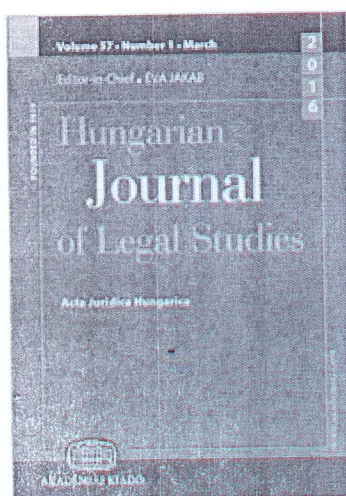


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Appraising the cross-currents of law, religion and culture on same sex marriage issue in Nigeria: The human rights approach

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Abstract

Since there is no well articulated legal protection against same sex marriage discrimination in Nigeria, lesbian, gay, bisexual, and transgender persons in Nigeria are facing unique legal and socio-religious challenges not experienced by those not in that category. Most Nigerians due to their religious belief opine that homosexuality is a way of life that the society should not accept. This position has been widely criticized by human and civil rights organizations as well as the United Nations as inconsistency with Nigeria's obligations as demanded by the international law and treaties that guaranteed human right and equity which Nigeria is a signatory. This paper therefore examines same-sex marriages from human rights' point of view. The article elucidates the imperative of Universality of Human rights, based on principle of justice and equity as against the socio-religious sentiment that was used to curry support for anti-same sex marriage campaigns in Nigeria.

Keywords: legalising, same-sex marriage, lesbian, gay, bisexual, human rights, law, religion

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Appraising the Cross-Currents of Law, Religion and Culture On Same Sex Marriage Issue in Nigeria: The Human Rights Approach

SAKA MUHAMMED OLOOKOBA – ADEBAYO KAYODE MAHMUD

Abstract. Since there is no well articulated legal protection against same sex marriage discrimination in Nigeria, lesbian, gay, bisexual, and transgender persons in Nigeria are facing unique legal and socio-religious challenges not experienced by those not in that category. Most Nigerians due to their religious belief opine that homosexuality is a way of life that the society should not accept. This position has been widely criticized by human and civil rights organizations as well as the United Nations as inconsistency with Nigeria's obligations as demanded by the international law and treaties that guaranteed human right and equity which Nigeria is a signatory. This paper therefore examines same-sex marriages from human rights' point of view. The article elucidates the imperative of Universality of Human rights, based on principle of justice and equity as against the socio-religious sentiment that was used to curry support for anti-same sex marriage campaigns in Nigeria.

Keywords: legalising, same-sex marriage, lesbian, gay, bisexual, human rights, law, religion

1. INTRODUCTION

The news of legalizing same sex marriage in some developed countries is viewed in the larger part of Africa and other developing countries as a sacrilege from religious, philosophical and ethical proportion. Some developing countries in parts of Africa and Latin America for instance, reacted to the idea of same sex marriage with speed of light and the ferocity of anger and resentment. Despite this, the debate over same sex marriage is growing across the world. "While some countries have legalized it, others are considering adopting it" (Oyeniyi-Adedapo).

Marriage is a universal institution and the bedrock upon which the society is founded. Religiously, marriage also enjoys the sanction of the two most famous holy books in the globe, the Quran¹ and Bible.² The definition of marriage as laid down in the case of *Hyde v. Hyde*³ by Lord Penzance as "the voluntary union for life of one man and woman to the exclusion of all others"; has received world-wide acceptability and adopted in most

¹ See *Quran* 4:3.

² See *Genesis* 2:18.

³ (1908) KB 729.

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common law countries. This definition raises complicated issues in view of global developments and discoveries in human evolution, such as the existence of hermaphrodites (individuals with both testis and ovary and some of the other physical characteristic of both sexes) and pseudo-hermaphrodites (i.e. individuals that possess the internal reproductive organs of one sex while exhibiting some of the external physical characteristics of the opposite sex).

This definition is also weakened and challenged by the emerging concept of same sex marriage (which is a term for a legally or socially recognized marriage between two people of the same sex) and the modern emerging classification of marriage into Polyandrous (a form of polygamous marriage or other sexual union in which a woman takes two or more husbands at the same time) and Polygamous (a marriage which includes more than two partners, for instance a man marrying more than one wife at a time especially in Muslim dominated communities).⁴

However, modern trends have shown that there is a disconnect from what was obtainable in the past and the present practice, especially with the advent of the elastic concept of human rights concept across the universe.

Netherlands was the first country in 2001 to legalize same sex marriage, since then over 15,000 gay couples have been married. This was followed by Belgium in 2003, Spain 2005, Canada 2005, South-Africa 2006, Norway 2009, Portugal, Norway, Argentina and Denmark all in 2010.⁵ After this development, an unprecedented avenue opened for a more serious agitation for the recognition of same sex marriage globally. Majority feels that same sex marriage cannot be allowed on moral and religious grounds, so it must be strictly prohibited so as not to contribute to the already moral decadent in the society.

During the 14th International Conference on AIDS and STIs (ICASA) held in Abuja in 2005,⁶ there were calls for the acceptance of same sex marriage, though not too many Nigerians thought it was a good idea. Despite this, the fact still remains that marriage is indeed a unique institution between a man and a woman. This fact is not only universally acknowledged, it is contained in the two Holy Books. However, in the anything goes atmosphere of modern times, it is only a matter of time before this kind of lifestyle would be accepted. For instance, before 1973, the American Psychiatrists Association considered same sex attraction homosexuality as abnormal behavior and offered treatment accordingly, but a decision that year reversed this long held stand. No longer was same sex attraction classified as abnormal.⁷ "This is to show that similar decision had already been made in other Western nations. In a span of time, the homosexual would go from being considered criminals by society to being accepted, if not fully embraced by much of the heterosexual community." (Oyeniyi-Adedapo)

In recent years, same sex couples have increasingly pressed for the legal option of entering a full marital status. Debates have occurred throughout Europe and parts of Africa over proposals to legalize same sex marriage as well as civil unions. Presently 22 out of the 51 countries in Europe recognize same type same sex marriage with France being the 14th country in the European zone to join in legalizing same sex marriage, and the first same sex

⁴ Available online at <http://en.m.wikipedia.org/wiki/samesexmarriage> (accessed on 14 April 2013).

⁵ Available online at <http://en.m.wikipedia.org/wiki/same-sexmarriage/in.the/Netherlands> (accessed on 14th April 2013).

⁶ *Ibid.*

⁷ <http://www.ucgstp.org/ht/gp048/same-sexmarriage.tmp> (accessed on 27 October, 2012).

couple to celebrate their wedding in a cathedral church in Southern France was on the 29th May 2013.⁸

In the face of the progressive value of mankind reflected in the pursuit of equality of all men and the need to provide every human being with the opportunity to express his/her views and be tolerated, phenomenon as strange to majority of mankind as same sex marriage deserves considerable attention. At a time when more countries across the universe are permitting, legalizing and legitimizing same sex marriage in an increasing global community. This paper is relevant in pushing the issues further into the limelight of discourse. Structured into five sections, the examination of the controversies and brouhaha that has greeted same sex marriage in Nigeria follows this section. Section three focuses the cross-current of law and religion on same sex marriage in Nigeria while section four examines same sex marriage and the Nigeria obligations under the international laws and treaties from human right point of view. The article ends in the fifth section with concluding remarks.

2. X-RAYING HUMAN RIGHTS AND SAME SEX MARRIAGE VIS-À-VIS THE NIGERIAN OBLIGATIONS UNDER THE INTERNATIONAL LAWS AND TREATIES

Right is a Universal Phenomenon and the emergency of human rights law in international sphere is one of the most significant developments that have taken place since the end of the Second World War (Adimula-Olatoke 2012: 55–65). Human rights being the basic guarantees, which individuals enjoy simply because they are human beings, are enshrined in the chapter four of the Constitution of the Federal Republic of Nigeria, as Fundamental Rights. These rights are intended to carry out the objectives set out in the preamble of the constitution and to establish an egalitarian social order informed with political, social and economic justice and ensuring the dignity of the individual (Alikali C. et. al. 1999: 2: 99).

As part of socio-political and civic responsibility of every nation, the social doctrine obliges every state to jealously protect the rights of its citizens without exclusion of any. The United Nations Universal Declaration of Human Rights of 1948 eloquently describes fundamental rights as the inalienable and inviolable rights due to all members of the human race (Ewere 2012: 284). Similarly in the Nigeria case of *Ransom-Kuti v. A. G Federation*,⁹ Eso JSC said of fundamental human rights thus;

It is a right which stands above the ordinary laws of the land and which in fact is antecedent to political society itself. It is a primary condition to civilized existence ... and what has been done by our constitution ... is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the immutability of the constitution itself.

⁸ http://en.wikipedia.org/wiki/Recognitionof_same-sex_union_in_Europe (accessed on 10 March 2013).

⁹ (1985)2 NWLR (Pt. 6)211.

This position was further elucidated in the Vienna Conference of 1993, where it was concluded that,

All human rights are universal, indivisible, inter-dependent and inter related – while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁰

According to Umozurike, human rights are ...claims, which are invariably ethics which should be supported by law, official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, colour, sex, or other distinction and may not be withdrawn or denied by government, people or individual. They are those rights which every individual claims or aspires to enjoy irrespective of his colour, race, religion, status in life, etc. (Umozurike 1979; Benjie 2012: 167).

From the foregoing, it is trite to say that the universality of human rights is inalienable. It is a right that is naturally belonging to every human being not withstanding their colour, sex, race or social status (Olokooba et al. 2012: 102).

In June 1994, the United Nations Human Rights Council (UNHRC) confirmed in the case of *Toonen v. Australia*,¹¹ that laws criminalizing consensual same sex activity violate both the right to privacy and the right to equality before the law and contrary to Article 17 of the International Covenant on Civil and Political Rights. Those laws interfere with privacy rights regardless of whether they are actively enforced, and run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention by driving marginalized communities underground. The UNHRC has subsequently affirmed this position on many occasions by urging countries to repeal laws that criminalize consensual same sex activity and thereby bring their legislations into conformity with the Covenant. Nigeria became a party to the Covenant on 29 January 1993.¹²

The United Nations Working Group on Arbitrary Detention in June 2002 found equally that the arrests for being homosexual or for engaging in consensual homosexual conduct are by definition, human rights violations.¹³ Any arrest constitute an arbitrary deprivation of liberty in contravention of Article 2, paragraph 1 of the Universal Declaration of Human

¹⁰ See part 1 Paragraph 5 of the Vienna Declaration and Programme of Action, Adopted following the UN World Conference on Human Rights Vienna, June 1993, see also Faga (Faga 2010: 126).

¹¹ Fiftieth Session, CCPR/C/50/D/488/1992. 4 April 1994 available online at <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256742005e60d5> (accessed on 10 March 2013).

¹² Status of International Covenant on Civil and political Rights, United Nations Treaty Collection, 30 July 2012 available online at http://www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=&lang=en (accessed on 10 March 2013).

¹³ Communication Addressed to the Government on 3 September 2001, United Nations Working Group on Arbitrary Detention, Opinion No. 7/2002 Egypt adopted 21 June 2002 available online at <http://www.unw.gadatabase.org/un/Document.aspx?id=2009> (accessed on 12 February 2014).

Rights, and of Article 2 Paragraph 1 and 26 of the International Covenant on Civil and Political Rights, 1966. This Declaration is part of International law and is, therefore binding on Nigeria with regard to the Provisions of Section 12 of the Constitution since these Treaties and Covenants have been domesticated.¹⁴

This position is also consistent with other regional and national jurisprudence, including the decisions of the European Court of Human Rights in *Dudgeon v. United Kingdom*,¹⁵ and United States Supreme Court in *Lawrence v. Texas*.¹⁶ The Constitutional Court of South Africa said affirmatively too in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,¹⁷ that the right to privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The court went further that the way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality, we act consensually and without harming others or one another, invasion of that precinct will be a breach of our privacy.

Thus the criminalization of sodomy in private between consenting males is a severe limitation of a gay's rights to privacy, dignity and freedom. The harm likely to be caused by the infringing on this right to privacy can and often does affect the one's ability to achieve self-identification and self fulfillment which are natural instinct in human beings. This likely harm may also radiate out into the society generally and gives rise to a wide variety of other human rights discriminations which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.¹⁸

Furthermore, Article 2 of the Convention against Torture and Other, Inhuman or Degrading Treating or Punishment requires each state party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. And Article 1.1 defines torture to be;

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation for or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁹

The argument here is that this Convention through the Committee Against Torture, officially monitors its implementation by all state parties to the Convention (Nigeria ratified the Convention on 28th June, 2001), by ensuring the protection of minority or marginalized individuals or population especially those at risk of torture or ill-treatment. This protection covers all persons regardless of gender, sexual orientation or transgender identity. This is

¹⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended).

¹⁵ Series A, No. 45, 23 September 1981.

¹⁶ 539 U.S. 558 (2003) 26 June 2003.

¹⁷ Case CCT 11/98, 9 October 1988.

¹⁸ *Ibid.*

¹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

the genesis and the argument for the protection and recognition of the lesbian, gay, bisexual, and transgender citizens in Nigeria.

The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover reported in April 2010 that laws criminalizing sexual conduct between consenting adults impede HIV/AIDS education and prevention efforts and are incompatible with the rights to health.²⁰ Also the Joint United Nations Programme on HIV/AIDS known as UNAIDS has a similar view.²¹

The international obligations of countries to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were articulated in 2006 in the Yogyakarta Principles²² on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity 2008 (O'Flaherty–Fisher 2008). These principles were developed and adopted unanimously by a group of human rights experts. Principle 2 of the Rights to Equality and Non-Discrimination affirms that everyone is entitled to enjoy human rights without discrimination on the basis of sexual orientation or gender identity, and specifically obligates countries to repeal criminal and other legal provisions that prohibit or are in effect employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same sex and different sex sexual activity.²³

Principle 6 of the Sexual Orientation and Gender Identity affirms the right to privacy of everyone regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms the obligation of countries to repeal all laws that criminalizes consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same sex and different sex sexual activity. Also to ensure that criminal and other legal provisions of general application are not applied to de-facto criminalizes consensual sexual activity among other persons of the same sex who are over the age of consent.

In an address delivered before the United Nations in a high level meeting on human rights, the United Nations High Commissioner for Human Rights while advocating for same sex marriage summed up thus:

²⁰ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health submitted to the United Nations Human Rights Council by Anand Grover, 27 April 2010, A/HRC/14/20, paragraphs 13 and 68, pages 7 and 20 available online at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf> (accessed on 3 October 2013).

²¹ Guidance for Applicants to the Global Fund to Fight AIDS, TB and Malaria Round 8 Call for proposal Joint United Nations Programme on HIV/AIDS, 28 February 2008 available online at http://data.unaids.org/pub/BaseDocument/2008/20080228_rd8_sexualminorities_en.pdf (accessed on 3 October 2013).

²² The Yogyakarta Principle available online at http://www.yogyakartaprinciple.org/principle_en.htm (accessed on 3 October 2013).

²³ Report of the United Nations High Commissioner for Human Rights, submitted to the United Nations Human Rights Council, A/HRC/19/41, 17 November 2011, p. 5 also available online at http://www2.ohrc.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf (accessed on 2 October 2013).

... the principle of universality admits no exception. Human rights truly are the birthright of all human beings. Sadly ... there remain too many countries which continue to criminalize sexual relations between consenting adults of the same sex in defiance of established human rights law. Ironically many of these laws like apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all ... it is our task and our challenge to move beyond a debate on whether all human beings have rights; for such questions were long ago laid to rest by the Universal Declaration of Human Rights ... and instead to secure the climate of implementation ... those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.²⁴

3. EXAMINING THE BROUHAHA ON SAME SEX MARRIAGE IN NIGERIA

On the 18th of January 2007, the Nigerian president sent the Same Sex Marriage (Prohibition) Act 2006 to the National Assembly for urgent action. The Bill however was not passed.²⁵ Again in 2011, it was re-sent and after series of persuasions, the Senate of Nigeria on the 29th November 2011 passed the Bill; but the same Bill was not passed by the House of Representatives until 2013.²⁶ Immediately President Goodluck Jonathan signed Same Sex Marriage (Prohibition) Act,²⁷ into law, even though without any announcement, a lot of brouhaha, condemnation and reactions erupted. The Act also drew international condemnation from countries such as the United States and Britain. In a similar vein, the Act was viewed by some as providing dangerous grounds for massive infringement on fundamental rights, not only of homosexuals, lesbians, gays, bisexuals and the transgender (LGBT), but also those of heterosexuals.²⁸

The Act completely outlaws homosexuality and imposes a prison terms of up to 14 years for people prosecuted under the Act. The Act also criminalizes homosexual clubs, associations and organizations, with penalties of up to 14 years jail term. Similarly, the Act will also make void and enforceable in Nigeria a marriage contract or civil union entered

²⁴ Addressing Human Rights Violations Based on Sexual Orientation and Gender Identity at the 10th Session of the Human Rights Council, ARC International, March 2009 p. 2 available at <http://arc-international.net/wp-content/uploads/2011/09/Advancing-SOGI-issues-HRC10.pdf> (accessed on 3 October 2013).

²⁵ Appendix: A Bill for an Act to Make Provisions for the Prohibition of Sexual Relationship Between Persons of the Same Sex, Celebration of Marriage by them and for Other Matters Connected Therewith available online at <http://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167#appendix> (accessed 10 March 2013).

²⁶ The implication of not passing it by the House of Representatives was that the Bill was not effective then. This is so because in Nigeria, before a Bill becomes a law, it must be passed by both House (the Senate and House of Representatives).

²⁷ Same Sex Marriage (Prohibition) Act, 2013.

²⁸ Femi Aborisade Same Sex (Prohibition) Act: A Critical Analysis, available online at <http://dailyindependentnig.com/2014/01/same-sex-prohibition-act-a-critical-analysis-2/> (accessed on 30 January 2014).

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 same sex in any place of worship either Church or Mosque or any other place or whatsoever called in Nigeria.

The Act also prohibits the registration of any gay clubs, societies, and organizations, their sustenance, procession and meetings; prohibits the public show of same sex amorous relationship directly or indirectly; makes a person who enters into same sex marriage contract or civil union liable for 14 years imprisonment; makes a person or group of persons that witness, abets, and aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria liable for 10 years of imprisonment.²⁹

While debating on a Bill prohibiting marriage of same sex sponsored by a Senator from Edo – State Senatorial District Domingo Alaba Obende; he expressed his feeling thus:

opening the legal door to same sex marriage in Nigeria will be morally and ideologically unsound when other traditionally shunned intuition as incest remain illegal. The problem with same sex marriage is not slippery slope; the primary assertion is that, just as most Nigerians should maintain that incest is socially unacceptable practice, so too should they disallow same sex marriage.³⁰

It should be remembered that the idea of morality as the basis of prohibiting same sex marriage is a subjective one, thus what is forbidden in one culture or tradition may be allowed in another, it's a matter of individual perception and civilization.

Also contributing to the Bill on prohibiting marriage of same sex, another Senator representing Plateau South East opined further that:

The essence of marriage is for procreation and if we allow same sex marriage to be recognized and legalized, we are not interested in future of our children.³¹

Proponents of same sex marriage regard it as a human rights issue to have all the benefits of marriage regardless of sexual orientation, while those who are opposed to it often based their reasons on tradition, religion, lack of parental concern, and the unintended/unforeseen consequences of same sex marriage.

Amnesty International, Human Rights Watch, the Nigerian Bar Association, and Nigeria Human Rights non-Governmental Organizations are deeply concerned by the Same Sex Marriage (Prohibition) Bill as being in contravention of the Constitution and inconsistent with Nigeria's obligations under international and regional human rights treaties which the country has ratified.³²

Religiously however, both Islam and Christian religions forbid same sex marriage, likewise the African traditional religion; all for the same reason, that it will lead to the

²⁹ LGBT rights in Nigeria-Wikipedia, the free encyclopedia available online at en.wikipedia.org/wiki/LGBT_rights_in_nigeria (accessed on 10 March 2013).

³⁰ *Ibid.*

³¹ *Ibid.*

³² Amnesty International 'Nigeria: Same Gender Marriage (Prohibition) Bill Violates Constitution available at www.amnesty.org/en/library/asset/AFR44/001/2009/en/9b8adc1b-cba6-11-dd-8cf1-49437baee106/arf440012009.

breakdown of the society. According to a one time Attorney General of the Federation and Minister of Justice in Nigeria Bayo Ojo, same sex marriage is un-African and is prohibited in the Bible and the Quran, thus re-echoing what Former President Olusegun Obasanjo told the African Bishops conference in 2005 that homosexuality is not known to African.

Furthermore, presently in Nigeria, there is no enacted legislation protecting Lesbians, Gays, Bisexuals, and Transgender, against discrimination or harassment on grounds of sexual orientation or gender identity. There is public hostility to homosexual relations and lesbianism on a wide spread basis. For instance, in August 2007, the Bauchi State Police Command arrested and charged eighteen men to court for dressing like women and addressing themselves as women, which is illegal under the *Shariah* Penal Code.³³ They were originally charged with sodomy, but the charges were later changed to vagrancy.

In the same vein, on 12th-September 2008, four newspapers (Daily Trust, Guardian, The Champion, and Vanguard) published the names, addresses and photographs of twelve members of the House of Rainbow Metropolitan Community Church, a Lesbian, Gay, Bisexual, and Transgender Church in Lagos. As a result, some of the members were threatened, stoned, and beaten by the members of the public. No action was taken by the Police authority on the perpetrators. Gradually the church and the partners' groups cancelled conferences on sexual rights and health scheduled for Lagos and Abuja in December of that year, because of the concern for the safety of attendees;³⁴ an indication of the public disapproval of the same sex marriage. Notable also among the populace is the general belief that HIV/AIDS is the result of immoral behavior and a punishment for same sex sexual activity, hence the hatred and discrimination against persons living with HIV/AIDS, though authorities and non-governmental organizations sought to reduce the stigma and change these perceptions through education campaigns.

Some gays already have fled the country because of intolerance of their sexual persuasions, and more are considering leaving, if the new law is enforced.³⁵ The Act reflects a highly religious and conservative society that considers homosexuality a deviation. Nigeria is one of 38 African countries; about 70 per cent of them have laws persecuting gay people.³⁶ The critic of this opinion is that, it is disheartening when one acknowledges the fact that same gender relationships have been formalized and solemnized in secrecy in some parts of Nigeria. This exhibits the shaming level of hypocrisy evident in the way and manner of life of Nigerians palpable in establishing that same gender marriage is alien to African continent and must be banned. Equally too, according to another critic, the Bill has a huge implication in that it will actually make families torn apart and open the doors to persecution of those perceived to be gays, the situation is particularly dire for these people who are subject to false arrest, loss of employment, extortion, attacks, and sometimes death.³⁷

³³ 2008 Country Reports on Human Rights Practices: Nigeria, Bureau of Democracy, Human Rights and Labour U. S. Department of State available online at <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm> (accessed on 10 March 2013).

³⁴ *Ibid.*

³⁵ The Telegraph Newspaper January 28 2014 at 4.

³⁶ *Ibid.*

³⁷ Oliver, Sexual Minorities and HIV Status, available online at http://www.asylumlaw.org/legal_tools/indexcfm?category=391&countryID=233 (accessed on 3 October 2013).

In reaction to the brouhaha on the Same Sex Marriage Prohibition Bill in Nigeria, the United States Assistant Secretary for Democracy, Human Rights and Labour Michael H. Posner, while addressing the Journalists during a news conference at the United States Consulate in Lagos, November 16th 2012 said that there is little the United States or other foreign governments can do to stop the passage of a Bill that criminalizes gay marriage, gay advocacy groups and same sex public display of affection in Africa's most populous nation.³⁸ The United States President Barack Obama had in a similar vein described the anti-gay bill as being anti-human rights and undemocratic. The United States Secretary of State John Kerry said the United States is deeply concerned by law that dangerously restricts freedom of assembly, association, and expression for all Nigerians. Former colonizer Britain said, the United Kingdom opposes any form of discrimination on the grounds of sexual orientation.³⁹

The above position however, does not translate to mean that all the Americans were on the same page with the United States Assistant Secretary for Democracy, Human Rights and Labour as well as United States President because in one of his dissenting judgment, Justice Alito⁴⁰ held that same-sex marriage falls outside the boundaries of what constitutes a fundamental right. At the heart of his argument is a contention that the analysis of a purportedly fundamental right's history and tradition should be constructed at a granular level because, according to him, "the right to same-sex marriage is not deeply rooted in this country (USA)⁴¹ history and tradition".⁴²

4. THE CROSS-CURRENT OF LAW, RELIGION AND CULTURE ON SAME SEX MARRIAGE IN NIGERIA

It should be noted that the constitution of the Federal Republic of Nigeria does not specifically protect or contain provisions for the protection of Lesbians, Gays, Bisexuals, and Transgender, but it does contain provisions guaranteeing all citizens equal rights as well as other rights,⁴³ like right to life, dignity of human person, freedom of expression and association, fair trial, and so on and so forth. Section 37 of the Constitution is often used as the basis for the entrenchment of same sex marriage in Nigeria under the umbrella of "right to privacy". The Section provides thus:

the privacy of citizens, their homes, correspondence, telephone conversation, and telegraphic communications is hereby guaranteed and protected.

³⁸ Associated Press 'Nigeria Poised to Pass Anti-gay Bill' available at <http://www.newsinfo.inquirer.net/308408/nigeria-poised-to-pass-anti-gay-bill> (accessed on 3 October 2013).

³⁹ <http://www.telegraph.co.uk/news/worldnews/african> (accessed on 28 January 2014).

⁴⁰ As Cited in Kreis, A. M., Unhinging Same-sex marriage from the Constitutional canon: The Search for a Principled Doctrinal Framework, available online at <http://www.law.emory.edu/fileadmin/journals/elj/63/eljonline/kreis.pdf> p.3 (accessed on 10th June 2014).

⁴¹ Emphasis mine.

⁴² *Ibid.*

⁴³ Chapter II of the 1999 Constitution (as amended) Sections 33–45.

According to a Learned Text Writer Ese, he commented that every person has the right to privacy and family life (Malemi 2006: 230). Where one person or public authority trespasses or invades the privacy of home of an individual, such individual may be entitled to sue for trespass and so forth. Furthermore, that an invasion of private life may amount to defamation, or other tort or crime. A person so defamed may sue under defamation law, or other relevant tort and recover damages, except the defendant has a defence. Action may also be brought in criminal law.

In Yakubu's view, Section 37 of the 1999 Constitution (as amended), allows a citizen to assert his privacy including the privacy of his home and correspondence in whatever way either by telephone conversation, telegraphic communications, letters or any other method of communication (Yakubu 2003: 383). Thus in the case of *Medical and Dental Practitioners' Disciplinary Tribunal v. Okonkwo*,⁴⁴ the court had to determine whether a patient had the right to consent to blood transfusion or not in defence of his privacy. The supreme court emphasized section 34 of the 1979 Constitution (repealed) now Section 37 of the 1999 Constitution (as amended) and maintained that the patient's constitutional right to object to medical treatment or, particularly, as in this case, to blood transfusion on religious grounds was founded on fundamental rights protected by the constitution with respect to right to privacy, and right to freedom of thought, conscience, and religion. In the words of Ayoola JSC (as he then was);

the sum total of the rights to privacy and of freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary.⁴⁵

It is doubtful whether there is any other country in the world in which the idea of same sex marriage is abhorred publicly than in Nigeria. As discussed earlier, the Same Sex Marriage Prohibition Act 2006 prohibits not only same sex marriages, but also the relationship that arise there from. Only recently, there was an attempt by some civil rights groups like Women's Rights Advocacy to litigate on the subject, but this was called off due to threats that the court might be stormed by angry mobs.⁴⁶ Nigeria can therefore be said to be zero tolerant in this respect of same sex marriage. However, the irony of it is the fact that there are those that engage in homosexual acts in considerable proportion under the cover of the dark or "for spiritual purposes or for money rituals" (Oyeniyi-Adedapo).

In the southern part of Nigeria, sex acts between men are illegal and the same attracts a maximum penalty of 14 years of imprisonment.⁴⁷ Sex acts between women are not mentioned specifically in the code, although it is arguable that the gender neutral term person in Section 214 of the code includes women. The Section provides (in parts) that; any person who has carnal knowledge of any person against the order of nature, 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 14 years.

⁴⁴ (2001) 19 WRN 1.

⁴⁵ *Ibid* at 40.

⁴⁶ Same-sex marriage around the world, CBS News (Toronto) available online at <http://www.cbs.ca/news/world/story/2009/05/06/f-same-sex-timeline.html> (accessed on 13 March 2013).

⁴⁷ Sections 214–217 of the Criminal Code CAP C38 LFN 2004.

Section 217 of the code provides further that:

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...⁴⁸

In the Northern states, Section 284 of the Penal Code which applies to all states in the North provides that:

whoever has carnal intercourse 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 a fine.⁴⁹

Equally, Section 405 of the Penal Code provides that a male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession is a vagabond. And under Section 407, the punishment is a maximum of one year's imprisonment or a fine, or both.

The *Shariah* Law based on purely Islamic tenet enacted by certain states in the North and adopted into criminal statutes contained provisions that prohibit sexual acts against the order of nature, like sodomy, lesbianism, and gross indecency (Ostien 2007). For instance, in Kaduna and Yobe States, sodomy is committed by whoever has anal coitus with a man, and in Kano and Katsina states sodomy is committed by whoever has carnal intercourse against the order of nature with a man or woman through their rectum.

In states like Bauchi, Gombe, Jigawa, Sokoto, and Zamfara too, sodomy is committed by whoever has carnal intercourse against the order of nature with any man or woman. The offence carries a punishment of canning with one hundred lashes if unmarried, and shall also be liable to imprisonment for the term of one year; or if married with stoning to death.⁵⁰

In states of Bauchi, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, and Zamfara, lesbianism 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.⁵¹ 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. The offence carries a punishment of canning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months.

The *Shariah* Penal Law in the Northern states also forbids acts of gross indecency. A person commits an act of gross indecency in public by exposing nakedness in public and other related acts of similar nature capable of corrupting public morals, like kissing in public or unusual standards of behavior.⁵² The offence carries a punishment of caning which

⁴⁸ *Ibid*, 217.

⁴⁹ Section 284 Penal Code (Northern States) Federal Provisions Act.

⁵⁰ *Shariah* Penal Code of Zamfara State 2000.

⁵¹ *Ibid*.

⁵² *Ibid*.

may extend to forty lashes and may be liable in addition to imprisonment for a term not exceeding one year and may also be liable to a fine.

The Shariah Penal Law also makes provision against vagabond and incorrigible vagabond by providing that any 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. Furthermore, any female person who dresses or is attired in the fashion of a man in a public place is a vagabond.⁵³ This equally attracts a term of imprisonment for a term which may extend to one year and shall be liable to canning which may extend to thirty lashes.

In the state of Borno, the secular criminal law enacted provides that a person who engages in lesbianism homosexual act, commits an offence and any sexual intercourse with another person of the same sex shall upon conviction be punished with death.⁵⁴

Another negative view expressed against same sex marriage was by a Nigerian Bishop, Emmanuel Chulwuma's attempt at exorcising Richard Kirker (Leader of the Lesbian and gay Christian Movement LGCM) in the United Kingdom; that homosexuals are going to hell,⁵⁵ and he compared the present day activists in the church with the residents of Sodom and Gomorrah, among other descriptions. In many African nations where the Anglican Church is active, prohibiting homosexual activity is accompanied by sanctions and is seen as being scandalously irresponsible. The failure to discuss sexuality and human rights among churches amounts to a moral complicity, and there is currently much dispute over the etiology and substantive reality of a homosexual identity in the Christian discussion of human rights.⁵⁶

The churches in Nigeria claimed to have publicized that homosexuality is inherently immoral; it is therefore evil and should be rejected as a perversion of human dignity and the National Assembly is encouraged to ratify the Bill prohibiting legality of homosexuality since it is incongruent with the teachings of the Bible, the Holy Quran and African traditional values.⁵⁷

The churches claimed further that the concrete legal defenses against the corrosive influence of homosexuals is necessary taking into consideration the context of human rights laws. For instance, Article 16 of the Universal Declaration of Human Rights,⁵⁸ provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. Also the African Charter on Human and Peoples' Rights,⁵⁹ in its Article 18 elaborates further that: the family shall be the natural unit and the basis of society. It shall be protected by the state which shall take care of its physical health and moral basis. And the state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

⁵³ *Ibid.*

⁵⁴ Shariah Law Administration and Implementation of Borno-State 2003.

⁵⁵ Fulcrum Rights, Homosexual, and Communion: Reflections in light of Nigeria available online at <http://www.fulcrum-anglican.org.uk/?167> (accessed on 3 October 2013).

⁵⁶ Hosea 6:6, Mathew 5:7, 9:13, 12:7, and Leviticus 20:13 of the Holy Bible.

⁵⁷ Church of Nigeria Standing Committee available online at <http://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167> (accessed 3 October 2013).

⁵⁸ Universal Declaration of Human Rights 1948.

⁵⁹ African Charter on Human and Peoples' Rights, CAP A10 LFN 2004.

This may also be in line with the Equality Act of the United Kingdom,⁶⁰ which was passed into law as a result of growing moral picnic about human rights in the United Kingdom. Whilst the Act extends marriage to same sex marriage couples in England and Wales, it equally established a form of legal discrimination in marriage based on sexual orientation (Johnson 2012).

In this light, it is obvious that the concern for the protection of the African traditional family values is formative as a moral repository and one of the most potent motivations among Africans for supporting anti-homosexual civil legislation, but surprisingly, the Catholic Church seemed to have taken an opposite direction on this position by recognizing homosexuals, for instance that homosexuals do not choose their erotic inclinations; meaning that there is an *a priori* Christian duty to ensure that homosexuals are granted an environment in which this attitude is neither disregarded nor forcibly assaulted.⁶¹

This stand above requires the creation and support of a context in which the deliberations and choices of homosexual persons are allowed to be made in a way that is honest in line with the realities of their personal resources and privacy.

3.1. Similitude of Same-Sex Marriage in the Culture of a Nigerian Community Identified

In the Mbaise community of Imo-State, in South Eastern Nigeria, there already exists similitude of same sex marriage. In that community, “a marriage between a woman and a woman is permissible” (Igwe 2009). The culture and the practice here in this very community is that when a married woman has no son or a child, and the husband dies, it is culturally allowed for her to marry another woman. When this happens, the first woman (the widow) becomes the husband. Almost, in every case, upon the death of her husband, she goes in search of a wife of her choice. On finding one, she pays her dowry and fulfils other traditional rites as it is done under heterosexually contracted marriage.

What is outstanding is that the production of offspring by the newly wedded couple is done upon an agreement of both parties. Both the woman –husband (the widow) and the woman-wife, will agree to allow a man from either the same village or neighboring one to impregnate the woman-wife. The practice, since it is the tradition, nobody questions the paternity of the child born by this couple, in fact the child born by the woman-wife bears the family name of the woman-husband (the widow), and not that of the man responsible for the pregnancy; a kind of surrogacy (Igwe 2009).

The emerging argument is that why allowing such a tradition to persist, but disallowing another form of tradition brought about by the so-called civilization or a new form of marriage simply because of the name it is called (gay or lesbian marriage). It is also a recognized fact that this traditional form of marriage among the Mbaise community of Imo-State pre-dates Christianity and the so-called western culture of gay or lesbian marriages which are now being faulted as social vices and moral decadence that has bedeviled our country. This traditional form of marriage in the Mbaise community is still being practiced till date, and it not in any way more important from the western culture, and it has not in any way undermined the social fabric that unites that community together (Igwe 2009).

⁶⁰ Equality Act, 2010 of the United Kingdom.

⁶¹ Universal Catechism, 2358 available online <http://www.fulcrum-anglican.org.uk/news/2006/20061121radner.cfm?doc=167> (accessed on 3 October 2013).

Although, it may be argued that a man eventually impregnates the “woman-wife”, it should be noted the essence of such man traditionally is basically to supply the sperm needed, what is paramount is the sexes that are involved in the union i.e., a woman to another woman (the woman-husband and the woman wife), and the responsibility of any offspring of that union rest on the couple. The offspring grow up knowing both women as his/her “father” and “mother” (Igwe 2009).

5. CONCLUSION

Changes are an undeniable aspect of human life, without it, there will be no improvement; neither will there be any progress. Nigeria for example is such a diverse country of people with different ideas, beliefs and philosophies. It is also the most populous country in Africa and the seventh most populous country in the world. There are conservatives as well as liberals. It is therefore desirable that government should make laws that will take into cognizance the Nation’s plurality as well as dynamism; laws that are fair, balanced and inclusive of the rights of lesbian, gay, bisexual, and transgender citizens as part of the constitutional guaranteed right to privacy.

Submissively, in the face of the progressive value of mankind reflected in the pursuit of equality of all men and the need to provide every human beings with the opportunity to express his or her views and be tolerated, a phenomenon as strange to majority of mankind as same sex marriage deserves considerable attention; especially at a time when more and more countries across the globe are permitting, legalizing and legitimizing same sex marriage in an increasing global community.

The writer submits further, that in an increasing modernization and globalization of the world into a village, there is no reason why we cannot accept another form of marriage arrangement: same sex marriage. In the Writer’s perception, it is not something that should generate many arguments because it is neither going to inhibit our growth and progress nor stunt our political development. Marriage so long as it is between two consenting adults, gender should not be an issue, in effect re-echoing the report of Wolfenden Report of England of 1957 that homosexuality between two consenting adults should not be seen as an offence so long as it is done within the four walls of the bedroom and in privacy.

The writer advocates against the criminalization of same sex marriage when one takes into consideration the paranoid of women being forced into marriage against their will/wishes, forced to have sex, forced to have children, forced to be domestic slaves for egoistic men; and forced to endure all manner of abuse and exploitation all in the name of traditional heterosexual marriage, thus depriving many of our women their fundamental human rights.

More so, new scientific evidence has shown that homosexuality is a normal expression of human sexuality that is not chosen; that gay and lesbian people form stable and committed relationship essentially equivalent to heterosexual relationship; that kinds of same sex parents are no less psychologically healthy and well adjusted than children of the opposite sex parents (Tenety–Beck (2010)). This research strongly supports the conclusion that discrimination by the government between married same sex couples and the married opposite sex couples in granting social benefits, stigmatizes same sex couples.

Lastly, but not the least, the writers pursuant to the above discourse in line with human rights advocate, recommend that since the subject of same sex relationship has more to do with philosophical, political and religious considerations, the law should simply affirm the right of every citizen to express their emotions and in particular become married to whatever sex he/she chooses; rather than criminalizing same sex unions. It is better to give same sex

marriage the status of civil union it deserves. Just like abortion, the fact that it is expressly prohibited in Nigeria does not in any way in reality limit its practices, so it would be better to let people be what they want to be. Criminalizing same sex relationship will turn Nigerians into being asylum seekers. Why do we want to keep subjecting our citizens to such psychological and emotional torture?

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