

A CRITIQUE OF ANTI GAY LAWS IN NIGERIA: A CASE FOR DECRIMINALIZATION*

Abstract

Nigeria is essentially a homophobic nation. The prejudice against homosexuality in Nigeria is ostensibly based on culture and religion and is reflected in the countries laws and practices. With the introduction of the Same Sex Marriage Prohibition Act, same sex unions or relations of any kind is prohibited and criminalized. Even before the enactment of this Act, both the Criminal and the Penal Code Acts in force in the southern and northern part Nigeria, criminalize homosexuality and prescribe harsh punishments for the conducts stated thereto. Because of widening global human rights concerns, the international community is increasingly responding to the need for individuals to exercise the rights to their sexuality. The 21st century has seen a tremendous change in attitudes towards homosexuals and most developed countries are guaranteeing that their rights are protected. Nigeria is slow to come to terms with these developments. This work examined and critiqued anti-gay legislations in Nigeria. This work argued that the sodomy laws contained in the Penal and Criminal Codes Area relic of British colonization. The provisions of the Same Sex Marriage Prohibition Act are in conflict with the Nigerian Constitution and International Human Rights Law and as such, should be decriminalized. The research methodology used in this work is the doctrinal methodology which involved a library reading of primary and secondary sources of law which include statutes, case law, journals, textbooks and internet sources and analyzing same. This work has found that even though there is no consensus as to a gay gene, there are some biological factors that may contribute to a person's sexual orientation and gender identity. This work argued that even though the laws that prescribe punishment for homosexual conducts are legal by reason that they were made by acts of the National Assembly, they are however unconstitutional. This work strongly recommended that anti-gay laws in Nigeria be repealed as the engender discrimination.

Keywords: Homosexual, Gay, Lesbian, Transgender, Bisexual, Homophobia

1. Introduction

The Same Sex Marriage Prohibition Act¹ in force in Nigeria came at a time when it seemed the discussions on LGBT² rights were at its peak. Nigeria decided to take a stance and this led to the enactment of the Same Sex Marriage Prohibition Act. Shortly after, the Supreme Court of the United States of America passed a judicial pronouncement legalizing same sex marriages in the case of *Obergefell v. Hodges*.³ The SSMPA has only 8 section all geared towards punishing same sexual relationships or activities. The LGBT community of Nigerian origin living in diaspora condemned the enactment of the Act.⁴ Before the enactment of Same Sex Marriage Prohibition Act, there were laws criminalizing homosexuality. The Criminal and Penal Code Acts are awash with provisions criminalizing homosexuality. Homophobia which means hatred for homosexuality in Nigeria is evidenced by attitudes of Nigerians towards homosexuals or perceived homosexuals. They argue that homosexuality is against their religious beliefs and is unAfrican.⁵ Because homosexuality is a crime in Nigeria, many Nigerians who are LGBT are in the closet for fear of being punished. There is a lot of prejudice and hostility towards people who identify as LGBT in Nigeria. Any individual who has the misfortune of having any attributes of the opposite sex is often termed gay. Given the complexity of the subject matter, it is difficult to ascertain the prevalence of homosexuality in Nigeria. Discussions on sex and sexuality in Nigeria are mostly ignored by both parents and schools and if discussed at all, it is mostly by threats of the dangers of getting involved in premarital sex. Discussing human rights often raises questions of whether human rights are culturally specific or universal⁶and forms a veritable ground for discrediting LGBT rights as human rights.

There is a debate amongst scientists as to whether there is any such thing as a gay gene and some studies seem to suggest that there may be a biological basis for homosexuality.⁷ This paper seeks to answer the question whether there is any justification for criminalization of homosexuality.

2. Homosexuality in Africa and Nigeria

Many Africans have argued that homosexuality is unafrikan and some African leaders have been heard to criticize homosexuality on similar basis. A president of Gambia Yahyah Jammeh is quoted to have said that 'Homosexuality is anti-god, anti-human and anti-civilization. Homosexuals are not welcome in Gambia. If we catch you, you'll regret why you

*By **Alma Nneka OKONKWO, PhD Candidate**, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State. Email: almanwaka41@gmail.com. Tel: 07039098626

¹ Same Sex Marriage Prohibition Act 2013 (SSMPA for short)

² LGBT means Lesbian, Gay, Bisexual and Transgender

³ (2015) 576 US

⁴ 'Nigeria Signs Harsh Anti-Gay Bill into Law' (A publication of Aljazeera America News) available online at <http://america.aljazeera.com/articles/2014/1/13/nigeria-signs-harshantigaybillintolaw.html> accessed on 4th January 2023 by 5:33pm

⁵ R Jaji, 'Homosexuality, Unafrikaness and Vulnerability' online article available at <https://www.zambakari.org/Africa/homosexuality-unafrikaness-vulnerability> accessed on January 20th 2023 by 5:36pm

⁶ J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) Volume 6, NO 4, *Human Rights Quarterly*. pp.400-419

⁷ T Ghose, 'Being Gay not a Choice. Science Contradicts Ben Carson' online article available at <https://amp.livescience.com/50058-being-gay-not-a-choice.html> accessed on 5th January 2023 by 5:51pm

were born. Allowing homosexuality means allowing satanic rights. We will not allow gay people here.⁸ One time president of Nigeria, Olusegun Obasanjo is also credited to have said that homosexuality is unAfrican, ungodly and unnatural.⁹ African and Nigerian history is replete with instances of homosexuality even in pre-colonial Africa. Homosexuality is recorded among the Siwa of Egypt.¹⁰ It was considered a boy's rite of passage in Benin¹¹. Woman to woman marriages involving a bride price existed in more than 30 African societies including Nigeria. Transvestism occurred in many different places including Madagascar and Ethiopia. Among the Pangwe people of present day Cameroon and Gabon, homosexual intercourse was practiced between males of all ages. The Nzima of Ghana had a tradition of adult's men marrying each other usually with an age difference of about 10 years. The Khoikhoi of South Africa used the word *koetsire* to describe men considered sexually receptive to other men.¹² The 'mudoko dako' or effeminate males among the Langi of northern Uganda were treated as women.¹³ In Buganda, king Kabaka Mwanga 11 who ruled in the latter half of the 19th century was said to be gay.¹⁴ The vocabulary used to describe same sex relations in traditional languages predating colonialism is proof of the existence of such relations in Precolonial Africa. The Shangan of Southern African referred to same sex relations as '*inkotshane*' (male wife), Basotho women in present day Lesotho engaged in socially sanctioned erotic relationship called '*motsaolle*' and in Wolof language spoken in Senegal, homosexual men are called '*gor-digen*' (men-women).¹⁵

Many African arts have shown the celebration of same sex sexual relationships before colonization of the continent. From Igboukwu to Benin and Ife arts, Nigerian art works celebrate the existence of same sex relationship, not seen as 'homosexuality' in modern terms but as a process of nurturing the acceptance of dualism of sexuality¹⁶. Prior to colonization, there are evidences to prove that Africa was never a heteronormative society. Africa is made up of thousands of ethnic groups with rich and diverse cultures and sexualities. There is no such thing as an authentic African culture existing, and even if it did, like all other cultures, it would not be static.¹⁷ In religious settings, some Nigerian God's have dual sexes. Esu is neither male nor female; Shango is depicted as a transvestite wearing skirts and earrings on both ears with braided hair. Oya the goddess of the ocean and Yemoja the mermaid are said to have used their sexuality to conquer men. They were not just seductive but exhibited a level of romantic affinity for each other.¹⁸ With the coming of colonization, African identities were systematically washed away

Woman to Woman Marriage in Nigeria

Woman to woman marriage is not novel to Africa on Nigeria. The practice of female husband is not novel to Igboland, East of Nigeria. The practice has however been argued to not involve sexual relationship between the couple as opposed to lesbianism. Woman to woman marriage as we know it in pre-colonial Igbo land was not created to facilitate gay marriage. It has however been described as an improvisation to sustain patriarchy.¹⁹ The male child was of utmost importance and it was this obsession to have a male child to continue a lineage that woman to woman marriage came about.²⁰ There were variations to this practice. In some cases, it was the barren wife in a marriage that took a younger wife for herself, while in some others; it was a wealthy and single woman who took a wife for herself. Among the Mbaise people of Igbo land, the female children of a family collectively pay bride price of a younger woman after the demise of their father in the name of their eldest sister so that the new bride could procreate and raise male children to preserve the family lineage.²¹ Women who were considered wealthy or had exceptional social standing or were past the age of childbearing could marry wives for their husbands, sons or for themselves these influential women were usually viewed as men due to the fluidity of gender in pre-colonial Igbo land context. By marrying women, their status was elevated mostly due to the 'female husband' paying bride price. The wives had freedom of sexuality. They could have boyfriends or anonymous men whose duty it was to impregnate them and this was socially accepted. Any child born of this union was taken care of by the 'female husband' and bore her name and was legitimate in the eyes of the law. The overriding goal for woman to woman marriage in Igboland

⁸ I Tharoor, 'Gambia's President Threatens to Slit the Throats of Gay Men' available online at <https://www.washingtonpost.com/news/worldviews/wp/2015/05/12/gambias-president-threatens-to-slit-the-throat-of-gay-men/> accessed on 5th January 2023 by 5:54pm

⁹ 'Obasanjo Chides Same Sex Marriage, Homosexuality' available online at <https://sudantribune.com/article6896/> accessed on 5th January 2023 by 6:04pm

¹⁰ B Evaristo, 'The idea that Homosexuality was a Colonial Import is a Myth', <https://www.theguardian.com/commentisfree/2014/mar/08/african-homosexuality-colonial-import-myth> accessed on 4th January 2023 by 6:14pm

¹¹ *ibid.*

¹² *ibid.*

¹³ B Alimi, 'Post-Colonial sexual identity and orientation in Nigeria', retrieved from <https://www.naij.com/54704.html> accessed on 4th January 2023 by 6:21pm

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ S Tamele, 'African Sexualities, Religion, Law and Power' (2014) volume 14, *African Human Rights Journal*. pp 152-156

¹⁸ B Alimi, 'Post-Colonial Sexual Identity and Orientation in Nigeria', retrieved from <https://www.naij.com/54704.html> accessed on 4th Feb 2023 by 6:21pm

¹⁹ 'Pre-Colonial Igboland on Woman to Woman Marriage' available online at <https://www.Holaafrica.org/Pre-colonial-igboland-on-woman--woman-marriage/> accessed on 6th January 2023 by 4:30pm

²⁰ *ibid.*

²¹ E Uchendu, 'Woman to Woman Marriage in Igboland', in A U Azodo & M Ekeh(eds), *Gender and Sexuality in African Literature and films*, (Trenton NJ; Africa world Press, 2006)

was for women to have children through other women for inheritance purposes.²² It can be argued that woman's woman marriage did not involve sexual relationship between the couple as the women involved were not romantically attracted to the other woman and childbearing was the only goal. However, it can also be argued that if woman to woman marriage was an ingenious way through which women manipulated the existing system to achieve higher economic status, what is to say that only heterosexual women took advantage of it. Is it impossible that lesbian women in pre-colonial past could not have similarly manipulated the society sanctioned woman to woman marriage to achieve personal goals? Sexual practices in Africa remain on the research owing largely to the fact that most scholars today are heterosexual. In recent times however, the old practice of woman to woman marriage for the purpose of procreation has been termed repugnant to natural justice and good conscience.²³ This goes to show that culture is constantly evolving.

Attitudes towards LGBT Behavior in Nigeria

Public hostility to homosexuality is widespread in Nigeria and many Nigerians are very vocal in their non-acceptance of LGBT behavior. In a statement dated 19 September 2006, the Nigerian Ambassador to the United Nations, Joseph Anyalogu stated that 'the notion that execution for offences such as homosexuality and lesbianism are excessive is judgmental rather than objective. What may be seen as disproportional penalty in such serious offences and odious conduct may be seen as appropriate and just punishment.'²⁴ A Sharia Court in Ningi, Nigeria after hearing witness statements as well as the confessions of all three men have sentenced them to death by stoning for being gay. The men, aged 20, 30, and 70 were sentenced by Judge Munka'ilu Sabo Ningi, under provision 134 of Bauchi State Penal Law of 2001 and Fiqhussunah Jizu'i number 2. In June 2022.²⁵ The case of Chidimma Okeke, Miss Anambra State whose explicit video was leaked on the internet showing her engaging in lesbianism caused uproar in social media circles.²⁶ The comments were mostly negative and are reflective of how a lot of Nigerians view homosexuality. Michael Ighodaro a White house awardee for humanitarianism was thoroughly beaten by an irate mob in Nigeria for being gay.²⁷

3. Biological Basis for Homosexuality/Transexuality

It is important to state that no studies have found specific gay genes that reliably make someone gay. But some genes may make being gay likelier. A 2014 study in the journal of Psychological medicine showed that a gene on the X chromosome (one of the sex chromosomes) called Xq28 and a gene on chromosome 8 seems to be found in higher prevalence in men who are gay.²⁸ There is some evidence that shows that the brains of homosexuals may be different from those of heterosexual men and women. The differences have been found in the hypothalamus which controls eating, drinking, temperature regulation and sexual behavior.²⁹ Studies done in the Netherlands and in Southern California have found such differences in several areas within the hypothalamus. One region, the midsagittal area of the anterior commissure is larger in females than in males but also appears to be larger in homosexual males. Another area, the suprachiasmatic nucleus which controls circadian rhythm is larger in heterosexual male and females than it is in homosexuals.³⁰ This is supported by the Psychoanalytic theory of homosexual behavior propounded by Sigmund Freud who is of the opinion in his works 3 essays on Theories of homosexuality,³¹ the Psychogenesis of a case of Homosexuality in a Woman³² that all people are born bisexual. He believes homosexuality to be a variation of the sexual function produced by the arrest of sexual development and attributes homoeroticism to insufficient repression of original bisexual disposition.

Humans are not the only species that have same sex pairings. Female Japanese macaques sometimes participate in energetic sexual stimulation. Lions, bison's, dolphins have also been spotted in same sex pairings. Nearly 130 bird species have been observed engaging in sexual activities with same sex partners³³ out of 10 pairings amongst giraffes occur between males. The entire species of the chimpanzee the closest relations to humans are bisexual.³⁴ Scientists reported the first strong physiological evidence that lesbian and bisexual women may be biologically different from Heterosexual women. The researchers at the University of Texas in Austin found that compared to heterosexual women, the hearing of bisexual

²² *ibid.*

²³ *Egwu v Meribe* (1976)3 SC. 23

²⁴ 'Three Men Sentenced to death by Stoning in Nigeria' available online at <https://www.back2stonewall.com/2022/07/three-gay-men-sentenced-to-death-by-stoning-in-nigeria.html> accessed on January 20th 2023 by 6:42pm

²⁵ *ibid.*

²⁶ J O Nwachukwu 'Miss Anambra Sex Scandal, How it Happened' available online at <https://dailypost.ng/2017/06/29/miss-anambra-sex-scandal-happened-chidinma-okeke/> accessed on 7th January 2023 by 8:09pm

²⁷ <https://www.independent.co.uk/lifestyle/love-sex/gay-nigeria-lgbt-reality-life-violence-west-africa-flee-michael-ighodaro-US-abuse-homophobia-a7741161.html> accessed on 7th January 2023 by 8:20pm

²⁸ T Ghose *opcit.*

²⁹ 'Biological Basis of Sexual Orientation' (A Stanford News Publication) available online at <https://news.stanford.edu/pr/95/950310Arc5328.html> accessed on 10th January 2023 by 2:30pm

³⁰ *ibid.*

³¹ S Freud, *Three Essays on the Theory of Sexuality*, (New York; Basic Books. 1905/1975)

³² S Freud, *The Psychogenesis of a Case of Homosexuality in a Woman*, in J Strachey (Ed), London: Hogarth, vol. 18 1920/1975). pp 147-172

³³ T Ghose *opcit.*

³⁴ J Ozoemene 'Nigerian Sodomy Laws' online article available at <https://jekwuoemene.wordpress.com/tag/nigerian-sodomy-laws/> accessed on 5th February 2023 by 5:55pm

women tend to be a bit more like that of men. The findings suggest that homosexual and bisexual women develop in subtly different ways than heterosexual women. Therefore their brains may also from differently accounting for their sexuality.’ It's an indication that other brain sites have also been masculinized’ said Dennis McFadden, a professor of experimental psychology who led the study in proceedings of the national academy of sciences.³⁵ A 2008 study compared 112 male to female transsexuals mostly already undergoing human treatment with 258 cisgender males. Male to female transsexuals were more likely than cisgender males to have a longer version of receptor gene (longer repetitions of the genes) for the sex hormone androgen or testosterone, which reduced its effectiveness at binding testosterone. The androgen receptor (NR3C4) is activated by the binding of testosterone or dihydrotestosterone where it plays a critical role in the forming of primary and secondary male sex characteristics. The research suggests reduced androgen signaling contribute to the female gender identity of male to female transsexuals. A decrease in testosterone levels in the brain during development might prevent complete masculinization of the brain in the male to female transsexuals and thereby cause a more feminized brain and a female gender identity³⁶

4. The Law and Gay Rights in Nigeria

Lesbian, gay, bisexual, and transgender persons in Nigeria face legal and social challenges not experienced by non LGBT persons or more aptly put, their heterosexual and cisgender counterparts. Nigeria does not recognize LGBT rights and offers no protection for their rights. Violence and discrimination against those who identify as LGBT are frequent and as such, many of them are not open about their orientation.

Criminal Code Act³⁷

Sex acts between men are illegal under the Criminal Code that applies to Southern Nigeria and carries a maximum punishment of 14 years imprisonment. Section 214 of the Criminal Code Act provides as follows:

Any person who

- a). Has carnal knowledge of any person against the order of nature
- b). Has carnal knowledge of an animal
- C). permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and his liable to imprisonment for 14 years

Though the Code does not specifically mention women, the gender neutral term person in section 214 has been albeit argued to be inclusive of women. However, for there to be carnal knowledge, there must be penetration,³⁸ which means penetration of the vagina, anus or mouth by the penis as seen in the case of *Magagi v Nigerian Army*.³⁹ This raises the question as to whether the sexual intercourse between lesbians fall under the ambit of this section. The question is answered in the negative as there cannot be penetration between lesbians⁴⁰. The import of section 214 therefore is that lesbians are excluded from the offense and the punishment prescribed thereto. Section 215 of the Criminal Code Act provides as follows: ‘Any person who attends to commit any of the offenses defined in the last preceding section Is guilty of a felony and is liable to imprisonment for seven years. The offender cannot be arrested without a warrant’. It is submitted that, there cannot be an attempt to commit the offense provided for in section 214 by females as female’s lack the instrument for the perpetration of carnal knowledge as established above. Section 217 provides as follows;

Any male person who whether in public or private commits an act of gross indecency with another male person or procures another male person to commit any act of gross indecency with him or attempts to procure the commission of any such act by any male person with himself or with another male person whether in public or private is guilty of a felony and is liable for imprisonment for three years. The offender cannot be arrested without a warrant.

The implication of the above section is that acts of gross indecency among females are not prohibited as the section expressly excludes females. It is also pertinent to state that the Criminal Code does not state or have provisions in relation to sexual intercourse among transsexuals and as such it is safe to posit that the above sections 214, 215 and 217 do not apply to them. The offence of sodomy was subsumed under Chapter 21 of the Code which deals with offenses against morality which is an attestation of the fact that sodomy was criminalized based on conflict with morality. Morality for the purposes of criminal law can either be private or public. There is however no indication in the code or any other law as to how to measure what constitutes morality upon which sodomy was prescribed. Nigeria has no state religion⁴¹ even though Nigeria is predominantly made up of Islam and Christian adherents. None of the morality of this religion can be imposed on the country as constituting public morality.

³⁵ T Ghose *opcit*.

³⁶ L Ramos 'Mutational Analysis of Androgen Receptor' available at <https://pubmed.ncbi.nlm.nih.gov/29051026/> accessed on 20th January 2023 by 7:37pm

³⁷ Cap C38 Laws of the Federation of Nigeria (LFN)2004

³⁸ *Edet v State* (2001) FWLR (pt 68) 1161. Criminal Code. Section 6

³⁹ (2008) 34 NSCOR (pt 1) 108 at 136

⁴⁰ A Nwazuoke & C Igwe, ' A Critical Review of Same Sex Marriage (Prohibition) Act, (2016), volume 45, *Journal of Law, Policy and Globalization*. p 183

⁴¹ Constitution of the Federal Republic of Nigeria (CFRN)1999(as amended) Section 10

Furthermore, Nigeria is a former colony of the Britain and imported sodomy laws into the Nigerian legal system. Nigeria inherited the bulk of her laws from the UK through incorporation by section 45 of the Interpretation Act which received the common law of England and the doctrines of equity together with the statutes of general application that were in force in England on the 1st of January 1900. The Buggery Act of 1563 made homosexuality a crime punishable by death in England. The Offenses against the Persons Act of 1861 reduced the punishment for sodomy to 10 years imprisonment.⁴² However it was not until 1967 that the offense of sodomy was abolished in the UK by the Sexual Offenses Act. For so many countries including Nigeria, criminalization laws were based on British imperial instruments. British colonies are more likely to have laws that criminalize homosexual conducts than other former European colonies and this may very well be as a result of decolonization of many African countries by Britain before the decriminalization of homosexuality in the UK and thus most British colonies still maintain homosexuality as offenses⁴³ including Nigeria.

Penal Code Law⁴⁴

The Penal Code Law applicable in Northern States is replete with prohibitions against LGBT conduct. Section 284 of the Penal Code Act provides that whoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for a term which may extend to 14 years and shall also be liable to a fine. They import of this section is that females or rather lesbians are excluded from this section as carnal knowledge can only be committed by penetration of the vagina, anus or mouth by the penis⁴⁵ and as such lesbians do not have the instrument or capacity to directly have carnal knowledge of themselves. Section 405 of the Act provides that 'A 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 is a vagabond'. Section 407 prescribes the punishment of a maximum of one year imprisonment or a fine or both. This section of the Penal Code it is submitted in the present day Nigeria is no longer viable. It is common for men to wear gowns (jalabiyas) and for women to wear trousers and shirts. It is further submitted that it is rather worrisome that the punishment for sodomy as a means of livelihood which literally translates to prostitution is only punishable by imprisonment for a maximum term of one year or an option of fine and yet intercourse between consenting adults of same sex carries fourteen years term of imprisonment. That being said, it is clear from the above that the punishments for homosexuality/ sodomy are a relic of colonization and have been decriminalized by the British imperialists.

Sharia Law

Twelve northern states of Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, Zamfara have adopted some form of Sharia into their criminal statutes. The Sharia criminal laws apply to those who voluntarily consent to the jurisdiction of the Sharia courts and to all Muslims. In the states of Gombe, Jigawa, Zamfara and Kano, a person who commits the offense of sodomy shall be punished: a) with caning of one hundred lashes if unmarried and shall be liable for imprisonment for a term of one year or; b) if married with stoning to death (rajm).⁴⁶ In Kaduna, Katsina, Kebbi and Yobe, the offense of Sodomy is punishable by stoning to death. In Bauchi the offense of sodomy is punishable by stoning to death or by any other means decided by the State.⁴⁷ The punishment for lesbianism in Gombe, Jigawa, Sokoto, Yobe, Zamfara is caning which may extend to 50 lashes in addition to a term of imprisonment which may extend to six months.

Same Sex Marriage Prohibition Act

On January 2014, the then President of Nigeria Goodluck Jonathan signed the bill to law. The Act contains only 8 sections and;

- Make a marriage contract or civil union entered into between persons of same sex invalid and illegal and not recognized as entitled to the benefits of a marriage.⁴⁸
- Make void and unenforceable in Nigeria a marriage contract or civil union entered into between persons of the same sex invalid and illegal and not recognized as entitled to the benefits of a valid marriage.⁴⁹
- Prohibit the solemnization of any marriage or civil union entered into between persons of the same sex in any place of worship, either church or mosque or any other place or whatsoever called in Nigeria.⁵⁰
- Recognize as valid only a marriage contracted between a man and woman⁵¹

⁴²E Han and J I'm Mahoney ' British Colonial Origins of Anti-Gay Laws' online article available at <https://www.washingtonpost.co/news/monkey-cage/wp/2014/10/30/the-british-colonial-origins-of-anti-gay-laws> accessed on 10th January 2023 by 3:50pm

⁴³ *ibid.*

⁴⁴ Cap P3, LFN 2004

⁴⁵ *Magaji v State supra*

⁴⁶ 'Nigeria: Situation of Homosexuals and their Treatment Under Sharia Law'(a refworld publication) available online at <https://www.refworld.org/docid/41501c3b1c.html> accessed on 20th January 2023 by 8:20pm

⁴⁷ <https://en.m.wikipedia.org/wiki/LGBT-rights-in-Nigeria> accessed on 20th January 2023 by 20:11pm

⁴⁸ SSMPA. Section 1

⁴⁹ *ibid.* S 1(2)

⁵⁰ *ibid.* S 2(1)

⁵¹ *ibid.* S 3

- Prohibit the registration of gay clubs, societies and organizations, their sustenance, processions and meetings⁵²
- Prohibit the public show of same sex amorous relationship directly or indirectly⁵³
- Make a person who enters into a sane sex marriage contract or civil union liable for 14 years imprisonment⁵⁴
- Make a person who registers operates or participates in gay clubs societies and organization or directly or indirectly make public show of same-sex amorous relationship in Nigeria liable for 10 years imprisonment⁵⁵
- Make a person or group of persons that witness, abet and aid the solemnization of same sex marriage or civil union or supports the registration, operation and sustenance of gay clubs societies organizations, processions or meetings in Nigeria liable for 10 years imprisonment. ⁵⁶
- Define civil union for the purposes of this law to mean any arrangement between persons of the same sex to live together as sex partners and include such descriptions as adult independent relationships, caring partnerships, civil partnerships, civil solidarity pacts, domestic partnerships, reciprocal beneficiary relationships, registered partnerships, significant relationships, stable unions, etc.⁵⁷
- The high court of a state or high court of the federal capital territory shall have jurisdiction to entertain matters arising from the breach of the provisions of this Act. ⁵⁸

In analyzing the above provisions, the Act does not make any distinction between a Nigerian and a non-Nigerian in the context of its application and as such any homosexual marriage contracted outside Nigeria is voided by the Act once the parties are within the shores of Nigeria. Furthermore, from the provisions of Section 4(1), it is arguable that the Act does not prohibit the formation or registration of lesbian, bisexual and transgender clubs, societies, or meetings except the drafters of the Act intended the term gay to be synonyms with homosexuality.⁵⁹ The SSMPA it will also seem, neither prohibits or sanctions sexual intercourse between homosexuals when done outside marriage or civil union.

Constitution of the Federal Republic of Nigeria 1999(as amended)⁶⁰

The 1999 constitution of Nigeria is the supreme law in Nigeria. By virtue of section 1(3), If any law is inconsistent with the provisions of the constitution, this constitution shall prevail and the other law shall to the extent of its inconsistency be void. Chapter 4 of the Constitution provides for fundamental rights. These rights have been described as inalienable rights by Oputa JSC in the case of *Ransom Kuti v AG Federation*.⁶¹ Section 33 provided for the Right to Life. It states as follows: 'Every person has a right to life and no one shall be deprived intentionally of his life save in the execution of the sentence of a court in respect of a criminal offence of which he is found guilty in Nigeria'. Instances where people who identify as LGBT are beaten or even lynched even where no court has found them guilty must be condemned and the offenders punished for their actions. Section 34 provides for Dignity of the Human Person and stipulates that 'every individual is entitled to respect for the dignity of his person and accordingly (a). No person shall be subjected to torture or inhuman or degrading treatment'. Situations where Nigerians beat up, torture and maim people for their sexuality is unconstitutional. The police sometimes parade perceived homosexuals and torture them even without proof. The right to freedom from torture is a non derogable right. Section 38 provides for freedom of conscience, thought and religion: 'Every person shall be entitled to freedom of thoughts conscience and religion including freedom to change his belief and freedom (either alone or in a community with others and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance'. The provision of the Same Sex Marriage Prohibition Act that prohibits the gathering of gay people is in conflict with the constitution.

A gay church in Lagos called rainbow Church where people of the same ideology gathered to worship and express job beliefs was shut down and members were beaten by an irate mob. The pastor had to flee to America where he now pastors a gay church.⁶² Gay persons are not afforded or accorded this constitutional safeguard as they are forbidden from identifying or even expressing their beliefs either alone or in community with others. Section 40 of the 1999 Constitution provides for Right to Peaceful Assembly and Association. The first limb of the section provides as follows: 'Every person shall be entitled to assemble freely and associate with other persons and in particular may form or belong to any political party, trade union or any other association for the protection of his interest'. Any law that contravenes this section is void hence the provision of the Same Sex Marriage Prohibition Act that criminalizes gay gatherings is in conflict with this provision. Section 42 provides for Freedom from Discrimination. It stipulates as follows:

⁵² *ibid.* S 4(1)

⁵³ *ibid.* S. 4(2)

⁵⁴ SSMPA. S. 5(1)

⁵⁵ *ibid.* S. 5(2)

⁵⁶ *ibid.* S. 5(3)

⁵⁷ *ibid.* S 7

⁵⁸ *ibid.* S 6

⁵⁹ A Nwazuoke & C Igwe *op cit.* P. 181

⁶⁰ Cap C23 LFN 2004

⁶¹ (1985) 2 NWLR (pt.6) 211

⁶² 'Meet 8 Nigerian Men who have Openly Declared Being Gay' available online at <http://www.nigerian.monitor.cpm/meet-8-nigerian-men-that-have-openly-declared-their-gay-status/amp/> accessed on 10th January 2023 by 4:15pm

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

- a) be subjected either expressly or in 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, religion or political opinions are not made subject;
- b) be accorded either expressly by or in the application of any law in force in Nigeria or any such executive or administrative action any privilege or advantage that is not accorded to citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religious or political opinion
- c). No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of circumstances of his birth.

This is perhaps one of the most important safeguard in protecting LGBT rights. Some individuals are born with both male and female organs. Can the law punish them if they decide to be either male or female bearing in mind that this condition arose from circumstances of their birth or refuse to be identified as any gender as in the case of people who identify as intersex? Section 42 of the Constitution is clear on this. Section 45 of the section has a derogation clause. Section 45 permits the State to derogate from the rights contained in section 37-41 of the constitution. Section 45 allows the state to make laws contravening the provisions of these sections in a reasonably justifiable manner in the cases of public defense, public morality, and public order or for the purposes of protecting the rights of others. This section has given room for unabated abuse of power by those in power and is a setback to actualization of human rights. It is also necessary to point out that in Nigeria, laws are made by the sovereign, and the subjects have an obligation to obey them. Failure to do so attracts penalties or sanctions. In Nigeria, the legislative arm of government makes laws by passing the bills. The bills are sent to the executive for assent before they become laws. All Anti-gay laws emanate from the sovereign and as such are legal. However being legal does not necessarily make the laws constitutional. Legality and constitutionality differ. Legality has to do with following the due process in making laws while constitutionality means the law being in tandem with constitutional provisions. It is submitted that even though the State has power to make laws derogating from rights in cases of extreme emergency, these laws should not include interference by the State into the realms of private morality⁶³ it is also unlikely that LGBT conducts constitute such cases of extreme emergency that requires suspension of rights. More so, it is unfortunate that violent crimes like rape and pedophilia or even bestiality are compared to homosexuality between two consenting adults. In rape, no consent is given and an underage child cannot legally give consent to sexual conducts with of adult. An animal as in the case of bestiality cannot also give consent in the true sense of the word.

5. Case for Decriminalization of Homosexuality

Nigeria has ratified many international human rights instruments. Human rights are rights inherent to all humans. We are all equally entitled to our human rights without discrimination, whatever our nationality, place of origin, sex, colour, religion, language or any other status such as age, disability, health status. These rights whether they are civil, and political rights such as right to life, equality before the law, and freedom of expression or economic, social and cultural rights such as right to work, and right to education are indivisible, universal, interrelated and interdependent.⁶⁴ Human rights were developed and articulated in the Universal Declaration of Human Rights in 1948 in response to the effects of World War 11. International human rights lay down obligations on governments to act in certain ways or refrain from certain acts in order to promote and protect human rights and fundamental freedoms of individuals or groups.⁶⁵ By becoming parties to international treaties, States assume obligations and duties under international law to respect, protect and to fulfill human rights. This obligation implies that States must refrain from interfering with or curtailing the enjoyment of human rights. This obligation means that the State must protect individuals, groups against human rights abuses by third parties as well as take positive actions to facilitate the enjoyment of basic human rights. Through ratification of international human rights treaties, governments undertake to put in place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communication are available at regional and international levels to help ensure that international human rights standards are indeed respected implemented and enforced at the local level. At the International level, these mechanisms include treaty bodies, expert committees established by treaty and tasked with monitoring implementation of treaty obligations and special rapporteurs and other independence experts appointed by the United Nations Human Rights Council to investigate and report on pressing human rights challenges.⁶⁶

In making a case for decriminalization of anti-gay legislations, it is submitted as follows:

LGBT Rights are Human Rights

It must be stated that no rights to sexuality exists explicitly in International Human Rights law rather it is found in a number of international human rights instruments including UDHR, ICCPR ICESCR, ACHPR etc. The rights to equality and non-

⁶³ *Dudgeon v. United Kingdom*

⁶⁴ <https://www.unfe.org/system/unfe-6-UN-fact-sheet-v6-international-human-rights-law-sexual-orientation-gender-identity-pdf> accessed on 12th August 2017

⁶⁵ *ibid.*

⁶⁶ *ibid.*

discrimination are core principles of human rights and enshrined in the United Nations Charter, the Universal Declaration of Human Rights and human rights treaties. The opening words of the UDHR are unequivocal 'All humans are born free and equal in dignity and rights'. Article 5 of the UDHR affirms that 'Everyone has the right individually and in association with others at the national and international levels to (a) meet or assemble peacefully, (b) form, join and participate in non-governmental organizations, associations or groups. Article 7 also states that 'everyone has the right individually and in association with others to develop and discuss new human rights ideas and principles and to advocate their acceptance.' The equality and non-discrimination guarantee provided by International Human Rights Law applies to all people regardless of sexual orientation and gender identity. There is no clause in any human rights treaty that might allow a State to guarantee full rights to some and withhold them from others purely on the basis of sexual orientation and gender identity.⁶⁷

The United Nations has documented a wide range of human rights violations committed against individuals based on their sexual orientation and gender identity. These include violent attacks ranging from aggressive verbal abuse and psychological bullying to physical assault, beating, and torture, kidnapping and targeted killings. The United Nations General Assembly in a series of resolutions has called on States to ensure the protection of the rights of all people under their jurisdiction and to investigate promptly and thoroughly all killings including those motivated by the victims sexual orientation and gender identity.⁶⁸ In June 2011, The United Nations Human Rights Council became the first UN intergovernmental body to adopt a wide ranging resolution to human rights sexual orientation and gender identity. Resolution 17/19 expressed the Council's grave concern at violence and discrimination based on sexual orientation and gender identity and commissioned a study on the scope and extent of these violations and the measures needed to address them. Its findings and recommendations formed the basis of a panel discussion that took place at the Council in March 2012.⁶⁹

International sources of law create an obligation on the part of the government to undertake numerous actions including those are the national level. The Nigerian Constitution however has a clog that states that 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the national assembly'.⁷⁰ Notwithstanding this provision, the African Charter on Human and People's Rights contains many of the provisions of other international instruments and has been enacted into law in Nigeria.⁷¹ Article 2 and 26 of the ACHPR provides for freedom from discrimination article 21 and 22 of ACHPR protect freedom of assembly and association. Article 2 and 26 of the ICCPR affirm the equality of all people before the law and the right to freedom from discrimination. The SSMPA and sodomy laws are in violation of fundamental rights guaranteed under the Nigerian Constitution and various human rights regional and international laws and agreements that Nigeria has ratified and enacted⁷²

Homosexuality is not alien to Africa

The homosexuality is on African mantra is often used to justify homophobia. The homosexuality is unAfrican myth is anchored on an old practice of selectively invoking African culture by those in power.⁷³ There are cave paintings of the San people in Guruve Zimbabwe depicting two men engaging in some form of ritual sex. The Ndebele and Shona of Zimbabwe, Azande in Sudan and Congo, Nupe in Nigeria all practiced same sex intercourse as a source of fresh power for their territories apart from erotic same sex desire.⁷⁴ Like everywhere else in the world, anal intercourse between couples of opposite sex to avoid pregnancy was historically practiced by many Africans before the invention of modern contraceptives⁷⁵ and still practiced till date. It is not homosexuality that is unAfrican but the laws that criminalize it. What is alien to the African continent is Abrahamic religions of which include Christianity and Islam that often accompany and augment the unAfrican arguments against homosexuality. With the introduction of new religions many sexual practices acceptable in pre-colonial times became demonized and legitimate and criminal. It is ironic that's an African dictator wearing a three-piece suit using an iPhone and speaking English and liberally what in the Bible indicts anything as being unAfrican.⁷⁶ Anthropological evidence has shown that homosexuality existed in pre-colonial Africa and Nigeria. Heterosexuality no doubt was the dominant sexual orientation, but alternative sexualities existed⁷⁷ and the indigenous

⁶⁷ *ibid*

⁶⁸ Fact Sheet International Human Rights Law on Sexual Orientation and Gender Identity' (a publication of the Office of the High Commissioner United Nations Human Rights) online article available at <https://www.unfe.org/system/unfe-6-UN-FactSheets-V6-International-Human-Rights-Law-Sexual-Orientation-Gender-identity> accessed on 13th Nov by 6:15pm

⁶⁹ *ibid*.

⁷⁰ CFRN 1999(as amended) Section 12(1)

⁷¹ Cap A10 LFN 2004

⁷² S Tamele *opcit*. p 161

⁷³ *ibid*. p 162

⁷⁴ Tamele, 'African Sexualities, Religion, Law and Power' (2014) volume 14, African Human Rights Journal. pp 152-156

⁷⁵ *ibid*. p. 162

⁷⁶ *ibid*. p 165

⁷⁷ C O Izugbara, 'Patriarchal Ideology and Discourse of Sexuality in Nigeria' (Lagos African Regional Resource Centre 2004). pp 29-30

languages used to describe it are proof of it. Britain decriminalized sodomy laws in 1967 in their country. Unfortunately by then, most African colonies had gotten Independence and as such sodomy laws remained.

The Enactment of The SSMPA was Unnecessary

Before the enactment of the SSMPA, there were existing laws criminalizing sodomy in both the Penal and Criminal Codes. Criminalizing same sex marriage despite the fact that the laws of the country already criminalized sodomy is tantamount to the hypothetical example of criminalizing boxing as a sport and then passing another law to criminalize seeking a boxing license and forming a boxing association.⁷⁸ In the case of *Lawrence v Texas*,⁷⁹ the question before the courts was the validity of a Texan statute making it a crime for persons of the same sex to engage in certain intimate conduct. And it was held as follows: 'Freedom extends beyond spatial bounds. Liberty presumes and autonomy of self that includes freedom of thought s belief, expression and setting intimate conduct. The instant case involves liberty of the person both in its spatial and transcendent dimension'. The court further ruled:

The condemnation of homosexuality has been shaped by religious beliefs, conceptions of right and acceptable behavior and respect for the traditional family. For many persons, these are not a trivial concern but profound and deep conviction accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. The consideration do not answer the question before us, however, the issue is whether the majority may use the power of the state to enforce these views on the society through operation of criminal law. Our obligation is to define the liberty of all not to mandate our own moral code.

The Matrimonial Causes Act⁸⁰ by virtue of section 3(1) makes statutory marriages in Nigeria monogamous. The Nigerian Interpretation Act appears to be the only Nigerian legislation that attempted to define monogamous marriage and defines it as ' a monogamous marriage is one which is recognized by the law of the place it is contracted as a voluntary union of one man and one woman to the exclusion all others'.⁸¹ The Act adopted the definition of marriage by Lord Penzance in the case of *Hyde v. Hyde*.⁸² This goes to show that the SSMPA was an unnecessary surplussage. Statutorily, Nigeria already recognized marriage as marriage between one man and woman. The SSMPA should be repealed as it continues to engender discrimination and homophobia and most of its provisions are inconsistent with constitutional provisions.

There is a Biological Basis for Sexual Orientation.

Another argument used in condemning homosexuality is that it is against the order of nature (*peccatum contra naturam*). As earlier stated in this work⁸³ some studies have found that there may be some biological factors responsible for LGBT behavior. Homosexuality has been observed in many non-human species. Two lions were caught on camera in 2017 in a Kenyan park engaging in same sex intercourse.⁸⁴ This goes to show that homosexuality is not exclusive to humans. The entire species of dwarf Chimpanzee the closest relations to humans are bisexual.⁸⁵

6. Conclusion and Recommendations

From the foregoing, it becomes clear that homophobia is not justified. The sodomy laws are a relic of British colonization which has since been expunged in the country from which it was imported. Homosexuality is not against the order of nature as it is not just exclusive to humans but to other species. Most importantly, LGBT rights are human rights contained in many international human rights instruments and as such ought to be protected. It is recommended as follows:

- Anti-gay legislations should be repealed as they are discriminatory. The law should not dictate what private morality should be. The SSMPA should be repealed as any Act which seeks to restrict freedom of association, conscience, thought is unconstitutional.
- The same standards that apply to heterosexual relationship should apply to homosexual relationship especially in terms of punishment. Homosexuality as well as heterosexuality should be punished in the cases of rape, defilement, sexual assault, sexual harassment. Once the act is between two consenting adults, then it should not be tagged a crime.
- The clog in section 12 of the constitution should be expunged to allow human rights instruments already ratified by Nigeria have the force of law.
- Homophobia should be condemned as it engenders discrimination. Situations where gay people are harassed, beaten or tortured should be condemned and the perpetrators of such acts should be penalized.
- Section 45 of the Constitution that allows the State permissible derogation from Fundamental Rights should be modified. If there should be suspension of fundamental rights then it must be only in cases of extreme emergency

⁷⁸ J Ozoemene *opcit*

⁷⁹ (2003) 539 US 559, 123 S. Ct. 2472

⁸⁰ Cap M6 LFN 2004

⁸¹ Section 18 Interpretation Act

⁸² (1886) L.R.I.P &D 130 at 133

⁸³ pp 8-10.

⁸⁴ J Farell ' Kenyan Official Says Male Lions Who Had Sex Must Have Seen Gay Men behaving Badly and Must be Separated' available online at <https://www.independent.co.uk/news/world/Africa/gay-lions-kenya-photos-men-therapy-says-official.html> accessed on 10th January 2023 by 4:42pm

⁸⁵ J Ozoemene *op cit*.

and what constitutes extreme emergency must be well articulated. Homosexuality should not constitute an act that requires such case of extreme emergency requiring suspension of rights.

- The need for decriminalization of sodomy laws cannot be overemphasized. Decriminalizing homosexuality will allow many Nigerians who are in the closet come out from the closet. This will prevent straight/heterosexual persons from going into relationships or even marriages with homosexuals and thus prevent the attendant psychological and emotional trauma caused by lack of intimacy that results from marrying a closeted homosexual.