Research Article

Beyond Morality and Empire: Rethinking The Criminalisation of Same-Sex Relations in Nigeria

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Abstract

Nigeria criminalises consensual same-sex intimacy through four overlapping regimes: the Criminal Code, the Penal Code, the Sharia Penal Codes of twelve northern States, and the Same Sex Marriage (Prohibition) Act 2013. The public defence of these laws rests much on the claim that they express indigenous values. This article tests that claim and finds it historically incomplete. The secular offences in the Criminal Code and the Penal Code are colonial transplants traceable to Queensland and India. The Sharia codes, by contrast, revive a pre-colonial Islamic jurisprudence which was confined to part of the country and bound by exacting rules of proof, while southern societies regulated sex and gender mainly through kinship and taboo rather than imprisonment. The article then argues that the case for reform does not depend on winning the historical debate. Measured against sections 34, 36(12), 37, 39, 40 and 42 of the Constitution, the African Charter on Human and Peoples' Rights, and the requirement in section 45 that restrictions be reasonably justifiable in a democratic society, the criminalisation of association, expression and vaguely defined "amorous" conduct may not be sustained. Drawing on Nigerian authority and on comparative decisions from Botswana, Kenya, Mauritius, India, South Africa and Europe, while confronting contrary decisions from Kenya and Uganda, the article proposes a calibrated reform: the State may continue to decline recognition of same-sex marriage while withdrawing criminal sanctions from private consensual conduct between adults, peaceful association and expression.

Keywords: criminal law reform; privacy; freedom of association; Same Sex Marriage (Prohibition) Act; colonial legal transplants.

1. Introduction

Few questions in Nigerian public law command so swift a public consensus as the regulation of same-sex relations. Legislators, religious leaders and a large part of the public treat the matter as settled: same-sex intimacy is described as alien to African culture, and its criminalisation as an act of cultural self-defence. This consensus found its fullest legislative expression in the Same Sex Marriage (Prohibition) Act 2013,[1] which, despite its title, reaches well beyond marriage to penalise the registration and support of organisations, meetings, and any direct or indirect "public show" of a same-sex amorous relationship.[2]

This article assumes two claims. The first is historical and deliberately modest. The dominant narrative that criminalisation expresses an unbroken African tradition does not survive scrutiny, but neither does the counter-narrative, common in advocacy literature, that criminalisation is purely a colonial imposition. The truth differs between the secular codes of the South and the Islamic jurisprudence of the North, and an honest argument for reform must accommodate both. The second claim is constitutional and carries the weight of the argument. Whatever the history, the present regime of criminal sanctions, and the SSMPA in particular, cannot be reconciled with the rights guaranteed by Chapter IV of the Constitution once the limitation clause in section 45 is applied with the rigour its wordings demand.

The scope of the argument in this work, therefore should be stated immediately. This article does not argue that the Constitution requires the recognition of same-sex marriage, nor that any religious body should be compelled to solemnise or approve such unions. The concern here is narrower and that is, whether the State may imprison

adults for private consensual conduct, for peaceful association, and for expression. The work is arranged in parts. Part 2 of this work sets out the legal framework while Part 3 examines the genealogy of the prohibitions. In Part 4, it is subjected to constitutional analysis, and Part 5 considers Nigeria's regional and international obligations. Part 6 critically examines how the law actually operates with Part 7 answering the principal objections to reform, and Part 8 proposes a reform agenda.

2. The Legal Framework of Criminalisation

2.1 The Criminal Code

In the southern States, the Criminal Code punishes any person who has "carnal knowledge of any person against the order of nature", or who permits a male person to have such knowledge of him or her, with fourteen years' imprisonment.[3] An attempt attracts seven years,[4] and any act of "gross indecency" between males, "whether in public or private", attracts three years.[5] Section 214 is, on its face, neutral as to the sex of the parties and would reach heterosexual conduct but section 217 is expressly confined to men. In practice, enforcement has been directed almost entirely at men.

2.2 The Penal Code

In the northern States and the Federal Capital Territory, the Penal Code punishes carnal intercourse "against the order of nature with any man, woman or animal" with imprisonment of up to fourteen years and a fine.[6] The Code further treats as a "vagabond" any male person who dresses in the fashion of a woman in a public place, or who practises sodomy as a means of livelihood.[7]

2.3 The Sharia Penal Codes

Since 2000, twelve northern States have enacted Sharia Penal Codes applicable to Muslims.[8] These codes create offences of sodomy (liwat) and lesbianism (sihaq), and several prescribe death by stoning for liwat.[9] Any analysis that treats Nigerian criminalisation as a single colonial inheritance must understand with this regime, which rests on a different source of authority and commands deep support in the communities where it applies.

2.4 The Same Sex Marriage (Prohibition) Act 2013

The SSMPA prohibits marriage contracts and civil unions between persons of the same sex and declares void any such certificate issued abroad.[10] It forbids the solemnisation of such unions in any place of worship and recognises only marriage between a man and a woman.[11] Had the Act stopped there, it would be a civil statute on the recognition of marriage, but the Act did not stop there. Section 4 prohibits the registration of "gay clubs, societies and organisations", their "sustenance, processions and meetings", and the "public show of same sex amorous relationship directly or indirectly".[12] Section 5 attaches fourteen years' imprisonment to entering a same-sex marriage or civil union, and ten years to registering, operating or participating in such organisations, to making the prohibited public show, and to witnessing, abetting or aiding a solemnisation or "supporting" the registration, operation and sustenance of such organisations.[13] None of the operative terms, whether "amorous", "gay club" or "support", is defined with any precision in the said law.

3. Genealogy: Colonial Transplant, Islamic Law and Indigenous Diversity

3.1 Colonial Codification

The secular offences are clearly imported. The Criminal Code was drafted on the model of the Queensland Criminal Code 1899 prepared by Sir Samuel Griffith, first applied in the Northern Protectorate and later extended to the whole of the colony in 1916. The Penal Code of 1959 was modelled on the Sudan Penal Code, which was

[3] Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria (LFN) 2004, s. 214.
[4] Ibid., s. 215.
[5] Ibid., s. 217.
[6] Penal Code (Federal Provisions) Act, Cap. P3, LFN 2004, s. 284. The Act applies in the Federal Capital Territory; the northern States apply their own Penal Code Laws derived from the Penal Code Law 1959 of the former Northern Region.
[7] Ibid., s. 405(2)(e).
[8] See e.g. Shari'ah Penal Code Law 2000 (Zamfara State). The twelve States are Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.
[9] Shari'ah Penal Code Law no 10 of 2000 (Zamfara State), ss. 130 (Liwat (sodomy), 136 sihaq(lesbianism). S.131 punishes by stoning.
[10] SSMPA, s. 1(1) and (2).
[11] Ibid., ss. 2 and 3.
[12] SSMPA., s. 4(1) and (2).
[13] SSMPA., s. 5(1)– (3).

itself derived from the Indian Penal Code of 1860 and its notorious section 377.[14] The "order of nature" formula in both codes descends from the English law of buggery, not from any Nigerian source. The Victorian moral outlook that informed these texts was therefore enacted in Nigeria without local deliberation or input.

The irony, often noted, is that the metropolitan source has long since moved on. Following the Wolfenden Report,[15] the Sexual Offences Act 1967 decriminalised private homosexual acts between men aged twenty-one and over in England and Wales.[16] The reform was partial: Scotland followed only in 1980,[17] and Northern Ireland in 1982, after the European Court of Human Rights held in Dudgeon v. United Kingdom that its prohibition violated the right to respect for private life.[18] The Supreme Court of India struck down section 377 in 2018,[19] and the Supreme Court of Mauritius, invalidating its own colonial-era provision in 2023, observed that the offence had not been introduced to reflect Mauritian values but had been inherited from British rule.[20]

3.2 Pre-colonial Islamic Jurisprudence

The colonial-transplant argument holds equally for the secular codes, but it cannot be stretched to cover the whole country. Before the British conquest of the Sokoto Caliphate in 1903, much of northern Nigeria was governed by Maliki Islamic law, which treats liwat as a grave offence.[21] In that region, a prohibition of same-sex intercourse predates colonial rule. Two notable qualifications are of importance here. First, the classical rules of proof for offences of this category were exacting, so that the prohibition operated more as a moral boundary than as an instrument of routine policing. Secondly, the Sharia codes today are State laws operating within a federal Constitution which forbids the adoption of any State religion and subjects every law to Chapter IV.[22] Their constitutional validity is not settled by their religious pedigree and is also forms part of the contention in this work.

3.3 Indigenous Social Formations in the South and Beyond

For the South, the historical record points in a different direction, although it must be read with care. Amadiume's study of Nnobi community documented the institutions of the "male daughter" and the "female husband", through which a woman could assume the social position of a son or a husband, hold property and marry wives in order to secure the continuity of a lineage.[23] These institutions show that gender roles in Igbo customary law were detachable from biological sex. They do not, however, show acceptance of same-sex intimacy. Amadiume herself rejected the reading of woman-to-woman marriage as lesbian relationships,[24] and scholarship that adopts her work for that proposition misuses it.

The yan daudu of Kano, studied ethnographically by Gaudio, are men who adopt feminine speech and social roles and form recognisable networks within a Muslim society that regards them with ambivalence; many are also husbands and fathers.[25] This work illuminates contemporary social tolerance at the margins. It fails to establish the pre-colonial position, and cautions against mapping Western identity categories onto local practices. Comparable evidence from elsewhere in Africa, such as the arrangements between Azande warriors and younger males described by Evans-Pritchard,[26] and the wider surveys of Murray and Roscoe and of Epprecht,[27] confirms that the continent's sexual history is more varied than contemporary rhetoric allows. It does not describe Nigerian practice.

Indigenous societies certainly regulated sexuality. Customary systems enforced sexual taboos through ritual cleansing, compensation, ostracism and, in grave cases, expulsion.[28] What they did not possess was the prison. Incarceration as the standard response to prohibited conduct arrived with colonial administration.[29] Even where

[14] Human Rights Watch, This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism (New York: Human Rights Watch, 2008) pp. 15–24, available online at https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf accessed on 2 October, 2026.

[15] Report of the Committee on Homosexual Offences and Prostitution (Cmnd. 247, 1957).

[16] Sexual Offences Act 1967 (UK), s. 1.

[17] Criminal Justice (Scotland) Act 1980, s. 80.

[18] Dudgeon v. United Kingdom (1982) 4 EHRR 149; Homosexual Offences (Northern Ireland) Order 1982.

[19] Navtej Singh Johar v. Union of India (2018) 10 SCC 1, overruling Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1.

[20] Ah Seek v. State of Mauritius, (2023) SCJ 399 (Supreme Court of Mauritius, judgment of 4 October 2023.

[21] See generally J. N. D. Anderson, Islamic Law in Africa (London: Her Majesty's Stationery Office, 1954) p.171-224.

[22] Constitution of the Federal Republic of Nigeria 1999 (as amended) (hereafter "CFRN"), ss. 1(3) and 10.

[23] I. Amadiume, Male Daughters, Female Husbands: Gender and Sex in an African Society (London: Zed Books, 1987) p.13.

[24] I. Amadiume, Introduction, p. 1-3.

[25] R. P. Gaudio, Allah Made Us: Sexual Outlaws in an Islamic African City (Chichester: Wiley-Blackwell, 2009) p. 1-25.

[26] E. E. Evans-Pritchard, 'Sexual Inversion among the Azande' (1970) 72(6) American Anthropologist 1428–1434.

[27] S. O. Murray and W. Roscoe (eds.), Boy-Wives and Female Husbands: Studies of African Homosexualities (New York: St. Martin's Press, 1998) p. 14; M. Epprecht, Hungochani: The History of a Dissident Sexuality in Southern Africa (Montreal: McGill-Queen's University Press, 2004) p. 3-20.

[28] T. O. Elias, The Nature of African Customary Law (Manchester: Manchester University Press, 1956) p. 110.

[29] V. Saleh-Hanna (ed.), Colonial Systems of Control: Criminal Justice in Nigeria (Ottawa: University of Ottawa Press, 2008) p. 17.

a community disapproved of a practice, the idea that such disapproval should be expressed through years of imprisonment imposed by a centralised State is itself an inheritance of empire.

3.4 What the History Proves

The historical enquiry yields a qualified conclusion. It refutes the claim that the present criminal regime expresses an uninterrupted Nigerian tradition: the secular offences are imports, and the incaceration response is colonial. Nevertheless, it does not support the opposite claim that decriminalisation would restore a pre-colonial acceptance of same-sex intimacy, and it must acknowledge that Islamic law in the North prohibited such conduct before the British arrived. History can clear away a false justification, but it cannot by itself settle the legal question. It is therefore for the Constitution to answer.

4. The Constitutional Case

4.1 The Interpretive Framework

The Constitution is supreme, and any law inconsistent with it is void to the extent of the inconsistency.[30] Its provisions, and particularly those guaranteeing fundamental rights, are to be given a broad and liberal interpretation rather than a narrow and technical one.[31] The rights in Chapter IV are not absolute. Section 45(1) preserves any law that is "reasonably justifiable in a democratic society" in the interest of defence, public safety, public order, public morality or public health, or for the protection of the rights and freedom of others. The analysis therefore comes in two forms: whether a guaranteed right is engaged, and whether the State can justify the restriction. The burden at the second stage lies on the State, and the courts have not treated the recital of a permitted purpose as conclusive. In Inspector-General of Police v. All Nigeria Peoples Party, the Court of Appeal held that the requirement of a police permit for public rallies could not be justified by the invocation of public order.[32]

4.2 Privacy

Section 37 guarantees "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications". The wordings did not mention family life or intimate relationships, and an honest argument must start from that basis. However, privacy of the home is expressly protected, and the Supreme Court has read section 37 as protecting a sphere of personal autonomy. In Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo, the Court upheld a competent adult patient's refusal of a blood transfusion, and Ayoola JSC located that choice within the protection that sections 37 and 38 give against coercive and unjustified intrusion into private decisions.[33] If the Constitution protects an adult's decision to refuse life-saving treatment, it is difficult to see why it does not protect consensual sexual conduct between adults in a private home.

Comparative authority appears consistent on this point. The European Court of Human Rights reached that conclusion in Dudgeon and again in Norris v. Ireland.[34] The United Nations Human Rights Committee held in Toonen v. Australia that the Tasmanian sodomy laws arbitrarily interfered with privacy under Article 17 of the ICCPR.[35] The United States Supreme Court overruled its earlier contrary decision in Lawrence v. Texas.[36] On the African continent, the South African Constitutional Court,[37] the High Court and Court of Appeal of Botswana,[38] and the Supreme Court of Mauritius[39] have invalidated equivalent provisions. These decisions are persuasive, not binding. Their value lies in showing how courts in common-law jurisdictions with comparable constitutional provisions have reasoned.

4.3 Dignity

Section 34(1) guarantees the dignity of the person and forbids inhuman or degrading treatment. The criminal prohibitions do not themselves prescribe degrading treatment, but they create the conditions for it. Suspects arrested under the SSMPA have been paraded before the press, an exposure that has cost them employment and family support. This practice sits uneasily with the statutory duty to accord every suspect humane treatment

[30] CFRN, s. 1(1) and (3).
[31] Nafiu Rabiu v. State (1980) 8–11 SC 130.
[32] Inspector-General of Police v. All Nigeria Peoples Party [2007] 18 NWLR (Pt. 1066) 457.
[33] Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo [2001] 7 NWLR (Pt. 711) 206.
[34] Norris v. Ireland (1991) 13 EHRR 186.
[35] Toonen v. Australia, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).
[36] Lawrence v. Texas 539 US 558 (2003), overruling Bowers v. Hardwick 478 US 186 (1986).
[37] National Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC).
[38] Motshidiemang v. Attorney General (High Court, MAHGB-000591-16, 11 June 2019), affirmed in Attorney General v. Motshidiemang (Court of Appeal, Civil Appeal No. CACGB-157-19, 29 November 2021).
[39] Ah Seek v. State of Mauritius, supra.

having regard to the right to dignity,[40] and with the Constitutional Court of South Africa's recognition that criminalisation itself stigmatises and degrades those it targets.[41]

4.4 Expression, Assembly and Association

Sections 39 and 40 guarantee freedom of expression and the right to assemble and associate freely. Sections 4 and 5 of the SSMPA strike directly at these rights. They penalise the registration of organisations, their meetings and their "sustenance", and they extend liability to anyone who "supports" such organisations. On that wording, a lawyer who advises a support group, a clinician who runs an HIV outreach programme for men who have sex with men, or a donor who funds such a programme may each be exposed to prosecution.

Here the comparative authority is especially instructive because it does not depend on decriminalisation. In Attorney General v. Rammoge, the Botswana Court of Appeal held that the refusal to register an organisation advocating for the rights of sexual minorities violated freedom of association, at a time when same-sex conduct remained a crime in Botswana.[42] In NGOs Co-ordination Board v. EG, the Supreme Court of Kenya reached the same conclusion, emphasising that the right to associate belongs to everyone and that the existence of penal offences did not justify refusing registration to persons on the basis of their sexual orientation.[43] A Nigerian court could adopt the same reasoning without deciding any question about the underlying criminal offences under the Act.

4.5 Legality and Vagueness

Section 36(12) forbids conviction for any offence that is not defined, and its penalty prescribed, in a written law. Nigerian courts have long read the guarantee as requiring that citizens be able to know in advance, from the word of a written law, what conduct is criminal.[44] The offence of making a "public show of same sex amorous relationship directly or indirectly" fails that test. The Act does not define "amorous", nor does it say what makes a show "indirect". The weakness was exposed in the first prosecution under the Act, in which forty-seven men were charged with engaging in a public show of same-sex amorous relationship "in hidden places" within a hotel,[45] a formulation that makes the offence impossible to understand. A provision that permits a "public" display to be committed in hidden places gives no fair warning of what it prohibits.

4.6 Equality

Section 42 protects a citizen against discrimination on the grounds of community, ethnic group, place of origin, sex, religion, political opinion or circumstances of birth. Sexual orientation is not listed, and Nigerian courts have not yet read it in. The strongest route runs through the ground of sex. A man who has intimate relations with a woman commits no offence, while a man who does the same with another man commits a crime. Whether the conduct is criminal therefore depends on the sex of the partner. The Human Rights Committee in Toonen held that "sex" in Articles 2(1) and 26 of the ICCPR includes sexual orientation;[46] the United States Supreme Court adopted closely analogous reasoning in Bostock v. Clayton County;[47] and the Supreme Court of Mauritius read the constitutional ground of sex in the same way.[48]

The Nigerian Supreme Court has shown itself willing to apply section 42 to customary norms with long pedigree. In Ukeje v. Ukeje, it held that an Igbo customary rule, disinheriting female children was void for discrimination on the ground of sex.[49] The case shows that a norm's cultural roots do not place it beyond constitutional review. The equality argument remains the most contestable of those advanced here, and it is better pleaded as reinforcing the privacy, association and legality claims than as a solo ground.

4.7 Section 45 and Public Morality

The decisive question is justification. Public morality is an express ground of limitation, and the SSMPA was enacted by an elected legislature with evident popular support. A court should accord weight to that legislative judgment. The phrase "reasonably justifiable in a democratic society" nonetheless imports a requirement of proportionality: the restriction must pursue a legitimate aim, be rationally connected to it, and impair the right no more than necessary.

[40] Administration of Criminal Justice Act 2015, s. 8(1). See also Sections 1 and 2 of the Anti-Torture Act 2017.

[41] National Coalition for Gay and Lesbian Equality v. Minister of Justice, supra.

[42] Attorney General v. Rammoge (Court of Appeal of Botswana, Civil Appeal No. CACGB-128-14, 2016).

[43] NGOs Co-ordination Board v. EG & 4 Others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR) (Petition No. 16 of 2019, 24 February 2023).

[44] Aoko v. Fagbemi [1961] 1 All NLR 400, decided under the equivalent provision of the 1960 Constitution.

[45] See Premium Times, 'Court Decision against Alleged Homosexuals "Failure of Justice"', 29 October 2020, available online at https://www.premiumtimesng.com/news/more-news/423634-court-decision-against-alleged-homosexuals-failure-of-justice.html accessed on 2 October, 2026, reporting the charge under SSMPA, s. 5(2).

[46] Toonen v. Australia, supra.

[47] Bostock v. Clayton County 590 US 644 (2020).

[48] Ah Seek v. State of Mauritius, supra.

[49] Ukeje v. Ukeje [2014] 11 NWLR (Pt. 1418) 384.

Applied provision by provision, the requirement produces different results. The State's refusal to recognise same-sex marriage, in sections 1 to 3 of the SSMPA, is a civil measure defining an institution the State itself creates, and a court may well hold it justified on grounds of public morality. The criminal sanctions are harder to defend. Imprisoning adults for private consensual conduct, for attending meetings or for undefined displays of affection, advances no protective purpose that the law does not already secure by other means. Non-consensual penetration of any person, including anal penetration, is rape under the gender-neutral definition in the Violence Against Persons (Prohibition) Act 2015,[50] and sexual conduct with children is separately criminalised.[51] What remains is the punishment of consensual adult conduct for no reason other than majority disapproval. Courts elsewhere have held that such disapproval, without demonstrable harm, cannot justify the deprivation of liberty; the Supreme Court of India framed the point as a distinction between constitutional morality and popular morality.[52]

The contrary authority must be confronted to balance the argument. In 2019, the High Court of Kenya declined to strike down that country's penal provisions, holding that the petitioners had not proved discrimination and giving weight to the constitutional protection of the family.[53] In 2024, the Constitutional Court of Uganda upheld most of the Anti-Homosexuality Act 2023,[54] having earlier annulled its 2014 predecessor on the procedural ground that Parliament lacked a quorum.[55] These decisions show that African courts are divided and that a Nigerian court may prefer deference. The Nigerian Supreme Court has also cautioned against sweeping judicial pronouncements on custom that go beyond the issues joined by the parties.[56] The lesson is strategic rather than substantive: litigation should begin with the narrowest and strongest claims, namely association and vagueness, rather than a direct challenge to every prohibition at once.

5. Regional and International Obligations

The African Charter on Human and Peoples' Rights is part of Nigerian law.[57] In Abacha v. Fawehinmi, the Supreme Court held that the Charter, as a domesticated treaty, is enforceable in Nigerian courts and prevails over inconsistent ordinary legislation, although it remains subordinate to the Constitution.[58] The Charter guarantees equality before the law and equal protection (Articles 2 and 3), dignity (Article 5), expression (Article 9) and association (Article 10). In 2014, the African Commission adopted Resolution 275, condemning violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity.[59] The regional picture is not uniform, however. In 2018, following a directive from the Executive Council of the African Union, the Commission withdrew the observer status it had granted to the Coalition of African Lesbians. The Charter's text is clear, but its political reception remains contested.

The position under the ICCPR differs in an important respect. Nigeria acceded to the Covenant in 1993 but has not enacted it into domestic law, and under section 12(1) of the Constitution it therefore creates obligations on the international plane without being directly enforceable in Nigerian courts.[60] Those obligations are nonetheless real. The Human Rights Committee's reasoning in Toonen applies to Nigeria, and the Committee raised the SSMPA in its 2019 concluding observations on Nigeria.[61]

[50] Violence Against Persons (Prohibition) Act 2015, s. 1.

[51] Child's Rights Act 2003, ss. 31 and 32.

[52] Navtej Singh Johar v. Union of India, supra.

[53] EG & 7 Others v. Attorney General; DKM & 9 Others v. Attorney General [2019] eKLR (High Court of Kenya, Petitions 150 and 234 of 2016, 24 May 2019).

[54] Fox Odoi-Oywelowo & Another v. Attorney General (Constitutional Court of Uganda, Constitutional Petition No. 14 of 2023, 3 April 2024).

[55] Oloka-Onyango & 9 Others v. Attorney General (Constitutional Court of Uganda, Constitutional Petition No. 8 of 2014, 1 August 2014).

[56] Mojekwu v. Iwuchukwu [2004] 11 NWLR (Pt. 883) 196, qualifying Mojekwu v. Mojekwu [1997] 7 NWLR (Pt. 512) 283.

[57] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, LFN 2004.

[58] Abacha v. Fawehinmi [2000] 6 NWLR (Pt. 660) 228. See also Ogugu v. State [1994] 9 NWLR (Pt. 366) 1.

[59] African Commission on Human and Peoples' Rights, Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)2014, available online at https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations accessed on 2 October, 2026.

[60] CFRN, s. 12(1).

[61] Human Rights Committee, Concluding Observations in the Absence of the Second Periodic Report of Nigeria, UN Doc. CCPR/C/NGA/CO/2 (adopted 19 July 2019) paras. 18–19, available online at https://www.rightofassembly.info/assets/downloads/Human_Rights_Committee_Concluding_Observations_on_Nigeria_(2019).pdf accessed on 2 October, 2026.

6. The Law in Operation

The SSMPA's practical effect lies less in convictions than in what happens before trial. In August 2018, police raided a hotel in Egbeda, Lagos, and arrested fifty-seven young men who said they were attending a birthday party. After the Lagos State Attorney-General declined to prosecute, the police filed charges under section 5(2) of the SSMPA in the Federal High Court, and forty-seven men stood trial. In October 2020, Aikawa J struck out the case for want of diligent prosecution.[62] The prosecution witnesses had connected no individual accused to the alleged offence. Nonetheless, because the case was struck out rather than dismissed, the men remain exposed to re-arrest, and many had already lost jobs and family support after being paraded before the media. The pattern is consistent with independent documentation of extortion by police and private actors, mob violence, and the reluctance of victims to report crimes against them for fear of self-incrimination.[63] The law also affects public health. A prospective cohort study of men who have sex with men in Abuja found that fear of seeking health care rose significantly after the Act came into force.[64] A law that drives an at-risk population away from HIV testing and treatment harms the public health that section 45 lists as a ground for limiting rights. Confidentiality of health information is already required by statute,[65] but that protection means little if the treatment relationship itself may be characterised as "support" under the SSMPA.

7. Objections Considered

Nigeria has no State religion,[66] and section 38 protects the freedom of believers to hold and practise their faith. Decriminalisation compels no religious body to solemnise, bless or approve any relationship; the SSMPA already excludes places of worship from any role in same-sex unions. The State's decision not to imprison people is not an endorsement of their conduct.

Chapter IV exists precisely to protect individuals against majorities. A right that protects only the popular gives little real protection. Legislative support deserves weight at the justification stage, as argued above, but it cannot end the enquiry.

Customary law in Nigeria may not be enforced where it is contrary to public policy or to natural justice, equity and good conscience,[67] and it is now also subject to the Constitution. Ukeje shows that longstanding custom yields where it offends constitutional guarantees. The historical analysis in Part 3 shows, in any event, that the incarceration regime is not itself customary.

The argument advanced here keeps the recognition of marriage separate from the criminal law. A State may define marriage as it chooses within constitutional limits while declining to imprison adults for their private lives. Kenya's Supreme Court protected freedom of association without disturbing the country's marriage laws, which shows that the distinction is workable.

8. A Reform Agenda

Reform should proceed on several fronts at once, beginning with those that require the least political capital.

First, the National Assembly should amend the SSMPA by repealing section 4 and section 5(2) and (3), and the criminal penalty in section 5(1), while leaving the civil non-recognition provisions in sections 1 to 3 intact if it so chooses. This single amendment would remove the provisions most exposed to constitutional challenge while preserving the Act's stated purpose.

Secondly, sections 214, 215 and 217 of the Criminal Code and section 284 of the Penal Code should be amended to exclude consensual conduct between adults in private, and section 405(2)(e) of the Penal Code should be repealed. The Violence Against Persons (Prohibition) Act and the Child's Rights Act already cover the conduct that genuinely warrants punishment. The Sharia Penal Codes raise distinct questions of State competence and religious liberty, but the prescription of death for consensual adult conduct cannot satisfy any credible test of proportionality, and the affected States should review it.

[62] American Bar Association Center for Human Rights, Trial Observation Report: Mass Trial in Nigeria (Clooney Foundation for Justice TrialWatch, 2020), available online at https://www.americanbar.org/groups/human_rights/reports/fair_trial_report_nigeria_mass_trial/ accessed on 20 September, 2026; Al Jazeera, 'Nigerian Judge Throws Out Homosexuality Case against 47 Men', 27 October 2020, available online at https://www.aljazeera.com/news/2020/10/27/nigerian-judge-throws-out-case-against-47-men-over-homosexuality accessed on 21 September, 2026.

[63] Human Rights Watch, "Tell Me Where I Can Be Safe": The Impact of Nigeria's Same Sex Marriage (Prohibition) Act (New York: Human Rights Watch, 2016) pp. 26–39, available online at https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act accessed on 2 October, 2026.

[64] S. R. Schwartz et al., op. cit., e299–e306.

[65] National Health Act 2014, s. 26.

[66] CFRN, s. 10.

[67] Evidence Act 2011, s. 18(3).

Thirdly, pending legislative reform, the Attorney-General of the Federation should use the powers conferred by section 174 of the Constitution to issue prosecutorial guidelines discouraging charges based on consensual adult conduct, and the Inspector-General of Police should prohibit the parading of suspects, in line with section 8(1) of the Administration of Criminal Justice Act. The National Human Rights Commission should monitor arrests and detentions under these laws.

Fourthly, health workers and organisations providing HIV prevention and treatment services should be expressly protected from liability for "support", so that the statutory guarantee of confidentiality is effective in practice.

Fifthly, strategic litigation should use the liberal standing rules of the Fundamental Rights (Enforcement Procedure) Rules 2009[68] and the Supreme Court's recognition of public interest standing,[69] beginning with association and vagueness claims under sections 36(12) and 40.

Finally, the Nigerian Law Reform Commission should undertake a public study of sexual offences legislation with a view to consolidating the fragmented regime into a coherent, harm-based code.

9. Conclusion

The criminalisation of same-sex relations in Nigeria is defended as the expression of indigenous morality. The history is more complicated. The secular offences were imported from Queensland and India; the prison was a colonial innovation; and while Islamic law in the North did prohibit the conduct before colonial rule, it did so under rules of proof far removed from today's mass arrests and televised parades. The stronger case for reform, however, is constitutional. The SSMPA's penalties for association, expression and undefined "amorous" display cannot be reconciled with sections 36(12), 39 and 40, and the imprisonment of consenting adults for private conduct fails the proportionality test that section 45 requires. Nigeria need not recognise same-sex marriage in order to stop imprisoning its citizens for their private lives and their peaceful associations. Drawing that line would be neither a surrender to foreign values nor a romantic return to an imagined past. It would be an application of the Constitution.

[68] Fundamental Rights (Enforcement Procedure) Rules 2009, Preamble, para. 3(e).

[69] Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation [2019] 5 NWLR (Pt. 1666) 518.