

**SAME SEX MARRIAGE:
TOWARDS UNDERSTANDING THE NIGERIAN POSITION.**

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**A PROJECT WORK WRITTEN AND, SUBMITTED TO THE FACULTY OF
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CERTIFICATION

I, **Favour Efosa EBHOAYE** (Mat. No. LAW1704695) hereby certify that apart from the references made to other people's work as duly acknowledged herein, this entire project is the product of my personal research, and has neither in part nor in whole been presented for another degree elsewhere.

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APPROVAL

We certify that this project work was completed and written by **Favour Efosa EBHOAYE (Mat No. LAW1704695)**, in partial fulfillment of the requirements for the award of the Bachelor of Laws (LL.B) Degree of the University of Benin.

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DEDICATION

I dedicate this work to God Almighty who makes all things possible and to my parents, Mr. and Mrs. Lucky Ebhoaye as a means of appreciation for all that they have done for me during the course of my Bachelor's degree program.

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Hyde v. Hyde (1886) LR 1 PD 130. 133

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Nachimson v. Nachimson (1930) P. 217, CA

Naz Foundation v. Govt of NCT of Delhi WP(C) No. 7475/2001

Obergefell v. Hodges (2015) 576 US 644

Obiekwe v Obiekwe (1963) 7 ENLR

United States v Windsor (2013) 570 US 744

Valier v Valier (1925) 133 LT 830

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Bauchi State Sharia Penal Code Law No 16, 2001.

Civil Marriage Act 2005.

Civil Union Act 17 of 2006.

Criminal Code Act, Cap 38 LFN 2004.

Constitution of Federal Republic of Nigeria (as amended) cap C23, LFN, 2004.

Constitution of the Republic of South Africa CRSA Act 108 of 1996.

Domestic Violence Act 116 of 1998.

Employment Equity Act 55 of 1998.

Evidence Act 2011.

Kaduna State Sharia Penal Code Law No 4, 2002.

Kano State Sharia Penal Code Law.

Katsina State Sharia Penal Code (Amendment) Law No 21, 2000.

Kenyan Penal Code 2009.

Marriage Act 1914.

Matrimonial Causes Act, Cap M7 LFN 2004.

Medical Schemes Act 131 of 1998.

Nigerian Armed Forces Act, Cap A20 LFN 2004.

Same- Sex Marriage (Prohibition) Act, 2013.

Same-Sex Marriage (Prohibition) Bill 2006.

Sexual Offences Act 23 of 1956.

Sharia Penal Code Law of Zamfara state No 10, 2000.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Right
AFA	Armed Forces Act
CCA	Criminal Code Act
CFRN	Constitution of Federal Republic of Nigeria
CRA	Child's Rights Act
ECHR	European Convention of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IGLHRC	International Gay and Lesbian Human Rights Commission
HRW	Human Rights Watch
LFN	Laws of the Federation of Nigeria
MCA	Matrimonial Causes Act
PCA	Penal Code Act
SSMPA	Same-Sex Marriage (Prohibition) Act
UDRH	Universal Declaration of Human Rights.
UN	United Nations

ABSTRACT

The concept of same-sex marriage in recent times is one of the recurrent controversial issues universally, and this is especially so with its criminalization in some countries. It is not a new phenomenon. There are conflicting views on same sex relationships and nations of the world are at disparity on this score. With the passage of time, it is glaring that the law is being influenced as a result of growth and development of science. A controversial issue in the argument on same sex marriage in Nigeria is whether marriages between people of the same gender is foreign to Nigerian culture and tradition.

The traditional marriage system in Nigeria has been particularly challenged by the rising visibility of same-sex relationships and marriages. Nigeria does not recognize or accept same sex relationships and this decision by the legislature is hinged on moral, religious and traditional values and the country has established this by passing the Same Sex Marriage (Prohibition) Act (SSMPA) 2014 into law. This law prohibiting same sex marriages and civil unions has been criticized by some of the international community on grounds that same sex activities are considered acts between two consenting adults as purely private affairs and ought not to be the state's concern. A major question that arose with the implementation of the SSMPA was whether the new legislation would infringe the rights of the Lesbian, Gay, Bisexual and Transgenders (LGBTs) and in extension, the Nigerian Constitution which safeguards the rights of citizens.

In light of the foregoing, this study examines the legality and framework of the anti-gay law in Nigeria and seeks to establish the impact same sex unions have on Nigerian culture, morals and the value system as a whole due to the fact that Nigeria is a highly moralist state.

CHAPTER ONE

GENERAL INTRODUCTION

The term “homosexuality” is the romantic and sexual interest and attraction of a person towards members of the same sex or gender. Etymologically, the term “homo” is of Greek origin and it means “one” or of the same and “sexual” means being connected to the activity of sex¹. Collins Web-Linked Dictionary of Sociology² defines homosexuality as the desire for sexual relationship with persons of the same biological sex. A major part of this research revolves round this concept.

A homosexual person prefers sexual or intimate relations with persons of the same sex as them. Homosexual practice is not a new phenomenon. It is an age long practice which has been recorded across various cultures and historical periods and ranging from age to age, has been condemned, extolled, punished and tolerated due to activism such as gay rights movement in present day.

Some important terms which will be used repeatedly throughout this long essay will be defined below;

A heterosexual is romantically and sexually attracted to people of the opposite sex. In Nigeria, heterosexuality is the only permitted sexual orientation.

The term *gay* is constantly used in lieu of homosexual. A male homosexual is often regarded as gay and female homosexuality is known as *lesbianism*. A lesbian is a woman who is sexually

¹ Oxford Advanced Learners Dictionary, 7th Ed. Oxford University Press.

² 3rd Ed(New York, Harper Collins Publishers, 2000)

attracted to another woman or who engages in sexual activity with another woman exclusively. The Sharia Penal Code Law of Zamfara State, one of the sodomy laws in Nigeria also described lesbianism stating that ‘whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of sexual excitement of one another has committed the offence of lesbianism’.³ The word ‘lesbian’ derives from the name of the Greek island of Lesbos⁴, home to the poet, Sappho whose poetry reflects on the beauty of women and her love for girls.

The polar opposite of a lesbian is a gay person. The term ‘gay’ refers to a man who has a strong desire for sexual, romantic, and intimate relationships with other men.

Bisexuality is the attraction to both sexes on a romantic and sexual level and such people are referred to as bisexuals.

People who are transgender or transsexuals believe that their true sex is not the one that has been assigned to them in terms of their biological and anatomical sex characteristics. To transition to the sex with which they identify psychologically, many undertake sex-change surgeries.⁵ It is worthy of note that this research does not include transgendered people. The acronym 'LGBT' (lesbian, gay, bisexual, and transgender) is a blanket term used when a larger reference to the sex and gender non-conforming population is made.

Homosexuality was classified as a form of mental illness in the 19th and 20th centuries and through legislation, it was an offence punishable with terms of imprisonment in various countries. However, at the beginning of the 21st century, different nations of the world (particularly European nations) reviewed their legislations on this score.

³ Sharia Penal Code of Zamfara State, section 134.

⁴ Lesbos is a Greek island located in the Northwestern Aegean Sea.

⁵ C Visser & E Picarra ‘Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism’ (2012) 28 *South African Journal on Human Rights* 506-511.

The definition of criminal behavior differs from country to country. In many countries, homosexual marriages and other same sex relationships are currently accepted and normalized by state institutions and civilized society. European countries like Sweden, the United Kingdom, Netherlands have legally recognized same sex marriage. In addition, in South Africa presently, the Supreme Court of Appeal on 30 November, 2004 declared that the common law concept of marriage must include partners of the same sex. Judge Edwin Cameron in the ruling 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”⁶. This is in a bid to protect and guarantee the enjoyment of right to freedom of private and family life of citizens without interference by public authority.⁷ The right to Private and Family life is also constitutionally protected in Nigeria⁸.

In contrast, in majority of African countries, same sex unions are outlawed and prohibited. Such marriages and relationships are viewed as alien and out of the ordinary to African cultures, traditions and against the laws of nature. In fact, the Nigerian government in 2014 took a bolder step further and signed the Same Sex Marriage (Prohibition) Bill 2011 into law prohibiting same sex unions in Nigeria. This Bill was passed on the 29th of November, 2011. Before the Bill was passed, a lot of arguments arose against the Bill being passed into law on grounds that it violates the constitutional rights of citizens such as right to freedom from Discrimination⁹, right to freedom of religion and belief¹⁰ inter alia. Nigeria is also a member state of some international treaties that protect the aforementioned rights such as the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples’ Rights, inter alia.

⁶ *Minister of Home Affairs and Anor v Fourie* 2006 1 SA 524 (CC).

⁷ Article 8 of European Convention of Human Rights 1998.

⁸ Constitution of the Federal Republic of Nigeria 1999, s42.

⁹ *Ibid* s37.

¹⁰ *Ibid* s38.

The Same Sex Prohibition Act (SSMPA) 2014¹¹ not only prohibits marriages and civil unions between people of the same sex in Nigeria but criminalizes same.¹² Section 3 of the Act explicitly states that only a marriage contracted between a man and a woman shall be recognized as valid in the country. Countries like Uganda, Burkina Faso, Saudi Arabia and Iran are some of the countries that have enacted penal laws for same sex practices with sanctions that even include life imprisonment. However, even before the passage of the SSMPA, other laws criminalizing same sex acts between consenting adults still existed in the Federal Criminal Code Act and the Federal Penal Code Act. These laws are otherwise referred to as sodomy laws.

There are various forms of same sex coupling. This union may be in the form of amorous or lustful relationship, domestic partnership, cohabitation, civil unions or marriage. In Nigeria, it can be said that majority of the same sex couples merely cohabit since they are not legally recognized as a couple.

Cohabitation is defined as the living together and having sexual relationship without being married.¹³ Domestic partnership is not a marital relationship between persons of the same or opposite sex living together as a couple for an outstanding period of time. These partnership agreements contain adoption rights, health benefits and other legal rights granted to married couples.

Civil partnership is also referred to as civil union. It is a marriage-like relationship, created for same-sex couples in jurisdictions where they were not allowed to get married legally.¹⁴ Section 7 of the SSMPA defines civil union as. “Any arrangement between persons of same sex to live

¹¹ The Act was assented by former President Goodluck Jonathan on 7th January, 2014.

¹² The long title of the SSMPA 2014 reads as follows: ‘An Act to prohibit a marriage contract or civil union entered into between persons of the same sex, solemnization of same, and for related matters’.

¹³ Oxford Advanced Learners Dictionary 6th Ed.

¹⁴ <https://www.findlaw.com/family/domestic-partnerships/what-is-a-civil-union.html>(accessed 18 February 2022).

together as sex partners, and shall include such descriptions as adult relationships, caring partnerships, civil solidarity pacts, domestic partnerships, reciprocal beneficiary relationships, registered partnerships, significant relationships, stable unions etc.”

Nigerian courts do not recognize any of the aforementioned partnerships contracted abroad.¹⁵

The purpose of the SSMPA is not only to prohibit marriage between persons of the same sex. The Act has a wider scope which encompasses prohibition of registration of gay clubs and organizations. However, this has been criticized by the international community for the violation of human rights and international obligations.

1.2 STATEMENT OF RESEARCH PROBLEM

The purpose and relevance of marriage is now a contentious topic due to increasing trends of recently developed concepts of marriage. In the Nigerian philosophy of marriage, marriage is sacred and held in high esteem but this institution is now being threatened by members of the LGBT community in the country. The Nigerian position on the subject must be examined adequately and understood.

1.3 AIM AND OBJECTIVES

¹⁵ SSMPA s1-3

The following are the research's aim and objectives;

1. This research is aimed at undertaking a thorough study and outlook of the legal systems of other countries where same sex practices have been recognized and accepted.
2. To critically and objectively evaluate the Nigerian situation and examining her laws on the subject.
3. This long essay seeks to examine the issue of same sex marriage generally, from a legal and moral perspective; to analyze critically, the position of the law and morality with regards to same sex marriage.
4. To ascertain the justification for criminalizing same sex conduct in Nigeria.
5. The work also seeks to investigate the remote and immediate implications of legalizing same sex relationships in Nigeria and how that will affect other laws already in place and making recommendations on the findings from such analysis.

1.4 RESEARCH METHODOLOGY

The researcher shall adopt the doctrinal (analytical) and comparative approaches and use of primary and secondary sources such as case law, statute books, library materials, journal articles (local and international), online articles, other legal sources and historical materials relevant to the topic. The same-sex marriage legislation of other jurisdictions such as United States of America, Netherlands and South Africa shall also be analyzed and compared. The Nigerian Association of Law Teachers (NALT) style of citation shall be employed to provide sources of this research.

1.5 SCOPE AND STRUCTURE OF THE STUDY

This long essay is divided into five chapters.

Chapter one of this research work is to introduce the subject to the reader, state the problem statement and objectives of the work. The introduction contained in this first chapter will help guide the reader to understand the subsequent chapters.

Chapter two includes the history and definition of same sex marriages and how it contrasts with the purpose of marriage as it relates to Nigeria in its ordinary sense.

Chapter three discusses the recognition of same sex unions in Western societies and how the status of same sex marriages changes as legislation takes place around the world. The chapter also focuses on the relationship between law and morality.

Chapter four focuses on the attempts made by the Nigerian legislature in stopping the scourge and utilizing law as a means to preserve morals.

Chapter five is a conclusion of the project with possible recommendations and a proposal for legal reforms.

CHAPTER TWO

THE MARRIAGE INSTITUTION

2.1 Introduction

This chapter starts with an examination of the nature and meaning of marriage, its traditional purpose and the purpose for establishing this institution. Marriage is a worldwide cultural concept. However, how different cultures view marriage is influenced by a variety of elements such as customs, gender roles, and religion, among others. The gender of parties of a marriage has now become an issue of social debate around the globe as countries especially Western countries have shifted towards the acceptance and legal recognition of same-sex marriages. This arguably, is to keep pace with changes in times and climes. All major English dictionaries, some statutes and sociologists have revised their definitions of marriage to include same-sex unions as a result of this and this was achievable with the exclusion of morality from the law.

The chapter progresses to a critical study and analysis of the evolution and historical development of same sex practices.

2.2 Definition of Marriage

Marriage is a legal, sacred and formal union of two people to become one which results in the man and woman living together and procreating. Marriage has long been viewed by Christians as an institution created by God and the parties to it are man and woman¹ as it is as old as the creation of man. Despite the personal nature of marriage, it is a legal relationship regulated by

¹ Genesis 2:24, Matthew 19:4-6, King James Version.

the state. It is an ancient, important social institution governed by the social and religious norms of a society². Every society makes laws that regulate the marriage institution.

The concept of marriage has been generally understood to mean a voluntary union for life of one man and one woman, to the exclusion of all others. This popular classic legal definition in *Hyde v Hyde*³ precludes unions between members of the same sex and implies that marriage as a sacred union should be between heterosexual couples (members of the opposite sex) with a view to becoming husband and wife and bearing children.

Procreation is a very key ingredient of marriage in the Nigerian philosophy of marriage and deemed only to happen between a man and woman and not with people of the same sex.

Although the formalities for entering into marriages may differ among various cultures and places, it is nevertheless universally recognized and accepted and as such, has some legal rights and responsibilities conferred on both parties referred to as consortium. Spouses in a **valid** marriage, in addition to enjoying certain rights, owe each other certain duties and obligations. Some of the attributes of consortium which have been considered by the courts include: change of name, duty to cohabit and sexual intercourse. When a man and a woman get married, although it is common for a wife to drop her surname and take that of her husband, it is not required by law. A divorced wife can keep her husband's surname, and the husband cannot prevent her from doing so through an injunction⁴.

Another aspect of consortium is the duty of cohabitation but it is not limited to physical cohabitation. Spouses also have the duty to cohabit except through mutual consent of both

² E.I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers 2014) 4.

³ (1886) LR 1 PD 130. 133.

⁴ *Cowley v Cowley* (1901) AC 450. See E.I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers 2014) 86.

parties, they live apart due to working conditions etc., as long as they still maintain one household.

Parties to a marriage must also consummate the marriage. One party's failure to do so by reason of impotency is a ground for nullity⁵. Another ingredient of consortium is mutual defence and this connotes the right of a spouse to exercise reasonable force in the defence or for the purpose of protecting the other spouse who is being assaulted. A person who acts reasonably necessary in the defense of himself or another against actual and unlawful threat of violence is not guilty under the Criminal Code Act (CCA)⁶ As a result, a husband or wife may use reasonable force to defend themselves in the face of a threat. In Nigeria, there is the general belief that same sex unions contrast with the natural and traditional ideology of marriage and it is for this reason that parties to same sex marriages do not enjoy these benefits.

Parties of same sex marriages do not also enjoy the degree of acknowledgement and social respect accorded to valid marriages in Nigeria. The Nigerian courts recognize only heterosexual unions. Madarikan JSC in the Nigerian case of *Meribe v Egwu*⁷ stated:

“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 permit such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and not to be upheld by the court”

⁵ MCA 1970 s5(1)(a).

⁶ Section 32 (3) Criminal Code Act. Section 33 (2) (1) CFRN 1999.

⁷ (1976) 10 SC 181 at 186.

Also, in *Ijoma v Ijoma*⁸, Saluwa JCA while deciding on the meaning and nature of marriage stated that the word marriage literally means the legal union of man and woman as husband and wife.

Although the term “marriage” is not explicitly defined in the Matrimonial Causes Act 1970, it can be deduced from its context to mean a union between a man and a woman through the definition of the phrase ‘children of the marriage’ which is given as “any child of the husband and wife born before the marriage, whether legitimated by the marriage or not...”⁹ Also, the use of the terms ‘husband’ and ‘wife’ indicates that the Matrimonial Causes Act in Nigeria recognizes only the union between a man and a woman.¹⁰

2.3 Legal Characteristics of Marriage

Marriage is a valid contract which contains rights and obligations prescribed by law only between a man and a woman who have the capacity to enter into the contract which bestows upon them the legal status of husband and wife. Some general characteristics of a marriage include;

Firstly, marriage creates special status which is universally recognized in all societies. Also, it is designed to fulfil biological, psychological and religious purposes. Another feature is that marriage establishes family through procreation. According to Henry Tichler, marriage in its

⁸ (2009) 2 NWLR (PT 1156) 607.

⁹ MCA 1970, s69(b).

¹⁰ Magaji Chiroma and Awwal Ilyasu Magashi, ‘Same-Sex Marriage versus Human Rights: The Legality of the “Anti Gay & Lesbian Law” in Nigeria’ [2015] 4(1)_International Law Research_ 14.

traditional and usual sense includes essential aspects such as being performed in a public and formal manner, legitimizing offspring and being intended to be a stable partnership.¹¹

It differs from other commercial contracts in certain aspects. One of these is that a marriage contract cannot be discharged in the same way as other contracts by frustration or agreement but a marriage can be ended by death of one of the parties or a decree of dissolution by a competent court having jurisdiction to do so, at the instance of one of the parties. Furthermore, the rules governing the capacity of the parties to a marriage contract are distinct from those that apply to a commercial contract. This means that there are certain legal characteristics peculiar to a contract of marriage.

From the popular definition of marriage given in *Hyde v Hyde (supra)* by Lord Penzance¹² which refers to statutory monogamous marriage, there are three major conditions which have been derived from this definition which are:

1. It must be voluntary.
2. It must be for life.
3. The marriage must be monogamous.

The Marriage must be a voluntary union

One of the major elements of a valid marriage is that it must be the result of the free consent of both parties. Just like other commercial contracts, consent is a prerequisite of marriage and absence of consent or consent obtained by duress or fraud whereby a person's will is overborne

¹¹ Akpan C.O, 'The Morality of Same Sex Marriage: How Not to Globalize a Cultural Anomie' [2017] (13)(1). *Online Journal of Ethics* <<http://dx.doi.org/10.18785/ojhe.1301.02>> (accessed 22 February 2022).

¹² n2

by pressure will vitiate the agreement. Section 3(1)(d) of the Matrimonial Causes Act (MCA) 1970 provides that where the consent of the parties was obtained by duress or fraud, where a party is mistaken as to the identity of the other party or as to the nature of the ceremony being performed, or where a party is mentally incapable of understanding the nature of the marriage contract, the marriage is void. In *Valier v Valier*¹³ an Italian who did not fully understand English language was fooled into signing some documents at a marriage registry by a British woman while thinking he was celebrating a ceremony of betrothal. The marriage was held to be void since he was mistaken as to the nature of the ceremony and had not given his free valid consent. A marriage without consent initially obtained can also be ratified by the conduct of the party whose consent was initially absent.

The Marriage must be for Life

The definition given by Lord Penzance referred to the traditional view in Western Europe based on the Christian belief has been viewed as flawed because it does not give room for divorce. However, for over eight years before this judgment, divorce by judicial process was available. Thus, the definition does not mean that marriage is indissoluble. What the judgment could be taken to mean is that the parties contemplate the union being for life and having the intention that it should last for life.¹⁴

The Marriage must be Monogamous

By virtue of Section 35 of the Marriage Act 1914, neither one of the parties to a statutory marriage may celebrate another statutory or a customary law marriage so long as the statutory

¹³ (1925) 133 LT 830.

¹⁴ *Nachimson v Nachimson* (1930) P. 217, CA.

marriage subsists. Such act constitutes an offence and whoever is found guilty shall be liable to imprisonment for five years.¹⁵

As this definition of marriage presumes that marriage must exist between a man and a woman, adhering to this strict definition has led to same sex couples being denied the right to marry. However, in some cases, it has proved difficult to determine the sex of some people who have gender identity dysphoria, which is the incongruity between the gender assigned to them at birth and their personal sense of their gender. They may undergo surgical operations to change their gender and transition from female to male or vice versa thereby becoming transsexuals. This difficulty arose in *Corbett v Corbett*¹⁶. In that case, the petitioner and respondent got married. The respondent had undergone surgery for the removal of testicles and construction of an artificial vagina and lived as a woman with the knowledge of the petitioner. In December 1963, the petitioner filed a petition for a decree of nullity on the ground of willful refusal to consummate. Ormrod, J. observed: "...Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormones which can exist in a person with male chromosomes, male gonads and male genital cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage..."

The court applying the three criteria of chromosomal, gonadal and genital tests and did not recognize the new sex of a person that underwent sex change operation concluded that the respondent had remained a biological male and not a woman for the purpose of marriage and therefore, the marriage was void. Although the Nigerian courts have not encountered this scenario, it is argued that the ruling in this English case represents the legal position in Nigeria.

¹⁵ MA 1914, s47.

¹⁶ (1970) 2 ALL ER 33.

However, a major expert on family law in Nigeria has argued that gender reassignment should be recognized by law for the purposes of determining the legitimacy of a marriage under Nigerian law.¹⁷

However, this decision has not been followed in many countries and was not followed in *Goodwin v United Kingdom*¹⁸. The court found for the applicant on ground that there was an emerging European consensus in favour of legal recognition of transsexual's adopted gender.¹⁹

Presently, the influence of homosexuality has grown and marriage has been redefined to mean a union between two consenting adults. Section 1 of the Civil Marriage Act²⁰ posits that marriage is a contract which can be entered into between two persons whether of the same sex or of opposite sex.

2.4 Same-Sex Marriage in Contrariety with Purpose of Marriage in the Ordinary Sense

Same sex marriage can also be referred to as gay marriage or sodomite marriage. It is the union of two people of the same sex who live as a family together. 'Sodomy and sodomy laws' are used in place of homosexual acts and homosexuality laws. The word 'sodomy' originates from the Biblical city of Sodom and Gomorrah where the act of same-sex practice was first noted. Under Nigerian criminal law, sodomy has been defined and penalized and are among the

¹⁷ See E.I. Nwogugu, *What Next in Nigerian Family Law?* (2006). Nigerian Institute of Advanced Legal Studies 11-13.

¹⁸ 41 ILM (2002) 1285 12.

¹⁹ E.I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers 2014) 6-7

²⁰ The Civil Marriage Act is a federal statute legalizing same- sex marriage across Canada.

practices tagged ‘offences against morality’ and ‘unnatural offences.’ Section 284 of the Criminal Code Act²¹ and Penal Code²² make provisions for sodomy.

Same-sex marriage is defined by the Same sex Marriage (Prohibition) Act as ‘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’.²³

To reiterate, marriage is a naturally existing sacred institution which gives rise to certain rights and obligations which makes couples gain social recognition. Marriage is founded on contract and established by law and existed prior to the existence of legal systems. It is far more than a personal relation between a man and a woman. The state recognizes such pre- existing social institutions and regulate them to serve public interest.

Family values in Nigeria are strong and remain the foundation of the Nigerian society. Marriage, in Nigeria is held in high esteem. The Nigerian society, culturally, morally, religiously, statutorily, frowns at any form of same sex relationship. Same- sex marriage prohibition is attached to the influence of culture and religion which is integral to the lives of Nigerians. Some religious organizations are of the view that same sex unions are unnatural and dysfunctional and are termed abominable²⁴. The religious argument is founded on the ground that God commanded humans to multiply on earth and since same sex couples cannot procreate without modern unnatural methods, homosexual relationships hinder this plan.²⁵

²¹ Cap C38 LFN 2004.

²² Cap P3 LFN 2004.

²³ SSMPA 2014 s7.

²⁴ Romans 1: 26-27 KJV.

²⁵ A comprehensive analysis of religious beliefs and argument against same sex marriage is discussed in chapter four of this work.

In Nigeria, one of the ordinary purposes of marriage is procreation (bearing of children), marriage without procreation is incomplete. In Nigeria, a man or woman is defined not only by their biological or gender characteristics, but also by their ability to impregnate and give birth to children. Same-sex unions are incompatible with the African system and unfit to sustain African values and customs because they cannot generate children on their own. As a result, Nigerians regard same-sex marriage as a moral insult to the concept of marriage in both substance and practice, which is one of the main reasons it is not legally recognized.

The Nigerian ethical system opposes homosexuality. This is understandable from the moral orientation of Nigerian society. The institution of marriage between two separate sexes is the sole mechanism within which a sexual desire and human birth can be realized, according to Nigerian cultural values, norms, and traditions. One of the ideologies among traditional Nigerians is that, because marriage is a community affair and kinship survival is dependent on this structure, a person who dies without being married has failed to fulfill some of his societal obligations, and in some societies, such a person may be ridiculed.²⁶ This belief is not peculiar to only Nigeria but also to a majority of African nations.

Another Nigerian ideology is that the public and natural purposes for which marriage has been created are best achieved when the parties are of different gender. For procreation to occur, there must exist the male and female reproductive organs. Where the reproduction is asexual which could occur through artificial insemination, the male sperm is required to be inserted into a female cervix. It cannot be done solely by a man or woman. A vast majority of Nigerians are extremely sensitive and reluctant to any deviation in terms of sex and procreation in any form

²⁶ Joseph Onuche, 'Same Sex Marriage in Nigeria: A Philosophical Analysis' [2013] *International Journal of Humanities and Social Science* (3)(12) 91-92.

and in a same sex relationship, the purpose of marriage in respect to procreation would have been defeated.

2.5 Emergence of Same-Sex Relationships from a Historical Perspective

There is the presumption that same-sex marriage is a novelty. However, only its explicit legislation is. The agitation for its recognition in law is a paradigm shift as this form of relationship was hitherto not recognized and prior to this time, a vast majority of people showed strong resentment towards the practice. In fact, the legal recognition of couples of such unions is relatively new. The beginning of same sex activities is obscured and cannot be stated with express precision. Social attitudes towards homosexual practices have changed over the years from express abomination and penalization of such acts to its acceptance in various societies.

The origin of homosexuality can also be traced to the Bible where the practice of sodomy in Sodom and Gomorrah was described by God as an abomination. The Biblical story is narrated thus; Lot was visited by two angels of God and he persuaded them to be his guests for that night. The people of Sodom were severely immoral. The men in the city, both young and old came to Lot's house demanded to have sex with the angels.²⁷ As a result of this, God destroyed the city and this has been interpreted by Christians as God's express disapproval of homosexuality.

Also, in the book of Leviticus, it was stated; "You shall not lie with a mankind, as with a womankind, it is an abomination"²⁸

²⁷ Genesis 19:4-5 King James Version.

²⁸ Leviticus 18:22 KJV.

In addition, the Bible also records homosexuality in the New Testament in the book of Romans.²⁹

2.5.1 GREECE

The ancient Greeks and Romans had a lack of terminology for the concept of ‘heterosexual’ and ‘homosexual’. These terms were not applicable to Greek antiquity. Same- sex marriages were accepted in ancient Greece, Mesopotamia and Rome. It is often stated that Greek culture is the most accepting of homosexuality. Writers like Plato and Athenaeus explored homosexuality in their works. Greek gods such as Zeus, Achilles and Hercules had stories of same-sex exploits attributed to them. Plato, in his book the *Symposium*, argues for an army to be comprised of lovers of the same sex.³⁰

Records of sexual relations between women are infrequent. However, Sappho, a poet from Lesbos wrote various love poems which were addressed to women and described erotic scenes of female intercourse but majority of her work is lost.

The predominant form was between adolescent boys and adult men known as pederasty and to the Ancient Greeks, this was the purest form of love because it was a way to gain knowledge and receive education. Plato described his teacher, Socrates as “boy crazy” who lost his senses in the presence of beautiful boys and could only cope with the attraction by teaching them.³¹ The Greek

²⁹ n17.

³⁰ Pickett, Brent, “Homosexuality”, *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edn), Edward N. Zalta (ed.)<<https://plato.stanford.edu/archives/spr2021/entries/homosexuality/>>

³¹ Livius.org.2020 *Greek Homosexuality*. <<https://www.livius.org/articles/concept/greek-homosexuality/>> (accessed 1 March 2022)

epitome of beauty was the male youth due to the belief that women were inferior and incapable of being objects of love.³²

To the Ancient Greeks, there were many benefits to such relationships. One of these benefits included learning basic life skills. The older man would often take the young boy (kleinos) on hunting expeditions teaching him how to survive in the wilderness and they would have sexual intercourse afterwards.³³ Also, the older man would love and provide for the younger boy.

Adolescent boys who engaged in sexual practices with older males were not given a homosexual identity and such relations were viewed as mere phases in life that they would outgrow, especially because many of them later on would marry women for the purpose of procreation. Although homosexuality in Greece was accepted, some forms were more encouraged than others. Homosexual relationships between adult men were more complicated and subject to ridicule because it was difficult to decide who would play the dominant and submissive roles in the relationships. Where an adult man was the passive partner, he was mocked and regarded as a woman unlike in pederasty where the adolescent boy generally assumed the role of the passive and receptive partner.

The ancient Greeks used homosexuality to boost the fighting spirit of soldiers by making up a separate military unit called The Sacred Band of Thebes in the 4th century BC comprising of 150 pairs of male lovers³⁴, as they believed a soldier would fight harder to protect his unit and lover.

³² Stone, Geoffrey. 2017. *Opinion: Sex and the Constitution: The ancient Greeks*.
<<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/1/sex-and-the-constitution-the-ancient-greeks/>>

³³< <https://historyofyesterday.com/homosexuality-in-ancient-greece/>> (accessed 1 March 2022)

³⁴ Mark, Joshua J. "Sacred Band of Thebes", *World History Encyclopedia*. Last Modified June 17, 2021
<https://www.worldhistory.org/Sacred_Band_of_Thebes/> (accessed 1 March 2022)

2.5.2 ROME

The Greeks heavily influenced the ancient Roman Empire. According to controversial historian John Boswell, the first historical mention of the performance of same-sex marriages occurred during the early Roman Empire and they were reported in a satirical manner. Roman emperors were known to have engaged in same-sex marriages. Of the first twelve emperors, only Emperor Claudius was involved with women to a great extent. The first Roman emperor to marry a man was Emperor Nero and he was also reported to have married two other males. The first was with one of Nero's emancipated slaves, Pythagoras and in this union, Nero took the role of the bride. In the second, Nero took the role of a groom and married a young boy, Sporus in a very public ceremony celebrated both in Rome and Greece extravagantly. Sporus, who had feminine charm was compelled to act like Nero's dead wife, Poppea Sabina who Sporus looked a lot like.³⁵ Homosexual acts in Rome were accepted if the active partner was a Roman and the passive partner was a non-Roman or a slave.³⁶ Slaves or freed youths took the receptive role during sex.

However, under Christian rule in Rome, attitudes towards same-sex behavior changed³⁷. In 390, Emperor Valentinian decreed a law condemning anally passive men to be burned at the stake as punishment in memory of the flames that consumed Sodom and Gomorrah.³⁸ Under the Theodosian Code at the end of the 4th century AD, Emperor Theodosius J, a Christian codified the laws against homosexuality. In the 6th century, under Justinian, the punishment was expanded to include the active partner. It was concluded that both partners indulging in male-

³⁵<<https://untoldhistorytour.com/homosexual-wedding-for-the-roman-emperor/>> (accessed 1 March 2022)

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Roman Sex, Sexuality, Slaves and Lex Scantinia) <<https://www.heritagedaily.com/2018/01/roman-sex-sexuality-slaves-and-lex-scantinia/97996?amp>> (accessed 1 March 2022)

³⁷ Ibid.

³⁸ Rictor Norton, *A History of Homophobia*, "3 The Later Roman Empire & The Early Middle Ages" 15 April 2002; updated 28 January 2011 <<https://rictornorton.co.uk/homopho3.htm>> (accessed 2 March 2022)

male sex, whether passive or active should be punished by death because the act was one that could lead to the destruction of cities through the wrath of God. Afterwards, Lex Scantinia³⁹ was legislated.

2.5.3 AFRICA

In colonial Africa, homosexuality was suppressed. The arrival of the British colonial masters induced the criminalization of homosexual conduct.

It's important to note that same-sex marriage isn't only a Western phenomenon. Marriage between two women is recognized in several traditional societies like Kenya, Namibia, Nigeria, among others. One assumes the role of husband, while the other assumes the role of wife and is based on the customary marital requirement.

Among the Igbo people of South-east Nigeria, a childless woman is allowed by tradition to marry another woman and have children through the new 'wife' for the purpose of procreation to continue her inheritance and family lineage. However, this form of relationship has no sexual implications. This has also been practiced in Esan land.⁴⁰

Other ancient societies have reported homosexual relationships. In ancient Mesopotamia (for example, Hittite, Assyrian, and Babylonian cultures), Chinese, Egyptian, and Indian societies, socially sanctioned gay relationships existed. The same-sex marriage of Perodias and Munho

³⁹ This is a poorly documented ancient Roman law that regulated sexual behavior such as adultery and passivity. It also legislated death penalty for same sex relationships between freeborn men.

⁴⁰ *Helina Odigie v Iyare Aika (1976) NMLR 323.*

Vandilas in the Galician municipality of Rairiz de Veig, Spain, is documented in medieval times.

This union took place on April 16, 1061, in a modest chapel, and was performed by a priest.⁴¹

⁴¹ n10.

CHAPTER THREE

SAME SEX MARRIAGES IN OTHER JURISDICTIONS

3.1 Introduction

This chapter adopts a comparative analysis and investigates and examines the judiciaries of other nations around the globe in relation to rights accorded to sexual minorities and members of the Lesbian, Gay, Bisexual and Transgenders (LGBT) community. The chapter highlights the fact that countries in Africa have promulgated more anti-homosexuality laws, adding to the ones previously inherited by the colonialist, Britain.

In the 1970s, LGBT rights advocacy in the Western world reached new heights. Though gay people were once opposed to marriage because they saw it as a traditional institution, they were successful in laying the groundwork for its acceptance. Between the 1980s and 1990s, there was a push for legal recognition of same-sex relationships.

Furthermore, this chapter examines the relationship between law and morality and the influence of morality on legislation. Are law and morality intertwined? A rigid separation between morality and the law is highly improbable. Moral questions invade the law at every turn in instances of abortion, euthanasia, same-sex unions among others. Some cultures in the West feel same-sex marriage is morally acceptable and should be permitted. The legalization has been met with fierce opposition, primarily from developing countries and a few religious denominations.

3.2 Comparative Analysis of Same-sex Marriages in Foreign Jurisdictions

The attitude of the different countries of the world towards same sex activities and unions is obvious upon an analysis and examination of the laws in that regard. It ranges from legal recognition of same-sex marriages or other sorts of unions to the death penalty for same-sex activities. As laws and judicial action take place around the world, the status of same-sex marriages changes often.

Some countries have implemented laws that prevent discrimination against gays and go even further by providing the partners with many of the incidents of marriage, while others have enacted laws that outright prohibit homosexuality.

While it is true that a growing number of jurisdictions have accepted same-sex marriages in recent years, the overwhelming weight of international authority, including a number of liberal western democracies with a long history of concern for gay and lesbian rights, continue to reserve the formal institution of marriage for opposite-sex couples.

A large number of nations have legally recognized same-sex unions and accorded degrees of sexual rights to persons who desire to pursue a relationship with members of the same sex and they include; Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Croatia, the Czech Republic, Denmark, Ecuador, France, Germany, Greenland, Hungary, Iceland, Ireland, Israel, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, United States, United Kingdom, Uruguay and in this discourse, some of these countries shall be examined. Some European countries have created civil unions. Others have registered cohabitation for same sex couples.

3.2.1 NETHERLANDS

In the Netherlands, LGBT rights have been among the most developed in the world. As an alternative to marriage, Dutch law began allowing same-sex couples domestic partnership advantages on January 1, 1998. The legal route that led to the introduction of registered partnership legislation in the Netherlands was not without its bumps. In 1995, the parliament established a special commission to look at the prospect of same-sex weddings. In 1997, the special panel completed its investigation and issued a report recommending that civil marriage be extended to same-sex couples. The Lower House enacted this significant bill on September 12, 2000, after it was proposed by the executive on July 8, 1999. On December 19, 2000, the bill was approved by the Upper House. To end discrimination in its marriage laws, the Parliament voted 107–33.

The law received royal assent by Queen Beatrix on 21st December, 2000 and came into force on 1 April, 2001. Job Cohen, the Mayor of Amsterdam, married four same-sex couples on that day after becoming a registrar specifically to perform the ceremonies¹, making The Netherlands the first country in the world to legalize same-sex marriage and strike out all references to gender in the marriage law. It was also one of the first countries to recognize cohabitation and unregistered partnerships of same-sex couples by law. When a same-sex couple cohabits but decides to keep their relationship's legal status unregistered or informal, this is known as unregistered partnerships or informal cohabitation. There is no legal entitlement by one party to the properties of the other party. In 2001, same-sex adoption was made legal alongside same-sex marriage.

¹ The Dutch Went First in 2001; Who Has Same-Sex Marriage Now?
<https://www.usnews.com/news/world/articles/2021-04-01/the-dutch-went-first-in-2001-who-has-same-sex-marriage-now> (accessed 8 March 2022).

Because of its early adoption of LGBT rights legislation and tolerance perception, the Netherlands has been considered to be one of the most gay-friendly countries in the world.² Publications such as *The Independent*³ have referred to Amsterdam, the country's capital, as one of the world's most gay-friendly cities. Since 1996, the annual LGBT pride event has been held in Amsterdam.⁴ The festival is one of the largest publicly held annual events in the Netherlands, attracting hundreds of thousands of attendees each year.

3.2.2 UNITED STATES OF AMERICA

In the 1970s, a movement in the United States emerged to secure marriage rights and benefits for same-sex couples.

Following the 1993 Hawaii Supreme Court decision in *Baehr v Miike*⁵ (formerly *Baehr v Lewis*), which suggested that the state's prohibition might be unconstitutional, the issue became more important in American politics. That ruling was met with federal and state moves to limit marriage to heterosexual couples, most notably the passage of the Defense of Marriage Act 1996⁶ (DOMA) as a federal law. The Act defines marriage as the union of one man and one woman for the purposes of federal laws.

² McDaid, Mark, "The Netherlands is one of Europe's most gay friendly nations" <https://www.iamexpat.nl/expat-info/dutch-expat-news/netherlands-one-of-europes-most-gay-friendly-nations> (accessed 9 March 2022).

³ Field, Marcus, "The Ten Best Places in the World to Be Gay". *Independent.co.uk* (The Independent), 17 September 2008.

⁴ "Amsterdam Gay Pride" amsterdamgaypride.nl

⁵ Supreme Court of Hawaii No 20371.

⁶ The bill, which was written in 1995, sought to make same-sex marriages illegal and to deny recognition to same-sex marriages recognized in other jurisdictions.

Since the case of *Lawrence v Texas*⁷ in 2003, same-sex sexual acts have been allowed throughout the United States. In this case, the Supreme Court of the United States abolished sodomy prohibitions across the country in a 6-3 ruling.

Recognition of same sex union varies by states, but it is not recognized by the federal government.

Following the Supreme Judicial Court's judgment in *Goodridge v Department of Public Health*⁸ six months prior, Massachusetts became the first state in the United States and the sixth jurisdiction in the world to make same-sex marriage legal on May 17, 2004.

Former President Barack Obama called for the repeal of DOMA in its entirety, as well as state constitutional bans on same-sex marriage. DOMA was declared unlawful by the Obama Administration in 2011, and the US Justice Department was ordered to stop defending the law in court. The United States Supreme Court declared in *United States v Windsor*⁹ on June 26, 2013, that Section 3 of DOMA was unconstitutional and a violation of the Fifth Amendment's Due Process Clause because it allowed the federal government to refuse to recognize same-sex licenses if they are performed or recognized in a state that allows same-sex marriage.

In the case of *Obergefell v Hodges*¹⁰, the United States Supreme Court on 26 June 2015, overturned all state restrictions on same-sex marriage, legalized it in all fifty states, and ordered states to honor out-of-state same-sex marriage licenses in a 5-4 ruling. Prior to this ruling which invalidated same-sex marriage bans in any state in the U.S and certain territories, same-sex

⁷ 539 US 558.

⁸ 798 NE 2d.

⁹ (2013) 570 US 744.

¹⁰(2015) 576 US 644.

marriages were legally performed in thirty-seven U.S states, the District of Columbia and some Native American tribes.¹¹

3.2.3 SOUTH AFRICA

In Africa, South Africa is the leading governance in rights of sexual minorities. The new Constitution of the Federal Republic of South Africa was signed into law by President Nelson Mandela and became the first in the world to contain a sexual orientation clause in its bill of rights in December 1996.

Discrimination, mostly on the basis of race, was a fundamental component of South Africa's apartheid administration¹². In apartheid South Africa, another prominent source of discrimination was sexual orientation. In stark contrast to the apartheid era, South Africa's Constitution established a democratic state based on the principles of human dignity, equality, non- sexism and the growth of human rights and freedoms.¹³

The Bill of Rights has been defined as the cornerstone of South African democracy, enshrining citizens' rights while expressing democratic values such as human dignity, freedom and equality.¹⁴

The South African Constitution provides for the following among other rights, the right to human dignity¹⁵, the right to life¹⁶, the right to freedom and security of the person¹⁷, the freedom

¹¹ https://en.wikipedia.org/wiki/History_of_same-sex_marriage_in_the_United_States/ (accessed 10 March 2022).

¹² T Deane 'Understanding the need for anti-discriminatory legislation in South Africa' (2005) 3 Fundamina: A Journal of Legal History 1.

¹³ CRSA 1996 s1(a)(b).

¹⁴ CRSA s7(1).

¹⁵ CRSA s10.

¹⁶ CRSA s11.

¹⁷ CRSA s12.

from slavery, servitude and forced labour¹⁸, the rights to privacy¹⁹, the freedom of religion, belief and opinion²⁰, the right to freedom of expression²¹, the right to peaceful assembly²², and the freedom of association.²³ These are the fundamental rights enshrined in the Bill of Rights.²⁴

Section 9(3) prohibits the state from discriminating against anyone on any of 16 enumerated grounds, including sexual orientation.²⁵ The insertion of the equality article in South Africa's final Constitution resulted in the decriminalization of gay behavior. Section 9(3) effectively repealed the anti-sodomy provisions of Section 20A of the Sexual Offences Act of 1957 by prohibiting discrimination on the basis of sexual orientation.

The South African constitution is not the only legislation that protects members of the LGBT community. A plethora of such legislations exist such as the Domestic Violence Act 116 of 1998 which extends protection of heterosexual couples to homosexual couples against intimidation, emotional abuse, physical abuse, psychological abuse etc.²⁶

The Medical Schemes Act 131 of 1998 also prohibits discrimination of citizens based on sexual orientation.²⁷ Harassment of an employee on the basis of sexual orientation is likewise prohibited under, as it constitutes unfair discrimination.²⁸ Such dismissal is null and void.

¹⁸ CRSA s13.

¹⁹ CRSA s14.

²⁰ CRSA s15.

²¹ CRSA s16.

²² CRSA s17.

²³ CRSA s18.

²⁴ See chapter 2 of the CRSA for the full provisions of the Bill of Rights.

²⁵ The other grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth.

²⁶ U Jivan 'From individual protection to recognition of relationships: *Same-sex couples and the South African experience of sexual orientation reform*' (2007) 11 Law, Democracy & Development 26.

²⁷ Medical Schemes Act No 131 of 1998 s24(e).

²⁸ EEA 1998 s6(3).

Furthermore, prior to the enactment of the Children's Act 38 of 2005, same-sex couples were not given the same parental adoption options as straight or heterosexual couples. Despite the fact that same-sex partnerships are not specifically stated in the Act, they have been accorded legal interpretation in *Du Toit and Anor v Minister of Welfare and Population Dev. & Ors.*²⁹ In this case, the parties who were in a lesbian relationship intended to adopt a child but were refused. They contended that they were being discriminated against on ground of their sexual orientation. Skwewiya AJ, in a unanimous judgment declared that excluding same-sex partners to jointly adopt children was in conflict with the Constitution.

The Civil Union Act 17 of 2006 marked the culmination of South Africa's legal efforts to recognize the rights of sexual minorities. It was passed by the National Assembly on November 14, 2006, by a vote of 230 to 41, making South Africa the fifth country to allow same-sex marriage, the first in Africa and the second outside of Europe.

The South African state's previous legislative acts have re-echoed numerous rights for gays and lesbians; nonetheless, there was a gap that needed to be filled. The right of same-sex couples to seek state legal recognition to marry lacked statutory support. As a result of the decision in the landmark case of *Minister of Home Affairs v Fourie*³⁰, the Act took effect on November 30, 2006. In that case, Marie Fourie and Cecilia Bonthuys, two lesbians had been in a committed relationship for more than ten years and approached a division of the Pretoria High Court seeking orders declaring their marriage to be legally valid under the Marriage Act 25 of 1961 and directing the Minister of Home Affairs and Director General, Home Affairs (respondents) to register their marriage. At first, this application was dismissed and on appeal, Edwin Cameron JA declared that the common law concept of marriage be modified to accommodate same-sex

²⁹ 2003 (2) SA 198 (CC).

³⁰ 1 SA 524 (CC).

couples in compliance with sections 8(3), 39(2) and 173 of the South Africa Constitution. The definition was altered to read; “Marriage is the union of two persons to the exclusion of all others for life.”

In December 2005, the court decided that existing marriage rules violated the Bill of Rights' equality clause, and granted Parliament one year to rectify the inequality.

Mozambique is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR).³¹ Mozambique does not criminalize same-sex marriage. On June 29, 2015, Mozambique legalized homosexual behavior.

Kenya, like most African countries, is hostile to the concept of LGBT rights. The populace and the leaders are on the same page when it comes to gay behavior. Former Kenyan President Daniel arap Moi claimed homosexual behavior to be anti-Christian and incompatible with African culture. In Kenya, anyone who engages in sexual actions against the natural order faces a sentence of 14 years in prison. If the crime is done without consent or with the use of force, the term is increased to 21 years in prison. If the other party's consent was obtained via the use of force or deceit, the sentence is increased to 21 years.³² Acts of gross indecency between males are also penalized.³³

³¹ Mozambique ratified the African Charter on February 22, 1989 and the ICCPR on 21 July 1993.

³² Kenyan Penal Code 2009 s162(a).

³³ Ibid s165.

3.3 ARGUMENTS FOR AND AGAINST RECOGNITION OF SAME-SEX MARRIAGES

3.3.1 The use of law to preserve morals

Scholars have long struggled to describe the link between law and morality, a process that is made more difficult when looking at criminalization. Morality as a basis for criminalizing conduct has always been and will continue to be a contentious issue. Should moral principles be enforced by the use of laws? And, if that's the case, to what extent? It is necessary and instructive to analyze the perspectives of prominent jurists and writers such as John Stuart Mill, Lord Patrick Delvin, and Stephen on this problem in order to get an answer to this question.

The essential question in the debate over the link between law and morality is whether there are regions of disagreement or divergence between the two, and if legislation has enough moral content to require compliance.

It is a well-known truth that the rules of law and the norms of morality serve the same purpose in society: to prescribe acceptable standards of behavior for the preservation of order and peace and to prohibit inappropriate activities and for this reason, criminal law should have some minimum moral content. Some have even stated that “law and morality are inseparable”³⁴ According to proponents of this viewpoint, law in action is more than just a set of rules; it also entails the application of moral concepts such as the equitable and good doctrine. External conduct is prescribed by law, whereas internal conduct is prescribed by morals. Morality is concerned with

³⁴ Fuller’s arguments are contained in his article “Positivism and Fidelity to Law” published in the Harvard Law Review 630 (1957-1958).

internal variables such as motive, whereas law is concerned with the external manifestation of the motive.³⁵

The overlap between law and morality is where law is used to impose morality or where moral ideals impact legislation and vice versa.

Is same-sex relationship a matter of law or morality? Some supporters of homosexuality as a valid lifestyle have claimed that it is not a moral issue, however this claim is incorrect because morality is concerned with interpersonal relationships and what should and should not be done within them. Both marriage and sexual commitment are fraught with moral dilemmas.

The majority morality platform, the cultural platform, and the religious platform are three key platforms that inspire social conservatism in Nigeria in its efforts to prohibit the legal acknowledgment of homosexual behavior. Section 45 of the Nigerian Constitution gives the majority morality platform its power and possible legal authority. Given the intense religiosity of the vast majority of Nigerians, the religious platform has been extremely effective.

In Nigeria and abroad, the majority of objections against gay behavior fall under the category of public morals objection. This objection to public morality forms the ground for criminality. Religion is a fundamental foundation of societal belief in what is right and evil. The world's two most popular religions, Christianity and Islam, forbid homosexual relationships.³⁶

The public morality objection raises the issue of legislating morality, a topic that has polarized eminent jurists all over the world. Nigeria uses a clause in the 1999 Constitution to limit the scope of the same Constitution's human rights guarantees. The legal basis for Nigeria's anti-

³⁵ Freeman in Lloyds, *Introduction to Jurisprudence* (London; Sweet and Maxwell 1999) 58.

³⁶ For the Biblical perspectives on homosexuality, read Leviticus 20:13; Leviticus 18:22; Romans 1:26-27; 1 Corinthians 6:9-10; 1 Timothy 1:10. See Surat An-Nisa 4:16; Surat Al-Anbiya 74-75 for the Islamic view.

homosexuality laws is frequently referenced as Section 45(1)(a) which provides that “Nothing in sections 37, 38, 39, 40, or 41 of this Constitution shall be construed to invalidate any law that is substantially acceptable in a democratic society for the sake of defense, public safety, public order, public morals, or public health”. As far as the rights guaranteed by articles 37 to 41 of the Nigerian Constitution are concerned, Section 45(1) might be regarded as a general limitation clause.

Is it possible for a country's government to legislate morality? Is it possible to make laws on the basis of majority morality? While certain scholars and jurists, such as Fitzjames Stephen, Devlin³⁷, and JM Elegido³⁸, believe that the law and morality, and even the law and the legal enforcement of morality, are inextricably linked, others, such as Mill and Hart, believe that the moral and legal realms should be separated.³⁹

There is no universally accepted definition for morality. Morality is based on a system of values and standards of behavior that are commonly accepted in a society⁴⁰. Private morality refers to decisions that have an impact on one's personal well-being. Public morality, on the other hand, is governed by legislation and refers to the moral and ethical principles that are imposed in a community and applied to public life and conduct in public spaces. The activities that are addressed by public morality have an impact on society as a whole.

Moral ideals come from a variety of sources, including religion. On the relationship between law and morals, Elegido claims that “law creates real obligations in the citizens only because it operates within the framework of some basic moral norms which prescribe that we must foster

³⁷ Patrick Devlin, *The enforcement of morals* (Oxford: Oxford University Press, 1965).

³⁸ JM Elegido *Jurisprudence* (1994) 358.

³⁹ See JS Mill *On liberty* (2003); HLA Hart *Immorality and treason*.

⁴⁰ MT Ladan *Introduction to jurisprudence, classical and Islamic* (2006).

the common good of our community and that in order to do this effectively we must obey the rule established by custom or laid down by those in authority.”⁴¹

The fear of public morality dictating state regulations that may harm the interests of minority components is what drives liberals like Mill and Hart to seek the separation of the legal and the moral. Those who advocate for the decriminalization of homosexuality argue that immorality cannot be the only or even the most important factor in determining what is criminal, and that a number of practices that are considered immoral by the public but are not punishable by law in most countries, such as adultery, are not punished by law. When the immorality test becomes the standard for defining what constitutes a crime, majority morality will impinge on minority rights.

In my opinion, morality is an essential ingredient of law and certain laws are in fact promulgated based on morality. For example, the various laws against murder and theft. It is both morally and legally wrong to steal and commit murder. In Nigeria, law has also been used to influence morals in the criminalization of abortion.⁴² Offenses against non-living (desecration of the dead) and non-human (bestiality) targets are amenable to legislative ban on simply moral grounds because they inflict no apparent harm.

In other instances, however, there is a distinction between law and morality. One difference is that the sanction of law is more official, whereas the sanction of morality is more informal. Morality is persuasive, whereas law is coercive. In addition, certain behaviors that could be considered immoral are not criminalized. The court in *Aoko v Fagbemi*⁴³ decided that the accused could not be punished because there was no written legislation against adultery in Nigeria.

⁴¹ n38.

⁴² CCA, s228, 229 and 230.

⁴³ (1961) ALL NLR 400.

3.3.2 Reconsidering the Hart-Devlin debate in the context of homosexuality in Nigeria

The argument was preceded by a similar debate between John Stuart Mill and Stephen. Under the guise of safeguarding public morality, Mill advocated the famous harm principle to limit the state's ability to intrude into the area of individual privacy⁴⁴. However, the Harm principle has been criticized by other writers who are of the opinion that it excludes too much. What constitutes harm? Mill takes a liberal stance on the subject, dividing morality into two categories: public and private, stating that private immorality, such as drug misuse and lesbianism, is solely a matter of the individual's conscience.⁴⁵

Mill distinguished public morality from the law and maintained the person's right to live according to his or her wants, as long as the act of individual will does not cause harm to others. The moral sphere, according to Stephen, is where laws work and receive their legitimacy.

In the twentieth century, Devlin and Hart reignited the debate. In England, the topic of the relationship between law and morality became a legislative concern. The Wolfenden report, written by a commission chaired by Sir John Wolfenden and published in 1957, was the catalyst for the renovation. Consensual adult same-sex practice should be decriminalized as it was a private affair, according to the recommendation of the report. In addition, the report also recommended that prostitution should also be decriminalized as long as it is done in public and with consent. In England, homosexual behavior was made illegal in 1533. The 1861 Offenses Against the Person Act made homosexual behavior punishable by life in prison. The Vagrancy

⁴⁴ Mill (n 39).

⁴⁵ F. Adaramola, *Jurisprudence* (4th Edn, LexisNexis Butterworths 2008) 79-80.

Act of 1898 reinforced England's gay laws. The publication of the Wolfenden report brought respite to homosexuals in England. The report was based on John Stuart Mill's libertine concept that the law should not interfere with the liberty of the individual except where there is injury to society at large.⁴⁶ "...There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business". Even the individual's own good, according to Mill, does not justify interfering with their private lives. What matters is how much harm the individual's actions will do to others. Mill proclaims: 'Over himself, over his own body and mind, the individual is sovereign'.⁴⁷ The recommendations on homosexuality became modified into law in the 1967 Sexual Offences Act for England and Wales.

From a conservative perspective, Patrick Devlin- a renowned law lord and judge- questioned the report's wisdom, while Hart defended it from a liberal perspective. Devlin sided with Stephen, while Hart sided with Mill. According to the Wolfenden report, it is not the duty of the law to become involved in private morals problems unless there is a threat to third persons. Lord Devlin argued in his Maccabean lecture in 1959 lecture to the British Academy titled "The Enforcement of Morals" that separating law from morality and public morality from private morality lowers society's moral standards, eventually leading to the society's internal deterioration and he maintained that any activity that is not governed by law is capable of producing harm. "The suppression of vice is as much the law's business as the suppression of subversive activities, it is no more possible to define a sphere of private morality than it is to define one of private subversive activity"⁴⁸

⁴⁶ Mill (n 39) 49.

⁴⁷ Mill (n 39) 81.

⁴⁸ Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 14.

Hart maintained that the law's interference with individual liberty in the area of sexuality could be considered a unique sort of pain. He claims that sexual liberty is at the heart of private life and personal liberty, and that prohibiting a practice that directly affects the emotional and physical well-being of a significant portion of a society's members is an exceptional case in which society's morality enforcement is unjustifiable. He also distinguished between harm caused by public display, on the one hand, and offence caused merely through knowledge, on the other such as homosexuality between consenting adults may offend those who are aware of the act and therefore does not warrant punishment.⁴⁹

Mill's harm principle, according to Devlin, is primarily concerned with physical harm rather than psychological harm. However, psychological injury can occur even if there is no physical impairment. Immorality, according to Devlin, is a moral (or psychological) harm. The two types of harm are inextricably linked. If immorality is a (moral) harm and states are allowed to legislate against harmful things and conducts, it stands to reason that the law has a legitimate interest in suppressing what society considers immorality.⁵⁰

Devlin appears to believe that immoral behavior has a comparable destructive impact to treason. If left unchecked, immorality, like treason, can undermine a state from within. Hart believes that a person's psychological revulsion for another's behavior cannot be used to determine the conduct's morality. He appeals to reason, insisting that before we can reach a decision regarding the immorality of any conduct, we must gather all of the facts and objectively establish that public morality is not influenced by ignorance, superstition, or confusion.⁵¹

⁴⁹ Raymond Wacks, *Understanding Jurisprudence* (3rd Edn, Oxford University Press 2012).

⁵⁰ Devlin (n 36) 135-136.

⁵¹ HLA Hart Immorality and treason.

Devlin reaffirmed the absolutist position that society cannot exist without morality, and that morals, or at least the rules of behavior that a reasonable man approves, are vital to society. Devlin went on to say that “an established morality is as necessary as good government to the welfare of society” and consequently, and that society has the same right to impose its moral code through the law.

Devlin's arguments were persuasive and objective. Individual liberty and society were among the topics discussed. Devlin stated that it is critical to regulate behavior in order to promote individual and societal well-being. To him, integration of a shared and common morality are the most important values.⁵² The utilitarianism theory can be used to support Devlin's assertions. When defining right and wrong, utilitarianism holds that the happiness of the majority is more essential than that of the minority.

Hart's ideas have been argued to be dismissive of society as an important part of human life and neglecting the necessity of progressing society by prosecution of conduct that can create psychological harm to society and does not satisfy the majority in constructing and presenting his views.

Morality is an important consideration in the criminalization of conduct. However, it should be noted that what is morally right varies by community, time and circumstances and the immoral acts that must be criminalized are those acts that are an infraction on some common public morality.⁵³

Although opinions differ on the importance of the law in enforcing private morals, why approach immorality restraints as if they were evil if they are the principal defenses of society against

⁵² David Bunikowski: Legal Protection of the Value of Public Morality: The Hart- Devlin Debate 4-5.

⁵³ B. Bazuaye & F. Alohan ‘Criminalization of Same Sex Marriage in Nigeria: Is it Much Ado About Nothing?’ *NIALS Journal of Law and Gender* 43.

potentially lethal influences? Why is it necessary to create such a clear distinction between social and legal status?

Conclusively, in countries that have permitted same-sex weddings, the liberal legacy of Mill, Berlin, Hart, Feinberg, and others provides the theoretical background for acceptance of homosexual rights. This is in accordance with international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), among others, which guarantee the right to privacy. These treaties were crucial in paving the way for the current homosexual-friendly atmosphere in the West, as evidenced by a slew of European Court judgements.

Devlin's appeal to majoritarian morality to justify the criminalization of certain kinds of behavior may have fallen into disrepute in the West, but the view is still dominant in other parts of the world, especially in Africa. Public or majority morality is the bulwark of Nigeria's anti-gay laws.

CHAPTER FOUR

THE LEGAL AND MORAL POSITION OF NIGERIA

4.1 Introduction

Many Nigerians' moral systems proclaim homosexual encounters to be indisputably unacceptable statutorily, judicially, culturally and religiously and hence behavior that should not and cannot be sanctioned by law. The moral system also argues that if marriage is expanded to include same-sex couples, the institution of marriage, the stability of the family, and the wellbeing of society as a whole will suffer. The moral context in Nigeria is based on communal values and because the Nigerian society requires generally accepted morals, the legal system is built on morals that have become law and are subject to sanctions. It differs from the liberal morality of the West. Because Nigerian morality is focused on the benefits of collective family and community well-being, homosexuality looks to be a threat to Nigeria's moral basis. Homosexuality has failed the Nigerian moral test in its current form. In Nigeria, only a small percentage of Lesbian, Gay, Bisexual Transgender (LGBT) people are open about their sexual orientation. Even though the criminal and penal codes prohibit it, homosexual activities have been quietly practiced.

The Nigerian Constitution stipulates unequivocally that for an act to be considered a criminal offense, it must be forbidden not only by a duly published written law, but also by a defined penalty.¹ Homosexual actions satisfy the formal constitutional criterion of legislative enactment in order to be considered a crime in Nigerian criminal law.

¹ CFRN 1999 s36(12).

It is critical to understand that the National Assembly of Nigeria has the authority to pass laws, including laws against homosexuality. Section 4(3) of the 1999 Constitution as amended provides that: “The power of the National Assembly to make laws for the peace, order and good governance shall, save as otherwise provided in this constitution be to the exclusion of the house of Assembly of states”.

Sexual minorities in Nigeria are deemed criminal outlaws not just in the eyes of the law. In the eyes of the general public, LGBT people are also despised.

4.2 Anti- Homosexuality and Same-sex marriages Legislation in Nigeria

Although the Same Sex Marriage (Prohibition) Act (SSMPA) 2014 has received widespread notice and is causing controversy, it is not the first law proposed or passed by the Nigerian legislature to criminalize homosexuality in Nigeria. The validity test on indigenous customary laws was the first legislative move taken in Nigeria to prevent same-sex marriage. The first test is that the customary law is not repugnant to natural justice, equity and good conscience. The second is that it is neither directly or indirectly incompatible with any law for the time being in force. The third test is that it is not contrary to public policy.² *Meribe v Egwu*³ was decided on the basis of repugnancy, putting same-sex marriage under the category of barbarous culture. The tradition of female-to-female marriage was ruled by the court held by the court to be repugnant to natural justice, equity and good conscience.

² Evidence Act 2011 s18(3).

³ (1976) LPELR SC 48/1975.

Prior to the enactment of the Act, Nigerian criminal law has made certain aspects of homosexual activities illegal. It is necessary to take a broad view of the Nigerian legal system against homosexuality.

4.2.1 Classification of Homosexual Offences under the Criminal Code Act

The Criminal Code Act Cap 38 LFN 2004 (CCA) is the substantive criminal legislation that regulates southern Nigeria. It covers a wide range of criminal offenses and governs criminal behavior in southern Nigeria. It specifies what constitutes a crime and lays out the consequences when someone breaks the law.

Under the Criminal Code Act, voluntary and consensual adult homosexual acts and other related offenses are classified as "unnatural offences." According to Section 214 of the Criminal Code,

Any person who-

- (1) has carnal knowledge of any person against the order of nature;
 - (2) has carnal knowledge of any animal; or
 - (3) permits a male person to have carnal knowledge of him or her against the order of nature,
- is guilty of a felony and is liable to imprisonment for fourteen years.

Section 214(3) is not confined to homosexuality, as it broadens the definition of unlawful sexual act to encompass unnatural ways of having sexual intercourse between heterosexual (straight) couples.

Two fundamental principles must be grasped in order to completely comprehend the substance of Section 214. What does the term 'carnal knowledge' and 'against the order of nature' mean in this provision? Carnal knowledge simply means sexual intercourse. Thus, if carnal knowledge is legally defined as sexual intercourse, the law's intent is to outlaw sexual intercourse that is

contrary to the order of nature. In *Magaji v. The Nigerian Army*⁴, it was stated that the phrase ‘carnal knowledge’ is an old legal euphemism for heterosexual intercourse. It was also stated that the expression ‘against the order of nature’ refers to any sex act that is not performed with the opposite sex.

The phrase ‘carnal intercourse against the order of nature’ was interpreted by the court in India to mean all types of sexual activity other than heterosexual penile-vaginal intercourse in *Naz Foundation v Govt of NCT of Delhi*⁵ otherwise known as the Naz Foundation case. In clearer terms, according to this interpretation, the import of Section 214 is that other forms of sexual intercourse aside from the heterosexual penile-vaginal intercourse such as anal sex, the use of sex toys and oral sex are prohibited even among heterosexuals.

Does Section 214 of the Criminal Code apply to lesbians? The Criminal code expressly prohibits male homosexual conduct and does not directly specify sex activities between women, yet it has been argued that the gender-neutral term "person" refers to women. A person who merely attempts to commit any of the mentioned sexual acts (offenses) in Section 214 has committed a felony and shall be sentenced to seven years imprisonment.⁶

Gay relationships are examined and categorized under section 217 of the Act. The section provides:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures, another male person to commit any act of gross indecency with, 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

⁴ (2008) 34 NSCQR (pt 1) 108 Niki Tobi JSC.

⁵ WP(C) No. 7475/2001.

⁶ Section 215.

imprisonment for three years. The offender cannot be arrested without warrant.⁷ The term 'gross indecency' suggests sexual relations between men.

4.2.2 Classification of homosexual offences under the Penal Code Act and Sharia Law

The Penal Code Act (PCA) is the substantive criminal legislation in Nigeria's nineteen northern states, and it was modeled after the Criminal Code of Sudan, which was based on the 1860 Indian Penal Code. Some of these states enacted Sharia Penal Code legislation, with minor differences. The presence of the Sharia Penal Code does not negate the Penal Code's jurisdiction, as the Sharia Penal Code exclusively applies to Muslims.

The provisions of the Penal Code Act are comparable to those of the Criminal Code Act (CCA) in southern Nigeria in terms of penalty.⁸ However, both the CCA and the PCA recognize significant characteristics of the crime of sodomy. To begin with, under the CCA, the punishment for sodomy is limited to a possible jail sentence, whereas under the PCA, an offender faces both jail time and a monetary fine. Another distinction between the two Acts is that the PCA does not make attempting to commit sodomy a crime. There is also a distinction in the operative words.

While the PCA uses the term 'carnal intercourse,' the Criminal Code utilizes the term 'carnal knowledge.' While a warrant is required for law enforcement personnel to arrest offenders under the Criminal Code, there is no such necessity for gays caught in the act under the PCA.

⁷ See also section 13 of the Sexual Offences Act 1956.

⁸ Both the CCA and PCA recommend jail terms which may extend to 14 years imprisonment.

Section 284 of Penal Code Act which is in pari materia with Section 214 of the Criminal Code Act provides: “whoever has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for a term which may extend to fourteen years and shall be liable to fine”. According to the explanatory note under this clause, penetration is required for the offense to be considered carnal intercourse. For it to be concluded that an offence has been committed under this section, there must be sexual intercourse between the parties, which may be between two women, two men, or male-female. Also, the intercourse must be against the order of nature, that is non-heterosexual penile-vagina sex. An unnatural offence is complete upon penetration simpliciter.

In addition, Section 405(2) describes a vagabond as ‘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 profession.’

Under accordance with Sharia, the punishment for homosexual activity in the Sharia Penal Code is more extensive on the offenses of homosexuality and takes the crime of homosexual conduct to capital punishment. Prior to the implementation of Sharia in the northern states where it is in effect, the maximum punishment for consensual adult homosexual activity in both the northern and southern parts of Nigeria was 14 years in prison. With the Sharia Penal Code firmly established in these northern Nigerian states, the maximum penalty for an offense is now the death penalty if convicted.

The precise definition and criminalization of lesbianism is a standout aspect of the code. Both the PCA and CCA are silent on lesbianism. The Sharia Penal Code Act is quite clear concerning lesbianism, which is referred to as sihaq in Arabic. The following is how the Code defines lesbianism: ‘Whoever being a woman, engages another woman in carnal intercourse through her

sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism.⁹ The Act also explains how the offence is committed which is by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.¹⁰ The various Sharia Penal Code Laws also specify the punishment for the offence which is usually canning as well as a term of imprisonment that varies depending on the laws.¹¹ The punishment for the offence of lesbianism in Sokoto Sharia Penal Code is the same as the provision under Jigawa State legislation.¹² Lesbianism is punishable by death in Katsina, as it is in Kano State.¹³

The Sharia Penal Code also coined the term "sodomy" to denote homosexual behavior.¹⁴ States that adopt Sharia law are considerably more religiously rigid, and homosexuality is punishable by death.¹⁵ There is a difference in sentencing for married and unmarried offenders who are found guilty of sodomy. In Kano, for example, the punishment for married offenders and divorced sodomites is death by stoning.¹⁶

4.2.3 Classification of homosexual offences under the Armed Forces Act

⁹ Sharia Penal Code Law of Zamfara State. Gazette volume 3 No 10, 15 June 2000 s134. Bauchi State Sharia Penal Code Law 2001 s137. Sokoto State Sharia Penal Code Law 2000 s129.

¹⁰ Explanatory note to section 134 above.

¹¹ Sharia Penal Code Law of Zamfara State s135. Bauchi State Sharia Penal Code Law 2001 s138. Kaduna State Sharia Penal Code Law 2002 s130.

¹² Sokoto State Sharia Penal Code Law 2000 s137.

¹³ Katsina State Sharia Penal Code Law 2001 s184.

¹⁴ Sharia Penal Code Law of Zamfara state s130. Bauchi State Sharia Penal Code Law s133. Sokoto State Sharia Penal Code Law 2000 s125.

¹⁵ Sokoto State Sharia Penal Code Law 2000 s133.

¹⁶ Kano State Sharia Penal Code Law 2000 s129(a).

The Armed Forces Act (AFA) governs the formation and composition of the Nigerian Armed Forces, which include the Nigerian Army, Nigerian Navy, and Nigerian Air Force.¹⁷ The Armed Forces Decree was initially adopted in 1993, and it is presently found in Chapter A20 of the Laws of the Federation of Nigeria, 2004.

The Armed Forces Act is the governing criminal code for all members of the Nigerian military who are subject to service law, and it is a federal law that applies throughout the country. Sodomy is one of the sexual offenses explicitly outlawed and punished by the AFA. Section 81(1) of the AFA provides that any person subject to the service laws under the Act who has carnal knowledge of a person against the order of nature; or has carnal knowledge of an animal; or permits a person to have carnal knowledge of him against the order of nature, is guilty of an offence.

Section 81(2) is to the effect that any person who commits an act of gross indecency or procures another to commit an act of gross indecency with him, or attempts to procure the commission of an act of gross indecency is guilty of an offence. The punishment for sodomy and gross indecency under this Act is seven years imprisonment, which is a shorter sentence than the CCA and PCA. This basically means that homosexuals are not permitted to serve in the military.

The interpretation of this provision came up in *Magaji v. The Nigerian Army*¹⁸ Mr. Bello Magaji, an army major, was charged with sodomy in 1996, in violation of Section 81(1)(a) of the Armed Forces Decree, and was found guilty by a court martial in 1997. He was accused of having carnal knowledge of four boys. He was convicted and sentenced to seven years in jail after the matter was prosecuted as a sodomy offense. It was reduced to five years in prison by the Confirming

¹⁷ Armed Forces Act s1(1).

¹⁸ n2.

Authority. seven (7) years behind bars. The appellant's conviction and sentence were upheld by the Court of Appeal. On appeal to the Supreme Court, the apex court denied the appeal and maintained the lower court's decision and conviction. The charge of homosexuality against Magaji was described by Akintan JSC as an 'unusual, abnormal and unbelievable one'.¹⁹ Tobi JSC was of the opinion that 'the natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration. That is against the order of nature and again that is what section 81 legislates against.'²⁰

Three men, Abubakar Beti, Kamilu Ya'u, and Mal Haruna, were sentenced to death by stoning by a Shariah court in the state of Bauchi for participating in homosexual behavior and breaking Section 134 of the state's penal code from 2001.²¹

4.3 Religious Beliefs and Homosexuality in Nigeria

The ban on same-sex marriage in Nigeria could not be separated from the influence of religions and culture, which are ingrained in the lives of Nigerians. Nigeria is a multi-ethnic and multi-religious nation. In Nigeria, there is a close connection between religion and family law. First, our statutory definition of marriage is a mirror image of Lord Penzance's concept of "Christian" marriage.²² Second, in Nigeria, a statutory marriage can be performed at a licensed place of worship or at a marriage registry. Despite the fact that official religion is outlawed by the constitution, Nigeria is unquestionably a religious country with a well-established symbiosis between religion and the state. This explains religion's extensive impact in Nigeria's legislative

¹⁹ *Magaji* paras E-F.

²⁰ *Magaji* paras H.

²¹ <https://saharareporters.com/2022/07/01/shari'ah-court-sentences-three-men-death-stoning-homosexuality-bauchi> accessed 1st July 2022.

²² *Hyde v Hyde* (1886) LR 1 PD 130. 133.

and adjudicatory processes. As a result, religion has an impact on marital beliefs. Marriage is a divinely ordained institution between a man and a woman for the sake of procreation and companionship, according to the majority of Nigerians. According to the Bible, God ordained marriage between a man (Adam) and a woman (Eve) at the beginning and instructed them thus:

“therefore shall a man leave his father and mother and shall cleave unto his wife and they shall be one flesh”²³

Both the Old Testament and the New Testament²⁴ contain specific scriptures prohibiting homosexuality. Christians claim that the account of Lot (covered earlier in Chapter 2) supports God's disapproval of homosexual behaviors because the cities of Sodom and Gomorrah were entirely destroyed as a result of the act of Sodomy. Leviticus 20:13 elaborates on this subject by stating: “if a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death, their blood shall be upon them...” According to the Bible, same-sex marriage is both wickedness and sin. In support of this, the Bible says: “But the men of Sodom were wicked and sinners before the Lord exceedingly.”²⁵ Homosexuality is a sin, according to the traditional Christian viewpoint.

The practice of same-sex marriage is likewise frowned upon by Islamic law in the country's northern regions. The narrative of Lot is told in the Quran, and it demonstrates God's disapproval of homosexuality. Qur'an 7:80-84 reads, “And remember when Lot scolded his people saying, ‘Do you commit a shameful deed that no man has ever done before? You lust after men instead of women; you are a people certainly transgressors...’” Sodomy has long been regarded as an

²³ Gen 1:28 KJV.

²⁴ 1 Timothy 1:10; Romans 1:26–27.

²⁵ Genesis 13:13.

impure and abominable act in Islam.²⁶ The death sentence (by way of stoning) is prescribed by Islamic law for a criminal, based on the fact that Almighty Allah did the same to the people of Lut (Lot) when they disobeyed his call to refrain from sodomy.²⁷ Furthermore, Islamic countries like Saudi Arabia, Sudan, Iran, and the United Arab Emirates (UAE) impose the death sentence for male homosexual behavior.

According to a survey done by the Pew Research Center in the United States in 2013, 98 percent of Nigerians feel homosexuality should not be accepted in society.²⁸ The report also revealed that countries with a largely Muslim population continue to be among the least accepting of homosexuality. The survey also revealed that there is a clear link between a country's religiosity and attitudes about homosexuality, with far less acceptance and tolerance of homosexuality in countries like Nigeria where religion is central to people's lives.²⁹ Homosexuality, according to many devout Nigerians, is a desecration of God's plan for marriage and humanity. Christian leaders, who wield great power in society, consider same-sex sexual activity to be immoral and taboo. Baptist preacher, Rumo James explained to a reporter in Jos, Plateau State, North central Nigeria said to a reporter that "Homosexuality is a virus that degrades the family and its values, corrupts human cohabitation and offends God." Nigerian Muslims also expressed support for the bill. The former national chairman of the Jama'atu Izaltil Bid'ah Wa'Ikamatis Sunnah (JIBWIS) Ulama Council, Sheikh Muhammad Sani Yahaya, said the following concerning homosexuality:

²⁶ Magaji Chiroma and Awwal Ilyasu Magashi, 'Same-Sex Marriage versus Human Rights: The Legality of the "Anti Gay & Lesbian Law" in Nigeria [2015] 4(1) International Law Research 15.

²⁷ Qur'an 7: 84: "And we poured upon them a rain of 'brimstone'. Then see what was the end of the wicked."

²⁸ The Global Divide on Homosexuality, PEW RES. CTR. (June 4, 2013), <https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/> accessed 12 May 2022.

²⁹ Larry O. C. Chukwu, 'A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage vis-à-vis Rising Gay Activism in the Western World' [2018] (32)(2) *Brigham Young University Journal of Public Law*, 191 <https://digitalcommons.law.byu.edu/jpl/vol32/iss2/2>> accessed 12 May 2022.

“It is an abomination, it is a crime.”³⁰ Malam Abdulkadir Apaokagi connected homosexuality to murder in his summons Friday summons. As a result, he claims, gays and lesbians are deserving of a severe lethal punishment, such as the death penalty.³¹ He applauded the Senate for passing the legislation and maintained that “Any society that tolerates gay marriage would come to destruction the way God destroyed Sodom and Gomorrah for sodomy”.³²

The Chief Imam of Damaturu Central Mosque, Ustaz Hudu Muhammed, called both Muslims and Christian clerics to speak out against homosexuality. He also urged the National Assembly to pass laws punishing such behavior.³³

Former Nigerian President Goodluck Jonathan's spokesman, Rueben Abati, declared that SSMPA “is a law that is in line with the people’s (Nigerians) cultural and religious inclinations.”³⁴

Senator Domingo Obende introduced the Same-Sex Marriage (Prohibition) Bill 2011 and urged his colleagues to take immediate precautions and measures to combat the growing trend of same-sex marriage, which he said could lead to the breakdown of Nigerian society because it is prohibited by Christian, Muslim, and Nigerian traditional religions, as well as on moral grounds.³⁵

³⁰ Dickson, P. C. Homophobia Unites Muslims and Christians in Nigeria. <https://theworld.org/stories/2014-02-13/homophobia-unites-muslims-and-christians-nigeria> accessed 13 May 2022.

³¹ The Deputy Chief Imam at the Abuja branch of Nasrul –lahi-L-Fatih Society of Nigeria (NASFAT).

³² Magaji Chiroma and Awwal Ilyasu Magashi, Same-Sex Marriage versus Human Rights: The Legality of the “Anti Gay & Lesbian Law” in Nigeria” [2015] 4(1) International Law Research 16.

³³ B. Bazuaye & F. Alohan ‘Criminalization of Same Sex Marriage in Nigeria: Is it Much Ado About Nothing?’ *NIALS Journal of Law and Gender* 45.

³⁴ Esther O. Ajayi-Lowo, ‘The Same-Sex Marriage Prohibition Act in Nigeria: A Critique of Body Policing 78.

³⁵ Joseph Onuche, ‘Same Sex Marriage in Nigeria: A Philosophical Analysis’ [2013] *International Journal of Humanities and Social Science* (3)(12) 94-95.

Senator Oluremi Tinubu (a prominent Senator from Lagos State), submitted that the act of allowing persons of same gender to get married to one another violates the people morals, hence it is spiritually wrong and unacceptable in the country.

Former Nigerian Senate President David Mark called it "the importation of a foreign culture" and said that his faith as a Christian abhors same-sex marriages in his opening remarks of the public hearing held by the Senate Committee on Judiciary, Human Rights, and Legal Matters.. His conclusion was that same-sex marriage is offensive to culture and tradition and repugnant.³⁶ The above statements by the senators show further that religious ideas have an impact on Nigeria's political system and play a significant part in the outlawing of same-sex relationships in Nigeria.

At the public hearing, the gay community's spokesperson, Dr. Otibho Obiowu, argued that homosexuality is not a choice and that the lack of support for same-sex unions has caused Nigerians who are members of the LGBT community to flee their homeland, and that passing the Bill into law will discourage them from returning, negatively impacting the country's development.³⁷

4.4 Critical Analysis of the Same-sex Marriage (Prohibition) Act

The Senate passed the SSMPA in 2011, and the House of Representatives passed it in July 2013. In 2006, the Obasanjo administration took the lead by presenting an executive bill to the National Assembly prohibiting same-sex marriage. That bill, however, did not pass during that administration's tenure.

³⁶ Ibid.

³⁷ Ibid.

On January 7, 2014, President Goodluck Jonathan signed the bill into law. The bill was smoothly passed without a single dissenting opinion in both houses and endorsed by the appropriate authority as a result of the overwhelming support and jubilation by the general public and religious quarters in the country during the passage of the Same-Sex Marriage (Prohibition) Bill 2011. The world community, on the other hand, was disappointed. The Canadian government even cancelled President Goodluck Jonathan's state visit to Canada, which had been set for February 2014.³⁸ The Prime Minister of Britain stated that Britain would not provide any assistance or aid to countries that oppose same-sex marriage, claiming that such a law violates the fundamental rights of choice and association.³⁹

Nigeria already had laws outlawing consensual same-sex acts in place when the SSMPA was passed, as previously stated. None of these same-sex legislations, however, mention same-sex marriage. The creators of these regulations, it is assumed, did not foresee a time when homosexuals would desire not only sexual expression and gratification, but also marital status, as their heterosexual counterparts do. As a result, the SSMPA is a broadening of anti-homosexual legislation. The Act is divided into eight sections, each of which covers a different aspect of the law. Namely: prohibition of same-sex marriage; the solemnization of same-sex marriages in places of worship; the registration of homosexual associations; offences and penalties; jurisdiction; interpretation and citation.

The Act proclaims any marriage contract or civil union between persons of the same sex entered into in Nigeria to be null and void. As a result, neither party will be entitled to the benefits of a

³⁸ Larry O. C. Chukwu, 'A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage vis-à-vis Rising Gay Activism in the Western World' [2018] (32)(2) *Brigham Young University Journal of Public Law*, <<https://digitalcommons.law.byu.edu/jpl/vol32/iss2/2>> accessed 15 May 2022.

³⁹ OA Odiase-Alegimenle. & JO Garuba 'Same-sex marriage: Nigeria at the middle of western politics' (2014) 3 *Oromia Law Journal* 285.

valid lawful marriage.⁴⁰ The prohibition on same-sex marriage extends to foreigners and Nigerians abroad who have entered into such a marriage but plan to return to Nigeria. Any same-sex marriage or civil union entered into in a foreign country is also void, and any benefit derived from it cannot be enforced by a Nigerian court of law.⁴¹ This means that if a couple marries in a country where same-sex marriage is legal, such as South Africa or Canada, their union will not be recognized as valid in Nigeria.

Marriage ceremonies in licensed places of worship, such as churches, are another means of celebrating marriage in Nigeria.⁴² The mere solemnization of a supposed marriage in a church, however, does not ipso facto confer legal validity unless all of the requirements of the Marriage Act are met. This would be nothing more than a 'church wedding.'⁴³ The Act prohibits a marriage contract between persons of the same sex from being solemnized in a church, mosque or any other place of worship in Nigeria. In addition, no certificate issued to the parties shall be valid in Nigeria.⁴⁴

Section 3 of the Act says unequivocally that 'only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria'. Statutory marriage, customary law marriage, and Islamic marriage are the three legal kinds of marriage recognized in Nigeria.⁴⁵ The Marriage Act and the Matrimonial Causes Act (MCA) govern statutory marriages in Nigeria, while customary law marriages are controlled by customs and Moslem law, respectively. None of the three types of marriage available in Nigeria allows for same-sex marriage.

⁴⁰ Same- Sex Marriage (Prohibition) Act, 2013, s1(1) (a) (b)

⁴¹Ibid s1 (2).

⁴² Marriage Act 1914, s6 authorizes the Minister to license any place of worship to be a place for the celebration of marriages...

⁴³ *Obiekwe v Obiekwe (1963) 7 ENLR.*

⁴⁴ n40 s (1)

⁴⁵ E.I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers 2014) 5.

The SSMPA makes gay clubs and organizations illegal. “The registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.”⁴⁶ The Act also prohibits couples of same-sex amorous relationship from making direct or indirect public displays of affection.⁴⁷ The term ‘amorous’ refers to showing sexual desire and love towards any person.⁴⁸ The purpose of the SSMPA, as seen in this section, is to stop the spread of what Nigerians have traditionally regarded as deviant behavior and to shield citizens from witnessing an attack on Nigeria's moral basis and assimilating it as the usual.

The SSMPA not only outlawed same-sex marriage and civil union in the country, but it also made it a crime, punishable by a sentence of fourteen (14) years imprisonment⁴⁹ without the possibility of a fine. The position in the Criminal Code and Penal Code is equivalent to this term of punishment. In addition, “a person or group of persons who...aids the solemnization of a same sex marriage...or supports registration, operation and sustenance of gay clubs, societies, organisations in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.”⁵⁰ Heterosexuals who run homosexual clubs for a living are likewise at risk of being imprisoned under this provision. According to reports, a young man named Mubarak Ibrahim was arraigned before a Shari'ah Court in Bauchi state on the charge of being a member of a gay club, and was subsequently convicted and sentenced to 20 strokes of the cane in compliance with Islamic injunctions. The Presiding Judge, Nuhu Idris, said the punishment could

⁴⁶ SSMPA s4(1).

⁴⁷ Ibid s4(2).

⁴⁸ Oxford Advanced Learners' Dictionary, 8th ed; Oxford University Press, 2010 p45.

⁴⁹ n40 s5(1) provides; 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.

⁵⁰ n40 s5(3).

have been harsher but there were no witnesses and the accused said he joined the club after being duped by classmates.⁵¹

In respect of jurisdiction, only the State High Courts or of the Federal Capital Territory shall have authority to entertain matters arising from the violation of the provisions of this Act have powers to try offenders under this Act.⁵²

Marriage is defined in Section 7, the SSMPA's interpretation section as "a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law". This definition clearly emphasizes that all existing marriage systems in Nigeria (including polygamous ones) are still safeguarded, dispelling the misconception that Section 2 only recognizes monogamous marriages. In addition, the Act defines same-sex marriage as the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship.⁵³

Finally, the SSMPA offers a wide range of applications. The criminalization web has now been expanded to include not only lesbians and gays, but also any person who assists, counsels, or procures them to celebrate or display their immoral activities in the open through solemnization or witnessing of their unions, registration or operation of their associations, holding of public meetings, or making public show of their amorous relationships. The outlawing of these actions, as well as the implementation of punishments for their commission, can only be interpreted as a strong indication of Nigerian public disapproval of such aberrant behavior. With sodomy statutes well established in Nigerian criminal law, there is no question as to what may happen to gays caught engaged in full consented same-sex sexual acts. Because of the legislative, religious, and

⁵¹ Magaji Chiroma and Awwal Ilyasu Magashi, 'Same-Sex Marriage versus Human Rights: The Legality of the "Anti Gay & Lesbian Law" in Nigeria' [2015] 4(1) *International Law Research* 22.

⁵² S6.

⁵³ Ibid.

socio-cultural limitations, no homosexual has ever sought an official license to marry or to legitimize an illicit relationship in Nigeria.

4.5 The Same Sex Marriage Prohibition Act and Constitutional Rights

Amnesty International, Human Rights Watch (HRW), and the International Gay and Lesbian Human Rights Commission (IGLHRC) strongly urged the Nigerian Senate not to enact the "Same Sex Marriage (Prohibition) Bill 2011," claiming that it breaches the constitution.

The prohibition of lesbian or gay marriage, according to LGBT activists, is a denial and violation of their fundamental rights to private and family life, freedom of expression and peaceful association, and non-discrimination on the grounds of sexual orientation, all of which are enshrined in Chapter IV of the Federal Republic of Nigeria's Constitution. Is this statement accurate?

Fundamental human rights are fundamental rights or liberties that all individuals are entitled to for their own advantage, and which a government may not impede with in their exercise. By devoting itself to human rights protection, the 1999 Constitution set the tone strongly by providing 'the purpose of promoting the good governance and welfare of all persons on ... the principles of freedom, equality and justice'.⁵⁴ Every freedom has always had a limit, dating back to the dawn of time. Even in the Bible, God placed man in the Garden of Eden and instructed him to eat freely from any tree in the garden except the tree of the knowledge of good and evil.⁵⁵

⁵⁴ See the Preamble to the CFRN, 1999.

⁵⁵ Larry O. C. Chukwu, 'A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage vis-à-vis Rising Gay Activism in the Western World' [2018] (32)(2) *Brigham Young University Journal of Public Law*, 210.

There are no absolute human rights. Most of the Constitution's human rights provisions have a caveat that limits their implementation and enforcement. For example, when a person commits murder and is sentenced to death, his or her right to life under Section 33 of the Constitution is limited. In this scenario, where a capital offense has been committed, the right to life cannot be deemed to have been violated. The constitution provides that Sections under Chapter four of the Constitution such as sections 37, 38, 40, and 42 shall not invalidate any law that is reasonably justifiable in a democratic society. The criminalization of homosexuality is reasonably justifiable to the legislature and majority of the state's citizens because Nigeria is a strongly religious and moralistic country, and the Act was enacted in the public good.

Even though its utterances are not as plain or refined as that of Child's Rights Act (CRA) 2003 or the European Convention of Human Rights (ECHR) 1998, Section 37 of the Constitution ensures the right to private and family life.⁵⁶ It guarantees and protects “the privacy of citizens, their homes” This right is not absolute as laws enacted in the interest of defence, public safety, public morality or public health or for the purpose of protecting the rights and freedom of other persons may abridge it.⁵⁷ As a result, individual rights are susceptible to the wishes of the general public.

Community, ethnicity, place of origin, sex, religion, political viewpoint, and birth circumstances are the seven grounds on which a person or citizen of Nigeria shall not be discriminated against under the right to freedom from discrimination.⁵⁸ The SSMPA has been accused of infringing on this right. The right to non-discrimination is a key value of international human right legislation, with international and regional human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR)

⁵⁶ Michael Attah & Elizabeth Iyamu-Ojo “Who Is My Child?”— Implications of Judicial Rejection of Commune Cultural Conceptions of the Family for Children’s Welfare in Nigeria [2021] (12) *Beijing Law Review*, 465.

⁵⁷ CFRN 1999, s45.

⁵⁸ CFRN 1999 s42.

providing substantial protection. According to Article 2 of the African Charter “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin fortune, birth or other status.”⁵⁹

Although it has been said that the government's decision to prohibit same-sex unions and make them illegal may have infringed on certain people's rights, criminalizing such was necessary for the welfare of society as a whole. Specifically, the African Charter on Human and People Rights provides, “The family shall be the natural unit of society. It shall be protected by the State which shall take care of its physical health and moral. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”⁶⁰

Sections 4(1), 5(1), and 5(2) of the SSMPA are also alleged to be in violation of the constitutional right to free association,⁶¹ which states; “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”

While people’s human rights must be safeguarded, it is also important to note that it is a state’s responsibility to make laws for the peace, order and good government of its citizens.⁶² This could involve the implementation of any law dealing with people's moral and social control. This is the reason that criminal laws have been enacted to deter crime and to manage public moral deterioration, such as law against adultery and drinking of alcohol in the north. The intention of the Nigerian government in my opinion, was to strike a balance between the rights of those who engage in same-sex activities and the need to preserve society's moral fiber. All rights are

⁵⁹ African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force on 21 Oct, 1986).

⁶⁰ Ibid Article 18(1) and (2).

⁶¹ CFRN 1999 s40.

⁶² Ibid s4.

constrained by a legal requirement, and every nation, including Nigeria, is confronted with the hard question of balancing individual rights with the responsibility to safeguard and sustain the societal survival.

Since Nigeria is a sovereign state, she possesses the authority to make laws for the good of the people without any outside interference or control in any form. Nigeria is a United Nations (UN) member, and the UN Charter prohibits the UN from interfering in a sovereign state's internal domestic affairs.⁶³ As a result, laws enacted by the country, such as those prohibiting same-sex couples from marrying and other policies, should be seen as solely local matters requiring no foreign or external intervention or influence. The SSMPA was enacted to reaffirm Nigeria's position on same-sex relationships in the face of increasing uproar and human rights activity for their legalization, as well as to promote and defend the Nigerian people's sense of morality, as required by the ACHPR. The state is required under Article 17(2) of the ACHPR to defend and promote morals and traditional values acknowledged by the community. The individual's moral code is determined by society, and it is the individual's responsibility to follow it and contribute to society's overall well-being. The goal of the law is to not just punish aberrant behavior, but also to legislate morality when it is necessary to maintain social order. As a result, on the basis of public policy, a basic right may not be granted. Article 29 of Universal Declaration of Human Rights (UDHR) provides; “in the exercise of the rights and freedoms, shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

⁶³ United Nations Charter, United Nations International Conference, San Francisco, 26th June 1945, entered into force on 20th October, 1945, Article 2(7).

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

This Chapter is the final part of this research work. It contains a brief summary of everything this research work stands for and hopes to achieve. This work was written to examine the Nigerian position on same-sex relationships and unions and to understand the reasons why the attitude towards such relationships is the way it is presently.

As earlier discussed, religion and the adopted British colonial law are the two main reasons why same-sex sexual conduct remains illegal in Nigeria. The work has indicated that the world is gradually gravitating towards a consensus on rights recognition for Lesbian Gay Bisexual and Transgenders (LGBTs) and has also examined the restrictions and penalties placed on same sex marriage and related unions in Nigeria. Over time, some nations around the world have resisted pressure and agitation to recognize same-sex marriage by passing legislation allowing same-sex relationships. But around the turn of the 21st century, the majority of those nations caved in and changed their laws to recognize same-sex unions.

As shown in Chapter four, Nigerian society is profoundly conservative, and takes the business of religion seriously. In the southern part of Nigeria, the Criminal Code Act holds sway, while the Penal Code Act is operative in the northern part. Both legal systems prohibit homosexual relations, as also shown in Chapter four. The traditional view that marriage is only a union between a man and woman has changed today with the passage of gender neutrality in marriage and marriage laws in various countries of the world which have made it possible for people of the same sex to celebrate marriage in the same way heterosexuals can. Notwithstanding the

recognition granted same-sex couples to marry, however, there are dissenting opinions or views on same sex marriage. Such people view the state's activities as a violation of societal norms. Majority of Nigerians, whose value system depends on children for survival, view the legalization of same-sex marriage as an imposition.

There will inevitably be an increase in the population of the lesbian and gay community and a corresponding rise in LGBT activism in Nigeria today due to the effects of globalization and the propensity of Nigerian young to fully adopt Western characteristics. This is why the Nigerian authorities saw the urgent need to take drastic and preventive measures aimed at nipping it in the bud. Although the Nigerian government's adoption of the Same Sex Marriage (Prohibition) Act (SSMPA) 2014 is a signal to the world community and same-sex rights activists that Nigeria does not plan to budge under pressure to uphold the rights of sexual minorities, the question is how long will Nigeria continue to do so? The undeniable fact is that the day will come when Nigeria will decriminalize same-sex association or union and enact a marriage law that is gender neutral, to accommodate same-sex association. This will bring problems because a high number of Nigerians are homophobic and do not accept homosexuality.

5.2 Recommendations

It is only appropriate to offer suggestions after carefully weighing the legal arguments, philosophical arguments and historical analysis of the many concepts of the work.

Firstly, our legal system's definition of marriage must continue to be in place. The definition of marriage must continue to remain a legally binding union exclusively between a man and a woman.

The SSMPA is frequently criticized for its enforceability. This is typically the issue with Nigerian law, which has hampered the nation's development. If laws are not enforced, they are of little or no significance. Laws are only effective to the extent that they are enforced; otherwise, they are mere proposals. Laws must be moral reflections of people's lives. When a majority of a society opposes a particular action, it is the duty of the law to ensure that such morality is recognized by the law and is appropriately enforced.

People who engage in same-sex behavior typically commit the practice in private. So how can one tell if someone practices same-sex behavior or not? If someone is found engaging in same-sex behavior in public, the SSMPA specifies severe penalties. Because only public same-sex acts are covered, the fact is that the SSMPA does not completely abolish homosexuality. Its major focus is provision for same sex activities made open to the public.

Additionally, in instances of citizen violence against homosexuals in Nigeria, the Nigerian Police should adopt policies and implement regulations that would force people to abstain from acts of violence and prejudice against homosexuals because it is against the law. Citizens of the society beat and torture suspected LGBT individuals, and this should not be tolerated. They ought to let the legal process play out and not take law into their own hands.

In addition, in these institutions where the same sex partners will be completing their sentences, there is a need for counseling and rehabilitation facilities. Mere arrest would not be beneficial in the long run. Given that the purpose is to refocus inmates, the prisons should be well-equipped.

The SSMPA's provisions are insufficiently promoted, and Nigerians are not even aware of the Act's entire scope. To help individuals in the society better understand this issue, there should be greater public education. The fact that same-sex unions are punishable by 14 years in prison is an

information that is generally known. In Nigeria, there is a dearth of knowledge regarding the sanctions for running gay clubs and organizations, however some do exist covertly. More people should be aware of the SSMPA. Reorientation and publicity should be made by the government.

The SSMPA primarily emphasizes the marriage contract or union of people who are of the same sex and does not address the issue of homosexuals adopting children. What about individuals who are cohabiting in private and have intentions of carrying out LGBT international adoption of children? Same-sex couples must turn to artificial insemination and adoption because they are unable to conceive children naturally. There are a lot of unanswered questions. What then is the situation's legal standing? Are they immune to sanctions given that adoption is not governed by the law? The SSMPA should provide clarification on this score.

Furthermore, the Sharia Law which is firmly established in Nigerian northern states that states that the maximum penalty for homosexual offences is death should be amended to a less stringent penalty. In my opinion, the death penalty for sodomy acts is too extreme and the method by which the death penalty is carried out (stoning) is inhumane. It is best to maintain the 14-year prison sentence under the Penal Code Act to maintain the dignity of offenders.

5.3 Conclusion

It is apposite to know that homosexuality would be frowned upon as long as Nigeria's moral context is as traditional as it is today. The legal requirements for marriage in Nigeria were developed with these facts and objectives in mind because marriage is one of the most significant social customs and ensures childbirth as the inevitable result of sexual activity. Even if the culture does change in the following generation, it will only do so gradually and not as a

consequence of external pressure like blackmail or compulsion on Nigerian society. This is based on a proposition by Nicholas Bala that it is unlikely for a society to go quickly from criminalizing homosexuality directly to one that recognizes same-sex marriage; There must be some interim phases to give social attitudes time to adapt to the new legal reality.¹

The legitimization of same-sex marriages comes with drastic modification of the legal framework of marriage. Under the current conditions, if Nigerian authorities gave in to Western pressure and legalized same-sex marriage, there would be strong popular opposition, if not violent protests. Politicians are concerned that if they make a decision that is contrary to the views of the people, they will lose the support of the electorate.

¹ Larry O. C. Chukwu, 'A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage vis-à-vis Rising Gay Activism in the Western World' [2018] (32)(2) *Brigham Young University Journal of Public Law*, 217.

BIBLIOGRAPHY

ONLINE SOURCES

Amsterdam Gay Pride, Amsterdamgaypride.nl

<https://www.findlaw.com/family/domestic-partnerships/what-is-a-civil-union.html> accessed 18 February 2022.

Dickson P. C, ‘Homophobia Unites Muslims and Christians in Nigeria’
<<https://theworld.org/stories/2014-02-13/homophobia-unites-muslims-and-christians-nigeria>>
accessed 13 May 2022.

Field M, “The Ten Best Places in the World to Be Gay”. Independent.co.uk (The Independent)

<<https://untoldhistorytour.com/homosexual-wedding-for-the-roman-emperor/>> accessed 1 March 2022.

< <https://historyofyesterday.com/homosexuality-in-ancient-greece/>> accessed 1 March 2022.

<https://en.wikipedia.org/wiki/History_of_same-sex_marriage_in_the_United_States/> accessed 10 March 2022.

<<https://saharareporters.com/2022/07/01/shari’ah-court-sentences-three-men-death-stoning-homosexuality-bauchi>> accessed 1st July 2022.

Livius.org.2020 *Greek Homosexuality*. <<https://www.livius.org/articles/concept/greek-homosexuality/>> accessed 1 March 2022.

Mark, Joshua J. “Sacred Band of Thebes”, *World History Encyclopedia*. Last Modified June 17, 2021 <https://www.worldhistory.org/Sacred_Band_of_Thebes/> accessed 1 March 2022.

McDaid M, “The Netherlands is one of Europe’s most gay friendly nations”. Netherlands; <https://www.iamexpat.nl/expat-info/dutch-expat-news/netherlands-one-of-europes-most-gay-friendly-nations>

Norton R, *A History of Homophobia*, “3 The Later Roman Empire & The Early Middle Ages” 15 April 2002; updated 28 January 2011 <<https://rictornorton.co.uk/homopho3.htm>> accessed 2 March 2022.

Pickett B, “Homosexuality”, *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edn), Edward N. Zalta (ed.) <<https://plato.stanford.edu/archives/spr2021/entries/homosexuality/>>

Roman Sex, Sexuality, Slaves and Lex Scantinia
<<https://www.heritagedaily.com/2018/01/roman-sex-sexuality-slaves-and-lex-scantinia/97996?amp>> accessed 1 March 2022.

Stone, Geoffrey. 2017. *Opinion: Sex and the Constitution: The ancient Greeks*.
<<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/1/sex-and-the-constitution-the-ancient-greeks/>>

The Dutch Went First in 2001; Who Has Same-Sex Marriage Now?
<https://www.usnews.com/news/world/articles/2021-04-01/the-dutch-went-first-in-2001-who-has-same-sex-marriage-now> accessed 10 March 2022.

The Global Divide on Homosexuality, PEW RES. CTR. (June 4, 2013),
<https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/> accessed 12 May 2022.

JOURNALS

Ajayi-Lowo E.O, ‘The Same-Sex Marriage Prohibition Act in Nigeria: A Critique of Body Policing 78.

Akpan C.O, ‘The Morality of Same Sex Marriage: How Not to Globalize a Cultural Anomie’ [2017] (13)(1). *Online Journal of Ethics* <http://dx.doi.org/10.18785/ojhe.1301.02> accessed 22 February 2022.

Attah M., & Iyamu-Ojo E. (2021). “Who Is My Child?”— Implications of Judicial Rejection of Commune Cultural Conceptions of the Family for Children’s Welfare in Nigeria. (2021) *Beijing Law Review*, 12 465.

Bazuaye B & Alohan F ‘Criminalization of Same Sex Marriage in Nigeria: Is it Much Ado About Nothing?’ *NIALS Journal of Law and Gender* 43.

Chiroma M and Magashi A.I, ‘Same-Sex Marriage versus Human Rights: The Legality of the “Anti Gay & Lesbian Law” in Nigeria’ [2015] 4(1) *_International Law Research_* <http://dx.doi.org/10.5539/ilr.v4n1p11>

Chukwu L, ‘A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage vis-à-vis Rising Gay Activism in the Western World’ [2018] (32)(2) *Brigham Young University Journal of Public Law*, 191 <<https://digitalcommons.law.byu.edu/jpl/vol32/iss2/2>> accessed 12 May 2022.

Deane T, ‘Understanding the need for anti-discriminatory legislation in South Africa’ (2005) 3 *Fundamina: A Journal of Legal History* 1.

Jivan U, ‘From individual protection to recognition of relationships: *Same-sex couples and the South African experience of sexual orientation reform*’ (2007) 11 *Law, Democracy & Development* 26.

Odiase-Alegimenle OA. & Garuba JO, ‘Same-sex marriage: Nigeria at the middle of western politics’ (2014) 3 *Oromia Law Journal* 285.

Onuche J, ‘Same Sex Marriage in Nigeria: A Philosophical Analysis’ [2013] *International Journal of Humanities and Social Science* (3)(12) 94-95.

Visser C & Picarra E ‘Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism’ [2012] 28 *South African Journal on Human Rights* 506-511.

Bunikowski D, *Legal Protection of the Value of Public Morality: The Hart- Devlin Debate* 4-5.

BOOKS

Adaramola F, *Jurisprudence* (4th Edn, LexisNexis Butterworths 2008) 79-80.

Lloyds *Introduction to Jurisprudence* (London; Sweet and Maxwell 1999) 58.

Devlin P, *The enforcement of morals* (Oxford: Oxford University Press, 1965) 14.

Elegido JM, *Jurisprudence* (1994) 358.

Fuller L, 'Positivism and Fidelity to Law' *Harvard Law Review* 630.

Hart HLA, *Immorality and treason*.

JS Mill *On liberty* (2003)

Ladan MT, *Introduction to jurisprudence, classical and Islamic* (2006).

Nwogugu E.I., *Family Law in Nigeria* (3rd edn, HEBN Publishers 2014)

Nwogugu E.I, 'What Next in Nigerian Family Law?' (2006) Nigerian Institute of Advanced Legal Studies (7) 11-13.

Wacks R, *Understanding Jurisprudence* (3rd Edn, Oxford University Press 2012).

DICTIONARY SOURCES

Collins Web-Linked Dictionary of Sociology 3rd Ed (New York, Harper Collins Publishers, 2000)

Oxford Advanced Learners Dictionary 6th Ed.

Oxford Advanced Learners Dictionary, 7th Ed. Oxford University Press.

Oxford Advanced Learners' Dictionary, 8th ed; Oxford University Press, 2010

