

The Travails of Same-Sex Marriage Relation under Nigerian Law

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Abstract

In contrast to the traditional definition of marriage as a voluntary union for life of one man and one woman to the exclusion of all others, same sex marriage is marriage between two persons of the same gender identify. Same sex marriage is a trend which is now spreading across the globe as the number of countries that support it continues to increase by the day. But Nigeria appears to be counted outside this growing world community as the Nigerian national assembly recently passed a law prohibiting same sex marriages in any form. This paper examines the statutes of same sex marriage relation in Nigeria by analyzing provisions of various laws including the Nigerian Constitution. The paper also discusses the contents of the new law passed by the National Assembly prohibiting same sex marriage and compares it with the practice in other jurisdictions. The paper concludes with the view that the law as it is, is inconsistent with the fundamental rights guaranteed by the Constitution, and that Nigeria could borrow a leaf from countries that have legalized same-sex marriage.

Keywords: Travails, Same Sex, Marriage, Relation, Nigerian Law,

1. Introduction

Both the issue and controversy generated by the concept of same sex marriage otherwise also known as ‘gay marriage’ is relatively new in Nigeria. Until recently, there was no known open discussion on the matter and presently, there is no law in Nigeria according recognition to that relationship which is still abhorred by majority of members of the society mainly on account of Nigeria’s cultural pattern and religious inclinations. (Sessou 2013). Indeed, both the criminal law and the Marriage Act prohibit same sex marriage. The situation is such that homosexuality can land men up to 14 years imprisonment in southern Nigeria and capital punishment for men in areas under Shari’a Islamic Law in northern Nigeria (Nanzing and Garba 2008)

Following this up, in 2006, under the leadership of President Olusegun Obasanjo, the Federal Executive Council proposed a bill titled: Same-Sex_Marriage (Prohibition) Bill to the National Assembly for enactment into law. While the Senate voted in favour of the bill in 2011, in July 2013, Nigeria’s lower chamber, the House of Representatives, unanimously voted for the outright criminalization of homosexual relations (Ikpechukwu 2013). The efforts of the Nigerian National Assembly and the aggressive intolerance of homosexuals which has been predicated on the banner of ‘protecting the integrity of our religion and culture’, is not only a fallacy, they are also unconstitutional. For example, section 39(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that:

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

Besides, the combined effect of the provisions of sections 38(1), 37, 40 and 42(1) of the same Constitution invest every person with the rights to freedom of thought, conscience and religion as well as the right to decide freely on his/her private life. It is in view of the foregoing that this paper examines and makes a criticism of the penal legislations that are inimical to the right of individuals to engage in same-sex relations.

2. The Meaning and Origin of Same Sex Marriage

Simply put, same-sex marriage is marriage between two persons of the same gender identity. Same sex marriage which is also known in some jurisdiction as ‘gay marriage’ is an expansion of the traditional or orthodox form of legal monogamous marriage to include homosexuals (Vitiello 2008). It means any marriage that exists between two persons of the same sex. It is otherwise also called ‘homosexual marriage’. Some people call it ‘gender neutral marriage’ apparently because it involves persons of same gender (Ifemeje 2008). The marriage could be between two males (then it is called ‘gay marriages’) or between two females (then it is called ‘lesbian’ marriage). What is to be understood is that same-sex marriage is marriage between two persons of the same biological sex. The legal recognition of same sex marriage is sometimes referred to as ‘marriage equality’ or ‘equal marriage’ (kefalas 2012).

Same-sex marriage contrasts with the orthodox concept of marriage which conceives it as a relationship between a man and a woman. From a sociological point of view, marriage has been described as the union of a man and a woman for the purpose of rearing children and for the ultimate good of the society. A District court in the United States of America gave credence to this view when it described the institution of marriage as the

social union of a man and a woman uniquely involving procreation and rearing of children within a family (Skinner v Oklohama 1942). Seen from the religious perspective, marriage is the union of a man and a woman into one flesh (Elwell 1993). The hallmark of this view of marriage is expressed in the definition of marriage by Lord Penzance wherein he defined marriage as ‘a voluntary union for life of one man and one woman to the exclusion of all others’ (Hyde v Hyde 1886). Nwogugu (2011) has asserted in this regard that:

It is universally accepted that marriage, being a union of man and woman, involves two persons of opposite sex. Consequently, sex constitutes an essential determination of marriage relationship. In order, therefore, to establish the existence of a valid marriage, it must be proved that the persons involved are man and woman.

It is to be understood that there is a paradigm shift in present day conception of marriage from the traditional and orthodox conception of marriage. This paradigm shift is predicated on the expression of human rights and the advancement in medical technology that has led to successful sex transplants. Besides, the legal recognition of same sex marriage in many countries of the world makes the redefinition of marriage imperative, to include homosexuals and transsexuals whose existence we cannot deny.

2.1 The History of Same-Sex Marriage

The first known historical mention of the performance of same sex marriage occurred during the early Roman Empire (Boswell 1995). It started with Emperor Nero who married one of his ‘Freed man’ named Pythagoras in a very public ceremony with all the solemnities of matrimony and lived with him as his spouse. He is reported to have married two other men in extravagant public ceremonies (Cassius 1984). On his own part, Emperor Elagabalus married his chariot driver named Hierocles. He also married an athlete named Zoticus in a lavish public ceremony in Rome amidst the rejoicings of the Roman Citizens (Scarre 1995). It should be noted however that *conubium* existed only between a male Roman Citizen and a female Roman Citizen so that a marriage between two Roman Males (or with a slave) would have no legal consequence in Roman law. This is so because under Roman Law, the concept of *matrimonium* is an institution involving a mother. The idea implicit in the word is that a man takes a woman in marriage, in *matrimonium ducere*, so that he may have children by her (Treggiari 1991). This means that even though same sex marriage existed in ancient Rome, it was not accorded any legal recognition. In 342 AD, Emperors Constantius II and Constans, both of them Christians, issued a law in the Theodosian Code (C. Th. 9.7.3) prohibiting same sex marriage in Rome with a penalty of death. (Kuefler 2007)

During the medieval period, a same sex marriage was celebrated between Pedro Diaz and Muno Vandilaz on April 16, 1061. They were both males and were married by a priest at a small chapel. (CBC News 2009). In modern times, the Netherlands became the first nation in the world to accord legal recognition to same-sex marriages in 2001. This followed the recommendation of a special commission appointed to investigate the issue in 1995 and the subsequent passing of a same sex marriage bill by both the House of Representatives and the Senate in 2000. The law took effect on April 1, 2001. Other countries including Belgium, Spain, Canada, South Africa, Norway, Portugal, Argentina, Denmark and most recently, France and New Zealand (Lavers 2013). Many states in the United States of America also permit same-sex marriage.

1.2 The History of Same Sex Marriage in Nigeria

In Nigeria, even though there is as yet no known incident of same sex marriage, homosexuality/lesbianism is an issue that has existed as far back as even before Nigeria began to exist as a nation (Igbodo 2012) though practised in great secrecy. However, with the passage of time, the same-sex issue has grown from its silent days when those attributed to its preference deny it with all their might, to an era where it has metamorphosed into an issue of right that must be protected. Its prevalence must have informed the prohibition of the practice by the major penal statutes. The result is that both male and female same-sex sexual activity is illegal in Nigeria.

3. Penal Provisions against Same Sex Relations in Nigeria

Going through the length and breadth of the body of laws in Nigeria, it is not difficult to see that public hostility to homosexual relations is widespread in this largely conservative nation (Vogt 2006). It is therefore content to assert that the law on the matter reflects the revulsion felt by the majority of the citizens for the act. It is the emphatic denunciation by the community of same sex relations. The disgust and disdain felt for same-sex relations had started even before Nigeria’s independence when the two major penal statutes – the Penal Code and the Criminal Code, were enacted. The relevant provisions of those statutes buttresses the point being made.

3.1 Criminal Code’s Provisions against Same Sex Relations

Section 214 of the Criminal Code (which is applicable in southern Nigeria) classifies same sex sexual activity as “unnatural offences”. The section provides as follows:

Any person who –

- (a) has carnal knowledge of any person against the order of nature, or

- ...
- (c) 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.

Section 215 criminalizes the attempt to commit the offences in section 214 and prescribes the punishment of seven years' imprisonment for any person found guilty of the offence. Section 217 which classifies homosexuality between males as "indecent practices between males" provides as follows:

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

3.2 Penal Code's Provisions against Same Sex Relations

Similar provisions are contained in the Penal Code which is applicable in northern Nigeria). Section 284 thereof provides that:

Whoever has carnal knowledge against the order of nature with any man (or) woman shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Under section 405 of the same Penal Code, a male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession is a "Vagabond" and is liable under section 407, to a maximum prison term of one year or a fine, or both (Nanzing & Garba 2008) (Ostien 2007). In addition to the foregoing, in the twelve northern states that have adopted the Shari'a criminal law system, homosexuality can earn one a death sentence (Ostien 2007).

3.3 Shari'a Law's Provisions against Same Sex Relations

The Shari'a criminal laws apply to all Muslims and to those who voluntarily consent to the jurisdiction of the Shari'a Courts. In most of the states in the north of Nigeria that practices this legal regime, the offence of "sodomy" is committed by "whoever has carnal intercourse against the order of nature with any man or woman" (Ostien 2007). In Kano State, as in most other states in the north, a person who commits the offence of "sodomy" shall be punished:

- (a) With caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for the term of one year; or
- (b) If married or has been previously married, with stoning to death.

With regard to lesbianism, the offence is committed by "whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another" According to the official explanation to the enactment in Bauchi, Jigawa, Katsina, Kebbi, Sokoto, Yobe and Zamfara states,

The offence is committed by the unnatural fusion of the female sexual organs and/or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement (Ostien 2007)

Punishment for the offence of lesbianism varies from state to state. In Gombe, Jigawa, Kebbi, Sokoto, Yobe and Zamfara states, punishment for the offence is caning of up to fifty lashes in addition to a prison term of up to six months. In Bauchi state, the punishment is more severe. In addition to the caning, the guilty party may be sentenced to a term of imprisonment which may extend to up to five years. But the severest of punishment for the same offence is found in the statute books of Kano and Katsina states. Therein, the punishment for committing the offence of lesbianism is stoning to death (Ostien 2007).

The position in Borno State is instructive and deserves some mention here. Apart from enacting that a person who engages in lesbianism and homosexual act in the state commits an offence, it makes a specific provision and describes the nature of the offence prohibited. Under that law, a person who "engages in sexual intercourse with another person of the same gender shall, upon conviction, be punished with death"

Notwithstanding the above position, the year 2006 witnessed a paradigm shift. In that year, one Reverend Rowland Macaulay set up a homosexual church in Lagos called House of Rainbow Metropolitan Community Church. His members were only men who worshipped as brethren and lovers. Macaulay was initiating new members into his gay club and was reported to have appeared on Cable News Network (CNN) where he proudly talked about his gay church. But when he read the story of his activities and the uproar that greeted it, he ran away to London where he is currently running his church which has branches in some African countries including Kenya, South Africa, Uganda etc (Sessou 2013). Given the fact that the world has become a global village, and a very small one at that, it is very easy for what is happening at one end of the village to influence the happenings at the other end. Since the wind of same sex relationship is blowing across the globe, it is no surprise that the number of homosexuals in Nigeria is on the rise. At present, some homosexuals converge at a

secret gay club in Lagos. A recent investigation by a BBC reporter revealed that some of the men always dress like females, as they wear wigs, earrings and take a quick glance at their pocket mirrors before adjusting their tight-fitted red dresses (Sessou 2013). The fact then is that Nigeria is dotted with people who have been into relationships with their own sex. The courage with which same-sex practitioners are openly declaring their status and the vehemence with which they agitate for the legalization of same sex marriage explains why the National Assembly recently passed into law, a bill prohibiting same sex marriage and other incidental homosexual practices.

3.4 Renewed War against Same Sex Relations

Following demonstrations for same sex marriage during the International Conference on HIV/AIDS (ICASA) in 2005, on January 18, 2007, the Federal Executive Council sent a bill – Same Sex Marriage (Prohibition) Act 2006, to the National Assembly for urgent action. The bill was not passed into law by the National Assembly. Apparently buoyed by the recent outcry against gay practice in Nigeria, on November 29, 2011, the Senate of Nigeria passed the Same Sex Marriage (Prohibition) Bill. The House of Representatives of Nigeria, on May 30, 2013, also passed the bill which has now been sent to the president for his assent (Sessou 2013). The latest unanimous vote by the National Assembly is only the culmination of recent legislation against homosexual acts. In many ways, the 2006 bill served as a template and precursor of the current legislation awaiting presidential assent. The current legislation contains all the restrictions outlined in the earlier bill, the only difference being in the severity of punishments for guilty offenders. (Ikpechukwu 2013) When signed into law, the Act would

- make a marriage contract or civil union entered into between persons of same sex “invalid and illegal and not recognized as entitled to the benefits of a valid marriage”
- make void and unenforceable in Nigeria a marriage contract or civil union entered into between persons of the same sex by virtue of a certificate issued by a foreign country
- prohibit the solemnization of any marriage or civil union entered into between persons of the same sex “in any place of worship either Church or Mosque or any other place or whatsoever called in Nigeria”
- prohibit the registration of “gay clubs, societies and organizations, their sustenance, processions and meetings”
- prohibit the “public show of same sex amorous relationship directly or indirectly”
- make a person who enters into a same sex marriage contract or civil union liable for 14 years’ imprisonment
- make a person who “registers, operates or participates in gay clubs, societies and organization, or directly or indirectly make public show of same sex amorous relationship in Nigeria” liable for 10 years’ imprisonment
- make a person or group of persons that “witness, abet and aids the solemnization of a same sex marriage or civil union, or supports the registrations, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria” liable for 10 years’ imprisonment
- define “civil union” for purposes of this law to mean “any arrangement between persons of the same sex to live together as sex partners, and include such descriptions as adult independent relationships, caring partnerships, civil partnerships, civil solidarity pacts, domestic partnerships, reciprocal beneficiary relationships, registered partnerships, significant relationships, stable unions etc.

4. Fundamental Rights Infringements

There is no doubt that the attitude and efforts of the National Assembly and indeed the Nigerian nation in promulgating the foregoing laws is in itself discriminatory against people with same sex preferences. This is an exhibition of public hostility to homosexual relations which appears to be the official policy of the government. It is contended that this position is not only flawed in logic, it is also unconstitutional as it constitutes a violation of the fundamental rights of people with same-sex preferences. This is so because the Constitution of the Federal Republic of Nigeria 1999 (as amended) contains several anti-discrimination protection clauses and any law that detracts from these guarantees must be a breach of the rights guaranteed. We shall now examine some of these provisions.

4.1 Anti-discrimination Protections

The Constitution of Nigeria guarantees every Nigeria Citizen the right to freedom from discrimination of whatever nature. Section 42(1) thereof provides as follows:

- 42(i) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person –
- (ii) be subjected either expressly by, or in the practical application of any law in force in

Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject.

In addition to the above blanket provision guaranteeing non-discrimination, section 17 under Chapter II of the Constitution entitled “FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY” provides further guarantees.

Section 17 guarantees all citizens equal rights as well as other rights, including adequate medical and health care and equal opportunity in the workplace. The section provides:

- 17(1) The State social order is founded on ideals of Freedom, Equality and Justice.
- (2) In furtherance of the social order –
 - (a) every citizen shall have equality of rights, obligations and opportunities before the law;
 - (b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced
- (3) The State shall direct its policy towards ensuring that –
 - (a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.

4.2 Violations of the Fundamental rights of Persons with Same-Sex Preference

It is contended that the entire law on same sex marriage in Nigeria violates the fundamental rights of the individual in so many respects. The current bill awaiting the assent of the president violates the right to private and family life guaranteed under section 37 of the Constitution. This includes the right of the individual to decide freely on his or her private life, and also the right to make a choice about one’s life and what one wants to do with it to find fulfillment as a human being (Sessou 2013). Furthermore, the proposed Same Sex Marriage law violates the right to freedom of thought, conscience and religion guaranteed under section 38 of the Constitution. The section provides as follows:

- 38(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

As can be deciphered from the foregoing, apart from violating the right to freedom of religion, the proposed law also deprives people with same-sex preferences of the freedom of thought and how to exercise or express their conscience. It gives the individual no choice as to what to think or the choice to be made in his or her private life. Besides, a mandate that compels churches and mosques not to celebrate or recognize same-sex relationships clearly contravenes this constitutional provision.

The Constitution also protects the freedoms of persons to freely assemble and associate with other persons in order to protect their interests. In this regard, section 40 provides as follows:

- Every person shall be 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.

The only proviso to this guarantee is in regard to the power of the Independent National Electoral Commission to recognize and register political parties. As there is no indication that people with same-sex preferences have applied or intend to apply to be registered as a political party, it is submitted that this constitutional provision would be in direct conflict with the proposed law’s prohibition on gay clubs and institutions. The same goes for the proposed law’s prohibition of public expression of affection between homosexuals, which is in conflict with the Constitution’s guarantee of freedom of expression under section 39.

The combined effect of the foregoing provisions of the Constitution, when juxtaposed with the proposed law on same-sex marriage as well as the provisions of the Criminal Code, the Penal Code and the Shari’a laws of the states in northern Nigeria, shows that they are grave violations of the fundamental rights enshrined in the Constitution. That being the case, all such laws are invalid and cannot stand in the face of the clear and unambiguous provisions of the Constitution guaranteeing fundamental rights. Section 1(3) of the Constitution provides that “if any other law is inconsistent with the provision of the Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void”. To that extent, such laws are of no effect being inconsistent with the provisions of the Constitution. In a long line of judicial authorities, the courts in Nigeria have been consistent in declaring void and of no effect, any law that is inconsistent with the provisions of the Constitution (Cadbury Nigeria Plc v. F.B. I.R. 2010) Lafia Local Govt. v. Gov. Nasarawa State

2012). What this means is that the proposed Same Sex Marriage (Prohibition) Act and all other laws with similar provisions, are bad laws not only in the context of the jurisprudence of Nigerian law but also from the global perspective. Nigeria cannot afford to be alone in a changing world that is steadily according recognition to same sex relations.

5. Same Sex Marriage Relation in other Jurisdictions

Before 2001, no nation in the world accorded legal recognition to same sex marriage. The Netherlands was the first country to extend marriage laws to include same-sex couples. This followed the recommendation of a special commission appointed in 1995, to investigate the issue. In 2000, a same-sex marriage bill was passed by both the House of Representatives and the Senate. The law took effect on April 1, 2001, allowing same-sex couples to marry. To accommodate the change, Article 1:30 of the Marriage Law was amended to read as follows: "A marriage can be contracted by two people of different or the same sex" (CBC News 2009). Since that time, other countries including Argentina, Belgium, Canada, Denmark, Iceland, Norway, Portugal, Spain, South Africa and Sweden have followed suit. France (Smith-Spark 2013) and New Zealand (Lavers 2013) are the latest countries to make same-sex marriage legal, bringing the total number to 13.

The expectation is that the number will increase as there is rising support for legally recognizing same-sex marriage globally across all races, ages, religions and political affiliations. This support increases with higher levels of education and it is strong among younger people (Shapiro 2012). The support is spreading even in Africa. Apart from South Africa which legalized same-sex marriage in 2006, the advancement of LGBT rights has spread to Malawi where the new President, Joyce Banda announced her intention to repeal the country's anti-gay law shortly after her swearing-in in April 2012. Mauritius has also decriminalized consensual same-sex acts while Mozambique has softened its law on sodomy if the act is consensual (Sessou 2012).

Nigeria could borrow a leaf from these other African countries and make the change now. It is now a very well-known wisdom that "those who make peaceful change impossible make violent change inevitable". It is time to heed the opinion of Igbodo (2012):

The idea of having same-sex relationships was a taboo in our shores. As a matter of fact, it was almost unheard of. It was also embarrassing to see guys walking hand-in-hand, it was awkward and out of place. Today, we have a society that celebrates gay relationships. It's the cool thing for a girl to have female lovers and guys to have male partners. If a survey were to be carried out among sexually active Nigerians between the ages 18-25, we'll discover that at least one in every five have had relations with those of same sex.

The moral is that if it does not happen today, it will happen tomorrow. Before it takes a bad turn, Nigeria should sit up, promulgate a law legalizing same-sex marriage and join the committee of nations that have done so. Like other nations, we should have marriage for the 21st century reflecting 21st century values and not those of a time when male homosexuality was outlawed and female homosexuality presumed not even to exist (Crompton 2006). This will lead to a redefinition of marriage in our laws. Other countries are doing it. Nigeria can do it. That is the reality of the time.

6. Conclusion

Same-Sex marriage as marriage between two persons of the same gender identity is a wind that is blowing across the globe. As many as fifteen countries have already fully legalized it and the process of doing so in many other countries is presently going on. While that is the case, people with same-sex preferences in Nigeria are not only being marginalized and discriminated against, their fundamental rights to freedom of thought and conscience, freedom of association etc are being denied. In the face of those travails, the Nigerian National Assembly has recently passed a bill – Same Sex Marriage (Prohibition) Act which is awaiting the assent of the President to become law. As discussed in the foregoing, the proposed law prohibits same-sex marriage and all other forms of same-sex relationships with stiff penalties. This is in addition to the law in Shari'a Law states of northern Nigeria where same-sex marriage or relationship could earn one the death penalty. This hostile environment is inimical to the enjoyment of the fundamental rights of people with same-sex preferences in Nigeria and needs to change for Nigeria to be at par with the global trend. Anything to the contrary will amount to a breach of the fundamental rights, particularly, of freedom of thought, conscience and religion, as well as the right to personal and private life of people with same-sex preferences who are also entitled to the right to freedom of association under the Nigerian Constitution.

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