



## LEGAL FRAMEWORK ON ANTI-HOMOSEXUALITY IN NIGERIA AND THE HUMAN RIGHTS CONTRAVENTIONS: RETHINKING THE LAW\*

### Abstract

Homosexuality has been defined as a form of sexual orientation that involves romantic and sexual attraction or behaviour between persons of the same sex or gender. Homosexual activities and conducts remain criminalised by Nigerian laws such as: the Criminal Code Act 1916, Penal Code Act 1960, Armed Forces Act 1960, Same Sex Marriage (Prohibition) Act 2013, Same Sex Marriage (Prohibition) Law, Lagos State, 2006 and the Sharia Penal Code Laws of twelve Northern States and so on. The aim of this work was to chronicle Nigerian anti-homosexual laws and expose their human rights violations. The objectives of the work include: to identify and explain Nigeria's multiple anti-homosexual laws; to ascertain whether Nigeria's anti-homosexual laws violate the human rights of homosexual persons in Nigeria and to canvass for the need to decriminalise homosexuality in Nigeria. The doctrinal research methodology was adopted. It was discovered that all the Nigeria's anti-homosexual laws violate the human rights of homosexual persons as contained in the constitution of the Federal Republic of Nigeria 1999 (as amended), African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966 and the Universal Declaration of Human Rights 1948 and so on. It was further discovered that about twenty-two countries in Africa have decriminalized homosexuality in private. It was concluded that Nigeria's multiple anti-homosexual laws and legislations amount to statutory violations of the human rights of homosexual persons and to that extend be decriminalized. It was recommended amongst other things that section 42(1) of the Constitution of Nigeria be amended to include sexual orientation as a prohibitive ground for discrimination as it is in Section 9(3) of the South African Constitution.

**Keywords:** Human, Human Rights, Homosexuality, Anti-Homosexuality, Nigerian Laws.

### 1. Introduction

Homosexuality is a form of sexual orientation that involves romantic and sexual attraction or behaviour between members of the same sex or gender.<sup>1</sup> Homosexual conducts are practical and physical expressions exhibited by consensual same sex adults. Gay, Lesbian, Cross-dresser and transgender persons fall within the definition of homosexual persons.

Nigerian laws such as the Criminal Code Act<sup>2</sup> Penal Code Act,<sup>3</sup> Armed Forces Act,<sup>4</sup> Same Sex Marriage (Prohibition) Act,<sup>5</sup> Sharia Penal Code Law, Zamfara State,<sup>6</sup> Sokoto State Sharia Penal Code Law,<sup>7</sup> and Yobe State Sharia Penal Code Law<sup>8</sup> and so on, have provisions criminalizing homosexual practices. These laws have subjected homosexual persons to serious human rights violations as they cannot express their sexuality freely.

In Africa, twenty two countries did not criminalize homosexual conducts in private; they include but not limited to: Angola, Benin, Botswana, Burkina Faso, Cape Verde, Central African

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<sup>1</sup> Academy of Science of South Africa, 'Diversity in Homosexuality: Implication for policy in Africa' <https://research.assaf.org.za> accessed 5 March 2024.

<sup>2</sup> Criminal Code Act of 1916, Cap C38 LFN 2004, ss.214 – 217.

<sup>3</sup> Penal Code Act 1960, Cap p3 LFN 2004, s.284.

<sup>4</sup> The Armed Forces Act, Cap A20 LFN 2004, s.81.

<sup>5</sup> Same Sex Marriage (Prohibition) Act, 2013, ss.1 – 8.

<sup>6</sup> Sharia Penal Code of Zamfara State No. 10, 2000, ss.130, 131, 134, 135 and 138.

<sup>7</sup> Sokoto State Sharia Penal Code Law No. 12, 2000, ss.132 – 140.

<sup>8</sup> Yobe State Sharia Penal Code Law, No. 12, 2000, ss.130, 131, 135 and 138.



Republic, DR Congo, Coted'voire, Congo, Guinea Bissau, Lesotho, Madagascar, Mali, Mozambique, Niger, Rwanda, Sao Zome and Principe, Seychelles and South Africa.<sup>9</sup> Homosexual practices are still criminalised in thirty-two (32) countries in Africa.<sup>10</sup> In eleven (11) Countries, the death penalty is imposed for consensual same sex sexual activity.<sup>11</sup> South Africa is the only African country that has legalised same sex marriage as well as adoption for same sex couples.<sup>12</sup> Same sex marriage is prohibited by the Same Sex Marriage (Prohibition) Act, 2013, in Nigeria.<sup>13</sup>

Homosexuality is still criminalized in about seventy one countries of the world as at 2021.<sup>14</sup> A large number of these countries are located in the Middle East, Asia and Africa.<sup>15</sup>

In Europe, after Northern Cyprus decriminalized homosexuality in 2014, Europe became the first region where homosexuality is legalized in all countries.<sup>16</sup> Laws against homosexual activities were finally declared unconstitutional by the United States Supreme Court in *Lawrence v Texas*,<sup>17</sup> accordingly, homosexuality and indeed same sex marriage are legal in the United States of America. Same sex marriage was made legal throughout the United States of America via the celebrated decision of the Supreme Court in *James Obergefell v Hodges, Director Ohio Department of Health*.<sup>18</sup>

Enforcement of Nigeria's anti-homosexual laws and legislations by state actors such as the Nigerian police appears to be injurious to the human rights of homosexual persons. Homosexual persons are human beings, they are entitled to enjoy human rights as contained in the Constitution of the Federal Republic of Nigeria,<sup>19</sup> African Charter on Human and Peoples' Rights,<sup>20</sup> International Covenant on Civil and Political Rights,<sup>21</sup> International Covenant in Economic, Social and Cultural Rights<sup>22</sup> and the Universal Declaration of Human Rights.<sup>23</sup> The Nigerian Anti-Homosexual Laws Seek to deny homosexual persons in Nigeria their cherished entitlements endued in them by their creator, because of their humanity.

It is imperative to note that being homosexual person in most cases is genetically connected; studies in the field of sexual behaviour indicate that homosexual persons often have no choice in the matter of their sexuality, strongly suggesting that there is a genetic basis for homosexuality.<sup>24</sup> This revelation does not only demand empathy but also for the protection and preservation of the rights of these sexual minorities.

This work will critically examine Nigeria's anti-homosexual laws and their effects on the human rights of their target victims - homosexual persons, with particular touch on the need for decriminalization of homosexuality in Nigeria.

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<sup>9</sup> L Kamer, 'African Countries where Homosexual Activity is not Illegal' <https://www.statista.com> accessed March 5, 2024.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Same Sex Marriage Act (n<sup>5</sup>)

<sup>14</sup> Amnesty International, 'Facts, Figures, Making Love a Crime: Criminalization of Same Sex Conduct in Sub-Sahara Africa' <https://www.amnestyusa.org> accessed 5<sup>th</sup> March, 2024.

<sup>15</sup> Ibid.

<sup>16</sup> P Gerber, 'Countries that still Criminalised Homosexuality' <https://antigaylaw.org> accessed 5<sup>th</sup> March, 2024.

<sup>17</sup> 576 U.S 558 (2012).

<sup>18</sup> 576 US (2015).

<sup>19</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended) ss.33 – 46.

<sup>20</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 LFN 2004.

<sup>21</sup> International Covenant on Civil and Political Rights 1966.

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights 1966.

<sup>23</sup> Universal Declaration of Human Rights 1948.

<sup>24</sup> G Wilson & Rahman, 'Born Gay: The Psychology of Sex Orientation' (2<sup>nd</sup> ed. Peters publishers 2008) 20.



## 2. Legal Framework on Anti-Homosexuality in Nigeria

This segment of the work will examine the Nigerian laws having provisions criminalizing homosexual practices. The anti-homosexual laws that will be examined include: Criminal Code Act (CCA), Penal Code Act (PCA), Armed Forces Act (AFA), Same Sex Marriage (Prohibition) Act (SSMPA), Same Sex Marriage (Prohibition) Law of Lagos state and so on.

### 2.1. Criminal Code Act (CCA)

The Criminal Code Act Contains provisions criminalizing homosexual practices.<sup>25</sup> Section 214 created the offence against the order of nature and the offence is termed ‘unnatural offence.’ It reads as follows: Any person who-

- 1) has carnal knowledge of any person against the order of nature, or
- 2) permits a male to have canal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.<sup>26</sup>

Also, Section 217 has made indecent practices between males an offence. The section has it that:

Any male person who, whether in the public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private is guilty of a felony and is liable to imprisonment for three years.<sup>27</sup>

Section 215 made it an offence to attempt to commit unnatural offence. The section has it that, ‘Any person who attempts to commit any of the offences defined in section 214 of this code is guilty of a felony and is liable to imprisonment for seven years’.<sup>28</sup>

The above provisions are discriminatory in the sense that they discriminate on the grounds of the type of sex act being performance and on the grounds of whom a sex act is being performed with.<sup>29</sup> It applies to both male and female heterosexuals as well as male and female homosexuals. Accordingly, heterosexual conduct can be found guilty in violation of section 214 of the Criminal Code if in the wisdom of the court, it considered a sexual conduct ‘against the order of nature.’<sup>30</sup>

### 2.2. The Penal Code Act (PCA)

The Penal Code Act,<sup>31</sup> like the Criminal Code Act, denies homosexual persons of their sexual autonomy and prescribes legal consequences for acts contrary to the state’s preferences in sexuality. Section 284 of the code states that: ‘Whosoever has carnal intercourse against the order of nature with a man, woman or an animal shall be punished with imprisonment for a term of imprisonment which may extend to fourteen years and shall also be liable to a fine.’<sup>32</sup>

Also, section 405(2) (e) describes or defines a vagabond to include: “any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of

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<sup>25</sup> Criminal Code Act (n<sup>2</sup>), ss. 214-217.

<sup>26</sup> Ibid, S 214 (1) & (2).

<sup>27</sup> CCA (n<sup>2</sup>), s. 217.

<sup>28</sup> Ibid, s.215.

<sup>29</sup> A. Sogunro, *Bad Laws: A Compendium on Laws Discriminating against Persons in Nigeria based on Sexual Orientation and Gender Identity /Expression* <[www.initiative4equality.org](http://www.initiative4equality.org)> accessed 12<sup>th</sup> July, 2022.

<sup>30</sup> Ibid.

<sup>31</sup> Penal Code Act, (n<sup>3</sup>).

<sup>32</sup> Penal Code Act, (n<sup>3</sup>), s.284.



livelihood or as a profession.”<sup>33</sup> It is pertinent to note that some states in northern Nigeria such as Kano and Kastina, also include section 405(2) (f) and further defines vagabond as: ‘any female person who dresses or is attired in the fashion of a man in public place.’<sup>34</sup>

The offence of being a vagabond is punishable by imprisonment up to two years.<sup>35</sup> The above provision is manifestly discriminatory as it targets cross-dressing men (or women) and trans-gender people.<sup>36</sup> The provision particularly targets the Yan Daudu sub-culture in northern Nigeria.<sup>37</sup> The Yan Daudu are cross-dressing males who often also engage in homosexual acts with a history that predates the colonial period.<sup>38</sup> While the original indigenous communities were tolerant of this sub-culture, the Penal Code has criminalized same, and, in the process, denied members of the Yan Daudu community legal protection.<sup>39</sup> Historically, the Penal Code was introduced to Nigeria to handle the concerns of northern Nigerians who argued that the provisions of the Criminal Code did not consider Islamic interests and practices.<sup>40</sup> Accordingly, the Penal Code was modelled on the Criminal Code of Sudan, which in turn, was based on the 1860 India Penal Code.<sup>41</sup> It is applicable to all the states in the Northern part of Nigeria. Like the Criminal Code, the Penal Code deprives homosexual persons of their individual and sexual autonomy and prescribes legal consequences for acts contrary to the state’s preference in sexuality.<sup>42</sup>

### 2.3. Armed Forces Act (AFA)

The Armed Forces Act,<sup>43</sup> is a Nigerian’s enabling legislation or statute for the establishment and composition of the military forces. Amongst other things, it prescribes offences and establishes a court martial for the prosecution of offenders. In character, the offences in the Armed Forces Act are in *pari materia* with the Criminal and Penal Codes. It also has provisions criminalizing some expressions or display of certain sexual orientations by homosexuals. Some sections of the Act do not guaranteed individual and sexual autonomies. Section 81, of the Act<sup>44</sup>, denied Sexual Minorities of sexual autonomy and criminalizes sexual acts or conducts by homosexuals. It provides as follows: ‘A person subject to service law under the Act who: (a) has carnal knowledge of a person against the order of nature or (b) permits a person to have carnal knowledge of him against the order of nature is guilty of an offence against this section- (2) A person subject to service law under this Act who whether in public or private, commits an offence of gross indecency with him or attempts to procure the commission of an act of gross indecency by another person with himself or with another whether in public or private, is guilty of an offence under the section (3) A person guilty of an offence under this section is liable on conviction by a court martial to imprisonment for a term not exceeding seven years or any less punishment provided by this Act.’<sup>45</sup>

Considering the aforestated provisions, it is observed that homosexuals cannot serve in the military even if they do not engage in homosexual acts in the course of their duty. In other

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<sup>33</sup> PCA (n<sup>3</sup>), s. 405 (1) (e).

<sup>34</sup> Sharia Law of Kano State, Section 405 (1) (f).

<sup>35</sup> PCA (n<sup>3</sup>), s. 407 (2).

<sup>36</sup> A Sagunro (n<sup>9</sup>), 11.

<sup>37</sup> Sagunro (n<sup>29</sup>).

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> The Armed Forces Act, (n<sup>4</sup>).

<sup>44</sup> Armed Forces Act (n<sup>4</sup>).

<sup>45</sup> The Arm Forces Act (n<sup>4</sup>), s. 81(1) (2) & (3).



jurisdictions such as in the United States of America (USA), it is permissible – an Army Reserve first class Ijpe Dekoe and his partner, Thomas Kostura (homosexual) got married in New York.<sup>46</sup>

#### 2.4. Same Sex Marriage (Prohibition) Act (SSMPA)

The Same Sex Marriage (Prohibition) Act (SSMPA)<sup>47</sup> is a federal legislation and applies as a Federal Law across the entire jurisdiction of Nigeria. However, offences under it can be prosecuted before State High Courts.<sup>48</sup>

The SSMPA has eight sections, accordingly, section 1 borders on the prohibition of marriage or civil union between persons of the Same Sex<sup>49</sup> and went on to declare that such marriage i.e. same sex marriage ‘shall not be recognized as entitled to the benefits of a valid marriage.’<sup>50</sup> A marriage entered into between persons of the Same Sex and certificate issued therefrom in a foreign country is void in Nigeria.<sup>51</sup> Section 2 of the Act prohibits the solemnization of such union or marriage in any place of worship in Nigeria<sup>52</sup> and no certificate issued in respect of the prohibited marriages shall be valid in Nigeria.<sup>53</sup> The Act has clearly established that ‘only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.’<sup>54</sup> The Act has also prohibited the registration of gay clubs, societies and organizations their sustenance, processions and meetings.<sup>55</sup> The public show of Same Sex amorous relationship directly or indirectly is prohibited as well.<sup>56</sup> A person who enters into a Same Sex Marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment;<sup>57</sup> any person who registers, operates or participates in gay clubs, societies and organizations, or directly or indirectly makes public show of Same Sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment;<sup>58</sup> any person or group of persons who administers, witnesses, abets or aid the solemnization of Same Sex Marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10years imprisonment.<sup>59</sup>

The entirety of the Act is discriminatory in nature as it prohibits Same Sex Marriage or civil union but recognizes marriage contract between persons of the opposite sex. Its sections 1 to 5 clearly violate the rights of homosexual persons particularly the rights to individual sexual autonomy, privacy<sup>60</sup> and freedom of association.<sup>61</sup>

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<sup>46</sup> *Obergefell v Hodges*, Director Ohio Department of Health, 576 US 5 (2015).

<sup>47</sup> Same Sex Marriage (Prohibition) Act, 2013.

<sup>48</sup> *Ibid*, s.6.

<sup>49</sup> *Ibid*, s.1 (a).

<sup>50</sup> *Ibid*, s.1 (b).

<sup>51</sup> SSMPA (n<sup>5</sup>), Section 1 (2).

<sup>52</sup> SSMPA (n<sup>2</sup>), s.2 (1).

<sup>53</sup> *Ibid*, s.2 (2).

<sup>54</sup> *Ibid*, s.3.

<sup>55</sup> *Ibid*, s.4 (1).

<sup>56</sup> *Ibid*, s.4 (2).

<sup>57</sup> SSMPA (n<sup>5</sup>), s.5 (1).

<sup>58</sup> *Ibid*, s. 5 (2).

<sup>59</sup> *Ibid*, s.5 (3).

<sup>60</sup> CFRN (n<sup>19</sup>) s.37.

<sup>61</sup> *Ibid*, S.40.



## 2.5. Same Sex Marriage (Prohibition) Law, Lagos State

The Same Sex Marriage (Prohibition) Law of Lagos State,<sup>62</sup> was enacted on the 18<sup>th</sup> day of May, 2007. It applies as a state law within the jurisdiction of Lagos State. The law has seven sections; section 1 deals with the validity and recognition of marriage and it states as follows:

As from the commencement of this law, only a marriage entered into between a man on the one part and a woman on the other part, under the marriage Act and the Islamic and customary laws shall be valid and recognized in the state.<sup>63</sup>

Section 2 of the law prohibits Same Sex Marriage in Lagos state. The section has it that: ‘Any marriage entered into- (a) by persons of the Same Sex shall not be recognized as a valid marriage. (b) between persons of Same Sex shall not be recognized as a valid marriage; (c) by persons of the Same Sex Pursuant to a licence issued by another state or country, shall not be valid in the state’<sup>64</sup> By sub-section 2 of Section 2, ‘marriage between persons of the Same Sex, entered into in any jurisdiction, either within or outside Nigeria shall not be recognized in the state.’<sup>65</sup> The law clearly states that any relationship between persons of the same sex which is treated as marriage in any jurisdiction whether within or outside the country shall not be recognized in the state.<sup>66</sup> This section is referring to civil unions recognized outside Nigeria as marriages. Ministries, Departments or Agencies of government are prohibited from according recognition or effecting a marriage, relationship or a claim emanating from a relationship or marriage between persons of the Same Sex.<sup>67</sup> The law also prohibits celebration of marriage between persons of the Same Sex in any place of worship in the state,<sup>68</sup> and that no marriage licence or certificate shall be issued to parties of the Same Sex in the state.<sup>69</sup> The punitive section of the law is section 14 and has prescribed ten (10) years imprisonment for the offence of engaging in Same Sex Marriage upon conviction.<sup>70</sup> While, whosoever performs, witnesses, aids, or abets the celebration of a Same Sex Marriage commits an offence and shall be liable on conviction to a term of five years imprisonment.<sup>71</sup> The Lagos State SSMPL is modelled on the ideas as, and uses similar wordings to, the SSMPA.<sup>72</sup> The main difference between the two documents is that the Lagos SSMPL does not expressly criminalize expressions or ‘public show’ of same sex relationships.<sup>73</sup> Nevertheless, all of its provisions are discriminatory and anti-homosexual relationships.<sup>74</sup>

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<sup>62</sup> Same Sex Marriage (Prohibition) Law C.

<sup>63</sup> Ibid, s.1.

<sup>64</sup> SSMPL (n<sup>62</sup>) ss. 2 (1) (a) (b) & (c).

<sup>65</sup> Ibid, s.2 (2).

<sup>66</sup> Ibid, s.2 (3).

<sup>67</sup> Ibid, s.2 (4).

<sup>68</sup> Ibid, s.3 (1).

<sup>69</sup> SSMPA (n<sup>5</sup>), s.3 (2).

<sup>70</sup> Ibid, s.4 (1).

<sup>71</sup> SSMPA (n<sup>5</sup>) s.1.

<sup>72</sup> Sogunro (n<sup>29</sup>) 15.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.



## 2.6. Sharia Penal Code of Zamfara State

The Sharia Penal Code of Zamfara state<sup>75</sup> is a state enactment and applies within the jurisdiction of the state on Muslims. Zamfara state in Northwest Nigeria was the first state to adopt and implement Sharia Penal Code in the year 2000. The law has provisions criminalizing homosexual conducts and practices. As a salient departure from the Criminal Code Act and the Penal Code Act, the Zamfara state Sharia Penal Code law, adopts the word ‘sodomy to describe homosexual acts. The law states as follows:

Whoever, has carnal intercourse against the order of nature with any man or woman is said to have committed the offence of sodomy’ provided that whoever is compelled by the use of force or threats or without his consent to commit the act of sodomy upon the person of another or the subject of the act of sodomy shall not be deemed to have committed the offence.<sup>76</sup>

The above section does not only create and define the offence of sodomy, it also creates the offence of homosexual rape, a great departure from the position as contained in the CCA and PCA. Accordingly, non-consensual sodomy act exonerates the non-consenting party ‘while the party that forcefully performs the act of sodomy remains guilty of the offence. By section 131, ‘whoever commits the offence of sodomy shall be punished: (a) with caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year; or (b) if married with stoning to death.’<sup>77</sup>

It is my humble view that apart from the aforesaid section being injurious to the human rights of the persons involved in the homosexual acts, it is grossly discriminatory as it awards or prescribes different punishments for the commission of same offence on the basis of status of the offenders - unmarried and married. The punishment of stoning to death to the married and caning up to 100 lashes and one year imprisonment to the unmarried.<sup>78</sup>

The Sharia Penal Code also criminalizes lesbianism when it succinctly defines or describes it as follows: ‘whoever being a woman, engages another woman in carnal intercourse through her sex organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism.’<sup>79</sup> The punishment for commission of the offence of lesbianism is caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months’.<sup>80</sup> The code also prohibits the act of gross indecency with a jail term of one year and fine.<sup>81</sup>

## 2.7. Sokoto State Sharia Penal Code Law No. 12, 2000

The Sokoto State Sharia Penal Code<sup>82</sup> provides for the offence of sodomy as follows: ‘whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy; provided that whoever is compelled by the use of force or in fear of death or grievous hurt or fear of any other serious injury or without his consent to commit the act of sodomy upon the

<sup>75</sup> Sharia Penal Code Law of Zamfara (n<sup>6</sup>).

<sup>76</sup> Ibid, s. 130.

<sup>77</sup> Ibid, s. 131.

<sup>78</sup> Ibid.

<sup>79</sup> Zamfara (n 71), s. 134.

<sup>80</sup> Zamfara (n<sup>6</sup>), s.135.

<sup>81</sup> Ibid, s. 138.

<sup>82</sup> Sokoto State Sharia Penal Code (n<sup>7</sup>).



person of another or be the subject of the act of Sodomy shall not be deemed to have committed the offence.<sup>83</sup>

The punitive section has it that: ‘whoever commits the offence of sodomy shall be punished: (a) with stoning to death (b) if the act is committed by a minor on an adult person, the adult person shall be punished by way of *ta’azir* which may extend to 100 lashes and the minor with correctional punishment’.<sup>84</sup>

The Sokoto State Sharia Penal Code also provides for the offence of lesbianism and extensively explains the vital ingredients of the offence.<sup>85</sup> The punishment for the offence of lesbianism is caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months’.<sup>86</sup>

Concerning the offence of gross indecency, the law has it that:

Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act shall be punished with caning of forty lashes and may also be liable to fine; provided that a consent given by a person below the age of fifteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be consent within the meaning of this section.<sup>87</sup>

It is pertinent to remark that the law has pegged the age of consent as fifteen years for the purpose of liability for the commission of the offence of gross indecency.

## 2.8. Yobe State Sharia Penal Code Law No. 12 of 2000

The Yobe State Sharia Penal Code<sup>88</sup> has provisions hindering homosexual persons and indeed LGBT persons from freely exercising their sexuality. The law provides for the offence of sodomy as follows:

Whoever has *anal coitus* with any man or woman is said to commit the offence of sodomy; provided that whoever compelled by the use of force or threat or without his consent to commit the act of sodomy upon the person of another or be the subject of the act of sodomy, shall not be deemed to have committed the offence.<sup>89</sup>

The punishment for sodomy under the Yobe State Sharia Penal Code Law is stoning to death,<sup>90</sup> however, where the offenders are a husband and wife, they are exempted from the penalty of death and be punished with caning which may extend to fifty lashes.<sup>91</sup> The law also provides for the offence of lesbianism with a punishment of caning extending to fifty lashes and probable six months prison term.<sup>92</sup>

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<sup>83</sup> Ibid, s. 132.

<sup>84</sup> Ibid, s. 133.

<sup>85</sup> Sokoto (n<sup>77</sup>), S. 136.

<sup>86</sup> Ibid, s. 137.

<sup>87</sup> Ibid, s. 140.

<sup>88</sup> Yobe State Sharia Penal Code Law, (n<sup>8</sup>).

<sup>89</sup> Ibid, s. 130.

<sup>90</sup> Ibid, s. 131 (1).

<sup>91</sup> Ibid, s. 131(2).

<sup>92</sup> Yobe (n<sup>82</sup>) s. 135.



The offence of gross indecency is created by the law as follows:

Whoever commits an act of gross indecency by way of kissing in public, exposure of nakedness in public, and other related acts of similar nature in order to corrupt public morals upon the person of another without his consent or by the use of force or threats or compels a person to join with him in the commission of such act shall be punished with caning of fifty lashes and shall also be liable to a fine of ten thousand naira or with both; except that the consent given by a person who does not attain puberty to such an act when done by his teacher, guardian, or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this paragraph.<sup>93</sup>

### **2.9. Kastina State Sharia Penal Code Law (as amended)**

The Kastina State Sharia Penal Code Law<sup>94</sup> has provisions prohibiting sodomy. The section prohibiting sodomy states extensively as follow:

Whoever has carnal intercourse against a man or woman through the rectum is said to commit the offence of sodomy; except that whoever is compelled by the use of force or threats or without his consent to commit that act of sodomy with another shall not be the subject of the act of sodomy nor shall be deemed to have committed the offence.<sup>95</sup>

The law reiterates on the fact that the offence of sodomy can be committed by a man with a woman as far as penetration occurs via the rectum of the woman by the man; the punishment for the commission of the offence of sodomy upon conviction in Kastina State is death.<sup>96</sup> The law exculpates, exonerates or excuses a victim of homosexual rape from criminal liability or culpability.<sup>97</sup> Regarding the offence of lesbianism, the law provides that: ‘whoever being a woman engages another woman in carnal intercourse through the sexual organs or by means of a stimulating or sexual excitement of one another commits the offence of lesbianism’<sup>98</sup>. The punishment for lesbianism in Kastina state, like Kano state is the death penalty<sup>99</sup> unlike Kano law that creates a demarcation on the grounds of marital status for imposition of punishment, Kastina has no such demarcation. Both married and unmarried lesbians upon conviction, faces the death penalty punishment. The Kastina law provides for the offence of gross indecency and whoever that commits the offence of gross indecency shall on conviction be punished with caning of fifty lashes and shall also be liable to fine of ten thousand naira or with both and further exculpates gross indecency committed without consent.<sup>100</sup>

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<sup>93</sup> Ibid, s. 138.

<sup>94</sup> Kastina State Sharia Penal Code (as Amended) Law No. 21, 2000.

<sup>95</sup> Ibid, s.128.

<sup>96</sup> Kastina (n<sup>94</sup>), s.129.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid, s.183.

<sup>99</sup> Kastina (n<sup>94</sup>), s.184.

<sup>100</sup> Ibid S. 187.



### 2.10. Kano, Kaduna, Jigawa, Bauchi and Kebbi Sharia Penal Codes Laws

The Sharia Penal Code of Kano,<sup>101</sup> Kaduna,<sup>102</sup> Jigawa,<sup>103</sup> Bauchi<sup>104</sup> and Kebbi<sup>105</sup> states have provisions criminalising certain homosexual or heterosexual conducts by adult individuals; they create the offence of sodomy.<sup>106</sup>

The punishment for sodomists under Kano Sharia Penal Code is stoning to death for married and the divorced; and unmarried sodomists attracts 100 lashes in addition to one year imprisonment;<sup>107</sup> under Kaduna State Sharia Penal Code, the punishment for the offence of sodomy is stoning to death.<sup>108</sup> The punishment for sodomy in Jigawa state<sup>109</sup> is the same with that of Kano State. Similarly, the punishment for the offence of sodomy in Bauchi State is stoning to death.<sup>110</sup> In Kebbi State, the punishment of stoning to death awaits persons who commit the offence of sodomy.<sup>111</sup>

The offence of lesbianism in Kano State is stoning to death,<sup>112</sup> in Kaduna the punishment for it as *yazir*,<sup>113</sup> in Jigawa State, it is caning which may not exceed fifty lashes and a sentence of imprisonment not exceeding six months,<sup>114</sup> in Bauchi State it is caning which may extend to fifty lashes and a term of imprisonment which may extend to five months.<sup>115</sup> The punishment for the offence of lesbianism<sup>116</sup> under the Kebbi Sharia Penal Code is same as in Jigawa State Sharia Penal Code.

## 3. Human Rights Violation by Nigeria's Anti-Homosexual Laws

### 3.1. Violation of the Right to Life

The Sharia Penal Code of the twelve (12) Northern States criminalize homosexual conducts. Some of the states such as Zamfara, Bauchi, Kaduna, Jigawa and Kano states, Penalize certain homosexual conducts with death penalty.

In Zamfara State, the offence of sodomy (homosexuality) is punishable with stoning to death if the offenders are married persons.<sup>117</sup> Accordingly, in Zamfara state the offence of sodomy attracts different punishments. To the unmarried, it is punishable with hundred lashes in addition to a term of imprisonment for one year,<sup>118</sup> and to the married it is punishable with rajm<sup>119</sup> (stoning to death). Similarly, the offence of sodomy under Kaduna state Sharia Penal Code is punishable with death (rajm),<sup>120</sup> and whoever commits sodomy with his wife is punishable with *ta'ir*.<sup>121</sup> In Kano state under

<sup>101</sup> Kano State Sharia Penal Code Law 2000.

<sup>102</sup> Kaduna State Sharia Penal Code Law No. 4, 2000.

<sup>103</sup> Jigawa State Sharia Penal Code Law No. 12, 2000.

<sup>104</sup> Bauchi State Sharia Penal Code Law No. 16, 2001.

<sup>105</sup> Kebbi Sharia Penal Code Law No. 20 of 2000.

<sup>106</sup> Kano (n<sup>101</sup>), s.128; Kaduna (n<sup>102</sup>), s.125; Jigawa (n<sup>103</sup>), s. 131; Bauchi (n<sup>104</sup>), s.133; Kebbi (n<sup>105</sup>), s.133.

<sup>107</sup> Kano (n<sup>101</sup>), s.129 (a) & (b).

<sup>108</sup> Kaduna (n<sup>102</sup>).

<sup>109</sup> Jigawa (n<sup>103</sup>).

<sup>110</sup> Bauchi (n<sup>104</sup>), s.134.

<sup>111</sup> Kebbi (n<sup>105</sup>), s.135.

<sup>112</sup> Kano (n<sup>101</sup>), ss.183 & 184; Kaduna (n<sup>102</sup>), s.130.

<sup>113</sup> Kaduna (n<sup>102</sup>), s.130.

<sup>114</sup> Jigawa (n<sup>103</sup>), s.135.

<sup>115</sup> Bauchi (n<sup>104</sup>), s.138.

<sup>116</sup> Kebbi (n<sup>105</sup>), ss.135 & 136.

<sup>117</sup> Zamfara State Sharia Penal Code (n<sup>6</sup>), s.131 (b).

<sup>118</sup> *Ibid*, Section 131 (a).

<sup>119</sup> *Ibid*, s.131 (b).

<sup>120</sup> Kaduna State Sharia Penal Code (n<sup>106</sup>), s.25-26.

<sup>121</sup> *Ibid*, s.126 (2).



the Sharia Penal Code the offence of Sodomy is punishable with stoning to death if the offenders are married or divorce persons.<sup>122</sup> The offence of lesbianism also attracts the same punishment as sodomy, i.e. death penalty,<sup>123</sup> for married and divorced lesbians. Also under Kastina State Penal Code, the offence of sodomy attracts death penalty<sup>124</sup> for both married and unmarried offenders. Similarly the offence of Lesbianism attracts the death penalty<sup>125</sup> for both married and unmarried lesbians.

The offence of sodomy under the Kebbi Sharia Code is punishable with death by stoning<sup>126</sup> and offence of lesbianism is not a capital offence in Kebbi State.<sup>127</sup> In Jigawa State, the punishment for sodomy for the married is stoning to death (rajm),<sup>128</sup> the offence of lesbianism is not declared a capital offence under the Jigawa sharia Code law.<sup>129</sup> The same death penalty<sup>130</sup> faith awaits the offenders of the offence of sodomy in Sokoto State.

It is amazing to note the aforesaid position of the laws prescribing death penalty for certain homosexual acts in some states in northern Nigeria. The severity of the offence of murder or armed robbery that attracts the highest punishment of death upon conviction is reasonable because the offender, himself takes the life of another unlawfully. In the case of homosexuality, the offenders are adults who consensually involve in a sex conduct in the privacy of their bedroom deriving satisfaction therefrom without hurting or causing any harm bodily or otherwise to anyone. Homosexuals or gay persons, lesbians, transsexuals and sodomists are all human beings and therefore entitled to the right to life<sup>131</sup> as guaranteed under Nigerian Laws.<sup>132</sup> It is pertinent to note that the limitation clause under Section 33(1) of the Constitution of the Federal Republic of Nigeria which legitimizes the deprivation of right to life in the case of execution of the sentence of a court in respect of a criminal offence of which an accused person has been found guilty in Nigeria amounts to an approval by the constitution of any sentence of death handed down by the courts on homosexuals for their involvement in consensual adult Same Sex conducts.

In 2001 a Sharia court sitting in Kebbi state handed down a death sentence penalty to Attahiru Umar for sodomizing a seven year old boy.<sup>133</sup> Similarly, in 2003 a Bauchi State Sharia Court sentenced one Jibrin Babagi to death by stoning for having carnal knowledge of teenage boys or for committing sodomy, however, the convict was discharged and acquitted by the Sharia Court of Appeal in 2004 because the defence of insanity pleaded by the convict was sustained.<sup>134</sup> In *Bauchi State Sharia Commission v Marafa*,<sup>135</sup> the accused was charged before an upper sharia court of Bauchi state for sodomy under Section 133 of the Bauchi State Sharia Penal Code. The accused pleaded not guilty to the offence of sodomy but was remanded in prison custody.<sup>136</sup> The accused after along stay in custody was granted bail. The inability of the prosecution to prove their case

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<sup>122</sup> Kano State Sharia Penal Code (n<sup>101</sup>), s.129 (a).

<sup>123</sup> Ibid, s.184.

<sup>124</sup> Kastina State Sharia Penal Code (n<sup>94</sup>), s.129.

<sup>125</sup> Ibid, s.184.

<sup>126</sup> Kebbi State Sharia Penal Code (n<sup>105</sup>), s.132.

<sup>127</sup> Ibid, s.136.

<sup>128</sup> Jigawa State Sharia Penal Code (n<sup>103</sup>), s. 131.

<sup>129</sup> Ibid, s.135.

<sup>130</sup> Sokoto State Sharia Penal Code (n<sup>7</sup>), s.133.

<sup>131</sup> CFRN (n 1) s. 33.

<sup>132</sup> Ibid, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 LFN, 2004, Art. 6; International Covenant on Civil and Political Rights) 1966, art. 4.

<sup>133</sup> G J Weimann, *'Islamic Criminal Law in Northern Nigeria*, Politics, Religion, Judicial Practice (Amsterdam: Vossiuspers-Amsterdam University press 2010) 174.

<sup>134</sup> G J Weimann, C (n<sup>133</sup>).

<sup>135</sup> Case No. CFRN /132/13.

<sup>136</sup> Ibid, 2.



against the accused by adducing substantial evidence, made the court to discharge the accused person under Section 28 of the Sharia criminal procedure Code 2001, Laws of Bauchi State.

Life is sacred and should be treated with utmost care and respect. It cannot be given by man. It comes from God and God alone, it is the duty of all to preserve and protect life. Our Constitution, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, the Universal Declaration on Human Rights (UDHR) and so on, guarantee the right to life. The right to life is provided for under the International Covenant on Civil and Political Rights (ICCPR) as follows: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.<sup>137</sup> On the same vein, the African Charter on Human and Peoples' Rights (ACHPR) States as follows: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this life'.<sup>138</sup> The Constitution of the Federal Republic of Nigeria provides for the right to life when it stated thus: 'Every person has a right to life, and no one shall be deprived intentionally of his life, save in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria'.<sup>139</sup>

In spite of the fact that the right to life is protected, under our laws aforesaid, the limitation to the right as contained in Section 33 (1) and the refusal of Nigeria to ratify the second Optional Protocol on Civil and Political Rights have made the right to life not absolute. The Second Optional Protocol to the ICCPR deals with the abolition of death penalty. Our laws guarantee the right to life with the right hand and then take it away or derogate with the left hand. It is wrong for our laws to elevate consensual adult Same Sex Conducts which is not supposed to be an offence to the group of most heinous offences such as in armed robbery,<sup>140</sup> murder,<sup>141</sup> treason,<sup>142</sup> treasonable conspiracy<sup>143</sup> abetting the invasion of Nigeria<sup>144</sup> and so on.

In the concept of individual autonomy as a natural right lies sexual autonomy which implies the right of adult persons to give their sexuality to any persons of their choice and in the way and manner appropriate to them including but not restrained to anal coitus, Same Sex intercourse and so on. It is a fundamental violation of the right to sexual autonomy of homosexual persons by Nigerian laws for criminalizing the exercise of their sexual autonomy and imposing even a death penalty. There is an urgent need to decriminalize Consensual Same Sex practices in Nigeria. It is surprising why Nigeria the claimed giant of Africa, has not seen it expedient to decriminalize homosexuality. About 22 countries in the continent of Africa have decriminalized homosexuality, accounting for about 41% of all African countries.<sup>145</sup> Nigeria is enjoined to key into this consensus among Nations who have concrete determination to protect natural rights of their citizens.

### **3.2. Violation of the Right to Equality before the Law and Equal Protection of the Law by Nigeria's Anti-homosexual Laws**

The right to equality before the law and equal protection of the law applies to heterosexuals and homosexuals equally. The right to equality before the law and equal protection of the law is guaranteed under the African charter on Human and Peoples' Rights (Ratification and Enforcement)

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<sup>137</sup> ICCPR, art 6.

<sup>138</sup> ACHPR, art 4.

<sup>139</sup> CFRN, s.33.

<sup>140</sup> The Armed Robbery and Firearms (Special provisions) Act, Cap LFN, 2004, S.1 (2) (b).

<sup>141</sup> Criminal Code (n<sup>2</sup>), s.319.

<sup>142</sup> Ibid, S. 37(1).

<sup>143</sup> Ibid, S. 37 (2).

<sup>144</sup> Ibid, S. 3.

<sup>145</sup> Kamzer, Share of Countries where Same Sex acts between adults are legalized <<https://www.statesta.com>> accessed 6<sup>th</sup> of March, 2024.



Act as follows: ‘Every individual shall be equal before the law’.<sup>146</sup> It went further and expressed that ‘Every individual shall be entitled to equal protection of the law’.<sup>147</sup>

The African Commission jurisprudence on the interpretation of this article is scarce; the Commission has established its pertinence in *Purohit and Another v the Gambia* as follows:

Article 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African charter. Article 2 lays down the principle that is essential to the spirit of African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individual within a legal system of a given country. Their provisions are non-derogatory and therefore must be respected in all circumstances in order for everyone to enjoy all the other rights provided for under the African Charter.<sup>148</sup>

The Articles (Art 2 & 3 of the ACHPR) was further given an interpretation with specific mention of sexual orientation in *Zimbabwe Human Rights Ngo Forum v Zimbabwe*<sup>149</sup> as follows:

Together with equality before the law and equal protection of the law as provided for in Article 3 of the Charter, the principle of non-discrimination provided for under Article 2 of the Charter provides the foundation for enjoyment of all human rights... equality and non-discrimination ‘is central to human rights.’ The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial, or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

Article 2(1) of the International Covenant on Civil and Political Rights<sup>150</sup> is analogous to Article 2 and 3 of the ACHPR. It reads as follows:

Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind such as race, colour, sex...<sup>151</sup>

Also, the ICCPR in its Article 26 guarantees right to equality before the law and equal protection of the law for all individuals within a state parties. It states as follows:

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race colour, sex, language, religion.

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<sup>146</sup> ACHPR, art 3 (1).

<sup>147</sup> Ibid, art 3(2).

<sup>148</sup> *Purohit and another v the Gambia* (2003) AHRLR 96 (AACHPR 2003).

<sup>149</sup> (2006) AHRLR 128 (ACHPR 2006).

<sup>150</sup> ICCPR, art 2 (1).

<sup>151</sup> Ibid.



The Human Rights Committee of the ICCPR applied the aforesaid Article and posited in *Toonen v Australia*<sup>152</sup> that ‘sex’ as used in Articles 2(1) and 26 of the ICCPR includes sexual orientation, stating that domestic law criminalizing private, homosexual relations between consenting adults to be discriminatory and in violation of this rights. Similarly in *Young v Australia*<sup>153</sup> the Human Rights Committee (HRC) of the ICCPR held that Australia had violated Article 26 of the ICCPR by ‘denying the author, a pension on the basis the sex or sexual orientation. As a result of this holding the HRC concluded that distinctions made on the basis of sexual orientation were obvious denials or violations of the right to equality before the law.

The UDHR also in its Articles 7 provides for the right to equality before the law.<sup>154</sup>

The Nigerian anti-homosexual laws violates the right to equality before the law and equal protection of the law as they treat homosexuals as criminals for exercising their sexual orientation while heterosexuals are treated with kids gloves because the laws do not criminalize the exercise of their sexual orientation.

### **3.3. Violation of the Rights to Marry and found a Family by Nigeria’s Anti-Homosexual Laws.**

The right to marry has been held to be fundamental right.<sup>155</sup> The ICCPR in its Article 23 provides the right of men and women of marriageable age to marry and found a family.<sup>156</sup> It prescribes equality to men and women of marriageable age to marry and found family. The Same Sex Marriage (Prohibition) Act 2013 which only recognizes marriage entered into between persons of the opposite sex,<sup>157</sup> violates the right to equality before the law and equal protection of the law.<sup>158</sup> The SSMPA honours heterosexual marriage and prohibits marriage contract between persons of the Same Sex.<sup>159</sup> However, the Supreme Court of the United States of America<sup>160</sup> has held that Same Sex people have equal right as opposite sex to marry. It is hereby submitted that sections 1-5 of the SSMPA amounts to statutory violation of the right to marry.

### **3.4. Violation of the Right to Freedom from Discrimination by Nigeria’s Anti-homosexual Law**

The Same Sex Marriage (Prohibition) Act (SSMPA) prohibits homosexual marriage<sup>161</sup> and recognizes heterosexual marriage.<sup>162</sup> This is a clear case of statutory discrimination, and in my humble view, it violates the fundamental right to freedom from non-discrimination particularly on the bases of sex and sexual orientation.

The Criminal Code Act (CCA) Cap C38 LFN 2004, by its provisions dealing with ‘unnatural offences’<sup>163</sup> are discriminatory in two ways. One, they discriminate on the grounds of the type of sex act being performed. Two, they discriminate on the grounds of whom a sex act is being performed with.<sup>164</sup> The discrimination on the grounds of the person with whom a sex act is been performed is illogical and unconstitutional under a constitutional framework where everyone subject to age

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<sup>152</sup> Communication no. 488/1992, UN Doc CCPR/C/D/488/1992 (1994).

<sup>153</sup> Communication No. 941/2000: Australia: 18/19/2003:U.N Dos CCPR/C/78/D/941/2008 (2003) .

<sup>154</sup> UDHR, Art 7.

<sup>155</sup> *Obergefell* (n<sup>46</sup>) 4.

<sup>156</sup> ICCPR, Art 23 (1) (2) (3) & (4).

<sup>157</sup> SSMPA (n<sup>5</sup>), s.3.

<sup>158</sup> ACHPR (n<sup>20</sup>), S 3(1) & (2).

<sup>159</sup> *Ibid*, S.1 (1).

<sup>160</sup> *Obergefell* (n<sup>46</sup>).

<sup>161</sup> SSMPA 2013, S 1(a).

<sup>162</sup> *Ibid*, S.3.

<sup>163</sup> CCA, ss. 214-217.

<sup>164</sup> Ayodele Sogunro, Bad Laws: A Compendium of Laws Discriminating against persons in Nigeria based on sexual orientation and gender identity/expression<[www.initiative4equality.org](http://www.initiative4equality.org)>accessed 15<sup>th</sup> August, 2022.



restrictions, is considered as having equal rights under the law.<sup>165</sup> The current value system or judgment of the Criminal Code depicts that men and women should be adjudged as having different values under the law and as such, should have different capacities for sexual acts.<sup>166</sup> The sexual act of a man with another man is given a different legal consequences from the sexual act of a man with a woman. The provisions of the Criminal Code is in sharp contradiction with the provision of the Constitution of the Federal Republic of Nigeria, which prohibits discrimination amongst other grounds by reason of sex of the person.<sup>167</sup>

It is instructive to note that by criminalizing homosexual acts that occur in the private, the provisions in Nigerian Criminal or Penal Laws attempt to force a discriminatory attitude not just in public affairs, but also in private places.<sup>168</sup>

#### 4. Judicial Attitude on Homosexuality in South Africa and Botswana

The pre-occupation of this sub-head would be an examination of the positions or pronouncements of courts in South Africa and Botswana in respect of Homosexual Practices.

##### 4.1. South Africa

The Constitution of the Republic of South Africa contains a provision which prohibits unfair discrimination on grounds of Sexual Orientation and marital status, and guarantees ‘everyone the right to privacy, human dignity, equality before the law and equal protection and benefit of the law.’<sup>169</sup>

The constitutional commitment to human dignity and equality and the inclusion of Sexual Orientation as a prohibitive ground for discrimination in terms of section 9 (3) of the Constitution 1996, has formed the basis for several courts decisions in South Africa.<sup>170</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Ackerman J, held that ‘the sole purpose and existence of the offence of sodomy was to criminalize a particular form of gay expression which failed to conform to record or religious views of a section of society.’<sup>171</sup> It was further held that ‘... the way in which we give expression to our sexuality is at the core of the area of private intimacy. If in expressing our sexuality we act consensually and without harming another, invasion of that precinct will be breach of our privacy.’<sup>172</sup> It was summed up by the court that the common law offence of sodomy was unconstitutional because it breached the rights to equality, dignity and privacy.<sup>173</sup> Also, in *National coalition for Gay and Lesbian Equality v Minister of Homes Affairs*,<sup>174</sup> the court acknowledged the existence of ‘another form of partnership which is different from marriage as recognized by law.’ This form of partnership is represented by conjugal relationship between two people of the Same Sex.

The judicial attitude on Same Sex relationship in South Africa is friendly even as Section 9(3) of Constitution of the Republic of South Africa 1996 supports Sexual Orientation.<sup>175</sup>

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<sup>165</sup> Sogunro (n<sup>29</sup>).

<sup>166</sup> Ibid.

<sup>167</sup> CFRN 1999, S 42(1) & (2).

<sup>168</sup> Sogunro (n<sup>29</sup>), 7.

<sup>169</sup> Ibid, 509.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> 1999 (1) S A 6 (CC) 69.

<sup>173</sup> T A Abbiyesuku and A Oyepho, ‘Critical Appraisal on Same Sex Partnership Union and Same Sex Marriage (Prohibition) Act 2013’ in O V C Okene and L O Nwauzi, *Books of Readings in Law, Legal Essays in Commemoration of the forty years of Existence of Faculty of Law Rivers State University, Port Harcourt (Faculty of Law, Rivers State University 2021) 504.*

<sup>174</sup> 200 (2) S A 1 (CC) in para (97).

<sup>175</sup> T A Abiyesuku & A Oyepho (n<sup>173</sup>).



#### 4.2. Botswana

Homosexuality has been decriminalized in Botswana via the case of *Letswelets Motshidiemang v Attorney General of Botswana*.<sup>176</sup> In that case, the court declared Sections 164(a), 164(c) and 165 of the Penal Code of Botswana<sup>177</sup> which criminalized sexual intercourse amongst individuals of the Same Sex or gender *ultra vires* (contrary to) Section 3, 9 and 15 of the Constitution and accordingly struck them down. It further severed and removed the word 'private' in Section 167 of the Penal Code so that the Section only covered public indecency.<sup>178</sup>

Note that Sections 164(a) (c) and 165 are similar to Sections 214 to 217 and Section 284 and Section 81 of the Criminal Code Act, Penal Code Act and the Armed Forces Act of Nigeria respectively.

Accordingly, there exist a positive judicial attitude on Same Sex Sexual Orientation in Botswana and Nigeria needs to follow this trend.

#### 5. Conclusion and Recommendations

The Nigerian laws having provisions dealing with anti-homosexuality such as the Criminal Code Act, Penal Code Act, Armed Forces Act, Same Sex Marriage (Prohibition) Act, Same Sex Marriage (Prohibition) Law of Lagos state, the Sharia Penal Codes Laws of 12 Northern States and so on, have negative human rights implications, that is, they constitute statutory violations of the rights of gay, lesbians, cross-dressers and transgender persons as contained in the Constitution of the Federal Republic of Nigeria 1999 (as amended), the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and International Human Rights Instruments (ICCPR, ICESCR, UDHR etc.) which Nigeria has ratified.

There is an urgent need for Nigeria to decriminalize consensual Same Sex Practices, Same Sex Sexual Orientation and better her disfigured international image before the International Community as a result of violation of the rights of homosexual persons on the basis of their sexual Orientation. It is further recommended as follows:

- 1) The Constitution of Nigeria should be amended to include Sexual Orientation in its Section 42(1) as a Prohibitive ground for discrimination as it is in Section 9(3) of the Constitution of the Republic of South Africa.
- 2) The Same Sex Marriage (Prohibition) Act 2013 should be repealed as the entirety of the Act constitutes statutory violation of the fundamental rights of citizens and indeed homosexuals as enshrined in Chapter Four of the Constitution of the Federal Republic of Nigeria 1999 (as amended), African Charter on Human and Peoples' Rights and International Human Rights Instruments ratified by Nigeria.
- 3) Legislations having provisions legitimizing discrimination on the basis of Sexual Orientations or identities such as Sections 214-217, Section 284, Section 81 of the Criminal Code, Penal Codes and Armed Forces Act respectively be amended.

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<sup>176</sup> (2019) MAHGB-000591-16.

<sup>177</sup> Penal Code of Botswana, Law No. 2 of 1964.

<sup>178</sup> University of Toronto, Botswana High Court decriminalizes homosexuality <<https://www.law.utoronto.ca>> accessed 24<sup>th</sup> of March, 2024.