

SAME SEX MARRIAGE, CONSTITUTIONALISM AND THE IMPERATIVE OF PUBLIC MORALITY*

Abstract

The enactment of Nigeria's Same-Sex Marriage (Prohibition) Act (SSMPA), 2013 which criminalized various forms of same sex unions and public display of amorous relationships by people of the same sex was greeted with cross-currents of commendation and condemnation respectively, by stakeholders in Nigeria and the international human rights landscape. Since then, the debate as to the propriety or otherwise of that instrument has continued to reverberate in global human rights discourse. This paper examines the contrary impulses of the protagonists and antagonists of same sex practices in the context of Nigeria's Constitution and extant human rights instruments to which the country is a signatory. Using the tools of historical and conceptual analysis as its methodological point of departure, the paper situates the prohibition of same sex relationships in Nigeria within the ambits of constitutionalism and the socio-cultural and religious sensibilities of the people. The paper contends that taking cognizance of the contours of Nigeria's grundnorm, marriage and human rights legislation, the prohibition of same-sex relations is not coterminous with the abrogation of the fundamental rights of lesbians and homosexuals having regard to the imperatives of public morality. The paper recommends, among others, the filling of the definitional lacuna in Nigeria's marriage legislation to obviate further misunderstanding as to the configuration of marriage in Nigeria.

Keywords: Same-sex marriage, Constitution, African Culture, Human Rights, Public Morality.

1. Introduction

Two main orientations exist as to the meaning and nature of marriage.¹ From a socio-cultural and religious perspective, marriage is chiefly an institution for the furtherance of the frontiers of procreation, interpersonal companionship and the maintenance of social order in line with the mandate to increase and multiply². Among the ultra-liberal human rights activists and the lesbian, gay, bisexual and transgender (LGBT) clans, marriage is simply a platform for sexual and emotional satisfaction³ and the promotion of children upbringing and education⁴. This paper examines the contrary impulses of commendation and condemnation which have attended the enactment of Nigeria's *Same-Sex Marriage (Prohibition) Act (SSMPA)* in the context of Nigeria's Constitution⁵ and extant human rights instruments to which the country is a signatory. Using the tools of historical and conceptual analysis as its methodological point of departure, the paper situates the prohibition of same sex relationships in Nigeria within the ambits of constitutionalism and the socio-cultural and religious sensibilities of the people. The paper contends that taking cognizance of the contours of Nigeria's *grundnorm*, marriage and human rights legislation, the prohibition of same-sex relations is not coterminous with the abrogation of the fundamental rights of lesbians and homosexuals having regard to the imperatives of public morality. The paper is divided into five parts with this introductory segment as the first. The second part examines the socio-cultural and religious attitudes of the people towards same sex relationships. The third part of the paper examines the nexus between human rights and same-sex marriage in Nigeria. A historical survey of instruments which criminalized same-sex relations in Nigeria prior to the enactment of the SSMPA is also dealt with in this section. Flowing from the third, the fourth part of the paper contextualizes same-sex marriage within the constitutional imperatives of good governance and public order while the fifth part is the conclusion.

Historically, the definition of marriage is rather straight forward as the legal relationship between husband and wife.⁶ This definition found judicial resonance in the famous English case of *Hyde v Hyde*⁷ as a voluntary union for life of one man and one woman to the exclusion of all others. Such conception of marriage casts it in the mold of a legal relationship between persons of opposite sex. However, the emergence and consequent legal recognition

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¹ These orientations are based on the socio-political, cultural and religious temperaments of the proponents.

² *The Holy Bible, Genesis 1:28.*

³ Bertrand Russell, 'History of Gay Marriages' <http://en.m.wikipedia/wiki/history-of-gay-marriage>.

⁴ John Bardley Rawls, *Political Liberalism* (expanded edn. 2005), p. 22.

⁵ *The Constitution of the Federal Republic of Nigeria, 1999* (as amended).

⁶ Sally Wehmeier (ed), *Oxford Advanced Learners Dictionary* (6th edition) P. 723.

⁷ (1861-1873) All ER. 175.

of the phenomenon of same-sex relationships have radically altered the definitional landscape of marriage⁸. Although homosexuality and lesbianism may have existed in Nigeria since time immemorial, such practices were carried out in utmost secrecy on account of the social stigma and public censorship that attended them.⁹ However, the impact of globalization is regarded as a major causative factor for the increased visibility of same-sex practices in Nigeria¹⁰. With increased public display of lesbian, gay, bisexual and transgender (LGBT) relationships followed a corresponding public outrage over such practices which gave rise to the enactment of the SSMPA. At the public hearing on the Bill, a group that styles itself as the 'Queer Alliance of Nigeria' decried it as a discriminatory instrument to punish LGBT persons for their sexual orientation¹¹. Similarly, the Amnesty International, Human Rights Watch, and the International Gay and Lesbian Human Rights Commission of Nigeria submitted a joint memorandum¹² to the Senate describing the bill as a violation of the rights of LGBT persons as enshrined in the constitution of Nigeria. Upon the presidential assent enacting the SSMPA,¹³ all hail seemed to have been let loose on Nigeria as several UN member states, human rights organizations and international agencies condemned the instrument and exerted concerted pressure on the country to repeal the law. The United Nations High Commissioner for Human Rights, Navi Pillay, issued a forceful denunciation of the instrument remarking that: 'rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights'.¹⁴ A group, the 'Aids-Free World,' fired a letter to the UN Secretary-General expressing utmost dismay over the law, demanding that the Nigerian government should vacate its then newly assumed UN Security Council seat: 'until such a time as the member state was no longer acting in violation of its international obligations'¹⁵. The US Secretary of State, John Kerry, issued a statement on behalf of his country saying that: 'the United States is deeply concerned by Nigeria's enactment of the same-sex marriage Prohibition Act [which] dangerously restricts the freedom of assembly, association and expression of all Nigerians'¹⁶.

Apart from the deployment of incendiary rhetoric against Nigeria on account of the enactment of the SSMPA, some powerful western nations directly threatened to cut humanitarian and development aids to Nigeria and other countries based on their treatment of their LGBT persons. For instance, the Obama administration in US issued a memorandum to administration officials directing them to: 'consider how countries treat their gay and lesbian populations when making decisions about allocating foreign aid'¹⁷. In line with the posture of some western nations, the United Kingdom categorically threatened to cut aid to African countries that violate the rights of gay and lesbian citizens¹⁸. On the other side of the divide, there was overwhelming support to the Nigerian government for the legislation. A Nigerian clergyman captures the religious temper and public support for the SSMPA as follows:

If the US or any other foreign country wants to strip us of aid because we hold on tightly to our values, then so be it. We are Africans not Americans. We do not influence other countries when they are making their laws, so it is ridiculous that they will attempt to influence the way we make our own laws. Africans view homosexuality as immoral. It has never been condoned in Africa, and it will certainly not be tolerated here in Nigeria¹⁹.

⁸Obianuju Nnamuchi, 'Nigeria's Same-Sex Marriage (Prohibition) Act and the Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?', *Southwestern Journal of International Law*, Vol. 25, March 2019. <https://www.researchgate.net>3319...>

⁹K. Igbodo, 'Gay Marriages in Nigeria', Available at www.dailytimes.com.ng/optional/gay-marriages-Nigeria.

¹⁰The recognition of same-sex practices in many western nations has emboldened homosexuals and lesbians in Nigeria to publicly acknowledge their peculiar sexual orientations.

¹¹Joseph Onuche, 'Same-Sex Marriage in Nigeria: A Philosophical Analysis' *International Journal of Humanities and Social Science*, Vol. 3, No12 (2013): 93 – 98.

¹²*Ibid*

¹³*The Same-Sex Marriage(Prohibition) Bill* was passed into Law by the Nigerian Senate and House of Representatives on 17 December 2013 and assented by the then President of Nigeria Dr. Goodluck Ebele Jonathan on 7 January 2014.

¹⁴UN Human Rights Chief Denounces 'Draconian Anti-Homosexual Law in Nigeria', UN News (Jan 14, 2014). <https://news.un.org/en/story/2014/01/45964-un-human-rights-chief-denounces-draconian-anti-homosexuality-law-in-nigeria>.

¹⁵Chinedu Okoro, 'NGO Petitions Un over Same-Sex Act' (CAJ NEWS AFR (Jan. 14, 2014) <https://allafrica.com/stories/201401140777.html>.

¹⁶Associated Press, 'Nigeria Passes Law Banning Homosexuality', Telegraph (Jan 14, 2014), <http://www.telegraph.co.uk/news/worldnews/africandindian/ocean/nigeria/10570304/nigeria-passes-law-banning-homosexuality.html>.

¹⁷Kaven McVeigh, 'Gay Rights Must be Criteria for US Aid Allocation, Instructs Obama', *The Guardian*, December 6, 2011 <https://www.theguardian.com/world/2011/dec/07/gay-rights-us-aid-criteria>.

¹⁸*Op. Cit*, Telegraph (Jan. 14, 2014)

¹⁹Tosin Omole, Nigerian Pastor while addressing his congregation in Lagos, 'Obama Fights Nigerian Anti-Gay Bill, Threatens to Cut Off Aid', December 9, 2011. www.forbes.com.

A Nigerian newspaper columnist sums up the perception among Nigerians that powerful western nations are attempting to arm-twist Nigeria to abandon its socio-cultural and moral values with respect to same sex practices: The hostile reaction of Europeans and the United States to the recent signing into law of the bill that (proscribes) marriages and sexual relations between people of the same sex has not taken into consideration the socio-cultural differences between people of different racial backgrounds and more importantly, the religious beliefs of our people ... We value the bilateral and multilateral relationships between Nigeria and its international partners and we believe that no unnecessary pressure will be brought to bear on us to accept what our people consider abhorrent. The US and EU should respect the sensibilities of those in the majority who abhor the practice of same sex relations²⁰.

Since the past several years, the issue of same sex marriage has remained one of the most controversial topics in international human rights discourse. Such controversy is accentuated by the fact that while same sex marriage is recognized and accepted in some jurisdictions, the practice is criminalized and discouraged in others²¹. The position adopted by each country is based on its conception of the meaning and nature of marriage anchored on its socio-cultural and religious backgrounds.

2. Same – Sex Relations in Cultural and Religious Contexts

In spite of the increasing erosion of age old traditional values in many parts of the world, mainstream cultural and religious thought have remained antagonistic and oppositional to same-sex practices. A recent global survey found that the acceptance of same-sex marriage is geographically and culturally determined²². While there is widespread acceptance of same-sex marriage in more secular societies especially those of North America, the European Union and parts of Latin America, there is widespread rejection of same in predominantly Muslim nations, Russia, Africa and Asia²³. In Africa, the highest acceptance rate of same-sex marriage is in South- Africa with 34% of the population being positively disposed to it while the lowest acceptance rate of same-sex marriage is found in Nigeria with only 1% of the population in support²⁴. Part of the explanation for the difference in the attitude of Western nations and African countries with respect to same –sex marriage is that the former places greater premium on individual choice and autonomy while the later prioritizes the community or public good over and above that of the individual²⁵. The principle of autonomy is regarded as the epicenter of ‘liberty’ or ‘freedom’ which the political philosopher Thomas Hobbes defines as the absence of opposition or external impediments to action²⁶. Autonomy is thus, the fundamental principle upon which any particular action or conduct can be accorded human right status with justification. The principle of autonomy constitutes the melting pot of other human rights such as right to personal liberty, right to life, right to self – determination, respect for human dignity, right to privacy, right to assembly / association, freedom of expression²⁷. The application of the principle of autonomy to same sex relations evinces the right of adults of sound mind to freely engage in private homosexual intercourse with other consenting adults without interference. This is the gravamen of the decision of the US Supreme Court in *Lawrence v Texas*²⁸ which invalidated the criminalization of private homosexual sex between two consenting adults, a decision which set off the chain of events that ultimately gave rise to the legalization of same sex marriage in the US. In spite of the pivotal status of the principle of autonomy as the fulcrum upon which human rights revolve, the need to find a balance between individual freedom and public interest remains the eternal challenge of all human rights regimes because ‘the protective privilege (of the individual citizen) ends where public peril begins’²⁹. However, unlike the Western societies which prioritize individual freedom, the African conception of personhood is founded on community consciousness. According to Mbiti:

[It is] only in terms of other people does the individual become conscious of his own being Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: ‘I am, because we

²⁰Victoria Ojeme, ‘Gay-Marriage Law: Canada Cancels Jonathan’s Visit’, *Vanguard* (Jan. 20, 2014) <https://www.vanguardngr.com.2014/01/gay-marriage-Law-canada-cancels-Jonathan’s-visit/>

²¹Magaji Chiroma and Awwal Ilyasu Magashi, ‘Same-Sex Marriage versus Human Rights: The Legality of the Anti-Gay and Lesbian Law in Nigeria’, *International Law Research*, vol 4, No 1, 2015. www.ccsenet.org/i/r.

²²Pew Research Center, ‘The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries’, (4 June 2013) <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-June-4-2013>.

²³*Ibid*

²⁴*Ibid*

²⁵ John S. Mbiti, *African Religions and Philosophy* (2nd rev. ed)(Oxford: N.H. Heinemann, 1990).

²⁶Thomas Hobbes, *Leviathan* (Crawford B. Macpherson ed), (London: Penguin Books, 1985), p. 261.

²⁷Obianuju Nnamuchi, ‘Nigeria’s Same-Sex Marriage (Prohibition) Act and the Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?’, *Southwestern Journal of International Law*, Vol. 25, March 2019. <https://www.researchgate.net>3319...>

²⁸ 539 U.S. 558, 578 (2003)

²⁹ Tobriner J. in *Tarasoff v Regents of the University of California*, 551 p. 2d 334 (cal. 1976).

are; and since we are, therefore I am'. This is the cardinal point in the understanding of the African view of man³⁰.

The primacy of individual autonomy and human rights in the Western nations make them more permissive of same – sex relationships as indices of individual choice. This is unlike communitarian societies which are more restrictive of individual autonomy in the interest of group solidarity. According to the African philosopher and bioethicist, Kasenene, in Africa, 'the community will restrict the free action of the individual for his or her own good. The good of the individual and of the group is more important than personal freedom or autonomy'³¹. Between western and African countries, there exists a huge cultural difference such that some things that are considered as fundamental rights abroad can be offensive to African culture, tradition and way of life³². In all parts of Africa, marriage is regarded as a sacred religious and cultural bond between members of the opposite sex for the perpetuation of the society and the promotion of communal affinity.

With the singular exception of South-Africa, the notion of same-sex –marriage is considered as an intolerable sacrilege throughout Africa and especially so in Nigeria³³. In Zambia, the social and cultural antipathy to same-sex practices led to the criminalization of any sexual relationship between members of the same sex with penal sanction ranging from fifteen years to life imprisonment³⁴. In Kenya, same sex practices are also outlawed while homosexuals and lesbians are regarded as persons under a curse and are liable to long prison terms upon conviction under the law.³⁵ In Southern Nigeria, for instance, long before the advent of colonialism, same-sex marriage was strictly prohibited under native law and custom³⁶.

Under the Christian religion, same-sex marriage is highly prohibited as marriage is ordinarily seen as the union of a man and a woman as contained in the *Bible* account of creation³⁷. Among Christians, the belief that marriage is founded on the union of male and female is rooted in the relationship between the first man (Adam) and the first woman (Eve)³⁸. References are made to the fact that when Jesus Christ was asked a question about marriage, he answered as follows: 'Haven't you read the scripture that says that in the beginning God made them male and female'.³⁹ Furthermore, God provided a model for the marital union: 'And God said for this reason, a man shall leave his father and mother and live with this wife and the two shall become one'⁴⁰. The *Bible* being the standard guide and reference point for Christian living, its condemnation of sexual relations between persons of the same sex is embodied in the old testament biblical exhortation: 'if a man has sexual relations with another man, they have committed a taboo and both shall be put to death by stoning and they are responsible for their own death'⁴¹.

The condemnation of same-sex relationship is reaffirmed in the New Testament provision: 'they exchange the truth about God for a lie the men give up natural sexual relation with women and burn with passion for each other and as a result, they bring themselves punishment they deserve for their wrong doing'⁴². From the point of view of Christianity, therefore, sexual practices by way of homosexuality, lesbianism and other same sex relations are considered unnatural and contrary to sound doctrine. Similarly, under the Islamic religion, same-sex marriage and allied relationships are also condemned as manifestations of unsound nature⁴³. The provisions of the *Qur'an* and other *Hadith* narrations as well as the rulings under the sharia law all foreground the condemnation of homosexuality as a grievous sin punishable by Allah.

³⁰*Op. Cit*, Mbiti.

³¹Peter Kasenene, 'African Ethical Theory and the Four Principles', in *Cross-cultural Perspectives in Medical Ethics* (Robert N. Veatch, 2nded) (Boston: Jones and Bartlett Publishers, 2000), p. 352.

³²Labaran Maku, Minister of Information and National Orientation at a Press Conference in Abuja Nigeria, 9 December 2011. 'Obama Fights Nigerian Anti-Gay Bill, Threatens to Cut Off Aid'. www.forbes.com.

³³*Op. Cit*, Pew Research center

³⁴s. 155 *The Penal Code, Zambia*. Sexual relations between members of the same sex in Zambia is designated as carnal knowledge against the order of nature.

³⁵Homosexuality and lesbianism are punishable with 5 to 14 years imprisonment on conviction. See same-sex marriage in Kenya, 'What is the position of Kenya on same sex marriage' <http://en.wikipedia/wiki/same-sex-marriage-in-Kenya>.

³⁶Joseph Onuche, 'Same-Sex Marriage in Nigeria: A Philosophical Analysis' *International Journal of Humanities and Social Science*, vol. 3 No 12 (Special issue, June 2013), 93 – 98.

³⁷Christian Answers Nets 'Same Sex Marriage what does the Bible say?' <http://www.christiananswers.net/qoden/edufoll18.htm>.

³⁸*The Holy Bible, Genesis 2: 23*.

³⁹*The Holy Bible Mathew, 19:4*.

⁴⁰*The Holy Bible, Mathew 19:5*.

⁴¹*The Holy Bible, Leviticus 20: 13*

⁴²*The Holy Bible, Romans 1: 25-27*

⁴³*An-Nur: 19 (Qur'an)*.

The basis of the Muslims' attitude towards homosexuality is traceable to the injunctions of prophet Muhammed who is considered the perfect example for all Muslims (Uswa Hasan) and who prescribed harsh treatment for homosexuals⁴⁴. One of the most stringent denunciations of same-sex practices by the *Qur'an* is contained in the following passage where Allah says: 'And we sent Lot who said to his people: Do you commit lewdness such as no people in creation (ever) committed before you, for you practice your lusts on men in preference to women; you are indeed a people transgressing beyond bounds'.⁴⁵ There is, therefore, consensus that from the Islamic perspective, marriage is the lawful union between a male and a female in accordance with the formal way prescribed by sharia⁴⁶. The corollary of the foregoing is that from cultural and religious perspectives, same-sex marriage is regarded as an aberration and prohibited with telling sanctions. The sponsor of Nigeria's *Same-Sex Marriage (Prohibition) Bill*, Senator Domingo Obende captured the cultural and religious basis for the peoples opposition to same-sex practices when he stressed that same-sex amorous relationships could lead to a breakdown of the Nigerian society for their lack of moral or religious justifications⁴⁷. The threat to the moral health of the country is, therefore, the informing factor for the enactment of the SSMPA.

3. Human Rights versus Same-Sex Marriage

In spite of the politics of homosexuality, there is not in existence even a single binding international human rights instrument that provides for or accords human rights recognition to homosexual or same-sex marriage⁴⁸. Among UN member States, only 12% recognize homosexual marriage⁴⁹. Paradoxically, however, for countries that choose to accord recognition to same-sex marriage and allied relationships, the basis of their acceptance and recognition is the human rights of the persons involved. This is because international law does not prohibit any individual countries from elevating gay marriage or any other same sex relationship to the status of a right within their domestic jurisdictions in exercise of national sovereignty⁵⁰. The prohibition of same sex marriage in most countries of the world is based on the notion that it is not in accord with the traditional and mainstream definition of marriage as the voluntary union of adult members of the opposite sex. In *Corbett v Corbett*⁵¹, the issue before the court was the sex of the parties about which Ormerod J. declared the marriage void on the ground that the parties were both males. This was reaffirmed in a plethora of cases including *Bellinger v Bellinger*⁵² where the court held that a valid marriage can only exist between persons of the opposite sex. In England, same sex marriage was prohibited until the enactment of the *Marriage (Same – Sex Couples) Act 2013* which came into effect in March 2014. In Scotland, same-sex marriage was legalized in 2014 with the passage of the *Marriage and Civil Partnership Act*⁵³.

In Spain, same sex marriage was not legalized until July 2005 in the face of stiff opposition from the Catholic Church⁵⁴. In the US, same sex marriage was only recognized by some states up to 2006. In 2013, however, the US Supreme Court in *United States v Windsor*⁵⁵ invalidated the Federal Defence Act⁵⁶ which defined marriage as a union of a man and a woman by redefining it as 'the exclusive commitment of two individuals to each other'. The controversy as to the constitutionality of same-sex marriage was finally laid to rest in the US in *Obergefell et al v Hodges et al*⁵⁷ where the Supreme Court declared same-sex marriage as a human right. In Africa, the only

⁴⁴Gay Marriage: Islamic View, Sexual Perversity. <http://www.onislam.net/English/ask-thescholar/crimes-and-penalties/sexual/170236-gay-marriage-islamic-view.html>.

⁴⁵ Qur'an 11; 80-81.

⁴⁶See Iqbal Sham Shahzad, 'Some aspects of Marriage and Divorce in Muslim Family Law' at pp. 10-22. <http://pu.edu.pk/images/journals/szic/current-issue-pdf/E>.

⁴⁷*Op. Cit*, Onuche.

⁴⁸Obiajulu Nnamuchi, 'Nigeria's Same Sex Marriage (Prohibition) Act and the Threat of Sanctions by Western Countries: A Legitimate Case of Human Rights Advancement or What?' *Southwestern Journal of International Law*, vol. 25, March 2019. <https://www.researchgate.net>3319...>

⁴⁹Aengus Carroll & Lucas Ramon Mendos, *State Sponsored Homophobia* (12th ed 2017) p. 26 <https://ilga.org/sites/default/files/ILGA-State-sponsored-Homophobia-2017-WEB-pdf>.

⁵⁰*Op. Cit*, Nnamuchi.

⁵¹(1970) 2 WLR 1308 & (1970) All ER 33.

⁵²(2006)2 WLR 411.

⁵³Scotland was the first jurisdiction in Britain to announce in July 2012, its intention to legalize same –sex marriage. <http://www.independent.co.uk/news/uk/politics/scotland-throwsdown-equality-guntlet-as-it-announces-plan-to-same-sex-marriage-7876328.html>.

⁵⁴Same-sex marriage in Spain: The Free Encyclopedia. <http://en.M.Wikipedia.org/wiki/recognition-of-same-sex-marriage-in-spain>.

⁵⁵U.S (2013)

⁵⁶*Federal Defence of Marriage Act* (Domo) 112.

⁵⁷135 S.ct.2584, 2608 (2015).

country which accords legal recognition to same –sex marriage is South-Africa⁵⁸. Other African countries repudiate same-sex marriage on the ground that it is against the people’s cultural values, tradition and morals.

In Nigeria, even before the enactment of the SSMIPA in 2013, same-sex marriage had always been regarded as an anathema. Although neither the *Marriage Act*⁵⁹ nor the *Matrimonial Causes Act*⁶⁰ provide any explicit definition of marriage, they, however, provide enough indicators to ground a logical inference that in Nigeria, a valid marriage must be between members of the opposite sex⁶¹. Apart from the above, other legislative instruments that criminalize same-sex relationships in Nigeria include the *Criminal Code Act*⁶² and the *Penal Code*⁶³ which operate in Southern and Northern parts of Nigeria, respectively. These instruments criminalize homosexuality and sexual expression against the order of nature⁶⁴, attempted homosexuality⁶⁵ and gross indecency by male persons⁶⁶ all of which are punishable with long terms of imprisonment. The enactment of the *Same-Sex Marriage (Prohibition) Act*, constitutes a more comprehensive and pungent denunciation and criminalization of same sex practices in Nigeria. Unlike, the *Marriage Act* and the *Matrimonial Causes Act* before it, the SSMIPA clearly defines marriage as a legal union between persons of the opposite sex in accordance with the *Marriage Act*, Islamic law or customary law⁶⁷. This definition is more expansive and takes care of the controversy as to the status of marriage under the Act and under native law and custom. The wide spectrum covered by the SSMIPA is evident in the fact that it not only declares as invalid and illegal, any marriage or civil union entered into by persons of same sex in Nigeria but also denies recognition to such marriage or civil union contracted anywhere in the world as well as denying them the benefits of marriage⁶⁸. One of the reasons why the Act has been viciously attacked by some stakeholders is that it not only criminalizes same sex relationships but also prohibits the registration of gay clubs, societies and organizations as well as their sustenance, processions and meetings and any form of public display of same-sex amorous relationship⁶⁹. The Act further provides deterrent penal sanctions ranging from 10 years to 14 years imprisonment for contracting same sex marriage or civil union or for the registration, funding or in any way abetting same sex practices in Nigeria⁷⁰. The Act confers jurisdiction to try the infractions of the law on the High Court of a state or the Federal Capital Tertiary⁷¹.

The antagonists of the SSMIPA base their opposition to and condemnation of the law on the ground that it is violative of the human rights of the LGBT persons as guaranteed by the Constitution of Nigeria and other international human rights instruments to which Nigeria is a signatory. It is contended, for instance, that the Act violates the constitutional right to private and family life⁷². One of the strands of opinions as to the purport of the right to private and family life is that it includes the right of an individual to be left alone to live his life as he pleases and to found a family according to his own preferences⁷³. It is thus contended that the right avails homosexuals to found a family with whomsoever they please be it person(s) of the same sex or of the opposite sex. This position is, however, countered by mainstream conceptualization of the right to private and family life to the effect that the scope only covers the right of a person to perform personal activities within an area exclusively owned and controlled by him⁷⁴.

It is to be noted that contrary to the contention of the antagonists of the SSMIPA, much as the Act criminalizes same sex relationships, it does not prohibit the private sexual activities of homosexuals and lesbians as long as such activities are not displayed publicly⁷⁵. It is also to be noted that the Act does not contemplate the abrogation

⁵⁸South-Africa recognized same-sex-marriage in November, 2006. See ‘Where is Gay Marriage Legal?’ <http://lesbianlifeabout.com/cs/wedding/a/wheremarriage.htm>.

⁵⁹ CAP M6 LFN 2004.

⁶⁰ CAP M7 LFN 2004.

⁶¹See for instance section 69 (b) and 1st schedule – to section 69 Matrimonial Causes Act where there are copious references to ‘marriage of a man ... and woman’, ‘children of the marriage’ etc.

⁶² CAP C38 LFN 2004

⁶³CAP P3 LFN 2004

⁶⁴section 214 (1-3) and section 352, *Criminal Code* and section 284 *Penal Code*.

⁶⁵section 215 *Criminal Code Act*.

⁶⁶section 217 *Criminal Code*.

⁶⁷section 7, SSMIPA.

⁶⁸section 2(1-2), 3 SSMIPA.

⁶⁹section 4(1), (2), SSMIPA.

⁷⁰section 5(1), (2), (3) SSMIPA.

⁷¹section 6, SSMIPA.

⁷²section 37, *Constitution of the Federal Republic of Nigeria 1999 (as amended)*.

⁷³Amah Emmanuel Ibiom, ‘Critical Examination of the Constitutionality of Same Sex Marriage (Prohibition). Act 2013, *Ebonyi State University Law Journal*, vol. 7, No2 (2016) pp. 108-120.

⁷⁴E. C Ngwakwe, *Issues in Human Rights Guarantees* (Ibadan: Hudson Jude press, 2008), p. 62.

⁷⁵section 5 (2), SSMIPA.

of the rights of say boys and girls who live together respectively, in hostels or other private accommodations neither does it outlaw public contacts by all female or all male bodies (eg women’s guild, women’s August meeting) who publicly relate with one another for various mutual benefits. What the Act prohibits is amorous relations displayed in public by members of the same sex. Opponents of the SSMPA also deprecate the law on the ground that it violates the constitutional rights to freedom of conscience⁷⁶, right to freedom of expression⁷⁷, right to peaceful assembly and association⁷⁸, and right to freedom of movement⁷⁹. They contend that freedom of conscience includes the right to adopt whatever sexual orientation a person chooses; that the freedom of expression includes the right to sexually express oneself in any manner be it homosexuality or lesbianism; that freedom of association includes the right to associate or meet with any person of one’s choice be it a person of same-sex or of opposite sex; and that the freedom of movement includes the right of LGBT persons to embark on public processions. At the public hearing on the Same Sex Marriage (Prohibition) Bill, the leader of the gay community in Nigeria, Dr. Otibho Obiowu stressed that it is discriminatory for LGBT persons to be denied the above constitutional rights which inure to other citizens⁸⁰. According to him, such discriminatory practices have forced LGBT persons to migrate from their homeland to other parts of the world thereby robbing the country of their contributions to nation building.⁸¹ However, contrary to the contention of the antagonists of the SSMPA, the human rights guaranteed by the constitution inure to all citizens including LGBT persons in so far as no one goes beyond the limits set by the constitution itself.

The *United Nations Declaration of Human Rights (UDHR)*⁸² is one of the benchmark international instruments with far reaching provisions for the protection of the rights of the individual. The UDHR not only provides for the right to privacy⁸³, it also provides against discrimination on any basis⁸⁴. Similarly, the *International Covenant on Civil and Political Rights (ICCPR)*⁸⁵ also provides for the right to privacy⁸⁶, freedom of conscience⁸⁷, freedom of expression⁸⁸ and freedom from discrimination.⁸⁹ In addition to the foregoing, the *African Charter on Human and Peoples Rights*⁹⁰ also provide for the enjoyment of the rights enunciated in the Charter without discrimination on any grounds.⁹¹

The antagonists of the SSMPA contend that these international instruments to which Nigeria is a signatory are offended by the Act to the extent that it restricts the LGBT persons from the unfettered enjoyment of these rights. However, both the Constitution of Nigeria and the international human rights instruments under reference provide for circumstances in which these rights may be derogated. For instance, as we shall see in details in the next section, the Constitution of Nigeria provides that the fundamental rights enshrined in *sections 37, 38, 39, 40 and 41* of the Constitution may be derogated in the interest of defence, public safety, public order, public morality or public health⁹² or for the purpose of protecting the rights and freedoms of other persons.⁹³ The SSMPA does not prohibit people from getting married or founding a family or having a preferred private sexual orientation. Rather, the Act prohibits the distortion of the nature and meaning of marriage contrary to the imperatives of public morality. Similarly, *Article 29 of the UDHR* and *Article 19(3) of ICCPR* are in sync with *section 45(1)(a-b) of the Constitution of Nigeria* and the *African Charter on Human Rights*, which provides that ‘the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’⁹⁴. The corollary of the foregoing is that the rights guaranteed in the Constitution and the extant international human rights instruments are not absolute but contingent.

⁷⁶Section 38

⁷⁷section39

⁷⁸section40

⁷⁹section41

⁸⁰*Op. Cit*, Joseph Onuche.

⁸¹*Ibid*.

⁸² The *UDHR* Charter was adopted by the UN General Assembly in San Francisco in Dec. 1948.

⁸³Article 12.

⁸⁴Article 2.

⁸⁵ The *ICCPR* was adopted in 16 December, 1966.

⁸⁶Article 17.

⁸⁷Article 18.

⁸⁸Article 19.

⁸⁹Article 26.

⁹⁰The *African Charter on Human and Peoples Rights* also known as the Banjul Charter, was adopted in Nairobi, Kenya in 1981 and entered into force on 21 October, 1986. The provisions of the Charter are incorporated into Nigerian Municipal Law through the *African Charter (Ratification and Enforcement) Act CAP A9 LFN 2004*.

⁹¹Article 2.

⁹²section45(1)(a).

⁹³section 45(1)b.

⁹⁴Article 27(2).

4. Same-Sex Marriage and the Imperative of Public Morality

Debates as to the place of morality in public affairs and the deployment of the machinery of the law to the enforcement of morality date back to Victorian England with J. S. Mill's essay⁹⁵ as the classic touchstone of the liberal position. According to Mill, 'the only purpose for which power can be exercised over any member [individual tendencies] of a civilized community is to prevent harm to others.'⁹⁶ The Philosopher and Physician John Lock underscored the above thesis with his postulation that all men are perfectly free to order their actions as they please without seeking leave or depending on the will of any other man provided that the operationalization of his choices are not injurious to the interests of others.⁹⁷ In the 20th Century, the controversy as to the nexus between private conduct and the legal enforcement of morality was rekindled with the publication of the famous *Wolfenden Report* in England which stressed that the function of criminal law is:

To preserve public order and decency; to protect the citizen from what is offensive and injurious, and to provide sufficient safeguard, particularly for those who are especially vulnerable... It is not the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behavior further than is necessary to carry out the purpose we have outlined.⁹⁸

The watershed report which occasioned the decriminalization of homosexuality between two consenting adults ignited the famous debate between Lord Devlin and HLA Hart. Devlin who represents the moderate and contemporary view on the subject acknowledges the need for the toleration of maximum individual freedom but stresses that it must be within the ambit of public or common morality for the order and stability of the society⁹⁹. According to him, 'an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up from external pressure. There is disintegration when no common morality is observed....'¹⁰⁰ The moderate view on morality insists that as there is no limit to the power of the society to legislate against treason, so can there be no limit to its powers to legislate against immorality.¹⁰¹ The exhortation is that while freedom and tolerance of individual choices are inevitable, society, however, cannot tolerate any immorality which is revolting to the bulk of society because 'not everything is to be tolerated; no society can do without intolerance, indignation and disgust'.¹⁰² In spite of Hart's famed disagreement with Devlin, he, however, acknowledged that the existence of any society must be founded on 'shared values consisting of a central core of rules or principles which constitutes its pervasive and distinctive style of life'.¹⁰³ Over the years, there is no consensus as to the exact intersection between private choices and public morality right from Plato¹⁰⁴ through Diamond¹⁰⁵ to Dias,¹⁰⁶ but no one contests the fact that the corporate existence of any community is rooted on the maintenance of an irreducible minimum bond of basic moral and social beliefs and values.¹⁰⁷ It is to be noted that the contours of public morality are determined by and consistent with the ethos, world view and cosmology of each society.¹⁰⁸ However, these values are not universally shared because while the public morality of western societies is largely conditioned by individualistic considerations, African public morality, for instance, is tempered by communitarian considerations. The result is that the world is denominated by a dichotomy of moralities either constructed on individualistic or communalist frameworks.¹⁰⁹ These in turn exert considerable influences on the meaning and limits of individual human rights. For instance, in Europe, the European Convention on Human Rights is deliberately eurocentric as its human rights system refuse to effect a wholesale purchase of all the ideals and exhortations of the UDHR. Instead, it commits itself to the collective enforcement of 'certain of the rights stated in the Universal Declaration of Human Rights' which are in tandem with and promotive of the 'common heritage of political traditions, ideals, freedom and the rule of law'¹¹⁰. The geo-cultural, socio-political and cosmological dichotomies which undergird the conception of public morality and human rights in various parts of the world explain why there is no unanimity in the recognition of such issues as

⁹⁵J. S. Mill, *On Liberty* (1859), (Cambridge: Cambridge University Press, 2011).

⁹⁶*Ibid.*

⁹⁷ The Lockean thesis was first given judicial application in *Lochner v. New York*, 198 US 45, 58 (1905).

⁹⁸ Wolfenden Committee (of the British Parliament) Report on Homosexuality and Prostitution, 1957.

⁹⁹Patrick Devlin, *The Enforcement of Morals* (1959) (London: Oxford University Press, 1965), P. 15.

¹⁰⁰*Ibid.*

¹⁰¹*Ibid.*

¹⁰²*Ibid.*

¹⁰³*The Listener* (July, 1959a) P. 163; *Oxford Lawyer* (1961), P. 10.

¹⁰⁴ The Republic in Critical Theory since Plato (Hazard Adams ed) (New York: Harcourt Brace Javonovich, 1971), pp. 19 – 33.

¹⁰⁵A. S. Diamond, *Primitive Law, Past and Present* (2nd edn) (London: Routledge, 2013).

¹⁰⁶R. W. M. Dias, *Jurisprudence* (5th edn) (London: Butterworths, 1985).

¹⁰⁷*Ibid.*, P. 121.

¹⁰⁸*Op. Cit.*, Nnamuchi.

¹⁰⁹*Ibid.*

¹¹⁰*Ibid.*

ethanasia (mercy killing), abortion and same-sex marriage which are accepted in some places and repudiated in others. For instance, a global survey conducted in 2015 showed that out of 196 countries whose legal frameworks were studied, only fifty-eight permit abortions on request while 137 countries do not allow this exception¹¹¹. A different study also showed that only 12% of UN member states recognize homosexual marriage.¹¹²

The point being made is that the African human rights system and its conception of public morality are undergirded by its communal or communitarian impulse which subordinates the individual to the community and its cultural values.¹¹³ For instance, the African Charter on Human and Peoples' Rights imposes an obligation on states parties to promote and protect the morals and traditional values recognized by the community.¹¹⁴ The Charter also imposes a duty upon every individual to preserve and strengthen positive African values in his relations with other persons in order to promote the moral wellbeing of the society.¹¹⁵ In Nigeria, the fundamental human rights of the citizens are guaranteed by the Constitution of the country.¹¹⁶ However, the same constitution also provides that these fundamental rights including even the right to life¹¹⁷ can be derogated under certain circumstances. According to the Constitution, the rights which accrue to homosexuals, lesbians, bisexual and transgender persons (like other citizens) as provided in *sections 37 – 41* of the Constitution can be derogated from 'in the interest of defence, public safety, public order, public morality or public health...'¹¹⁸.

The enactment of the SSMPA, therefore, squarely falls within the confines of the Constitution pursuant to the imperative of public order and public morality and in line with the mandate of the African Charter on human rights. This cannot be otherwise because an overwhelming 99% of Nigerians repudiate same-sex marriage as immoral.¹¹⁹ In enacting the SSMPA, the Nigerian National Assembly acted within the responsibility imposed on it by the constitution 'to make laws for the peace, order and good governance of the federation...'¹²⁰. In *Gani Fawehinmi vs. Akilu and Togun*¹²¹, the Nigerian Supreme Court per Obaseki JSC gave judicial *imprimatur* to the responsibility of government to recognize the linkage between law, public morality and good government.

The corollary of the foregoing is that the SSMPA is not only constitutionally unimpeachable but also it does not abrogate the human rights of LGBT persons. Chiroma and Magashi express it eloquently by stressing that the SSMPA 'is indeed a child of the constitution' and the provisions 'do not in any way contravene the Nigeria Constitution'.¹²² In contextualizing the SSMPA within the ontological imperative of public morality and good governance, Nigeria and other African countries which repudiate same-sex marriage are on firm grounds 'in institutionalizing and pursuing an indigenous or Afrocentric concept of human rights consistent with the region's cosmology and epistemology'.¹²³ It is observed that part of the angst and misconception which the enactment of the SSMPA has generated among a section of stakeholders is that the primary legislative instrument on marriage in Nigeria – *The Marriage Act* – does not have any explicit definition of marriage. This creates the impression that any union of persons which accords importance to child upbringing (as does same-sex marriage) may also be regarded as a marriage¹²⁴. The situation, therefore, calls for the amendment of the *Marriage Act* to clearly define marriage as a union of adult members of the opposite sex. This will bring it in tandem with the definition of marriage in the SSMPA¹²⁵. It is also recommended that Nigeria should utilize various public enlightenment vehicles as well as its diplomatic channels to enlighten LGBT persons and the international community as to its obligations to further the frontiers of good governance rooted in public morality.

¹¹¹Pew Research Centre, 'Worldwide Abortion Policies: Circumstances under which a Woman can Legally obtain an Abortion' (Oct. 5, 2015) <http://www.pewresearch.org/interactives/global-abortion/>

¹¹²*Op. Cit.*, Carroll and Mendos.

¹¹³*Op. Cit.*, Nnamuchi.

¹¹⁴*Article 17(3)*.

¹¹⁵*Article 29(7)*.

¹¹⁶*sections 33 – 44 (Chapter 4) of the Constitution*.

¹¹⁷*section 33(2)(a-c)*

¹¹⁸*section 45(1)(a-b)*.

¹¹⁹*Op. Cit.*, Pew Research Centre, 2015.

¹²⁰*Section 4(2)*.

¹²¹ (1987)12 SC 136.

¹²²*Op. Cit.*

¹²³*Op. Cit.*, Nnamuchi.

¹²⁴While Same-Sex marriage partners can easily engage in and promote children upbringing and children education by officially adopting children, they cannot biologically participate in procreation which is the point of differentiation from marriage contracted between members of the opposite sex.

¹²⁵ Section 7, SSMPA.

5. Conclusion

In spite of the absence of any binding international human rights instrument which accords recognition to same-sex marriage, Nigeria's enactment of the Same-Sex Marriage (Prohibition) Act, has been condemned by some human rights activists on the ground that it violates the rights of LGBT persons provided in the constitution. However, a dispassionate examination of the constitution and other international human rights instruments to which Nigeria is a signatory shows that the rights guaranteed by these instruments are not absolute having provided circumstances under which they may be derogated. These circumstances include: defence, security, public order, public morality and public health. The jurisprudence of human rights validates the fact that the values that undergird public morality are not universally shared and that the dichotomy of socio-cultural and cosmological factors influence the contours of human rights in different countries. While human rights in Western, more secular societies are constructed on individualistic ethos, human rights and social relations in Africa are informed by communitarian values. Same-sex marriage is repudiated in all parts of Africa with South-Africa as the only country which accords legal recognition to same sex marriage. Nigeria's SSMPA is a product of the people's aversion to same sex practices which are viewed as immoral and destructive. In the final analysis, the SSMPA is not an abrogation of the recognized human rights of LGBT persons because it does not criminalize private homosexual or lesbian sexual orientations and expressions but only prohibits the alteration of the meaning and nature of marriage in Nigeria as well as the public display of same-sex amorous practices considered offensive to the moral core of the society.