice same sex activities do not come within the ambit of minority in the light of the above Declaration, whose rights should be protected? If the answer is in the affirmative, the issue therefore would be whether Nigeria is not in violation of the above Declaration.

If it is conceded here that same sex practitioners fall within the ambit of minority shoes rights should be protected, it is however, important to observe that a provision in the above stated Articles provided an exemption clause. In that if the government of Nigeria views very strongly that to allow homosexual activities to operate in the society will violate the national laws, it could refuse to grant them such rights, which she has done by the introduction of the *Same Sex Marriage (Prohibition) Act, 2013.*[30] Notwithstanding, the LGBT community still kick against the enactment of the Act, saying the law encroaches on their human rights – rights that should be recognized and protected in a democratic society.[31] This they believe was wrong and unacceptable since same-sex marriages or relationships was no business of the State to criminalize, since they have the right to private and family life. The constitutionality guaranteed right that no government could take away from them. Be it a sexual or marital relationship

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[29] Ibid.

[30] Alegimenlen O. and Garuba, *Same Sex Marriage:* Nigeria at the Middle of Western Politics" [2004] (3)(1) *Oromia Law Journal*, 204.

[31] Ihenyen, 'The Same Sex Marriage (Prohibition) Act in Nigeria: Reactions and Counter Reactions' <www.nigerianlawtoday.com/> accessed 8 June 2022.

between men; or one between women such act are one private matters between the consenting adults, which the state should not be concerned with.[32]

The initiative for Equal Rights (TIER), a Nigeria based LGBT organization, has asserted that "government should think about development and not sex between two consenting adults". Many Nigerians based abroad (some of whom maintain they are straight though) are also in support of this position, boxing that Nigeria must tolerate and respect the rights of others no matter their personal convictions or religious And respect the rights of others no matter their personal convictions or religious beliefs.[33] Apart from domestic reaction against the Act, Nigeria has been under tremendous pressure from international community to reverse the law recently passed which prohibits same sex marriage in the country.

The British former Prime Minister Mr. David Cameron,[34] reacting to the passage of the Same Gender Marriage (Prohibition) Act, told Nigeria that:

"Britain would not give any assistance or help to countries that were opposed to same sex marriage. The British High Commissioner in Nigeria, Mr. Andrew Loyd, in closed door meeting with the Jigawa State Governor, ALhaji Suleman Lamindo, asked the Nigerian government to rescind its decision on punishing individuals involved in same sex marriage, adding that such a law infringes on the fundamental rights of choice and association".[35] In the same view, the Canadian government also condemned the passage of a bill criminalizing same-sex marriage and gay activities in Nigeria by the statue, saying that

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[32] Ibid.
[33] Ibid.
[34] Prime Minister of United Kingdom from 2010 to 2016.
[35] 'Britain Tells Nigeria to Rescind on Gay Marriage Law or Else…' <www.gistmania.com/talk/topic,85853.0.html > accessed 8 June 2022.

> "The bill, if assented to by the President Goodluck Jonathan, would trample upon the fundamental human rights of homosexuals and gay people. The Canadian Government, in statement by its Foreign Affairs Minister, John Baird, called on Nigeria to reverse the bill so as to allow all its citizens to enjoy basic rights. He further maintained that, a bill passed by Nigeria's Senate, if ratified disregard basic human rights and fundamental freedoms".[36]

Recently, the British Prime Minister, Theresa May while addressing leaders at the commonwealth Heads of Government meetings, urged countries that had made laws banning same-sex marriage to change their stands.[37] She said, three countries that had earlier made such laws recently revoked them and advised others to emulate them.

A sovereign state is free to govern its state and its state and its citizenry in accordance with the laws of its land. The pertinent question to ask therefore, is whether it is appropriate for such state to be coerced into accepting a practice which she considers incompatible with the customs, traditional belief and culture values of the people? This of course will be answered in the negative. Nigeria is a Sovereign nation and so has authority and power to make laws for the good governance of the people without any form of interference or external influence of any kind. This is in accord to the *Article 1 (7) of the UN Charter* provided for non-interference of the domestic affairs of a sovereign state.[38] Hence, what the Nigeria government has done in enacting the Same Sex Marriage (Prohibition) Act, 2013 is to draw a balance between the rights of persons who are inclined to same sex activities and the need to uphold the moral fabrics of the society[39].

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[36] Ibid.

[37] 'Nigeria passed law banning homosexuality' <www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html> accessed 8 June 2022.

[38] United Nations Charter, United Nations International Conference, San Francisco, 26th June 1945, entered into force on 20th October 1945.

[39] Alegimenlen and Garuba (n 30).

3.5 Woman to Woman Marriage

Although not strictly homosexual in nature, some of our customs, particularly those of the Ibos in the Eastern portion of Nigeria, are equivalent to the practice of same-sex partnerships.

There are some circumstances where two women can get married. The term woman-wife in customary law refers to a married woman who tries to provide for her husband by laying or a new wife on behalf of her husband, or providing him with the necessary funds for a new marriage, with a view to raising his children for him by proxy. This practice was acceptable until the repugnancy test was introduced to test the validity of customary laws.

The Supreme Court of Nigeria made mention of this practice in Eugene *Meribe v Joshua C. Egwu,*[40] when it had to determine whether it was contrary to public place. The court further made a clear clarification of this practice when it for a woman to get married to another woman as alleged in that case. The counsel submitted during the appeal that "it is the custom in our place that if a woman has no issue, she can marry another woman for her husband, any issue from the said married woman would be regained as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance". Madarikan JSC whilst delivering the lead judgment held that;

In every system of jurisprudence known to us, one of the basic requirements for a valid marriage is that it must be a union of a man and woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a woman to woman marriage; and where there is proof that a custom permits such an association,

[40] [1976] 1 ALL NLR 266.

the custom must be regarded as repugnant by virtue of the proviso of the Evidence Act and ought not to be upheld by the court.[41]

The court observed that what transpired was not a marriage of same sex marriage but rather, a giving by a barren wife of another woman to her husband to help her bear children for him. In the words of the court on a close examination of the facts, however, the nature of a woman to woman marriage in the case is not a marriage between two women, rather one woman due to the fact that she was barren, had procured another woman for her husband as a wife.[42]

The fact remains however that an indication had been given of the fact that this practice is prevalent in the hinterlands of Nigeria.[43]

Under Ibo customs, another form of woman to woman marriage is when a woman who is not married and cannot bear children may marry another woman who would bear children by any men. The woman that is so 'married' would live with the one who purports to marry her and bear children while she caters for her and her children.

3.6 Conclusion

This Chapter concludes that although the Same Sex Marriage (Prohibition) Act, 2013, by the National Assembly may be creating a stir and grabbing media attention, it is not the first law that the Nigerian legislature has introduced or even enacted to forbid immoral practices like homosexuality in Nigeria. Other Nigerian laws that now make same-sex partnerships illegal include the Criminal Code Act, the Nigerian Penal Code Act, and Sharia Law and also the contention that the Same Sex Marriage (Prohibition) Act 2013 infringes on a number of fundamental rights guaranteed by the Federal Republic of Nigeria's 1999 Constitution (as

[41] Ibid, 222.
[42] OO Arokoyo, 'Comparative analysis of societal acceptance of same sex marriage'.
[43] SNC Obi, Modern Family Law in Southern Nigeria [1960] 157.

amended) and other international and regional human rights instruments to which Nigeria is a signatory is the most divisive point in the discussion over the ban on same-sex marriage in Nigeria.

The Nigerian legislature has made an effort to come up with ways to ensure that gay behaviors are curbed early on and do not spread widely in society and it also analyzes the woman to woman marriage.

CHAPTER FOUR

SAME SEX MARRIAGE IN OTHER JURISDICTIONS

4.1 Introduction

Prior to the turn of the 20th century, legal jurisprudence was unaware of the present trend of same-sex marriage. Homosexuality was perceived by the society as a disorder brought on by a flawed development. In actuality, the creator of psychoanalysis and Austrian physician Sigmund Freud saw homosexuality as a deviant condition. From the early 21st century countries from different continents of the world, predominantly the western world reviewed their legal systems not just to accommodate but also to legalize same sex marriage.[1]

It is within this chapter to examine the legislation and prohibition of the position of same sex marriage in different countries such as Netherlands, U.S.A, South Africa, Uganda, and Canada.

4.2 The Legal Position in Different Countries as it relates to the Same Sex Marriage

An examination of the regulations in that area reveals the basic attitudes of the various nations toward same-sex conduct. It ranges from the death sentence as a punishment for same-sex acts to the legal acceptance of same-sex marriage or other sorts of partnerships. As laws and legal cases are developed and implemented all over the world, the status of same-sex marriage regularly changes. A federal law in Canada supports same-sex unions. Civil unions have been established in a few European nations. Others have reported same-sex couples living together. As a result of the aforementioned, several nations have passed legislation recognizing homosexuality, particularly in western nations. We shall look at a few of these nations in this speech.

[1] The Netherlands Same Sex Marriage Law 2001; Belgium Same Sex Marriage Law 2003; Canada Same Sex Marriage Law 2005.

4.2.1 Netherlands and Same Sex Marriage

LGBT rights have advanced in the Netherlands over time. One of the most progressive countries in both Europe and the entire world, according to reports. In the Netherlands, registered partnerships were first introduced in 1998. It was then legal to marry people of the same sex starting in 2001. The Netherlands is the first nation in the world where a proposal to legalize same-sex marriage has passed into law. Henk Kiel led a group of gay rights campaigners that requested the government to legalize same-sex marriage as early as the middle of the 1970s. In 1995, the parliament voted to establish a special commission to look into the prospect of same-sex unions. The Christian Democrats (Christian Democratic Appeal) were not participating at the time. After completing its investigation in 1997, the special commission came to the conclusion that same-sex couples should also be eligible for civil marriage. The final text of the Act was discussed in the Dutch Parliament in September 2000. The marriage bill passed the House of Representatives by 109 voted to 33 on 12 September 2000.[2] The senate approved the bill on 19 December, 2000 by 49 to 26 votes130, only the Christian Parties, which held 26 of the 75 seats at the time, voted against the bill.[3] It was signed into law by Queen Beatrix on 21st December, 2000.

The main article of the law changed article 1:30 in the marriage law, as it provides that "marriage can be entered into by two persons of opposing or the same sex". The law came into effect on 1 April 2001, making Netherlands to become the first country in the world to legalized same sex marriage.[4] The law requires that at least one member of the couple be a Dutch national or live in the Netherlands. In the Course of this period, Job Cohen, the Mayor of Amsterdam married four

[2] The New York Times, 'Same-sex: Dutch couples Gain Marriage and Adoption Right' *The New York Times* <https://mobile.nytimes.com/> accessed 29 May 2022.
[3] Ibid.
[4] CNN, 'Same-Sex Marriage legalized in Amsterdam' <http://transcripts.cnn.com/TRANSCRIPTS/0104/01/sm.10.html> accessed 29 May 2022.

same sex couples after becoming a registration specifically to officiate weddings. The rational for the progressive nature of gay rights in Netherlands may be due to wide support for it by her population. According to poll conducted in May 2013, it was indicated that 85% of the Dutch population supported same sex marriage and adoption. A European member poll conducted in 2006 indicated that 82% of the Netherlands supported same-sex marriage which was the highest amount support during that time.[5] The Netherlands had become one of the most socially liberal countries in the world with recent polls indicating that more than 90% of the entire Dutch people view homosexuality as moral.[6] The only form of opposition against the LGBT rights, came from the Christians and Muslim communities. As those who opposed it before now see it as no issue. Hannie Van Leeuwen, leader of the Christian Democrat party and opponent to the gay marriage law was heard to have reversed himself, when he said; "at the time I opposed same-sex marriage I was led by fear. Having seen so many happy gay and lesbians' couples getting married, I realized I was wrong, I don't understand anymore what made me treat gays and lesbians differently from other citizens".[7]

After the Dutch parliament legalized same sex marriage, the protestant church in the Netherlands permitted individual congregations to decide whether or not to bless such relationships as unions of love and faith before God, and in practice many churches now conduct such ceremonies.[8] To reduce and possibly end discrimination against same-sex couples, rights against discrimination have been established. The Equal Rights Act, which forbids discrimination on the basis of sexual orientation in employment, housing, and both public and private accommodations, was passed by

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[5] GayNews, <www.365gay.com> accessed 29 May 2022.
[6] 'Ministerie van Volksgezond held, welzijn en sport' <https://www.rijksoverheld.ni/ministerie/> accessed 29 May 2022.
[7] Adam Taylor, 'What was the first country to legalize gay marriage?' <https://www.washingtonpost.com/news/> accessed 29 May 2022.
[8] National Service Centre PCN, 'The Uniting Protestants Churches in the Netherlands and Homosexuality' (November 2004) accessed 29 May 2022.

the Dutch parliament in 1993. People who identify as transgender are protected under the heading "gender." The Netherlands has frequently been referred to as one of the gayest friendly countries in the world,[9] on account of its early adoption of LGBT rights legislation, and tolerance perception. Amsterdam has been referred to as one of the gayest friendly cities in the world by publications such as The Independent.[10] The annual gay pride festival has been held in Amsterdam every year 1996.[11] The festival attracts several hundred thousand visitors each year and thus one of the largest publicity held annual events in the Netherlands.

4.2.2 United States of America and Same Sex Marriage

In America, the gay community was an oppressed and reviled minority. Large parts of the country ridiculed, categorically rejected, feared, labeled "immoral" and "pathological," and outlawed same-sex relationships. The notion of same-sex couples lawfully marrying was unthinkable and each pioneers who bravely stepped forward to claim the freedom to marry were met with derision and venom.[12] From the dawn of the modern LGBT movement, in the immediate aftermath of Stone Wall in 1969, same sex couples in several states filed legal challenges seeking the freedom to marry.[13] LGBT rights in the US have changed over time and differ from state to state. Since June 26 2003, sexual activity between consenting adults of the same sex as well as same-sex adolescents of a close age has been legal nationwide, pursuant to the US Supreme Court ruling in *Lawrence v Texas*[14]where the court by a majority of 6-3 struck down the sodomy laws in Texas and by extension invalidated sodomy laws in 13 other states

[9] Mark McDaid, 'The Netherlands is one of Europe's Most Gay Friendly Nations' (Netherlands 20 May 2013).
[10] Marcus Field, 'The Ten Best Places in the world to be Gay' *the Independent* (The Independent, 17 September 2008).
[11] 'Amsterdam Gay Pride' <Amsterdamgaypride.nl> accessed 29 May 2022.
[12] 'Winning the Freedom to Marry Nationwide: The Inside story of a Transformation Campaign' <www.freedomtomarry.org/pages/> accessed 30 May 2022.
[13] Ibid.
[14] (2003) 539 U.S.558.

making same-sex sexual activity legal on every U.S states and its territory. The court overturned its previous ruling on the same issue in the 1986 case of *Bowers v Hardwick*[15] which criminalize oral and anal sex in private between consenting adults.

However, as of June 26, 2015 all states gave license and recognize marriage between same sex couples, based on the Supreme Court decision in *Obergefell v Hodges.*[16] In that case, the U.S Supreme court in a 5-4 ruling decided that the fundamental rights to marry is guaranteed to same sex couples by both the Due process clause and the Equal protection Clause of the 14th amendment to the United States constitution. The plaintiff, James Obergefell had sued Ohio's state government for refusing to recognize his Maryland marriage to John Arthur. Supreme Court Justice Anthony Kennedy, writing for the majority, was eloquent in building his argument that obergefell's right to equality protection under the law has been violated. He wrote;

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions.

President Obama noted in the following words less than an hour before the Supreme Court decision

[15] (1986) 478 U.S. 186.
[16] (2015) U.S. 576.

> "Our nation was founded on a bedrock principle that we are all created equal. The project of each generation is to bridge the meaning of those founded words with the realities of changing times, a never ending quest to ensure those words ring true for every single American. Progress on this journey often comes in small increments, sometimes two-steps forward, one step back, propelled by the persistent effort of dedicated citizens. And then sometimes, there are days like this, when that slow, steady effort is rewarded with justice that arrives like a thunderstorm".[17]

The strongest expansion in LGBT rights in the United States have come from the United States Supreme court. In four landmark decisions between the year 1996 and 2015, the Supreme Court invalidated a state law[18] banning protected class recognition based upon homosexuality, struck down sodomy laws nationwide,[19] strike down section 3 of the Defense of Marriage Act,[20] and made same marriage and adoption legal nationwide.[21]

In November 2014, following a lengthy series of Appeal Court ruling from the fourth, seventh, ninth, and Tenth Circuits, that state level bans on same sex marriage were unconstitutional, the sixth Circuit ruled that it was bound by *Baker v. Nelson,*[22] (which ruled that a state law limiting marriage to persons of the opposite sex didn't violate the U.S Constitution) and found such bans to be constitutional. Due of the division this caused between the circuits, a Supreme Court

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[17] 'Winning the Freedom to Marry Nationwide: The Inside story of a Transformation Campaign'

[18] *Romero v Evans* 517 U.S. 620 (1996), is a landmark United States Supreme Court case dealing with sexual orientation and state laws. The court ruled in a 6-3 decision that a state constitutional amendment in Colorado preventing protected status based upon homosexuality or bisexuality did not satisfy the Equal Protection Clause.

[19] Lawrence v Texas (2003) 539.

[20] was a United States Federal law that, prior to be ruled unconstitutional defined marriage for federal purposes as the union of one man and one woman and allowed states to refuse to recognized same-sex marriage granted under the law of other states. Unfollow section 3 of the Act was struck down in 2013 in the case of *United States v. Windsor*, 570 U.S. 744 (2013), DOMA with other statutes, had banned same-sex married couples from being recognized as "spouses" for purpose of federal law, effectively barring them from receiving Federal marriage benefits. DOMA's passage did not prevent individual states from recognizing same sex marriage, but it imposed constraints on the benefit received by all legally married same sex couples. <www.supremecourt.gov/opiniom/12pdf/12-207-6j37.pdf>

[21] Obergefell v. Hodges (2015) 28.

[22] 291 Minn. 310, 191 N.W. 2d 185.

review was unavoidable. Bakers' case was overturned by the Obergefell case, which was decided a year later, and now all states must grant marriage licenses to same-sex couples and recognize same-sex marriages that were properly performed in other jurisdictions. In 2015, the U.S Equal Employment Opportunity Commission concluded that Title VII of the Civil Rights Act of 1964 does not allow sexual orientation discrimination in employment because it is a form of sex discrimination.[23]

4.2.3 South Africa and Same Sex Marriage

With relation to LGBT rights, South Africa has set the bar for the rest of Africa and the world. Despite having a history of homophobia, the country underwent a significant change in the 1990s with the end of apartheid. Gay people's rights are protected by the 1996 South African Constitution, which specifically forbids discrimination on the basis of sexual orientation in *Sections 9(3) and (4).*

Section 9(3) reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status color, sexual orientation, disability, religion, conscience, belief, culture, language and birth.

Section 9(4) provide that; "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination ".

Other fundamental rights guaranteed under the Constitution include right to dignity[24], security of persons[25] privacy[26] and expression.[27] These provisions were further cemented by the promotion

[23] Carpenter Dale, 'Anti-gay Discrimination is Sex Discrimination, says the EEOC' (The Washington Post 2012) <https://ipfs.io/ipfs> accessed 30 May 2022.
[24] Constitution of South Africa 1996, s 10.
[25] Ibid, s10.

of Equality and Prevention of Unfair Discrimination Act, 2000, which aimed to give effect to the provisions of section 9 0f the Constitution of South Africa.

In 2005, the Constitutional Court of South Africa in the landmark case of *Minister of Home Affairs v Fourier,*[28] rules that denying people in same-sex relationships the right to marry was unconstitutional. The applicants were Ms. Marie Adrianna Fourier and Ms. Cecelia Johanna Bonthuys, a lesbian couple who wanted to get married before the hearing. Doctors for life International and its legal counsel, Mr. John Smith, also requested admission as amici curiae on their behalf. The Marriage Alliance of South Africa also requested to be admitted as an amicus curiae, with Cardinal Wilfred Napier's affidavit supporting their request. The nine judges who heard the case decided unanimously that same-sex couples had the right to get married. As a result, they ruled that the common law definition of marriage was unconstitutional and invalid to the extent that it did not grant same-sex couples the same status and obligations as heterosexual couples.

Upon the historic decision above, South Africa's highest court legalized same sex marriage with the introduction of the *Civil Union Act, 2006.*[29] Under which any two persons could be joined together as spouses or partners in a Civil Union, as long as the union was voluntary and they were of age (18 years) [30] *Section 13 of the Act,*[31] accords a civil union the same legal status as marriages under the Marriage Act and the Customary Marriage Act.

Section 13(1) the legal consequences of marriage contemplated on the Marriage Act apply, with such changed as may be required by the context, to a civil union.

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[26] Ibid, s 14.
[27] Ibid, s 16.
[28] Case CCT 60/04.
[29] Act No. 17 of 2006.
[30] ibid, s 1.
[31] Ibid.

(2) The exception of the Marriage Act and the Customary Marriage Act, any reference to

(a) marriage in any other law, including the common law unused with such changed as may be required by the context, a civil union; and

(b) Husband, wife or spouse in any other law, including the common law, includes a civil union partner.

In *National Coalition for Gay and Lesbians Equality and others v Minister of Justice and others,*[32] the Witwatersrand High Court had declared as unconstitutional and invalid, the Commonwealth law offence of sodomy and the inclusion of sodomy as a crime in the South Africa Sexual Offences Act, 1957, among other legislation and referred its decisions to the Constitutional Court for confirmation in terms of *Section 172(2) (a) of the constitution.*[33] The application for confirmation in the latter case was brought before the Constitutional Court in *National Coalition of Gay and Lesbians Equality and Anor v Minister of Justice* And others.[34] In confirmation, the High Court's decision, the constitutional court acknowledged that criminalization stemmed from moral and religious views of section of society.[35]

On the harmful effects of criminalization, the court noted that these went beyond anything immediate impact on victims' dignity and self-esteem to their personhood and identity stolen deep level, affected their ability to achieve self-identification and self fulfilment and was overall, a severe limitation of their right to equality, privacy, dignity and freedom.[36] Also in the case of *Satchnell v The President of the Republic of South Africa and Anor.*[37] The Constitutional Court

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[32] 1998 (6) BCLR 726 (W).
[33] Paragraph 1 *National Coalition for Gay and Lesbians Equality v Minister of Justice;* the other laws were schedule 1 of the Criminal Procedure Act 1977, sch E1 and Schedule Officers Act 1984.
[34] Case CCT 11/98.
[35] Ibid, para 26(b).
[36] Ibid, paras 24, 26 and 36.
[37] Case CCT 45/01.

declared as unconstitutional and unfairly discriminatory based on sexual orientation provision pertaining to payment to which a judge's surviving spouse was entitled.

With regard to adoption in 2002, the Constitutional Court's ruling in *Du Toit v Minister of Welfare and population development,*[38] gave same sex partners the same adoption rights as married spouses, sleeping couples to adoption children jointly.[39] The adoptive law has since been replaced by the *Children's Act 2005,*[40] which allows adoption by spouses and by "partners in a permanent domestic life-Partnership" regardless of orientation. In 1998, the Department of Defense adopted a policy on Equal Opportunity and Affirmative Action under which recruits may not be questioned about their sexual orientation and the Defense Force officially takes no interest in the lawful sexual behavior of its members.[41] In 2002, the SANDF extended spousal medical and pension benefits to "partners in a permanent life-partnership.[42]"

South Africa became the fifth country, and the first in Africa to legalize same sex marriage. In South Africa today, the position has changed drastically as opinion poll revealed that about 52% of South Africans think wrongly about homosexuality[43]and they consider it in immoral. It is true that the political climate and constitutional framework favor same-sex unions, but it can be argued that while some segments of South Africa's public opinion continue to view homosexuality as a sort of abomination, others are still steadfastly supporting its legality and regard it as a significant advancement of human rights. As a result, the government amended the

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[38] [2002] 2 ACC, 20.
[39] "Lesbian, Gays can Adopt Children" available at www.news24.com/world/news/ <accessed June 1, 2022>.
[40] Act No. 38 of 2005.
[41] Aaron Belkin and Margot Canaclay, 'Assessing the Integration of Gays and Lesbians into the South Africa National Defense Force' [2010] (38)(2) *Militaria African Journal Military Studies*, 21.
[42] Ibid.
[43] The case was brought by Marie Fourie and Cecilia Bonthuys, a lesbian couple seeking the right to marry, in the ruling, Judge Edwin Cameron stated that the definition of marriage should be altered to read: "Marriage is the union of two persons to the exclusion of all others for life".

Civil Unions Bill at the last minute to allow for the voluntary union of two people that is solemnized and recorded through either a marriage or a civil union.

4.2.4 Uganda and Same Sex Marriage

Uganda prohibits same sex relationship, the rational being that it is contrary to the country's cultures, moral and religious beliefs.[44] The Constitution of Uganda 1995, Uganda Penal Code and most recently, the Uganda Anti-Homosexuality Act, 2014, all criminalize homosexuality.

The Uganda Constitution was amended in 2005 to include a proviso expressly outlawing same sex marriage, with the inclusion of Article 31(2a), which provides thus:

> "Marriage between persons of the same sex is prohibited".

Meanwhile, section 145(a) and (c) of the Ugandan Penal Code reserved one of the harshest penalties possible for those involved in homosexuality, that is life imprisonment, with a penalty of 7 years imprisonment attached for an attempt to engage in homosexuality.[45] Only same-sex acts between men were illegal prior to the Penal Code Amendment (Gender References) Act of 2000. That Act was passed in 2000, and the word "any male" was changed to "any person" so that severely obscene conduct between women were now made a crime and are now subject to up to 7 years in jail. The Uganda Anti-Homosexuality Act, 2014, is the most recent addition to this collection of anti-gay legislation. On October 13, 2009, Member of Parliament David Behati introduced the Anti-Homosexuality Act, 2009, which would increase the criminalization of same-sex relationships in Uganda and institute the death penalty for repeat offenders, HIV-positive individuals who engage in same-sex sexual activity, individuals who engage in same-sex sexual activity with individuals under 18, and individuals who engage in such behavior. LGBT

[44] Adebanjo, Culture, Morality, 261.
[45] Ugandan Penal Code, s146.

rights advocates might face fines, jail time, or both for their actions. Any violator of the Act must be deported by those "in authority" within 24 hours or risk up to three years in prison. Individuals or Companies that promote LGBT rights would be fined or imprisonment, or both. Persons "in authority" would be required to deport any offender under the Act within 24 hours or face up to three years imprisonment. In November 2012, Parliament Speaker Rebecca Kadaga promised to pass a revised anti-homosexuality law in December 2012. In her words:

"Ugandans want that law as Christmas gift. They have asked for it, and we'll give then that gift".[46]

The parliament, however adjourned in December 2012 without acting on the bill.[47] The bill passed on 17 December 2013 with a punishment of life in prison instead of the death penalty for "aggregated homosexuality" new law was promulgated in February 2014 and signed by Yoweri Museveni.[48]

The Act is most discriminatory.[49] Section 2 prescribes a life sentence for homosexuals, it provides:

2. The offence of homosexuality.

A person commits the offence of homosexuality if –

(a) He penetrates the anus or mouth of another person of the same sex with his penis or any other sexual contraption;

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[46] BBC, 'Uganda to pass Anti-Gay Law as Christmas Gift' *BBC News* <www.bbc.com/news/world-africa-20318436> accessed 1 June 2022.
[47] Alexis Okeowo, 'Uganda's kill The Gays 'Bill Back in Limbo' *The New Yorker* <https://www.newyorker.com/news-desk/> accessed 1 June 2022.
[48] President of Uganda since 1986.
[49] Adetoun Teslimat Adebanjo, 'Culture, Morality and the Law: Nigeria's anti-gay law in perspective' [2015] (15)(4) *International Journal of Discrimination and the Law*, 263.

(b) He or she uses any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;

(c) He or she touches another person with the intention of committing the act of homosexuality.

A person who commits an offence under this section shall be liable, on conviction, to imprisonment for life.

Section 3 designates "aggravated homosexuality" for situations like those in which one of the partners is a minor, the "offender" is HIV positive, or the offender is a serial offender, and it imposes a life sentence for violators. According to Section 4 of the Act, attempting to commit homosexuality carries a sentence of seven years in jail, while attempting to commit aggravated homosexuality carries a sentence of life in prison. Importantly, section 12(2) of the Act penalized anyone who officiated same sex unions, much like it does in Nigeria, and in the case of institutions, and their license might be cancelled. Section 14 is especially significant since it allows Ugandan homosexuals to be returned from other nations to face the consequences of their behavior. This Ugandan has the authority to punish gay Ugandan nationals living abroad which allow same sex relationships for their sexual orientation.

In June 2014, the American State Department, in response to the passing of this Act announced several sanction, including among other, cuts of funding, blocking certain Ugandan officials from entering the country, cancelling aviation exercises in Ugandan and supporting Ugandan LGBT NGO.[50] Also, President Obama reacted thus: “The Government of Ugandan’s enactment

[50] Grant Harris and Stephen Pomper, ‘Further U.S Efforts to protect Human Rights in Uganda’ <https://obamawhitehouse.archives.gov/blog/2014/06/19/> accessed 1 June 2022.

if the Anti-Homosexuality Act, is precisely such a step in the wrong direction[51] There have been noble instances in which gay persons were targeted in Uganda. These include arresting suspected gay people, organizing mass protest against homosexuality and publishing the names of suspected gay people in the media.[52]

However, in August 2014, Uganda's Constitutional Court annulled the tough anti-gay legislation signed into law in February.[53] It ruled that the bill was passed by MPs in December without the requisite quorum and was therefore illegal. Also another petition before the court was that the anti-gay law violate the well enshrined rights to freedom of expression, assembly, and association as well as privacy. Also caused Ugandan land lords to evict the LGBT tenant since the last banned 'aiding and abetting homosexuality' and keeping any room, home or place 'for the purpose of homosexuality'.[54]

The question to ask, having in mind the decision of the Constitutional Court will be "is it now legal to be gay in Uganda? The answer seems negative, as the decision of the constitutional court was on a procedural grounds, and it was rather unfortunate that the court did not address the substantive concern at stake. Hence, in reality the ruling did not entirely make gay practice legal in Uganda, as the law's nullification does not protect LGBT people from the ongoing discrimination, arrest and prosecution, despite misleading international headlines to the contrary.[55]

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[51] Ibid.
[52] Mujuzi, 'The Absolute Prohibition of Same Sex Marriage in Uganda' [2009] (23) *International Journal of Law Policy and Family,* 279.
[53] BBC, 'Uganda Court Annuls Anti-Homosexuality Law' *BBC News* <www.bbc.com/news/world-africa-28605400> accessed 1 June 2022.
[54] The Anti-Homosexuality Act 2014, s 7.
[55] Neela Ghoshal and Maria Burnett, 'Is it Now Legal to Be Gay in Uganda?' <www.hrw.org/news/> accessed 1 June 2022.

4.2.5 Canada and Same Sex Marriage

With the Civil Marriage Act's implementation on July 20, 2005, Canada became the fourth nation in the world to make same-sex marriage lawful everywhere. Eight out of 10 provinces and one of three territories, home to nearly 90% of Canada's population, each allowed same-sex marriage beginning in 2003. More than 3,000 same-sex marriages took place in these regions prior to the Act's adoption. Most legal benefits commonly associated with marriage had been extended to cohabiting same sex couples since 1999.

The first legalization of same-sex unions came about as a result of court decisions in which provincial or territorial judges declared that pre-existing restrictions on same-sex unions were illegal. Following that, a large number of gay and lesbian couples got marriage licenses in those provinces; unlike opposite sex couples, they were not required to be residents of any of those provinces in order to get married there. For same-sex couples who were legally recognized in these jurisdictions, marriage status existed in a de facto provisional capacity. According to the Constitution of Canada, the definition of marriage is the exclusive responsibility of the federal government. Until July 20, 2005, the federal government had not yet passed a law redefining marriage to conform to the recent provincial court decisions. Until the passing of the Bill C- 38,[56] the previous definition of marriage was binding in the four jurisdictions where courts had not yet ruled it unconstitutional, but void in the nine jurisdictions where it had been successfully challenged. Given the Supreme Court ruling, the role of precedent in Canadian law, and the overall legal climate, it would have being highly unusual for any challenges in the remaining four jurisdictions not to result in the legalization of same sex marriage.

[56] Bill C-38, introduced by Justice Minister Irwin Cotler on 1 February 2005.

The Supreme Court has also being asked to rule on whether limiting marriage to heterosexual couples is consistent with the Canadian Charter of Rights and Freedoms and if same sex civil unions are an acceptable alternative. On December 9, 2004, the supreme court of Canada ruled that the marriage of same sex couples is constitutional, that the federal government has the sole authority to amend the definition of marriage, and the Charter's protection of freedom of religion grants religious institutions the marriage ceremonies of same sex couples if they deem it fit not to do so.

In the Supreme Court case of *M v. H,*[57] the court held that same sex couples were entitled to receive many of the financial and legal benefits commonly associated with marriage. However, this decision stopped short of giving them the right to full legal marriage. Most laws which affect couples are within provincial rather federal jurisdiction. As a result, rights are varied somewhat from province to province.

Furthermore, in *Halpern v Canada,*[58] the Court of Appeal, Ontario confirmed that current Canadian law on marriage violated the equality provisions in the Canadian Charter of Rights and Freedoms as it restricted marriage to heterosexual couples. The court did not allow the province any grace time to bring its laws in line with the ruling, making Ontario the first jurisdiction in North America to recognize same sex marriage. The Ontario Court of Appeal further declared the Divorce Act unconstitutional for excluding same sex marriages. It ordered same sex marriages read into Act, permitting the plaintiffs, a lesbian couple, to divorce.

A Ruling quite similar to the Ontario ruling was issued by the British Columbia Court of Appeal on 8 July, 2003. Another decision in British Columbia in May of that year had required the

[57] [1999] 2 SCR 3.
[58] Halpern v Canada (A.G), (2003) 169 O.A.C. 172 (CA).

federal government to change the law to permit same sex marriages. The July ruling stated that "any further delay…will result in an unequal application of the law between Ontario and British Columbia[59]". On May 19, 2004, the Quebec Court of Appeal ruled similarly to the Ontario and British Columbia courts by upholding *Leboeuf's case*. In *Dunbar & Edge v Yukon (Government of) & Canada (AG)* [60] the Yukon territorial Supreme Court issued another similar ruling with immediate effect. Rather than reproducing the Charter equality arguments used by the courts, the Court ruled that since the provincial courts of appeal had ruled that the heterosexual definition of marriage was unconstitutional, it was unconstitutional across Canada. It further ruled that to continue to restrict marriages in Yukon to opposite sex couples would result in an unacceptable state of a provision being in force in one jurisdiction and not another.

4.3 Conclusion

This chapter concludes by the divergent views of the western countries that have legalized same sex marriage into their jurisdiction and also their justification for adopting it such as United States of America as seen in the case of *Obergefell v Hodges,*[61] South Africa legalized same sex with the introduction of the Civil Union Act, 2006 and Netherlands etc. However, some countries refused to adopt the same sex marriage into their doctrine or jurisdiction despite the pressure from other Countries that have adopted it such as Uganda because it is contrary to the country's cultures, moral and religious beliefs.

[59] Leboeuf v Quebec.
[60] [2004] YSKC 54.
[61] 576 US 135 (2015).

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This Chapter analyzes the impact of the Same Sex Marriage (Prohibition) Act, 2013, its implication and the far realizing effect it has had on marriage and its forms in Nigeria. It takes a sequential view at the various chapter that contributes to the buildup of this work, ranging from the first chapter to the very last chapter. This was an attempt to compact the arguments and thoughts forming the basis of this work into a unified whole.

5.2 Summary

The first Chapter evaluates the very aim of this work, which lays a background for the understanding of the work.

A further step is taken in Chapter two to understand the scope of marriage, legal sanctity of marriage as judicially recognized in *Onwudinjoh v Onwudinjoh,*[1] purpose of marriage, same sex marriage contradicts to marriage as well as the concept and history of same sex marriage from Africa and other jurisdictions such as Greece etc.

From this, an attempt was made to appraise the various legislation the Nigeria Criminal Code, penal code, sharia law as well as the Same Sex Marriage (Prohibition) Act, 2013 in Nigeria. It also treats the issue of same sex marriage neglecting privacy and family life. This forms the crux of this work. It embodies the writers view and the remarks associated with the divergent views. It

[1] [1957/58] 1 ENLR 1.

also considers the position of the law as regards to woman – to –woman marriage especially in Igbo land.

The preceding Chapter seeks the evaluation of the legal position of same sex marriage in western jurisdictions.

The final Chapter seeks to summarize and recommend steps, believed by the writer to put to rest the contention associated with same sex marriage. It concludes by holding firm to these assertions and tabling the thoughts forming the basis of this work chronologically.

The General Summary is According to international legislation, same-sex marriage has been legalized, and couples who marry of the same sex are now granted the same privileges as heterosexual couples. However, some nations continue to resist this practice because they find it odd and believe it violates morals and common sense. As a result, I have declined to support marital neutrality legislation. The current law in Nigeria, the Same Sex Marriage (Prohibition) Act 2013, forbids and makes illegal any civil union or marriage between people of the same sex. According to the Act, "the coming together of persons of the same sex with the aim of living together as husband and wife or for other purposes of same sexual relationship" is referred to as a same-sex marriage. A federal Constitution that serves as the nation's fundamental law governs Nigeria, a sovereign state with federating units. During the colonial era, same-sex partnerships and/or unions were illegal in Nigeria. In Nigeria, the legal concerns surrounding marriage have long since been resolved. Therefore, it is illegal to associate or unionize with people of the same sex in Nigeria. Because Nigeria affirms marriage to be a connection or union between heterosexual couples, the problem of gender neutrality in marriage and marriage legislation does not arise there.

5.3 Recommendations

Given the state of the law, same-sex marriage in Nigeria will likely remain novel to the country's legal system for a very long term. The truth of this claim does not, however, change the necessity of putting measures, strategies, and policies in place to guarantee the maintenance of the status quo. This is crucial because, as previously explained, society's level of disintegration has been rising hourly in recent years. For this reason, above all else, I recommend the following in relation to this work:-

(1) It should be noted that Nigeria's current socio-legal position on homosexual partnerships is the result of careful examination of the country's inherent religious and cultural values. All ethnic groups in Nigeria have different traditions and customs, and such a practice is foreign to them. We therefore suggested that state policies be adopted to preserve cultural ethics and norms. As westernization continues to grow, traditions and values are typically lost, which lowers the bar for morality and makes it easier for people to define morality differently. Policies will go a long way toward preserving the ethos and heritage with the added benefit of fostering the same types of values that have been the target of criticism directed at the idea of same-sex marriages in Nigeria if they are given to traditional leaders and others sub-leaders who can permeate the system with them.

(2) It cannot be overstated how important it is for the Nigerian government to step up its sanctions against homosexual tolerance. Even though same-sex partnerships are not legal in Nigeria, we cannot pretend that many Nigerians do not already have a predisposition to these behaviors. Some people could even think the penalties are too light to convince them to change their sexual orientation at its core. Therefore, it is imperative that the Nigerian government review the same sex marriage (prohibition) Act in order to

strengthen the penalties currently stipulated in those laws. Despite the recent moratorium on the death penalty in other countries, I sincerely suggest that section 5(1) of the same sex marriage (prohibition) Act, which imposes a 14 years sentence for those who enter into a same sex marriage contract or any civil union, be changed and raised to a life sentence. The wording of Section 5(2) of the Same Act should be changed to read "14 years imprisonment" instead of "10 years imprisonment" for anyone who registers with, operates, or participates in gay clubs, societies, or organizations in Nigeria, or who directly or indirectly displays same sex-romantic relationships in public. In accordance with subsection (3) of the same section, this should also apply to individuals who administer, witness, facilitate, or assist in the solemnization of a same sex marriage or civil union or who support the registration, operation, and maintenance of gay clubs, societies, organizations, processions, or meetings in Nigeria.

(3) Finally, these jails where the same sex partners would be serving sentences require counseling and rehabilitation facilities. Given that the purpose of these institutions is to orient and reeducate inmates about their sexual orientation, they should be well-equipped.

5.4 Conclusion

This work concludes by drawing an analogy that, it is commonly accepted that the traditional legal definition of marriage, given by Lord Penzance in the *Hyde case,*[2] is the "voluntary union for life of one man and one woman, to the exclusion of all others." Marriage is viewed as a connection between a man and a woman in Nigeria according to the Marriage Act, customary law, and Islamic law (although a man understand the Islamic law can get married to at least four wives, it is apt to state that the union remains one with a man and a woman). The custom of

[2] [1866] L.R. 1 P. & D. 130.

marriage has a long history. All other institutions get their existence from this fundamental institution.

But regrettably, there seems to have been a significant shift in how most nations throughout the world view the institution of "marriage." Nations (mostly western nations) now have legislation permitting same-sex marriage in their nation, demonstrating this ideological movement. And in fact, they have set out on a mission to persuade other countries to follow suit. The practice of gay relationships has been denounced in this work as an unacceptable expansion of the general moral principles that form the basis of interpersonal relationships. The argument of discrimination and universal fundamental rights appears to be the mainstream justification utilized in this work to promote or legitimize the business of gays. It is claimed that these justifications can always be used to explain moral turpitude of any kind, hence they may not always be valid.

It's interesting to note that Nigeria still adheres to the common law definition of marriage, which states that a marriage is a union of a man and a woman. Additionally, it is acknowledged that the National Assembly's subsequent action in passing the Same Sex Marriage (Prohibition) Act 2013 has put the last nail in the coffin for any remaining doubts about the actual state of the law in Nigeria regarding same-sex unions. It strongly reaffirmed Nigeria's view on the matter from a legal standpoint.

Nigeria, the largest country of African descent, has a responsibility to protect its cultural legacy. The liberalism that permeates these societies is a major driving force behind the legalization of same-sex unions in many nations. For instance, despite all the challenges, America continues to be a nation based on the ideas of liberalism and equality. The disparate societies and ethnic groups that make up Nigeria, in contrast, uniformly detest such liberal activities for ethical and religious grounds. Therefore, it would be offensive if the National Assembly passed a legislation

granting all of these socio-cultural groups the right to have homosexual relationships. Although the traditional justifications of human rights will justify the adoption of such an Act, it is argued that the consequences will be crippling for a developing nation like Nigeria. It only takes a little while for the other components of culture to gradually erode to the point where it causes social collapse when one aspect of culture is changed. Therefore, it is the responsibility of the Nigerian government to take the lead and safeguard the black race's culture and heritage, which typically views homosexual behavior as sinful and alien. A piece of legislation that continues to represent the beliefs and worldviews of the general public is the Same Sex Marriage (Prohibition) Act of 2013. The reason that statute is legitimate—aside from the fact that it is legal—is that it properly embodies the sociocultural ethos of the Nigerian state with regard to marriage and sex. As long as it is in effect, this legislation will be unstoppable and lauded.

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