

Same Sex Marriage Prohibition Act of Nigeria, 2013: A Still Birth?

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Abstract

The Same Sex Prohibition Act of Nigeria, 2013,(hereinafter referred to as the Act) a prohibiting any marriage contract or civil union entered into between persons of same sex, solemnization of the same; and for related matters was signed into Law on the 7th day of January, 2014 by the President of the Federal Republic of Nigeria, Dr. Goodluck Jonathan. The passage instantly generated a plethora of reactions. Does the Same Sex Prohibition Act, 2013 infringe on fundamental human rights? Does the Same Sex Prohibition Act, 2013 breach the Constitution of the Federal Republic of Nigeria, 1999, as amended? How far can the principle of cultural relativism protect this Act?. Is this law really current or needed at all? Are there germane issues that are far from the contemplation of this law which may have created lacunas? This work seeks to find answers to these questions.

Keywords: Same sex, Marriage, Human rights

Introduction

The President of the Federal Republic of Nigeria, Dr.Goodluck Ebele Jonathan assented to the Same Sex Marriage (Prohibition) Act 2013 on 7th January 2014, effectively making the provisions of the Act operative in Nigeria. The law has generated much debate and anxiety on the implications of the passage, especially as it affects human rights and related issues. The act has drawn international condemnation from countries such as the United States and Britain. Human rights activists argue that this law threatens the very livelihood of Lesbians, Gays, Bisexuals and Transgender (LGBT) people and allies in Nigeria, and sets a dangerous precedent for persecution and violence against minorities throughout the nation. Considerations bothering on culture and religion have lent support to this new law. This enactment of the National Assembly has raised a great deal of dust within and outside Nigeria. Lesbian, Gay, Bi-sexual and Transgender (LGBT) communities in and outside Nigeria and their members find their voice and favour with some Western media to lampoon the Nigerian State for denying these persons what they claim as their fundamental and inalienable human rights to liberty, association and to live out their sexual fantasies as they deem fit.

On the other hand, many Nigerian Christians, Moslems and traditionalists have hailed the enactment and the Nigerian State for not caving into pressures from Western countries like the United States of America, Canada and Britain to desecrate our acclaimed sacrosanct and immutable core values while insisting that the West has no right to impose their lifestyle on Nigerians just as we do not interfere with theirs. It must be noted that long before now homosexuality was already unlawful and criminalized in Nigeria under the Criminal and Penal Codes. Specifically, Section 214 of the Criminal Code states that ‘ ‘ *any person who (1) has carnal knowledge of any person against the order of nature; or (2) has carnal knowledge of animals; or (3) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony.*’ ’ The question here may be what is the order of nature and who determines it?

Chimamanda Ngozi Adichie,¹ an award winning Nigerian writer argues that though this law is popular among Nigerians, it shows a failure of our democracy because the mark of a true democracy is not in the rule of the majority but in the protection of its minority – otherwise mob justice will be considered democratic. To her, the society suffers no harm by how adults express love and whom they love. Nigerians must accommodate benign differences even where we may not as in this case truly understand homosexuality. She reminds us that we are a society where men are openly hold hands, hug each other and generally display affections to the other. Does this Act breach human rights and the Constitution of the Federal Republic of Nigeria, 1999 as amended? Medical considerations have also ignited a new course in this discourse. As a result of these multifaceted developments some sundry issues have arisen.

The Act and the Issue of Marriage.

The Same Sex Prohibition Act, 2013, an Act of the Nigerian National Assembly seeks to prohibit any marriage contract or civil union entered into between persons of same sex, solemnization of the same; and for related matters. It has eight sections with Section 1 clearly prohibiting in Nigeria a marriage contract or civil union entered into by persons of the same sex and any entered outside Nigeria shall remain void and any benefit accruing thereto also remain legally unsupportable in Nigeria with or without a certificate issued by a foreign

¹ Chimamanda Ngozi Adichie, ‘Why Cant He Be Just Like Everyone Else?’

country to that effect. The solemnization of any such marriage or civil union in any church, mosque or worship centre is also prohibited.¹ Section 3 for emphasis states that *'only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.'*

The Act also goes after bodies that promote gay activities as clubs, societies and organizations are banned while their registration, procession and meetings prohibited. Section 4 (2) of the Act even prohibits *'the public show of same sex amorous relationship directly or indirectly.'*

In creating offences and penalties, Section 5 of the Act states thus

(1) *Any person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment.*

(2) *A person who registers operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.*

(3) *A person or group of persons, who administers, witnesses, abets or aids the solemnization of same sex marriage or civil union or supports the registration, operation and or sustenance of gay clubs, societies or organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.*

The Act gives jurisdiction to the High Court of a State or of the Federal Capital Territory to entertain matters arising from the breach of the provisions of the Act² while section 7 provides for interpretations. For clarity, the Act says

'same sex marriage' means the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purpose of same sexual relationship.

'marriage' means a legal union entered into between persons of opposite sex in accordance with Marriage Act, Islamic Law or Customary Law.

On the whole, the Acts effectively prohibits same sex contracts of marriage. Outside a contract of marriage, the Act prohibits civil unions for the purpose of sexual relationships between persons of the same sex.

Curiously, the Matrimonial Causes Act referred to in the interpretation provides no statutory definition of marriage. The Act is designed for the celebration of marriage between a man and a woman and that has to be a monogamous one. Nigerian courts have often followed the definition of marriage in the celebrated case of HYDE V. HYDE³ which effectively excludes same sex marriages. Islamic or Sharia Law does not recognize same sex marriage in any form and provides for death by stoning where found guilty. For Christians, Jesus never defined marriage but when Jesus talked about married people, he spoke of 'a man ...and... his wife' in Matthew 19:5 and Mark 10:7. Jesus went on to use the language "... the two shall become one." Jesus quoted the text of Genesis 2:24 as the foundation of his teaching on marriage where you have one man and one woman being together for a lifetime.

Meanwhile, some provisions of the Marriage Act⁴ leave much to be desired. It can be argued that the Marriage Act itself envisages homosexual marriages. Section 7, for instance provides:

Whenever *any persons*⁵ desire to marry, one of the parties to the intended marriage shall sign and give to the registrar of the district in which the marriage is intended to Form A. take place a notice as in Form A in the First Schedule.

Having not defined marriage throughout its provisions to mean a heterogeneous phenomenon, it is arguable; that the loose use of the phrase *any persons* envisages persons of the same sex. However, the Interpretation Act⁶ defines marriage to mean

A marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage

It is axiomatic from this provision that marriage is intended to be between persons of the opposite sex. The prohibitions expressed by the Act are not alien to Nigerian law. Section 217 of the Criminal Code⁷ provides:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether

¹ Ibid

² Section 6 of the Act.

³ [LR] 1 P&D 130.

⁴ Cap 218, Laws of the federation of Nigeria

⁵ Emphasis mine.

⁶ Section 18, Cap 123, Laws of the Federatoion,2004

⁷ Cap 77, Laws of the Federatoion.1990

in public or private, is guilty of a felony, and is liable to imprisonment for three years.

It is surprising that the Act has varied the status of foreign marriages in Nigeria. Before the enactment of the Act, foreign marriages conducted abroad are duly recognised in Nigeria. In the case of same sex marriage, and in order to masticate the structure of homosexual marriage, the Act is contradicting an existing legal practice. It is doubtful if the Act is not just a toothless bulldog in that regard.

However, under Customary Law of the Igbos in the eastern part of Nigeria, there is a feature worthy of examination here and that is Woman to Woman marriage. This ordinarily would appear as a same sex marriage since it is a woman that marries another. The truth however is that a woman marries another not for her selfish sexual needs but that of a man of her choice. For instance, a woman could be barren but desires to satisfy her husband's pursuit of procreation and to satisfy her husband the wife now 'marries' another woman for her husband.

In *MERIBE V. EGWUM*¹, the Supreme Court of Nigeria was called upon to pronounce on the validity of this type of marriage. In that case, land was in dispute. The land belonged to one Nwanyiakoli, one of the wives of Chief Egwu who died in 1935 while she later died without an issue in 1937. The Plaintiff contended that the land devolved on him under customary law as the son of Nwanyiocha married under the customary law marriage of woman to woman by Nwanyiakoli to her husband Chief Egwu. The Defendant claimed inter alia that the marriage was against public policy and good conscience.

The trial court found for the Plaintiff and the appeal of the defendant to the Supreme Court was dismissed. On the status of the particular relationship before it, the court observed that,

"We however do not think that on a close observation of the facts of this case, there was a woman to woman marriage between Nwanyiokoli and Nwanyiocha. the true nature of the arrangement was appreciated by the learned trial judge when he rightly in our view, made the following observations:" the facts disclosed in evidence did not show that Nwanyiokoli married Nwanyiocha for herself, a fact naturally impossible – but that she married in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwo to marry her. There was no suggestion in evidence that there was anything immoral in the transaction."

The expressed opinion of the court in this case is not totally correct. The woman to woman marriage is not just a colloquial phenomenon; the woman who marries another for the sake of procreation usually does not sleep with her but exercises control over her in all other situations. In the first place, she pays the dowry and takes initiative. Sometimes she dictates when the new wife sleeps with her husband. She is in control. It is pertinent to point out that, some heterogeneous marriages are not necessarily sexual relationships; they are sometimes union of convenience. This fact makes the woman to woman practice not less a subsisting marriage in itself.

The question is, does the Act contemplate this customary marriage in its prohibition? The matter becomes more complex when Section 7² defines marriage to include customary marriage. If the Act prohibits same sex marriage in all its manifestations and customary marriage is within the contemplation of that law, can it be said that the Act is prohibiting the culture of woman to woman practice? Is the Act changing the jurisprudence of customary law in Nigeria? Can the statute invalidate a custom? If these conclusions are not the intendment of the Act, then it is obvious that the Act may have bitten more than it can chew. It has died on arrival.

The Act and Sexual Issues

A person may be considered to be a transsexual person if his identity is incongruent with the sex he was assigned at birth The Act prohibits the union of persons of the same sex. It follows that a man cannot marry a man and a woman cannot marry a woman. The issues arise when the distinction of who is a man and who is not becomes foggy. It becomes difficult to ascertain the gender of transsexuals especially for the purpose of identifying offenders under the Act. The considerations within the parameters of *Corbett v Corbett*³, where the position of the Law was that for the purposes of marriage, a post-operative transsexual was considered to be of the sex they were assigned at birth.; it would mean that any union between a man and a woman, one of who was at birth a different sex would be invalid under the Act. Since April 2005, as per the Gender Recognition Act 2004, it became possible for transgender people to change their legal gender in the UK, acquire a new birth certificate, with full recognition of their acquired sex in law for all purposes. The application of new position of the law in the UK to the operation of the Act will mean that when a man marries a transsexual woman, the marriage will be valid, since for all purposes the union is between two opposite sexes. It is doubtful if this is the intendment of the Act. The Act makes no provision for the relationship of transsexuals. Nigerian law has made no statement on the

¹ (1976) 3 SC 23.

² "In this Act: marriage" means a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law;"

³ FD 1-Feb-1970, also 236 Ga. App. 299, 511 S.E.2d 633 (1999), (1970) All E,R, 33.

legal status of transsexuals and the Act has failed to take a stand on this issue. It would appear the silence of the Act on the issue of transgender presupposes that Nigerian law recognises the legal status of transsexuals. Once again the Act has omitted an important legal phenomenon in the discourse of the law and LGBT rights.

Similarly, the Act has left a big lacuna, by not expressing a position on bisexual issues. It is pertinent to note that there are persons born bisexual, being that they possess both male and female *genitalia*. Such persons may present a particular sex in a greater measure than the other, yet could be comfortable with either sex. Is the Act forbidding a bisexual male from entering into a heterosexual marriage relationship with a woman?

Congenital Sexual Issues

Some people are claimed to have medical and congenital sexual disorders. Infact, some transgender cases are caused by a medical condition called **Gender Dysphoria**. This is a fundamental unease and dissatisfaction with the biological sex one is born with which results in anxiety, depression, restlessness, and other symptoms. The dysphoria often acts as a catalyst to change one's body and gender expression.¹ Until 1973, homosexual was regarded as a psychological disorder. While it is no longer a psychological issue, there are indications that some may actually have a disorder from birth which gets them attracted only to persons of the same sex. While this is not scientifically proven, it has also not been disproved. Chances then, are that congenital malformation or some medical conditions may be responsible for some homosexual behaviour. The question is, does the Act contemplate such scenario? Will the Act still be vituperating against homosexual unions in such a situation. The Act makes no reference to such instances and as such leaves much to be imagined.

Gay Rights, Human Rights and The Act

In Nigeria, everyone shall be entitled to his personal liberty² and Section 37 of the Constitution states that ‘‘the privacy of citizens, their homes, correspondences, telephone conversations and telegraphic communications is hereby guaranteed and protected.’’ Section 38 of the same Constitution goes on to guarantee the freedom of thought, conscience and religion with the right to teach, practice and observe such. Furthermore, every person is entitled to freedom of expression, including the right to hold opinions and to receive and impart ideas and information without interference.³ In addition, every person is entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.⁴ Finally, every person is not to be discriminated against and in particular, no citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstances of his birth.⁵

It would appear therefore from the above that there are issues to be resolved concerning the position of the Act which tends to violate the human rights of gays, lesbians, transgender persons and bisexuals. The Act by prohibiting same sex marriages and civil unions to that effect would appear to limit the right of a gay person to his or her personal liberty. The gay union would have ordinarily been between consensual adults who should have the liberty or freedom of choosing who to associate with. The Act restricts the expression of their sexual orientation and liberty to choose who and how to relate with him or her. The Act restricts the free determination of sexuality of the homosexuals.

The Act tends to question what people do in their privacy as against the guaranteed protection of individual privacy as a human right under the Constitution. The Act prohibits civil unions, clubs, societies and associations that may promote sex between persons of the same sex when the Constitution itself guarantees as human right the right to freely associate and belong to any association that may protect his interests. The right to freedom of thought, conscience and religion is available to every Nigerian citizen but the gay person is prohibited from having his gay relationship solemnized in any place of worship in Nigeria. There is the freedom of thought and expression but advocacy in support of gay rights and or activities

are criminalized. Some of these homosexual persons actually claim their sexual orientation is not social but natural to them. If then this is natural to them and they were born that way, this Act certainly discriminates against them owing to the circumstances of their birth which amounts to an infringement of their human right to non discrimination.

Sound as these arguments may be, their foundations are questioned when it is appreciated that these human rights are not absolute and that individual rights are subject to that of the people. The fact that you have the right to liberty does not mean you have the freedom to do whatever you like otherwise paedophiles and the likes could rely on same argument to justify their actions, although, in the case of homosexuals, two consenting adults are involved.

The fact that there is the right to privacy does not mean the law should not be interested in what is

¹ NHS CHOICES, <http://www.nhs.uk/livewell/transhealth/pages/transoverview.aspx> last visited, 29/01/2015

² S. 35 of the Constitution of the FRN, 1999, as amended

³ S. 39 of the Constitution of the FRN, 1999, as amended

⁴ S. 40 of the Constitution of the FRN, 1999, as amended

⁵ S. 42 of the Constitution of the FRN, 1999, as amended

done in private to determine and limit those that may impact negatively on the society at large. For instance, planning in private to unleash terror on the society at large should not be permissible in law. In like manner, the right to freely associate and the freedom of expression are limited. The idea that there exists a realm of private morality where the law is stranded has long been extinguished by the arguments of Lord Devlin when he argues that the suppression of vice and not only subversive activity is as well the law's business.

Presently, it is not in dispute that gay activities are associated with the spread of terrible diseases and the dreaded HIV disease and there are intensive global efforts to curb the scourge. Sexual transmission of some of these diseases is rare in the exclusively heterosexual population. Others, while found among heterosexual and homosexual practitioners, are clearly predominated by those involved in homosexual activity. Why would the society not be interested in containing by way of legislation or otherwise an act that threatens its very existence? In this case, there is a battle between the rights of homosexuals to privacy and personal liberty and the rights of other members of the society to life and good health. The Act in this regard gives hegemony to the rights of the majority.

Furthermore, under Article 29(7) African Charter on Human and Peoples Rights (ACHPR)¹, the individual has a duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and in general to contribute to the promotion of the moral well being of the society Article 17(2) of the ACHPR that imposes a mandatory duty on the state to promote and protect morals and traditional values recognized by the community while Article 17(2) of the ACHPR imposes a mandatory duty on the state to promote and protect morals and traditional values recognized by the community. It is the society at large that determines her moral code and it has the duty of promoting and protecting same. The individual responsibility is to contribute to the moral well being of the society at large.

Also, Section 45 of the Constitution provides that valid and enforceable laws may be enacted and enforced even when they compromise these human rights provided such are reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of other persons.

Consequently, it can be concluded that the rights of the individual including his human rights are subject to those of the people at large and the people determine the limitations. In the instant case, the Act is an enactment of the National Assembly of the Federal Republic - a democratically constituted and representative assembly of the people. The Act was for years before the National Assembly that debated the same and eventually passed the Bill unanimously. Dr. Goodluck Jonathan, in his exercise of his function as the President of the Federal Republic of Nigeria assented to the Bill and it is now a Law in Nigeria. By this the National Assembly can be said to have codified a moral position of the Nigerian people. By this Act also, the Nigerian State can be said to promote and protect the moral code of the Nigerian people in satisfaction of her obligation under the ACHPR.

In fact, going by the ACHPR, the individual homosexual has a duty to support the Act. In any case, the Act gives jurisdiction to the High Court of a State or of the Federal Capital Territory to determine issues arising from the breach of the Act suggesting that the right to fair hearing is still available to the affected person. Consequently, any interested person can question in a Court of Law the legality or otherwise of the Act or any part thereof.

Conclusion

There are wide gaps between the provisions of the Act and current reality. The Act definitely did not contemplate a lot of germane issues part of which are discussed above. It has been shown that given the many lacunas in that law the Act is likely dead on arrival. It will not be able to answer series of legal questions that will be begging hereafter. The exclusion of many issues discussed above has given a lee way to the apologists of same sex marriage to throw it off balance in no time. Can legislation effectively control what consenting adults do in their privacy? It is known that even the threat of everlasting time in hellfire for pre-marital sex, fornication and adultery among Christians has not kept people from committing those sins. The effectiveness of the Act is a different thing but whether it should be struck down for infringing human rights regime is a matter that the Courts can resolved if involved. Considering the wide acceptance in Nigeria, it can safely be said that the Act is a product and the representation of the Nigerian moral and cultural sentiment. The question is, whether sentiments should translate to law. The Act is in place as law and will remain so until either repealed or declared void by a judicial process. These are processes that should be explored by those opposed to the Act and desirous of either repealing or striking down same. The issue of whether this Law was needed and is relevant is unsettled.

¹ (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

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