

## **An Overview of the Nigerian Same-Sex Marriage (Prohibition) Act, 2013**

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### **ABSTRACT**

*The Same-Sex Marriage (Prohibition) Act recently enacted by Nigeria criminalizes marriage or civil union between persons of the same sex; solemnization of same sex marriage or civil union or witnessing, aiding or abetting the same; registration, operation, membership or support of gay clubs; public show of same sex amorous relationship and related matters. Each of these offences attracts a long term of imprisonment. The Act was enacted in bold defiance of threats of economic and political sanctions by the western powers against any developing country that enacts anti-gay legislation. This article reviews the Act against the backdrop of the extant laws operative in Nigeria as well as the underlying mores of the Nigerian society in contrast to western idiosyncrasies. It concludes that the enactment is consistent with Nigerian culture and pre-existing laws, whereas the human rights' spin which the western world lately puts on homosexual orientation, on the footing of which the enactment is attacked, is rooted in neither natural law nor customary international law.*

### **1. INTRODUCTION**

Nigeria is a hugely pluralistic society with concomitant legal pluralism. As a result, marriage is regulated by statute,<sup>1</sup> Islamic law and native law and custom. A statutory law marriage is, essentially, monogamous, while a marriage under Islamic law or native law and custom is, essentially, polygamous. However, a golden thread that runs through all the marriage laws in Nigeria is, and has always been, heteronormativity. Throughout the ages, same-sex marriage has

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1 The governing statute throughout the country is the Marriage Act, which was enacted in 1914, now Cap. M6, Laws of the Federation of Nigeria, 2004.

never been allowed in Nigeria, whether statutorily, judicially, religiously, traditionally or otherwise.<sup>2</sup>

When it comes to sexual orientation, same-sex copulation is regarded as an anathema all over the country. The reprobation cuts across all religious and socio-cultural groups. What is more, both the Criminal Code Act<sup>3</sup> and Penal Code Act<sup>4</sup> (which were handed down by our British colonial masters) have since criminalized homosexuality in Nigeria,<sup>5</sup> prescribing a punishment of up to 14 years imprisonment.<sup>6</sup> So also, prior to the enactment of the Act under review, 12 States in northern Nigeria had enacted the Sharia Penal Code Law<sup>7</sup> which makes homosexuality an offence carrying a maximum punishment of death. In view of the statutory, religious and socio-cultural prohibitions, there has never been any known case of homosexuals seeking licence to marry or to regularize their illicit liaison in Nigeria. A search at the Corporate Affairs Commission, which houses the central registry of clubs and associations, reveals the non-existence of any registered gay club or association. That is not to say that Nigeria is totally insulated from homosexuality. Without doubt, gays and lesbians have for long been in Nigeria and, indeed, their number is believed to be growing in recent times.<sup>8</sup> However, since their activity is illegal, they operate surreptitiously, thus posing little or no danger to public morals for now.

With the impact of globalization and the penchant of Nigerian youths to imbibe western idiosyncrasies lock, stock and barrel, there is bound to be an increase in the population of the lesbian and gay community and consequent

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2 Indeed, in the entire continent of Africa, South Africa is the only country which has legalized same-sex marriage by virtue of the Civil Union Act, which came into force on 30 November 2006.

3 It is now Cap. C38, Laws of the Federation of Nigeria, 2004, which was first enacted in 1916 for the whole country, but which is currently applicable throughout the southern States (hereinafter simply referred to as “Criminal Code”).

4 The Act first came into force on 30 September 1960, replacing the Criminal Code in the then Northern Region, but which is currently applicable throughout the northern States; see now Cap. P3, Laws of the Federation of Nigeria, 2004 (hereinafter simply referred to as “Penal Code”).

5 That holds true for at least 34 countries in Africa; a comprehensive survey of the legislation by country or territory is available at [https://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_Africa](https://en.wikipedia.org/wiki/LGBT_rights_in_Africa) (last accessed on 29 October, 2015).

6 See section 214, Criminal Code; section 284, Penal Code

7 It was the Zamfara State Sharia Penal Code Law, 2000, that set the ball rolling on 27 January 2000. Each of those Laws applies to all Muslims as well as non-Muslims who voluntarily submit to the jurisdiction of the Sharia courts in those States: see, e.g., Introduction, paragraph C, Zamfara State Sharia Penal Code Law 2000.

8 For useful insights, visit [www.vanguardngr.com/2012/06/r-e-v-e-a-l-e-d-more-people-are-secretly-practising-homosexuality-in-Nigeria/](http://www.vanguardngr.com/2012/06/r-e-v-e-a-l-e-d-more-people-are-secretly-practising-homosexuality-in-Nigeria/) (retrieved on 27 April, 2015).

surge of gay activism in Nigeria presently. The fear is that, if uncurbed, we are likely to witness here the sort of sexual revolution that occurred in the western world in the 1960's.<sup>9</sup> Worried by the impending danger of cross-infestation of the Nigerian society with what is considered (at least, by African standards) as a harmful and morally degenerative practice and the destabilizing legal implications thereof, the Nigerian authorities saw the urgent need to take drastic and prophylactic measures aimed at nipping it in the bud.

It was the Obasanjo regime that took the initiative in 2006 by presenting the National Assembly with an executive bill outlawing same-sex marriage. That bill was, however, not passed during the life of that administration. It was left for the 7<sup>th</sup> session of the National Assembly to finally enact the Same-Sex Marriage (Prohibition) Act, 2013, to which President Goodluck Jonathan promptly assented; it came into force on 7 January 2014.

As expected, the enactment was welcomed with virtually unanimous ovation by Nigerians right across religious, political and socio-cultural spectra.<sup>10</sup> Conversely, it attracted condemnation and threats of economic sanctions against Nigeria by western countries, notably the United States,<sup>11</sup> United Kingdom and Canada,<sup>12</sup> which posit that the prohibition of same-sex marriage constitutes a curtailment of the fundamental rights of persons with same-sex orientation. The question is: from whence does the human rights' argument draw legitimacy?

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9 For an apt summary of the sexual revolution and its consequences, see "Sexuality and Modernity", available at [www.isis.aust.com/stephan/writings/sexuality/revo.htm](http://www.isis.aust.com/stephan/writings/sexuality/revo.htm) (last accessed on 27 April 2015). See, also, T.W. Smith, "A Report: The Sexual Revolution?" (1990) *The Public Opinion Quarterly*, Vol. 54, No. 3, 415 – 435.

10 Addressing the UN Human Rights Council at the 17<sup>th</sup> session of the Periodic Review in Geneva, the then Attorney-General and Minister of Justice, Mohammed Bello Adoke, stated that opinion poll showed that 92% of the Nigerian populace supported the enactment of the Act: available at [www.thisdaylive.com/articles/no-way-for-same-sex-marriage-nigeria-tells-the-world/162386/](http://www.thisdaylive.com/articles/no-way-for-same-sex-marriage-nigeria-tells-the-world/162386/) (last accessed on 29 October, 2015).

11 Ironically, in the absence of any federal law legalizing same-sex marriage in the US, judicial opinion vacillated for years until 26 June 2015 when the Supreme Court of the United States decided by a slim majority of 5:4 that ban on same-sex marriage is unconstitutional in *Gary R. Herbert, in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney-General of Utah (Petitioners) v Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge, individually (Respondents)*. This writer was part of a team of 54 comparative law scholars from 27 countries led by Professor Lynn D. Wardle that filed a joint brief as *amici curiae* in the matter. For a commentary on the brief, see Adam Liptak, "Supreme Court Asked to Look Abroad for Guidance on Same-Sex Marriage", *New York Times*, 6 April 2015.

12 In the wake of the enactment of the Act, the Canadian government went as far as cancelling President Jonathan's state visit to Canada earlier scheduled for February 2014: details available at [www.vanguardngr.com/2014/01/gay-marriage-law-canada-cancels-jonathans-visit/](http://www.vanguardngr.com/2014/01/gay-marriage-law-canada-cancels-jonathans-visit/) (retrieved on 27 April 2015).

Besides, whose human rights are they agitating for – Nigerian citizens or foreigners? Are Nigerian homosexuals complaining that their fundamental rights have been curtailed? Indeed, it appears that the western detractors are crying louder than the bereaved, if at all there is any Nigerian bereaved as a result of the anti-gay legislation.

## **2. MAIN FEATURES OF THE ACT**

The Act consists of eight sections; the first five contain the substantive provisions. Section 6 merely states the court that has jurisdiction to deal with matters arising from a violation of the provisions of the Act, i.e., the High Court of a State or of the Federal Capital Territory. Section 7 is the interpretation clause while section 8 bears the citation of the short title of the Act. The long title reads: “An Act to prohibit a marriage contract or civil union entered into between persons of same sex, solemnization of same; and for related matters”. Its core provisions are, as follows:

### **2.1 SECTION 1 - PROHIBITION OF MARRIAGE OR CIVIL UNION BY PERSONS OF SAME SEX**

In terms of sub-section (1), “A marriage contract or civil union entered into between persons of same sex:

- (a) is prohibited in Nigeria; and
- (b) shall not be recognised as entitled to the benefits of a valid marriage.”

The prohibition and non-recognition of same-sex marriage or civil union purportedly entered into in Nigeria is, rather, declaratory of the pre-existing state of the Nigerian law. In the first place, although the Marriage Act did not state categorically that a marriage must be between persons of mixed sex,<sup>13</sup> one

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<sup>13</sup> Note that section 18 of the Interpretation Act, Cap. I23, Laws of the Federation of Nigeria, 2004 (which governs the interpretation of all statutes throughout Nigeria) defines the term “monogamous marriage” (which every marriage under the Marriage Act denotes) as “a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage”. This statutory definition is an adaptation from the

of the essentials of a valid marriage under the Act is capacity to consummate the marriage (i.e., the ability to have ordinary and complete sexual intercourse with the spouse). Thus, a marriage under the Act is voidable where either party is incapable of consummating the marriage.<sup>14</sup> Clearly, same-sex partners are incapable of achieving consummation, which requires the full penetration of the female organ by the male in the ordinary sense. In the well-known English case of *Corbett v Corbett*,<sup>15</sup> a trans-sexual was held incapable of consummating a marriage; hence, the purported marriage was declared null and void.<sup>16</sup>

Although an occasion has never arisen for the Nigerian courts to determine the issue of capacity of a trans-sexual to marry, it is submitted that the decision in the English case is in accord with the Nigerian law.<sup>17</sup> Moreover, since sexual intercourse between spouses is an intrinsic element of every marriage, and homosexuality has since been criminalized in Nigeria, it follows that same-sex marriage could not be lawfully celebrated in Nigeria even before the recent legislation.

As for the position under customary law,<sup>18</sup> same-sex marriage has all the time been absolutely forbidden. As one learned writer<sup>19</sup> aptly observes, “Same-sex marriage is not practised by any known custom in Nigeria. Rather, the act is an abomination and it is condemned by all customs in Nigeria and

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common law definition propounded by Lord Penzance in the old English case of *Hyde v Hyde* (1866) L.R. 1 P. & D. 130 at 133, where he defined marriage, as understood in Christendom, as “the voluntary union for life of one man and one woman to the exclusion of all others”.

14 Section 5 (1) (a), Matrimonial Causes Act, Cap. M7, Laws of the Federation of Nigeria, 2004.

15 [1970] 2 All ER 33.

16 The decision was adopted by the Family Court of Brisbane, Australia, in the case of *Marriage of C and D (falsely called C)* [1979] F.L.C. 90. Today, that line may no longer be followed even in England: see, e.g., *Bellinger v Bellinger* [2002] 1 All ER 311 (House of Lords). It has been rejected in some reported cases from other common law jurisdictions, e.g., *MT v JT* (1976) 355 A. 2d. 204 (Supreme Court of New Jersey); *Re Kevin* [2001] Fam CA 1074 (Australia); *A-G v Otahuhu Family Court* [1995] 1 NZLR 603 (New Zealand); *Godwin v The United Kingdom* (2002) I.L.M., vol. xli, 1285 (European Court of Human Rights).

17 Interestingly, a leading authority on Nigerian family law has made out a case for statutory recognition of gender re-assignment for the purpose of ascertaining the validity of a marriage under the Nigerian law: see E.I. Nwogugu, *What Next in Nigerian Family Law*, Lagos, Nigerian Institute of Advanced Legal Studies, (2006), pp. 11 – 13. Gender re-assignment has been statutorily recognized in several countries including Australia, New Zealand, Canada, South Africa, Singapore, Israel and most states of the USA.

18 Under the Nigerian legal system, the term “customary law” encompasses both Islamic law and the various systems of native law and custom operative in Nigeria.

19 F.T. Hangeior, “An overview of the proposed law to prohibit same-sex marriage in Nigeria”, *Nigerian Law Reform Journal* (2011), p. 93, at p. 100, citing as an illustration section 5 of the Declaration on Tiv Native Law and Custom 1958.

viewed as immoral”. Thus, the new legislation has done no more than restate the customary law disavowal. That said, it is pertinent to point out an old custom among some societies of southern Nigeria where a childless woman or one without a male child would “marry” a wife in order to raise a male child for either her husband or her maiden family.<sup>20</sup> For want of a better terminology, this is prosaically described as “woman to woman marriage”.<sup>21</sup> However, that terminology is misleading, for such a marriage never involves any sexual activity between the two women; rather, the wife is procured for the husband of the woman responsible for the marriage or an agreed male member of her extended family.

In the case of *Meribe v Egwu*,<sup>22</sup> the plaintiff claimed title to the land in dispute on the ground that his mother had been married to the deceased female owner on behalf of her husband. The trial court found in favour of the plaintiff. On appeal, the Supreme Court went at length in analyzing the so-called “woman to woman marriage”. Madarikan, JSC, who delivered the unanimous judgment of the Court, made the following pertinent observation:

“In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a “woman to woman” marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14 (3) of the Evidence Act and ought not to be upheld by the court.”<sup>23</sup>

In dismissing the appeal, the Supreme Court stated, thus:

“We, however, do not think, on a close examination of the facts of this case, there was a “woman to woman” marriage between Nwanyiakoli

20 This custom has fallen into desuetude anyway. Today, adoption is resorted to by childless women wishing to achieve the same objective.

21 See E.I. Nwogugu, *Family Law in Nigeria*, (revised ed.), Ibadan, Heinemann Educational Books, (1990), pp. 63 – 65; M.C. Onokah, *Family Law*, Ibadan, Spectrum Books, (2003), 114.

22 [1976] 1 All NLR 266; [1976] 3 SC 23.

23 [1976] 1 All NLR 266 at 275.

and Nwanyiocha. The true nature of the arrangement was appreciated by the learned trial judge when he, rightly in our view, made the following observations: “[t]he facts disclosed in evidence did not show that Nwanyiakoli married Nwanyiocha for herself, a fact naturally impossible – but that she ‘married’ in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwa to marry her. There was no suggestion in evidence that there was anything immoral in the transaction.”<sup>24</sup>

Sub-section (2) provides, as follows:

“A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing therefrom by virtue of the certificate shall not be enforced by any court of law.”

This provision has to be viewed against the background of the Nigerian rules of conflict of laws relating to the recognition of marriages celebrated abroad. Under the applicable conflict rules, a foreign marriage is recognized as valid if it complies with the formalities prescribed by the law of the place of celebration (*lex loci celebrationis*) and if each of the parties has the capacity to enter into such a marriage under his or her personal law. As for the recognition of a foreign marriage which would have been void if celebrated in Nigeria, the test which should be applied is that propounded by an English court, that is, “whether it is so offensive to the conscience of the English [Nigerian] court that it should refuse to recognize and give effect to the proper foreign law”<sup>25</sup>

It is on that basis that the courts in western countries have, in many cases, refused to recognize polygamous marriages validly celebrated in foreign jurisdictions.<sup>26</sup> Surely, the preponderant judicial opinion in Nigeria would be that same-sex marriage is repugnant to good conscience and contrary to public policy. Today, a conservative Nigerian judge who ruminates over the uncharitable terms in which early English authorities described polygamy as,

<sup>24</sup> *Ibid.*

<sup>25</sup> *Per* Sir Joscelyn Simon, P., in *Cheni v Cheni* [1965] 85 at 99.

<sup>26</sup> For a fuller discussion, see L.O.C. Chukwu, “The Metamorphosis of Polygamy in Private International Law”, 15 (1) *Nigerian Law Journal* (2011), pp. 163 – 180.

for instance, “unchristian”,<sup>27</sup> “revolting”,<sup>28</sup> “barbarous”<sup>29</sup> and “a union falsely called marriage”,<sup>30</sup> may feel impelled to return the punches when asked to recognize same-sex marriage celebrated abroad. He is apt to fall in with the view of this author that public policy or morality is by no means more outraged by polygamy than by same sex marriage. He might then wonder why his western counterparts would view same-sex marriage differently. Why would they discountenance the same human rights’ argument canvassed in favour of same-sex marriage when it comes to their non-recognition of polygamous marriages celebrated in countries where it is legitimate such as Nigeria? Or, indeed, why is bigamy an offence in many parts of the world (including, curiously, Nigeria where polygamy under customary law is the predominant practice) if people should have the freedom to marry without any restriction?

However, as the saying goes, in every twelve there is always a Judas. Perchance, a judge who is himself gay or an apologist for gayness might take a different view. The essence of the statutory prohibition, therefore, is to foreclose the chances of Nigerian courts sounding discordant tones whenever they may be called upon to recognize same-sex marriages contracted outside the country.

## **2.2 SECTION 2 - PROHIBITION OF SOLEMNIZATION OF SAME-SEX MARRIAGE OR CIVIL UNION IN PLACES OF WORSHIP**

This Section provides, as follows:

- “(1) A marriage contract or civil union entered into between persons of same sex shall not be solemnized in a church, mosque or any other place of worship in Nigeria.
- (2) No certificate issued to persons of same sex in a marriage or civil union shall be valid in Nigeria.”

In this context, it is important to distinguish between the solemnization of marriage in a church and in a mosque. A marriage celebrated in a mosque, having satisfied all the requirements of Islamic law, is regarded as customary

<sup>27</sup> *Re Bethell* (1888) 38 Ch. D. 220.

<sup>28</sup> *Hyde v Hyde* (1866) L.R. 1 P. & D. 130.

<sup>29</sup> *Warrender v Warrender* (1835) 2 Cl. & Fin. 488.

<sup>30</sup> *Harvey v Farnie* (1880) 6 P.D. 35.



law marriage in Nigeria. There is no provision under the Marriage Act for the celebration of a statutory marriage in a mosque for Islamic law marriage is, essentially, polygamous and, as such, antithetical to an Act marriage, which must be monogamous.

On the other hand, the Marriage Act provides for the celebration of a marriage in either a marriage registry<sup>31</sup> or a licensed<sup>32</sup> place of worship.<sup>33</sup> In the case of the latter, the marriage must be celebrated by a recognized minister of the church, denomination or body to which such place of worship belongs, and according to the rites or usages of marriage observed in such church, denomination or body.<sup>34</sup> Nevertheless, the mere solemnization of a purported marriage in a church does not give it any legal validity unless all the prerequisites prescribed by the Marriage Act are duly satisfied. The case of *Obiekwe v Obiekwe*<sup>35</sup> nicely illustrates this point.

In that case, the court was asked to determine the validity of a marriage which was solemnized in the Roman Catholic Church in accordance with the canons of the church but without due compliance with the provisions of the Marriage Act. The judge, after taking a swipe at the officiating priest, had this to say:

“A good deal has been said about ‘church marriage’ or ‘marriage under Roman Catholic Law’. So far as the law of Nigeria is concerned, there is only one form of monogamous marriage, and that is marriage under the Ordinance.<sup>36</sup> Legally, a marriage in a church (or any denomination) is either a marriage under the Ordinance or it is nothing. In this case, if the parties had not been validly married under the Ordinance, then either they are married under native law and custom or they are not married at all. In either case, the ceremony in church would have made

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31 Section 27.

32 Section 6 empowers the Governor of a State to license any place of public worship to be a place for the celebration of marriages. For obvious reasons, such a “place of public worship” has to be a church, and not a mosque or a shrine for traditional worshippers.

33 Section 21.

34 *Ibid.*

35 [1963] ENLR 196.

36 The Judge was referring to the Marriage Act, which was originally titled the Marriage Ordinance when it was enacted by the colonial administration in 1914.

not a scrap of difference to their legal status.”

By and large, there seems to be no room for the solemnization of same-sex marriage in a church, mosque or any other place of worship in Nigeria. This is because none of the known religious groups in Nigeria allows same-sex marriage. Even if any of them were to allow it, the mere solemnization of such marriage in accordance with the rites of the religious body but in contravention of extant statutes would be of no legal consequence.

Curiously enough, by section 2 (1) of the Act the prohibition is expressed to be against the solemnization of a same-sex marriage or civil union “in a church, mosque or any other place of worship”, thus leaving out marriage registry. Clearly, the omission of marriage registry from the statutory provision must have been occasioned by drafting inadvertence, for there seems no policy consideration for allowing a same-sex marriage entered into in a marriage registry. Be that as it may, the provision of section 2 (2) is not forum specific, thus making room for the invalidation of a marriage certificate issued by a marriage registry to parties to a same-sex marriage or civil union. Similarly, section 5 (3), which punishes any person who administers, witnesses, abets or aids the solemnization of a same-sex marriage or civil union, makes no exception for a Marriage Registrar.

### **2.3 SECTION 3 - RECOGNIZED MARRIAGE IN NIGERIA**

In terms of section 3, only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria. This provision has now filled the lacuna in the Marriage Act which, as earlier observed, omitted to state categorically that a marriage can only be entered into between persons of opposite sex. Arguably, the provision is capable of being construed to also mean that only a monogamous marriage shall be recognized as valid in Nigeria.

However, applying the purposive and mischief rules of interpretation and, also, calling in aid the long title of the Act, it seems clear that the purport of the provision is simply to put it beyond argument that same-sex marriage is not recognized as valid in Nigeria. Indeed, by defining marriage as “a legal union

entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law”,<sup>37</sup> the Act has made two profoundly significant statements, to wit, that only a mixed-sex marriage is allowed and that all the existing systems of marriage in Nigeria (including polygamous ones) are still preserved. At any rate, even a polygamous marriage is, usually, contracted between a man and each of his female partners one after the other. Thus, it has been fittingly noted:

“Polygamy in reality is not so much a form of marriage fundamentally distinct from monogamy as, rather, multiple monogamy. It is always in fact the repetition of a marriage contract entered into individually with each wife, establishing an individual relationship between the man and each of his consorts.”<sup>38</sup>

#### **2.4 SECTION 4 - PROHIBITION OF REGISTRATION OF HOMOSEXUAL CLUBS AND PUBLIC SHOW OF HOMOSEXUALITY**

In terms of sub-section (1), the registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited. The registration of clubs, societies and organizations as corporate bodies is the statutory responsibility of the Corporate Affairs Commission by virtue of the powers conferred on it by the Companies and Allied Matters Act.<sup>39</sup> For an association to be registered, its aims and objects “must be for the advancement of any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, and must be lawful”.<sup>40</sup>

Even though a gay club may, arguably, be regarded as a social club, its aims and objects are unarguably unlawful by reason of the long-standing statutory prohibition of homosexuality in Nigeria. Thus, in this respect, the new legislation can be said to be unnecessary, for, prior to its emergence, it was high impossible to register a gay club the chief object of which is manifestly

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37 Section 7.

38 *Encyclopedia Britannica*, vol. 14, 949.

39 Cap. C20, Laws of the Federation of Nigeria, 2004.

40 *Ibid*, section 591 (1) (b).

unlawful. Even under international law, a well recognized exception to the freedom of association is that such association must be for lawful objectives.

Sub-section (2) provides that the public show of same-sex amorous relationship, directly or indirectly, is prohibited. The purport of the Act is not that homosexuality is banned by it; that has already been done by pre-existing criminal legislation. Rather, the aim is to arrest the spread of what is, traditionally, a deviant behaviour and its cancerous effect on the society. It is for this reason that any public display of gayness by way of celebration of same-sex marriage or civil union, open association, procession or meeting of homosexuals or public show of same-sex amorous relationship is outlawed. In this matter, the choice is between an individual's acclaimed right to lead a bohemian life and the society's right to protect its members as a whole from an insidious assault on its moral foundations.

## **2.5 SECTION 5 - OFFENCES AND PENALTIES**

This section provides as follows:

- “(1) A person who enters into a same-sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment.
- (2) A person who registers, operates or participates in gay clubs, societies and organisation, or directly or indirectly makes public show of same-sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.
- (3) A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.”

The criminalization of these acts and imposition of severe penalties for their commission can only be seen as a clear demonstration of the degree of

distaste for such deviant behaviours in this clime and the state's resolve to curb homosexuality in all its ramifications. Hitherto, the criminal laws<sup>41</sup> of this country had prohibited sodomy and indecent practices between males, and grouped them (together with bestiality) as "unnatural offences".<sup>42</sup> It seems, however, that lesbianism is not contemplated within the scope of those extant criminal statutes, since anal penetration with the male sexual organ is essential to the offence of sodomy. Be that as it may, the web of criminalization has now been extended so as to capture not only lesbians and gays, but, also, any person who aids, abets, counsels or procures them to publicly celebrate or display their illicit activities by way of solemnization or witnessing of their unions, registration or operation of their associations, holding of public processions or meetings or, otherwise, making public show of their amorous relationships.

It is noteworthy that quite apart from the denial of official registration, the operation of gay club or association secretly has always been illegal, for the Constitution of the Federal Republic of Nigeria 1999<sup>43</sup> denies a person the right to "form, take part in the activity or be a member of a secret society". It is equally pertinent to note that even before the recent legislation a civil or religious official who conducted the celebration of a marriage between persons of the same sex could be charged with conspiracy to commit or aiding, abetting, counselling or procuring the commission of unnatural offences under the provisions of the Criminal Code or Penal Code.

### **3. THE HUMAN RIGHTS' ARGUMENT BY THOSE AGAINST THE LEGISLATION**

Gay activists and apologists for same-sex marriage have been at pains to re-define the concepts of human rights and marriage. They argue that the prohibition of marriage between lesbians or gays amounts to a deprivation of their fundamental rights to freedom of association and freedom from discrimination on the basis of their sexual orientation. But such argument misses the point that right from the origin of mankind there has always been a limit to every freedom.<sup>44</sup>

41 Criminal Code, sections. 214, 217; Penal Code, section 284.

42 It is known as buggery at common law.

43 Section 38 (4).

44 For instance, the *Holy Bible* tells the story of how God put man in the Garden of Eden and commanded

Unrestrained freedom is inimical to the very existence of any organized society. For this reason, international law allows states to impose restrictions on the fundamental rights and freedoms, provided that such restrictions are in accordance with the law and are reasonably necessary in a democratic society to protect national security, public safety and order, public health and morals, and the rights and freedoms of others.<sup>45</sup> Likewise, even though freedom of contract is a universally recognized principle, under the common law certain contracts are struck down on the ground that they are immoral or *contra bonos mores*<sup>46</sup> or, otherwise, contrary to public policy.<sup>47</sup>

Basically, human rights are inherent rights which enure to the benefit of all mankind right from birth. They are rights which human beings are entitled to enjoy simply by virtue of their having been created as humans as distinct from the lower animals. The question is: were humans (or indeed other animals) designed to practise same-sex copulation? The answer, of course, is in the negative. From the Biblical account of creation, “God created man in his own image ...; male and female he created them. And God blessed them, and God said to them, Be fruitful and multiply, and fill the earth and subdue it ....”<sup>48</sup> More emphatically, God commanded that a man “shall not lie with a male as with a woman; it is an abomination”.<sup>49</sup> The Holy Bible<sup>50</sup> gives a sordid account of how God annihilated the inhabitants of Sodom and Gomorrah because of their sin of homosexuality.<sup>51</sup> Even the sexual organs of both sexes have been designed

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him: “You may freely eat of every tree of the garden; but of the tree of the knowledge of good and evil you shall not eat”: Genesis 2 vs. 15 – 17. Arguably, this is the *fons et origo* of the declaration of the right to life, at least from the Christian perspective, for no man can survive without food.

- 45 See article 29 of the Universal Declaration of Human Rights, 1948; also, section 45 of the Constitution of the Federal Republic of Nigeria 1999.
- 46 E.g., contracts that promote sexual immorality or prostitution: *Girardy v Richardson* (1793) 1 Esp. 13; *Pearce v Brooks* (1866) L.R. 1 Ex. 213; *Upfill v Wright* [1911] 1 K.B. 506. See, also, the English case of *Shaw v D.P.P.* [1962] A.C. 220 for the offence of conspiracy to corrupt public morals.
- 47 E.g., marriage brokerage contracts: *Hermann v Charlesworth* [1905] 2 K.B. 123; contracts in restraint of marriage: *Re Fentem* [1950] 2 All ER 1073; contract to marry entered into by a married person: *Spiers v Hunt* [1908] 1 K.B. 720; *Shaw v Shaw* [1954] 2 Q.B. 429; *Alake v Oderinlo* (unreported), Suit No. 23A/74, High Court of Western State, Agbaje, J. (as he then was), judgment delivered on 24 January, 1975.
- 48 The *Holy Bible*, Revised Standard Version, Genesis 1 vs. 27 – 28.
- 49 *Ibid.*, Leviticus 18 vs. 22. See, also, Romans 1 vs. 26 – 27. Parallel passages in the Qur’an are ably articulated by Hangeior, “An overview of the proposed law to prohibit same sex marriage in Nigeria”, note 19 above, at 105 – 106.
- 50 Genesis chap. 19.
- 51 Indeed, it seems that the word “sodomy”, which means the sexual act of putting the penis into a man’s or

by the omniscient creator in such a fashion that they fittingly complement each other. As homosexuality is, unquestionably, a perversion of the natural order of sexual activity, from whence do homosexuals derive the human rights that are being bandied about?

Indeed, the *modus operandi* of homosexuals itself smacks of a gross abuse of human rights. For a man to plunge his penis into the rectum of another man or for a woman to push a dildo, candle, vibrator or any other sex toy through the vagina of another woman is, by definition, “inhuman or degrading treatment,” which is an infringement of a fundamental right guaranteed under the Nigerian Constitution<sup>52</sup> as well as under the United Nations Universal Declaration of Human Rights<sup>53</sup> and other international human rights instruments. The fact that they may derive a sort of sadomasochistic pleasure from the act makes it no less a depreciation of human dignity. Nor, it is submitted, would any argument for freedom to engage in consensual harmful activity hold water in this context. Indeed, when it comes to sexual activity, *laissez-faire* portends grave dangers to public morality, for people would be free to do it wherever they like, whenever they like, however they like and with whomever they like. Prostitutes, for instance, would have the freedom to practise their trade openly without any let or hindrance.

By analogy, it is difficult to draw a line between homosexuality and such other abnormal sexual acts as bestiality (zoophilia), incest, paedophilia, necrophilia, and so on. Should the society endorse such aberrant sexual behaviours under the guise of human rights? Should we legalize marriages between man and beast,<sup>54</sup> parent and child, brother and sister, adult and under-aged child<sup>55</sup> or living human being and corpse? Surely, these other species

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woman’s anus, is derived from the Biblical Sodom.

52 Section 34 (1) (a); section 17 (2) (b).

53 Article 5.

54 This appears to have been already endorsed in the Americas! For instance, it has been reported that 35-year-old Paul Horner married his dog named Mac at the Chapel of Our Lady at Presidio in San Francisco, USA, on 10 February 2014: details available at [nationalreport.net/California-allows-first-ever-state-recognized-human-animal-marriage/](http://nationalreport.net/California-allows-first-ever-state-recognized-human-animal-marriage/) (retrieved on 9 September 2014). It has, also, been reported that on 9 July 2014, in San Pedro Huamelula, Mexico, Mayor Joel Vasquez Rojas, a Mexican man, wedded a female crocodile which was dressed in a wedding gown and decorated with flowers: details available at [www.dailystar.co.uk/news/latest-news/388403/Mayor-Joel-Vasquez-Rojas-marries-crocodile](http://www.dailystar.co.uk/news/latest-news/388403/Mayor-Joel-Vasquez-Rojas-marries-crocodile) (retrieved on 9 September 2014).

55 In South Africa, it has been reported that an eight-year-old school boy, Sanele Masilela, married a 61-year-old woman, Helen Shabangu, in March 2013, details available at [www.dailymail.co.uk/news/article-2291324/](http://www.dailymail.co.uk/news/article-2291324/) (retrieved on 9 September 2014). In compliance with the stipulations of the Convention

of moral degenerates are entitled to put the same human rights' spin on their amorous relationships and, accordingly, agitate for licence to marry their "lovebirds".

Perhaps, the most insidious effect of homosexuality, nay same-sex marriage, is that it is capable of sweeping away the most important and sacred of all human rights – the right to life and the sustenance of the family as the natural unit and basis of society. For, if all humans go the way of homosexuals, sure enough, *Homo sapiens* will soon become an extinct species. And, before they finally wither away, the last vestiges of human species would be reduced to non-reproductive solitary or, at best, twosome family life. Meanwhile, adoption by same-sex partners is not allowed in Nigeria;<sup>56</sup> hence there is, at present, no legitimate opportunity for proliferation in a same-sex relationship.<sup>57</sup> Since self-preservation is the most natural instinct of all living beings, therefore, the global community has the fundamental right and obligation to save humankind from this obvious existential threat. For this reason, the framers of the Nigerian Constitution deemed it fit to state, as part of the fundamental objectives and directive principles of state policy, that the state shall direct its policy towards ensuring that "the evolution and promotion of family life is encouraged".<sup>58</sup>

Remarkably, section 42 of the Nigerian Constitution (which guarantees the right to freedom from discrimination) makes no provision for freedom from discrimination on the basis of sexual orientation.<sup>59</sup> It explicitly guarantees freedom from discrimination based on one's place of origin, ethnicity,

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on the Rights of the Child and African Charter on the Rights and Welfare of the Child, Nigeria enacted the Child's Rights Act 2003, section 23 of which criminalizes the marriage of a child under the age of 18 years. Soon after, a former Governor of Zamfara State, Senator Sani Ahmed Yerima, married a 13-year-old Egyptian girl under Islamic law. He was charged with the offence of marrying an under-aged child. Backed by the Nigerian Supreme Council for Islamic Affairs, the accused contends that the statutory prohibition is an invidious curtailment of his freedom to marry in accordance with Islamic law, which allows such child marriage. Although the case is still *sub judice*, it is doubtful whether such a defence would avail the accused person.

56 See section 129, Child's Rights Act, 2003. For a detailed discussion, see L.O.C. Chukwu, "Adoption in Nigeria under the Child's Rights Act 2003: Problems, Pitfalls and Prospects", in L.D. Wardle and C.S. Williams, *Family Law: Balancing Interests and Pursuing Priorities*, (2007, William S. Hein & Co, Buffalo, New York), chap. 27; also available at [www.law2.byu.edu/isfl/saltlakeconference.htm](http://www.law2.byu.edu/isfl/saltlakeconference.htm).

57 Even, assisted conception and surrogacy are still largely unpractised in Nigeria and there is, as yet, no legal endorsement of those alternative means of reproduction here in Nigeria.

58 Section 17 (3) (h), Constitution of the Federal Republic of Nigeria, 1999.

59 This is unlike South Africa, for instance, which has entrenched freedom from discrimination based on sexual orientation as a human right in section 9 of its 1996 constitution, being the first country in the world to do so.



circumstances of birth, sex (i.e., gender identity), religion or political orientation. This constitutional provision corresponds with the provisions of the United Nations Universal Declaration of Human Rights<sup>60</sup> and the African Charter of Human and Peoples' Rights.<sup>61</sup> This writer is not oblivious of the United Nations Human Rights Council Resolution on Human Rights, Sexual Orientation and Gender Identity<sup>62</sup> and African Commission on Human and Peoples' Rights Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.<sup>63</sup>

However, the objective of these resolutions is strictly "to end all acts of violence and abuse, whether committed by state or non-state actors, including those targeting persons on the basis of their imputed or real sexual orientation or gender identities...."<sup>64</sup> Of course, acts of violence and abuse<sup>65</sup> against any person, regardless of their sexual orientation are, generally, forbidden under both international and municipal laws. But, quite frankly, no section of the Act under review can be said to violate or engender the violation of those Resolutions. It is, therefore, submitted that the claim that the enactment of the Act constitutes an infringement of the fundamental rights of persons with homosexual orientation has no leg to stand on.

#### 4. CONCLUSION

This work represents a root-and-branch analysis of the provisions of the Same-

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60 Article 2.

61 Articles 2 and 3. See, also, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria, 2004.

62 Res. A/HRC/17/L.9/Rev. 1 adopted on 17 June, 2011, available at <http://www.hrw.org/news/2011/06/17/historic-decision-united-nations> (retrieved on 9 September, 2014).

63 Res. 275 adopted on 12 May, 2014, available at [www.achpr.org/sessions/55th/resolutions/275/](http://www.achpr.org/sessions/55th/resolutions/275/) (retrieved on 9 September, 2014).

64 *Ibid.*

65 Which the ACHPR Res. 275 noted as including 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail. There has been no allegation that these acts are committed in Nigeria whether before or after the enactment of the Act. By contrast, it has been reported that some of these acts were being flagrantly perpetrated in South Africa despite the decriminalization of homosexuality and legalization of same-sex marriage there: see G. Joubert, "Culture and Tradition in Family Law: An Essay into the Morality of Human Rights Developments in South African Family Law", (paper presented at the 15<sup>th</sup> World Conference of the International Society of Family Law in Recife, Brazil on 8 August 2014).

Sex Marriage (Prohibition) Act, 2013, and the interplay between them and the stipulations of the extant legislation as well as the Islamic and customary laws operative in Nigeria. It has been shown that the new enactment is by no means revolutionary, as it merely draws upon the pre-existing Nigerian laws and religious, social and cultural norms and values. Indeed, while its passage was being debated, Professor Nwogugu had opined that the bill was unnecessary. “What was required”, according to the learned Professor, “is an amendment of the Marriage Act to stipulate clearly that marriage is a union between a man and a woman”.<sup>66</sup>

This viewpoint may be supported on the basis that the legislation, even from its title, misleadingly suggests that same-sex marriage had, hitherto, been legitimate in Nigeria. The present writer, nevertheless, sees the new legislation as very significant in not only criminalizing same-sex marriage or civil union, for the first time in Nigeria, but, also, in prohibiting the public display of same-sex amorous relationships (including lesbianism and other variants of homosexuality) as well as related matters, all of which, as earlier observed, were arguably not captured by prior legislation.

Since a law ought to reflect a combination of the political, social, cultural, religious and moral matrixes of the society in which it operates – a test which the recent legislation clearly satisfies – it is submitted that the deprecation of the legislation by western detractors under the guise of human rights’ advocacy is utterly baseless. As a prominent English judge, writing extra-judicially, once remarked: “If the law becomes too far removed from generally accepted standards, it becomes discredited”.<sup>67</sup> An apt illustration is the fact that since 1916 when bigamy was criminalized by the colonial administration in Nigeria there has been only one recorded conviction for the offence,<sup>68</sup> even though the law is not infrequently violated with impunity. The moral justification for the recent enactment, therefore, is to be evaluated vis-à-vis the basic notion that “what constitutes sexual immorality will to some extent differ from society to society and from generation to generation”.<sup>69</sup>

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66 Nwogugu, “*What next in Nigerian Family Law?*” note 17, above, at p. 10.

67 Lord Nicholls of Birkenhead, “Trustees and their broader community: where duty, morality and ethics converge”, (1995) 9 (3) *Trust Law International*, 71 at 72.

68 See *R. v Princewell* [1963] NNLR 54.

69 I.E. Sagay, *Nigerian Law of Contract*, 2<sup>nd</sup> ed., Ibadan, Spectrum Books, (2000), p. 426.

From the foregoing, it can be seen that throughout the ages up to the present day, the Nigerian society has always been homophobic; hence the abhorrence of same-sex marriage. Even if the culture would change in the next generation, it can only evolve gradually from within, and not as a result of blackmail or coercion from outside the Nigerian society. Indeed, nothing can be sounder than the following proposition of Nicholas Bala:

“It seems unlikely that a society can go quickly from having laws that criminalize homosexual acts directly to a society that recognizes same-sex marriage; there need to be some intermediate stages to allow time for social attitudes to change in response to new legal realities and to more socially visible same-sex relationships”.<sup>70</sup>

It is certain that if the authorities in Nigeria were to succumb to western blackmail and legalize same-sex marriage under the prevailing circumstances, that would attract serious public condemnation, if not violent protests. We cannot afford such a risk, especially now that our country is under siege by an Islamist terrorist organization known as *Boko Haram* whose acclaimed primary mission is to de-westernize and Islamize Nigeria. The Nigerian government should, therefore, be commended for being bold enough to resist cultural imperialism which, to all intents and purposes, the promptings from the western powers represent.

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70 N. Bala, “Same-Sex Marriage in Canada: Controversy over the Evolution of a Fundamental Social Institution” in L.D. Wardle and C.S. Williams, *Family Law: Balancing Interests and Pursuing Priorities*, note 56, above, at 174.