

THE DIALECTICS OF CONSTITUTIONALLY GUARANTEED RIGHTS AND LGBT LAWS IN NIGERIA*

Abstract

This paper examines the contradiction inherent in the constitutionally guaranteed rights and freedoms; in the Nigerian Constitution, and in the African Charter ratified and domesticated as part of the legal regime in Nigeria and other international instruments as against the enactment of the Laws against same sex in Nigeria. The Nigerian Constitution and of course the African Charter have ample provisions for the rights of the citizens: Prominent among these rights is the right of non-discrimination as to circumstances of birth, sex, culture or religion. The sexual orientation of a citizen ought to be within the private life of the individual involved and against whom to associate is simply a choice. The Penal Laws in Nigeria; the Penal Code, Criminal Code and the Sharia Penal Code prohibit what is called Unnatural Offences and in some extreme situation the punishment is death penalty. The coming into effect of Same Sex Marriage Prohibition Act of 2014 does not only outlaw same sex, it criminalises same with fourteen years imprisonment. The Act goes ahead to prohibit gay clubs and organisation and places liability on witnesses to same sex marriage. The question that has arisen for determination is: Are these laws not in conflict with the unambiguous provisions in the Constitution of the Federal Republic of Nigeria? The constitution is the ground norm of every democratic society, the foundation on which every other law takes its root including religion and culture. This research discovers that the prohibition or discrimination of LGBTs is purely a cultural and religious phenomena rather than legal. This research is doctrinal and only primary sources like statutes and secondary sources will be used. It is recommended that if Nigeria and of course many African Nations must fit into the comity of nations, the equality and rights of all citizens must be guaranteed and letters of the constitution must be obeyed to the latter.

Keywords: Dialectics, Lesbian, Gay, Bi-Sexual, Transgender and Constitutional Rights

1. Introduction

The idea of marriage in all Nigerian societies and of course the general African society is that of procreation. Any union between man and woman that does not produce any child is hated by family, neighbours and the female partner in the union is often referred to as a ‘man’. The lack of children in marriage has led to polygamy as more often than not the female partner who is barren will go all out to marry for the husband to have issues. It has even led to so many divorces as the reason of childlessness leads to the breaking down irretrievably of such unions. The advent of Christianity consolidated the hatred of the Nigerian people on same sex. The Bible for instance, prohibits any sexual intercourse amongst people of same sex which is seen as abomination. The Bible expressly provides death sentence to such acts¹. The Nigerian legal system which is founded on received English laws has copious provisions in the Penal system to prohibit what is called unnatural offences². In 2014, the Federal Government of Nigeria enacted an Act prohibiting same sex marriage in Nigeria³. The Act goes ahead not only prohibiting same sex marriages, it covers other activities associated with homosexual identity, including registering gay clubs, public showing of same sex amorous relationships either directly or indirectly. There are sanctions that attract a breach⁴. Nigeria as a country is under a constitutional democracy. The ground norm is the Constitution of the Federal Republic of Nigeria⁵. Chapter four thereof is founded on Fundamental Human Rights of its citizens. Prominent amongst these rights is the right to freedom from discrimination⁶. Nigeria is also signatory to international instruments, for example, the African Charter on human and people’s rights⁷ and other International Conventions.

The coming into effect of the same sex marriage prohibition Act runs foul and in contradistinction of the extant provisions of the Constitution of the Federal Republic of Nigeria. The questions that are begging for answers are: Can Nigeria pride itself as a country that practices rule of law? Can these laws stand in the face of true democratic principles as provided for in the constitution of the country? This paper will try to unearth the dialectics inherent in the provisions of the constitution and the other laws that appear to discriminate ‘LGBT’ persons in Nigeria.

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¹Holy Bible: Leviticus 18:22 is to the effect that ‘they shall not lie with mankind as with womankind; it is abomination’ Leviticus 20:13 ‘If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.

²Section 216 Criminal Code of Southern Nigeria. See also Section 284 Penal Code of Northern Nigeria 1960 which criminalises homosexual acts between both men and women tags them as unnatural offences.

³ Same Sex Marriage (Prohibition) Act, 2014.

⁴ Section 5 (2) and (3) of the same sex (prohibition) Act 2014.

⁵ Section 1 (2) of the Constitution of Federal Republic of Nigeria 1999.

⁶ Section 42 (1) (a) and (b) of the CFRN 1999.

⁷ Adopted 27 June, 1981, OAU DOC. CAB/LEG? 67/3rev5 21 LLM 58, 1982.

2. The Concept of Human Rights

The idea of rights is at the core of human existence without which human life is meaningless. According to Aduba, Human rights are rights possessed by all persons by virtue of their common humanity to live a life of freedom and dignity⁸. He describes them to be inalienable and cannot be denied any one or given up⁹. Indeed, the recognition of these rights which is described as inalienable is the foundation of freedom, justice and peace in the world¹⁰. According to the United Nations Human rights are rights inherent to all human beings. As human beings, one is entitled to human rights without discrimination from irrespective of nationality, origin, sexual orientation, status, age, sex, disability, colour and gender¹¹. According to Lovell, Human rights are rights one has simply because one is human, the theoretical basis of which is founded on two fundamental claims: first because 'every human being is said to have special moral value and secondly, because every human being has special value' certain things ought not to be done to any human being and certain things ought to be done for every human being'. The implication is that due to his humanity, the rights bestowed on him are inalienable¹². The Nigerian apex court in *Chief (Mrs.) Olu Funmilaye Ransome-Kuti & Ors v. Attorney General of the Federation*¹³ adumbrated the very nature of human rights thus: this is no doubt a right guaranteed to everyone including the appellants by the constitution. But what is the nature of a fundamental human right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is primary condition of a civilized existence and what has been done by our constitution, since independence starting with the independence constitution, that is, the Nigerian (Constitution), that is, the constitution of the Federal Republic of Nigeria, 1979 is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the non-immutability of the constitution itself.

3. Human Rights and Fundamental Rights: Any Boundary

There have been attempts by jurists and legal text writers, by scholars to delineate a boundary between human rights and fundamental rights. It has been argued that fundamental rights fall within the confines of domestic legislations of individual states. They are outlined and protected by national constitutions while human rights on the other hand are universally guaranteed rights which are covered by United Nations and regional conventions and are enforced by international institutions¹⁴. Towing the same line, Odje submits that while all rights enjoyed and asserted by human persons may be described generally as human rights, not all human rights can be termed fundamental rights or fundamental human rights under our classification unless they are entrenched in the constitution¹⁵. Idigbe submits further that 'unless their existence or continued existence is guaranteed under the state's constitution, they cannot with reference to that particular state or political society be described as fundamental rights. It is therefore my respectful view that a description of these rights as fundamental rights ought to be confined to the state or political societies governed by written constitutions'¹⁶. However, Ayoola JCA (as he then was) had a purposive approach to the issue of fundamental rights where he observed that the constitution as an organic document must be treated as speaking from time to time. It can therefore only describe the fundamental rights and freedoms it guarantees in broad terms. It is for the courts to fill the fundamental rights such as would fulfill their purpose and infuse them with life. A narrow and literal construction of the human rights provisions in the constitutions can only make the constitution arid in the sphere of human rights. Such approach will retard the realisations, enjoyment and protection of those rights and freedoms and is unacceptable¹⁷. It is clear from the above that there is no serious distinction between fundamental rights and human rights. Though the latter is captured in constitutions of nation states, it is indeed the offshoot of the wider rights that are bestowed on an individual simply for being in human being. In Nigeria for instance, the fundamental rights are provided for under chapter four of the constitution¹⁸. The relevant rights shall be discussed in details in the later part of this work.

4. What is LGBT?

LGBT is an acronym or initiation for Lesbian, Gay, Bisexual and Transgender. A Lesbian is a woman whose sexual and emotional attraction is to another woman, while a Gay is a homosexual whose sexual attraction is to men. A Bisexual is a person whose romantic attraction is to both men and women. Transgender refers to persons

⁸ J. N. Aduba; *Introduction to Human Rights Law in Nigeria* (Jos: innovative communications) 2016 P.3.

⁹ Ibid p. 2.

¹⁰ See the preamble to the United Nations declaration of human rights: resolution 217A of 10th December, 1948.

¹¹ United Nations: International Human Rights Law and Sexual Orientation and Gender Identity available at www.ochr.org.

¹² Natalie Lovell 'Theorising LGBT Rights as Human Rights: A Queer (ritical) Analysis. Available at <https://www.e-ir.info/2015/12/20/theorising-igbt-rights-as-human-rights-a-queeritical-analysis> (accessed) 29/9/2021.

¹³ (1985) 5 NWLR (pt. 10) 211 @ 229 – 230.

¹⁴ The Difference between Human and Fundamental Rights. Available at <https://www.exploringyourmind.com> last accessed 16/10/2021.

¹⁵ Mundiaga Odje 'Human Rights, Civil, Political, Social Economic and Cultural Rights. The Place and Protection into the Future Political Order' *The Nigerian Bar Journal* Vol. 21 P.21 No. 3.1986.

¹⁶ N J. Aduba: *An Introduction to Human Rights Law in Nigeria* (2016 Innovative Publishers, Lagos) P. 6.

¹⁷ Femi Falana: Quoted Ayoola JCA in his book *Fundamental Rights Enforcement in Nigeria* 2nd Edition (2010 Legalex Publishing Company Limited, Lagos) at P. 8.

¹⁸ Constitution of Nigeria the Federal Republic of Nigeria 1999.

who identifies and or wish to be referred to a gender different from the one they have been identified with at birth most a times is realizable through hormone change or other medical procedures. There is a burgeoning literature on the on the issue of LGBT rights the world over and Nigeria is no exception. A number of researches have been beamed on Nigeria by international bodies Non-Governmental Organisations (NGOs) and other individuals. Prominent amongst the researches is that tagged ‘the situation of sexual and gender minorities in Nigeria (2014 – 2018)’¹⁹ the research discovered that there are legal and socio-cultural inhibitions to the realisation of LGBT rights as circular and religions criminal laws both have penal provisions against lesbian, gay,²⁰ bisexual and transgender, there are no protective measures to people with different sexual orientation.²⁰ Another report is ‘human Rights situation for Lesbian, Gay, Bisexual and Transgender (LGBT) persons and sexual rights in Nigeria’²¹. The report examines the constitutional provisions and international law as it relates to the rights of the LGBT. It concludes that Nigeria still has legislations that impede on the rights of citizens with different sex orientation. The Queer Alliance Nigeria in their report titled ‘A Shadow Report on Human Rights Violations Based on Sexual and Gender Identity in Nigeria’ highlights the rights of persons whose sexual orientation does not conform with the accepted norms of the society. They discovered that Nigeria rejected all recommendations related to sexual orientation and gender identity on grounds of religion, public morality at the 4th and 17th session of the Human Rights Council stating that same is gross violation of natural values²². A report by Human Rights watch titled ‘Tell me where I can be safe’ the impact of Nigeria Same Sex Marriage (prohibition) Act²³ hinge on the impact of same sex prohibition on persons of different sexual orientation or gender identity. It was discovered that the Act came to add on the existing legislations that criminalised consensual adult same sex conduct. The report has taken a more sociological view on it than a legal perspective.

The Same Sex Marriage Prohibition Act has been described as the most repressive legislation since the end of military rule. According Reid ‘it undermines basic universal freedoms that Nigerians have long fought to defend and is a throwback to past decades under military rule when civil rights were treated with contempt’²⁴. In a report submitted to the 50th session of the African Commission on Human and peoples’ rights, long before the Same Sex Marriage Prohibition Act came to being, it was discovered that Nigeria despite being a signatory to the African Charter on Human and peoples’ rights had legislations that violate rights particularly of those whose who are sexual minorities²⁵. The same sex marriage prohibition law came in fulfillment of the cry of the rights groups in this report.

In their work, a ‘Critical Examinations of LGBT Rights in Nigeria,’ Izzi and Ummuna examine the rights of sexual minorities in relation to the constitutional provisions and the existing laws that have emasculated these rights²⁶. The challenge with this article are that they lack the depth requires of such titles. This work will make a forensic analysis of the issues as it involves the constitutional rights of citizens and whether the Nigerian government can derogate on them as provided for by section 45 of the constitution of the Federal Republic of Nigeria.

5. Legal Regime on Human Rights in Nigeria

Nigeria is a constitutional democracy governed by the constitution and other legislations from the National Assembly and the State Houses of Assemblies of the 36 constituent states. The country is also a signatory to various charters and conventions which have formed the legal system. This subsection shall analyse the constitution and such other laws particularly as it relates to Human Rights of its citizens.

1999 Constitution of Nigeria

The constitution is often referred to as the ground norm upon which all other legislation take their taproot from and any law where inconsistent with the constitution is to the extent that its inconsistency void²⁷. The Nigerian constitution has incorporated Human Rights which it christened fundamental rights. As stated in *Sky Field*

¹⁹Research of the Directorate of Immigration and Refugee Board of Canada, 2019. Available at <https://www.irb.gc.ca/en/country-information/research/pages/situation-gender-minorities> (accessed 29/9/2021).

²⁰ Ibid.

²¹Report Presented to the UN Human Rights Committee 126th Session July 1st – July 26th of 2019. Available at www.INT-CCPR-CSS-NGA-35448-E.PDF accessed 16/10/2021

²² Queer Alliance: A shadow Report on Human Rights Violations Based on Sexual and Gender Identity in Nigeria’ Submitted for Consideration for the 31st Session of the Universal Periodic Review, March 29th, 2018 available at <https://www.heartlandalliance.org> (Accessed 15/11/21)

²³ Human Rights Watch ‘Tell me where I can be safe’ The Impact of Nigerians Same Sex Marriage (Prohibition) Act available at www.hrw.org/report/2016/ (accessed 21/10/2021).

²⁴ Human Rights Watch: Nigeria: Anti-LGBT Law Threatens Basic Rights. ‘Same Sex Spectre used to Criminalise Expression, Association, Assembly’ available at www.hrw.org/news/2014/ last accessed 22/10/2021.

²⁵ The report Titled: ‘The Violations of Human Rights on the Basis of Sexual Orientation and Gender Identity in the Federal Republic of Nigeria under the African Charter of Human and Peoples Rights’ was prepared by rights groups and is available on www.hearandalliance.org>2016/02 last accessed 22/10/2021.

²⁶Mabel Izzi and Ophelia Umunna: ‘Critical Examination of LGBT Rights in Nigeria’ available at www.seahipaj.org>full>IJBLR-s-6-2020 (last accessed 22/10/2021).

²⁷ Section 1 (3) Constitution of the Federal Republic of Nigeria 1999.

*Property Development Ltd v. Mrs. Mercy Ifeanyi Nwachukwu*²⁸ the Court of Appeal said ‘fundamental rights are now warehoused in chapter IV which encompasses sections 33 – 45 of the constitution as amended’. Section 46 of the constitution as amended, allocates to every citizen whose fundamental right is, or being harmed even *quia timet*, to approach the court to prosecute his complain and obtain redress. These rights are right to life, dignity of human person, personal liability, fair hearing, private and family life, freedom of thought, conscience and religion, freedom of expression and the press, peaceful Assembly and association, freedom of movement, freedom from discrimination, the right to acquire property²⁹.

African Charter on Human and Peoples Rights

The African Charter became a domestic law in Nigeria by virtue of the Act domesticating same⁴⁰. The African Charter has abundant provisions for the protection of human rights. It provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion.

Other Covenants and Conventions applicable in Nigeria

Nigeria is signatory to several covenants and conventions that are applicable alongside domestic legislation. Prominent among these covenants is the International Covenant on Civil and Political Rights (ICCPR)⁴⁷. The covenant provides for the right to freedom of expression, assembly and association⁴⁸. Each state party to the covenant undertakes to respect and to ensure to all individuals within the territory and subject to its jurisdiction the rights recognized in the present covenant without distinction of any kind⁴⁹. The covenant guarantees equality before the law and equal protection of the law⁵⁰. This is regardless of one’s status or sexual orientation. Under the covenant it is obligatory on state parties to ensure respect for these rights. State parties are enjoined to adopt such laws or other measures as may be necessary to give effect to their rights recognized in the present covenant⁵¹. The Human Rights Committee established pursuant thereto has upheld the rights of citizens in several occasions. For instance, in *Young v. Australia*⁵² the court held that states are under obligation to protect individuals from discrimination on the basis of their sexual orientation. In Russian case of *Fedetova v. Russian Federation Communication*⁵³ the victim who displayed posters announcing his gay status near a secondary school building in Ryzan was convicted under the Ryzan Regional Law for the offence of propaganda among minors. The human rights committee held that such a conviction was a violation of the rights guaranteed under the covenant.

The Universal Declaration of Human Rights is the foundation upon which regional and national constitutions derive their human rights principles. The Declaration guarantees the rights of the individuals without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. All are equal before the law and are entitled without any discrimination to equal protection of the law⁵⁴. The Human Rights Committee established pursuant to the declaration struck down the Tasmania Sodomy Law and in that judgment held that such laws violate protections against discrimination in the ICCPR as well article 17 which protects right to privacy.

6. LGBT Rights: whether Human Rights?

The idea of LGBT rights as human rights is controversial, even countries where the rights have gained legislative and judicial approval, there are dissenting voices. The pro – LGBT rights activists opine that human rights are rights inherent to all human beings and that by humanness in an individual; he is entitled without discrimination irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status, such as age, disability health status, sexual orientation or gender identity⁵⁵. It is submitted that under the international human rights law, state parties who have ratified international treaties are bound to make legislations in the domestic legal system where the domestic legislation do not avail a person, resort to can be had to the international treaties⁵⁶. It has been established that international treaties which have been enacted into local laws pursuant to Section 12 of the Nigerian Constitution are enforceable by municipal courts. See *Oshevire v. British*

²⁸ 2021 Legal Pedia (CA) 65111.

²⁹ Chapter IV of the Constitution of the Federal Republic of Nigeria 1999.

⁴⁰ African Charter (Ratification and Enforcement) Act Chapter A9 Laws of the Federation of Nigeria, 2004.

⁴⁷ Article 11 of the Charter.

⁴⁸ Adopted by the General Assembly of the United Nations on 19th December, 1966.

⁴⁹ Article 2 ICCPR 1966.

⁵⁰ Article 26 ICCPR 1966.

⁵¹ Article 2 (2) ICCPR 1966

⁵² Communication No 941/2000 (CCPR/C/941/2000)..

⁵³ 5 No. 1932/2010 UN DOC CCPR/C/106/D/1932/2010(2012).

⁵⁴Chukwumeka Anyamele and Ronald L’wabaayi and Tuu-Van Nguyen and Hans Bins Nanger: Sexual Minorities, Violence an AIDS in Africa available at www.researchgate (accessed 29/10/2021).

⁵⁵ Free and Equal: ‘International Human Rights Law and Sexual Orientation and Gender Identity’ available at www.unfeorg. (Accessed 15/11/21)

⁵⁶ Ibid.

*Caledonia Airlines*⁵⁷. It has been argued in favour of the LGBT rights activist that the right to equality and non-discrimination are core principle of human rights enshrined in the Universal Declaration of Human Right which in its opening paragraphs provide that all human beings are born free and equal in dignity and rights⁵⁸. This equality applies to all regardless of sex, sexual orientation and gender identity or other status and that the treaties have not exempted categories persons who are not to enjoy these rights⁵⁹. In a critical analysis of LGBT rights as human rights, Lovell submits that the human rights discourse and its universality has long been challenged by cultural relativists, and this he said has profound implications when advocating LGBT rights⁶⁰. The advocates of cultural relativist are of the view that 'ethical, political, legal and social values of a certain culture are firmly rooted in the traditions and beliefs of the culture in question. It is argued that cultural relativist sometimes do accused human rights advocates of ethnocentrism, and cultural Imperialism⁶¹. He said the imposition of LGBT rights for instance has met with stiff resistance from countries like Uganda and far right Christian groups in the United States. Cultural relativists see human rights as set up in the United Nations Declaration on Human Rights (UDHR) as having no normal the force in the face of divergent cultural traditions⁶². Also to the feminists, the idea of who constitutes a 'human' is a historically contested concept the feminists have highlighted how the rights of woman have been marginalised through a continued focus on the rights of man protagonists of this viewpoint like Docke believes that the framers of the United Nations Declaration thinking about those who were to hold the 'Natural' and 'human rights'. Feminists have also argued that the human rights has consistently relied on a rigid, Unitary category of 'woman' and fails to recognize the inherent diversities and intersections of identity, such as ethnicity, race, class, religion and sexual orientation⁶³. It is submitted that the concept of universalism of human rights of individuals and social groups willing to conform to normative way of life.

7. Laws against LGBT in Nigeria

Nigerian Criminal Justice System is founded principally on two Major codes, the Criminal code operational in the South and the penal code in the north. The codes provide against what is termed unnatural offends it provides: 'Any person who; has carnal knowledge of any person against the order of nature has carnal knowledge of an animal or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony, and is liable to imprisonment for fourteen years'⁶⁴ For a person to attempt to commit the above offences alone is punishable with an imprisonment term of seven years⁶⁵ The code punishes persons who either in public or private procures another to commit what it terms gross indecency with him or attempts such act in imprisonment term of three years. Schism 217 is to the effect that: 'Any male person who, whither in public or private, commit an act of gross indecency with 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 belong, and is liable to imprisonment for three years'⁶⁶ In *Dowling v Inspector General of Police*⁶⁷ the appellant committed an unnatural offence and was later blackmailed by his accomplice, on advice, he went to the police to report the blackmailer. A trap was set and the blackmailer was caught and both were charged separately on different offences, the appellant was convicted to Six months imprisonment upon admission. On appeal the court held dismissing the appeal. 'Whatever may be the view taken of such offences elsewhere, it is clear that in Nigeria it is still considered grave since the law prescribes a maximum punishment of fourteen years imprisonment for it. That being so, *prima facie*, a sentence of six months cannot be considered excessive. It would appear more over that in passing the sentence, the learned chief magistrate took into consideration all the circumstances and did not apply any wrong principle. I cannot see any good reason, therefore to interfere with him decision.' Thin judicial approval of section 214 of the Code has set the tone for the enforcement of the crimes against the order of nature.

Sharia Law

The Northern states of Nigeria which are predominantly Muslim adopted the Sharia Penal Code since the return to democracy in 1990, the Sharia penal laws prohibit same sex or sexual intercourse against the order of nature and such shall attract a death penalty. The Code provides.⁶⁸ 'Whoever has carnal intercourse against the order of nature with any man or woman is said to commit the offence of sodomy and shall be punished with canning of one hundred lashes if unnamed, and shall also be liable to imprisonment for the term of one year or if named with

⁵⁷ (1987) 4 NWLR (pt. 163) 507.

⁵⁸ Free and Equal op cit.

⁵⁹ Ibid.

⁶⁰ Natalle Lovell, 'Theorising LGBT Rights as Human Rights: A Queer (Itical) Analysis available at [www.e-ir.info/2015/12/123/theorising-igbt-right-0-queer\(itical\)-Analysis](http://www.e-ir.info/2015/12/123/theorising-igbt-right-0-queer(itical)-Analysis) (last accessed 15/9/2021).

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Section 214 Criminal Code Chapter 77 Laws of the Federation of Nigeria 1990. See also Section 284 Penal Code Laws of Northern Nigeria 1960.

⁶⁵ Section 215 Ibid

⁶⁶ Section 217 Ibid

⁶⁷ Appeal No. LD/51/CA/64

stoning to death' Lesbianism or Sihaq is defined under the law to mean that when a woman engaged another woman in carnal inter course through her sexual organ or by means of stimulation of sexual excitement of one another has committed the offence of lesbianism and shall be punished with canning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months⁶⁹ Though no reason has been advanced as to while there is a sharp distinction in the nature of punishment imposed in seemingly similar offences but it does appeal that the lawgivers tend to view the offence of homosexual as being more grave than Lesbianism.

Same Sex Manage (Prohibition) Act 2013

The Act came into force in 2014 prohibiting civil unions of same sex, it amplifies the provisions of the Criminal and the Penal Codes already in existence in Nigeria. It is submitted by the Directorate of immigration and Refugee Board of Canada that the Act is wider in scope than the title appears. The law has gone ahead to prohibit cohabitation between same Sex sexual partners, it also bans public show of amorous relationship and prohibits the formation, operation and support of gay clubs, so likely and organisations.⁷⁰ The Act outright prohibits the contracting of civil unions between persons of same sex and shall not be accorded any recognisance and such parties shall not be entitled to benefits of a valid manage.⁷¹ No place of worship is allowed to conduct such marriages and certificates of such unions shall be not be valid in Nigeria. The punishment shall be 14 years imprisonment. The Act also prohibits registration of gay clubs, societies and organisations, their sustenance, processions, and meetings as well as public shows of amorous relationship directly or indirectly, the punishment here is 10 years imprisonment.⁷² It is also an offence for a person group of persons who administer, witness, abets, or aids the Solemnisation of same sex manage or civic union, or supports the registration operation and sustenance of gay clubs, societies, organization, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.⁷³ One noticeable feature about this act is that it does not admit of any option of fine upon conviction even for those who may only 'aid' 'abet' about or 'support' such civil unions. As observed by the African Commissions special rapporteur on human rights defenders in Africa, human rights defenders will definitely come under the weight of the law as they may be seen to be supporting gay organisation she said. 'The special rapporteurs is concerned by some provisions of the Act, in particular, section 4(1) and 5(2) which prohibit and provide for penalties against defenders of lesbian, gay, bisexual and transgender (LGBT) people the provisions undermine the rights of human rights defenders and are against any public debate on thin crucial issue.⁷⁴

8. The Dialectics of Constitutional Provisions and Anti-LGBT Rights in Nigeria

Nigeria is governed through a constitution which has declared itself supreme, the opening paragraph of the Constitution reads, 'this constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria, if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'⁷⁵. According to Ewemie and Ainabor, the supremacy of the constitution means that the constitution is superior to every other law in the land. They opine that the constitution is always the final authority in the land as administered by the law court. it means no other institution person or persons, not even legislature that assisted in making the law should claim superiority over the law. The supremacy of the constitution in relation to government and its functionaries, state and those government functionaries or agencies must recognise and obey the constitution of the state, its influences and authority transcend any other institution in the state the existence of the constitution of the state, its influence and authority transcend any other institution in the state. The existence of the constitution makes it impossible to process or exhibit arbitrary or absolutepower.⁷⁶ Drawing from the above, the constitution exists for purposes of checking governmental powers so as to prevent abuse of power, guard the rights and state the duties of citizens defend human rights and promote the rule of law.

As adumbrated in the earlier part of this work, the constitution has provided in its chapter four the fundamental rights of the people within Nigeria it has also been agreed that Nigeria, is a signatory to the African Charter of Human and Peoples Rights and the UN Declaration of human rights which are in force as domestic legislature.

⁶⁸ Sections 130 and 131 of the Zamfara State Sharia Penal Code 2000.

⁶⁹ Sections 134 and 135 of the Zamfara State Sharia Penal Code 2000.

⁷⁰ See the situation of Sexual and Gender Minorities in Nigeria (2014-2018) A research carried out by the Directorate of Immigration.

⁷¹ Section 1, Same Sex Marriage (Prohibition) Act 2013

⁷² Section 5(2) Same Sex Marriage (Prohibition) Act, 2013

⁷³ Section 5(3) of the Same Sex Marriage (Prohibition) Act 2013.

⁷⁴ The except of the speech is contained in the report 'Human Rights Situation for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Sexual Rights in Nigeria presented to the UN Human Rights Committee at 126 Session in July, 2019.

⁷⁵ Section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria 1999.

⁷⁶ Benedict D, Ewemie and Aibanor Augustine E; ' Supremacy of the Constitution and Good Governance in Nigeria available at <https://globalacademicgroup.com> (accessed 6/11/21)

At this stage, the question that has arisen for determination is, whether the Nigerian government can validly derogate from the abundant provisions of the constitution, the African Charter and the other extant legislations and Covenants to which she is signatory by enacting anti-LGBT laws that appear in contradiction with the consolidation. The application of the African Charter has been upheld in *Ohakosin v Commissioner of Police, Imo State*⁷⁷ where the court of appeal held. 'By virtue of Cap A9, Laws of the Federation of Nigeria, 2004, the Africa Charter constitute part of the laws of Nigeria and must be upheld by all Courts in the country. Indeed, as rightly observed by the Supreme Court in the case of *Abacha v Fawehinmi*⁶, Nigeria has given due recognition to the charter by enshrining most of the rights and obligation guaranteed therein in Chapter iv of the 1999 Constitution.'

It has been argued that apart from the fundamental rights provisions in chapter iv, chapter two of the Constitution sets out the Fundamental Objectives and Directives Principles of the State Policy with which 'all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers' are obliged to conform sections 15 and 17 thereof provides as follows: National integration shall be actively encouraged whilst discrimination on the grounds of place of origin, sex, religion, states, ethnic or linguistics association or ties shall be prohibited.⁷⁸ Promote or encourage the formation of association that cut across ethnic, linguistics, religious and others.⁷⁹ The state shall abolish all corrupt practices and abuse of power. Every citizen shall have equality of rights, obligations and opportunities before the law and the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced.⁸⁰ The African Commission in 2014 pursuant to the Charter in Human and Peoples Rights adopted a Resolution on 'Protection against Persons on the Basis of their Real or Imputed Sexual Orientation'⁸¹ this was in reaffirmation of the right to freedom from discrimination, equality before the law and equal protection of the law; the right to life; and the right to dignity and prohibition of torture and cruel, inhuman and degrading treatment.⁸² Nigeria therefore owes a moral and legal duty to protect every citizen irrespective of his social difference. The penal laws including the sharia penal code and the same sex marriage prohibition law appear to have not only emasculated a section of the Nigeria community of their rights but have exposed them to violence and persecution. However, opponents of the gay rights have argued that the LGBT rights as championed by the west is alien to the cultural norms of the people, that the fundamental rights as provided for in the constitution is not absolute and can be derogated upon section 45 provides.⁸³ 'Nothing in section 37, 38, 39, 40 and 41 of the constitution shall invalidate any law that is reasonable justifiable in a democratic society, (a) In the interest of defense, public safety public order, public morality or public health, For the purpose of protecting the rights and freedom of other persons.'

Ogouno is of view that prohibiting and criminalizing same sex marriage or civil union may well have infringed on the rights of some persons, nevertheless, the greater good of the society has dictated the decision to do so.⁸⁴ It is has been argued further that these rights are said to be fundamental and inalienable, they are not absolute since they are subject, from time to time, to all manners of derogations and restrictions in the interest of defense, public safety, public order, public morality, public health and freedom of other persons in *Yetunde Ogungbesan & ors v Hon Minister of Health and Social Services*⁸⁵ the applicants who were nurses had sued the respondents for their right to freedom of association, in dismissing the action, it was held that since the applicants were engaged to provide essential services their right to embark on industrial action was properly derogated upon. 'Viewed from Savigny's *Volkgeist's* doctrine, which is to the effect that law must be understood as the product of a long and continuing historical product and its validity depends on the fact that its national character is rooted in the popular consciousness and is thus a true national law in accordance with the spirit of the people⁸⁶ the question that will be called for determination is, whether the penal laws are within the contemplation of the spirit of Nigeria society. Ogouno has this to say; 'It is instructive to point out that Nigerians are very religious people and there exists several religions in Nigeria, helping to accentuate regional and ethnic distinctions. These account for the reason why majority of Nigerians were unanimous in applauding the passage of same sex marriage (Prohibition) Act, by the government of president Ebele Goodluck Jonathan despite international pressure and criticism from America and European governments to borrow the worlds of presidents Kenyatta of Kenya, when asked about gay rights issue, quickly and clearly, he stated that homosexuality was 'non-issue' for Kenya and by way of corollary to Africans, Nigeria inclusive.⁸⁷ It is clear that Nigeria and of course Africa is yet to come to terms with same sex

⁷⁷ (2009) 15 NWLR (pt 1164) 229

⁷⁸ LGBT Rights available at <http://liw.org>topic>lgbt-rights> (Access 8/11/2021)

⁷⁹ Section 15(2) CFRN 1999

⁸⁰ Section 15(3) (d) CFRN 1999

⁸¹ Section 17 CFRN 1999

⁸² African Commission Resolution 275, 2014.

^{82b}(2000) 6 NWLR (PT 660) 228 at 259c; 340 G.H.X 342 DE.

⁸³ Section 45 of the Constitution of the Federal Republic of Nigeria 1999

⁸⁴ John Ogouno, A Critical Appraisal of Same Sex Marriage vis a vis Human Rights in Nigeria.

⁸⁵ (1995) FHCLR 168 at 190

⁸⁶ Ifedayo Akomolade: Introduction to Jurisprudence and Legal Theory. (Niyak Print and Law Publications, Lagos, 2008) P.5

⁸⁷ Ogouno Op cit

⁸⁸ *Obergerfell v. Hodges*, 576 US 644⁸

relationship which viewed from the sociological perspective is alien to the culturalism of the people, though from the stand point of the international law, the laws enacted by the National Assembly are in sharp distinction from the tenets of the constitution which is the ground norm.

9. Conclusion and Recommendations

It is not in doubt that the constitution of the federal republic of Nigeria has ample provision in Chapter IV on the human rights of its citizens. These rights have been abused by the government itself particularly those of LGBTs. The government has enacted some legislation; the Penal Code, Criminal Code in force in the north and South of Nigeria and the Sharia Penal Codes which is operational in the 12 northern states. The Same Sex Marriage Prohibition Act, 2013 has emasculated the rights of some citizens on the basis of their sexual orientation, this it is submitted is dialectical and a challenge to the supremacy of the constitution. It is recommended that such sections that run afoul of the inalienable rights of some sections of the Nigerian community be amended to accord the constitution its true supremacy. It is a truism that the idea of LGBT rights is evolutionary even the west at particular times in history had to contend with the issue of gay rights in the United States of America for instance it has been a long walk to the 2015 Supreme Court decision in *Obergefell v Hodges*⁸⁸ wherein the Supreme Court legalised same sex marriage, striking down the Defense of Marriage Act which prohibited gay rights. It is therefore recommended as follows: There is a need for sensitisation of the populace and the government that LGBT rights are human rights by non-governmental organisations and human rights organisations. The National Assembly should be lobbied to alter the constitution of the Federal Republic of Nigeria, as it stands now; the constitution has empowered the institution of government to depart from same by making laws to protect public morality. Human rights lawyers require empowerment to enforce the fundamental rights of the sexual minorities whose rights are abused by security agencies and community members.