

An Appraisal of the Same-Sex Marriage (Prohibition) Act 2013 in the Face of Emerging Multiplicity of Gender and Sexual Orientations

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Abstract

The Same-Sex Marriage (Prohibition) Act 2013 is a response to the rising demands for equality of marriage rights and recognition of other forms of consensual sexual relationships. These demands emanated from the Lesbian, Gay, Bisexual, Transgender and other mixed groups represented as Queer community (LGBTQ). The said demands, no doubt, are reminiscent of the emerging multiplicity of gender and sexual orientations the world over. The article thus employs doctrinal method to appraise the extent to which the Act covers the present multiplicity of Gender and Sexual orientations. The article also appraises the Human Rights, Ethical and Conflict of Laws concerns in relation to the Act. The article finds that, there are gaps which make it impossible for the Act to cure the mischief it was enacted to cure. Some of the said gaps include that the Act has failed to capture the entire variants of the emerging gender and sexual orientations such as transgender, transvestite and the queer community. The Act is equally silent on individuals or corporate entities indoctrinating people and minors on the LGBTQ ideology. The article accordingly makes recommendations for the amendment of the Act to be not just the Same Sex Marriage Prohibition Act simpliciter but encapsulate other related offences to enable the other multiplicity of gender and sexual orientations to be captured as well. The article further recommends that the Act provides for the protection of minors by prohibiting individuals and corporate bodies from indoctrinating people and minors with the LGBTQ ideology.

Key words: marriage, same-sex, transgender, queer community, privacy rights

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Introduction

The Lesbian, Gay, Bisexual, Transgender and other mixed groups represented as Queer community (LGBTQ) are evidence of the emerging multiplicity of gender and sexual orientations. They justify their legitimacy in the bundle of rights known as Privacy Rights. The Right to Privacy is a human right as contained in the United Nations Declaration of Human Rights (UNDHR),¹ the International Covenant on Civil and Political Rights,² and in a plethora of other International and Regional instruments.³ It is equally contained in the 1999 Constitution of the Federal Republic of Nigeria (as Amended) (CFRN).⁴ The Right to Privacy generally includes other consequential rights as privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic conversations amongst others.⁵ It has been said to be one of the most central human rights issues of the modern age.⁶ The wide acclaim of these rights are said to have begun sequel to an essay published by Samuel D. Warren and Louis D. Brandeis in 1890⁷ incensed by intrusiveness of the press into people's privacy at that time. Further, in 1928, Louis D. Brandeis asserted in a dissent that privacy was one of the protections guaranteed by the Bill of Rights even against the Government, referencing it as 'the right to be let alone' he went on to declare it 'the most comprehensive of rights and the right most valued by civilized men.'⁸

In present times, privacy Rights have been delineated to include the right to be let alone, the right to limit the access others have to one's personal information, secrecy or the option to conceal any information from others, control over others' use of information

¹ Article 12 of the UDHR

² Article 17

³ See, UNGA Doc A/RES/44/25 (12 December 1989) with Annex, Article 16; Article 8 the European Convention on Human Rights.

⁴ Section 37; *Ibironke v MTN* (2019) LPERL-47483.

⁵ *Nwali v EBSIEC & Ors* (2014) LPELR-23682(CA).

⁶ A report by Global Internet Liberty Campaign, 'Privacy And Human Rights An International Survey of Privacy Laws and Practice' Available on <gilc.org/privacy/survey/intro.html> accessed on 10 June 2019

⁷ Warren and Brandeis, 'The Right to Privacy' [1890] (4) *Harv. L. Rev.* 193.

⁸ *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928).

about oneself, states of privacy, personhood and autonomy, self-identity and personal growth and protection of intimate relationships. It is against this background that nations have legalized Gay and Lesbian Rights, Transgender Rights, Trans-species Rights, incestuous relationships, amongst other related gender and sexual identifications.

The first country that legalized same sex marriage was Netherlands in 2000. Three years later Belgium followed. Other countries that legalized it are: Canada (2005), Spain (2005), South Africa (2006),⁹ Norway (2008), Sweden (2009), Argentina (2010), Portugal (2010), Iceland (2010), Denmark (2012), Uruguay (2013), Brazil (2013), New Zealand (2013), England and Wales (2013), France (2013), Luxemburg (2014), Scotland (2014), United States (2015), Ireland (2015), Finland (2015), Greenland (2015), Columbia (2016), Malta (2017), Australia (2017), Germany (2017) and in 2019 Austria, Taiwan and Ecuador.¹⁰

From the list above, it is evident that the legislation in favor of same sex relations witnessed a spike from 2011. This was largely due to the United Nations Human Rights Council resolution in 2011,¹¹ in favor of LGBT rights. In line with this, the Office of the United Nations High Commissioner for Human Rights released a report on the violations of the rights of LGBT people,¹² such as hate crimes, criminalization of homosexuality and discrimination. The United Nations thus urged all nations to enact legislations with a view to protecting the basic rights of LGBT people. This occasioned the spike in the number of United Nations (UN) member nations who in line with the directive have enacted LGBTQ affirming laws from

⁹ The first country to do so in Africa.

¹⁰ Elisa Tang, Here are the 30 countries where same-sex marriage is officially legal < <https://www.goodmorningamerica.com/culture/story/30-countries-sex-marriage-officially-legal-56041136> > accessed on 25 April, 2020.

¹¹ Wendy Zeldin, 'Discrimination' (Library of Congress, 2011) < <https://www.loc.gov/law/foreign-news/article/u-n-human-rights-council-first-resolution-against-discrimination-based-on-sexual-orientation/>> accessed 26 April 2020.

¹² United Nations General Assembly, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights' <https://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf > accessed 26 April 2020.

2011 till date. Nigeria as a member nation in her response enacted the Same Sex Marriage (Prohibition) Act, 2013. This article is an effort to appraise the efficacy of the Act in the face of the evident multiplicity of gender and sexual orientations.

The article thus begins with an introduction, followed by conceptual clarification of related concepts, an overview of the Act is made, after which necessary Human Rights perspectives are also examined, Ethical imperatives are equally examined, then an Appraisal of the Act is made in the face of Conflict of Laws realities, then the paper concludes and recommendations made.

Conceptual Clarification

Human Rights

Essentially, the core thesis of Human rights connotes that basic rights belong to every member of the human race.¹³ Art. 2 of the UDHR, is to the effect that human rights are rights belong to every human ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Again, Sam McFarland defined them from a moral perspective as ‘the morally justifiable claims that every human should be able to make upon society.’¹⁴

Freedom or the rights of men has been a much cherished ideal to be attained by men at individual, societal and state levels. Men and nations have striven to attain and maintain this from time immemorial. In 539-530BC for example, King Cyrus II, the king of Persia begun his reign by embossing reforms upon a clay cylinder. One these reforms enabled exiled slaves return to their homelands. Another of such reforms was the religious freedom for all in the Persian Empire.¹⁵

¹³ Sam McFarland, Human Rights 101: A Brief College-Level Overview < https://www.aaas.org/sites/default/files/content_files/AAAS%20Coalition%20Human%20Rights%20101_0.pdf > accessed 26 April 2020; *Fort Royal Homes Ltd & Anor v EFCC & Anor* (2017) LPERL-42807.

¹⁴ (n, 12).

¹⁵ Amnesty International, A HISTORY OF HUMAN RIGHTS Key Human Rights Milestones throughout History. Available on < https://www.amnesty.org.nz/sites/default/files/History_of_human_rights_0.pdf > Accessed on 5 June 2019

Though the concept of freedom or rights cannot be said to be nascent, it was until the World War II which saw the gross evil of man against man that the rights thesis was brought into full focus globally. For this reason, the United Nations was established in 1945 with a view to saving future generations from the ills of war. By the contemplation of the United Nations Charter, the way to achieve this lay in the promotion of universal respect for, and observance of human rights and fundamental freedoms for all devoid of bias as to race, sex, language or religion.¹⁶ This formed the foundation for the making of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR contains thirty articles which cover the rights of the individual such as the freedom from discrimination; political and civil rights, economic rights, as well as social and cultural rights. The UDHR has influenced the making of many other instruments such as regional Charters and nations' Constitutions as well as the 1999 Constitution of the Federal Republic of Nigeria (As Amended) (CFRN).¹⁷

Same-Sex Sexual Orientations

Sexual orientation connotes 'a person's sexual identity in relation to the gender to which they are attracted.'¹⁸ To this end, by a person's sexual identity one could be heterosexual – where one is sexually attracted to the opposite sex, homosexual – where one is sexually attracted to the same sex, or bisexual – where one is attracted to either of the sexes being male or female.

As seen above, same sex sexual orientation is a situation whereby a person is drawn sexually to persons of the same sex rather than the opposite sex. The term is akin to homosexual couples.¹⁹ This could involve gay, lesbian, bisexual, pansexual, asexual, transsexual

¹⁶ Article 1(3) United Nations Charter 1945 < <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> > accessed on 18 November 2019.

¹⁷ Section 37

¹⁸ Elizabethtown College, Sexuality, Gender, and Identity Definitions < <https://www.etown.edu/campus-life/lgbtq/sexuality-gender-identity-definitions.aspx> > accessed 26 April 2020.

¹⁹ Definitions, 'Same Sex Relationships' <<https://www.definitions.net/definition/same-sex+relationship>> accessed 5 April, 2020.

and androgynous persons. Same-sex marriage on the other hand ‘refers to the institutionalized recognition of such couples.’²⁰

Bisexuality

This exists where one is attracted to the two sexes sexually, being male and female sexes. Bisexuality is naturally the opposite of monosexuality which implies that one is sexually attracted to a sole sex. Some examples of monosexual genres include heterosexuals, homosexuals, gays and lesbians. Robyn Ochs captures it thus ‘I call myself bisexual because I acknowledge that I have in myself the potential to be attracted – romantically and/or sexually – to people of more than one sex and/or gender, not necessarily at the same time, not necessarily in the same way, and not necessarily to the same degree.’²¹ In plain terms, therefore, Bisexuality may be said to be ‘a sexual orientation based upon sexual behaviour with or attraction to both males and females.’²²

Individuals who identify as bisexual do not necessarily have equal sexual attraction or chemistry to both sexes, so some bisexuals describe themselves as mostly heterosexual because they are more often attracted to the opposite sex, or as mostly homosexual where they more often attracted to the same sex, and finally they can be evenly attracted to both.²³

Pansexuality

The word pansexual is derived from the Latin root pan-, which means ‘all’, and is defined by attraction to individuals or to all genders and sexes.²⁴ A person might identify as pansexual when they experience the potential to be romantically and/or sexually attracted

²⁰ (n, 14).

²¹ Bisexuality, Pansexuality, Fluid Sexuality: Non-Monosexual Terms & Concepts < Bisexuality, Pansexuality, Fluid Sexuality: Non-Monosexual Terms & Concepts > accessed 26 Apr. 20.

²² KG Esterberg, The bisexual menace revisited: Or, shaking up social categories is hard to do. In N. L. Fischer & S. Seidman (Eds.), *Introducing the New Sexuality Studies* 3rd edn (Routledge, 2016)207–214.

²³ Ibid

²⁴ AH Gonel, Pansexual identification in online communities: Employing a collaborative queer method to study pansexuality. [2013](10)(1) *Graduate Journal of Social Science*; 36–59.

to people of every gender.²⁵ So typically, a pansexual is sexually attracted to biological males and females, as well as transgender men and women, intersex and non-binary people.²⁶ Pansexuality is distinguished from bisexuality in that a bisexual is romantically attracted to merely two sexes usually biological men and women. A pansexual on the other hand is attracted to more than two sexes, they are attracted to whatever sex or gender a person which could biological men and women, trans men and women and so on.

Sexual Fluidity

A person who identifies as being sexually fluid is one whose romantic and/or sexual attraction is not static or stable but changes over time.

Transgender

A transgender is one who transits, or moves from his biologically assigned gender to another gender of his choice usually by aid of medical (technology) assistance. A person who transitions to another gender is typically referred to as 'trans' as in trans man or trans woman. Sexually, a Trans person may identify as a gay, lesbian, straight or asexual person. Quite a number of trans people are not usually able to ascertain their future sexual orientation before the completion of their transition. In some cases it remains the same and in others it does not. For instance, a trans person who had hitherto been attracted to women may remain attracted to women or may cease being attracted to women. Again, a trans person who had hitherto been attracted to men, may remain so or may cease being attracted to men. This has been said to be due to the fact that in the process of transition, the issue of sexual orientation is usually of little concern to the individual in question, as the all-

²⁵ Gender and Sexuality Centre, 'Bisexuality, Pansexuality, Fluid Sexuality: Non-Monosexual Terms & Concepts' < Bisexuality, Pansexuality, Fluid Sexuality: Non-Monosexual Terms & Concepts > accessed 26 Apr. 20.

²⁶ A Callis, Beyond bi: Sexual Fluidity, Identity, and the Post-Sexual Revolution. In N. L. Fischer & S. Seidman (Eds.), *Introducing the New Sexuality Studies* 3rd Ed. (Routledge, 2016) 215–224.

consuming matter on his or her mind then is their gender identity.²⁷

Transvestite or ‘Cross Dresser’

In much of the literature these two terms are used interchangeably. They refer to people who enjoy wearing the clothes associated with people of the opposite sex for short periods of time. Some may do this because they identify with the opposite sex and therefore may decide to adopt an identity of that gender. Some others cross-dress for the mere fun of it while remaining content with their natal sex.

Gender Fluidity and Gender Neutrality: A person who identifies as being Gender fluid is one whose gender is not static or stable but changes over time. Some gender fluid people manifest day to day while others change over longer periods of time.²⁸

Gender Non Binary: This connotes a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both male and female, somewhere in between, or even as being totally outside these categories. While some non-binary people also identify as transgender, not all non-binary people do.²⁹

Queer Identity and Kink Identity: Queer identity is used generally to describe individuals who identify as non-straight. It is also used to describe people who have non-normative gender identity.³⁰ Kink identity is also said to be used to refer to all forms of non-normative intimacy, from activities to clothing expressions to relationship dynamics such as BDSM, polyamory, role play and fetishism.³¹

²⁷ Gender Identity Research and Education Society (2006), Gender Dysphoria, GIRES. < <https://www.gires.org.uk/>> accessed 28 April 2020.

²⁸ Human Rights Campaign, 'Non-Binary Gender Fluid & Gender-Expansive Youth, FAQ for Parents & Guardians' < <https://assets2.hrc.org/files/assets/resources/NonBinaryFAQ-01082019.pdf> > accessed 28 April 2020.

²⁹ Human Rights Campaign, (n, 24)

³⁰ Elizabethtown College, Sexuality, Gender, and Identity Definitions < <https://www.etown.edu/campus-life/lgbtq/sexuality-gender-identity-definitions.aspx> > accessed 26 April 2020.

³¹ A (non) Exhaustive List of Common Terms and Identities < https://vaden.stanford.edu/sites/g/files/sbiybj10461/f/terms_and_identities.pdf> accessed 26 April 2020.

An Appraisal and Overview of the Act

The Act cited as Same Sex Marriage (Prohibition) Act 2013 (SSMPA) contains eight (8) sections. Section 1 relates to the prohibition of marriage or civil unions between persons of the same sex.³² The section clearly provides that such marriages or unions will not be recognised in Nigeria nor shall they be entitled to the benefits of a heterosexual marriage which the Act describes as a valid marriage.³³ The section finally declares a marriage certificate relating to such prohibitive unions derived from a foreign country void. Section 1(2) provides *inter alia*:

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 there-from by virtue of the certificate shall not be enforced by any court of law.

Section 2 of the Act prohibits the solemnisation of such unions in any place of worship in Nigeria.³⁴ The subsection 2 of that section declares that no certificate issued in such a marriage shall be valid in Nigeria as only marriages contracted between a man and a woman shall be recognised as valid in Nigeria.³⁵

Section 4 of the Act relates to the registration of homosexual clubs and societies. The section prohibits the registration of gay clubs, societies and organisations. It further prohibits the sustenance, processions and meetings of such clubs and societies. Subsection 2 of the section also prohibits the public show of same sex amorous relationship either directly or indirectly. The section is spuriously silent on the private show of amorous relationship either directly or indirectly.

Section 5 is the punitive section of the Act. Subsection 1 of the section relates persons who enter into a same sex marriage contract or civil union, such a person is said to have committed an offence and liable on conviction to a term of 14 years imprisonment.

³² S. 1a SSMPA

³³ S. 1b

³⁴ Section 2(1)

³⁵ Section 3

Subsection 2 relates to persons who register, operate or participate in gay clubs, societies and organisations, or who directly or indirectly make public show of same sex amorous relationship in Nigeria. Such person(s) commit an offence and are liable on conviction to a term of 10 years imprisonment. Finally, subsection 3 of the relates persons or group of persons who administer, witness, abet or aid the solemnization of a same sex marriage or civil union, or who support the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria. Such person(s) commit an offence and are liable on conviction to a term of 10 years imprisonment.

Section 6 is the jurisdictional section and vests same in the High Court of a State or of the Federal Capital Territory to entertain matters arising from the breach of the provisions of this Act.

The interpretation Section of the Act is section 7. The section has defined what a marriage is, it defines the meaning of a court, it also provides the definition of same sex marriage, the section further defines a witness and concludes by defining what amounts to a civil union. Finally, section 8 is the concluding section of the Act and is the citation section of the Act. It provides for the citation of the Act as the Same Sex Marriage (Prohibition) Act, 2013.

It has been argued that the SSMPA is superfluous as the Criminal Code in S. 214 already criminalises ‘unlawful carnal knowledge against the order of nature’ prescribing a fourteen year sentence on any person convicted of same.³⁶ While the Criminal Code and Penal Code have criminalised this, none of the Acts envisaged that parties would want to be married. What the Acts therefore criminalised at best amounts to criminalising Bisexual, Lesbian and Gay acts. In this respect, it is a plus to the SSMA that it goes beyond the contemplation of the Criminal and Penal Codes.

Section 2 of the Act prohibits the solemnization of same sex marriage in a church, mosque or any other place of worship in Nigeria. This provision is misleading as it purports to mean that marriages may only be conducted by religious bodies in places of

³⁶ JA Dada, “The Constitutionality, Legal, Social and International Implication of the Same Sex Marriage (Prohibition) Act 2014” Being a Lecture Delivered at the Trailblazers Inn of Court UNIUYO Dinner held on the 7th of March, 2014 in Uyo.

worship in Nigeria. On the contrary, marriage in Nigeria may be statutory marriage where it is conducted in accordance with the Marriage Act or Customary Marriage.³⁷ The latter could be traditional marriage or Islamic marriage. By this, the Act seemed to have turned a blind eye on traditional rites for same sex marriage.

Section 3 of the Act provides *inter alia*, ‘only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.’ This provision is completely oblivious of the polygamous system of marriage in Nigeria which is domiciled under the customary form of marriage consisting of both traditional and Islamic forms of marriage.³⁸ This is because, polygamous marriages are not marriages between a man and a woman but between a man and two or more women.

The Act is also silent on the many other variants of Gender and Sexual variations that form the LGBTQ+ community. Take a transgender person for instance, who seeks to transition in or outside Nigeria, the law is completely silent on this. The Law is equally silent on the status of a transgender person who having transitioned seeks to marry ‘heterosexually’ in accordance with his/her acquired sex or same sex with the acquired sex. In such circumstances, which one of the above will come within the purview of the Act?

Human Rights Perspectives

The justification for same sex marriage (SSM) and the LGBTQ+ causes have been largely rooted in Human Rights. In this wise, quite a number of rights have been substantiated in favor of SSM and the LGBTQ+ cause, prominent amongst which is the right to privacy. There are several aspects to the right of privacy, these include the privacy of one’s personal information, one’s body, personal space, and one’s communications.³⁹ This right is protected

³⁷ EI Nwogugu, *Family Law in Nigeria* Rev. edn, (HEBN Publishers Plc, 2011)

³⁸ Ibid

³⁹ Charles Raab and Benjamin Goold, Protecting Information Privacy <<https://www.equalityhumanrights.com/sites/default/files/research-report-69-protecting-information-privacy.pdf>> accessed 24 April 2020.

by a myriad of international, regional and national instruments.⁴⁰ In Nigeria, the right to privacy is protected under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). This section provides *inter alia* ‘the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.’

The argument may however fail as it remains unsettled how private the exercise of the liberty of gender and sexual orientation are. For instance, in the case where trans women⁴¹ now insist to be enlisted in sporting competition against biological or cisgender female,⁴² while retaining their biological advantage as biological men already moves their gender issue out of private domain into a public sphere and a host of other issues.⁴³ Be that as it may, the right to privacy is not unfettered. Section 45(1)a provides empowers the government to make laws that may curtail same in the interest of defence, public safety, public order, public morality or public health.

Another human right issue raised against the SSMPA is the freedom of association⁴⁴ denied the LGBTQ+ community under section 4 of the Act. This argument is however spurious as the law cannot by any stretch of imagination allow meetings upon illegality that would amount to blowing hot and cold.⁴⁵ Further still, section 40 is also fettered by section 45(1)a empowers the government to make laws that may curtail same in the interest of defence, public safety, public order, public morality or public health.

Finally, it is equally argued that they enjoy the right against discrimination as provided under section 42 of the constitution which

⁴⁰ Global Internet Liberty Campaign, ‘Privacy and Human Rights, An International Survey of Privacy Laws and Practice’ < gilc.org/privacy/survey/intro.html > accessed 10 June 2019.

⁴¹ That is, a man who transitioned into a woman by aid of medical technology.

⁴² Andrea Jones, Males Don’t Belong in Women’s Sports—Even If They Don’t Always Win < <https://www.heritage.org/gender/commentary/males-dont-belong-womens-sports-even-if-they-dont-always-win>> accessed 28 April 2020.

⁴³ Andrea Jones, Males Don’t Belong in Women’s Sports—Even If They Don’t Always Win < <https://www.heritage.org/gender/commentary/males-dont-belong-womens-sports-even-if-they-dont-always-win>> accessed 28 April 2020.

⁴⁴ Section 40 1999 CFRN

⁴⁵ *Ijale v. Ijale* (2018) LPELR-46637(CA); *Luke Okoro & Ors v Hilary Egbuoh & Ors* S.C. 395/2001; *Eshwarappa v The Special Land Acquisition Officer* MFA8200/2015.

protects every citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion from being discriminated against by reason only that he is such a person.⁴⁶ The proponents of such arguments assume that the use of 'sex' in this context connotes sexual orientation. With respect however, the word as used connotes sex as in male or female. The mind of the drafters of the constitution was to eliminate gender discrimination as it is prevalent in Nigeria even in those times. The LGBTQ+ with respect was not an issue in this country then and could therefore not have elicited such constitutional protection while in the same vain criminalising same in the Criminal and Penal Codes.⁴⁷ This would be tantamount to breathing hot and cold.

Ethical/Moral Imperatives: While ethics/morality are distinct from the law, the law is normally tested against ethics/moral parameters to know whether the law is fair, good or just.⁴⁸ It is in the light of this that the constitution empowers the state to make laws that protect the morality of the citizenry even at the expense of human rights in certain circumstances under section 45(1)a of the CFRN 1999. That the moral value system of a people needs protection was pronounced per Viscount Simonds in the celebrated case of *Shaw v DPP*⁴⁹ where the appellant had published a 'ladies directory' which listed contact details of prostitutes, the services they offered and nude pictures ... He was convicted of conspiracy to corrupt public morals, living on the earnings of prostitution and an offence under the Obscene Publications Act 1959. The court held *inter alia*:

In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state and

⁴⁶ Navanethem Pillay, "UN human rights chief denounces new anti-homosexuality law in Nigeria," January 14, 2014, <<http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=14169&LangID=E#sthash.VWY5ccuC.dpuf>> accessed 3 September, 2015.

⁴⁷ *Major Bello Magaji v. The Nigerian Army* (2008) LPERL-1814(SC).

⁴⁸ *Washington v. Glucksberg* 521 U.S. 702, 720-21 (1992).

⁴⁹ 1962 AC 220.

it is their duty to guard against attacks which may be more insidious because they are novel and unprepared for.

In this wise, a lot of things may be said about the SSMPA, but it remains undisputable that the Act is a reflection of the moral value system of Nigeria. This truth was demonstrated in the polls conducted by NOIPolls⁵⁰ in 2015 in conjunction with the Initiative for Equal Rights (TIERS).⁵¹ According to the poll, 87 percent of Nigerians support the SSMPA and the punitive measures provided under the Act. 81 percent believed homosexuals should not have equal rights which would directly relate to the LGBTQ+ relations not having the same status with heterosexual relationships or marriage. 90 percent also believed lesbian, gay, and bisexual people should not be allowed to hold LGBTQ meetings or establish LGBTQ organisations. Against this backdrop, it would be apt to say that the SSMPA is in line with the Nigerian *volkgeist* and therefore justified from the historical school praxis.⁵²

Conflict of Laws Concerns: In general, at international law, the place that grants legality and therefore validity of the marriage is the *lex loci celebrationis*⁵³ and not necessarily the *lex loci domicili*.⁵⁴ By this reason, people can move from their *lex loci domicili* where same sex marriage is illegal to *lex loci celebrationis* where same is legal and have a ceremony and then return to their *lex loci domicili* to reside now armed with a legal union recognised under the age long conflict of rule.⁵⁵ This kind of situation has been obviated by section 1(1) and (2) SSMPA which provides that ‘a marriage contract or civil union entered into between persons of same sex is prohibited in Nigeria; and shall not be recognised as entitled to the benefits of a

⁵⁰ NOIPolls, June 11, 2013, <<http://www.noipolls.com/root/index.php?pid=287&ptid=1&parentid=66>> accessed October 18, 2016.

⁵¹ A Nigerian based NGO < <http://theinitiativeforequalrights.org/>. > accessed 24 April 2020.

⁵² Robert Rodes, On the Historical School of Jurisprudence, [2004](49) Am. J. Juris.; 165.

⁵³ The *lex loci celebrationis* means the place the marriage was celebrated while *lex loci domicili* means the place of domicile.

⁵⁴ Tahenni, Hamid, Conflict of Law Rules in Marriage: An Approach based on the Co-ordination of the Relevant Policy Considerations <http://theses.gla.ac.uk/5009/1/1995TahenniPhd.pdf> accessed 28 April 2020.

⁵⁵ *Obergefell v. Hodges* 576 U.S. ____ (2015)

valid marriage.’ It goes on to refuse the recognition of any foreign certificate as being void nor can ‘the benefit accruing there-from by virtue of the certificate be enforced by any court of law.’

Recommendations

Clearly, the Act is silent on quite a number of variants of gender and sexual orientations. The Act is silent on the transgender community, transvestite or ‘cross dressers’,⁵⁶ the queer and the +. The question remains whether the mischief that was sought to be cured was solely same sex marriage? This question becomes apparent as the issue of same sex marriage just represents a subset of the universal set of the LGBTQ+ community which represent the changing face of gender and sexual orientations. This silence is a gap giving occasion for such acts which though not captured in the law nonetheless offend the *volkgeist* of the people. It is, therefore, recommended that the Act be reviewed in order to reflect entire LGBTQ+ community.

Pursuant to the above, it is recommended that the Act should be amended from the Same-Sex Marriage (Prohibition) Act to the Same-Sex Marriage (Prohibition) and other related Offences Act to enable the Act include the entire LGBTQ community. This will enable the Act properly address the mischief it sought to address.

The Act is also conspicuously silent on the issue of individuals or corporate entities indoctrinating people and minors on the LGBTQ+ ideology. This is despite the avalanche of efforts being made by individuals and corporate entities striving to change attitudes towards the LGBTQ+ by the use of the media, propaganda, toys amongst other things.⁵⁷ This is crucial because attitudinal disposition is what would determine the construction or construing of the law.⁵⁸ It is thus recommended that the law should be amended to

⁵⁶ This explains perhaps the reason Bobrisky, a Nigerian cross dresser resident in Lagos state has proven a difficult case to handle for law enforcement agents.

⁵⁷ C. Sarah, MS Gomillion and Traci Giuliano, The Influence of Media Role Models on Gay, Lesbian, and Bisexual Identity [2011](58)(3) *Journal of Homosexuality*, Pages 330-354.

⁵⁸ Felipe Oliveira de Sousa, A Realistic Theory of law [2018](9)(2) *An International Journal of Legal and Political Thought*; 438-447

pronounce on acts aimed at indoctrinating people especially minors⁵⁹ who would be susceptible to being thrown into confusion or dysphoria at such an early age.

Furthermore, it is recommended that section 2(2) of the Act which prohibits the public show of same sex amorous relationship but remains silent on the private show of same sex amorous relationship be amended to equally prohibit the later. This is because, the provision appears to allow for the private show of same sex amorous relationship and this defeats the spirit of the Act.

Finally, it is recommended that section 3 of the Act which provides that ‘only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria’ and thereby appears to equally prohibit marriage between a man and several women being polygamous marriages be amended to read ‘only marriages contracted between biologically heterosexual parties shall be recognized as valid in Nigeria.’ This would be more in tune with the intendment of the Act.

Conclusion

The SSMPA has been embroiled in a lot of controversies but it was no doubt a response of the government to the *volgeist* of the people. The inability of the Act to capture the face of emerging multiplicity of gender and sexual orientations, however defeats, the mischief the Act could have cured. It is, however, hoped that when the recommendations are implemented, the said mischief would be cured.

⁵⁹ Russian Politician Behind Anti-Gay Law Champions President Putin’s Conservative Cause, ASSOCIATED PRESS, <http://www.foxnews.com/world/2013/08/09/russian-politician-behindanti-gay-law-champions-president-putin-conservative/>(last updated Jan. 13, 2015).