

AN APPRAISAL OF GAY MARRIAGE UNDER THE NIGERIAN LAW*

Abstract

Gay marriage is a global phenomenon. Same-sex marriage also known as gay marriage is the marriage of two people of the same legal sex. In contrast to the traditional definition or concept of marriage as the voluntary union for life between one man and one woman to the exclusion of all others same sex marriage or gay marriage is marriage between two persons of the same gender. Same sex relationships and marriage is a trend which is now spreading across the globe as the number of countries that support it increases as time goes on. But Nigeria appears to be counted outside this growing world community as the Nigerian National Assembly in 2013, passed a law prohibiting same sex marriages in any form. The aim of the study was to critically examine gay marriage and the legal import and make to compare with other foreign jurisdictions. The research methodology was doctrinal approach, using expository and analytical research design. The main sources of data collection were various legal literatures, both from the physical library and the e-library. The study observed that Same-sex relationships and marriage is a trend which is now spreading across the globe as the number of countries that support it increases but Nigeria appears to be counted outside this growing world community as the Nigerian National Assembly in 2013, passed a law prohibiting same sex marriages in any form. However, it is recommended among others that on the basis of the relationship between law and morality it is advocated that Nigeria should not legalize same sex or gay marriages in the country regardless of what the practice is in other jurisdictions.

Keywords: Gay, Legal, Marriage, Rights, Same Sex marriage.

1 Introduction

Gay marriage is a global phenomenon but it is controversial and relatively new in Nigeria. There is no law in Nigeria according recognition to that relationship which is still abhorred by the majority of members of the society mainly on account of their cultural pattern and religious inclinations.¹ Same-sex marriage also known as gay marriage is the marriage of two people of the same legal sex. In contrast to the traditional definition² or concept of marriage as the voluntary union for life between one man and one woman to the exclusion of all others,³ same sex marriage or gay marriage is marriage between two persons of the same gender. Same sex relationships and marriage is a trend which is now spreading across the globe as the number of countries that support it increases as time goes on. But Nigeria appears to be counted outside this growing world community as the Nigerian National Assembly in 2013, passed a law prohibiting same sex marriages in any form.⁴ This paper examines the statute of same sex marriage relation in Nigeria by analyzing provisions of various laws including the Nigerian Constitution. The paper also discusses the content of the law passed by the National Assembly prohibiting same gay or same sex marriage and compares it with the practice in other jurisdictions. The paper concludes with the view that the law, strictly speaking, is inconsistent with the fundamental rights guaranteed by the constitution.⁵ However, it is recommended among others that on the basis of the relationship between law and morality it is advocated that Nigeria should not legalize same sex or gay marriages in the country regardless of what the practice is in other jurisdictions.

2. Gay Marriage in History

The ancient reference to marriage between same-sex couples appears in the Sifra (the Halakhic midrash to the book of Leviticus) which was written in the 3rd century CE. The Book of Leviticus prohibited homosexual relations; and the Hebrews were warned not to 'follow the acts of the land of Egypt or the acts of the land of Canaan' (Lev. 18:22, 20:13). The Sifra clarifies what these ambiguous 'acts' were, and that they included marriage between same-sex couples: 'A man would marry a man and a woman a woman, a man would marry a woman and her daughter, and a woman would be married to two men. What is arguably the first historical mention of the performance of marriages between same-sex couples occurred during the early Roman Empire

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¹ E Sessou, Nigerian Law is against our Fundamental Rights-Gays, Saturday Vanguard 29 June 2013

² Traditional definition used in the loose sense.

³ *HYDE vs. HYDE* (1866) LR 1 P&D 130.

⁴ Same Sex Marriage (Prohibition) Act (SSMPA), 2013

⁵ Section 39(1) 1999 Constitution of the Federal Republic of Nigeria (as amended).

according to controversial⁶ historian John Eastburn Boswell. Child emperor Elagabalus referred to his chariot driver, a blond slave from Caria named Hierocles, as his husband.⁷ He also married an athlete named Zoticus in a lavish public ceremony in Rome amidst the rejoicings of the citizens. According to Craig A. Williams, some Romans as early as the first century clearly did participate in formal ceremonies in which two males were married. These marriages were seen as atypical. Williams writes that ‘a marriage between two fully gendered men’ was inconceivable; if two males were joined together, one of them had to be ‘the woman’.⁸ The first Roman emperor to have married a man was Nero, who is reported to have married two other males on different occasions. The first was with one of Nero's own freedmen, Pythagoras, with whom Nero took the role of the bride.⁹ Later, as a groom, Nero married Sporus, a young boy, to replace his wife Poppaea Sabina following her death, and married him in a very public ceremony with all the solemnities of matrimony. Contemporary historians variously trace the beginning of the modern movement in support of same-sex marriage to anywhere from around the 1980s to the 1990s. In United States of America, same-sex marriage became an official request of gay rights movement after the Second National March on Washington for Lesbian and Gay Rights in 1987.¹⁰ In 1989, Denmark became the first country to legally recognize a relationship for same-sex couples, establishing registered partnerships, which gave those in same-sex relationships ‘most rights of married heterosexuals, but not the right to adopt or obtain joint custody of a child.’¹¹ In 2001, the continental Netherlands became the first country to broaden marriage laws to include same-sex couples. Since then, same-sex marriage has been established by law in 31 other countries, including most of the Americas and Western Europe. Yet its spread has been uneven; South Africa is the only country in Africa to take the step and Taiwan is the only one in Asia.¹²

3. The Legal Position of Gay/ Same-Sex Marriage in Nigeria

Criminalization of Same Sex Sexual Conduct

Chapter 21 of the Nigerian Criminal Code criminalizes certain sexual conducts and terms them, ‘Offenses against Morality’. Sections 214 and 215 of this Chapter make ‘carnal knowledge of any person against the order of nature’ a felony punishable by fourteen years imprisonment.¹³ This is the language traditionally used to penalize same-sex sexual activity. Additionally, Section 217 of the Criminal Code states as follows:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures a 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.

Punishment can be even more severe in Nigeria’s twelve northern states, which have adopted Sharia law. In those states, adults convicted of engaging in same-sex sexual activity may be subject to execution by stoning.¹⁴

Sharia Law and Criminalization of Same-Sex Intimacy

In Northern Nigeria, where Sharia law is implemented in 12 states, consenting homosexual conduct between two adults is punishable. For example, the Zamfara Sharia Penal Code stipulates that: ‘Art. 130: Sodomy (Liwat) defined it thus;

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 threats 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.

Art. 131: Punishment for Sodomy

⁶Shaw criticizes Boswell's methodology and conclusions as disingenuous Shaw, Brent (July 1994). ‘A Groom of One’s Own?’ *The New Republic*. Pp. 43–48. Archived from the original on 7 May 2006. Retrieved 20 August 2022.

⁷Bunson, M., *Encyclopedia of the Roman Empire*, Infobase Publishing, 2009, p. 259.

⁸Williams, CA., *Roman Homosexuality: Second Edition*, Oxford University Press, 2009, pp. 279–284.

⁹ Ibid.

¹⁰<<https://www.harvardmagazine.com/2013/03/how-same-sex-marriage-came-to-be>> Retrieved 20 August 2022.

¹¹Sheila Rule, ‘Rights for Gay Couples in Denmark’. *New York Times* (2 October 1989) <<https://www.nytimes.com/1989/10/02/world/rights-for-gay-couples-in-denmark.html>> Retrieved 20 August 2022.

¹²D. Crary and M. Corder, ‘The Dutch went First in 2001; Who has same-sex marriage now?’ <https://apnews.com/article/europe-africa-netherlands-job-cohen-western-europe-e08b053af367028737c9c41c492cc568> Retrieved 20 August 2022.

¹³ Criminal Code Act (1990) Cap. 2, Ss. 214-15.

¹⁴Bureau of Democracy, Human Rights, and Labor, 2008 Human Rights Report: Nigeria, U.S. DEPT. OF STATE <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm> Retrieved 20 August 2022.

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 the term of one year; or
- (b) if married with stoning to death (rajm).

Art. 134: Lesbianism (Sihaq) defined

Whoever being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of Lesbianism.

Art. 135: Punishment for Lesbianism

Whoever commits the offence of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months.

Same Sex Marriage (Prohibition) Act 2013

The Same Sex Marriage (Prohibition) Act (SSMPA), 2013, was enacted by Nigeria's National Assembly in December 2013 and signed into law by the President on the 7th day of January, 2014. Although the law's title refers to 'Same Sex Marriage', the scope of the law is much broader. It includes same sex relations. By the provisions of this Act, not only is the act of same sex marriage prohibited by the law, the witnessing of such is also prohibited. The explanatory memorandum of the Act¹⁵ states as follows: 'This Act prohibits a marriage contract or civil union entered into between persons of same sex, and provides penalties for the solemnization and witnessing of same thereof.' The Act cited as Same Sex Marriage (Prohibition) Act 2013 (SSMPA) contains eight (8) sections. Section 1 clearly prohibits marriage or civil unions between persons of the same sex. The section clearly provides that such marriages or unions will not be recognized in Nigeria nor shall they be entitled to the benefits of a heterosexual marriage which the Act describes as a valid marriage. The section finally declares a marriage certificate relating to such prohibitive unions derived from a foreign country void. Section 1(2) provides *inter alia*: 'A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by virtue of the certificate shall not be enforced by any court of law'. Section 2 of the Act prohibits the solemnization of such unions in any place of worship in Nigeria. Under the Nigerian Law, even where such marriage has taken place and a certificate issued to that effect, such certificate issued in such a marriage shall not be valid in Nigeria; as only marriages contracted between a man and a woman shall be recognized as valid in Nigeria.¹⁶ From the provision of section 2, it is clearly implied that if two persons A and B conduct a marriage in a country where same sex marriage is recognized and a certificate issued to that effect, it then means that in Nigeria, the said certificate will not be recognized irrespective of the fact that it was recognized in the country where the marriage was celebrated. Section 4 of the Act relates to the registration of homosexual clubs and societies. The section prohibits the registration of gay clubs, societies and organizations. It further prohibits the sustenance, processions and meetings of such clubs and societies. The public show of same sex amorous relationship either directly or indirectly is equally prohibited¹⁷. It is important to point out at this juncture, that the section is spuriously silent on the private show of amorous relationship either directly or indirectly.

The law prescribes punishment for persons who enter into a same sex marriage contract or civil union. Such a person is said to have committed an offence and liable on conviction to a term of 14 years imprisonment.¹⁸ The law goes further to prescribe punishment for person who registers, operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same sex amorous relationship in Nigeria.¹⁹ The implication of this provision is that such businesses are illegal in nature and as such, the Corporate Affairs Commission cannot register such businesses in Nigeria. Again, even if Mr. A from Costa Rica is gay, he cannot be allowed to display such amorous show in Nigeria. In the same vein, person or group of persons who administers, witnesses, abets or aids the solemnization of a 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 10 years imprisonment.²⁰ Where a person is in

¹⁵ SSMPA, 2013

¹⁶ Sections 2(2) & 3 SSMPA

¹⁷ Section 4(2) SSMPA

¹⁸ Section 5(1) SSMPA.

¹⁹ Section 5(2) SSMPA- 10 years imprisonment

²⁰ Section 5(3) SSMPA

breach of the provisions of the SSMPA, the court seized with the jurisdiction to hear the matter is the High Court of a State or the Federal Capital Territory.²¹

It is observed that the Act is also silent on the many other variants of Gender and Sexual variations that form the LGBTQ+ community. A transgender person for instance, who seeks transition in or outside Nigeria, the law is completely silent on this. The Law is equally silent on the status of a transgender person who having transitioned seeks to marry 'heterosexually' in accordance with his/her acquired sex or same sex with the acquired sex. In such circumstances, which one of the above will come within the purview of the Act?

Perspectives on the Criminalization of Gay/Same Sex Marriage in Nigeria Particularly in the Light of the SSMPA 2013

Domestic Human Rights Perspective

The justification for same sex marriage (SSM) and the LGBTQ+ causes have been largely rooted in Human Rights. The first concern the SSMPA creates is as it relates to the right to privacy as guaranteed by the constitution²² as well as other international treaties that Nigeria is a party to. There are several aspects to the right of privacy which may include the privacy of one's personal information, one's body, personal space, and one's communications.²³ People who argue against the justification of the SSMPA are of the view that the law violates people's right to privacy. The argument may however fail as it remains unsettled how private the exercise of the liberty of gender and sexual orientation are. For instance, in the case where Tran's women²⁴ now insist to be enlisted in sporting competition against biological or cisgender female while retaining their biological advantage as biological men already moves their gender issue out of private domain into a public sphere and a host of other issues.²⁵ Be that as it may, the right to privacy is not unfettered. Section 45(1)(a) CFRN, 1999 empowers the government to make laws that may curtail same in the interest of defence, public safety, public order, public morality or public health. Another human right issue raised against the SSMPA is the right to freedom of association²⁶ denied the LGBTQ+ (Lesbians, Gay, Bisexual, Transgender, Queer, etc) community under Section 4 of SSMPA. This argument is however spurious as the law cannot by any stretch of imagination allow meetings upon illegality that would amount to blowing hot and cold.²⁷ Further still, Section 40 is also fettered by Section 45(1)(a) CFRN, 1999 which empowers the government to make laws that may curtail same in the interest of defense, public safety, public order, public morality or public health.

Finally, it is equally argued that they enjoy the right against discrimination as provided under section 42 CFRN which protects every citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion from being discriminated against by reason only that he is such a person.²⁸ The proponents of such arguments assume that the use of 'sex' in this context connotes sexual orientation. With respect however, the word as used connotes sex as in male or female. The mind of the drafters of the constitution was to eliminate gender discrimination as it is prevalent in Nigeria even in those times. The LGBTQ+ with respect was not an issue in this country then and could therefore not have elicited such constitutional protection while in the same vein criminalizing same in the Criminal and Penal Codes.²⁹ This would be tantamount to breathing hot and cold.

International Human Rights Perspective

In response to the enactment of the SSMPA, The African Commission's Special Rapporteur on Human Rights Defenders in Africa - Mrs. Reine Alapini- Gansou, issued a press release noting that she 'is deeply concerned about the consequences this law may have on sexual minorities who are already vulnerable as a result of social

²¹ Section 6 SSMPA

²² Section 37, CFRN 199

²³ Charles Raab and Benjamin Goold, Protecting Information Privacy <<https://www.equalityhumanrights.com/sites/default/files/research-report-69-protecting-information-privacy.pdf>> Accessed 20 August 2022.

²⁴ That is, a man who transitioned into a woman by aid of medical technology.

²⁵ Andrea Jones, Males Don't Belong in Women's Sports—Even If They Don't Always Win <<https://www.heritage.org/gender/commentary/males-dont-belong-womens-sports-even-if-they-dont-always-win>> accessed 20 August 2022

²⁶ Section 40, CFRN 1999

²⁷ *Ijale v Ijale* (2018) LPELR-46637(CA); *Luke Okoro & Ors v Hilary Egbuoh & Ors* (S.C) 395/2001; *Eshwarappa v The Special Land Acquisition Officer* MFA8200/2015.

²⁸ Navanethem Pillay, 'UN Human Rights Chief Denounces new Anti-Homosexuality Law in Nigeria,' January 14, 2014 <<http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=14169&LangID=E#sthash.VWY5ccuC.dpuf>> Accessed 18 August, 2022.

²⁹ *Major Bello Magaji v The Nigerian Army* [2008] LPERL-1814(SC).

prejudice.³⁰ Further stating: ‘The Special Rapporteur is concerned by some provisions of the Act, in particular, Sections 4(1) and 5(2) which prohibit and provide for penalties against defenders of the rights of lesbian, gay, bisexual and transgender (LGBT) people. These provisions undermine the work of human rights defenders and are against any public debate on this crucial issue.’ The enactment of the SSMPA also elicited concern from the international community, including the United Nations and the African Commission, about its potential impact on human rights. On January 14, 2014, former United Nations High Commissioner for Human Rights, Navanethem Pillay, called the SSMPA a ‘draconian new law’ that ‘makes an already bad situation worse’³¹: Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights ... rights to privacy and nondiscrimination, rights to freedom of expression, association and assembly, rights to freedom from arbitrary arrest and detention: this law undermines all of them. Again, Former UN High Commissioner Navi Pillay predicted the law risked ‘reinforcing existing prejudices towards members of the LGBT community and may provoke an upsurge in violence and discrimination.’ At the same time, the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) warned that the SSMPA would impede access to HIV services for LGBT people in Nigeria.³² While examining the ICCPR (International Covenant on Civil and Political Rights), the following should be noted: Firstly, Article 6 of the ICCPR proclaims that, ‘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.’³³ Article 7 declares that nobody can be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment.’³⁴ The Human Rights Committee’s General Comment No. 20 established that the purpose of the prohibition against torture and cruel, inhuman or degrading treatment is to ‘protect both the dignity and the physical and mental integrity of the individual.’³⁵ Between December 2017 and November 2018 civil society organizations monitoring violations on grounds of sexual orientation, gender identity, and gender expression reported 15 cases of torture of individuals based on their real or perceived sexual orientation, gender identity or expression were reported along with 38 cases of assault and battery, 17 cases of threats to life, and 4 cases of murder.³⁶

Secondly, Article 9 of the ICCPR protects the right to liberty and to the security of the person. Specifically, it states that ‘No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’³⁷ Arbitrary arrests and unlawful detentions are perpetrated by state actors and non-state actors and are often based on one’s perceived sexual orientation.³⁸ Most times, arrests are based on one’s sexual orientation because a lot of individuals have limited knowledge on gender identity.³⁹ However, anyone who is expressing gender identity that is non-conforming to the society’s expectation is still a target.⁴⁰ The number of cases of arbitrary arrests and unlawful detentions of people based on their real or perceived sexual orientation, gender identity, or gender expression reported to human rights organizations between December 2017 and November 2018 was 30.⁴¹ Actions by non-state actors are further validated by the behavior of state actors, specifically law enforcement, who also extort people based on their sexual orientation, gender identity, or gender expression by evoking fear

³⁰ Special Rapporteur on Human Rights Defenders in Africa, Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria, 5 Feb. 2014, available at <http://www.achpr.org/press/2014/02/d190/>

³¹ Ibid

³² UNAIDS and the Global Fund Express Deep Concern about the Impact of a New Law Affecting the UNAIDS Response and Human Rights of LGBT People in Nigeria,’ UNAIDS press release, January 14, 2014 <http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2014/january/20140114nigeria> Accessed 19 August 2022.

³³ Article VI, International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

³⁴ Article VII, International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)

³⁵ Human Rights Committee, Gen. Comment 20, Art 7 (Forty-fourth session, 1992), Compilation of Gen. Comments and Gen. Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) available at <http://www1.umn.edu/humanrts/gencomm/hrcom20>

³⁶ The Initiative for Equal Rights, Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria, 2018

³⁷ Article IX, International Covenant on Civil and Political Rights; opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

³⁸ Mx. Emmanuella David-ette, TIP for Human Rights in Nigeria (THRIN)

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ The Initiative for Equal Rights, Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria, 2018

of legal reprisal.⁴² People who have been wrongfully arrested do not report these incidents for fear of possible backlash and social stigma.⁴³

Thirdly, Article 2 and Article 3 mandate that ‘States Parties take all necessary steps to enable every person to enjoy’ all individual rights recognized in the Covenant. This means that States must take all steps necessary ‘to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.’⁴⁴ Nigeria’s patriarchal system of society fails to recognize women’s sexuality and fosters a culture of silence on issues that affect them.⁴⁵ Many women in Nigeria marry men to hide the fact that they are lesbian to avoid persecution.⁴⁶ This has led to the normalization of violence both gender-based and otherwise against women.⁴⁷ Another factor is the prevalence of backlash both publicly and privately on women.⁴⁸ Reporting violations is therefore low, and in some cases, non-existent, which continues to encourage perpetrators and the suppression of women.⁴⁹

Nigeria fails to fulfill its obligations under Article 3 by allowing crimes committed against women and transgender women on the basis of their sexual orientation and gender identity, simply because of their sexual orientation. One particularly heinous crime prevalent in Nigeria is ‘Corrective rape.’ Former UN High Commissioner for Human Rights, Navi Pillay, stated that, ‘Corrective rape commonly combines a fundamental lack of respect for women, often amounting to misogyny, with deeply-entrenched homophobia.’⁵⁰ ‘Corrective rape’ is an extreme crime that causes irreparable physical and psychological harm. Violence is a common response to women’s inability to pursue heterosexual relationships and this violence is many times meted out through corrective rape.⁵¹ Violence against lesbian women is prevalent in Nigeria and the state is unresponsive.⁵² Many are afraid to report sexual crimes committed against them for fear that the police will perpetuate the abuse or humiliate them.⁵³ Women’s access to justice is often impeded by insufficient budget allocations for legal aid, alleged corruption and stereotyping within the judiciary.⁵⁴ The situation is particularly serious in the Northern part of the country, where Sharia law is adopted. In northern Nigeria there is a lack of civil societies that women can report violations to. Further, there are multiple layers of discrimination in these cases. Women who are sexual minorities face discrimination for being a woman as well as discrimination related to their sexual orientation, gender identity, and gender expression. These multiple layers of discrimination make it extremely challenging to find out about these cases.

Again, Article 2 of the ICCPR provides that ‘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,’ including sex or other status.⁵⁵ Similarly, Article 26 prohibits discrimination on any ground, including sex or other status. It declares that all persons are ‘equal before the law and are entitled without any discrimination to the equal protection of the law.’ In 1994, the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of their sexual orientation in *Toonen v Australia*.⁵⁶ This position is reflected in later decisions of the Committee.⁵⁷ Not only

⁴² Ibid.

⁴³ Ibid.

⁴⁴ General Comment No. 28.

⁴⁵ (n, 40)

⁴⁶ Telephone Interview with Hope Alive Health Awareness Initiative (Apr. 4, 2019): Human Rights Situation for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Sexual Rights in Nigeria Report presented to the UN Human Rights Committee 126th Session July 1 to July 26 of 201.

⁴⁷ (n, 40)

⁴⁸ (n, 40)

⁴⁹ (n, 40)

⁵⁰ Pillay Navi, ‘*The shocking reality of homophobic rape*’ in *The Asian Age*, June 20, 2011.

⁵¹ Keren Lehavot and Tracy L. Simpson, *Incorporating Lesbian and Bisexual Women into Women Veterans Health Priorities*, June 27, 2013

⁵² The Initiative for Equal Rights, *Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria*, 2018

⁵³ Ibid.

⁵⁴ Committee on the Elimination of Discrimination against Women, *Concluding Observations: Nigeria*, para. 13, U.N. Doc.CEDAW/C/NGA/CO/7-8 (2017)

⁵⁵ Article II, International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar.23, 1976).

⁵⁶ Communication No. 488/1992 (CCPR/C/50/D/488/1992).

⁵⁷ See, for example, *YOUNG v. AUSTRALIA*, Communication No. 941/2000 (CCPR/C/78/D/941/2000), para. 10.4; *X v. COLOMBIA*, Communication No. 1361/2005 (CCPR/C/89/D/1361/2005), para. 9; and *Concluding Observations on Mexico* (CCPR/C/MEX/CO/5) para. 21 and *Uzbekistan* (CCPR/C/UZB/CO/3), para. 22.

does Nigeria fail to protect the rights to non-discrimination and equality, it actively promotes the violation of these rights. As mentioned above, provisions of Nigerian criminal law discriminate against sexual minorities and violate the ICCPR. Further, by contributing to a pervasive climate of homophobia, these laws undermine Nigeria's obligation to protect, respect and fulfill human rights of all individuals under its jurisdiction. Thus, rather than adopting legislative or other measures to give effect to the ICCPR rights to equality and non-discrimination, as required by Article 2 of the Convention, Nigeria has adopted legislation that is overtly discriminatory against sexual minorities. These criminal provisions fan the flames of hatred and contempt.

These criminal provisions deny individuals the equal protection of the law on grounds of their real or perceived sexual orientation or gender identity for the additional reason that they discourage the reporting of violence and other crimes and they make these individuals vulnerable to extortion and blackmail. Impunity is one of the driving forces of the continued violation of people based on their sexual orientation, gender identity, or gender expression in Nigeria. Sexual minorities find it extremely difficult to approach relevant government agencies for redress, for fear of stigma, more violence and discrimination. This is in direct contravention of Article 26 of the ICCPR, which provides that everyone is equal before the law and everyone must enjoy the same level of protection under the law. The existence of discriminatory laws provides an atmosphere where violations thrive. It creates a sense of impunity in perpetrators and fear in victims. It is common place for people to prey on people based on their sexual orientation, gender identity, or gender expression, often blackmailing and extorting money from them while leaving them in a state of constant fear and hopelessness. Religious and traditional sentiments, discriminatory laws and a hostile social environment have instilled fear in these people, leaving them with a life plagued by limited access to justice.⁵⁸ LGBT individuals are often reluctant to take legal actions against police violations as this could further make them visible and expose them to stigma and discrimination.⁵⁹ This discrimination often extends to their family and friends and continues to breed a climate of fear and uncertainty.⁶⁰ The direct breach of individual rights without proper restitution often leaves a negative impact on people.⁶¹

Fourthly, Articles 19, 21, and 22 of the ICCPR respectively guarantee the rights to freedom of expression, assembly, and association. Article 19(1) states that everyone has the right to 'hold opinions without interference.' Article 21 states that 'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law.' Article 22 states: 'Everyone shall have the right to freedom of association with others.' Individuals in Nigeria are denied freedom of association and assembly based on their sexual orientation, gender identity, or gender expression by Nigeria's SSMPA. Under this law, 'the Registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited.' Participation in such organizations is criminalized: 'A person, who registers, operates or participates in gay clubs, societies and organization . . . commits an offence and is liable on conviction to a term of 10 years imprisonment.'

Additionally, 'a person or group of persons who 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 10 years imprisonment.' These provisions criminalize and impose severe penalties for activities that must be protected under the ICCPR. This law often affects transgender individuals within Nigeria who would love to express themselves, but for fear of being misidentified as having what Nigeria considers an unacceptable sexual orientation, their expression becomes hindered.⁶² Further, many LGBT individuals believe that transgender individuals who are expressive of their gender identity should not be allowed to come near them for fear of being outed.⁶³ The Human Rights Committee has consistently promoted these rights for all in cases concerning sexual orientation, gender identity, and gender expression. For example, Irina Fedotova claimed to be a victim of a violation by the Russian Federation of her rights under Article 19 and Article 26 of the ICCPR.⁶⁴ The author displayed posters that declared 'Homosexuality is normal' and 'I am proud of my homosexuality' near a secondary school building in Ryazan. Fedotova was stopped by police and ordered to pay a fine of 1'500 Russian roubles. Fedotova brought a complaint to the Human Rights Committee, which concluded that the conviction of an administrative offence for 'propaganda of homosexuality among minors' on

⁵⁸ The Initiative for Equal Rights, *Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria*, 2018

⁵⁹ The Initiative for Equal Rights, *Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria*, 2018

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Mx. Emmanuella David-ette, TIP for Human Rights in Nigeria (THRIN)

⁶³ Ibid.

⁶⁴ *Irina Fedotova Vs. Russian Federation*, Communication No. 1932/2010, U.N. Doc. Ccpr/C/106/D/1932/2010 (2012).

the basis of the ambiguous and discriminatory section 3.10 of the Ryazan Region Law, amounted to a violation of Fedotova's rights under article 19, paragraph 2, read in conjunction with Article 26 of the Covenant.

Similarly, on 16 December 2009, Sergei Androsenko, together with other activists, handed a petition to representatives of the embassy of the Islamic Republic of Iran in Minsk calling for an end to punishment of homosexuals in that country.⁶⁵ After the petition was delivered, the author, together with others, held a peaceful assembly (demonstration) during which he held up a poster that read 'Stop killings of gays in Iran.' In about 15 minutes, the author was apprehended by the police and taken to the Department of Internal Affairs of the Soviet District, where he was charged with an administrative offence under article 23.34, paragraph 2, of the Code of Administrative Offences of Belarus. The Committee concluded that Belarus violated Androsenko's rights under Articles 19 and 21 of the ICCPR.

From 2006 to 2008, Nikolai Alekseev, a homosexual and a human rights activist, together with other activists, tried to organize a number of peaceful assemblies (gay pride marches) in Moscow, but they were all banned by the municipal authorities.⁶⁶ Alekseev filed a complaint with the Human Rights Committee, asserting that the Russia Federation violated his right to peaceful assembly as protected by Article 21 of the ICCPR. In 2013, the Committee decided in Alekseev's favor, stating that the right of peaceful assembly, as guaranteed under Article 21 of the ICCPR, 'is essential for the public expression of a person's views and opinions, and indispensable in a democratic society.'

Fifthly, Article 17(1) ICCPR states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honor and reputation.' Moreover, Article 17(2) guarantees this right as against private individuals and imposes a duty on the state 'to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks.' Nigeria's laws criminalizing same-sex conduct violate the right to privacy under the HRC's jurisprudence as established in *Toonen v Australia*⁶⁷. Denial of status of transgender people, including, but not limited to, deprivation of the right to change name and sex, is a violation of the right to privacy. Similarly, the Human Rights Committee decided in favor of a female transgender in Australia who claimed that the refusal to change her sex on her birth certificate, unless she divorced from her spouse, constituted a direct arbitrary interference with her right to privacy under article 17 of the Covenant.⁶⁸ Moreover, Article 17 requires that states take positive measures to protect the right to privacy. Nigeria does not allow transgender people to rectify their legal name and gender markers on official documents. Transgender persons must use official documents that do not reflect their identity and are therefore exposed to great discrimination and obstacles to their ability to access services essential to the realization of fundamental rights. Of course marriage certificates that fall under the right to family life cannot be issued to persons who have conducted gay marriage.

Morality and the Law- The Moral Perspective

While ethics/morality is distinct from the law, the law is normally tested against ethics/moral parameters to know whether the law is fair, good or just.⁶⁹ It is in the light of this that the constitution empowers the state to make laws that protect the morality of the citizenry even at the expense of human rights in certain circumstances under Section 45(1) (a) of the CFRN 1999. Section 45(1)(a) CFRN 1999 provides as follows: 'Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) In the interest of defense, public safety, public order, public morality or public health, or...' That the moral value system of a people needs protection was pronounced per Viscount Simonds in the celebrated case of *SHAW v DPP*⁷⁰ where the appellant had published a 'ladies directory' which listed contact details of prostitutes, the services they offered and nude pictures. He was convicted of conspiracy to corrupt public morals, living on the earnings of prostitution and an offence under the Obscene Publications Act 1959. The court held *inter alia*:

In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state and it is their duty to guard against attacks which may be more insidious because they are novel and unprepared for.

⁶⁵ *Sergei Androsenko Vs. Belarus*, Communication No. 2092/2011, U.N. Doc. Ccpr/C/116/D/2092/2011 (2016).

⁶⁶ *Nikolai Alekseev Vs. Russian Federation*, Communication No. 1873/2009, U.N. Doc. Ccpr/C/109/D/1873/2009 (2013).

⁶⁷ (n, 55)

⁶⁸ *G. v. Australia*, Communication No. 2172/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (2017).

⁶⁹ *Washington v. Glucksberg* 521 U.S. 702, 720-21 (1992)

⁷⁰ 1962 AC 220.

Medical Perspective

Medicine is scientific and as such, does not work with sentiments or beliefs but with facts that are proven empirically. There are many illnesses that are associated with same sex relationships. Longmore and others states that Kaposi's sarcoma, a cancer of connective tissues of the body mostly affects homosexual or bisexual men.⁷¹ Also, Baliga avers that Herpes Zoster Syndrome (Shingles), a painful blistering skin eruption occurs at least 7 times more frequently with homosexual men.⁷² Hepatitis C, a virus that causes severe liver damage is higher among homosexuals compared to their heterosexual counterparts.⁷³ Furthermore, Peschke asserts that 'homosexuals also are at a high risk group for AIDS.⁷⁴ Contagion is caused primarily by anal intercourse'. Other organisms causing infections of the stomach and intestines which manifests as diarrhea such as entamoeba histolytica, shigella specie, campylobacter specie and cryptosporidium specie have all been associated with homosexual men. The Same Sex Marriage (Prohibition) Act is therefore to the best interest of Nigerians medically as it tends to deter same sex relationships and its consequent medical hazards.

4. Conclusion and Recommendations

A lot of things may be said about the SSMPA, but it remains undisputable that the Act is a reflection of the moral value system of Nigeria. This truth was demonstrated in the polls conducted by NOI Polls⁷⁵ in 2015 in conjunction with The Initiative for Equal Rights (TIERs).⁷⁶ According to the poll, 87 percent of Nigerians support the SSMPA and the punitive measures provided under the Act. 81 percent believed homosexuals should not have equal rights which would directly relate to the LGBTQ+ relations not having the same status with heterosexual relationships or marriage. 90 percent also believed lesbian, gay, and bisexual people should not be allowed to hold LGBTQ meetings or establish LGBTQ organizations. Against this backdrop, it would be apt to say that the SSMPA is in line with the Nigerian *volkgeist* and therefore justified from the historical school praxis.⁷⁷ Nigeria should not allow gay/same sex marriages simply because same is obtainable in other jurisdictions. The law of our land should be a representation of the principles and ethics that guide us and according to the above named poll; the citizens of Nigeria have shown their attitude towards the said same sex/gay marriage. For example, in Australia, Australians voted in favor of legalizing same-sex marriage, by a 62% to 38% margin, in a non-binding, nationwide referendum before the law came to be in their land. Again, more than six-in-ten Irish voters (62%) voted 'yes' to amend the Constitution of Ireland to say that 'marriage may be contracted in accordance with law by two persons without distinction as to their sex. The measure won approval by a 77-44 margin in New Zealand's unicameral legislature.

That being said, it is recommended that:

- a. Even though same sex/gay marriages are unacceptable in Nigeria, persons categorized in the LGBTQ+ group are still humans and should be protected by law from discrimination that would lead to torture or inhumane treatment and the likes.
- b. That the SSMPA be amended to capture the face of emerging multiplicity of gender and sexual orientations because the absence of this, may defeat, the mischief the Act could have cured.
- c. Gay marriage is against the natural law of marriage by God, no country should legalize gay marriage knowing fully well that family is the smallest unit in the society. If same sex is legalized what it denotes is complete failure of the marriage structure, hence a total disorder in the society,
- d. There is need for restructuring and reorientation of the law enforcement agents on the need to protect human rights while discharging their official duties.
- e. The Same Sex Marriage Prohibition Act should be amended to stipulate the test to grounding an allegation of same sex under the law to avoid overzealous enforcement agencies using the law as tool to abuse the rights of Nigeria.

⁷¹ Longmore, M., Wilkinson, I.B., Davidson, E.H., Foulkes, A. & Mafi, A.R, *Oxford Handbook of Clinical Medicine 8th ed.* Italy: L.E.G.O. 2010

⁷² Baliga, R.R, *250 Cases in Clinical Medicine, 4th ed.* Edinburgh: Saunders Elsevier, 2010.

⁷³ S. Davidson, *Davidson's Principles and Practice of Medicine 20th ed.* China: Elsevier 2010

⁷⁴ K.H. Peschke, *Christian Ethics: Moral Theology in the Light of Vatican II, vol. 2*, Bangalore: Theological Publications, 1999.

⁷⁵ NOI Polls, June 11, 2013, <http://www.noipolls.com/root/index.php?pid=287&ptid=1&parentid=66> Accessed 23 August 2022

⁷⁶ A Nigerian based NGO < <http://theinitiativeforequalrights.org/> > Accessed 23 August 2022.

⁷⁷ Robert Rodes, 'On the Historical School of Jurisprudence,' (49) Am. J. Juris.; 165, (2004)