

**PROTECTING RELIGION AND CULTURE IN NIGERIA:
PROBING SAME SEX RELATIONSHIPS AND
MARRIAGES UNDER THE CRIMINAL
JUSTICE ADMINISTRATION**

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Abstract

In contrast to the conventional definition of marriage as a voluntary union for life of one man and one woman to the exclusion of all others, same sex marriage is a marriage between two persons of the same gender identity. Same sex marriage is a practice which is now trending across the world as the number of states that support it increases daily. Despite this emerging global change in the composition of what a marriage could practically be, Nigeria appears to be counted outside this growing world community as its National Assembly has passed a law prohibiting same sex marriages in any form. The main objective of this research is to examine the state of same sex marriage in Nigeria by analysing the influence of both religion and culture on the enactment of Same Sex Marriage (Prohibition) Act. The work also presents instances whereby the legality of the Same Sex Marriage (Prohibition) Act could be inconsistent with the fundamental rights as guaranteed by the Constitution of the Federal Republic of Nigeria and other international treaties. The article concludes

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that in as much as homosexuality is not only impermissible but also illegal in Nigeria due to the influence of religion and culture, it does appear that it is not likely that there will be an amendment on the Same Sex Marriage (Prohibition) Act by the Legislators towards legalizing same sex unions in the farthest future.

Keywords: Same Sex, Marriage, Relationships, Religion, Culture.

Introduction

“Marriage is an institution that is made up of a complex set of personal values, social norms, religious customs and legal constraints that regulate a particular intimate human relation over a life span”.¹

Marriage has been asserted to be the fusing together of two component parts or ‘other halves’, that is, a man and a woman. But the orthodox definition of marriage is the coming together of a man and a woman, that is, members of diverse sex to form a voluntary unification.² According to Gagnon, the idea of marriage found in the Christian and Jewish Scriptures joins male and female into an incorporated sexual whole.³ These definitions opine that the two natural sexes or gender identity, that is, male and female are to

¹ Allen, Douglas, ‘An Economic Assessment of Same Sex Marriage Laws’ (2006) *Harvard Journal of Law and Public Policy* 29(3): 949 – 980.

² Obidimma, Emmanuel and Obidimma, Angela, ‘The Travails of Same-Sex Marriage Relation Under Nigerian Law’ (2013) *Journal of Law, Policy and Globalization* Volume 17, 42-49.

³ Gagnon, Robert, ‘Why Gay Marriage is Wrong’ (2004) <<http://www.robagnon.net/homopresbytodayarticle.html>> accessed June 25, 2018.

reconstitute a sexual whole which is pivotal as the framework of marriage.

Recently, Homosexual discuss has gained prominence globally. Realistically and legally, same sex marriage comes into existence when two individuals of the same sex contracts a marriage and become wedded. The universal expression describing a marriage between same sexes whether between males or females is ‘gay marriage’ and various terms like homosexual marriage and gender-neutral marriage can also be used to qualify same sex marriage.⁴ Gay marriage also means the evolution of the traditional form of legal monogamous marriage to include homosexuals.⁵ Same sex marriage opposes the belief of the orthodox concept of marriage which sees it strictly as a contractual union between a man and a woman, that is, two persons of opposed sex.⁶ Same sex marriage is therefore a paradigm shift from the original definition of marriage.

In any legal system, sexuality and sexual activities are complicatedly linked with the exercise of power.⁷ African states give an issue that bothers on same sex marriage and civil relationships silent treatment due to the insight that same sex marriage is not an African culture or that it does not exist in African communities.⁸ The complexities researchers face to obtain information on homosexuality has led to a dearth of scholarly

⁴ Obidimma, Emmanuel and Obidimma, Angela *supra* n.2.

⁵ *Ibid.*

⁶ Ikpong, Aniedi, ‘The Anathema of Gay Marriage in Nigeria’ (2012), *African Journal of Social Sciences*, Volume 2, Issue 4, 31-43.

⁷ Foucault Michel, *The History of Sexuality* (1980), Random House, Volume 1, New York.

⁸ Dlamini, Bonginkosi, ‘Homosexuality in the African context’, (2006), *Agenda*, Volume 67, 128-136.

literature on the subject matter. This silence, however, can be linked to the fact that sex is not frequently discussed in public in African societies. The subject of sex, in combination with homosexuality in particular, is generally perceived as a taboo.⁹

Issues that bother on sexuality is constantly controlled and highly monitored in many state across the globe and this is why sexuality is a “highly value-laden terrain”.¹⁰ So many states in advanced jurisdictions have begun to repeal and amend the brutish and obsolete laws infringing on the rights of individuals who engage in same-sex associations, but the majority of African states continue to enact laws, oppress and maim them, or even execute those who are in same-sex relationships: “by maintaining a tight grip on certain activities, and silencing the voices of those individuals and groups that engage in them, the patriarchal state makes it extremely difficult for these individuals to organise and fight for their human rights”.¹¹

It is not legal or permissible to engage in consensual ‘gay’ sex in thirty-eight of the fifty-three African states. Countries like Nigeria, Senegal, Malawi, and more recently Uganda have imposed punishments on persons who are convicted of being involved in same-sex relations.¹² These punishments are deterrent measures and mechanisms to discriminate against those who engage in these

⁹ Ayisi Ebenezer: *An Introduction to the Study of African Culture*’ (Great Britain, Fletcher & Son, 1979).

¹⁰ Nel Juan, ‘*Same-Sex Sexuality and Health: Psychosocial Scientific Research*’ in ‘*Social Silence to Social Science: Same-Sex Sexuality, HIV & AIDS and Gender in South Africa*’, ed. V. Reddy, T. Sandfort, and L. Rispel, (HSRC Press, 2009) 32–50.

¹¹ Tamale Sylvia, ‘*Out of the Closet: Unveiling Sexuality Discourses in Uganda*’ In ‘*Africa After Gender*’, edited by Catherine M. Cole, Takyiwaa Manuh, and Stephen F. Miescher, (Indiana University Press, 2007).

relationships since colonial era in Africa when colonial authorities were keen on regulating sexuality and these laws are still same till date.¹³

This article examines the role culture, religion and morality play in shaping the Nigerian society on the issue of same sex relationships. It examines the background to Nigeria's anti-gay law, emphasizing the acceptance and support of the Nigerian people for this law and the condemnation this action has received from human rights groups and the international community. The article discusses Nigeria's contravention of international human rights obligations as a result of her stance on same-sex relationships. It then concludes with suggestions on ways to fortify and safeguard the ethics of both religion and culture in Nigeria in relation to anti-gay laws.

Religion and Homosexuality

From time immemorial religion has influence on same sex relationships in various jurisdictions across the globe and Nigeria is no exception. Religion influences the life of every Nigerian orientation wise, psychologically, spiritually, educationally and sociologically. More so, religion affects the way we dress, the food we eat and even the way we speak. This section will explore the impacts of Christianity, Islam and traditional beliefs on homosexuality and how these evolved to influence the enactment of the Same Sex Marriage (Prohibition) Act.

¹² See Anika Rudman, 'The Protection Against Discrimination Based on Sexual Orientation Under the African Human Rights System', (2015), *African Human Rights Law Journal*, Volume 15,1-27 and Blandy Fran, 'Homosexual Africans Face Prison, Intolerance and the Death Penalty', (2010) *Telegraph*, <<http://telegraph.co.uk/expatnews/6951539/Homosexual-Africans-face-intoleranceand-the-death-penalty>>, accessed 8 July 2018.

¹³ *Ibid.*

In the Bible, homosexuality is strongly condemned in all ramifications. God said;

I am the Lord. Do not lie with a man as one lies with a woman; that is detestable. Do not have sexual relations with an animal and defile yourself with it.¹⁴

This quotation lays emphasis on the fact that God prohibits this immoral act and He regards it as perversion.¹⁵ In addition to the above quotation, Peppler reveals that the Bible¹⁶ states that “from the beginning of foundation, God made man and gave him a wife (woman)”.¹⁷ In another section of the bible, it is stated that a man shall leave his father and his mother and cleave to his wife and the two of them shall be one flesh.¹⁸ From the above assertion, Peppler argues that heterosexual marriage is the will of God and that is the heavenly purpose of marriage. He is of the opinion that people should not argue from contemporary culture back to the bible but from the bible to contemporary culture.¹⁹

In the same vein, Paul in the New Testament wrote extensively about love, grace and tolerance in personal and interpersonal relationships; this is critical in evaluating homosexual lifestyle. He

¹⁴ The Bible, Leviticus Chapter 18, Verses 21-23. See also Genesis Chapter 19 verse 5.

¹⁵ Obasola Kehinde, ‘An Ethical Perspective of Homosexuality Among The African People’, (2013) *European Journal of Business and Social Sciences*, Volume 1, Number 12, 77-85.

¹⁶ The Bible, Genesis 1 verse 18.

¹⁷ Peppler Christopher, ‘Same Sex Marriage: A Current South African Christian Perspective’, (2014), <<http://www.sats.edu.za/userfiles/Peppler,Same-SexMarriage.pdf>> accessed 4 June 2018.

¹⁸ The Holy Bible, Ephesians Chapter 5 verse 31.

¹⁹ *Ibid.*

adopted the most condemnatory language when referring to homosexual practices among the Romans and the Corinthians. The Romans particularly, had forgotten the commandments of God and given themselves to sordid practices.²⁰ Therefore,

God gave them vile passions. For even their women exchanged the natural use for what is against nature. Likewise, also men, leaving the natural use of the women burned in their lust for one another, men committing what is shameful and receiving in themselves the penalty of their error which was due... being filled with all unrighteous, sexual immorality...who knowing the righteous judgment of God that those who practice such things are deserving of death, not only do the same but also approve of those who practice them.²¹

Homosexuality is an act which is “against nature” in the New Testament; that is, it is unnatural and it is on this basis that it is judged as unacceptable and immoral.²²

The Islamic religion also criticized the act of Homosexuality, but, it is however, not clear on the definitions of the activity or what the punishments should be. As with many other Islamic laws, the religious schools that emerged during the middle of the 8th century C.E. would be required to clarify and create specific Islamic laws provide the Muslims clearer moral guideposts. The Koran expressly mentioned issues concerning homosexuality and the

²⁰ *Ibid* 81.

²¹ The Bible, Romans Chapter 1, Verses 26 – 32.

²² *Ibid*

actions of the people of Lut about seven times.²³The Islamic, Christian, and Jewish traditions all tell the story of Lut (Lot) and till date, refers to the story as that of “Sodom and Gomorrah” wherein God's anger was used against a city of sexually immoral people and the one man that God saved because of his holiness and faithfulness.²⁴

We also (sent) Lut: He said to his people: “Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds.” and “And to Lut, too, we gave Judgment and Knowledge, and we saved him from the town which practiced abominations: truly they were a people given to Evil, a rebellious people.²⁵If two men among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone, for Allah is Oft-returning, most Merciful.²⁶

The requirements of the Sharia law provides that, four males must testify that they witnessed the intercourse between two males before an accused person can be tried for homosexuality. But the truth is, the probability that anyone may witness such an act is virtually nil, not to talk of four male adults. Even if they did, they may not have enough confidence to testify publicly and this will automatically limit the possibility of prosecution. Among the four

²³ Homosexuality and Islamic History with a Focus on Modern Day Afghanistan <whale.to/c/Homosexuality-inIslamic-History-Doodiepants.com_.pdf..... currentdocum address> accessed 20 March, 2020.

²⁴ *Ibid.*

²⁵ Yousef Ali, Holy Qur'an, Suras 7:80-81, 21:74.

²⁶ Yousef Ali, Holy Qur'an, Sura 4:16.

Sunni Islamic legal schools, three prescribe severe punishment for male anal intercourse (*liwat*). The fourth and oldest legal school of thought in Islam, the Sunni Hanafi School,²⁷ “left punishment to the discretion of the courts based on the reasoning that it is not synonymous with adultery”.²⁸

The Hadith contains more specific legal verses against sodomy. Abu Dawud states that “If a man who is not married is seized committing sodomy, he will be stoned to death”.²⁹ This oddly implies that a married man may be authorised to sodomise his wife, but if unmarried, he is not authorised to sodomy at all. Similar to the Koran, another Hadith verse quotes the Prophet as saying that “If you find anyone doing as Lot's people did, kill the one who does it, and the one to whom it is done”.³⁰ Much like in the Koran, the specifics of the sexual activity of the people of Lut are not clearly revealed, only that people are not to do them or they will be killed.

It is glaring from the foregoing that the religious practices and beliefs of most Nigerian citizens does not align with the practice of same sex marriage. Marshall in his study explained that religious beliefs of the Bible, Quran and traditional worship denounce and detest homosexuality.³¹ An author further explained that same sex marriage or civil relationships cannot be regarded as a right marriage since it does not have the natural sexual engagements or

²⁷ Homosexuality and Islamic History with a Focus on Modern Day Afghanistan *supra* n.23 accessed 4 June 2018.

²⁸ Samar Habib, Islam and Homosexuality Volume 2, Ed. (Santa Barbara: ABC-CLIO, 2010), 312.

²⁹ Abu Dawud, Book 38, 4448.

³⁰ *Ibid*, Book 38, 4477.

³¹ Marshall Tim, ‘African Anti-Gay Laws are Damaging US Ties’, (2014) <<http://news.sky.com/story/1213009/anti-gay-laws-are-damaging-us-ties>> accessed 10 June 2018.

consummation.³² This marital moral value is established in the Islamic and Christian sexual ethics across the globe. Omenga affirms that “the Nigerian morality which abhors same sex union is really its religious expression”.³³ Are we to allow morality, religion and culture to determine what acts are right or wrong? Assuming we do, are we to do this at the expense of infringing upon the fundamental rights of Nigerians that is already protected by the 1999 Constitution of the federal Republic of Nigeria? The Constitution clearly regards Nigeria is a secular state. For this reason, it does not seem wise to use religious sentiments, to declare an act illegal no matter how unethical or impermissible it may seem to be, especially when such acts are committed in the private domains of persons involved.

In Nigeria any traditional worshipper believes in the natural union between a man and woman since culture and traditions are so intertwined, not only in Nigeria but in Africa as a continent. Under customary laws and traditions is entitled to marry as many wives as he can and for a man to be involved in a civil relationship with another man is regarded as an abomination or incest. From the foregoing, same sex relationships or unions are totally impermissible in a traditional worship setting in Nigeria, but have influenced.

Nigerian Culture and Homosexuality

³² Gagnon, Robert, *‘Why Gay Marriage is Wrong’*, (2004) <<http://www.robgagnon.net/homopresbytodayarticle.htm>> accessed 10 June 2018.

³³ Omenga, Joshua, ‘Anti-Homosexual Legislation in Nigeria in Periscope, The Law Students’ Blog’ (2014), <<http://www.anti-homosexual-legislation-in-nigeria-in-periscope/the-lawstudents-blog.com>> accessed 10 June 2018.

Culture is the belief system of a group of people within a particular defined area. It is the total set of individual traits that are under social influence.³⁴ Culture is also defined as the collective paradigm of attitude and communications, deliberate systems and general understanding that are adopted through a mechanism of socialization.³⁵

According to a 2013 Pew Research Report, Nigeria is the world's least understanding country of homosexuality with approximately about 98 percent of the country's population opposing society's acceptance of homosexuality, the justification being its incompatibility with cultural and moral values.³⁶ It has also been argued that Nigeria's position against same sex marriage is entrenched in intrinsic socio-cultural ideological complexes of the African society and the cultural inclination of the African society does not allow for such marital unions.³⁷ Molefe is of the opinion that the African traditional view of marriage holds that homosexuality and lesbianism are "animalistic and degrading to humanity", "it is defiant to virtues such as value, morality, respect and honour that being African stands for"; "it is an unacceptable social behaviour and a taboo that is anti-ethical to the African Culture".³⁸

³⁴ Axelrod Robert, 'The Dissemination of Culture: A Model with Local Convergence and Global Polarization' (1997) *The Journal of Conflict Resolution*, Volume 41, 203-226.

³⁵ *Ibid.*

³⁶ Cox D'azur, 'Nigeria's Intolerance of Homosexuality Disturbs Human Rights Activists'.(2014), The Pendulum <<http://www.nigeria's-intolerance-of-homosexuality-disturbshuman-t=rights-activists/>> accessed 7 June 2017.

³⁷ Okol Chukwuma and Halidu, Abdullahi Shehu, 'Betwixt Civil Liberty and National Sensibility: Implications of Nigeria's Anti-Gay Law', (2014), *International Affairs and Global Strategies*, Volume 19, Issue 2, 17-24.

³⁸ Molefe, Osiname 'A Soft Voice On Gay Rights', (2014) *The New York Times*. <<http://www.nytimes.com/20>

Seminars and consultations were not conducted before enactment and implementation of the homosexual law in Nigeria since the law represents the will of the majority which detest the practice of gay marriage and civil relationships.³⁹ Most Nigerians particularly the law makers allowed their religious, cultural and traditional beliefs to becloud their psychology before the enactment of the anti-gay law. In other words, despite tribal diversities, Nigerians stood together to denounce the act of homosexuality as an incest that negates the socio-cultural notions and norms of African societies.⁴⁰ Furthermore, marriage in Africa is seen as a union between a man and a woman which brings together families, communities and ethnic groups.⁴¹ The foundation of marriage exists for various reasons amongst which are for procreation and for companionship. This means that couples should be able to reproduce. Gay marriage, due to sexual resemblance, cannot allow for procreation.⁴²

Same sex marriage is not permissible in Nigeria since it has the capability to weaken the marriage institution, the family and societal values but a novel family system is emerging across the globe from the framework of gay marriages and relationships. Homosexuality is generally unacceptable in Africa to the extent that most African leaders have denounced homosexuality as

14/03/21/opinion/molefe-a-soft-voice-on-gay-rights.html?> accessed 7 June 2018.

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Campbell Joel, 'Nigerians Circle the Wagons against West on Anti-Gay Law', (2014), *African Affairs*, Volume 98, 70–85.

⁴⁰ *Ibid.*

⁴¹ Ola, T.M, 'The Socio-Cultural Perception and Implications of Childlessness Among Men and Women in an Urban Area, Southwest, Nigeria', (2009), *Journal of Social Science*, Volume 21, Issue 3, 205-209.

⁴² *Ibid.*

depraved, unorthodox and not permissible to African culture and tradition.⁴³ For example, President Robert Mugabe of Zimbabwe asserted that homosexuality is the same as bestiality and authorised the Zimbabwean Police to raid the offices of homosexuals.⁴⁴ Also, Namibian President, San Nujoma, condemned and attacked homosexuals in a more emphatic and antagonistic manner when he said that “the Republic of Namibia does not allow homosexuality or lesbianism here. Police are ordered to arrest you, deport you and imprison you”.⁴⁵ Nujoma believes homosexuality is against God’s will and is an act that proves the presence of the Devil among humans.⁴⁶

The world is evolving daily and has become more complex but more advanced and developed in all ramification and issues that bothers on same-sex relationships are no exception especially in this contemporary era. It is pertinent to note that in as much as culture determines almost everything we do not just in Nigeria but Africa at large, caution should not be thrown to the winds when determining issues that will affect the lives of the minority to ensure justice and fairness.

Legal Framework on same Sex Marriage

The Same Sex Marriage (Prohibition) Act, 2013 passed through some hurdles before it was enacted in Nigeria. During the

⁴³ Obasola Kehinde, ‘An Ethical Perspective of Homosexuality among the African People’, (2013) <<http://www.ejbss.com/Data/Sites/1/marchissue2013vol12/ejbss-1212-13anethicalperspectiveofhomo sexuality.pdf>>, accessed 7 June 2018.

⁴⁴ Keith Boykin, “Homosexuality in Africa”, (2001) <<http://www.keithboykin.com/author/africa.html>>, 7 June 2018.

⁴⁵ *Ibid.*

⁴⁶ Obasola Kehinde, ‘An Ethical Perspective of Homosexuality among the African People’ *supra* n.43.

International Conference on HIV/AIDS (ICASA) in 2005, concerns were raised for same-sex marriage and this made the Federal Executive Council of Nigeria in 2006, to propose a same-sex marriage prohibition bill to the National Assembly for endorsement into law.⁴⁷ Despite President Obasanjo's campaign of the 2006 prohibition bill stating that homosexuality is 'unnatural, ungodly, and un-African', yet the bill was not approved.⁴⁸

Between 2008 and 2009, the same sex marriage prohibition bill was presented for deliberation at the National Assembly, there was also a public hearing on the matter but these consultations did not result in the bill being passed into law.⁴⁹ In 2011, there was public disagreement against gay practice in Nigeria and this instigated a re-visit on gay practice.⁵⁰ On 29 November 2011, the senate of Nigeria passed the Same Sex Marriage (Prohibition) bill. The same bill was approved by the House of Representatives of Nigeria on July 2, 2013 and was eventually signed into a law by the former President Goodluck Jonathan on 7 January, 2014.⁵¹ Although, the wide-ranging emotion in Nigeria was support for the law, it met with some resistance, both for its violation of gay rights, and, owing to the belief that there were more pressing matters to tackle, such as poverty and corruption. On the international scene, calls were made for its withdrawal.⁵² The paradigm of the legal

⁴⁷ Ikpechukwu, Chinedu, 'Nigeria's Fourteen-Year Sentence for gay Marriage', (2013) <<http://www.opendemocracy.net/chinedu-nigeria%E2%80%99s-fourteen-year-sentence-for-gay-marriage>> accessed 29 June, 2017.

⁴⁸ Ajibade Ijeoma, 'Nigeria: Same Sex Marriage (Prohibition) Act', (2014) *Kaleidoscope Trust Briefing*.

⁴⁹ *Ibid.*

⁵⁰ Obidimma, Emmanuel and Obidimma, Angela *supra* n.2.

⁵¹ Ajibade Ijeoma, 'Nigeria: Same Sex Marriage (Prohibition) Act' *supra* n.48.

framework on same sex relationships and marriage are discussed below;

Same Sex Marriage (Prohibition) Act, 2013

In the Act, same sex marriage means “the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship.”⁵³In affirmation, the Marriage Act⁵⁴did not define marriage, but the provisions of section 11(c) implied that marriage is ‘the union of a man and a woman to the exclusion of others, voluntarily entered into for life.’ The provisions of Matrimonial Causes Act infer same.⁵⁵In the same vein, under the common law of marriage, it has always been stated that marriage is ‘the voluntary union of one man and one woman to the exclusion of all others’, and this is confirmed in the definition given by Lord Penzance in *Hyde v Hyde*.⁵⁶

Section 1 of the Act prohibits marriage contracts or civil unions between persons of the same sex in Nigeria, irrespective of where they were contracted.⁵⁷ Thus, same-sex unions contracted by Nigerian citizens in foreign countries where such relationships are legal or of foreigners who contract such unions in their country or other countries where such unions are recognised automatically

⁵² Nsehe Mfonobong, ‘Obama fights Nigerian Anti-gay Bill; threatens to cut off aid.’ (2011).<<http://www.forbes.com/sites/mfonobongnsehe/2011/12/09/obama-fights-nigerian-anti-gay-bill-threatensto-cut-offaid/>>accessed 7 June 2018.

⁵³ Same Sex Marriage (Prohibition) Act, 2013, S. 7

⁵⁴ Marriage Act, cap 218, Laws of the Federation 1990.

⁵⁵ Matrimonial Causes Act, cap 218, Laws of the Federation 1990, S. 4.

⁵⁶ *Hyde v Hyde and Woodmansee* [1861–1873] All ER Rep 175.

⁵⁷ Same Sex Marriage (Prohibition) Act, 2013, S. 1.

become void by the provisions of the Act.⁵⁸ This is automatically problematic for gay non-Nigerians that are resident in Nigeria because even when their home country regards this union as valid, the Nigerian law will not recognise the relationship despite the presentation of a certificate to show proof.⁵⁹ The Act also bars the church, mosque and any other place of worship in Nigeria from contracting same sex unions.⁶⁰ Furthermore, the Act emphasises that only the union between a man and a woman would be recognised in Nigeria.⁶¹ It is further stipulated in the Act that no gay club, societies or organisation should be registered while their sustenance, processions and meetings are prohibited.⁶² The exhibition of same sex relationship in public directly or indirectly is also prohibited.⁶³

The punishment for anyone who enters into a same sex marriage contract or civil unions is fourteen years' imprisonment if convicted.⁶⁴ The Act further punishes any gay clubs, societies or public show of same sex amorous relationship, whether directly or indirectly; with ten years' imprisonment upon conviction.⁶⁵ Furthermore, anyone who officiates, witnesses or supports same-sex marriages or who supports gay societies is also liable to ten years' imprisonment upon conviction.⁶⁶ The requirements of the Act in Section 5 amounts to using scare techniques to deter the society from associating with people in same-sex relationships,

⁵⁸ *Ibid*, S. 1(2).

⁵⁹ *Ibid*, S. 2 (2).

⁶⁰ *Ibid*, S. 2.

⁶¹ *Ibid*, S. 3 & 7.

⁶² *Ibid*, S. 4(1).

⁶³ *Ibid*, S. 4(2).

⁶⁴ *Ibid*, S. 5(1).

⁶⁵ Same Sex Marriage (Prohibition) Act, 2013, S. 5(2).

⁶⁶ *Ibid*, S. 5(3).

whereas, gay persons exists in our society and in-fact, they could be family members, friend and even persons who share the same religious and cultural beliefs in their immediate environment.

Lastly, it is the High Court of a state or the Federal Capital Territory that has jurisdiction to entertain matters arising from the breach of the provisions of the Act.⁶⁷

The Criminal Code Act

The Criminal code,⁶⁸ in its requirements make it a felony to have carnal knowledge of any person against the order of nature;⁶⁹ or carnal knowledge of an animal;⁷⁰ or permits a male person to have carnal knowledge of him or her against the order of nature.⁷¹ The accused person, if found guilty, is liable to imprisonment for fourteen years.⁷² The Act further stipulates that any person who attempts to commit any of these offences is guilty of a felony and is liable to imprisonment for seven years; but the offender cannot be arrested without warrant.⁷³

It is also a felony for any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with 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, and is liable to imprisonment

⁶⁷ *Ibid*, S. 6.

⁶⁸ Criminal Code Act, Laws of Federation of Nigeria, 2004.

⁶⁹ *Ibid*, S. 214 (1).

⁷⁰ *Ibid*, S. 214 (2).

⁷¹ *Ibid*, S. 214 (3).

⁷² *Ibid*

⁷³ *Ibid*, S. 215.

for three years”⁷⁴ The Criminal Code strongly prohibits sex relationships between two males and completely silent on such acts between a female person with another. This points to a lacuna in the law since females also get involved in same sex marriages and civil relationships.

The Penal Code (Northern States) Federal Provisions Act of 1959

The Penal Code⁷⁵ provides that, “Whoever has carnal intercourse against the order of nature with a man, woman or an animal shall be punished with imprisonment for a term of which may extend to fourteen years and shall also be liable to fine”.⁷⁶ The penal code also stipulates that a vagabond is “any male person who knowingly lives wholly or in part on the earning of a prostitute or in any public place solicits or importunes for immoral purposes;⁷⁷ or any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession”.⁷⁸ These provisions emphatically prohibits gay rights in the Northern part of Nigeria.

Is the Same Sex (Prohibition) Act In consistent with the Principles of Human Rights?

The Constitution of the Federal Republic of Nigeria 1999 (as amended) contains several anti-discrimination protection clauses and any law that is inconsistent with these provisions is a violation of the rights guaranteed and *void abinitio*. The Constitution of Nigeria ensures the right to liberty from discrimination of whatever

⁷⁴ *Ibid*, S. 215.

⁷⁵ Penal Code, Penal Code (Northern States) Federal Provisions Act cap P3 Laws of the Federation of Nigeria 2004.

⁷⁶ *Ibid*, S. 76.

⁷⁷ *Ibid*, S. 405 (2) (d).

⁷⁸ *Ibid*, S. 405 (2) (e).

nature of all her citizens and Section 42(1) therefore provides as follows:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject.⁷⁹

In addition to the above comprehensive stipulation guaranteeing non-discrimination, section 17 under Chapter II of the Constitution entitled “FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY”⁸⁰ provides further guarantees. The section guarantees all citizens’ equivalent rights as well as other rights, including sufficient medical and health care and equal prospect in the workplace. The section provides that:

The State social order is founded on ideals of Freedom, Equality and Justice. In furtherance of the social order, every citizen shall have equality of rights, obligations and opportunities before the law; the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced. The State shall direct its policy towards ensuring that all citizens, without discrimination on any group whatsoever, have the

⁷⁹ 1999 Constitution of the Federal Republic of Nigeria, Section 42(1).

⁸⁰ *Ibid.* Section 17.

opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.⁸¹

It is asserted that the law on same sex marriage in Nigeria is in violation of the fundamental rights of the individual in so many respects. The same sex law infringes on the right to private and family life guaranteed under section 37⁸² of the Constitution. This includes the right of the individual to make a decision freely on his or her private life, and also the right to make a preference about one's life and what one wants to do with it to find accomplishment as a human being.⁸³ Furthermore, the right to freedom of thought, conscience and religion is violated by the same law but guaranteed under section 38 of the Constitution which states that:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.⁸⁴

These rights are globally ensured under the provisions of the Universal Declaration on Human Rights (the UDHR)⁸⁵ and the

⁸¹ *Ibid.* Section 17(1, 2 and 3).

⁸² *Ibid.* Section 37.

⁸³ Sessou Eburn, 'Nigerian Law is against our Fundamental Rights-Gays', (2013) *Saturday Vanguard*, June 29, 2013.

⁸⁴ *Ibid.* Section 38(1).

⁸⁵ The Universal Declaration on Human Rights, Article 12.

International Covenant on Civil and Political Rights (ICCPR).⁸⁶ Thus, gay persons are also protected by these rights, which cover their homes, correspondence, telephone and telegraphic communications.

In the paradigm of international politics, Nigeria has signed and ratified some instruments and treaties which the enactment of Same Sex (Prohibition) Act, may negate. For example, the United Nations General Assembly declares that:

Persons belong to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belong to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. Persons who belong to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties. States shall take measures to create favourable conditions to enable persons belonging to the minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.⁸⁷

⁸⁶ The International Covenant on Civil and Political Rights, Article 17.

Homosexuals living in Nigeria fall within the minorities mentioned in the UN resolution and the question to ask is are the rights of homosexuals trampled upon by the enactment of the anti-gay laws in Nigeria? Before this can be answered, let us take a closer look at the last two lines of the quotation which states that “such practices” must not violate national law and contrary to international standards. From the last provisions of the last two lines of the UN resolution, homosexuality obviously negates national law (The Same Sex (Prohibition) Act) and with this, homosexuals do not have an infringement of their rights in Nigeria.

However, Nigeria has been under tremendous pressure from the international community to overturn the law which prohibits same sex marriage in the country. The then Minister of Information, Labaran Maku, after one of the nation’s Federal Executive Council’s meetings where the President presented a memo seeking the Federal Executive Council’s endorsement of Nigeria’s Second Quota Universal Periodic Review Report (2008-2012) to the United Nations Human Rights Council stated that “the country has made substantial progress in 30 out of the 32 issues raised in the last report in 2009. That “Nigeria had continued to differ in the other two areas which include abolition of death penalty and the clamour for same-sex marriage”.⁸⁸He further stated that “while Nigeria has made substantial progress in terms of death penalty, but with relation to same-sex marriage, it still has fundamental differences

⁸⁷ United Nations General Assembly, Resolution A/RES/47/135. Article 2(1), (5) and Article 4(2), (1992) ‘Declaration on the Rights of Persons Belong to National or Ethnic, Religious and Linguistic Minorities’

⁸⁸ Olalekan Adetayo, ‘Nigeria, UN Disagree over Same-Sex Marriage, Death Penalty,’ (2009), The Punch Newspaper.

within the country and that they are trying to look into it and see what position Nigeria will take”.⁸⁹

The former British Prime Minister, Mr. David Cameron, reacting to the endorsement of the Same Sex Marriage (Prohibition) Act, told Nigeria that “Britain would not give any assistance or aid to countries that were opposed to same sex marriage”. The British High Commissioner in Nigeria, Mr. Andrew Lyod, in a closed door meeting with the Jigawa State Governor, Alhaji Sule Lamido, asked the Nigerian government to rescind its decision on punishing individuals involved in same sex marriage, adding that such a law infringes on the fundamental rights of choice and association”.⁹⁰ The question to be asked at this juncture is, has the UK endorsed the rights of its citizens who clamour for same sex marriage? Why are the UK and some other international entities advising Nigeria to have a rethink of its position on the rights of gay person in her jurisdiction? Perhaps this is a matter of international diplomacy and politics.

Section 1(3) of the Constitution provides that ‘if any other law is inconsistent with the provision of the Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void’.⁹¹ Even though the Same Sex (Prohibition) Act contradicts the 1999 Nigerian Constitution, perhaps the lawmakers in order to fortify and preserve ethics of religion, customs and traditions in Nigeria disregarded the fact that the Act should be considered *void abinitio* to the extent of its inconsistencies. The Nigerian courts have been constant in

⁸⁹ *Ibid.*

⁹⁰ David Cameron, ‘Britain Tells Nigeria to Rescind on Gay Marriage Law or Else...’, (2014) <www.gistnigeria.com> accessed March 2020.

⁹¹ Section 1(3) Constitution of the Federal Republic of Nigeria 1999.

affirming that any law that is not consistent with the provisions of the Constitution is void and ineffective, as was held in *Cadbury Nigeria Plc v F.B. I.R.*,⁹² and *Lafia Local Govt. v. Gov. of Nasarawa State*.⁹³ The Judiciary has followed the steps of the Lawmakers and have refused to declare the Same Sex (Prohibition) Act void since it negates the requirements of the Constitution. It is opined that the courts followed suit so as to guard and secure religion and tradition as permissible within the Nigerian society.

Recommendations

Nigerian citizens are advised to be tolerant of homosexuals that live amongst us. Once they are detected, the next line of action should not be to judge, condemn, maim or kill them, but to be handed over to law enforcement agents to perform their own duties there from. Since it is glaring that no matter the cultural, religious and legal constraints or limitations, gay persons are constantly part of the Nigerian society. The provisions of the Same Sex Marriage (Prohibition) Act, 2013 should form part of curriculum right from primary and secondary schools down to the tertiary institutions. This will create awareness among students and also enlighten them on issues that border on same sex activities particularly the legal framework. In order to continuously protect religion and culture in terms of same sex marriages and unions, religious institutions are to constantly preach against it among their followers while the traditional rulers are enjoined to do same so as to safeguard the culture of various ethnic groups in Nigeria, thereby upholding the relevant law.

Conclusion

⁹² *Cadbury Nigeria Plc v F.B. I.R.* (2010) 2 NWLR. (pt. 1179) 561.

⁹³ *Lafia Local Govt. v. Gov. of Nasarawa State* (2012) 17 NWLR (Pt. 1328) 94.

It is inferred from the findings of this research that the influence of culture and religion is the pivot of the decision to enact Same Sex Marriage (Prohibition) Act, 2013 in Nigeria. Same-Sex marriage as marriage between two persons of the same gender identity is a wind that is blowing across the globe and obviously, it has elicited deep and often extreme reactions in Nigeria and beyond. As many as over fifteen countries have already fully legalised it and the process of doing so in many other countries is presently going on. While that is the case, it will only be a denial of the truth if it is assumed that there are no people with same-sex preferences in Nigeria. Such people do feel marginalized, threatened, discriminated against or their fundamental rights to freedom of thought and conscience, freedom of association and so on are also being denied. Despite all of these, the Nigerian government has enacted the Same Sex Marriage (Prohibition) Act which is against any form of relationship between individuals of the same gender make-up to silence such persons within the Nigerian jurisdiction due to established law, religion and culture across the country. The article concludes that in as much as homosexuality is not only impermissible but also illegal in Nigeria due to the influence of religion and culture, it does appear that it is not likely that there will be an amendment by the law makers on the Same Sex Marriage (Prohibition) Act towards legalizing same sex unions in the farthest future.