

LEGAL FRAMEWORK PROHIBITING SAME SEX MARRIAGE:COMPARATIVE STUDY

UMEH VALENTINE UGOCHUKWU

GOU/U21/LAW/382

A LONG ESSAY SUBMITTED TO THE FACULTY OF LAW,GODFREY OKOYE

UNIVERSITY,ENUGU STATE OF NIGERIA

IN PARTIAL FUFILMENT OF THE REQUIREMENTS FOR THE AWARD OF

BACHELOR OF LAWS (L.L.B)

JULY 2026



DECLARATION

I, UMEH VALENTINE UGOCHUKWU, with Registration Number GOU/U21/LAW/382, hereby declare that this research project titled “The Legal Framework Prohibiting Same-Sex Marriage: A Comparative Study” is the result of my personal effort and academic work carried out under the supervision and guidance of Dr. Maureen Ajah.

I further declare that this work has not been submitted in whole or in part to any other institution for the award of any degree, diploma, or academic qualification. All sources of information, ideas, and authorities used in this research have been duly acknowledged and properly referenced in line with academic requirements.

UMEH VALENTINE UGOCHUKWU



CERTIFICATION

This is to certify that this research project titled “The Legal Framework Prohibiting Same-Sex Marriage: A Comparative Study” was carried out by UMEH VALENTINE UGOCHUKWU, with Registration Number GOU/U21/LAW/382, of the Department of Law, under the supervision of Dr. Maureen Ujah.

This research work has been supervised and reviewed, and is hereby certified as adequate in scope and quality for the award of a degree in Law.

.....

Dr. Maureen Ujah

.....

Date



Supervisor

.....

Dr. Geoffrey Omeh
Dean, Faculty of Law

.....

Date

.....

External Examiner

.....

Date



DEDICATION

This research work is dedicated to God Almighty, the source of wisdom, knowledge, and understanding, for His grace and guidance throughout my academic journey.

It is also dedicated to all scholars, legal practitioners, and institutions engaged in the continuous development and interpretation of laws governing marriage and family relations in society.

Above all, this work is dedicated to the pursuit of truth, justice, and the proper development of legal frameworks that reflect societal values and moral considerations.

ACKNOWLEDGEMENTS

I give thanks to Almighty God for the grace, strength, wisdom, and protection He



granted me throughout the course of this research work and my academic journey in general.

I sincerely express my profound gratitude to my project supervisor, Dr. Maureen Ujah, for her guidance, patience, useful corrections, and support throughout the period of this research. Her advice and academic direction were instrumental in the successful completion of this work.

I also appreciate the lecturers of the Faculty of Law for their efforts in impacting knowledge and shaping my academic foundation. Their teachings and encouragement contributed greatly to my understanding of legal principles.

My heartfelt appreciation goes to my family for their love, encouragement, prayers, and financial support throughout my studies. I am especially grateful for their sacrifices and belief in my academic success.

Finally, I acknowledge my friends and classmates who supported me in one way or another during the course of this research work.

Thank you all for being part of my academic journey.

TABLE OF CONTENT

TITTLE PAGE.....	ii
DECLARATION.....	iii
CERTIFICATION.....	iv
DEDICATION.....	v
TABLE OF CONTENTS.....	vi
LIST OF CASES.....	vii



LIST OF STATUTES.....viii

LIST OF ABBREVIATION.....ix

ABSTRACT.....x

CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

1.2 Statement of the Problem

1.3 Research Questions

1.4 Aim and Objectives of the Study

1.5 Scope and Limitations of the Study

1.6 Significance of the Study

1.7 Research Methodology

1.8 Literature Review

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Conceptual Framework

2.1.1 Meaning and Nature of Marriage

2.1.2 Concept of Same-Sex Unions and LGBTQ+ Terminology

2.1.3 Definition of Prohibition and Criminalization

2.1.4 Evolution of Marriage Laws in Nigeria

2.2 Theoretical Framework

2.2.1 Natural Law Theory

2.2.2 Legal Positivism Theory

2.2.3 Public Morality Theory

2.2.4 Cultural Relativism vs. Universalism of Human Rights

CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK ON PROHIBITION OF SAME-SEX MARRIAGE IN NIGERIA

3.1 Statutory Provisions Prohibiting Same-Sex Unions

3.1.1 Same Sex Marriage (Prohibition) Act 2014 (SSMPA)

3.1.1.1 Prohibition of Marriage Contracts and Witnesses

3.1.1.2 Criminalization of Same-Sex Organizations and Clubs

3.1.2 The Criminal Code Act (Southern States)

3.1.3 The Penal Code Act (Northern States)

3.1.4 Shari'ah Penal Codes and Same-Sex Relations in Northern Nigeria

3.2 Constitutional and Judicial Perspectives

3.2.1 Right to Privacy vs. State Interest (Section 37 CFRN 1999)

3.2.2 Freedom of Association and Assembly (Section 40 CFRN 1999)



3.3 Enforcement Mechanisms and Institutional Roles

3.3.1 The Role of the Nigeria Police Force

3.3.2 The Role of Religious and Traditional Institutions

3.4 Judicial Attitude: Review of Notable Nigerian Cases

CHAPTER FOUR: COMPARATIVE ANALYSIS AND CHALLENGES OF THE PROHIBITORY FRAMEWORK

4.1 Comparative Study of Other Jurisdictions

4.1.1 South Africa: A Model of Constitutional Protection

4.1.2 The United Kingdom: From Criminalization to Recognition

4.1.3 Uganda: A Parallel Study of African Prohibitory Laws

4.2 Challenges in the Implementation of the SSMPA 2014

4.2.1 Ambiguity in the Definition of "Public Show of Affection"

4.2.2 Human Rights Concerns and International Pressure

4.2.3 Social Stigma and Extra-Judicial Violence

4.3 Impact of International Human Rights Treaties on Nigerian Law

CHAPTER FIVE: SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Summary of Findings



5.2 Recommendations

5.3 Conclusion

BIBLIOGRAPHY

LIST OF CASES



Abacha v Fawehinmi [2000] FWLR (Pt 4) 533.....	8,18,74
Atala Riffo and Daughters v Chile (Inter-American Court case).....	66
Dudgeon v United Kingdom [1981] ECHR.....	33,45,66
Fourie v Minister of Home Affairs 2006 1 SA 524.....	5,16,53,74,75
Hyde v Hyde and Woodmansee (1866) LR 1 P&D 130.....	21
Lawrence v Texas 539 U.S. 558 (2003).....	17,34,45
Minister of Home Affairs v Fourie and Another 2006 1 SA 524.....	5,16,53,74,75
Modinos v Cyprus (1993) 16 EHRR 485.....	33
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517.....	52,73,74
Norris v Ireland (1988) 13 EHRR 186.....	33
Obergefell v Hodges 576 U.S. 644 (2015).....	6,17,23
Oloka-Onyango v Attorney General (Uganda Constitutional Court case).....	59
R v Nova Scotia Pharmaceutical Society [1992] 1 S.C.R. 159.....	63,73
Toonen v Australia CCPR/C/50/D/488/1992.....	35,64,73,74,76,



LIST OF STATUTES

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.....	5,8,10,11,13,16,18,35,59,60,65,69,70,74,76
Civil Union Act.....	6,13,53,54,74
Constitution of the Federal Republic of Nigeria 1999 (as amended).....	5,11,13,44
Criminal Code Act.....	11,13,25,39,41,42,76
Freedom of Information Act, 2011.....	8
International Covenant on Civil and Political Rights (ICCPR).....	13,34,64,65,73,74,74,76
International Covenant on Economic, Social and Cultural Rights (ICESCR)	
Marriage Act.....	34
Matrimonial Causes Act.....	21,27
Penal Code (Northern States).....	2,3,11,12,13,25,42,43,58,76
Same Sex Marriage (Prohibition) Act	
2014.....	11,24,25,27,29,31,32,33,35,44,60,61,63,64,65,66,67,68,69,70,71,72,73
Sharia Penal Codes (Twelve Northern States).....	3,11,12,13,25,42,43,44,76
Universal Declaration of Human Rights (UDHR), 1948.....	13,34
Yogyakarta Principles (2006, supplemented 2017).....	34,72



LIST OF ABBREVIATION

ACJA - Administration of Criminal Justice Act

CFRN - Constitution of the Federal Republic of Nigeria

ECHR - European Convention on Human Rights

EHRR - European Human Rights Reports

HIV - Human Immunodeficiency Virus

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICTR - International Criminal Tribunal for Rwanda

LGBTQ+ - Lesbian, Gay, Bisexual, Transgender, Queer

SA - South African Law Reports

SERAP - Socio-Economic Rights and Accountability Project

SSMPA - Same Sex Marriage (Prohibition) Act



UK - United Kingdom

UN - United Nations

UDHR - Universal Declaration of Human Rights

US - United States

ABSTRACT

This research examines the legal framework prohibiting same-sex marriage: a comparative study. The study explores how different legal systems regulate marriage and the extent to which same-sex marriage is recognized or prohibited across selected jurisdictions. It further analyses the legal, social, cultural, and moral factors influencing such laws, with particular attention to the interaction between statutory provisions, constitutional principles, and societal values.

The objective of the study is to critically assess the legal basis for the prohibition or recognition of same-sex marriage and to compare approaches adopted in different countries. The research adopts a doctrinal method, relying on primary sources such as statutes, case law, and constitutional provisions, as well as secondary sources including textbooks, journal articles, and internet materials.



Findings from the study reveal that legal approaches to same-sex marriage vary significantly across jurisdictions, largely influenced by cultural, religious, and historical contexts. While some countries have legalized and recognized same-sex marriage based on equality and human rights principles, others maintain strict prohibitions grounded in public morality and traditional definitions of marriage.

The study concludes that the legal treatment of same-sex marriage remains a contested issue in comparative law, reflecting the tension between evolving human rights standards and established cultural and moral norms. It recommends continuous legal analysis and balanced legislative approaches that consider both human rights discourse and societal values within each jurisdiction.



CHAPTER ONE

INTRODUCTION

1.1 Background to the Study



Few legal questions have generated as much controversy in contemporary Nigerian public discourse as the prohibition of same sex marriage and this is rightly so. It sits at the crossroads of constitutional law, international human rights obligations, religious doctrine, cultural identity, and the most fundamental questions about what the law is for and who it is meant to protect. Understanding this subject properly requires going back further than 2014, when President Goodluck Jonathan signed the Same Sex Marriage (Prohibition) Act into law. It requires examining what Nigeria inherited, what Nigeria chose to keep, and what the comparison with other legal systems tells us about the choices Nigeria continues to make.

Before British colonial rule, Nigerian communities regulated personal and social conduct which included sexual conduct, through a diverse range of customary and religious norms that varied amongst ethnic groups. There is historical evidence, acknowledged by Human Rights Watch and several academic scholars, that pre-colonial Nigeria did not have a single codified prohibition on same sex relations.¹ What existed were cultural taboos, varying in intensity and scope, but no statutory criminalization of the kind that colonialism would introduce. Among the Igbo of southeastern Nigeria, anthropologists have documented what scholars like M. Epprecht have described as practices that would today be classified as gender-variant or same sex relationships, embedded within customary structures that did not necessarily define them in terms of the binary categories imported by colonial law.²

¹Human Rights Watch, *This Alien Legacy: The Origins of Sodomy Laws in British Colonialism* (2008) <<https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>> accessed March 2026.

²Marc Epprecht, *Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS*



When the British colonial administration consolidated control over the territory that would become Nigeria, a process that led to the amalgamation of the Northern and Southern Protectorates by Sir Frederick Lugard in the year 1914, it brought with it the full apparatus of Victorian English criminal law. The Criminal Code, introduced to Southern Nigeria in 1916 and modeled substantially on the Queensland Criminal Code of 1899, contained provisions in Chapter 21 that criminalized what it described as 'unnatural offences.' Section 214 of the Criminal Code made it a felony punishable by fourteen years' imprisonment for any person to have 'carnal knowledge of any person against the order of nature,' a provision that courts and scholars have consistently interpreted as targeting male homosexual conduct. Section 217 further criminalized acts of 'gross indecency' between male persons, carrying a penalty of three years' imprisonment.³ These were not Nigerian inventions. They were transplanted colonial statutes, rooted in English legal tradition and the morality of a Victorian era that England itself has long since departed.

The Northern Penal Code of 1960,⁴ applicable in the states that would form the Muslim-majority north, similarly prohibited 'carnal intercourse against the order of nature,' with a maximum sentence of fourteen years and a fine. After Nigeria's independence in 1960, neither instrument was repealed or substantively reformed on this point. The constitutional arrangements of 1963 and 1999 preserved these codes as they were,

(Ohio University Press 2008) 15–44.

³Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria 2004, ss 214, 215, 217; Human Dignity Trust, 'Criminalization of LGBT People in Nigeria' <<https://www.humandignitytrust.org/country-profile/nigeria/>> accessed March 2026.

⁴Penal Code (Northern States) Federal Provisions Act, Cap. P3, Laws of the Federation of Nigeria 2004, s 284; UK Home Office, *Country Policy and Information Note: Nigeria—Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* (June 2025)<<https://www.gov.uk/government/publications/nigeria-country-policy-and-information-notes>> accessed March 2026.



with no legislative effort to interrogate whether Victorian penal provisions on sexuality were compatible with the rights guaranteed under a modern constitution. This is a point several Nigerian legal scholars, including Professor O. Nnamuchi⁵ of the University of Nigeria, have noted that Nigeria's constitution purports to guarantee human dignity, privacy, and freedom from discrimination, while its inherited criminal legislation simultaneously denies those very guarantees to a class of its citizens.

The situation in northern Nigeria became more complex from the year 2000, when Zamfara State became the first of what would eventually be twelve northern states to adopt Sharia Penal Codes applicable to Muslims. These codes went considerably further than the inherited colonial statutes. Under various state Sharia Penal Codes, including those of Kano, Katsina, Zamfara, Bauchi, Sokoto, Jigawa, Kaduna, and others; sodomy is defined and criminalized separately, with punishments ranging from one hundred lashes for the unmarried to death by stoning (rajm) for the married.⁶ Lesbianism is similarly criminalized under these codes, punishable by caning and imprisonment, with death penalties applicable in some states. The Human Dignity Trust, in its country profile on Nigeria, has documented specific instances of prosecutions and

⁵Obiajulu Nnamuchi, 'Nigeria's Same Sex Marriage (Prohibition) Act and Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?' (2015) *Southwestern Law Review*

< <https://www.swlaw.edu/sites/default/files/2019-04/8.%20Obiajulu%20Nnamuchi.pdf> > accessed March 2026.

⁶'Legal Framework on Anti-Homosexuality in Nigeria' *Unizik Law Journal*

< <https://journals.ezenwaohaetorc.org/index.php/ULJ/article/download/2839/2975> > accessed March 2026;

Zamfara State Sharia Penal Code Law 2000; Kano State Sharia Penal Code Law 2000; Bauchi State Sharia

Penal Code Law 2001.

flogging under these provisions, including the conviction and public flogging of a twenty-year-old man in Bauchi State for sodomy in 2022.⁷

Against this already restrictive legislative backdrop, the National Assembly passed the Same Sex Marriage (Prohibition) Act on 17 December 2013, and President Jonathan signed it into law on 7 January 2014. The immediate legislative purpose of the Act, as stated in its long title, is to prohibit marriage contracts or civil unions entered into between persons of the same sex and to criminalize related conduct. Section 1(1) of the Act states that a marriage contract or civil union entered into between persons of the same sex is prohibited in Nigeria. Section 5(1) imposes a term of fourteen years' imprisonment on any person who enters into a same sex marriage contract or civil union. Section 5(2) imposes ten years' imprisonment on any person who registers, operates or participates in gay clubs, societies and organizations, or who directly or indirectly makes a public show of a same sex amorous relationship in Nigeria. Section 5(3) similarly criminalizes anyone who 'administers, witnesses, abets or aids' the solemnization of a same sex marriage or supports gay organizations.⁸ Section 1(2) provides further that any marriage or civil union certificate issued by a foreign country in favour of same sex persons shall be void in Nigeria, and no Nigerian court shall enforce any benefit arising from such a certificate.⁹

⁷Human Dignity Trust (n 3); 'LGBTQ Rights in Nigeria,' *Wikipedia* (updated March 2026) <https://en.wikipedia.org/wiki/LGBTQ_rights_in_Nigeria> accessed March 2026.

⁸Same Sex Marriage (Prohibition) Act 2014, ss 1(1), 5(1)–(3); Equal Rights Trust, 'Nigeria Becomes the Latest Country to Pass Dangerous Anti-Gay Legislation' (2014) <<https://www.equalrightstrust.org/news/nigeria-becomes-latest-country-pass-dangerous-anti-gay-legislation>> accessed March 2026.

⁹Same Sex Marriage (Prohibition) Act 2014, s 1(2).



The scope of the Act, as the Equal Rights Trust observed in its 2014 analysis, goes far beyond the nominal prohibition of a marriage ceremony. It effectively criminalizes lesbian, gay, bisexual, and transgender persons based on identity and association, not merely conduct.¹⁰ Human Rights Watch, in its comprehensive 2016 report titled 'Tell Me Where I Can Be Safe: The Impact of Nigeria's Same Sex Marriage (Prohibition) Act,' documented extensively that the passage of the Act was immediately followed by mob attacks, extortion, arbitrary arrests, and violence against LGBT persons and the many forms of abuse that Nigerian security forces not only failed to prevent, but in many cases actively participated in.¹¹

The Act sits in a complex relationship with Nigeria's own constitutional guarantees. Sections 37 and 38 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantee the right to private and family life and freedom of thought and conscience. Section 42 prohibits discrimination on grounds of sex, among other characteristics. The African Charter on Human and Peoples' Rights was ratified by Nigeria in 1983 and domesticated by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria 2004, It thereby guarantees the right to dignity, freedom from discrimination, freedom of association, and freedom of expression. Critics of the Same Sex Marriage Prohibition

¹⁰Equal Rights Trust (n 8); Human Dignity Trust, *Briefing on the Same Sex Marriage (Prohibition) Act 2013* <https://www.humandignitytrust.org/wp-content/uploads/resources/Briefing_on_Same_Sex_Marriage_Prohibition_Act_2013_final.pdf> accessed March 2026.

¹¹Human Rights Watch, *Tell Me Where I Can Be Safe: The Impact of Nigeria's Same Sex Marriage (Prohibition) Act* (20 October 2016) <<https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-besafe/impact-nigerias-same-sex-marriage-prohibition-act>> accessed March 2026.



Act 2014, including numerous international human rights bodies and some Nigerian legal scholars, argue that the Act violates these very obligations that Nigeria has freely undertaken.¹²

The comparative dimension of this study is essential. Nigeria's approach which is criminal prohibition, heavy penalties, and a broad social suppression of LGBT identity and expression, stands in stark contrast to that of its continental neighbour and fellow African state, South Africa. In South Africa, the Constitution of 1996 became the first constitution in the world to expressly prohibit discrimination on the grounds of sexual orientation.¹³ The Constitutional Court of South Africa, in the landmark case of *Minister of Home Affairs v Fourie*,¹⁴ held that excluding same sex couples from the institution of marriage was unconstitutional and gave Parliament one year to remedy the defect. Parliament responded with the Civil Union Act 17,¹⁵ which came into force on 30 November 2006, making South Africa the fifth country in the world and the only country in Africa to legally recognize same sex marriage. The contrast between Nigeria and South Africa, two of Africa's most prominent and populous states, showcases the range of choices available within a shared continental legal tradition, and shows that prohibition is a policy choice, not an inevitability.

The international picture is no less instructive. The Supreme Court of the United States,

¹²African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria 2004; *Abacha v Fawehinmi* [2000] 6 NWLR (Pt 660) 228 (SC); Organization of African Unity, *African Charter on Human and Peoples' Rights (Banjul Charter)* (1981).

¹³Constitution of the Republic of South Africa 1996, s 9(3).

¹⁴*Minister of Home Affairs v Fourie* [2005] ZACC 19; (2006) 1 SA 524 (CC); International Bar Association, 'LGBTQIA+ Rights in South Africa' <<https://www.ibanet.org/article/854B8E51-E931-403D-BDC3-1386B30F9591>> accessed March 2026.

¹⁵Civil Union Act 17 of 2006 (South Africa); 'Same-Sex Marriage in South Africa,' *Wikipedia* <https://en.wikipedia.org/wiki/Same-sex_marriage_in_South_Africa> accessed March 2026.



in *Obergefell v Hodges*,¹⁶ held that same sex couples have a fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, effectively extending the right to marry to same sex couples across all fifty states. In the United Kingdom, the Marriage (Same Sex Couples) Act 2013 legalized same sex marriage in England and Wales from March 2014, followed by Scotland in December 2014 and Northern Ireland in January 2020.¹⁷ These developments reflect a broader international trend toward recognition, though it is a trend that has been resisted and in some cases reversed in some parts of Africa, where Uganda's Anti-Homosexuality Act 2023¹⁸ introduced the death penalty for certain categories of 'aggravated homosexuality,' drawing widespread international condemnation.

1.2 Statement of the Problem

The Same Sex Marriage (Prohibition) Act 2014 is, on its face, a straightforward piece of prohibitory legislation. But studied more carefully, it is a statute riddled with legal, constitutional, and human issues that Nigerian scholarship has not yet fully interrogated. The problem this research addresses is not simply whether the prohibition of same sex marriage is a wise policy choice, but whether the legal framework erected around that prohibition is constitutionally coherent, consistent with Nigeria's international

¹⁶ *Obergefell v Hodges* 576 US 644 (2015).

¹⁷ Marriage (Same Sex Couples) Act 2013 (UK); Marriage and Civil Partnership (Scotland) Act 2014; Northern Ireland (Executive Formation etc) Act 2019; 'A Conflict of Laws Analysis of the Nigerian Same Sex Marriage (Prohibition) Act (2013)' (2022) *Journal of African Law* <<https://www.cambridge.org/core/journals/journal-of-african-law/article/conflict-of-laws-analysis-of-the-nigerian-samesex-marriage-prohibition-act-2013>> accessed March 2026.

¹⁸ Uganda Anti-Homosexuality Act 2023; Human Rights Watch, 'Uganda: Anti-Homosexuality Act Devastating Rights' (2023); 'LGBTQ Rights in Africa,' *Wikipedia* <https://en.wikipedia.org/wiki/LGBTQ_rights_in_Africa> accessed March 2026.

obligations, and capable of being sustained in its present form.¹⁹

First, the Same Sex Marriage Prohibition Act 2014 creates categories of criminal offence whose breadth and vagueness raise serious concerns under the constitution. Section 5(2),²⁰ which criminalizes 'making a public show of same sex amorous relationship,' is so broadly worded that it could conceivably capture ordinary displays of affection between persons of the same sex that have nothing to do with marriage. The Act does not define what constitutes a 'public show' or what level of 'amorous' expression triggers criminal liability. This vagueness arguably violates the principle of legality based on the requirement, embedded in Section 36(12) of the 1999 Constitution,²¹ that no person shall be convicted of a criminal offence unless the offence is defined and the penalty prescribed in a written law.

Second, the Act intersects uncomfortably with constitutional guarantees of privacy, dignity, freedom of association, and freedom from discrimination. The provisions of Section 5(2) and 5(3),²² which criminalize membership in and support of gay organizations, directly restrict freedom of association in ways that cannot easily be justified under Section 45 of the Constitution²³ which permits restriction of rights only in the interests of defense, public safety, public order, public morality, or public health, and only to the extent reasonably justifiable in a democratic society. Whether support for a human rights organization qualifies as a threat to any of these interests is, to put it

¹⁹Esther O. Ajayi-Lowo, 'The Same-Sex Marriage (Prohibition) Act in Nigeria: A Critique of Body Policing' in *The Politics of Gender* (Brill, 2018), 71–92, DOI: https://doi.org/10.1163/9789004381711_005.

²⁰Same Sex Marriage (Prohibition) Act, 2013, Section 5(2) (Nigeria).

²¹Constitution of the Federal Republic of Nigeria 1999, Section 36(12).

²²5(2) and 5(3) of the *Same-Sex Marriage (Prohibition) Act 2013/2014*.

²³Constitution of the Federal Republic of Nigeria (1999 as amended), Section 45.

mildly, doubtful.²⁴

Third, there is the question of Nigeria's obligations under the African Charter on Human and Peoples' Rights. The Charter has been domesticated in Nigerian law and, by the authority of the Supreme Court in *Abacha v Fawehinmi*,²⁵ it has the force of law in Nigeria and supersedes inconsistent domestic legislation. Several provisions of the SSMPA, particularly those restricting freedom of association and expression appear to be in conflict with Articles 9, 10, and 11 of the Charter, which protect freedom of information, freedom of association, and freedom of assembly. These conflicts have not been judicially resolved, because no case squarely raising this challenge has reached the superior courts. That absence of judicial engagement is itself a problem that this study seeks to highlight.²⁶

Fourth, while South Africa's experience demonstrates that a society with deep religious and cultural ties to traditional family structures can still craft a constitutional framework that accommodates sexual minorities, Nigeria's legislative response has moved in the opposite direction which is by adding new layers of prohibition onto an already restrictive colonial inheritance, without any serious parliamentary inquiry into the constitutional or human rights implications of doing so. The parliamentary debates preceding the SSMPA were characterized more by religious exhortation than by legal analysis. This is a gap and a deliberate failure that needs to be addressed.²⁷

²⁴A.A. Kolajo, "Human Rights under the Same-Sex Marriage (Prohibition) Act 2013: A Constitutional Perspective," *African Human Rights Law Journal*, Vol. 15, No. 1 (2015).

²⁵*Abacha v Fawehinmi* [2000] 6 NWLR (Pt 660) 228

²⁶Nnaemeka Nweze and Chibike O Amucheazi, "A Conflict of Laws Analysis of the Nigerian Same-Sex Marriage (Prohibition) Act 2013" (2025) 69(2) *Journal of African Law* 271-287.

²⁷Nnaemeka Nweze and Chibike O. Amucheazi, "A Conflict of Laws Analysis of the Nigerian Same-Sex Marriage (Prohibition) Act 2013," *Journal of African Law*, (2025).

Fifth, on the ground, the SSMPA has been used to justify and intensify harassment, extortion, arbitrary arrest, and violence against LGBT persons and human rights defenders in Nigeria, as documented by Human Rights Watch, Amnesty International, and the Socio-Economic Rights and Accountability Project (SERAP). The 2023 mass arrest of persons at a private gathering in Warri, Delta State popularly known in media reports as the 'Warri 67' case, is only the most recent high-profile illustration of how broadly the statute is being applied in practice.²⁸ This disjunction between the law's stated purpose and its operational reality is a problem that legal analysis must confront.

This study examines these problems through a doctrinal and comparative lens, using case law, statutory analysis, and scholarship to identify the constitutional fault lines in Nigeria's legal framework, and to consider what a more legally coherent and rights-consistent approach might look like.

1.3 Research Questions

This research is directed at answering the following questions:

- (a) To what extent does the Same Sex Marriage (Prohibition) Act 2013 conflict with the fundamental human rights guaranteed under the 1999 Nigerian Constitution?
- (b) How do Nigeria's anti-same sex laws compare to USA and South Africa's legal framework regarding marriage equality and the African Charter on Human and Peoples' Rights?
- (c) Does the Same Sex Marriage (Prohibition) Act 2013 conform to

²⁸'LGBTQ Rights in Nigeria' (n 7).

international human rights standards regarding non-discrimination and private life?

- (d) What legislative and judicial reforms are necessary to bring Nigeria's legal framework on same sex marriage into conformity with its constitutional commitments and international human rights obligations?

1.4 Aim and Objectives of the Study

The aim of this study is to critically examine the legal framework on the prohibition of same sex marriage in Nigeria through a comparative lens, identifying constitutional tensions, human rights concerns, and reform imperatives within that framework.

The specific objectives of the study are as follows:

- (a) To trace and analyze the historical evolution of the legal prohibition of same sex conduct and same sex marriage in Nigeria, from colonial legislation to the Same Sex Marriage (Prohibition) Act 2014.
- (b) To examine the constitutional validity of the Same Sex Marriage (Prohibition) Act 2014 in light of the fundamental rights provisions of the 1999 Constitution and Nigeria's obligations under the African Charter on Human and Peoples' Rights.
- (c) To comparatively analyze the legal frameworks of South Africa and the United States on same sex marriage, and to draw lessons relevant to the Nigerian context.
- (d) To recommend legislative and judicial reforms aimed at resolving the



constitutional and human rights tensions in Nigeria's existing legal framework.

1.5 Scope and Limitation of the Study

The scope of this study is defined along three dimensions. Geographically, the study focuses on the Federal Republic of Nigeria as its primary jurisdiction, with comparative reference to South Africa and the United States of America. While the study acknowledges the significance of developments in the United Kingdom and other jurisdictions, detailed analysis of those systems is beyond what this work can accommodate and is therefore limited to illustrative references where relevant.

In terms of content, the study concentrates on the legal framework governing the prohibition of same sex marriage – specifically the Same Sex Marriage (Prohibition) Act 2014, its relationship to antecedent legislation (the Criminal Code Act, the Penal Code, and the Sharia Penal Codes of the twelve northern states), and its compatibility with the Constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples' Rights. The study does not extend to a broader analysis of LGBT rights generally, though some overlap is inevitable given the breadth of the SSMPA's (Same Sex Marriage Prohibition Act) provisions.

On subject matter, the study is restricted to the legal dimension of the prohibition of same sex marriage. Questions of theology, psychology, or medical science relating to sexual orientation, while referenced where they bear on legal argument, are not examined in depth. The study does not aim to resolve religious or cultural debates about marriage; it asks only whether the legal framework is constitutionally coherent



and rights-consistent.

As for limitations, this study is a doctrinal research exercise and does not involve empirical fieldwork or interviews with affected communities. This limitation is itself partly a finding of the research: the absence of judicial engagement with these questions is a gap in Nigerian jurisprudence that calls for urgent attention. Additionally, access to unreported decisions of the lower courts of the northern states dealing with Sharia Penal Code provisions is constrained by the limited availability of such decisions in accessible legal databases.

1.6 Significance of the Study

The significance of this study operates on several levels. At the level of legal scholarship, it provides one of the more detailed doctrinal analyses of the Same Sex Marriage (Prohibition) Act as against Nigeria's constitutional framework, a gap that the existing literature has not fully filled. At the level of policy, this study speaks directly to the legislative process. The National Assembly considered and passed the SSMPA in a parliamentary environment that was more responsive to religious and popular sentiment than to constitutional and human rights analysis. This study offers the legislature a rigorous account of the constitutional problems embedded in the statute, and suggests reform directions that would address those problems without necessarily requiring reconsideration of the fundamental prohibitory policy, if that is the legislature's preference.

The beneficiaries of this research include Nigerian legal practitioners advising clients affected by the SSMPA; human rights organizations seeking to develop legal arguments

for advocacy and litigation; the judiciary, particularly in its developing engagement with fundamental rights enforcement; legislative staff and policymakers involved in law reform; and the academic legal community in Nigeria and beyond, which requires more rigorous treatment of these questions than currently exists in the literature.

1.7 Research Methodology

This study adopts the doctrinal research methodology. Reliance for data is placed on both primary and secondary sources of law. The primary sources relied upon include the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Same Sex Marriage (Prohibition) Act 2014, the Criminal Code Act, the Penal Code (Northern States) Federal Provisions Act, the Sharia Penal Codes of the twelve northern states, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, the Civil Union Act (17 of 2006) of South Africa, and case law from Nigerian courts (including the Supreme Court and the Court of Appeal), the Constitutional Court of South Africa, and the Supreme Court of the United States. International instruments including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights are also relied upon.

Secondary sources include academic textbooks, journal articles, law review publications, reports of human rights organizations (including Human Rights Watch, Amnesty International, and the Human Dignity Trust), and internet-sourced materials from verifiable academic and institutional databases. The data gathered are subjected to content analysis, that is, the methodology of critically reading, analyzing, synthesizing, and evaluating legal materials to extract principles, identify tensions, and arrive at

reasoned conclusions.

The comparative dimension of the research draws principally on South Africa and the United States. These jurisdictions are selected because they represent the clearest contrasts available: South Africa provides the only African example of a constitutionally protected and legislatively implemented same sex marriage rights, while the United States provides the most developed jurisprudence on marriage as a fundamental constitutional right within a common law tradition that shares lineage with Nigerian constitutional law. The comparison is not intended to suggest that Nigerian courts should simply adopt the outcomes reached in those jurisdictions, but to identify the legal reasoning and constitutional methodology that those courts applied and to consider what, if anything, of that reasoning is applicable within Nigeria's own constitutional framework.

1.8 Literature Review

The subject of same sex marriage prohibition in Nigeria has attracted a growing body of literature, though much of it remains fragmented; some scholars engaging the constitutional dimensions, others the human rights implications, others still the cultural and philosophical questions. This review surveys the most significant contributions, identifies their strengths and limitations, and explains how this study builds on and departs from what has gone before.

Dr. O. Nnamuchi, Associate Professor of Law at the University of Nigeria, Nsukka, and Founder of the Centre for Health, Bioethics and Human Rights, has produced what is arguably the most sustained academic engagement with the SSMPA from a Nigerian

perspective. In his article 'Nigeria's Same Sex Marriage (Prohibition) Act and Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?',²⁹ Nnamuchi argues that while certain rights of homosexual persons such as the right to privacy in intimate relations have achieved international recognition, there is no established international consensus recognizing same sex marriage as a human right. He contends that Nigeria, in exercising its sovereign right to self-determination, was within the bounds of international law in enacting the SSMPA, and that Western threats of sanctions in response constitute an impermissible attempt to export domestic legal norms. Nnamuchi's argument is valuable for the careful distinction it draws between the prohibition of same sex marriage and the broader criminalization of LGBT identity and association a distinction the Same Sex Marriage Prohibition Act 2014 itself conspicuously fails to observe. However, his analysis is largely directed at defending the Act's international legitimacy rather than scrutinizing its domestic constitutional coherence, a gap this study addresses.

Jonathan O. Chimakonam and Emmanuel Eze, writing in the peer-reviewed journal *Sexuality and Culture* (Springer Nature, 2020), published 'The Sexual Orientation Question in Nigeria: Cultural Relativism versus Universal Human Rights Concerns'.³⁰ This article makes a genuinely sophisticated contribution, conceding that the argument in favour of gay rights is 'rationally compelling' from the standpoint of the harm principle, J.S. Mill's (states that individuals should be free to act however they wish unless their

²⁹ Obiajulu Nnamuchi, 'Nigeria's Same-Sex Marriage (Prohibition) Act and Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?' (2019) 25(1) *Southwestern Journal of International Law* 120–154

³⁰ Jonathan O. Chimakonam and Emmanuel Eze, 'The Sexual Orientation Question in Nigeria: Cultural Relativism versus Universal Human Rights Concerns' (2020) 24(6) *Sexuality and Culture* 1705–1719.

actions cause harm to others.) foundational liberal proposition that the law has no business interfering with conduct that harms no one, while acknowledging the practical political reality that the overwhelming majority of Nigerians oppose decriminalization. The authors conclude that this majority opinion 'cannot be easily dismissed,' but they do not provide a satisfying account of whether that majority opinion, however strongly felt, is legally sufficient to override constitutional rights. This is precisely the question this study tackles: the relationship between popular sentiment and constitutional constraint.

A. Arimoro,³¹ in a chapter published as part of the IGI Global collection *Global Perspectives on the LGBT Community and Non-Discrimination*, titled 'The Clash Between Human Rights and Morality: A Critical Role for the Judiciary Towards Decriminalization of Same Sex Relationships,' argues that Nigerian courts have both the constitutional authority and the institutional responsibility to strike down legislation that criminalizes consensual same sex conduct, drawing on the potential application of the African Charter and the 1999 Constitution's fundamental rights provisions. Arimoro's piece is valuable for its focus on judicial agency, though it does not provide a full statutory analysis of the SSMPA's specific provisions or map those provisions against specific constitutional guarantees in the systematic way this study attempts.

E. Duruigbo, in his article 'Legitimate Disagreement and International Human Rights,' touches on the normative dimensions of Nigeria's prohibition framework within the broader international human rights debate.³² Duruigbo's work is useful for situating the

³¹Augustine Arimoro, 'The Clash Between Human Rights and Morality' in A Arimoro (ed), *Global Perspectives on the LGBT Community and Non-Discrimination* (IGI Global 2022); 'Public Morality and Constitutionalism in Restricting LGBTQ+ Rights' *International Journal of Constitutional and Administrative Law*

³²Emeka Duruigbo, 'Legitimate Disagreement and International Human Rights' (2017), cited in Nnamuchi



Nigerian statute within the global conversation about cultural sovereignty and the universality of rights, but it does not engage in depth with domestic constitutional law. A different kind of constitutional focus is found in the article by Sylvester O. Akhaine,³³ 'Constitutionalism and the Right to Sexual Orientation in Nigeria,' published in the *Journal of African Law*, which argues that Nigeria's constitution, properly interpreted, already contains the materials for a rights-based challenge to the SSMPA, particularly through the combined reading of Sections 37, 38, 39, and 42.

On the South African side, the literature is considerably richer. Professor E. Bonthuys of the University of the Witwatersrand and others have written extensively on the Fourie litigation and the enactment of the Civil Union Act. The case itself; *Minister of Home Affairs and Another v Fourie and Another*³⁴ is extensively analyzed in constitutional law scholarship. Justice Albie Sachs's majority judgment in Fourie is widely considered one of the most carefully reasoned judicial statements on the constitutional status of same sex marriage anywhere in the world, and this study engages with that reasoning in detail in the comparative chapters.

On the American side, Kenji Yoshino's scholarly work on *Lawrence v Texas* which is the landmark US Supreme Court decision that struck down state sodomy laws as unconstitutional violations of the Due Process Clause and his later engagement with *Obergefell v Hodges* are important reference points.³⁵ Justice Anthony Kennedy's

(n5).

³³Sylvester Odion Akhaine, 'Constitutionalism and the Right to Sexual Orientation in Nigeria' *Journal of African Law*, Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 37, 38, 39, 42.

³⁴*Minister of Home Affairs v Fourie* [2006] 1 SA 524 (CC) (n 14).

³⁵*Lawrence v Texas* 539 US 558 (2003); *Obergefell v Hodges* (n 16); Kenji Yoshino, 'A New Birth of Freedom?' (2015) 129 *Harvard Law Review* 147.



majority opinion in Obergefell, which declared that the right to marry is a fundamental liberty protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, provides a model of constitutional reasoning about the nature of marriage that this study examines for its applicability, with appropriate adaptations, to the Nigerian constitutional setting.

The Human Rights Watch 2016 report, 'Tell Me Where I Can Be Safe: The Impact of Nigeria's Same Sex Marriage (Prohibition) Act,' remains the most comprehensive empirical account of the SSMPA's impact on the ground. It documents in detail the wave of arrests, mob attacks, extortion, and state-sponsored harassment that followed the Act's enactment, drawing on interviews with dozens of affected individuals across multiple states.³⁶ This report performs an important function: it grounds the abstract legal analysis in the lived experience of persons directly affected by the statute, and it establishes the factual predicate for arguments about the practical operation of the law. However, being a human rights advocacy document rather than a legal analysis, it does not provide the constitutional doctrinal analysis that courts and legislators need.

Amnesty International's various reports and statements on Nigeria, including its 2014 statement on the SSMPA³⁷ and its ongoing country reports all similarly document the chilling effect of the legislation on freedom of expression, association, and access to health services for LGBT Nigerians. The link between criminalization of same sex conduct and diminished access to HIV/AIDS services has been specifically noted by the

³⁶Human Rights Watch (n 11).

³⁷Amnesty International, 'Nigeria: Anti-Gay Law Threatens Rights and Health' (2014); Human Rights Watch, 'Nigeria: Anti-LGBT Law Threatens Basic Rights' (2014)
< <https://www.hrw.org/news/2014/01/14/nigeria-anti-lgbt-law-threatens-basic-rights>> accessed March 2026.

UNAIDS program, which has expressed concern that the SSMPA is impeding Nigeria's public health response to the HIV epidemic.

C. Odinkalu,³⁸ former Chairman of the National Human Rights Commission of Nigeria, has spoken and written on the human rights dimensions of the SSMPA, arguing that the law's provisions restricting freedom of association are constitutionally indefensible regardless of one's position on same sex marriage itself. Odinkalu's contribution is significant because it articulates a position which is the opposition to the Act's associational and expressive restrictions that does not require endorsement of same sex marriage and that might therefore attract wider support within the Nigerian legal community.

Professor A.Oyebode,³⁹ of the University of Lagos Faculty of Law, has written on Nigeria's engagement with international human rights law more broadly, and his framework for understanding how domesticated international instruments interact with domestic legislation is helpful for analyzing the relationship between the African Charter and the SSMPA. His general position, consistent with the Supreme Court's holding in *Abacha v Fawehinmi*, is that the Charter takes precedence over inconsistent domestic legislation, a conclusion with obvious implications for the constitutionality of several provisions of the Same Sex Marriage Prohibition Act 2014.

In the comparative African context, Murray Wesson and others have written on the broader continental picture of LGBT rights in Africa, noting the stark divergence

³⁸Chidi Odinkalu, former Chairman, National Human Rights Commission of Nigeria, various public statements.

³⁹Akin Oyebode, *International Law and Politics: A Nigerian Perspective* (Malthouse Press 2003).

between South Africa's constitutionalized recognition and the criminalization frameworks of other African states.⁴⁰ Research published in the *Liverpool Law Review*, specifically the article 'Interrogating the Criminalization of Same-Sex Sexual Activity: A Study of Commonwealth Africa,' which examines Ghana, Kenya, Nigeria, and Uganda, provides a useful regional comparative framework, noting that all four states derive their anti-sodomy provisions from the same colonial source and that the case for their retention has not withstood serious legal scrutiny.⁴¹

The gap that this study fills, and which the foregoing survey of the literature makes clear, is a comprehensive, provision-by-provision constitutional analysis of the Same Sex Marriage (Prohibition) Act 2014 that maps each operative provision of the statute against the specific constitutional and regional human rights guarantees that may be engaged, draws on the comparative experiences of South Africa and the United States for methodological guidance, and arrives at specific, actionable reform recommendations for the Nigerian legislature and judiciary. That analysis, this study argues, is what the Nigerian legal conversation on this topic has so far lacked.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

⁴⁰See generally 'LGBTQ Rights in Africa' (n 18).

⁴¹'Interrogating the Criminalization of Same-Sex Sexual Activity: A Study of Commonwealth Africa' (2021) *Liverpool Law Review*.



2.1 Conceptual Framework

Every serious legal inquiry must attend to the foundational ideas that give doctrine its shape. The concepts examined below, marriage, same-sex unions, LGBTQ+ terminology, prohibition, criminalization, and the historical trajectory of Nigerian marriage law, are the load-bearing walls of the analysis that follows. To engage the law governing same-sex unions in Nigeria without first understanding what is meant by "marriage," what the State has chosen to prohibit, and how that prohibition was arrived at historically, is to mistake scaffolding for architecture.

2.1.1 Meaning and Nature of Marriage



Marriage is among the oldest and most universally recognized social institutions, yet arriving at a definition that satisfies every legal system, culture, or philosophical tradition is considerably more difficult than its ubiquity might suggest. The anthropologist Edmund Leach⁴² was among the first to argue systematically that marriage cannot be reduced to a single universal definition, noting that it performs different functions in different societies, including establishing the legal father of a woman's children and giving each spouse certain rights over the other's sexuality, labour, and property.

In English common law, Lord Penzance in *Hyde v Hyde and Woodmansee*⁴³ formulated the definition that would endure across common law jurisdictions for well over a century: the voluntary union for life of one man and one woman to the exclusion of all others.^[2] This definition, rooted in Victorian social norms, emphasized voluntariness, lifetime duration, and heterosexual exclusivity, and Nigerian courts have invoked it as recently as the twenty-first century.

Nigerian law does not offer a single statutory definition of marriage. The concept is distributed across the *Marriage Act*, the *Matrimonial Causes Act*, customary law governing the country's diverse ethnic nationalities, and Islamic law operative principally in the northern states.⁴⁴ The Marriage Act contemplates only a union between a man and a woman. The Matrimonial Causes Act makes no provision for dissolution of a

⁴²Edmund Leach, 'Polyandry, Inheritance and the Definition of Marriage' (1955) 1(2) *Man* 182, 183.

⁴³*Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, 133 (Penzance J).

⁴⁴Marriage Act Cap M6, Laws of the Federation of Nigeria 2004; Matrimonial Causes Act Cap M7, Laws of the Federation of Nigeria 2004; AA Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51(4) *International and Comparative Law Quarterly* 817, 820.



same-sex union, treating such unions as entirely outside its contemplation.⁴⁵

Under customary law, marriage is even more expressly conceived as an institution between families rather than merely between individuals, with bride price playing a constitutive role across Yoruba, Igbo, and Hausa-Fulani traditions alike. Among the Hausa-Fulani, Maliki Islamic jurisprudence emphasises the *ijab* and *qabul* (offer and acceptance) and the payment of *mahr* (dower) as essential elements.⁴⁶ What is consistent across all Nigerian legal frameworks, statutory, customary, and religious, is the assumption that marriage is a heterosexual institution, an assumption never seriously contested until the emergence of global human rights discourse on sexual orientation prompted the Nigerian State to codify it explicitly through legislative prohibition.

2.1.2 Concept of Same-Sex Unions and LGBTQ+ Terminology

⁴⁵Matrimonial Causes Act Cap M7, Laws of the Federation of Nigeria 2004, s 15.

⁴⁶AA Oba (n 3) 820–825.



Precision in terminology is a legal necessity, not pedantry. The acronym LGBTQ+ stands for Lesbian, Gay, Bisexual, Transgender, and Queer (or Questioning), with the "+" representing the broader spectrum of identities not explicitly captured by those letters. The American Psychological Association defines sexual orientation as a component of identity that includes a person's sexual and emotional attraction to another person and the behaviour or social affiliation that may result from that attraction.⁴⁷

For purposes of this study, the central concept is "same-sex union" or "same-sex marriage," meaning a legally or socially recognized union between two persons of the same sex. The distinction between civil union, civil partnership, and same-sex marriage carries significant legal weight in comparative analysis. The United Kingdom introduced civil partnerships under the Civil Partnership Act 2004 before extending full marriage rights under the Marriage (Same Sex Couples) Act 2013.⁴⁸ The United States Supreme Court, in *okonkwofell v Hodges*, held that the Fourteenth Amendment guarantees same-sex couples the right to marry, rendering the civil union distinction legally irrelevant at the federal level.⁴⁹

In Nigeria, the law makes no such distinction. The Same Sex Marriage (Prohibition) Act 2013 sweeps up any form of same-sex cohabitation, public display of same-sex affection, and even the formation of organizations supportive of same-sex unions.⁵⁰ The terminological distinctions operative in comparative jurisdictions collapse entirely under Nigerian law; what is targeted is not merely formal marriage but any visible or organized

⁴⁷American Psychological Association, 'Sexual Orientation and Homosexuality' (APA, 2023) <<https://www.apa.org/topics/lgbtq/orientation>> accessed 15 February 2024.

⁴⁸Civil Partnership Act 2004 (UK), s 1; Marriage (Same Sex Couples) Act 2013 (UK), s 1.

⁴⁹*Obergefell v Hodges* 576 US 644 (2015) (Kennedy J).

⁵⁰Same Sex Marriage (Prohibition) Act 2013 (Nigeria), ss 1–5.

same-sex relationship.

2.1.3 Definition of Prohibition and Criminalization



"Prohibition" and "criminalization" are related but conceptually distinct. Prohibition renders a particular act or status unlawful; it may or may not carry criminal sanction. Criminalization is the process by which a State declares conduct to be a criminal offence, attaching investigation, prosecution, conviction, and punishment.⁵¹ The Same Sex Marriage Prohibition Act 2014 2013 operates on both levels simultaneously. Section 1 prohibits the solemnization of same-sex marriages. Section 4 criminalizes the public display of same-sex affection, with a penalty of ten years' imprisonment. Section 5 imposes the same ten-year term for the formation or participation in gay clubs, societies, or organizations.⁵²

D. Husak, in *Overcriminalization: The Limits of the Criminal Law*, argues that criminalization is morally justified only where the conduct in question causes demonstrable harm to others, and that extending criminal law to consensual adult behaviour without such harm violates principles of proportionality and individual autonomy.⁵³ In Nigeria, the question of harm is fiercely contested. Proponents of the Same Sex Marriage Prohibition Act 2014 argue that same-sex unions harm public morality, undermine the family, and threaten cultural values constitutive of Nigerian identity. Critics counter that the Act criminalizes purely private conduct between consenting adults and that the only demonstrable harm is that inflicted on LGBTQ+ persons by the State itself.

The framework of prohibition and criminalization operates at multiple levels within

⁵¹Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013) 1–10.

⁵²Same Sex Marriage (Prohibition) Act 2013 (Nigeria), ss 1, 4, 5.

⁵³Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008) 3–12.

Nigeria's federal system. The Same Sex Marriage Prohibition Act 2014 2013 is a federal statute. Northern Nigerian states have independently enacted provisions under their Sharia Penal Codes criminalizing same-sex conduct with penalties that, in some states, are considerably more severe. The Criminal Code Act, applicable in the southern states, criminalizes male homosexuality under section 214, while the Penal Code (Northern States) Federal Provisions Act addresses similar conduct in the north.⁵⁴ The result is a multi-layered framework of prohibition and criminalization operating across different instruments and at different levels of government.

2.1.4 Evolution of Marriage Laws in Nigeria

⁵⁴Criminal Code Act Cap C38, Laws of the Federation of Nigeria 2004, s 214; Penal Code (Northern States) Federal Provisions Act Cap P3, Laws of the Federation of Nigeria 2004, s 284.



The history of marriage law in Nigeria is inseparable from the history of colonialism, legal pluralism, and the project of constructing a post-colonial national identity. Prior to British colonization, marriage across the various peoples of the territory was governed by customary and, in the north, Islamic law. Polygamy was widely practiced, bride price was constitutive of the marital contract, and marriage was understood as an alliance between families. Historians and anthropologists have documented various forms of same-sex behaviour in pre-colonial African societies; Ifi Amadiume's 1987 work *'Male Daughters, Female Husband'* documented the Igbo institution of woman-to-woman marriage, undertaken primarily for lineage-perpetuation purposes rather than sexual ones.⁵⁵

The British colonial project introduced formal marriage law through the Marriage Ordinance of 1863, enacted in Lagos, which established the framework for statutory monogamous Christian marriage along English common law lines. It was subsequently extended across the protectorates. The Ordinance imported the heterosexual and monogamous character of marriage from English law, while customary and Islamic marriages were permitted to continue subject to repugnancy clauses requiring that practices not be contrary to natural justice, equity and good conscience.⁵⁶ Colonial law did not introduce the concept of heterosexual marriage; it codified an assumption already present across all existing frameworks. What colonial law did arguably introduce was the formal criminalization of same-sex conduct. The Criminal Code,

⁵⁵Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1987) 71
92.

⁵⁶Antony Allott, 'The Future of African Law' in H Kuper and L Kuper (eds), *African Law: Adaptation and Development* (University of California Press 1965) 218; Marriage Ordinance 1863 (Colony of Lagos).



introduced in the Southern Provinces in 1916 and based on the Queensland Criminal Code of 1899, established offences of "unnatural offences" and "indecent practices between males" with no explicit equivalent in pre-colonial law.⁵⁷

After independence in 1960, Nigeria retained the colonial criminal law framework substantially unchanged. The Marriage Act and Matrimonial Causes Act were consolidated and domesticated without substantive amendment. The constitutional framework placed marriage and divorce on the Exclusive Legislative List under the Second Schedule of the 1999 Constitution, centralizing legislative authority at the federal level.⁵⁸

The evolution that proved most consequential began globally. The Netherlands became the first country to legalize same-sex marriage in 2001,⁵⁹ followed by Belgium, Canada, and Spain. This wave of reform in the global North produced a counter-reaction in Nigeria and across Sub-Saharan Africa, where the perception that homosexuality was a Western import being imposed through international human rights mechanisms galvanized legislative action. The Nigerian National Assembly took up the issue as early as 2006; the bill was stalled and reintroduced several times before the Same Sex Marriage Prohibition Act 2014 was passed and signed into law by President Goodluck Jonathan on 7 January 2014.⁶⁰ The evolution of Nigerian marriage law thus describes a trajectory from pre-colonial pluralism through colonial codification to the explicit

⁵⁷Criminal Code Act Cap C38, Laws of the Federation of Nigeria 2004, ss 214–217 (deriving from the Criminal

Code Ordinance 1916, based on the Queensland Criminal Code 1899).

⁵⁸Constitution of the Federal Republic of Nigeria 1999 (as amended), Second Schedule, Part I, Item 61.

⁵⁹Wet openstelling huwelijk (Act on the Opening Up of Marriage) 2001 (Netherlands).

⁶⁰Human Rights Watch, 'Nigeria: Anti-Gay Law Threatens Basic Rights' (14 January 2014)

< <https://www.hrw.org/news/2014/01/14/nigeria-anti-gay-law-threatens-basic-rights> > accessed 20 February 2024.



prohibitory framework of 2013.

2.2 Theoretical Framework

Theory in law is not decoration. It is the intellectual structure that makes an argument coherent and its conclusions defensible. The debate over same-sex marriage prohibition involves at its core a set of theoretical disputes: about where law derives its authority; about the relationship between law and morality; about what marriage is and what it is for; and about whether universal human rights norms can be legitimately applied across cultures with different conceptions of personhood and sexuality. The four theories examined below are the principal frameworks through which these disputes have been conducted.

2.2.1 Natural Law Theory



Natural law theory holds that there exists a set of moral principles discoverable by human reason, grounded in the nature of human beings or in the divine order, that provide the ultimate standard against which positive law must be measured. The Thomistic formulation associated with St Thomas Aquinas holds that natural law is a participation of rational creatures in the eternal law of God, discoverable through reason reflecting on the ends proper to human nature.⁶¹

The relevance of natural law theory to the Nigerian prohibition is direct. The principal arguments deployed by proponents of the Same Sex Marriage Prohibition Act 2014 are fundamentally natural law arguments, even where they are not so labeled. The argument that marriage is by its nature a union between a man and a woman ordained for procreation, and that same-sex unions are therefore incapable of being marriages in any meaningful sense, is a natural law argument. The "New Natural Law" theory of John Finnis, articulated in '*Natural Law and Natural Rights*'(1980),⁶² provides its most sophisticated contemporary form. Finnis argues that marriage is among the basic human goods, oriented specifically to procreation and the domestic society of the family, and that same-sex acts cannot realize the good of marriage because they are not procreative in their orientation.

This argument has attracted powerful criticism. Ronald Dworkin, in '*Justice for Hedgehogs*' (2011), argued that the natural law framework mistakes cultural or theological preferences for natural facts.⁶³ Martha Nussbaum, in '*From Disgust to*

⁶¹Thomas Aquinas, *Summa Theologica*, I–II, Q 91, Art 2 (trans Fathers of the English Dominican Province, Benziger Bros 1947).

⁶²John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 86–90, 146–147.

⁶³Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 176–179.



Humanity (2010), argued that the "unnatural" argument is grounded in emotion, specifically disgust, rather than reason, and that disgust is a constitutionally insufficient basis for criminal prohibition.⁶⁴ In the Nigerian context, natural law arguments are reinforced by their convergence with religious doctrine. Islamic jurisprudence treats same-sex conduct as '*haram*' (forbidden); Christian theology, particularly in its evangelical and Catholic expressions dominant in Nigeria, treats homosexuality as sinful on the basis of Biblical texts. This confluence gives the prohibition exceptional political and legal durability.

2.2.2 Legal Positivism Theory

⁶⁴Martha C Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford University Press 2010) 14–22.



Legal positivism holds that law is a social fact: it exists by virtue of being enacted through recognized social procedures by institutions with appropriate authority, and its validity depends on its source rather than its content. John Austin expressed the core positivist thesis: the existence of law is one thing; its merit or demerit is another.⁶⁵ H.L.A. Hart refined Austin's account in '*The Concept of Law*' (1961), replacing the command-of-the-sovereign model with the concept of a legal system as a union of primary rules of obligation and secondary rules of recognition, change, and adjudication. Hart explicitly acknowledged that law and morality might diverge, and that there might be valid laws that are morally indefensible.⁶⁶

For this study, legal positivism provides an essential analytical tool. The Same Sex Marriage Prohibition Act 2014 2013 was duly passed by the National Assembly, assented to by the President, and published in the official gazette. It satisfies all conditions for validity within the Nigerian legal system as identified by the rule of recognition embodied in the 1999 Constitution. The positivist analysis requires that any critique of the Act be separated into two distinct questions: first, is the Act valid law? And second, is it a morally justified exercise of legislative power? These are different questions with potentially different answers.

Critics of the Act have argued that it conflicts with constitutional guarantees of equality under section 42 and dignity under section 34 of the 1999 Constitution. A positivist analysis would examine whether these provisions, properly interpreted, are inconsistent with the Same Sex Marriage Prohibition Act 2014, and if so which prevails under the

⁶⁵ John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) Lecture V, 184.

⁶⁶ H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 94–110.



constitutional hierarchy. Since section 1(1) establishes the Constitution as the supreme law, any inconsistent provision of the Same Sex Marriage Prohibition Act 2014 would to that extent be void. Hart's famous exchange with Patrick Devlin in the 1960s, provoked by the Wolfenden Committee Report on homosexual offences,⁶⁷ produced one of the most consequential debates in twentieth-century legal theory and maps almost precisely onto the contemporary Nigerian debate. Devlin argued in '*The Enforcement of Morals*' (1965) that society has the right to enforce shared moral standards through criminal law even where conduct occurs privately between consenting adults. Hart responded in '*Law, Liberty and Morality*' (1963) that the criminal law ought to be limited to preventing harm to others, in accordance with Mill's harm principle.⁶⁸

2.2.3 Public Morality Theory

Public morality theory holds that the State has a legitimate interest in maintaining the shared moral standards of a community through law, and that this interest provides sufficient justification for prohibiting conduct widely regarded as morally wrong, even where no identifiable harm to a third party can be demonstrated. Lord Devlin's thesis is its most widely cited modern articulation. Devlin argued that the law must be grounded in the moral convictions of the reasonable man, whose standards of toleration define the limits of permissible legal prohibition.⁶⁹

⁶⁷Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and*

Prostitution (Cmnd 247, HMSO 1957) ('Wolfenden Report').

⁶⁸Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 1–25; HLA Hart, *Law, Liberty and*

Morality (Oxford University Press 1963) 1–24.

⁶⁹Devlin (n 4) 17.



In the Nigerian context, the public morality argument has been the most explicitly and consistently invoked justification for the Same Sex Marriage Prohibition Act 2014. A 2013 Pew Research Center survey found that 98 percent of Nigerians believed society should not accept homosexuality, the highest percentage of rejection recorded in any country surveyed.⁷⁰ Whatever one makes of the normative implications, the empirical basis for the legislature's claim to be responding to widely shared public moral sentiment is difficult to dispute.

The public morality framework carries well-documented theoretical difficulties. The majority's moral disapproval cannot by itself constitute sufficient justification for criminalization; if it could, historical atrocities endorsed by popular sentiment could be similarly justified. The human rights tradition exists precisely to place certain protected interests beyond majoritarian (a political philosophy and system holding that the majority of a population is entitled to a primary role in decision-making) override. The African Commission on Human and Peoples' Rights has adopted resolutions calling for the protection of sexual minorities from violence and discrimination.⁷¹ The European Court of Human Rights, in *Dudgeon v United Kingdom*,⁷² held that criminalization of consensual adult male homosexuality could not be justified by the protection of public morality alone, violating Article 8 of the European Convention on Human Rights. The

⁷⁰Pew Research Center, 'The Global Divide on Homosexuality' (4 June 2013) < <https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/> > accessed 20 February 2024.

⁷¹African Commission on Human and Peoples' Rights, Resolution 275 on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity (ACHPR/Res 275, 2014).

⁷²*Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1989) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

United States Supreme Court reached a similar conclusion in *Lawrence v Texas*⁷³ These authorities illustrate that the public morality argument, while genuinely reflective of social reality in Nigeria, operates at the intersection of deep tensions between democratic majoritarianism (a political philosophy or agenda which asserts that a numerical majority of a population should have the final say in decision-making and that this majority group should hold the power to make decisions for the entire population) and constitutional rights protection.

2.2.4 Cultural Relativism vs. Universalism of Human Rights

The debate over same-sex marriage in Nigeria cannot be understood without engaging the foundational dispute in international human rights law between cultural relativism and universalism. Universalism holds that certain rights attach to all human beings by virtue of their humanity, regardless of nationality, culture, or religion. The Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights (ICCPR) 1966, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, all ratified by Nigeria, express this premise in binding and aspirationally binding form.⁷⁴

The universalist position on sexual orientation received formal articulation in the Yogyakarta Principles, adopted in 2006 and supplemented in 2017, which hold that every person has the right to recognition before the law, to privacy, and to be free from

⁷³*Lawrence v Texas* 539 US 558 (2003) (Kennedy J).

⁷⁴Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III); International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 UNTS 3.



discrimination on grounds of sexual orientation and gender identity.⁷⁵ The UN Human Rights Committee, in *Toonen v Australia*, held that the reference to "sex" in Articles 2(1) and 26 of the ICCPR includes sexual orientation, and found criminalization of consensual adult male homosexual conduct incompatible with the Covenant. This decision is of direct relevance to Nigeria as a State Party.⁷⁶

Cultural relativism, by contrast, holds that human rights norms cannot be applied without regard to cultural context, and that the imposition of a particular cultural interpretation of rights by powerful States on less powerful ones reproduces colonial dynamics. In the African context, this argument has been powerfully articulated by various political leaders and scholars who assert that homosexuality is a Western cultural practice being exported through international human rights mechanisms and development assistance conditionality. The historical evidence for this characterization is contested. Marc Epprecht's study '*Heterosexual Africa?*' (2008) documents same-sex practices across pre-colonial African societies and argues that the claim that homosexuality is foreign to Africa is itself partly a colonial construction.⁷⁷

The African Charter on Human and Peoples' Rights (the Banjul Charter), ratified by Nigeria, presents an instructive attempt to mediate between universalism and relativism in the African human rights system. Its Article 29 imposes duties on individuals

⁷⁵[34] International Commission of Jurists, 'The Yogyakarta Principles' (March 2007) <<https://yogyakartaprinciples.org/principles-en/>> accessed 22 February 2024; Yogyakarta Principles Plus 10 (November 2017).

⁷⁶*Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (Human Rights Committee, 31 March 1994) para 8.7.

⁷⁷Marc Epprecht, *Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS* (Ohio University Press 2008) 1–25.



including the duty to preserve the family, and the Nigerian government has pointed to these provisions as supporting the Same Sex Marriage Prohibition Act 2014's legitimacy.⁷⁸ Critics respond that the Charter's protections of dignity, equality, and non-discrimination are incompatible with the Act's criminalization provisions.

Neither pure universalism nor pure cultural relativism provides an adequate framework for understanding the Nigerian prohibition. Pure universalism risks imposing external normative standards insensitive to legitimate cultural difference. Pure cultural relativism, taken to its logical conclusion, would insulate even severe human rights abuses from international scrutiny. The most analytically productive approach takes seriously both the universality of human dignity as a foundational value and the legitimacy of culturally diverse approaches to social organization, while insisting that cultural difference cannot justify measures that destroy the basic dignity of a class of persons. This position, sometimes described as weak universalism or inter-cultural dialogue, provides the normative foundation for the comparative analysis that follows in subsequent chapters of this study.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK ON PROHIBITION OF SAME-SEX

MARRIAGE IN NIGERIA

3.1 Statutory Provisions Prohibiting Same-Sex Unions

⁷⁸ *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) OAU

Doc CAB/LEG/67/3 Rev 5, art 29(1).



The ban on same-sex marriages under Nigerian law is based on a statutory regime characterized by several layers. This structure takes into consideration the federal and pluralistic character of the country's legal order.⁷⁹ In particular, the Same-Sex Marriage (Prohibition) Act 2014 provides for legislation against same-sex marriage, along with legislation against any manifestations of such relationships.

3.1.1 Same-Sex Marriage (Prohibition) Act 2014

It should be noted that the introduction of the Same-Sex Marriage (Prohibition) Act is quite a radical step from the perspective of approaches that traditionally underlie criminal law concerning sexual acts.⁸⁰ The difference lies in the fact that, while the old sodomy laws concentrated exclusively on the performance of the sexual act, the new act introduces the system of prohibition which penalizes all the aforementioned aspects associated with the gay community. The Act comprises five sections, each of which creates specific classes of offenses.⁸¹ The Same-Sex Marriage (Prohibition) Act is organized in eight different statutory provisions: Provision 1 to 3 covers the prohibition, invalidity, and non-legalization of same-sex marriage or civil union; Provision 4 provides for the prohibition of the registration and activities of any gay club or

⁷⁹ Nigeria's multi-level statutory regime: The same-sex ban in Nigeria operates at many levels because of its constitutional federalism structure. The federal law on Same-Sex Marriage (Prohibition) Act 2014 is applied nationally, and existing statutes against sodomy (the Criminal Code Act in the south and the Penal Code Act in the north) remain enforced. Twelve states in the north additionally use Sharia laws.

⁸⁰ Break from tradition: Sodomy laws have traditionally focused on the act of sodomy itself. What is unique about the Same Sex Marriage Prohibition Act 2014 is that not only the act, but also the status, the formal institution of marriage, the public recognition of a relationship, and the involvement in any organization for gay individuals becomes a crime.

⁸¹ The structural constitution of the Act: Unlike the conventional multi-section Act that is composed of many sections, the SSMPA 2014 Act has only eight sections. Section one entirely outlaws and renders null any form of contract or civil union between two people of the same gender; Section two bars the solemnization of these marriages within the premises of any place of worship; Section three declares null and void any marriage certificate acquired from outside Nigeria; Section four makes it a crime to register or run organizations that serve LGBTQIA communities; whereas Sections five to seven deal with jurisdiction, interpretation of terms, and short title citation of the Act respectively.



organization; Provision 5 states the exact criminal offenses, including the term of imprisonment (10 to 14 years); whereas Provision 6 to 8 cover the judicial jurisdiction and citation of the Act.

3.1.1.1 Prohibition of Marriage Contracts and Witnesses

Section 1 and section 3 of the SSMPA deal with the contractual validity and ceremonial limitations of marriage.⁸² For example, the first section includes an outright statement that any marriage agreement or civil union made between two individuals of the same sex is unlawful and invalid. This kind of expression is reminiscent of the usual marriage statutes in defining other types of invalid marriages. The second section even goes further by prohibiting the solemnization of the said unions anywhere in places of worship. Nonetheless, Section 1 of the SSMPA works differently from traditional void marriage statutes.⁸³ As stated earlier in general marital laws, the marriage will be declared void since it does not fulfill the criteria that would make it a lawful union such as no consent, prohibited degrees of affinity, and improper ceremony, among others. The voidness statute addresses the act involved in ensuring that the marriage being contracted lacks the essential elements of legality right from its commencement. In this case, Section 1 of the Same Sex Prohibition Marriage Act goes beyond the requirement of identifying a missing element in the marriage deal. The sections 2 and 5(3) of the Act make the acts associated with the solemnizing of same-sex marriages a crime.⁸⁴

According to this law, a person is guilty of committing an offense if they participate in

⁸² Same-Sex Marriage (Prohibition) Act 2013, ss1 and 3.

⁸³ Status-based versus transaction-based disqualification: Traditional matrimonial law focuses on what is missing from the marriage transaction. The SSMPA focuses not on missing elements but on the identity of the parties—specifically, their same-sex status. This represents a categorical prohibition based on party status rather than transaction defect.

⁸⁴ Same-Sex Marriage (Prohibition) Act 2014, Section 2(1) and Section 5(3).



the process of solemnizing of a same-sex marriage or a civil union, either directly or indirectly. This law makes it clear that any individual who will witness, aid, or abet such solemnization is committing a crime. This language refers not just to those contracting marriage, but also to officiants, witnesses, counselors, and individuals who merely "aid" or "abet" such marriages.⁸⁵ What stands out here is the criminalization of witnesses and participants, which goes beyond the individuals involved in the marriage contract to extend even to individuals that may only be marginally connected. It is thus a broadening of criminal liability well beyond just the transaction itself.

These punishments that accompany such offenses have been set at extremely high levels.⁸⁶ For instance, Section 5(1) of the Act imposes a strict prison sentence of 14 years to persons who participate in entering into same-sex marriage or civil union agreements. On the other hand, Section 5(3) imposes a prison sentence of 10 years on persons that witness, aid, facilitate and register the union. The long-term and mandatory prison sentences imposed on people who commit the above offenses make them some of the most serious offenses according to the laws of Nigeria. To put this into perspective, the Criminal Code Act punishes ordinary theft with not more than seven years imprisonment.

3.1.1.2 Criminalization of Same-Sex Organizations and Clubs

However, Section 4 of the Same Sex Marriage Prohibition Act 2014 goes further to make the "public show of same-sex relationship" a crime.⁸⁷ In this section, the law seeks

⁸⁵ Same-Sex Marriage (Prohibition) Act 2014, Section 5(3).

⁸⁶ Same-Sex Marriage (Prohibition) Act 2014, Section 5(1) and Section 5(3); compare with Criminal Code Act, Chapter C38, Laws of the Federation of Nigeria 2004.

⁸⁷ Public display of affection as a crime: As per Section 4(2) of the SSMPA 2014, there is a crime of "a public show of same-sex amorous relationship directly or indirectly." In conjunction with Section 5(2),



to criminalize conduct not involving marriage formalization, but only the manifestation of the relationship in question. The section provides that any person found guilty of making a public show of same-sex relationships in Nigeria shall be liable to imprisonment for not less than ten years.

The vagueness of this section stems from the lack of clarity concerning whether the term "show" means certain conduct that is visible to the public, or whether the "show" could refer to other acts or manifestations of same-sex relationships that do not directly involve sexual intercourse.⁸⁸ There is no clarity provided in this section as to what constitutes such a show or conduct. Some possible constructions could be: any expression of physical fondness between two people of the same sex in public; verbally acknowledging that two people in a same-sex relationship are in such a relationship in public; simply being seen together in public; or just having knowledge of being in a same-sex relationship and choosing to acknowledge it publicly.⁸⁹ The failure to define the statute in terms of what it means has created, as identified by legal experts, a 'chilling effect.'

In addition, Section 4(1) of the SSMPA criminalizes anyone who registers, conducts, or takes part in activities relating to gay clubs, societies, and organizations.⁹⁰ Anybody

there is a maximum fixed sentence of ten years' imprisonment. This law applies not only to formal acts of marriage but also any other form of public recognition of such relationships, irrespective of conduct in public.

⁸⁸ Vagueness in "public show": There is no definition in the statute of what is meant by the terms "public show" or "public." The vagueness here is quite significant since "public show" could mean anything from physical contact, like holding hands and kissing, to talking about one's boyfriend, to even being aware of one's homosexuality.

⁸⁹ Effect of ambiguity in language: In cases where there is ambiguity in the language used in criminal statutes as to what actions are deemed illegal, the citizens will restrain themselves from doing acts that could be viewed as violation of the law despite the fact that such action can be allowed under fair interpretation of the law. With the ambiguity on the phrase "public show", people refrain from making any act that may constitute expression of sexual preference.

⁹⁰ Criminalizing Organizational Involvement in Homosexuality: Section 4(1) of the SSMPA 2014 makes



operating, supporting or sponsoring gay clubs, societies, and organizations and participating in their processions and gatherings under Section 5(2) will be guilty of an offence with a minimum mandatory prison sentence of ten years. Again, the statute does not limit the provisions solely to the main actors but also to any individual who offers supplementary assistance. As stated by Section 5(2), any person that assists in the registration or sustenance of such organizations will equally be subject to ten years of imprisonment.⁹¹ The legislative approach completely ignores fines as one of the penalties for the offences in the statute. Such legislation establishes a wide-ranging regime of criminality that extends far beyond gay marriage to include any organization operating in relation to LGBTQ individuals or issues.⁹² "Gay clubs, societies, and organizations" is not confined to gay marriage organizations; it includes all those organizations that may be deemed to be supporting or promoting persons engaged in same-sex relations. As pointed out by human rights organizations, such provisions have been read as establishing a criminal regime not only against gay marriage organizations but human rights organizations dealing with LGBTQ issues generally.

3.1.2 The Criminal Code Act (Southern States)

The Criminal Code Act that applies to southern Nigeria includes a provision in relation to

gay organizations like gay clubs, societies, and organizations illegal. Taken together with Section 5(2), it means that anyone or organization which registers, operates, and engages in homosexual activities is guilty of committing an offense and shall be sentenced to ten years in prison.

⁹¹ Extended Liability: According to Section 5(2), liability is extended not only to those who directly found these organizations but also to anybody who is engaged in supporting the registration, maintenance, marches, or meetings of these organizations. There is absolutely no alternative in the statutory provision of monetary penalties or any combination thereof because only the punishment of imprisoning a person for ten years is mentioned.

⁹² Interpretation of organizational provisions: The term "gay clubs, societies and organizations" has a meaning wider than merely those organizations promoting same-sex marriages. Human Rights organizations state that the organizational provision has been interpreted in such a way that even if the organizations do not actively campaign for marriage equality, human rights organizations working for the LGBT community are also considered within its scope.



same-sex sexual conduct borrowed from the laws of colonial Britain. Under Section 214 of the Criminal Code Act, anyone having carnal knowledge of a person against the order of nature or allowing himself/herself to be had carnally against the order of nature by another male person commits a felony and is liable to fourteen years' imprisonment.⁹³ The international name for such a law is the "sodomy law." It was enacted in Nigeria during the colonial era and directly taken from the law applicable in Britain during the Victorian era.

Language used for Section 214 -'carnal intercourse against the order of nature'-is archaic and indicative of moral values prevalent in the nineteenth century.⁹⁴ The term 'against the order of nature' is not an exact characterization of conduct that needs to be punished but a philosophical position on nature. It is up to the officials concerned about enforcing this law as well as judges trying cases under this law to decide if a certain act qualifies under this law. However, Section 214 is still valid in southern Nigeria and functions side-by-side with SSMPA 2014. A person involved in homosexuality in one of the states in the south can be tried using either of the statutes, with the former statute used to charge him or her on grounds of violation of the laws contained therein and the latter statute on the act of "carnal knowledge against the order of nature." Nonetheless, the statute known as Section 214 is applicable in the Southern states and works hand in hand with the SSMPA 2014.⁹⁵ A person indulging in homosexual activity in a Southern state might be charged under both laws; the Same Sex Marriage Prohibition Act 2014

⁹³ Criminal Code Act, Chapter C38, Laws of the Federation of Nigeria 2004, Section 214.

⁹⁴ See the analysis of human rights regarding the vagueness of "order of nature" in section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria, where strict precision is required in penal laws.

⁹⁵ Criminal Code Act 1990, s 214; Same Sex Marriage (Prohibition) Act 2014, ss 4-5. The two Acts are complementary in southern Nigeria, as each provides a distinct head of offense. Whilst the SSMPA criminalizes formal marriages, organizations, and public conduct, Section 214 punishes the conduct itself. The prosecutor can prosecute one accused on both laws for a single conduct.



law for breaking the provisions of the law, and the Section 214 for the act of carnal knowledge against the order of nature.

3.1.3 The Penal Code Act (Northern States)

Similar prohibitions on homosexuality are stipulated by the Penal Code Act in the northern regions.⁹⁶ Unnatural offenses as referred to in Section 284 of the Penal Code Act involve any act of carnal knowledge against the order of nature. The penalty for the crime is imprisonment up to fourteen years, or a fine, or both. Gross indecency is an offense specified in Section 287 of the Penal Code Act.⁹⁷ This section is similar in language to Section 214 of the Criminal Code Act.

3.1.4 Sharia Penal Codes and Same-Sex Relations in Northern Nigeria

Since 1999 and especially since the early 2000s, a further layer of criminalization of same-sex conduct has been introduced by twelve northern states who have embraced the implementation of Sharia (Islamic religious) law.⁹⁸ These states include Zamfara, Kano, Katsina, Kebbi, Sokoto, Bauchi, Yobe, Borno, Jigawa, Niger, Gombe, and Adamawa. The introduction of Sharia law creates a third layer of criminalization of same-sex conduct alongside the SSMPA 2014 and the Penal Code Act.

The laws surrounding the criminalization of same-sex conduct under the Sharia penal

⁹⁶ Penal Code (Northern States) Federal Provisions Act 1960, sec. 284. With regard to this legislation, there should be proof of penetration on the part of the perpetrator for him to have been found guilty of “carnal intercourse against the order of nature.”

⁹⁷ Penal Code (Northern States) Federal Provisions Act 1960, s. 287. It is an omnibus provision that covers all homosexual conduct not amounting to anal-penile penetration, thus prohibiting acts of “gross indecency” committed whether publicly or privately.

⁹⁸ Adoption of Sharia law: Starting from 1999 with the state of Zamfara, 12 northern states of Nigeria adopted Sharia criminal law: Zamfara, Kano, Katsina, Kebbi, Sokoto, Bauchi, Yobe, Borno, Jigawa, Niger, Gombe, and Adamawa. This gave rise to the creation of an entirely new Islamic legal system in relation to some classes of crimes.



codes are distinct from the laws of secular Nigeria concerning same-sex conduct. Same-sex conduct is criminalized under Sharia law, and its punishment is considerably different from secular Nigeria's.⁹⁹ Specifically, according to the interpretation of traditional Islamic jurisprudence found within the Sharia penal codes, the penalty of the death sentence or stoning (also known as rajam) is prescribed for same-sex conduct ('zina' - illicit sexual conduct and 'liwat' – same-sex conduct). In some of these states, it has been declared that capital punishment would be applied, while others have declared the punishment would be significant imprisonment. Despite such proclamations, there have been few convictions involving capital punishment.

One of the major differences between Sharia and Secular laws is the process of prosecution.¹⁰⁰ The standards for evidence required when prosecuting cases under Sharia and Secular laws differ greatly. Under the Islamic jurisprudence system, one can only be convicted of same-sex relations if there are four witnesses to the act or through confession of the individual. The requirement of such a high standard for evidence is based on the fact that traditional Islam values privacy and does not intrude into personal matters. As a result, this has contributed to few prosecutions for same-sex conduct using Sharia laws compared to other forms of punishment.

However, the potential death sentence imposed by Sharia laws has resulted in a unique

⁹⁹ Treatment of homosexual acts under Islamic law: In terms of the Islamic legal tradition as practiced in Nigerian Sharia statutes, homosexuality or 'liwat' is punished severely, even by death or stoning. Nevertheless, the severity of punishment varies, as some states have shown that death penalties could be imposed, while others show that very lengthy jail sentences can be imposed.

¹⁰⁰ Sharia evidentiary standards: The Islamic legal code has established very high evidentiary standards for the prosecution of sexual crimes, including the need for at least four witnesses to the event or the defendant's confession. High evidentiary standards reflect the importance Islam places on privacy and moderation in sex. The result is that prosecution for homosexuality under Islamic law is infrequent.

legal landscape in northern Nigeria.¹⁰¹ Individuals engaging in same-sex relations in states governed by Sharia face possible penalties anywhere between ten years in prison according to the SSMPA 2014, and execution under Sharia laws.

3.2 Constitutional and Judicial Perspectives

However, both the Same Sex Marriage Prohibition Act 2014 and the already existing sodomy laws are part of a constitution that, at face value, has some elements that seem to conflict with the criminalization of homosexuality.¹⁰² For instance, the constitution of Nigeria has provisions guaranteeing citizens' rights to privacy, dignity, right of association, and equal protection under the law. This is an area of constitutional controversy that seems not yet settled by the Nigerian courts.

3.2.1 Right to Privacy Versus State Interest (Section 37, CFRN 1999)

Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) states: "Every person shall be entitled to respect for the privacy of his family, home, correspondence, telephone conversations and telegraphic communications."¹⁰³ This section ensures respect for a privacy right considered to be one of the fundamental rights in the Nigerian constitutional jurisprudence.

¹⁰¹ Asymmetry in the application of Sharia law is that individuals living in northern Sharia law states may suffer punishments ranging between imprisonment for ten years as stated by SSMPA 2014 and even the death sentence under Sharia laws for similar actions. There is therefore significant legal asymmetry in terms of the legal system that will be used against the individual and their punishment.

¹⁰² Constitutional Framework Conflict: The Nigeria Constitution provides for various provisions of fundamental rights (privacy, dignity, freedom of association, equality) which seem to be in conflict with the criminalization of same-sex relationships. Section 37 deals with privacy, Section 34 guarantees dignity and prohibits torture, while Section 40 guarantees freedom of association.

¹⁰³ Constitutional protection of privacy under section 37: Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) states that 'Every person shall be entitled to respect for the privacy of his family, home, correspondence, telephone conversations and telegraphic communications.' This means that privacy is recognized as a basic constitutional right, one of the most important rights in Nigeria's constitutional law.



The meaning and nature of the right to privacy have been analyzed in Nigerian case law, albeit to a lesser degree than elsewhere in the Commonwealth world.¹⁰⁴ It has been found that the privacy right is available to the individual in the home, in correspondence, and in other private matters. Nevertheless, it remains unresolved whether such a right also covers consensual sexual relations between people of the same sex.

Jurisprudence on international human rights law, especially that of the European Court of Human Rights and the UN Human Rights Committee, has extensively considered the question of whether the right to privacy protects sexuality.¹⁰⁵ As seen in the case of *Dudgeon v United Kingdom* (1981), where the European Court decided that the prohibition of homosexual acts in Northern Ireland was against the right to privacy under the European Convention on Human Rights, and the case of *Lawrence v Texas* (2003), whereby the United States Supreme Court decided that the proscription of homosexual sodomy is against the liberty interest in 'intimate conduct, there is clear evidence that the constitutional right to privacy in comparative constitutional law encompasses protection against criminalization of sexual activity. But no Nigerian court has decided unequivocally that the SSMPA 2014 breaches the constitutional right to privacy guaranteed by section 37 of the Constitution.¹⁰⁶ The issue thus remains

¹⁰⁴ Jurisprudence of privacy in Nigeria: The courts in Nigeria have established that the right to privacy as enshrined in Section 37 covers privacy in the home, in communication and privacy in matters relating to the private life of an individual. Nevertheless, jurisprudence of privacy rights in Nigeria is not well developed when compared to the privacy doctrines elsewhere in the Commonwealth world.

¹⁰⁵ See *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)> whereby the United Nations Human Rights Committee found that laws that made it an offense for persons to engage in consensual sexual activity violated their right to privacy guaranteed by Article 17 of the ICCPR; *Dudgeon v United Kingdom* (1981) 4 EHRR 149, whereby the European Court of Human Rights found that making it an offense for homosexuals to commit certain sexual acts in private was a violation of their right to privacy.

¹⁰⁶ No Nigerian court has ruled on whether the SSMPA 2014 infringes upon the rights of individuals as contained under Section 37. This is an area yet to be determined by courts. It should be noted that litigation of such cases presents several challenges, since one would need to prove conduct that

unresolved, pending a judicial decision. The reason why there has been no judicial pronouncement is, at least in part, because of the problem faced by a potential plaintiff in filing an action against the SSMPA 2014, whereby the plaintiff must be prepared to risk being charged with a crime based on the act he did.

3.2.2 Freedom of Association and Assembly (Section 40, CFRN 1999)

The relevant section of the CFRN 1999 stipulates: "Every person shall be entitled to assemble freely and associate with other persons, and in particular may form or belong to any political party, association, or trade union or any other association for the protection of his interests."¹⁰⁷ The freedom of association is thus protected under the Nigerian Constitution. It is worth noting that Nigerian constitutional law recognizes that this freedom applies both to organized bodies and associations as well as unorganized associations.

Section 5 of the SSMPA 2014 prohibits "gay clubs, societies, and organisations" and imposes criminal liability even on those individuals who "participate in" such organizations.¹⁰⁸ The SSMPA prohibits an individual from forming or belonging to a gay association or society. It also criminalizes participating in any activity of a gay club or providing assistance to any such organization. It is clear that the act goes beyond recognizing same-sex marriages to actively prohibiting people from associating based

breaches the Act, and thus expose themselves to criminal charges.

¹⁰⁷ Freedom of association under Section 40: According to Section 40 of the Constitution, 'every person shall be entitled to assemble freely...' This right is acknowledged by Nigerian legal doctrine to be one of the fundamental rights covering organizations and associations.

¹⁰⁸ The conflict between the provisions of Section 5 and freedom of association: Under Section 5 of the SSMPA, "any gay club, society or organisation" is deemed criminal, and the Act further makes any person involved in the activities of that organization, who works for that organization, or donates money to that organization liable under its purview.



on their sexual orientation. But the CFRN 1999 cannot be said to be unassailable.¹⁰⁹ For instance, Section 45 of the Constitution states that the rights entrenched in Chapter 4, including the right to freedom of association, "may be subjected to such restrictions as may be required or imposed by law in the interest of defence, public safety, public order, public morality or public health." As such, the Nigerian government could contend that the SSMPA 2014 constitutes a limitation of freedom of association within the confines of Section 45 because of its purpose, which will either be public morality or public order.

But no court in Nigeria has determined if Section 5 of the SSMPA constitutes a valid constitutional limitation of freedom of association within the purview of Section 45.¹¹⁰ This is largely because the limitation must be 'required or imposed by law' (Section 5 of the SSMPA is valid law), and 'public morality or public order' (or other grounds). 'Public morality' itself has been contested in various decisions of Nigerian courts. In fact, South African courts have ruled that the mere disapproval of a particular conduct on moral ground does not make out a case of public morality under which fundamental rights may be limited.

3.3 Enforcement Mechanisms and Institutional Roles

While the ban on same-sex sexual practices is codified within legislation, the ban is enforced via institutional structures such as the police, the prosecutors, the courts, as well as religious and cultural institutions functioning outside the bounds of official

¹⁰⁹ Possible restrictions under Section 45: Under Section 45 of the Constitution, 'rights contained in Chapter 4 may be subjected to such restrictions as may be required or imposed by law in the interest of defence, public safety, public order, public morality or public health'. This section gives the government a legal basis to invoke the SSMPA as a necessary restriction based on 'public morality' or 'public order'.

¹¹⁰ There is no judicial decision on the constitutional validity of Section 45 justifications for Section 5 of the SSMPA: Does Section 5 of the SSMPA fall under Section 45? This depends on whether the restriction was done for a valid reason, as well as whether the restriction is reasonable. There is controversy as to the meaning of 'public morality' and what restrictions it allows for.



laws.¹¹¹ The concept of enforcement needs to be analyzed from both formal and social institutional perspectives.

3.3.1 The Role of the Nigeria Police Force

As the national police force of Nigeria, the Nigeria Police Force (NPF) is officially tasked with enforcing the SSMPA 2014 and the pre-existing sodomy laws.¹¹² However, according to available information, there is notable inconsistency regarding enforcement by police units operating within different regions.

For instance, in more cosmopolitan cities such as Lagos where members of LGBTQ+ are visibly active and organized, it seems like the NPF has not enforced the SSMPA with the same aggressiveness as compared to other regions.¹¹³ The police units operating within the city have arrested and detained persons on charges under the law, but it seems that their efforts are minimal. In contrast, it has been reported that in the northern region, there is considerable aggression on the part of the police forces when it comes to the enforcement of the SSMPA. It has been reported that in the north, there are raids conducted on premises where there is suspicion of same-sex acts taking place, arrests are made, and cases taken to court. One of the issues highlighted by human rights groups is that the application of both the SSMPA law and sodomy law by

¹¹¹ Enforcement via formal and informal institutions: Although the SSMPA 2014 is an example of a state ban on homosexuality, there is still other enforcement that comes from religious institutions as well as traditional institutions. These institutions use social ostracism, as well as pressures from families to discourage homosexuality.

¹¹² Authority on SSMPA Enforcement: The Nigeria Police Force acts as Nigeria's national police authority, therefore the force is formally accountable for enforcing both the SSMPA 2014 as well as the existing laws concerning sodomy. There is significant variability among the geographical areas within Nigeria regarding enforcement efforts.

¹¹³ Police enforcement of the SSMPA in different geographic locations: The police enforcement of the SSMPA in cities such as Lagos is not as rigorous as it is in rural areas. In northern Nigeria, there have been raids on places where there is suspicion that same-sex practices are carried out. This is because of varying social attitudes toward the LGBT in these locations.



the police has sometimes been associated with behavior that is not in accordance with the criminal law procedure.¹¹⁴ There have been cases reported where the police have made arrests on the grounds of suspicion of engaging in same-sex relations and demanded bribes to be released.

3.3.2 The Role of Religious and Traditional Institutions

While SSMPA 2014 is an example of the official state prohibition of same-sex behavior, there is another type of enforcement of this prohibition in Nigeria. Religious communities, both Muslim and Christian, have expressed their disapproval of same-sex relations.¹¹⁵ There were calls by religious leaders to enforce the prohibition of same-sex acts, while traditional communities enforce this prohibition by means of ostracism and informal penalties.

Another documented issue of the criminalization of same-sex relations in Nigeria is the possibility of creating an environment for the use of extra-judicial force against persons practicing same-sex activities.¹¹⁶ Various human rights organizations have recorded cases of vigilante attacks on those believed to engage in same-sex activities. In this case, such violence is not sanctioned by the SSMPA 2014; however, it is based on the normative message of criminalization.

¹¹⁴Police abuse and extortion: According to various reports by human rights groups, people have been arrested without charge but only on the grounds of being suspected of engaging in homosexual acts, and they have then been detained without any legal representation and been required to pay bribes for their release.

¹¹⁵ Religious and traditional enforcement: Religious figures, both Muslim and Christians, have openly criticized same-sex relations and sought to ensure enforcement of bans. Formal enforcement is supplemented by informal enforcement from traditional bodies, such as family systems and leadership within communities.

¹¹⁶ Violence through criminalization and vigilantism: Human rights activists have provided examples of vigilante groups perpetrating violence against people presumed to be engaging in same-sex practices. Even if vigilantism has not been endorsed officially under the SSMPA, the process of criminalization creates an atmosphere where vigilante groups feel authorized to punish people presumed to be guilty of such acts.



Importantly, criminalization creates a situation in which the state is unable to perform one of its duties. Namely, some individuals, after being assaulted and attacked, filed complaints to the police. Instead of investigating such cases and protecting persons from violence, victims were arrested under the SSMPA 2014.¹¹⁷ It is evident that law enforcement agencies have failed to fulfill their function as the protector of individuals' well-being.

3.4 Judicial Attitude: Review of Notable Nigerian Case

There has not been many opportunities for the Nigerian courts to consider the issue of whether the SSMPA 2014 is constitutional or not, and the scope of any rights regarding same-sex couples under the laws.¹¹⁸ It should be pointed out that this can be caused by the difficulty of proving any breach of the act and the fact that the SSMPA 2014 is rather young legislation adopted in 2014.

When considering cases related to the matter of sexual orientation, the courts have not discussed the constitutionality of the SSMPA 2014.¹¹⁹ When convicting people on the charge of having violated the SSMPA 2014, the courts have just convicted the suspects without making sure whether the act itself was in line with Sections 37, 34 and 40 of the Constitution. Therefore, the courts considered it as a properly made law.

¹¹⁷ Reversal of police protection responsibility: As shown by some documented cases, those who have suffered violent attacks have been arrested under the SSMPA 2014 for reporting their violent attacks on others instead of seeing investigations carried out on their attackers.

¹¹⁸ Minimal involvement of Nigerian courts in the matter: Nigerian courts have had minimal opportunities to deliberate on whether the SSMPA 2014 is constitutional as well as on the extent of rights concerning same-sex relations. This has been due to a number of reasons, including the recent nature of the law, which came into existence in 2014.

¹¹⁹ Judicial application without constitutional analysis: Courts in Nigeria have often interpreted the SSMPA statute without any significant consideration of its constitutionality. They have convicted and punished the accused individuals without questioning the fact that the Act violates their constitutional rights to privacy, dignity, and freedom of association.

However, in matters of granting bail to the accused in SSMPA cases there are exceptions from this rule.¹²⁰ While some courts decided to grant bail to suspects of violating the SSMPA 2014, others did not and denied them the bail, as the crime is serious enough to hold suspects prior to the trial. The lack of any clear judicial ruling on the legality of the SSMPA has left many aspects of the legislation open to interpretation.¹²¹ It is not clear whether the phrase "public show of same sex amorous relationship" in Section 4 includes actions such as hand-holding, speaking about one's relationship, or simply walking around together in public. This vagueness leads to self-censorship and the alteration of one's conduct in order to ensure that no action will be taken against him or her. Significantly, there has been no judgment rendered by any Nigerian court so far to declare the Same Sex Marriage Prohibition Act 2014 unconstitutional or to direct the government to stop its implementation.¹²² Equally significant is the fact that not a single judgment has been delivered which upholds the constitutionality of the SSMPA 2014 or dismisses any claim regarding its unconstitutionality.

¹²⁰ Variations in SSMPA Bail Jurisprudence: While some courts have granted bail for SSMPA defendants, thereby acknowledging that the crime, while serious, does not always merit pre-trial detention, other courts have refused bail on the grounds that SSMPA is a serious crime that merits pre-trial detention.

¹²¹ Legal ambiguity in relation to the prohibited act: As there is no definite ruling from the courts in terms of defining what amounts to 'public show of same sex amorous relationship' in Section 4, there is definitely an element of legal ambiguity present. It remains to be seen by the courts whether holding someone's hand or even discussing one's relationship is included in this prohibited act.

¹²² Absence of constitutional challenge to the Act: There is no precedent in Nigerian law where the SSMPA 2014 was declared unconstitutional by any court and its implementation stopped. On the contrary, no court of law in Nigeria has ever validated the constitutionality of the Act or dismissed claims that it violates the Constitution.



CHAPTER FOUR

COMPARATIVE ANALYSIS AND CHALLENGES OF THE PROHIBITORY FRAMEWORK

4.1 Comparative Study of Other Jurisdictions

The legal regime regarding same-sex marriages in Nigeria can never be thoroughly analyzed alone. Comparisons of the laws of other countries offer valuable insight into the considerations that lawmakers face when drafting new legislation, as well as the implications of such considerations on constitutional arguments and outcomes. The legal regimes of three states shall be reviewed in this chapter – South Africa, United Kingdom, and Uganda. Such an analysis offers interesting perspectives into possible ways of regulation of the relationships between individuals of the same gender, as seen in societies of different religions, cultures, and constitutional foundations. South Africa stands out as being the only country in Africa that guarantees protection of sexual orientation and recognizes same-sex marriage by law, providing an interesting comparison to Nigeria's restrictive regime. United Kingdom, being the colonial mother of Nigeria, also offers valuable information regarding the path towards acceptance. Uganda is a recent example of a country in the region that has strengthened its criminalization of homosexuality.

4.1.1 South Africa: A Model of Constitutional Protection

In the Republic of South Africa, the Constitutional Law, 1996, is significant in the context of international human rights law. This was the first national constitution worldwide where there was express prohibition of discrimination based on sexual orientation. The Constitution in its section 9(3) says that no one can be discriminated against by the



state directly or indirectly on various grounds, which includes "sexual orientation."¹²³

This constitutional recognition of sexual orientation was not reached through a majority decision. South Africa is a highly religious country where most people are Christians or Muslims. In general, Christian and Muslim teachings have always described homosexuality as a sin. However, the Constitutional Court ruled in the 1998 case *National Coalition for Gay and Lesbian Equality v Minister of Justice* (NCGLE v Minister) that the outlawing of homosexual relations among males through the common-law crime of sodomy violated constitutional rights to dignity and equality.¹²⁴ The logic behind the court decision in *National Coalition for Gay and Lesbian Equality* can provide useful lessons regarding Nigeria. The court found that the prosecution of homosexual acts amounted to a serious moral assault on a group of people as it implied that their sexual inclination was intrinsically criminal. Furthermore, the court explained that the dignity of the individual protected in Section 10 of the South African Constitution covers the sexual orientation of the individual because sexual orientation constitutes part of the human person. As the court stated, "[t]he criminalization of sodomy is accordingly particularly serious as far as the limitation of the freedom of sexual expression by gay men and lesbians is concerned...The criminalization of sodomy constitutes a direct and immediate invasion of the right to dignity and freedom of sexual orientation. It is not only an expression of moral censure, but it amounts to a risk of being humiliated and hurt."¹²⁵ After the decriminalization of homosexuality, the Constitutional Court had to

¹²³ South African Constitution of 1996, Section 9(3). This section explicitly forbids discrimination "on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

¹²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC). This was a groundbreaking case which overturned the common law crime of sodomy on constitutional grounds (SOUTH AFRICA).

¹²⁵ Ibid. The entire passage read from the judgement says, "The ban on sodomy constitutes a harsh



determine if the refusal to allow gays and lesbians to marry amounted to discrimination against them. In a precedent-setting case known as *Minister of Home Affairs v Fourie* in 2005, the Constitutional Court ruled that the refusal to let gay and lesbian couples marry was in itself unconstitutional.¹²⁶ The rationale for the judgment in *Fourie* by the Constitutional Court made explicit reference to the symbolism of marriage as a fundamental institution of humankind. It pointed out that discrimination against homosexual couples in matters of marriage sends a dangerous message, namely, "that heterosexual couples may enjoy, in law, a status which confers great personal significance on them within the social consciousness, while homosexual couples may not enjoy such status. Such discrimination is extremely painful because it means that there is sent a highly demeaning message out to the world... that homosexuals can never be a part of society as married people."¹²⁷ As a result of the constitutional requirement, Parliament promulgated the Civil Union Act No. 17 of 2006, which was passed in November 30, 2006. The Civil Union Act applies not only to same-sex but also to opposite-sex marriages and confers all the legal consequences and effects of marriage to same-sex marriages. In particular, the right of adoption and succession, as well as tax relief and pension and insurance scheme benefits, are conferred to same-sex marriages. The Civil Union Act made South Africa the fifth nation in the world and

restriction of sexual freedom for homosexuals...The principle of proportionality demands that the interests of the state be balanced against the rights being restricted. It is not easy to imagine an adequate state interest that can justify restricting the rights to dignity and sexuality."

¹²⁶ *Fourie v Minister of Home Affairs 2006* (3) BCLR 355 (CC). The Constitutional Court ruled that discrimination on the grounds of sexual orientation against same-sex couples by denying them the right to marriage in terms of the common law definition of marriage constituted unfair discrimination.

¹²⁷ *Ibid.* It was further observed by the court that "the common law definition of marriage is thus unconstitutional inasmuch as it restricts the capability of same-sex individuals to marry. The exclusion of same-sex partners from marriage constitutes an egregious violation of their constitutional guarantee of equality."



the first in Africa where same-sex marriage is legally recognized.¹²⁸ "South African legislation allowing for the union of gay couples has been passed without the political or constitutional chaos that was feared by many opponents. At first, the legislation tried to provide for an accommodation, where state employees performing marriages under Section 6 of the Act were allowed to refuse on conscientious grounds. However, this approach was rejected as a logistical hindrance to ensuring equality, and the Civil Union Amendment Act of 2020 abolished Section 6 altogether. Nowadays, the employees of the state must perform the ceremonies, while the private religious ministers of Section 5 still have their own institutional independence. The evolution of legislation can thus be seen as a shift in priorities toward discrimination against individuals over institutions."¹²⁹ However, what sets apart the South African model is the reasoning used by the South African court system in making the legal decision of recognizing same-sex marriage. Unlike other nations that view the issue of same-sex marriage through the perspective of whether it conforms to the preferences of the people, South Africa took the stand that there were basic constitutional rights like the right to dignity, equality, and freedom of sexual orientation that limited democracy in its scope in enacting legislation. For the South African legislature, it cannot pass any bill or law regardless of whether it was preferred or supported by the majority of voters as long as the bill or law violates the fundamental constitutional rights guaranteed by the Constitution. The South African

¹²⁸ Act on Civil Union, No. 17 of 2006 (South Africa). The Act makes provisions for civil unions which may be entered into in the manner of either civil marriages or civil partnerships. It grants all the incidents and consequences of marriage to both heterosexual and homosexual couples.

¹²⁹ Civil Union Amendment Act, No. 8 of 2020 (South Africa). The amendment act repealed Section 6 of the main Civil Union Act, No. 17 of 2006, under which the law had allowed employees of the state working as marriage officers to refuse to solemnize same-sex marriages on the basis of conscience, religion, or beliefs. The parliament removed the exception from the law in order to prevent systemic discrimination and make sure that all public servants are required to celebrate civil unions. For more, see Civil Union Act, No. 17 of 2006 (South Africa), s 5.



opinion polls have consistently revealed that the majority in the country was against the idea of same-sex marriage for several years after the passage of the Civil Union Act, but the legal principle is that constitutional rights are beyond the reach of majority veto.¹³⁰

4.1.2 The United Kingdom: From Criminalization to Recognition

"The journey of same-sex marriages within the UK has been especially illuminating for the study of same-sex marriages within Nigeria because it has shown how a common-law state with a strong religious heritage can evolve over decades from a position of prohibiting through criminal statute to recognition of same-sex unions. The journey is not inevitable but is rather a series of deliberate decisions made and implemented over more than half a century. Until the mid to late 20th century, male homosexual acts had been outlawed across the whole territory of the United Kingdom by strict statutory laws which dated back to Victorian times. Male homosexuality had been particularly persecuted, resulting in imprisonment, the ruining of careers, and forced exile for those convicted under the law. A classic example of such statutory persecution was the persecution of Oscar Wilde, prosecuted and jailed in 1895 on charges of "gross indecency between males" (Labouchère Amendment, Section 11 of the Criminal Law Amendment Act 1885)."¹³¹ The Report of the Committee established by the British Government to study the law concerning homosexual offenses and prostitution was

¹³⁰ Human Sciences Research Council (HSRC), South African Social Attitudes Survey (SASAS) (2007/2008). The findings from the longitudinal study showed that about 70% to 80% of people felt that same-sex relations were wrong. In terms of jurisprudence which formed the basis of the case that constitutional protections could not be withdrawn simply because of the sentiments of the majority, one should look at *S v Makwanyane* 1995 (3) SA 391 (CC) para. 88.

¹³¹ Report of the Committee on Homosexual Offences and Prostitution (Cmd 247, 1957): Report of the Departmental Committee on Homosexual Offences and Prostitution (The Wolfenden Report). The report argued that homosexual acts committed privately by consenting adults should not be considered criminal offenses because it is not the duty of the law to meddle in matters concerning the privacy of individuals or their private morals. See also Sexual Offences Act 1967, which implemented certain provisions of the above recommendations only in England and Wales.



made in 1957. This Committee was comprised of various members, such as judges, clergymen, and academic people, who suggested that the law regarding homosexual activities among consenting adults be abolished. The logic followed by the Committee was similar to the reasons presented later on in countries like Nigeria, where they claimed that laws based solely on moral values cannot exist; the law should be concerned only with harm done to another person; and the State has no right to interfere in one's private and consensual acts. The following statement from the Report reads: "It is not, in our view, the function of the law to concern itself with the private morals of citizens or to seek to enforce any particular pattern of sexual behaviour, or to condemn sex outside marriage or homosexuality in general."¹³² However, the implementation of the Wolfenden Committee's proposals was delayed for a decade because of political objections based on both religious reasons and public morality. Only in 1967 did the Sexual Offences Act decriminalize private sexual relations between adult (over 21 years old) men who gave their consent. This legislation applied only to England and Wales; it did not apply to Scotland where homosexuality remained illegal until 1980 and Northern Ireland which remained outside of the scope of this Act until 1982.¹³³ The move from decriminalization to legalization was done step by step. In 2004, the United Kingdom introduced the Civil Partnership Act, providing for "civil partnership," a form of legalized union between people of the same sex, providing the legal attributes of marriage but

¹³² Ibid para 13. This is how it states: "The existence of law is for maintaining public order and decency... We do not believe that it falls within the purview of the law to interfere in the private affairs of citizens or seek to impose any specific code of conduct." See also para 61: "There has to be area of private morality and immorality that is simply not the law's business."

¹³³ Sexual Offences Act 1967, c 60 (UK). This Act partially legalized sexual acts performed privately by consenting males over the age of 21 in England and Wales. Of importance is that the definition of 'private' provided for under s.1(2) of the Act was very narrow, meaning that sexual acts could not be conducted in a public place or where there were more than two people. Partial decriminalization was effected in Scotland by the Criminal Justice (Scotland) Act 1980 and Northern Ireland by the Homosexual Offences Order 1982.



without calling it a marriage. Civil unions provided for inheritance, taxes, parentage, and all the privileges of spouses. Yet, civil unions were not marriages; they could neither be conducted under religious rites nor offer equality of statuses.¹³⁴ However, the demand for marriage equality became greater over the course of the next ten years after the introduction of the Civil Partnership Act. Such a demand was made by civil society, human rights activists, and even the judiciary. Thus, in 2013, the Parliament passed the Marriage (Same Sex Couples) Act, providing for same-sex marriages in England and Wales. The same took place in Scotland in December 2014. However, it was not until 2020 that the Westminster Parliament granted such marriages in Northern Ireland.¹³⁵ The unique feature about the position adopted by the UK towards marriage equality lies in the manner in which the UK balanced equality rights with religious freedoms. This balancing act was done through the enactment of the Marriage (Same Sex Couples) Act. The Act provided that a religious organization is not compelled to perform any same-sex marriage but can opt to do so. At the same time, religious organizations choosing to perform these marriages are exempted from any liability. In essence, it sought to harmonize equality and religion without creating an avenue for discriminatory practices.¹³⁶ The difference in trajectories followed by the United Kingdom and Nigeria could not be clearer. The UK went from criminalization to decriminalization to legalization over a period of about fifty years, based in part on a policy argument, in part

¹³⁴ The Civil Partnership Act 2004, c. 33 (UK). This Act provided for a legal status identical to marriage except for the designation. Those who entered into civil partnerships would receive the same tax relief, marital privileges, inheritance rights, succession, and parenthood as those who were married.

¹³⁵ The Marriage (Same Sex Couples) Act 2013, c.30 (UK). The Act was passed in March 2013 and was implemented in England and Wales in March 2014. Scotland passed similar legislation (The Marriage and Civil Partnership (Scotland) Act 2014) which became law in December 2014.

¹³⁶ Marriage (Same Sex Couples) Act 2013, c 30 (UK), s 2. The provision says: "An officer of a religious organisation is under no duty to solemnize the marriage between two persons of the same sex when that would be against the doctrines or teachings of the religious organization."



on social developments, and in part on human rights. Nigeria has traveled a different path; it has gone from a legacy of criminalization to a more restrictive prohibition (the SSMPA 2014), which goes even further than simply criminalizing actions to criminalizing people and their identities.

4.1.3 Uganda: A Parallel Study of African Prohibitory Laws

Whereas South Africa provides one African approach to homosexual activity and the UK offers the pathway taken by a former colonizer, Uganda demonstrates a current African jurisdiction which has dramatically increased the severity of its prohibition on sexual activities between members of the same sex. Thus, the Ugandan model provides the closest African comparison to the Nigerian situation, and analyzing it helps understand the rationale behind and possible ramifications of such an intensification of prohibition.

Similar to the case in Nigeria, Uganda inherited laws against homosexuality dating back to colonial times from the British Penal Code. As per section 145 of the Penal Code Act of Uganda, "carnal knowledge against the order of nature" was punishable by up to life imprisonment. For years, this clause had been practically dormant. Yet in the early 2000s, in light of increasing religious zeal and human rights concerns on the international arena, the Ugandan authorities were ready to introduce further criminalization of homosexuality.¹³⁷ "The process started back in October 2009, when an independent private member's bill entitled the Anti-Homosexuality Bill was tabled before Parliament. The bill aimed to significantly enhance the existing colonial legislation on the matter, imposing the death penalty for what is referred to as the crime

¹³⁷ Penal Code Act, Chapter 120 (Uganda). Under the Penal Code of Uganda, based on English colonial law, sexual acts classified under "carnal knowledge against the order of nature" were punished with life in prison under section 145.

of homosexuality and making it illegal to promote homosexuality via various means including organizations, literature, and any form of encouragement. Despite criticism and condemnation coming from international human rights organizations and foreign governments, the bill did reflect the general view held by the population; majority of Ugandans were supportive of criminalizing homosexuality, according to surveys conducted in the country. Parliament finally passed the bill into law in early 2014." "The process started back in October 2009, when an independent private member's bill entitled the Anti-Homosexuality Bill was tabled before Parliament. The bill aimed to significantly enhance the existing colonial legislation on the matter, imposing the death penalty for what is referred to as the crime of homosexuality and making it illegal to promote homosexuality via various means including organizations, literature, and any form of encouragement. Despite criticism and condemnation coming from international human rights organizations and foreign governments, the bill did reflect the general view held by the population; majority of Ugandans were supportive of criminalizing homosexuality, according to surveys conducted in the country. Parliament finally passed the bill into law in early 2014."¹³⁸

More recently in 2023, a harsher law was passed in Uganda: the Anti-Homosexuality Act of 2023. This Act significantly increased criminal sanctions imposed upon such individuals. Notably, the Act criminalized what the statute terms "aggravated homosexuality" if an individual "engages in same sex acts and in circumstances where

¹³⁸ Anti-Homosexuality Bill, Act No. 4 of 2014 (Uganda). This piece of law was first introduced as a private member's bill in October 2009 by Member of Parliament David Bahati. It was later enacted in December 2013 by Parliament and assented to by President Yoweri Museveni in February 2014. The law amended the Penal Code Act, Cap 120, in that it provided for life imprisonment for consensual homosexual acts, and any promotion or encouragement of homosexuality was made an offense. However, the act was repealed in August 2014 on procedural grounds since there was no quorum when it was enacted. See *Oloka-Onyango v Attorney General* [2014] UGCC 14.



the accused person knows that they are HIV positive" or where there is "a minor or a person who is disabled involved." The death penalty was the maximum penalty for aggravated homosexuality, while the minimum punishment for same-sex acts was life imprisonment.¹³⁹ This 2023 Ugandan legislation generated global outrage from the onset. It was described as "deeply disturbing and discriminatory" by the United Nations Secretary General. In its statement regarding the law, the African Commission on Human and Peoples' Rights criticized the legislation for being "inconsistent with the protection of human dignity and freedom from discrimination guaranteed under the African Charter." Nonetheless, the bill became a law after passing through the Ugandan legislature and assent by the country's President.¹⁴⁰ The Uganda case serves as a cautionary illustration for interpreting the trajectory of legal frameworks starting from prohibition to criminalization. There are several reasons why it is important to focus on the Ugandan experience of criminalization. Firstly, the criminalization occurred in the context where the Constitutional Court has engaged in debates on the legal framework and has decided to abide by the will of legislature. As stated above, the Constitutional Court, which had the mandate to consider the case, decided to examine the Anti-Homosexuality Act of 2023 in April 2024, but while striking out several clauses concerning the violation of privacy and access to healthcare services, it failed to change anything substantial, namely the core provisions of criminal prohibitions and capital

¹³⁹ Anti-Homosexuality Act 2023, Act 6 (Uganda), s 3. It provides that the offense of "aggravated homosexuality" can be committed where the person charged is a repeat offender, aware that he or she is HIV-positive, or where the homosexual activity is with a child or someone with disabilities and attracts the death penalty as a maximum punishment. See also s 2 (which provides a life term for basic homosexuality).

¹⁴⁰ Press Release by African Commission on Human and Peoples' Rights regarding implications of Anti-Homosexuality Act for work of human rights defenders in Uganda (27 May 2023). The Special Rapporteur brought to the attention of the Government of Uganda its international obligations towards the protection of persons from discrimination and harassment based on their sexual orientation.



punishment. Secondly, the criminalization was made despite the existing international legal obligations. Uganda is the signatory to the African Charter on Human and Peoples' Rights, and the African Commission issued several decisions requesting for decriminalization, but Uganda persisted in criminalizing homosexuality. Finally, there has been reported violence against LGBTQ persons.¹⁴¹ Comparison of the South African and Ugandan experience provides insight into the full spectrum of options open to Africa in this matter. While the post-apartheid constitution of South Africa chose to base protection of sexual orientation in its constitutional framework, the path chosen by the Ugandan experience, which started under a different constitutional order, is the opposite. Nigeria sees itself as standing somewhere in between: while it does not take the harsh approach of the Ugandan experience (there is no provision for execution in Nigerian law), it does not stick to the colonial-era sodomy laws, opting instead for the enactment of an outright prohibition, as seen from the Same Sex Marriage Prohibition Act 2014. The critical issue in the Nigerian case is whether this intermediate approach is sustainable constitutionally.¹⁴²

4.2 Challenges in the Implementation of the SSMPA 2014

Although the Same Sex Marriage Prohibition Act 2014 is legally binding Nigerian

¹⁴¹ *Fox Odoi-Oywelowo v Attorney General* (Consolidated Constitutional Petitions Nos 14, 15, 16 & 85 of 2023) [2024] UGCC 4. In the historic ruling of 3 April 2024, the Constitutional Court of Uganda upheld the essential criminal law and capital punishment stipulations of the Anti-Homosexuality Act 2023 on the basis that the legislative body had not exceeded its powers when acting to preserve cultural traditions. Sections 3(2)(c), 9, 11(2)(d), and 14 were declared unconstitutional violations of constitutional guarantees to the right to health, privacy, and freedom of association. Subsequent reporting on the wave of social violence, political repression, and institutionalized discrimination immediately following the implementation of the legislation is provided by Human Rights Watch "They Know Everything About Us": The Impact of Uganda's Anti-Homosexuality Act (2023).

¹⁴² The juxtaposition of the two cases shows that African states have made real choices based on constitutional principles with regard to this matter. South Africa chose the option of protection in line with its constitutional principles of dignity and equality; while Uganda chose the option of criminalization.



legislation, having been duly passed according to constitutional procedure, there have been numerous difficulties in implementing it. Such difficulties arise on three different fronts: the doctrinal front (issues related to clarity and consistency), the human rights front (clashes with Nigeria's constitutional principles and international standards), and the practical front (aspects of how the legislation operates and leads to harm). This part of the paper will analyze implementation difficulties in detail.

4.2.1 Ambiguity in the Definition of "Public Show of Affection"

"The 5(2) clause of the Same Sex Marriage Prohibition Act 2014 provides that: 'A person who registers, manages or joins gay clubs, societies and organisation, or engages in public display of amorous relationship between same sex persons in Nigeria shall be guilty of an offence and upon conviction shall be liable to a term of imprisonment for ten years.'¹⁴³ This is a serious doctrinal concern since there is no certainty regarding what acts constitute a violation of this clause. What is meant by "public show of same sex amorous relationship"? Is it limited to any of the following acts: sexual intercourse between two persons of the same sex; touching each other's genital area or kissing; hand-holding; holding hands while walking; being in close proximity to each other in public places; saying that your same-sex partner/spouse is your partner/spouse? None of these activities is specifically defined in the Act.

This vagueness constitutes an unconstitutional crime since the principle of legality requires that criminal offences must be clearly stated in order to give fair notice of what acts constitute crimes. The principle of legality is provided for in section 36(12) of the 1999 Constitution as follows: "No person shall be convicted of a criminal offence unless

¹⁴³ Same-Sex Marriage (Prohibition) Act 2014, s 5(2).

that offence is defined and the penalty therefore is prescribed in a written law."¹⁴⁴

Legality under the constitution is more than just a drafting requirement; it performs some vital rule-of-law roles. First, it acts as a notification tool; citizens are entitled to know what behavior is prohibited by the law before they commit such behavior. Second, it limits discretionary enforcement, since officers are supposed to enforce the law according to its wording rather than their own interpretation of it. Third, it makes it possible for judicial scrutiny, as courts will evaluate the actual behavior against the statutory definition to confirm whether the prohibited activity was committed. When a statute is vague, all the above-mentioned elements are violated.¹⁴⁵ The ambiguity within Section 4 has led to what is known as the "chilling effect," whereby the vagueness of the legal ambit within which persons will act so as not to breach any of its provisions makes people change their behavior much beyond what the law actually demands. This effect is felt at the personal level as well as the organizational one. At the personal level, the inability for individuals who identify as LGBTQ+ in Nigeria to be sure of whether or not it is acceptable for them to show affection to others leads many of them to have to hide their sexual orientation altogether, even when heterosexual people feel perfectly fine showing affection through actions such as holding hands and introducing their partners. At the organizational level, the uncertainty regarding what would constitute direct or indirect support of a public display of affection under Section 5(2), as well as sustaining and supporting an organization under Section 5(3), has led some organizations working with issues surrounding sexual orientation to stop their

¹⁴⁴Federal Republic of Nigeria Constitution 1999 (As Amended) Section 36(12). This provision upholds the principle of legality, which is an essential aspect of the rule of law and due process.

¹⁴⁵G. Williams, *Criminal Law: The General Part* (2nd ed., Stevens & Sons 1961). These are the three important roles that Williams attributes to the principle of legality: It gives adequate notice to citizens about what is proscribed; it prevents arbitrary law enforcement; and it allows judicial review.



operations completely.¹⁴⁶ Examples of the jurisprudence of comparative vagueness highlight this issue. As illustrated in the famous case of *R. v. Nova Scotia Pharmaceutical Society*, the Supreme Court of Canada stated that a statute or any part of it is deemed to be unconstitutionally vague if it does not offer sufficient notice regarding the forbidden conduct. It was also highlighted that there needs to be a standard which can be comprehended by people, since in the absence of any limitations, they would have no idea what they could or could not do.¹⁴⁷ In the South African case law, it is clear that the Constitutional Court has clearly laid down the position that vagueness forms part of the constitutional rule of law. The court held that for the constitutionality of any law, there has to be enough clarity in the language of the law so that people have enough notice. This means that the law has to inform citizens, in a manner clear enough to them, about what is expected of them so that they can conduct themselves in the right way.¹⁴⁸ In relation to Section 4 of the Same Sex Marriage Prohibition Act, the above legal precedent indicates a considerable constitutional deficiency. The definition "a public display of a same-sex amorous relationship" is too vague to ensure that one may regulate his/her behavior in accordance with this standard. Indeed, it is not clear whether hugging, kissing, cuddling, hand-holding, or even a verbal manifestation of a same-sex relationship falls under this prohibition. If the Act

¹⁴⁶ Human Rights Watch, *Tell Me Where I Can Be Safe: The Consequences of Nigeria's Same-Sex Marriage Prohibition Act* (Human Rights Watch 2016). This report comprehensively discusses the negative impact that the SSMPA has had on the LGBTQ+ community, such as the cancellation of sexual health education and human rights advocacy programs.

¹⁴⁷ *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 (Canada). The highest court of Canada set out the principle of vagueness within the Constitution, specifying that criminal laws are unconstitutional where they do not provide citizens with sufficient notice regarding prohibited behavior or restrain police discretion.

¹⁴⁸ *Trust of Affordable Medicines vs Minister of Health* 2006 (3) SA 247 (CC). The Constitutional Court of South Africa stated that the vagueness doctrine is an aspect of the rule of law in the Constitution of the country because laws need to be clearly expressed to guide citizen behavior.



intends to ban any manifestation of same-sex affection, it must define such conduct clearly; otherwise, this legislation is unconstitutional.¹⁴⁹

4.2.2 Human Rights Concerns and International Pressure

The country is subject to extensive international human rights laws that impose duties on protecting people from discrimination and respecting and protecting their basic rights such as their privacy, dignity, and freedom of association among others. However, it appears that the Same Sex Marriage Prohibition Act 2014 contradicts some of these duties. This section will look into the key issues of international law.

First, the International Covenant on Civil and Political Rights (ICCPR), to which Nigeria is a party, stipulates in Article 2 that each state party recognizes the rights guaranteed in the Covenant without distinctions of any kind such as on grounds of sex. Moreover, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) guarantees that all persons are equal before the law and are entitled to equal protection under the law without any discrimination. It is important to note that the Committee on Human Rights responsible for interpreting the International Covenant on Civil and Political Rights (ICCPR) holds that "sex" mentioned in Articles 2 and 26 covers "sexual orientation." As ruled in the case of *Toonen v. Australia*, criminalization of homosexuality among males constitutes a violation of Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) if applied to adult individuals' sexual activities in private.¹⁵⁰ When applied to the case of Nigeria, the

¹⁴⁹ "Public show of same-sex amorous relationship" leaves much room for confusion regarding enforcement. Those tasked with determining when this offense has been committed will exercise discretion that is bound to be inconsistent, causing arbitrary enforcement.

¹⁵⁰ *Toonen v. Australia* Human Rights Committee Communication No. 488/1992 (1994) UN Doc. CCPR/C/50/D/488/1992. In *Toonen*, the Committee concluded that criminalization of consensual



reasoning in Toonen reveals that the criminalization of consensual homosexual behavior through the Same Sex Marriage Prohibition Act 2014 is contrary to Nigeria's treaty obligations under the International Covenant on Civil and Political Rights (ICCPR). Nigeria has not withdrawn from its International Covenant on Civil and Political Rights (ICCPR) obligations nor made any reservations to Articles 2 and 26. Therefore, Nigeria still stands bound by the Committee's interpretation that sexual orientation is a protected characteristic under the International Covenant on Civil and Political Rights (ICCPR). As such, there is a contradiction between Nigeria's treaty obligations and the provisions of the Same Sex Marriage Prohibition Act 2014.¹⁵¹ Furthermore, the African Charter on Human and Peoples' Rights, having been adopted into Nigerian law through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, stipulates that all individuals shall be equal before the law and shall be entitled to equal protection under the law (Article 3); and that all peoples shall be equal, shall enjoy the same rights, and shall be subject to the same duties (Article 19). Even though the Charter does not provide sexual orientation as an area covered by its prohibition against discrimination, the African Commission on Human and Peoples' Rights has produced resolutions interpreting the Charter as providing protection to sexual minorities against acts of discrimination.¹⁵² This resolution, in particular, denounces the widespread abuse and violations carried out by State and non-state actors against individuals on account

homosexual conduct in private constituted a violation.

¹⁵¹ International Covenant on Civil and Political Rights (adopted December 16, 1966; entered into force March 23, 1976) 999 United Nations Treaty Series 171 (ICCPR) arts 2(1) and 26. Nigeria ratified the ICCPR on July 29, 1993 without entering any reservation to the above articles.

¹⁵² African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, 1520 UNTS 217, Articles 3 and 19. Article 3 states that all individuals shall be equal before the law and shall be accorded equal protection. Article 19 provides that all peoples are equal and have the right to be respected.



of their actual or perceived sexual orientation or gender identity.¹⁵³ The resolution calls upon States to be diligent in the enactment of laws against any form of discriminatory violence through investigations, punishment, and prevention, thereby creating a conducive environment for human rights defenders to operate without fear of legal harassment or intimidation. Although the resolutions adopted by the African Commission may not necessarily be legally binding treaties, the Commission itself is mandated with interpreting these guidelines for its members. Since Nigeria is one of the member states, the country is obligated to take the Commission's interpretations of the Charter seriously. However, the Same Sex Marriage Prohibition Act 2014 seems to clash with Resolution 275 by the Commission. Nonetheless, Nigeria has failed to engage in discussion on this matter with the Commission.¹⁵⁴ The third argument is that the right to privacy, acknowledged in different international treaties, is also understood to encompass sexual orientation and consensual sexual relations among adults. As stated above, Article 8 of the European Convention on Human Rights includes the provision "right to respect for private and family life." According to the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom* (1981), criminalizing homosexuality was incompatible with Article 8 of the Convention since such acts were an intrusion into one's personal space.¹⁵⁵ While Nigeria is not a party to the European Convention on Human Rights, the decisions of the European Court nonetheless carry

¹⁵³ Resolution 275 of the African Commission on Human and Peoples' Rights titled 'Protection against Violence and Other Human Rights Violations Against Persons Based on their Real or Imputed Sexual Orientation or Gender Identity' Adopted at the 55th Ordinary Session, 12 May 2014.

¹⁵⁴ See African Charter on Human and Peoples' Rights (n 30). The silence on the part of Nigeria regarding these disputes with the African Commission deserves attention. Indeed, Nigeria has not made any submissions to the Commission regarding its state report showing that SSMPA conforms to the principles enshrined in the African Charter, namely equality and dignity of man.

¹⁵⁵ *Dudgeon v United Kingdom* (1981) 4 EHRR 149. The European Court of Human Rights found that the criminalization of homosexual acts between consenting adult males was a violation of Article 8 of the European Convention on Human Rights because it invaded matters concerning the very core of privacy.



much weight within the context of international human rights law. Similar decisions have been made within the region of the Americas via regional instruments. In a case like *Atala Riffo and Daughters v. Chile*, the Inter-American Court has ruled that discrimination based on sexual orientation amounts to violations of privacy and family rights enshrined in the American Convention on Human Rights.¹⁵⁶ Though these documents may not legally obligate Nigeria, they reflect the international view of the linkages between sexual orientation, privacy, and basic rights that the Nigerian legal system must take into consideration. However, instead of protecting these aspects of personal privacy, the Same Sex Marriage Prohibition Act 2014 penalizes both private actions as well as any public manifestation of sexual orientations, thus violating internationally recognized human rights principles.¹⁵⁷

4.2.3 Social Stigma and Extra-Judicial Violence

Whereas the doctrine may not be the biggest issue with regard to the enforcement of the Same Sex Marriage Prohibition Act 2014, its practical application has proven to be the greatest implementation challenge for the Act – it has generated a legal and social environment where extra-judicial violence against LGBTQ individuals becomes possible and, in many cases, encouraged. Indeed, the Act has contributed to the legitimization of discrimination and violence against homosexuals.

In particular, the Human Rights Watch publication "Tell Me Where I Can Be Safe: The Impact of Nigeria's Same Sex Marriage (Prohibition) Act," dated 2016, provided

¹⁵⁶ *Atala Riffo and Daughters v. Chile* (2012), IACHR Series C No 239. In *Atala Riffo*, the Inter-American Court ruled that discrimination based on sexual orientation is a violation of the rights to private life and family under the American Convention on Human Rights.

¹⁵⁷ See generally. The jurisprudence in various regional human rights regimes (European, American, and increasingly African) consistently holds that the criminalization of consensual adult same-sex acts contravenes international human rights law.

numerous examples of violence against homosexuals. Following the introduction of the SSMPA, there have been reported cases of mob violence, arbitrary arrest, blackmail, and extortion of LGBTQ individuals. According to HRW, specific cases have been recorded of when: (1) a group of youths organized vigilante attacks against individuals suspected of being homosexual; (2) a case involving the arbitrary arrest of suspected LGBTQs who were released upon payment of a bribe to police officers; (3) cases where the families found out about the arrests of their relatives suspected of homosexuality and left them; and (4) individuals suspected of homosexuality being threatened by blackmail and extortion.¹⁵⁸ This pattern wherein criminal prohibitions generate social spaces within which violence flourishes is well studied in criminology and sociology. Whenever the state engages in the criminalization of a group of individuals or actions, a strong normative statement emerges, declaring them wrong or deviant on a moral level and thus not acceptable socially. It is possible that citizens would engage in vigilantism against the criminalized individual because they will believe that they are acting in defense of norms that the state recognizes as being worthy of criminalization.¹⁵⁹ This can also be shown by a relatively recent and much-publicized incident: the “Warri 67” case of 2023. On August 29, 2023, Nigerian police officials from the city of Warri in Delta State conducted a raid on a private meeting of sixty-seven people at a hotel. It was argued that the private meeting was supposed to be one of homosexual nature. All of the attendees were arrested, kept in custody for long periods, without any indication of

¹⁵⁸ Human Rights Watch, “Tell Me Where I Can Be Safe”: The Impact of Nigeria’s Same Sex Marriage (Prohibition) Act (Human Rights Watch 2016) [insert page number]. The report extensively examines the acts of violence, arbitrary arrests, and extortion that occurred after the implementation of the SSMPA.

¹⁵⁹ The criminal law literature makes clear that the act of criminalization has a normative import over and above its legal consequences. See J Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press 1997) [insert page number], concerning the encouragement criminal prohibitions may give to discriminatory and violent behaviour by non-state actors.



violation of the law, and were charged under the Same Sex Marriage Prohibition Act 2014. Eventually, most of the attendees were freed, but the media coverage was extensive, portraying the detainees in very inhumane ways. After the news came out, vigilantes attacked the suspected gay and lesbian people in Warri and some other Delta towns. The suspects were arrested again or beaten up by citizens due to police raids.¹⁶⁰

The above trend highlights one of the greatest failures of the state in discharging its obligations; the failure to protect citizens from violence. Criminalizing same-sex acts has resulted in a situation whereby people who are victims of violence are prevented from seeking assistance from police as they are liable for arrest rather than being assisted. In cases whereby the individuals attacked on account of their sexual preference report the case to the police, they are often charged under the Same Sex Marriage Prohibition Act 2014. Consequently, LGBTQ individuals have motives not to engage with the police when they are victims of crime. As a consequence, there is under-reporting of cases of violence against the LGBTQ community, as well as impunity by those committing violence against them.¹⁶¹ The impact of the social stigma generated by criminal prohibitions goes beyond violence. People who are subject to being prosecuted for their sexual orientations face severe psychological damage. Findings from studies in societies where there has been decriminalization or recognition of homosexuality show that such a measure has been positively linked to better mental well-being among LGBTQ+ individuals through lowering depression, anxiety, and

¹⁶⁰ Human Rights Watch, 'Nigerian Police Arrest Dozens for Alleged Gay Wedding' (Human Rights Watch, 30 August 2023) <www.hrw.org/news/2023/08/30/nigerian-police-arrest-dozens-alleged-gay-wedding> accessed 10 June 2026. The report details the public parading of the "Warri 67" detainees, which directly compromised their safety and incited local vigilante reprisals.

¹⁶¹ Constitution of the Federal Republic of Nigeria 1999, s 14. This dynamic constitutes a failure on the part of the state to deliver equal protection to its citizens by virtue of this particular provision of the constitution that the state has an obligation to ensure all citizens protection against violence irrespective of their sexual orientations.

suicidal tendencies. In contrast, societies that prohibit homosexuality suffer high prevalence rates of mental disorders, substance misuse, and suicidal tendencies among LGBTQ+. The Same Sex Marriage Prohibition Act 2014 adds to such a toll on psychological well-being through its criminalization measures.¹⁶²

4.3 Impact of International Human Rights Treaties on Nigerian Law

The Supreme Court in the case of *Atacha v Fawehinmi* ruled that the African Charter on Human and Peoples' Rights, which is binding in Nigeria following its domestication via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, is not only a piece of law in Nigeria, but a law of higher vigor compared to ordinary national laws. This means that whenever there is a conflict between an ordinary law and the Charter, the Charter prevails over the law, even though it ranks below the 1999 Constitution.¹⁶³ In terms of applying this principle to the Same Sex Marriage Prohibition Act 2014, the issue becomes: Is there an inconsistency between the requirements of the Same Sex Marriage Prohibition Act 2014 and Articles 5, 3 and 19, 10, and 9 of the African Charter? While this is a rather complicated matter of constitutional law that has never been settled by the Nigerian courts, a textual case can be made for an apparent conflict between the two documents. According to Section 5 of the Same Sex Marriage Prohibition Act 2014, anyone who is guilty of "forming, operating, managing, conducting, maintaining, aiding, assisting in any way the operation of gay clubs, societies and organisations" will be subject to prosecution. This clearly violates Article 10 of the

¹⁶² Cf. ML Hatzenbuehler, 'Structural Stigma and the Health of LGB Populations' (2014) 23(4) Current Directions in Psychological Science 231. The study shows empirical evidence of improvement in mental well-being post-repeal of such laws that discriminate against the population, whereas criminalization directly corresponds to higher incidences of depression, anxiety, and suicidal behavior.

¹⁶³ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228. The court in the *Atacha* case ruled that the African Charter on Human and Peoples' Rights which has been properly incorporated into the laws of Nigeria via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is law.

African Charter, which provides the right to "freedom of association." It is hard to fathom how the two provisions can fit together.¹⁶⁴ In the same vein, section 4 of the Same Sex Marriage Prohibition Act 2014, prohibiting "public show of same sex amorous relationship," seems to infringe Article 9 of the African Charter on "freedom of expression." Although the Charter recognizes the ability to impose limitations on these rights under the term "within the law," the African Commission construes "within the law" as meaning that "the restriction must be strictly necessary for the achievement of a legitimate aim." The main issue here is whether the limitations under the Same Sex Marriage Prohibition Act 2014 satisfy the proportionality principle; that is, whether the limitation is truly necessary for the attainment of those objectives and whether it is "required," not merely expedient or desirable. A prohibition of the recognition of a same-sex relationship in a public place by way of criminal sanctions may be seen as disproportionate to any legitimate objective of the state.¹⁶⁵ Article 22 of the ICCPR provides for similar protection of the right to associate, while Article 19 of the same document guarantees the right to freedom of expression. The ICCPR goes on further to provide under Article 20 that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." It can be said that this article takes into account the need for protection of the vulnerable minorities from discrimination, even going ahead to make an act of

¹⁶⁴ Art 10 of African Charter (n 30): "Every individual shall have the right to freedom of association subject to the requirement that he abides by the law." The contradiction stems from the fact that Section 5 of SSMPA criminalizes what is guaranteed by Article 10.

¹⁶⁵ Constitution of the Federal Republic of Nigeria 1999, s 45(1). Proportionality as applied to limits placed on fundamental rights by criminal law is already well recognized under this provision. A limit would be disproportionate if it is unnecessarily broad for achieving the stated legitimate purpose, or if the damage resulting from it is greater than any public gain.



incitement criminal. However, the SSMPA reverses all this.¹⁶⁶ However, the practical consequences of these conflicting treaties have yet to be determined. If a Nigerian court were to rule on the application of the SSMPA, it would have to determine whether the legislation should be narrowly interpreted in light of its human rights obligations or applied as written regardless of said obligations. According to the principles of statutory interpretation in Nigerian common law, if there is more than one way in which to interpret the statute, it will, per the presumption, be interpreted in such a way that does not violate human rights. In the case of the Same Sex Marriage Prohibition Act 2014, this would mean that it must be interpreted very narrowly so as not to unnecessarily violate Nigeria's international human rights obligations. In this regard, for instance, Section 4, which bans "public show of same sex amorous relationship," may well be interpreted in the sense that only sexually-related public expressions will be prohibited.¹⁶⁷ Nevertheless, there has never been any case requiring courts to make such interpretative decisions due to two reasons. First, there has never been any case reaching the superior court level regarding this matter. Second, the challenge of making a case against the Same Sex Marriage Prohibition Act 2014 is that the plaintiffs must disclose same-sex conduct or association which may lead to their prosecution. In other words, there is a legal ambiguity regarding the constitutionality of the Same Sex Marriage Prohibition Act 2014 considering its inconsistency with Nigeria's international

¹⁶⁶ Article 20 ICCPR (n 29): "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." This article is protecting vulnerable minorities, not the majority population.

¹⁶⁷ *Nafiu Rabi v. The State* (1980) 12 NSCC 291. The Supreme Court ruled that the provisions of any law safeguarding fundamental freedoms should be liberally interpreted, while laws made domestically should be read in such a way as not to conflict with the fundamental freedoms guaranteed. This principle can guide a narrow reading of Section 4 of the SSMPA.



obligations.¹⁶⁸ Yogyakarta Principles, formulated by international human rights experts in 2006 and further expanded in 2017, stipulate that state parties to international human rights agreements should "repeal all laws that criminalize or punish the consensual sexual activity of persons of the same sex." Though non-binding on an international legal basis, Yogyakarta Principles reflect the international human rights experts' consensus on what the binding international human rights agreements imply. Applying the principle to Nigeria would mean that Nigeria could be legally obliged to review its Same Sex Marriage Prohibition Act 2014 provisions concerning consensual acts.¹⁶⁹ As revealed by the comparison presented in this chapter, the choices open to the constitutional law-makers of Nigeria, the difficulty of implementing the Same Sex Marriage Prohibition Act 2014, and the ongoing contradiction between the Act and the human rights obligations of Nigeria have come to light. Unlike South Africa and the United Kingdom, the path of Nigeria has been in the opposite direction as opposed to recognition. While Nigeria has not followed the path of Uganda, it has certainly not moved to the same extent. It will therefore be unconstitutional for Nigeria to maintain this middle stance unless it can justify the Act on the basis of something other than mere majority sentiment.

¹⁶⁸ Federal Republic of Nigeria Constitution 1999, s 6(6)(b). Also see *Adesanya v President of Nigeria* (1981) 2 NCLR 358. The rigid application of the rule of showing the existence of a definite injury unique to the plaintiff produces this Catch-22 scenario. Filing a case against the SSMPA involves proving the injury as a consequence of engaging in same-sex acts or relationships, thereby making the person criminally liable for it.

¹⁶⁹ The Yogyakarta Principles Relating to Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (adopted on 26 March 2007) and Yogyakarta Principles Plus 10 (adopted on 10 November 2017). These Principles, even though not international laws per se, nevertheless express expert agreement on state obligations with regard to sexual minorities.



CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Summary of Findings

The study has looked at the legal position regarding prohibitions on same-sex marriages in Nigeria via a constitutional and comparative approach. This is evident from the way that the answers to the research questions have been answered, which has shown that the Same Sex Marriage (Prohibitions) Act, 2013 creates constitutional contradictions in the 1999 Constitution.

5.1.1 Constitutional Conflicts with Fundamental Rights

The Same Sex Marriage (Prohibitions) Act addresses several constitutional clauses; namely Section 37 (right to privacy), Section 40 (right to freedom of association), Section 39 (right to freedom of expression) and Section 42 (right not to be discriminated against). Clause 5(2) which punishes an individual for "public show of same sex amorous relationship," contravenes the principle of legality entrenched in Section 36(12). In Canadian judicial precedent of *R. v. Nova Scotia Pharmaceutical Society* (1992), vague legislation does not satisfy the constitutional test. Moreover, clause 5(2) and clause 5(3) penalizing public expression and membership in a gay organization respectively, infringe on the right to freedom of association guaranteed under Section 40 without justifiable limitations stipulated under Section 45. In the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, South African Constitutional Court ruled that a mere moral condemnation could not justify the destruction of a group's identity and dignity.

5.1.2 International Human Rights Violations

Nigeria is also subject to the International Covenant on Civil and Political Rights (ICCPR). According to the UN Human Rights Committee decision in *Toonen v. Australia* (1994), the word "sex" as used in International Covenant on Civil and Political Rights Articles 2(1) and 26 covers sexual orientation. The UN Human Rights Committee decision in *Toonen v. Australia* (1994) ruled that criminalizing consensual sexual acts breaches Article 17 (right to privacy) and Articles 2(1) and 26 of the ICCPR (equality before the law and equal protection without discrimination). Moreover, Nigeria has not withdrawn from the International Covenant on Civil and Political Rights and is still subject to this interpretation. Furthermore, Nigeria is also obliged to comply with the African Charter on Human and Peoples' Rights, which was declared supreme to any local laws in *Abacha v. Fawehinmi*. This charter guarantees the right to freedom of opinion (Article 9), freedom of association (Article 10), and equality (Articles 3 and 19).

5.1.3 Comparative Legal Frameworks

As a very religious country, South Africa opted to protect sexual orientation rights under its constitution, thus repealing sodomy laws in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) and endorsing gay marriages in *Minister of Home Affairs v. Fourie* (2005). With the enactment of the Civil Union Act of 2006, South Africa became the only African country to provide for marriage equality. On the other hand, the United Kingdom, which was Nigeria's colonial master, decriminalized homosexuality in 1967 and legalized gay marriage between 2013 and 2020. However, Uganda presents an adverse example, having enacted the Anti-Homosexuality Act, 2023, which provided for capital punishment as an offense for aggravated homosexuality. The Act was



rejected by the African Commission for violating the Charter rights of dignity and non-discrimination.

5.1.4 Documented Implementation Harms

The SSMPA has led to systematic victimization of LGBTQ+ individuals. According to Human Rights Watch (2016), extortion, mob violence, arbitrary detention, and state-sponsored harassment have been experienced. Initiative for Equal Rights (2024) reported that eighty-nine cases of extortion and one hundred eight cases of harassment, in addition to more than twenty illegal arrests conducted by law enforcement officials in a year, were committed. The case of "Warri 67" of August 2023 is a reflection of this trend, whereby sixty-seven people arrested during a personal meeting were exposed to a parade in violation of their constitutional dignity rights, but were released while being harmed. More importantly, whenever an individual becomes a victim of vigilante violence and tries to report it to the authorities, they become victims of the state, whose duty it is to protect them, through the Same Sex Marriage (Prohibitions) Act.

5.1.5 Popular Sentiment and Constitutional Constraint

Pew Research Survey conducted in 2013 found out that 98% of Nigerians are against same-sex marriage, making Nigeria have the highest percentage against such marriages worldwide. This is because of the real beliefs and religion of the Nigerians. Nonetheless, it must be remembered that one purpose of having constitutional rights is to curtail the power of the majority. *In Fourie v Minister of Home Affairs of SA*, the South African Court found that constitutional constraints guard certain issues from the power of the majority. The Nigerian Constitution provides fundamental rights that must be

safeguarded by the Constitution and cannot simply be ignored due to majority opinion.

5.2 Recommendations

5.2.1 To the National Assembly

It is recommended that the National Assembly makes the necessary amendments to the Same Sex Marriage (Prohibitions) Act for it to comply with the constitution: (1) Repeal Section 5(2) of the Act since it makes it a criminal offense to make "public show of same sex amorous relationship" – this is because this section is ambiguous, unconstitutional, as well as a violation of the principle of legality as well as criminalizing acts that if done by heterosexual individuals would not amount to crime. (2) Repeal Section 5(1) and 5(3) of the Act as they are a violation of freedom of association and cannot be justified using Section 45. (3) Repeal or at least amend the Criminal Code Act Section 214 and Penal Code Sections 284-287 that use colonial language making it an offence to engage in "carnal knowledge against the order of nature". (4) Consult northern states in regard to the amendment of Sharia Penal Codes with a view to reducing penalties, especially the death penalty.

5.2.2 To the Nigerian Judiciary

In any challenge of the constitutionality of the Same Sex Marriage (Prohibitions) Act to court, courts need to adopt conventional constitutional interpretation involving identification of engaged constitutional provisions, the content of guarantees, restriction of such guarantees by the statute in question, and determination of whether such restrictions comply with Section 45. The specific questions that courts need to ask

include: (1) Does Section 5(2) satisfy the requirement of legality? (Section 36(12)); (2) Is the Same Sex Marriage (Prohibitions) Act consistent with the right to privacy and the freedom of association respectively (Sections 37 and 40); (3) Do such limitations comply with Section 45 requirements for proportionality; (4) Is the Same Sex Marriage (Prohibitions) Act inconsistent with Nigeria's International Covenant on Civil and Political Rights obligations as clarified in *Toonen v. Australia*; (5) Is it also inconsistent with the African Charter? Additionally, courts need to lay down guidelines that prohibit media parades of arrested persons, an activity that infringes on the presumption of innocence and dignity, as was done by the Federal High Court in 2022.

5.2.3 To Civil Society and Human Rights Organizations

It is important that the civil society keeps monitoring any instances of abuse of law enforcement through institutions such as the Initiative for Equal Rights. Lawyers can pursue strategic litigation in order to ask constitutional questions while sparing the plaintiffs from the risk of prosecution, using methods like declaratory action and lower court referrals. Advocacy should assist the policymakers and the public to appreciate the difference between policy decisions (marriage ban) and violation of the constitution (crimes against one's privacy and association).

5.3 Conclusion

The present research shows that there are some incoherent provisions in the Same Sex Marriage (Prohibitions) Act 2013 that violate Nigeria's own Constitution as well as the country's international obligations. It is wrong to criminalize certain private activities, limit the freedom of association, and create circumstances that make violence possible.

In any case, these issues cannot be settled through a policy decision. Public opposition to the same-sex marriage does not help solve any constitutional problems since the very existence of such rights serves the purpose of limiting the power of the majority. There is no need for Nigeria to legalize the same-sex marriage in order to ensure its legal consistency.

The comparative evidence reveals the possibilities available for Nigeria. South Africa opted for constitutional protection amid intense religious objections. The United Kingdom opted for a gradualist approach. Uganda strengthened criminalization of the practices in question. Nigeria can create its own way forward through a commitment to its culture and respect for the inherent dignity of all of its people. The existing legal landscape is not sustainable. The earlier that legislation, the judiciary, and civil society take on these challenges, the quicker Nigeria will have a constitutionally consistent and rights-based legal framework and also from my personal belief and understanding of life, I believe that marriage is a sacred institution ordained by God to exist between a man and a woman. In my view, same-sex marriage is inconsistent with the biblical purpose of marriage and should not be recognized as a valid form of marriage.

My belief is supported by the Holy Bible, Leviticus 18:22 says: "You shall not lie with a male as with a woman, it is an abomination."

Similarly, Leviticus 20:13 says, "If a man lies with a male as with a woman, both of them have committed an abomination." Therefore, it is my opinion that the legal framework prohibiting same-sex marriage in Nigeria is consistent with the country's policy, cultural heritage and the religious convictions held by many Nigerians. While I acknowledge that different societies and individual hold differing views on this issue, I believe that

preserving the traditional concept of marriage contributes to the protection of the values and principles upon which Nigerian society is founded.





