TOWARDS SAME-SEX MARRIAGES IN NIGERIA AND ENGLAND*[1]

Abstract
Same sex marriages are becoming popular acceptable norms in many nations in contemporary times. The developed nations of the world are increasingly embracing this phenomenon named same sex marriage. The paper is a product of relevant statutes, treaties, textbooks, judicial precedents. The paper is imperative because of recent agitations by certain same sex persons for recognition in Nigeria coupled with the nation's historical ties and legal jurisprudence with England. The paper examines the concept of marriage, same sex marriages in Nigeria and England, and marriage as a traditional institution. Homosexual activities either between male or female adults were considered activities carried out between two consenting adults. Different legal systems of the world at one time and by legislations criminalized it. It was towards the advert of the 21st century that different western societies commenced the reviewing of their legal systems to legalize same-sex union. From time immemorial, diverse nations resisted agitations to recognize same gender marriage. Most of those nations yielded to pressure and then amended their laws to accommodate same-sex marriage. This paper concludes that different positions confirm that the world is moving towards same sex marriage. The day will come when Nigeria will decriminalize same-sex marriages. It was recommended that the desire could be achieved without instrumentality of the law and without affecting the traditional concept of marriage. Same-sex couples could as well go about their activities without seeking any license from the government provided the law of the land does not ban their activities.

Keywords: Sex, Marriage, Gay, Homosexual, Lesbian

1. Introduction

Homosexual practice is not a new phenomenon. Homosexual activities either between male or female adults were considered as acts or activities carried out between two consenting adults as purely private affairs in society. Different legal systems of the world at one time or the other frowned at it and by legislations criminalized it, thereby making it a punishable offence with death or terms of imprisonment. The concept of same sex marriage was unknown to legal jurisprudence till about the end of the 20th century, following pressure from gay activists like gay liberation funds who first met at the (LSE) London School of Economics on 13th October 1970.

June 1972 saw the fortnight publication of gay newspaper called the gay news. This reported on discrimination and political and social advances but also campaigned for law reforms. It ceased publication on 15th April 1973. 1st July 1972 witnessed the first UK gay pride march when one thousand people ran from Trafalgar square to Hyde Park in London. Previously on 27th November 1825, James Pratt and John Smith were the last two men to be executed for homosexual act in the UK. The 1828 act legislation under which the last two men were executed was replaced in 1861 thus revoking the death penalty for homosexuality act between them and replaced it with a prison term of between ten years and life imprisonment.

It was towards the tail end of the 20th century and the dawn of the 21st century that countries from the different continents of the world predominantly England and western societies commenced the process of reviewing their legal systems to legalize same-sex union or association. These reviews brought about the introduction, acceptance and legal recognition of same-sex union in the form of civil partnership and later marriage between same sex partners[2].This paper centers on the introduction, the concept of marriage, same sex marriage in England, same sex marriage in Nigeria, marriage as a traditional institution and the conclusion.

2. The Concept of Marriage

Marriage is the world's oldest institution. In Christendom, it is believed that it was instituted by God Himself and it is as old as man's creation. Marriage therefore, is believed to be a sacred union that exists between a man and a woman. The term marriage has been described elsewhere as 'a socially sanctioned

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[2]The Wolfeden Committee (of the British Parliament) Report on Homosexuality and Prostitution in 1957.

union, typically of one man and one woman, in this connection called husband and wife.' Typically they form a family, socially, through forming a household, which is often subsequently extended biologically, through children. It is found in all societies, but in widely varying forms. In Islam, marriage has been defined as 'a contract that results in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of right and obligations.' Under the Marriage Act chapter 218, Laws of the Federation of Nigeria 1990, marriage is said to be one that is performed in compliance with the Marriage Act either in consideration with the customs of the bride and the groom's family by paying the bride price, the giving of gifts etc. Furthermore, 'it is a mutual contract between a man and a woman whose goal is for each to enjoy one other, become a pious family and sound society. The common law definition of marriage is credited to Lord Bughley wherein he refers to it as, 'the voluntary union for life of one man and one woman to the exclusion of all others'. The existing marriage law in Nigeria, the Marriage Act, made no attempt to define marriage. However, recourse can be had to the Interpretation Act, which again did not define marriage. According to the Act, 'monogamous marriage to mean a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man to the exclusion of all others during the continuance of the marriage.' Marriage has been further defined as 'a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic and Customary Laws.

3. Same Sex Marriage in England

Marriage is an important institution in England. The principles of long-term commitment and responsibility which underpin it bind society together and make it stronger hence the monarch is seen as a royal family whose marriage is viewed as a marriage compass for marriage virtue in England. The Government believes that we should not prevent couples from marrying unless there are very good reasons – and loving someone of the same sex is not one of them. The Marriage (Same Sex Couples) Act 2013 makes the marriage of same sex couples lawful in England and Wales, while protecting and promoting religious freedom. The Government believes that opening up marriage to all couples demonstrates society's respect for all individuals, regardless of their sexuality, making our society fairer and more inclusive for all its citizens.[3] The Marriage (Same Sex Couples) Act 2013, was passed on 17 July 2013, and the first marriages of same sex couples took place on Saturday 29 March 2014. Same sex couples who got married abroad under foreign law, who were consequently treated as civil partners in England & Wales, are now recognized as being married in England and Wales. The Act enables same sex couples to marry in civil ceremonies; ensures those religious organizations willing to do so can opt in to marry same sex couples according to their rites; protects religious organizations and their representatives from legal challenge if they do not wish to marry same sex couples; enables civil partners to convert their partnership to a marriage, if they wish; and enables individuals to change their legal gender without having to end their marriage. A civil partnership is designed as a legally recognized union of a same sex couple. The couples have rights that are basically identical to those of marriage.[4] The Act also requires reviews to be conducted to consider three issues: (1) Whether faith organizations should be able to conduct legally valid marriage ceremonies; (2) The operation and future of the Civil Partnership Act 2004 (now civil partnerships, marriages and death (registration etc.) Act 2019. This comes in force on 26 July 2019 having received royal assent on 26 May 2019 in England and Wales; and (3) Relevant differences in survivor benefits offered by occupational pension schemes.

Religious protections

The Act reflects the Government's commitment that no religious organization or representative will be forced to conduct or participate in same sex marriage ceremonies. Article 9 of the European Convention on Human Rights guarantees the right to freedom of thought, conscience and religion, and the Act protects and promotes religious freedom through the Government's 'quadruple lock'. This ensures that religious organizations and their representatives can continue to act in accordance with their doctrines and beliefs on this issue.[5]

[3] Marriage (Same Sex Couples) Act 2013. Was introduced by Maria Miller M.P. and received royal assent on 17 July 2013.
[4]Ryan T. Anderson (2013) Marriage: What it is, why it Matters, and the Consequences of Redefining it: http://www.heritage.org/research/reports < accessed on Sept. 18, 2013).
[5]Fearon cited in Definition of Marriage. Available at www.duhaime.org/LegalDictionary/M/Marriage.aspx < accessed on July 12,2013>

The Quadruple Lock

In order to calm the fears that church and other religious institutions will be forced to perform same sex marriages against their will, the government of UK therefore proposes the quadruple lock. This makes it abundantly clear that a religious marriage ceremony of a same sex couple will only be possible if these four cast-iron in legal assurances are guaranteed: (1) The governing body of the religious organization has opted in by giving explicit consent to marriages of same sex couples; (2) The individual minister is willing to conduct the marriage, (3) If the ceremony takes place in a place of worship, those premises have been registered for marriages of same sex couples (4) The Church of England and Church in Wales cannot opt in as they are effectively banned from conducting same sex marriages otherwise the church canon law must be changed if they wish to conduct same sex marriage explicitly states that no religious organization can be compelled by any means to opt in to marry same sex couples or to permit this to happen on their premises; and no religious organization or representative can be compelled by any means to conduct religious ceremonies for same sex couples. The British court and the European Court Of Human Rights cannot be used to challenge decisions not to conduct their marriages. UK amends the Equality Act 2010 to make clear that it is not unlawful discrimination for a religious organization or representative to refuse to marry a same sex couple.[6]

4. Same Sex Marriage in Nigeria

One of the contentious issues in the debate over homosexuality and same sex marriage in Nigeria is whether a marriage between persons of the same gender is totally alien to Nigerian culture and tradition. Those opposing same sex marriage have continued to argue that same gender union is foreign to Africa. But on the contrary, Leo Igwe has argued that homosexuals have always existed in Africa. He is of the view that gay sex is as old as Nigerians in Africa, and predates the contact with Arab and western cultures, but as in other cultures, gays in Africa have until recently been in the closet, expressing their sexual emotions and orientation in private, because heterosexuality is seen as the norm. Consequently, homosexuals in Nigeria contract heterosexual relationship to bear children and to live 'normal lives'. That is why some say there are no gays in Nigeria.[7] Igwe condemned what he called Nigerian rash of comments dripping hatred, disgust, and condemnation for the homosexuals. Whilst many called for the burning, execution, decapitation or stabbing of these 'vile' men with their 'disgusting' lifestyle, others lamented the decline of Nigerian moral values and the concomitant importation of depraved western cultural values. Under no circumstances, it was argued, should the notion of human rights be extended to such persons, because after all, they were sub-human, doing stuff that even animals would not do. Advocates of the current trend in the same-sex debate readily put blame on the British for inserting antigay laws in our statutes books on the eve of their departure. They hold that the present persecution of homosexuals in Nigeria has some roots in our colonial experience. Western imperialists forced on these colonies their social, cultural and political ideologies. Unfortunately, at independence most African countries blindly adopted the laws and constitutions of their colonial masters.[8] For instance, the former British Colonies, Nigeria, Kenya, Uganda, Ghana, adopted the British common law which until the 1960s prohibited homosexuality; while the Islamic majority states adopted the Sharia law - introduced to Africa by Arab jihadists - which sanctions death for gay sex. So homosexuality is a crime in Nigeria. Mensah is of the view that, the fact that anti-gay laws inserted into the statute books by the departing British colonialists should in itself put paid to that ridiculous notion that the idea that homosexuality is a western concept and therefore foreign to Africa as nonsense. Homosexuality, he claimed, cuts across all cultures worldwide and is simply human, in as much as it is also derided across cultures. In fact, until relatively recently in western societies, homosexuality was frowned upon and criminalized in many countries. Even today, in spite of liberal laws, there are gay men in the West who

[6]Matthew Spalding, 'A Defining Moment for Marriage and Self-Government''. Available at www.heritage.org/reserch/reports/2013/03/redefining- < accessed on Dec.20, 2013>.

[7]'Those who want homosexual relationships to be redefined as marriages say that many aspects of their relationships are like marriage—having sexual play, living together, loving one another, etc.—and therefore they should be allowed to call their relationships marriages and should be recognized in the law as marriage partners…The answer they want is for law making and adjudicating authorities to change the law based on the principle that reality is defined by the will and declarations of individuals, all of whom should be treated without discrimination'

[8]Melissa Bull et al, Homosexual Law Reform in Australia: Australian Institute of Criminology, 1991. http:/www.aic.gov.au < accessed on Feb. 22, 2014>.

hide their sexuality and go through loveless marriages just for the sake of 'keeping up appearances'; fearful of the ridicule and contempt of their peers were their secrets to 'come out'. The strict Nigerian communal expectations of yesteryear simply meant men who had sexual feelings for men were forced to bury them whilst they went through the tortuous and sometimes unhappy ritual of marriage and procreation that was expected of them, and in many instances, led 'double lives'.

The argument therefore that homosexuality is intrinsically a Western perversion foisted on poor but hapless Nigerians fits into an interesting narrative, but it is simply a hysterically jingoistic, ignorant one devoid of any intellectual basis or evidence. On several fronts in Africa's evolving culture, the pressure to conform, which is the bedrock of our ancient communalistic society, is fast evaporating, and clearly in that vacuum groups begin to assert themselves as they cast off the 'yoke' of conformity. It therefore should come as no surprise that homosexuals in Ghana, South Africa and Nigeria are becoming bolder by the day. As urbanization and education and international travel and the internet spread into Africa, it is inevitable that certain structures will tumble down, and we may be powerless to do much about it. Currently we have Nigerians claiming political asylum in the UK on the basis of their persecution for identifying as a member of LGBTQ in Nigeria. The LGBTQ community in England actively supports them financially, morally, emotionally and psychologically. Some of these applications for asylum are even supported and are peculiar situations raised on the floor of the House of Parliament to the extent that the British home office, the British Court and the European court of human right now grant or approve refugee status of these applicants within the meaning of the 1951 UN convention.

Also, many educated Nigerian women with independent careers and finances no longer feel the need to remain trapped in loveless and sometimes abusive marriages just to conform to traditional society's expectation of 'stable' marriages. Single parenthood no longer is a matter of eternal shame; hence the traditional view of marriage even in Nigeria is beginning to water down. A woman's choice to work as a prostitute no longer raises hysterical outrage-certainly not in the anonymous jungles that our cities have become. As people become more and more aware of their democratic rights of self-expression through the concept of human rights they will remind you that it is their life if you dare reproach them for their chosen lifestyle.[9] Our extended family system is dying slowly and the nuclear family gains center ground is shifting. Many young people come from broken or one parent family and have taken their own destinies into their hands. We are very slowly but gradually ceasing to care what another person does with his or her life. It is within this context of the western-style individuality taking over Nigerian communality that the gay Nigerians feel unwilling to live according to the strict demands of societal expectation and demand to be left alone to get on with his life as he see fit, sometime seeking protection abroad and contributing to brain drain and skills shortage in Nigeria.

Nigerian Philosophy of Marriage

In Nigeria, marriage is seen as a community affair. Marriage is held very sacred and in very high esteem; and of a very ontological and moral value. Among the Igala people, marriage is between families and not just individual man and woman who met somehow and think that they can live the rest of their lives together. In Nigerian moral thought, marriage and procreation belong together. Without procreation marriage is incomplete. This is a unity which attempts to recapture, at least in part, the lost gift of immortality.[10] Marriage is regarded as an obligation by means of which the individual contributes the seeds of life towards man's struggle against the loss of original immortality. Biologically both the husband and wife are reproduced in their children, thus perpetuating the chain of humanity. In some societies it is believed that the living dead are reincarnated in part, so that aspects of their personalities or physical characteristics are re-born' in their descendants. A person who has no descendants in effect

[9] European Convention of Human Rights, Council of Europe, Rome, adopted on 19th November 1950, effective on 1953, Resolution 2200A (XXI); The African Charter on Human and Peoples' Right, Organisation for African Unity (now African Union), Banjul, adopted on 1981, came into force on 1986, Resolution 115(XVI); Article 2 provides 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status.'

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quenches the fire of life, and becomes forever dead since his line of physical continuation is blocked. From this background therefore, the idea about marriage in contemporary Nigerian contends with the issues of homosexuality and same sex marriage.[11]

Marriage as Traditional Institution

One of the most respected African scholars that captured the concept of marriage is Mbiti. He described marriage as a complex affair with economic, social and religious aspects which often overlap so firmly that they cannot be separated from one another. It is the point where all the members of a given community meet: the departed, the living and those yet to be born. All the dimensions of time meet here and the whole drama of history is repeated, renewed and revitalized. Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. Therefore, marriage is a duty, a requirement from the corporate society, and a rhythm of life in which everyone must participate. Otherwise, anyone who does not participate in it is a curse to the community, he or she is a rebel and a law breaker, he is not only abnormal but 'under human'. Failure to get married under normal circumstances means that the person concerned has rejected society and society rejects him in return.[12]This is a sacred understanding and obligation which must neither be abused nor despised. Similarly, marriage and procreation as a unity attempt to recapture immorality in the matter of 'remembering' the living-dead. So long as there are persons in the family who remember someone who has physically died, this person is not really dead: he is still alive in the minds of his relatives and neighbors who knew him while he was in human form. His name still means something personal, and he can 'appear' to members of his family who knew him and who would recognize him by name. This, as we have seen, is extremely important in Nigerian societies. This is a serious philosophical concern among traditional Nigerian peoples. To lack someone close who keeps the departed in their personal immortality is the worst misfortune and punishment that any person could suffer. To die without getting married and without children is to be completely cut off from the human society, to become disconnected, to become an outcast and to lose all links with mankind. Everybody is expected to get married and bear children and, that is, the greatest expectation of the individual for himself.[13] Marriage is a family affair and it involves the combining of two lives, two families, and sometimes even two communities. Marriage is sacred in Nigeria and in other African nations because it solidifies relationship that enriches communities and nations by bringing forth new life and new hope.

The union of man and woman is a celebration of the natural continuity of life. Marriage is the only known incubator for the raising of balanced socially functional children. Because the bride is the link between the unborn and the ancestors, she is treated with respect. A bride may bear a very powerful child. An Igala adage on the significance of the bride says, 'No one knows the mother of the king'. In other word every bride is a potential mother of the king. Mbiti identifies the traditional African family as a setting wherein the vertical power structure of the society is introduced and sustained as predominant over the freedom of individuals. In Nigeria, the survival of kinship in the social structure depends on marriage; marriage always establishes very strong bonds between the individuals belonging to different families and clans, especially when children are born. When a community seeks out a wife or a son-in-law, they look for one that lives up to their expectations, namely; a person with good moral qualities, industrious in physical work, respectful towards their elders and a good reputation. Physical attractiveness doesn't matter as much as the community's expectations. Similarly, sex is not used for biological purposes alone. It has also ontological, religious and social uses. Mbiti lists it to a solemn seal or signature, in which sex is used as a sacred action, as 'sacrament' signifying inward spiritual values.[14] Mbiti lists what constitutes sexual offences in African societies to include; ritual offences which arise on account of taboos and ritual regulations, where people (including married couples) are forbidden from having sexual relations at given times, adultery, when discovered is severely dealt with in some societies the guilty person (particularly a man) would be whipped, stoned to death, made

[11] *Toone v Austria* (UN Committee for Human Rights). Cited in Katharina Boele-Woelki and A. Fuchs (eds), Legal Recognition of Same-Sex Couples in Europe, (Antwerp, Intersentia, 2003) p 184 referred to in I. O. Omoruyi, An Introduction to Private International Law: Nigeria Perspectives
(Benin: Ambik, Press Limited, 2005) p 257.

[12]Marriage as a Concept and its Purpose : dksuresh: http://www.scribd.com/doc/ 2505629/marriage_as_a_concept_&_purpose < accessed Feb. 25, 2014>

[13] Ibid

[14] Ibid

to pay compensation or have his head or other part of his body mutilated, Fornication, incest, rape, seduction, homosexual relations, sleeping with a forbidden 'relative' or domestic animals, intimacy between relatives, children watching the genitals of their parents (in the wide usage of the term), all constitute sexual offences in Nigerian community. Nigerians are very sensitive to any departure from the accepted norm concerning all aspects of sex since any of these offences upset the smooth relationships of the community which includes those who have already departed. Marriage then, is an ontological duty and responsibility for every Nigerian.[15]

5. Conclusion

From time immemorial, different countries of the world over time resisted the pressure and agitation by different groups to recognize same gender marriage by passing gender neutrality laws that allows same-sex couples to be married like the heterosexual couples. But at the wake of the 21st century most of those countries gave in to such pressure and then amended their laws to accommodate same-sex marriage into their legal system. The civil union act 2006 in South Africa made sex legal, being the first African country to legalize gay marriage. Currently 25 countries in the world have legalized gay marriage. In April 2003, Netherlands became the first country in the world to allow gay and lesbian couples to marry in a civil ceremony. Although such union are frowned at in Israel but it does recognize gay marriages performed elsewhere. This various positions confirm that the world is definitely collapsing and the foundation of a new bridge called same sex marriage is in the horizon. However, there is a school of thought that opines the whole idea of same-sex marriage couples is about adult pleasure desires and nothing more. This desire could be achieved without seeking the instrumentality of the law to gain recognition and legitimacy without tinkering with the traditional concept of marriage. Same-sex couples could as well go about their activities without seeking any license from the state or government for any form of legitimacy so long as the law of the land does not ban their activities. How long Nigeria would continue to resist such pressure particularly those from the international community championed by the United Nations Human Rights Council, which say the present law against same-sex marriage is anti-human rights. The day will come when Nigeria will decriminalize same-sex association or union and enact a marriage law that is gender neutral, to accommodate same-sex association. Especially when such sentiments are currently held and even mentioned by moneybags and powerful presidents like ex-president Obama of the United States who broached the subject with president Uhuru Kenyatta of Kenya and ex-president Goodluck Jonathan of Nigeria during their high level meeting.

[15] Ibid