

# A Critical Review of Nigeria's Same Sex Marriage (Prohibition) Act

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## Abstract

*The Same Sex Marriage (Prohibition) Act (hereinafter referred to as 'Same Sex Act') has generated pungent controversy within Nigeria and between Nigeria and the West. Some people have called for the imposition of economic sanctions on Nigeria. The Same Sex Act criminalizes any marriage or civil union between homosexuals. This work questions the constitutionality of the Act and recommends its immediate repeal.*

**Keywords:** Constitution, Criminal, Nigeria, Prohibition, Same, Sex.

## 1. Introduction

The Same Sex Marriage Prohibition Act came into effect on the 7<sup>th</sup> day of January, 2014. It prohibits and sanctions any marriage contract or civil union between persons of the same sex and the solemnization of such marriage or union. It also criminalizes the registration of gay clubs, societies and organizations, their sustenance, processions and meetings. The work questions the constitutionality of the Act and argues that if homosexuality was caused by genetic factors, then it would be protected by the phrase 'circumstances of birth' under section 42 (2) 1999 CFRN (as amended). The authors have shown that lesbian cannot be guilty of anal inter course under sections 214, 284 and 81 of the Criminal Code Act, Panel Code Act and the Armed Forces Act respectively. The paper recommends that the Nigerian National Assembly should take steps to repeal the Act.

The work appraises the prohibition and sanctions created by the Act. It also investigates the constitutionality of the Act as well as Nigerian Criminal Jurisprudence on anal Intercourse and questions its reasonability in a democratic state.

In addressing the aims of this work, the authors have generated the following research questions:

- i. What are the prohibitions, offences and penalties established by the Same Sex Marriage Prohibition Act.
- ii. What is the constitutionality of the Act.
- iii. What is the position of Nigerian Criminal Jurisprudence on inter course against the order of nature.

The paper is divided into the following segments:

- i. Abstract
- ii. Introduction
- iii. Prohibition and sanctions under the Act,
- iv. The constitutionality or otherwise of the Act.
- v. The Act and the Nigerian criminal law
- vi. Conclusion and recommendations

The paper employs the doctrinal research methodology in investigating the issues raised above.

### 1.1 Prohibitions and Sanctions under the Act

The Act prohibits any marriage contract between homosexuals or civil union entered into in Nigeria and declares that such marriage contract or civil union is void<sup>1</sup>. Consequently the parties involved shall not be entitled to the benefits of a valid marriage. The Act further renders void any same sex marriage or civil union entered into in a foreign country and any benefit accruing therefrom shall not be enforced by any court of law in Nigeria<sup>2</sup>.

The first point to note is that the Act does not distinguish between a Nigerian and a non Nigerian in the context of its application. Thus, any homosexual marriage contracted outside Nigeria is voided by the Act once the parties are within the shores of Nigeria. Second, the parties to such a marriage do not derive any benefit from it. This second point has far reaching implications in view of the benefits of a valid marriage.

<sup>1</sup> Section 1 (1) (a) (b) of the Same Sex Marriage (Prohibition) Act, 2013.

<sup>2</sup> Section 1 (2) *Ibid*.

The most important benefit of a valid marriage is consortium. This connotes a bundle of rights and obligations between spouses. Some of the elements of consortium are: Change of name, cohabitation, sexual intercourse and mutual defence. Although it is customary for a wife to drop her surname and take on the husband's surname but this is not a legal requirement. A divorced wife can still retain the husband's surname and the husband cannot by injunction restrain her from so-doing<sup>1</sup>.

Another aspect of consortium is cohabitation. This entails living together of the spouses. However, this is not limited to physical cohabitation.<sup>2</sup> Where the spouses are forced by circumstances to live apart, this is still cohabitation in its wider sense, provided there is mutual consent otherwise this may lead to the offence of desertion<sup>3</sup>.

It is also necessary to point out that where a third party (not being the parents of either the wife or the husband) denies a spouse the companionship or society of the other, he or she shall be liable in damages.

Marriage obligates the parties to consummate it. However, the consummation of a marriage does not necessarily imply the discontinuance of further sexual intercourse. A spouse is not under an obligation to tolerate inordinate sexual demand of the other, especially where such will be injurious to the health of the other. Indeed such inordinate demand of a spouse may constitute a ground for holding that the marriage has broken down irretrievably<sup>4</sup>.

Additional benefits of marriage can be found in the Criminal Code Act and Evidence Act. In terms of mutual defence, the Criminal Code Act provides that it is not an offence for a person to do an act which is reasonably necessary in the defence of himself or another from actual and unlawful threat of violence<sup>5</sup>. Thus, a husband or a wife may employ reasonable force in the defence of each other.

Furthermore, the law protects the communication between spouses during marriage and none can be compelled to disclose it<sup>6</sup>. Exceptions are:

- i. Where the person who made the statement or his representatives in interest consents to disclose the communication; or
- ii. In suit between married persons; or
- iii. In a proceeding where a married person is being prosecuted for an offence under section 182 (1) of the Evidence Act<sup>7</sup>.

Again, the Constitution recognizes citizenship through marriage<sup>8</sup>. It states that any woman who is married to a citizen of Nigeria can be registered as Nigerian provided she satisfied the President that:

- a. She is a person of a good character;
- b. She has expressed the intention to be domiciled in Nigeria; and
- c. She has taken the oath of Allegiance in the seventh schedule to the Constitution.

Solemnization or celebration of marriage is a means by which the parties to a contract to marry become husband and wife. The Act prohibits a marriage contract between persons of the same sex from being solemnized in a church, mosque or any other place of worship in Nigeria<sup>9</sup>. And any certificate issued upon such solemnization is of no effect. Section 2 subsection 1 of the Act is defective because it excludes from the ambit of its prohibition such places as diplomatic mission and a place under special licence<sup>10</sup>. Marriage can also be solemnized in the aforementioned places though they cannot be categorized as any other place of worship.

<sup>1</sup> Fendall v. Goldsmith (1977) 2 PD 263; 264; Cowley v. Cowley (1901) AC 450; see E. I. Nwogugu, Family Law in Nigeria, (3<sup>rd</sup> ed.), Ibadan: Heinemann Educational Books, 1990, p. 71.

<sup>2</sup> Bradshaw v Bradshaw (1897) p. 24

<sup>3</sup> Pulford v. Pulford (1923) p. 18, 21, per Lord Mervivale; E. I. Nwogugu, *Op Cit*, p. 72

<sup>4</sup> Section 15 (3) (1) Matrimonial causes Act, Cap M7, LFN 2010; E. I. Nwogugu, *Op. Cit.* P. 72.

<sup>5</sup> Section 32 (3) Criminal Code Act Cap. C38 LFN 2010; Section 33 (2) (1) CFRN 1999 (as amended) Cap. C23 LFN 2010

<sup>6</sup> Section 187 Evidence Act 2011

<sup>7</sup> Evidence Act 2011 (Which has repealed The Evidence Act. Cap. E14 LFN 2010). The offences referred to by section 182 (1) can be found in sections 217-219, 221-226, 231, 300-301, 340-341, 357-362, 369, 370 or 371 of the Criminal Code Act, Cap C38 LFN 2010.

<sup>8</sup> Constitution of the Federal Republic of Nigeria, 1999 (as amended) Cap. C23 LFN 2010.

<sup>9</sup> Section 2 (1) of the Same Sex Marriage (Prohibition) Act.

<sup>10</sup> Section ..... Matrimonial Causes Act Cap M7 LFN 2010

With reference to ‘church and Mosque’ in section 2 (1), the authors assume that the drafters had in mind a licensed place of worship<sup>1</sup>. However, marriage solemnized in a Registrar’s office, Diplomatic Mission or a place specially licensed will still be null and void by virtue of section 1 (1) (2) of the Act.

Section 3 of the Same Sex Act states the obvious. It recognizes hetero-sexual marriages. It provides that “Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.”

The Act defines marriage as any legal union entered into between persons of opposite sex pursuant to Marriage Act, customary and Islamic Laws. On the other hand, the first leg of section 4 prohibits the formation and registration of gay clubs, societies and organizations including their meetings and processions. The essence of this provision is to prevent the emergence of the culture of gay or LGBT<sup>2</sup> pride in Nigeria. Gay or LGBT<sup>3</sup> pride is an emotional, mental and social dispositions which refute the attribution of shame to homosexuality bisexuality and transgender. It is also a stance against discrimination and violence towards LGBT. It celebrates sexual diversity and gender variance. It may manifest in the form of parades, processions, matches, rallies, clubs, societies<sup>4</sup> etc .

It is arguable that section 4 (1) of the Same Sex Act does not prohibit the formation or registration of lesbian, bisexual and transgender clubs, societies or even their meetings, parade or procession since it is restricted to gay associations except the drafters intended the term ‘gay’ to be synonymous with homosexuality.

Subsection 2 of section 4 mainly prohibits public show of same sex amorous relationship. The term ‘amorous’ has been defined as showing sexual desire and love towards any person<sup>5</sup>.

The word ‘public’ may mean any place, premise or thing to which individuals whether of a particular class, status, profession or generally have the right of ingress or egress. Thus, wherever two or more persons of the same sex are found kissing or involved in other romantic display in public, they would have contravened section 4 subsection 2 of the Act.

Any person or persons who enter into a same sex marriage contract<sup>6</sup> or civil union<sup>7</sup> commits an offence and is punishable on conviction by 14 years imprisonment. Section 5(2) punishes the registration, operation or participation in gay clubs, societies and organizations with 10 years imprisonment. The same punishment is melted out to those involved in a public show of same sex amorous relationship in Nigeria.

Furthermore, the Act provides for 10 years imprisonment on conviction for a person or group of persons who administer, witness, abet or aid the solemnization of a same sex marriage or civil union; or support the registration, operation and sustenance of gay clubs, societies, and organizations.

It is singular to note that none of the sanctions for flouting the Act include an option of fine. Moreover, the court has no discretion to impose punishments less than those provided for in the Act.

The jurisdiction to entertain matters arising from the breach of the Act is rested on the High Court of a State or of the Federal Capital Territory.

### 1.1.1 The Constitutionality or Otherwise of the Act

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<sup>1</sup> Section ..... *Ibid*

<sup>2</sup> Section 3 Same Sex Marriage (Prohibition) Act, 2013

<sup>3</sup> LGBT means Lesbians, Gay, Bisexual and Transgender.

<sup>4</sup> Gay Pride, <https://en.m.wikipedia.org>. Accessed 05/09/2015.

<sup>5</sup> Oxford Advance Learners’ Dictionary, 8<sup>th</sup> ed; Oxford University Press, 2010 p.45.

<sup>6</sup> Section of 5 (1) of the Act

<sup>7</sup> Section 7 defines ‘Civil Union’ as any arrangement between persons of the Same Sex to live together as sex partners, and includes such descriptions as:

- (a) Adult independent relationships,
- (b) Caring partnership;
- (c) Civil partnership;
- (d) Civil solidarity parts;
- (e) Domestic partnerships;
- (f) Reciprocal beneficiary relationship;
- (g) Registered partnerships;
- (h) Significant relationships; and
- (i) Stable union

The first issue for determination is whether the declaration of same sex marriage as a nullity is constitutional vis-à-vis the guaranteed freedoms under the Nigerian Constitution. Section 42 (2)<sup>1</sup> which guarantees freedom from discrimination provides: “No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth”.

‘Circumstances of birth’ may be described as a combination of nature and nurture. Some people are born deformed or physically challenged, others are born poor or within a particular religion or environment. Consequently, they develop or learn some attributes of that environment.

Homosexuality as a sexual orientation has been defined thus:

An enduring pattern of emotional, romantic and/ or sexual attractions primarily or exclusively to people of the same sex. It also refers to a person’s sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attraction...

There is no consensus among scientists about why a person develops a particular sexual orientation. Many scientists think that nature and nurture –a combination of genetic hormonal and environmental influences – factor into the cause of sexual orientation. They favour biologically – based theories which point to genetic factors. There is no substantive evidence which suggests that parenting or early childhood experiences play a role when it comes to sexual orientation ... while some people hold the view that homosexual activity is unnatural, scientific research has shown that homosexuality is an example of a normal and natural variation in human sexuality and is not in and of itself a source of negative psychological effects...<sup>2</sup>

It seems that scientific research from the above quotation has found that sexual orientation of homosexuals is based on genetic factors and not a consequence of parenting or early childhood experiences. This position has been further substantiated by a recent ground-breaking scientific finding<sup>3</sup>. Consequently, homosexuality falls within the phrase ‘circumstances of birth.’ It will therefore be unconstitutional that homosexuals in contradiction to heterosexuals are denied the right to enter into a marriage contract<sup>4</sup>. Thus, homosexuals are subject to disability and deprivation to which intersexuals are not.

In *Uzoukwu v. Ezeonu II*<sup>5</sup> the Court of Appeal held in respect of section 39 (2)<sup>6</sup> of the 1979 Constitution of Nigeria that it is not enough to prove any form of circumstances of birth “without the proof of any disability or deprivation. If either of these is not proved, the discrimination as such will not fall within subsection (2) of section 39. Not only that there was disability or deprivation, the action giving rise to this must, it seems be the action of the state or its agencies”.

Undoubtedly, the Act has imposed both disability and deprivation on homosexuals. And these result from the action of the National Assembly – an organ of the government of Nigeria.

Therefore, the Act is null and void to the extent of its inconsistency with the Constitution of the Federal Republic of Nigeria. It is equally important to note that section 42 (2) is not subject to any constitutional limitation or drawback. Section 45 of the 1999 Constitution which delimits the fundamental rights enshrined in sections 37, 38, 39, 40, and 41 of the same constitution does not affect section 42.

In view of the fact that the prohibition by the Act of same sex marriage is unconstitutional, it will also amount to unconstitutionality for the Act to prohibit the formation, registration, sustenance and participation in same sex clubs, societies, organizations, meetings and processions<sup>7</sup>. They amount to a violation of the constitutionally guaranteed rights to freedom of association, assembly<sup>8</sup>, movement<sup>1</sup> and expression<sup>2</sup>.

<sup>1</sup> CFRN 1999 (as amended)

<sup>2</sup> <https://en.wikipedia.org/wiki/File:Lefond-Sapphon-and-Homer.jpg>.-Homosexuality-Wikipedia, the free encyclopedia. Accessed 6-09-2015.

<sup>3</sup> Brain Stallard, Homosexuality is Genetic: Strongest Evidence Yet. [www.natureworldnews.com/articles/10443/20141118/homosexuality-genetic-strongest-evidence.htm](http://www.natureworldnews.com/articles/10443/20141118/homosexuality-genetic-strongest-evidence.htm). Accessed 10/9/2015. However, earlier scientific findings do not see Biological causes of Same – Sex Attraction, [www.samesexattraction.org/biological-causes-homosexuality.htm](http://www.samesexattraction.org/biological-causes-homosexuality.htm).

<sup>4</sup> Sections 1 (1) (2) and 5 of the Act.

<sup>5</sup> (1991)6 NWLR (pt. 200) 703

<sup>6</sup> Which is in *pari materia* with section 42(2) 1999 CFRN (as amended).

<sup>7</sup> Sections 4 (1) 5 (2) (3) Same Sex Marriage Act.

<sup>8</sup> Section 40 1999 CFRN (as amended)

Although these rights and freedoms are delimited by section 45 of the Constitution, it is contended that the Same Sex Marriage (Prohibition) Act is not a law that is reasonably justifiable in a democratic society. Hence, it cannot derogate from the constitutionally secured freedoms.

### 1.1.2 The Act and the Nigerian Criminal Laws

The Same Sex Act neither prohibits nor sanctions sexual intercourse between homosexuals when done outside marriage or civil union. However, prior to the enactment of the Act, Nigerian criminal law has criminalized certain aspects of homosexual activities.<sup>3</sup> For example, section 214 of the Criminal Code Act provides:

Any person who –

- (1) Has carnal knowledge of any person against the order of nature; or
- (2) Has carnal knowledge of an animal; or
- (3) Permits a male person to have carnal knowledge of him or her against the order of nature is guilty of an offence, and is liable on conviction to imprisonment for fourteen years.

The phrase ‘carnal knowledge’ is an old legal euphemism for sexual intercourse between heterosexuals. This has been extended to include sex between homosexuals<sup>4</sup>. On the other hand, the expression ‘against the order of nature’ means any sex act other than that with the opposite sex<sup>5</sup>. In this regard the Supreme Court of Nigeria adumbrated: “The natural function of anus is the hole through which solid food waste leaves the bowels and not penis penetration. That is against the order of nature.”<sup>6</sup> In other words, the qualifying element of sodomy is anal intercourse.

In *Magaji v. The Nigerian Army*<sup>7</sup>, the appellant Major Magaji was arraigned before the General Court Martial on a charge of sodomy contrary to section 81(a) of the Armed Forces Decree No 105 of 1993<sup>8</sup>. He was alleged to have had carnal knowledge of four males. He was found guilty and sentenced to seven (7) years imprisonment. Subsequently, the confirming Authority reduced it to five (5) years imprisonment. The Court of Appeal affirmed the conviction and sentence of the appellant. On further appeal to the Supreme Court, the apex court upheld the judgment of the lower court.

For there to be carnal knowledge within the context of Nigerian criminal jurisprudence, there must be penetration<sup>9</sup>. This means the penetration of the vagina, anus<sup>10</sup> or mouth by the penis or by any other part of a person’s body or thing<sup>11</sup>.

The next question is does sexual intercourse between lesbians fall within the ambit of section 214 of the Criminal Code Act? It is argued that there cannot be penetration between lesbians. Consequently this form of homosexuality is outside the scope of section 214.

However, it is submitted that anal intercourse between men or between a man and a woman is sanctioned by section 214. It is irrelevant that the anal intercourse occurred between spouses in a heterosexual marriage. This is the result of the community reading of section 214 (1) and (3) of the Criminal Code Act<sup>12</sup>.

Given the above examination of section 214 of the Criminal Code Act which is similar to sections 284 and 81 of the Penal Code Act and Armed Forces Act respectively, it is obvious that lesbianism is not a crime in Nigeria.

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<sup>1</sup> Section 41 *Ibid.*

<sup>2</sup> Section 39 *Ibid.*

<sup>3</sup> Sections 214, 215 Criminal Code Act, section 284 Penal Code Act and Section 81 of the Armed Forces Act.

<sup>4</sup> *Magaji v. Nigerian Army* (2008) 34 NSCQR (pt 1) 108 at p. 136.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at p. 139

<sup>7</sup> *Supra*, note 33.

<sup>8</sup> Now Armed Forces Act, Cap A2 LFN, 2010, Section 81 (1) (a).

<sup>9</sup> *Edet v. State* (2001) FWLR (pt 68) 1161; *Magaji v. Nigerian Army supra*; Section 6 of the Criminal Code Act.

<sup>10</sup> *Magaji v. Nigerian Army supra*.

<sup>11</sup> Violence Against Persons (Prohibition) Act, 2015, Section 1 (1).

<sup>12</sup> Section 284 of Penal Code Act which is *pari materia* with Section 214 of the Criminal Code Act provides: “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 fourteen years and shall be liable to fine”.

This position is true of those states which have not adopted Sharia Criminal Law. In the twelve Northern States<sup>1</sup> which have adopted this law, the maximum punishment for same sex sexual activity is death by stoning.

It seems odd that a country where prostitution, fornication and adultery<sup>2</sup> are largely not crimes, that its criminal law should punish homosexual activity between consenting adults when done in private<sup>3</sup>. Such activity can neither corrupt public morality nor be inimical to public safety under section 45 of the 1999 Constitution. Otherwise the same can be said of prostitution, fornication, adultery and the distribution of condoms by government and sundry agencies.

### 1.1.3 Conclusion

This work has examined the prohibitions and sanctions imposed on same sex marriage and related activities in Nigeria. The authors have argued that if homosexuality or sexual orientation was a consequence of genetic factors and thus falls within the phrase 'circumstances of birth' then marriage between homosexuals is constitutionally protected. Consequently, the prohibitions and sanctions imposed by the Act are null and void as being inconsistent with the aforementioned constitution.

As such, sections 214, 284 and 81 of the Criminal Code Act, Penal Code Act and the Armed Forces Act respectively are of no effect. Furthermore, an analysis of these sections has revealed that lesbians are incapable of achieving penetration which is a cardinal ingredient of sodomy. Moreover the authors find it absurd that anal intercourse between consenting adults when done in private is criminalized while adultery, fornication and prostitution are not, especially in the Southern Nigeria. It therefore follows that any law which prohibits and sanctions intercourse between homosexuals when done in private will not be reasonably justifiable in a democratic society.

It is therefore recommended that the Nigerian National Assembly should take step to repeal the Same Sex Act and other legislative prohibition against homosexual activities.

### Authors' Biographies

Prof. Anthony N. Nwazuoke was born in Lagos on the 12<sup>th</sup> June 1964. He obtained the Bachelor of Law (LLB) in 1990 in the University of Benin, Edo State Nigeria; BL in Nigeria Law School, in Lagos State; LLM 1996 - University of Lagos, Lagos State and Ph.D (in law) 2008 -Nnamdi Azikiwe University, Awka Nigeria. He majors in Labour Law and Human Rights Law

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<sup>1</sup> LGBT rights in Nigeria, [https://en.m. Wikipedia. Org/wiki/sharia-in-Nigeria](https://en.m.wikipedia.org/wiki/sharia-in-Nigeria). Retrieved 5-09-2015. However, the punishment for sex between lesbians vary from state to state. For example, in Gombe, JKigawa, Kebbi, Sokoto, Yobe and Zamfara , the punishment is caning which may extend to fifty lashes and imprisonment which may extend to six months while in Bauchi State, the sanction is coming which may extend to fifty lashes and a term of imprisonment which may be up to five years

<sup>2</sup> In the Southern part of Nigeria, prostitution, fornication and adultery are not crimes. See Aoko v. Fagbemi. However, in the Northern part of Nigeria, sections 386 and 387 of the panel Code Act applicable to the Northern Nigeria make adultery an offence for a person to be convicted under these sections, the prosecutor must prove that the nature law or custom which applies to the accused criminalizes extra-material sexual intercourse . it is submitted that nature law and custom cannot beate an offence since it is unwritten. See section 36 (12) of the 1999 CFRN (as amended). Consequently adultery cannot be a crime under the Penal Code Act.

<sup>3</sup> See the Report of the Departmental Committee on Homosexual Offences and Prostitute otherwise known as Wolfender Report of 1957.