Homosexuality and African Criminal Justice System: Exploring the Current Laws and Enforcement Regimes in Nigeria

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Abstract
The discussions surrounding the position taken by the various legal systems towards the lifestyles and activities of homosexuals have gained notoriety and remained topical within and outside the academic space. While some nations have reviewed their criminal laws to decriminalize homosexuality in the recent past, others have re-hardened their criminal justice system against it. Most African nations fall in the latter category—Nigeria being the most recent example that enacted new criminal legislation in 2014 prescribing 14 years imprisonment for homosexuality related activities. Within the academic literature, scholars have generally appraised the African legal stance, and particularly the Nigerian regime, from different perspectives: human rights, medical laws, international laws, etc. However, not much research has been devoted to examining the section-by-section terms of the so-called anti-gay legislation in Africa. This paper is exploratory. It selects Nigeria as a case study and examines the scope of her laws on the 'crime' of homosexuality. Whilst references were made to other African countries, the paper isolates the Nigerian criminal laws and justice system and discusses the legal elements of each provision of the criminal laws relating to homosexuality and the crimes they establish. It also investigates the current enforcement mechanisms put in place. By exploring the extant Nigerian 'anti-gay' laws as they are, this paper makes accessible to the international community how the regime expects persons of LGBTQ+ to conduct their lives and businesses within the ambit of the existing laws while the debates to review or repeal the laws continue.

Keywords: Antigay Laws, Criminal Justice, Africa, Nigeria, Anti-Homosexuality Laws

Introduction

Within the academic literature, homosexuality has been discussed from different perspectives, and the rationale is not far-fetched. The issues relating to homosexuality have increasingly drawn to itself unprecedented global attention in the recent past (John Corvino, 1999). Discussions on the issue now cut across all spheres of life and fields of knowledge (Crompton Louis, 2006) — from the elections' debates in the United State of America (Wilson W., 2014) to the appointment of the Roman Catholic Pope in Italy (Ben Johnson, 2014), to the foreign policy to repatriate homosexual migrants in Lesotho and Swaziland (Murcd M., 2014), to the granting of asylum to the deported homosexual migrants in the United Kingdom (McDonald Henry, 2012), even to the pressure mounted on the *Fédération Internationale de Football Association* (FIFA) against Russia and Qatar for hosting the World Cup (Steve Siebold, 2014).

Meanwhile, a trend that marked the beginning of the twenty-first century in Africa was the surge in the pace at which the various African States moved to re-criminalize the act of homosexuality and prescribe stricter punishment for offenders. Even as the Western donor nations, non-governmental organizations and United Nations agencies sought to make the protection of gay rights a condition for international aids, many African laws continue punishing homosexuals. As a result, two major jurisdictions appear to have emerged based on their respective laws on the act of homosexuality: the "Pro" and "Anti" gay jurisdictions. Central to this issue is Nigeria— a country that drew global attention to itself in the wake of 2014 when it enacted specialised legislation that focuses exclusively on criminalising homosexual activities in the country.

Almost a decade after the passage of its antigay legislation and amidst pressure to reverse it, it is curious to observe that the Nigerian lawmakers have not shown any sign of retracing their stance. Further, the lawmakers have not only continued the drive against homosexuality, but they have also gained the support of the legal community in the country (Ikechukwu Nnochiri, Henry Ojelu, and Jane Onosore, 2021). As it stands today, reports have continued to show a yearly increase in the numbers of suspects arrested and prosecuted for homosexuality related crimes in Nigeria.[1] However, it appears that no conviction has been secured in any of the cases before the Nigerian courts (Alexis Akwagyriam, 2020). Experience has also shown that while many of the ongoing cases in the Nigerian courts are based on the 2014 anti-gay law, there are some other cases filed based on other extant criminal legislations in Nigeria. Thus, it is imperative to review the bodies of laws on the 'crime' of homosexuality in Nigeria, to make accessible to the academic and perhaps international community too, the seemingly less–talk-about area of this subject; to investigate how homosexuality was and is criminalised in Nigeria. Then, to examine the range of policies and legislations on the 'crime,' and isolate the parent legislation on anti-homosexuality in Nigeria—the Same-Sex Marriage (Prohibit) Act 2014— for a detailed analysis of its provisions. The ultimate objective is to show how the existing Nigerian 'anti-gay' regime expects persons of LGBTQ to conduct their lives and businesses within the ambit of the existing laws in Nigeria, even as the age-long and almost-a-never-ending debate continues on whether or not the anti-gay law in Nigeria should be repealed.

[1] See the Report of an empirical research jointly carried out by PEN American Center, PEN Nigeria, and the Leitner Center for International Law and Justice at the Fordham Law School, retrieved from < https://pen.org/press-clip/nigeria-urged-to-repeal-its-anti-gay-law-by-rights-group/> on the 2nd of January 2022.

Nigerian Antigay Regimes before the enactment of the 2014 Act

Before the enactment of the 2014 Act, there had been laws that were tougher on homosexuals in Nigeria, and those laws are extant to date. Thus, the reason for the exceptional attention the 2014 Act has gotten from the international community even with little attention on the tougher laws on homosexuality in Nigeria is difficult to rationalize. Nonetheless, it is important to briefly review all the laws on this subject in Nigeria, perhaps to give a clear view of how the entire legal regime on anti-homosexuality in Nigeria crystalised.

Before the enactment of the 2014 Antigay Act, there had been five pieces of legislation that criminalised the act of homosexuality or expressed antigay disposition in Nigeria. These are:

a. The penal code laws (applicable in the Northern part of Nigeria).
b. The criminal code laws (applicable in the Southern part of Nigeria).
c. The Shari'ah penal code laws (applicable in the Northern part of Nigeria).
d. The Armed Forces Act.
e. The Matrimonial Causes Act.

The history behind the making of the Penal and Criminal Code Laws in Nigeria

One major factor that has made a research on this subject controversial is that the records of the legal systems of the African societies before her contact with the Europeans and the Arabian invaders were, though kept, but not kept in the modern ways of record-keeping, even though civilization in terms of written records started from Egypt in Africa (Eltoukhy M., 2019). Most, if not all, of the literature about Africa, were either written by Africans who had gotten the information transmitted to them verbally from past generations or written by foreigners who simply wrote out of their limited experience even after they had begun to socialise with the African people and already influenced their culture, or out of a pre-meditated understanding about the African society. Therefore, the lack of original modern-day written records about the legal system of the pre-Europeanized African society has made it challenging for historians to tell, authoritatively, the attitude of the pre-Europeanized Nigerian society towards homosexuals. To this end, the most convenient starting point to trace the evolution of laws on homosexuality in Nigeria for this paper is to begin from when some written laws were introduced to the country— during colonialism.

The Laws against homosexuality imported into the Lagos Crown Colony

Historically, the ancient city of Lagos was the first place in Nigeria to be brought under British rule. It was invaded, shattered and made a British crown colony in 1861, and then, the colonial invaders started ruling the territory through some written laws called Ordinances (Bonny Ibhawoh, 2002). By 1863, one of the ordinances promulgated for the colony was Ordinance No. 3 which made all the laws of England also applicable to the colony. Under this blanket legislation, the English Offences Against the Person Act 1861 (and the English courts' decisions interpreting and applying the 1861 Act) was transplanted into the colony. This transplanted piece of English legislation was the first written law to criminalize the act of homosexuality (in the name "buggery") in Lagos city. The law prescribed a term of life imprisonment to punish offenders. Although, the record of any suspect ever punished under this Act appears unknown. However, the colonial office did establish a kind of English court system in Lagos; to try and punish offenders of all laws imported into the colony which included the 1861 Act. More so, the office of the governor

of the colony of Lagos was created and empowered to enforce the decisions of those courts on behalf of Her Majesty the Queen.

The spread of the Laws against homosexuality to the Northern Nigeria

As at the time homosexuality had become a written offence of "buggery" (or "sodomy" as it was later renamed) under the criminal justice system of the Lagos colony, the laws were yet to be transplanted into the other part of Nigeria (Obilade Akintunde, 1996). This was because the other part of present-day Nigeria— outside the Lagos crown colony— was not colonized until much later. Nonetheless, the Northern Nigeria Protectorate (covering the Northern part of Nigeria) was the next to criminalize homosexuality by an English-type criminal code. Unlike the Lagos colony, there was a deliberate effort to draft a criminal code for Northern Nigeria (Niki Tobi, 1996). The first criminal legislation applicable in the area was drafted in 1903 by Henry Gollan (the then Colonial Chief Justice of the Northern Nigeria Protectorate). The 1903 Penal Code did criminalize the act of homosexuality in two broad ways. First was what the legislation characterized as "unnatural offence," and second was the offence of "acts of gross indecency between male persons" which has a wider scope.

The Penal Code Laws applicable in modern-day Northern Nigeria

Although there had been many modifications in the elements constituting homosexuality related offences from the 1903 Penal Code to date, the Penal Code laws presently applicable in modern-day Northern Nigeria still stemmed from the 1903 Code. The Penal code is now applicable in the 19 Northern States in Nigeria (including the Federal Capital Territory - Abuja). Section 284 of the Penal Code Law reads:

"Whoever has carnal intercourse against the order of nature with any man (or) woman or animal shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine."[2]

The phrase "against the order to nature" has been interpreted to include intercourse between male and male or female and female genitals. Besides the jail term of 14 years prescribed for this offence, the law provides for the payment of a fine by the convict. Worthy of note is the provision of Section 405 of the Code which further criminalizes conducts suggesting acts relating to same-sex relationships. For instance, it criminalizes the conduct of 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. Curiously, the Code does not clarify what is sodomy. Still, such an offender is tagged a "*vagabond"* under the Penal Code, and liable, under Section 407 of the Act, to a maximum prison term of 1 year or a fine, or both.

The Shari'ah Code Laws applicable in modern-day Northern Nigeria

The Shari'ah Code was not introduced by the British colonial invaders— it was inherited from the Arabs slave merchants who had raided the Northern part of Nigeria far before the British. Historically, in the 18th century, a jihadist— Usman dan Fodio— launched several assaults on the people living in a part of present-day Northern Nigeria which ended sometime in the 1800s.[3] Part of what the incursion brought was the imposition of Islam on

[2] Penal Code Law of Jigawa State, Cap P3 Laws of Jigawa State of Nigeria, 2012, S. 284.
[3] Justin Su-Wan Yang, 'The Shifting Tide (Once Again) of Shari'a Law in Northern Nigeria' (2017) Vol.8 No.2 *The King's Student Law Review* 18-36, 20-22.

the people and the introduction of Islamic religious courts (the courts of the Alkalis and the Emirs) to adjudicate the Islamic Shari'ah criminal injunctions throughout the conquered territory (Paul Lovejoy, 2016). When the British colonialists later raided the same territory and declared the area as a (Northern) Protectorate, they retained the Islamic courts to continue their functions. Indeed, it has been argued that the Northern Nigeria protectorate was the only British colony where the colonialists allowed Shari'ah criminal law to apply simultaneously with the imported English-styled laws.[4]

Accordingly, the act of homosexuality and other related orientations (LGBTQ+) seems to be criminalised under the Shariah criminal law, implicitly or explicitly. It is important to observe that though homosexuality was not one of the acts expressly classed as a Qur'anic offence, however, the Maliki legal doctrine, being the prevailing Islamic criminal jurisprudence handed down to the Muslims of Northern Nigeria as the aftermath of the Uthman dan Fodio's jihad, recognizes "sodomy" (*liwāṭ)* as a 'sin' and punished offenders with various penalties ranging from public flogging to death penalty by stoning. In the period spanning from the 1800s till the abolition of the Shari'ah Codes in the 20th century, many offenders were tried with the offence of *liwāṭ* and convicted. However, there was no record of the exact numbers of the convict that were punished by death for *liwāṭ* in the Northern Protectorate.

Meanwhile, oral testimonies garnered from some eyewitnesses appear to show that many convicts were given public whipping while the death penalty was sparingly pronounced by the Islamic courts. Still, the scarcity in the use of the death penalty may not be unconnected to the repugnancy doctrine introduced into the colonial legal system to test every law and procedure and reserved death penalty to a court that follows the English criminal justice procedures. The Islamic courts fell short of the essential procedures required of the English criminal justice system, and that could explain why there might not be a record of the death penalty for the offence of *liwāṭ,* particularly during colonialism. However, about four decades after independence, the criminal jurisdiction of the Islamic courts has been restored in various States now occupying the then Northern Protectorate. Further, most states in the Northern part of Nigeria has individually re-enacted the abolished Sharia'h Penal Codes, though the offences and penalties vary from state to state.

Some provisions of the Shari'ah Penal Code Laws on homosexuality

In all the Shari'ah penal codes applicable in various states, homosexuality is generally criminalized. Most of the Codes named the act as *liwāṭ,* with some variations though. For instance, the Sharia'h Penal Law of Yobe State, states that:

"Whoever has anal coitus with any man is said to commit the offence of sodomy."

The punishment prescribed for *liwāṭ* also varies from state to state, ranging from lashes of cane to death by stoning. In Kano State, for instance, the following punishments are prescribed for an offender found guilty of the offence of *liwāṭ*:

[4] T.A. Nwamara, "*Encyclopedia of the Penal Code of the Northern States of Nigeria and Abuja"* (Law and Educational Publishers Ltd). Pg. 558-560.

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

From the above provision, in punishing homosexual offenders in Kano State, the law separates unmarried from married (or divorced) offenders. While capital offence (death by stoning) is prescribed for a married or divorced person who engaged in the act of homosexuality, a maximum of one hundred lashes of cane and a one-year jail term is prescribed for an unmarried offender (Nwamara T., 199). However, the law in Yobe State treats both married and unmarried offenders alike. The Yobe's Shari'ah penal code provides: "(1) Subject to the provisions of subsection (2), whoever commits the offence of sodomy shall be punished with stoning to death (rajm)."

Further, under most of the Shari'ah Codes, an offence of *liwāṭ* is differentiated from *Sihaq* (lesbianism). Most of the statutes describe the offence relating to lesbianism in the following words:
"…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"

Thus, according to the official explanation to the Codes in some States, the offence of lesbianism 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. Punishment for the offence relating to lesbianism also varies from state to state. In Gombe and Jigawa, for instance, punishment for the offence is caning up to fifty lashes in addition to a prison term of up to six months. In Bauchi State, the punishment is more severe; in addition to canning, the offender may be sentenced to up to five years imprisonment. Like the Penal Codes, all the Shari'ah Codes also criminalize an act called "gross indecency" under which many other same-sex relationships could fall. The typical clause on gross indecency in most of the Shari'ah Codes provides:

"Whoever commits an act of gross indecency by way of kissing in public, exposure of nakedness in public and other related acts of similar nature capable of corrupting public morals shall be punished with caning which may extend to forty lashes and may be liable to imprisonment for a term not exceeding one year and may also be liable to fine."

Unlike the Penal Codes, the Sharia'h Code illustrates the act of "gross indecency" with some examples like kissing in the public, exposure of nakedness in the public, and other related acts of similar nature "capable of corrupting public morals."

The Criminal Code Laws applicable in modern-day Southern Nigeria

The historical background to the making of a written criminal law against homosexuality in Southern part of Nigeria was different from the experience in Northern Nigeria. The British colonial government could not introduce any codified body of criminal law into the Southern Protectorate throughout her existence because of the disagreement among officials of the colonialists as to which criminal code was to be transplanted into that part of Nigeria. However, after the amalgamation of the Lagos Crown Colony, the Northern and Southern Protectorate in 1914, the colonial government simply extended the Criminal Code applicable in the North to the entire country (Niki Tobi, 1996). Thus, from 1914, the act of homosexuality became punishable in Southern Nigeria under the offences of "unnatural offences," and "acts of gross indecency." Thus, the criminal justice system in Nigeria

remained uniform until 1960 when the regional government of Northern Nigeria opted to enact her Penal Code fashioned after the Sudan Penal Code (which took after the Indian Penal Code).

Though not expressly targeted at homosexuals, the offence classified as "unnatural offences" under the category of offences against morality easily target homosexuals. Under the Criminal Code in Southern Nigeria, a same-sex relationship is named "sodomy" and prescribes a maximum penalty of 14 years imprisonment for an offender. The antigay sentiments underpinning the law is expressed through the provisions of Sections 214, 215, and 217 of the Criminal Code Act:

Section 214 of the Act provides thus:
"Any person who -
(1) has carnal knowledge of any person against the order of nature; or
(2) has carnal knowledge of an animal; or
(3) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony and is liable to imprisonment for fourteen years."

From the foregoing provision, what is easily notable, which may also be confusing, is that it seems that the Code only criminalizes being a gay lifestyle and not lesbianism, particularly with the use of the word "male person" in Section 214(3) without specific mention of female or woman in the provision. However, a careful perusal of the provision, and decision of the Nigerian courts, show the use of the word "person" has been interpreted to mean male or female individual. Thus, the law is broad and could enable conviction for lesbianism related acts. Further, the Criminal Code further outlaws conduct which shows an attempt on the part of the offender to engage in same-sex relations. The Act prescribes a jail term of seven years for such an attempt. This is prescribed under Section 215 of the Criminal Code Act:
"Any person who attempts to commit any of the offences defined in the last preceding section is guilty of a felony and is liable to imprisonment for seven years. The offender cannot be arrested without a warrant."

Also, Section 217 of the Act generally criminalizes other conducts relating to same-sex union in both public and private as well as attempts to commit the offence which it described as 'indecent conducts.' Section 217 reads:

"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. The offender cannot be arrested without a warrant."

Indecent conducts relating to the same-sex union under this Act have been interpreted to include flirting, kissing, fondling, sensual massages or erotic stimulations and other forms of oral sex or foreplay etc., between persons of the same gender. Nonetheless, there is yet no clear court's pronouncement on what constitutes an offence under Section 217 of the Criminal Code Act.

The Armed Forces Act

As noted earlier, there are other statutes with some special provisions that also criminalize homosexual acts or convey antigay disposition in Nigeria. The most popular statutes are The Armed Forces Act[5] and the Matrimonial Causes Act.[6] These statutes are limited in scope because they do not apply to all Nigerian residents but a specific class of the populace. For instance, the Armed Forces Act is only applicable to persons who are subject to the service laws while the Matrimonial Causes Act applies only to persons who contracted marriage under the Act. Like the Criminal Code, the Penal Code and the Shari'ah Criminal Laws, the making of these other statutes could still be traced to the colonial days in Nigeria. During colonialism in Nigeria, the British Colonial office introduced a distinct criminal law to the military circle in the colonies under which many acts popularly attributed to homosexuality were criminalized. The antigay regime within the Nigerian military originated from the transplantation of the 1881 British Army Act into the colony. The transplanted law criminalized homosexuality related activities majorly in three ways.

The first was what it terms as 'sodomy' which forbade male military officers from having 'carnal knowledge of another 'human being per anurn (anus).' The second crime was defined as "the act of indecency" which made it an offence for a male officer, either in public or private, to involve in "act of gross indecency" with another male person. The third crime was defined as "disgraceful conduct" of an unnatural kind, which generally punished all conduct not befitting the military profession. By the way, the provisions of the 1881 Army Act were couched, any of the activities of the homosexuals could be read to mean 'disgraceful conduct.' This latter crime appears to show the striking difference between the anti-homosexuality criminal regime within the military and the other part of the society.[25]

Given the history of many military interventions and long military rule in Nigeria, it would be expected that the laws regulating the command, maintenance and administration of the Armed Forces of the federation would have undergone some comprehensive reforms, however, the opposite appears to be the case (Theophilus Olatunde, 1978). There have been only little changes from the inherited 1881 Act and the extant Armed Forces Act in Nigeria. To this end, the three antigay crimes created in the 1881 Act remain within the system to date. They now form part of Sections 81 and 93 of the Armed Forces Act.

The Matrimonial Causes Act

The law makes the act of 'sodomy' (as defined under the Criminal Code Act) one of the grounds upon which a law court could dissolve a marriage in Nigeria. By section 16 of the Act, once a petitioner in a divorce proceeding can show that his or her spouse has involved in the act of sodomy, it is a sufficient ground, without more, to dissolve a marriage. Even though the Act is not a criminal statute in Nigeria, it establishes a relationship with the criminal justice system on some issues such as bigamy, sodomy, rape etc. For instance, Section 87 of the Act relieves a wife who is alleging that her husband engages in a homosexual relationship from going through eliciting direct evidence to establish her case once she can show that her husband had once, during the marriage, been convicted for the offence of sodomy by a competent law court.

[5] Laws of the Federation of Nigeria, Cap. A20, 2004.
[6] Laws of the Federation of Nigeria, Cap. M7, 2004.

The making of the 2014 Same-Sex Marriage (Prohibition) Act

In 2005, Nigeria hosted the International Conference on AIDS and Sexually Transmitted Infections in Africa, ICASA, and being a gathering of officials from different international groups from both pro and anti-gay jurisdictions, an invitation was extended to many people of different orientations and backgrounds. While the deliberations were ongoing, news had it that one of the Nigerian officials expressed an opinion that there is no homosexuality in Nigeria. The insensitive expression attracted spontaneous counter-reactions and criticisms from some pro-gay groups in the gathering. Following the meeting, the government of President Obasanjo presented for approval some draft copy of a bill to legislate against homosexuality related activities and relationships in Nigeria. Some writers believed that Obasanjo's proposal was the genesis of the contemporary move to harden the Nigerian antigay legislation and regime.

The bill provoked international outrage and reactions. In February 2006, the United States Department condemned the proposal. In March 2006, sixteen international human rights groups signed a letter condemning the bill.[7] The bill died a natural death. Again, in 2007, the lower chambers of the Nigerian federal parliament introduced another similar bill for debate, though the bill was re-titled to 'prohibit marriage between persons of the same sex, solemnization of same and for other matters related therewith.' The difference between Obasanjo's bill and the latter was that the term "sex" in the former bill was replaced with the word "gender" in the latter. The Parliament received many memoranda and communiqués on the issue and conducted public hearings. Meanwhile, like the 2006 bill, the 2007 bill also got an uptight reaction from some developed economies, particularly the United Kingdom and the United State of America, and some NGOs that were much concerned about the projected damaging impact of the law and attended the public hearings. Again, the bill had a natural death.

Nonetheless, sometime after the 2011 general election, one Obende Domingo (a federal lawmaker) presented another similar bill to the National Assembly (i.e. the Senate) for passage into law. In many ways, it is observed that the 2006 bill simply served as the template for Obende's bill. Though the latter legislation contains all the restrictions outlined in the earlier bill, it is slightly different in terms of the severity of punishments for guilty offenders. There is no record of what triggered Senator Domingo to sponsor the third and final bill on this subject in Nigeria despite the failed past attempts. Many reasons have been advanced to rationalize Obende's decision. One of the most popular views was that failed Nigerian politicians that were losing relevance, owing perhaps to their poor performance in governance, had decided to throw religious sentiments into the equation of governance to maintain relevance in the sight of the vastly religious citizens, culminating into the re-toughening of the antigay laws in the country. For whatever reason it was, the Obende's bill enjoyed the vast support of members of both chambers of the Federal Parliament. Then, the bill became a law after it got a presidential assent in December 2013, now commonly called, among Nigerians, the 2014 Anti-Gay Act.

[7] Human Right Watch's, "Nigeria: Obasanjo Must Withdraw Bill to Criminalize Gay Right," retrieved from <https://www.hrw.org/news/2006/03/23/nigeria-obasanjo-must-withdraw-bill-criminalize-gay-rights#>

Analysis of the provisions of the 2014 Antigay Act

The 2014 Antigay Act is a short legislation with just 8 Sections. The first four sections prohibit marriages or civil unions by persons of same-sex, solemnization of same-sex marriage in places of worship and registration of homosexual clubs and societies in Nigeria, and the fifth section prescribes antigay offences and penalties. The last three sections respectively identify the court that has the requisite jurisdiction to try offenders under the Act, the interpretation of some key terms under the Act and citation.

Section 1 of the Act provides:
"1—(1) Marriage Contract or Civil Union entered into between persons of the same sex:
(a) is hereby prohibited in Nigeria
(b) shall not be recognized as entitled to the benefits of a valid marriage
(2) A marriage Contract or civil union entered into between persons of the same sex by a certificate issued by a foreign country shall be void in Nigeria, and any benefit accruing there-from by the certificate shall not be enforced by any court of law."

Two prominent phrases are readily noticeable from the opening of the above provision. They are: "marriage contract" and "civil union." Though, these two phrases are used interchangeably throughout the Act, in some other jurisdictions, they convey a different meaning. From the title of the statute, it appears that the drafters do not intend to use the words "marriage" and "civil union" interchangeably. Perhaps, maybe the use of the word *'or'* in describing the scope of the legislation might be said to have shown the legislators' intention. The law describes its scope as covering issues such as the "…prohibit(ion) (of) marriage or civil union entered into between persons of the same sex, solemnization of same and for other related matters." By this long title, the legislation appears to have banned the two relationships, that is, both "marriage" and "civil union" between persons of the same gender.

Under Section 7 of the Act, same-sex marriage is understood to arise when persons of the same sex entered into a legal union that shares similar features with marriage under the Marriage Act or Islamic Law or Customary Laws in Nigeria. In other words, when a marriage is contracted following any of the three (3) recognized marriage rites in Nigeria (i.e. the Marriage Act, Islamic Law or Customary Laws) but between persons of the same sex, such marriage is, on the ground of the gender composition, null and void. Thus, all the relationships listed in Section 7 of the Act fall under the category of "civil union."[8]

Further, it may be argued that having listed some of the prohibited relationships and used the word 'includes' before the listed relationships, it implies that the list is unending. Thus, the law leaves many other unions between persons of the same sex, even though not expressly mentioned in the Act, to become an indiscriminate target of one overambitious law enforcement agents and law courts. This has been the experience in practice where many cross-dressers have been arrested for interrogation under the Act in spite of the fact that the Act does not clearly prohibit cross-dressing (Nasiru Suleiman, 2020). In practice, experience has shown that the law enforcement agency usually relies on the rule of *ejusdem generis* which denotes that when the provision of a statute introduces some items by an open-ended word such as "include", and further highlights the likes of the items envisaged, any other

[8] These are the (i) adult interdependent relationships, (ii) caring partnerships, (iii) civil partnerships, (iv) civil solidarity pacts, (v) domestic partnerships, (vi) reciprocal beneficiary relationships, (vi) registered partnerships, (vii) significant relationships; and (viii) stable unions.

item not expressly mentioned but share the same characteristics with the ones expressly mentioned. This gap has become, in Nigeria, a sleepy slope to produce bullying tool, instrument of extortion and creation of a big bracket net to catch all fishes to the police net.

Further, Section 1(2) of the Act is particularly applicable to a foreigner in Nigeria. It focuses on the legal status of same-sex marriage or union contracted outside Nigeria. The prima-facie evidence of any marriage contract in most countries of the world is the marriage certificate. Thus, Section 1(2) of the Act is applicable in the circumstance where a same-sex couple married in a pro-gay jurisdiction and came to Nigeria with the marriage certificate. By the express provision of Section 1(2) of the Nigerian Anti-Gay Act, it appears that such a marriage certificate would be treated as null and void under the Act. The implication of this is that the Nigerian law would take the marriage as non-existing between the couple or partners and treat them as unmarried foreigners.

Section 2 of the Act provides:

"2—(1) A marriage contract or civil union entered into between a person of the 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."

Unlike Section 1 which bothers on foreign marriages or civil unions, Section 2 focuses on the status of gay marriage under the Islamic, church and traditional marriage rites within Nigeria. It prohibits the solemnization of gay marriage in Nigeria in any of the two broad forms of marriage recognized under Nigerian family laws. These are the s*tatutory* and *customary marriages*.[9] Thus, Section 2(1) of the Anti-Gay Act covers marriages contracted under the customary laws in Nigeria. The effect of the provision is that, when a Nigerian or Nigerian resident decides not to contract a statutory marriage but opted for a customary marriage (in church, mosque or any other licensed place of contract for customary marriage), the licensed authorities are prohibited from celebrating marriages for persons of the same gender. If perhaps, there is any religious faith in the country that provides for same-sex marriage or relationship, it appears that such belief would be treated as being repugnant and contrary to public policy and national interest as expressed in the provisions of the Act.

More so, even where there is a celebration of gay marriage in a church, mosque or other licensed places of worship in Nigeria, the act of celebration may be declared void and the marriage so contracted, invalid. The person who ministers or authorizes the marriage, as well as the persons who witnessed, abets or aids the solemnization of the marriage or civil union, may also risk a jail term of 10 years under Section 5 of the Act.

Section 3 of the Act provides:

"Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria"

[9] While the statutory marriage is contracted following the provisions of the Marriage Act (commonly described, in Africa, as *court marriage*), customary marriage can be contracted in any of these three forms: (i) marriage contracted at a Christian church (following Christian matrimonial rites) and in deviant of the Marriage Act; (ii) marriage contracted following the Islamic tenets, and (iii) marriage contracted following the customs and traditions of any Nigerian indigenous community.

Section 33(3) of the Nigerian Marriage Act declares as valid all marriages celebrated under the Act if they are celebrated in accordance with the formalities stipulated in the Act. The provision of Section 34 of the Act further states that every marriage celebrated according to the Marriage Act is good and valid in law. Thus, the Marriage Act does not describe what is a valid marriage, and so, the legislation does not prohibit persons of the same gender from contracting a marriage in the country. However, Section 3 of the Act appears to have fixed the controversies and declared invalid marriages or unions between persons of the same sex. The ultimate effect of Section 3 of the Act is that it cleared the ambiguity created under the Marriage Act as to the legality of gay marriages contracted in a statutory, Islamic or customary way in Nigeria.

Section 4 of the Act provides:

"(1) The Registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited.

(2) The public show of same-sex amorous relationship directly or indirectly is prohibited."

The provision forbids every person within Nigeria to form an establishment aiming at engaging in gay or gay-related activities. Going by the provision, the prohibited establishments could take three forms which are *"clubs," "societies,"* or *"organizations."* But curiously, it appears that the wordings of Section 4(1) of the Act are one of the most ambiguous out of the 8 Sections of the legislation. This is because the provision does not limit its scope to the establishments that are purposely registered for gay activities. An overambitious law enforcement agent could rely on the provision to cover organizations, such as many non-governmental organizations operating in Nigeria, with a general focus on international human rights laws or public health issues which may include advocacy on gender equality. Although, it appears that there is yet no record of the disruption of the activities of any international organisation in Nigeria based on this provision, in some African countries such as Kenya and Uganda such interpretation has been given to their similar laws. For instance, in Uganda, about 38 non-governmental organizations dealing with the advocacy of gender equality were banned in 2012 based on their activities.[10]

The provision of Section 4 of the Act could not be strictly interpreted to include NGOs as gay societies or organizations. Thus, in banning the registration of gay clubs, societies and associations, the wordings of Section 4 of the Act imply two things. First, the law bars everyone from presenting, for registration, any organization whose objects relate to same-sex activities. Second, the law further bars any registering authority from accepting for registration any organization that has an object in same-sex activities.

Section 5 of the Act provides:

"Offences and Penalties

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 organizations, or directly or indirectly makes a 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 administer, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and

[10] The Guardian Newspaper, published in March 2004 on <https://www.theguardian.com/world/2012/jun/20/uganda-bans-organisations-promoting-homosexuality>

sustenance or 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 provision of Section 5 prescribes what is a crime and punishment for offenders under the Act. The law creates three classes of offence. These are: (i) Contracting Same-Sex marriage or union, (ii) Promoting Same-Sex relationship; and (iii) Conspiracy to commit offences relating to contract or promotion of same-sex marriage or union. The first crime created is a follow-up to the provision of Section 1(a) and (b) of the Act. Section 1 simply prohibits, without more, marriages contracted, or civil union entered, between persons of the same gender in Nigeria, and further denies the parties the benefits ordinarily accruable to a valid marriage. However, Section 5 of the Act prescribes penalty for anybody who choose to act contrary to the earlier provision of the Act, particularly by contracting or involving in a same-sex marriage or union respectively. For any offender who is proven to have acted contrary to this provision, the law prescribes a term of 14 years imprisonment. The implication of the jail term prescribe under this provision is that the court has no discretion to prescribe any penalty other than 14 years imprisonment prescribed under the Act. The court cannot reduce or increase the jail term, neither can the court prescribe any other punishment like warning, canning or fines etc.

On the second crime, the law criminalizes all acts or conducts which tend to promote or endorse gay-related activities in Nigeria. Section 5(2) is a follow up to Section 4 of the Act. By Section 4, the registration of gay clubs, societies and organizations, their sustenance, processions and meetings or public show of same sex amorous relationship directly or indirectly are considered a promotion or endorsement of same-sex relationship and prohibits Nigerians from involving in the acts. Section 5(2) of the Act further made such act of promotion or endorsement an offence under the Act. The scope of this provision seems to be too broad. It is capable of many interpretations and serves as the basis to fit any accused. Nevertheless, the purport of the provision cannot be misunderstood – it criminalizes all positive acts of promotion or endorsement of same-sex relationship. For instance, a registering authority who knowingly and intentionally registers or runs a gay marriage or club respectively may be found guilty of the offence under the Act as well as a person (natural or corporate) who directly or indirectly finances the establishment or meetings of gay societies or show. It is noteworthy however that this provision does not cover activities in the private confines of citizens contrary to the present experience where accused are raided from the confines of their privacy in Nigeria (Maltida Davies, 2021).

The third and final crime created under Section 5 is conspiracy to commit offences under the Act. This is an omnibus provision which establishes an offence of conspiracy to commit offences such as: where a person or group of persons administers, witnesses, abets, aids, or supports the entering into a same-sex marriage contract or civil union, or the registration, operation and sustenance or gay clubs, societies, organizations, processions or meetings in Nigeria. It criminalizes any action of a third party who, though not the person contracting or promoting same-sex marriage or union but played a positive role in enabling the parties to actualize the prohibited conducts. For instance, when Reverend A administers the oath of matrimony for Mr. A and Mr. B in a same-sex marriage, besides the fact that such marriage is not valid under the Nigerian law, Reverend A is also guilty of an offence under the Act. More so, Mr. X who signs as the witness or a sponsor of the marriage between Ms. Y and Ms. Z is guilty of an offence under the Act. Also, a hotelier or knowingly and deliberately allowed Mr. F and Mr. G to lodge and engaged in amorous doings at his hotel is guilty of an offence under the Act. It is noteworthy to observe that the interpretation section of the Act defines who is a *"witness"* for the purpose of the Act as *"a person who signs or witnesses*

the solemnisation of the marriage". By this definition therefore, witnessing a gay marriage is not limited to signing the marriage document as a witness but also positive participation in the solemnization. In any of the foregoing or more instances, the law empowers the court to convict such accused to 10year imprisonment if found guilty.

Conclusion

In this paper, attempt has been made to examine the regimes on anti-homosexuality related offences in Nigeria and a special focus has been beamed on the implication of each provision of the Nigerian 2014 Anti-Gay Act. Efforts have been made not to take any position on the divergent ideas on the unfairness of the anti-gay legislation in Nigeria. Rather, the approach is more of the positivist school of jurisprudence – stating the law the way it is. It is hoped that by exploring the extant Nigerian 'anti-gay' laws as they are, this paper would make accessible to the international community how the regime expects persons of LGBTQ+ to conduct their lives and businesses within the ambit of the existing laws while the debates to review or repeal the laws continue. However, it is not envisaged that there should be a general consensus on the interpretation of laws expressed in the paper, but if I succeed in provoking further legal thought and even divergent positions on the subject discussed, then, the paper has achieved its object.

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