

IX

An Appraisal of the Issue of Gay and Lesbian Relationships: Nigeria and Canada as Case Studies

C. Umeobika*

Abstract

Gay and Lesbian Relationship has currently become a global issue. In many countries today, it is a human right, cultural, moral, religious, and political issue with different views from individuals and groups either supporting or opposing the gay and lesbian relationship. It is an emerging concept which has posed a threat to the traditional notion of marriage and human sexual relations which is traditionally accepted to be between the opposite sexes. The laws relating to the issue of gay and lesbian relationship varies by jurisdiction, through recognition, legalization, prohibition and criminalization of gay and lesbian relationship and activities. The objective of this study is to do an appraisal of the status of gay and lesbian relationship using Nigeria and Canada as case study, with a view to examining the current legal positions adopted in each jurisdiction. The findings of this research depict different positions in each jurisdiction achieved through legislations and judicial interpretations. Gay and lesbian activism is a significant concern in the whole world currently. There is the need, for every jurisdiction to either choose to prohibit gay and lesbian relationship through legislations and other means, to forestall the springing up of other immoral forms of relationship in the future; or recognise it, and be prepared to face similar issues in future.

Introduction

There have been records of homosexual practices in some cultures in the past, but recently family issues became significant concerns for gay and

* LLM, Lecturer, Nnamdi Azikiwe University, Awka, Anambra State.

lesbian couples. This current push for gay and lesbian marriage and civil union stemmed from gay activism which became vocal as from 1960 and 1970. Currently, gay and lesbian marriage, civil union and partnership is legalized in some jurisdictions as well as prohibited in some other jurisdictions. This work will look at the method adopted in Nigeria as well as in Canada.

Meaning and Nature of Gay and Lesbian Relationship

A gay is referred to as a person especially men sexually attracted to a person of the same sex.¹ A lesbian is referred to as a woman who is sexually attracted to another woman.² The word gay is commonly used for both the male and female category. In other words, a female or male person whose sexual orientation is the attraction to people of the same sex is referred to as a lesbian or a gay respectively. Having known who is a gay or lesbian, the next issue is to look at their relationship. Relationship on the other hand is defined as a loving and or sexual friendship between two people or the way in which two or more people or things are related or the way in which a person is related to somebody else in the family or the way in which two people, groups or countries behave towards each other or deal with each other. It is also defined as a situation in which two people spend time together or live together and have romantic or sexual feelings for each other.³ Relationship can be in various forms like marriage, civil union, co-habitation, partnership, friendship, family etc. Relationship can exist between persons of opposite sex or same sex. Thus, gay and lesbian relationship is a relationship legally or socially recognized as existing between two persons of the same biological sex or social gender.

It is an obvious fact that gay and lesbian relationship has become an intruding concept that has affected the opposite-sex traditional knowledge of sexual relationship. Naturally people of the same sex are commonly believed to be mere friends with no sexual attachment, and the general presumption is that marriage is celebrated between a man and a woman and not otherwise, but the current recognition and legality of gay and lesbian marriage and civil union in some countries like Canada, Spain, South Africa, Denmark, etc., has posed a problem to the traditional knowledge of marriage. To buttress this fact, it is needful to refer to some traditional definitions of marriage. In

¹ A S Hornby, Oxford Advanced Learner's Dictionary, 8th Edition, London, Oxford University Press. 2010,pg 620

²*Ibid*, p. 851

³*Ibid*, p. 1242

Skinner v Oklohama,⁴ marriage was described as an institution of a union of man and woman uniquely involving the procreation and rearing of children within a family and which is as old as creation. In *Okonkwo v Okagbue*,⁵ marriage was defined as a union of a man and a woman. In *Hyde v Hyde*,⁶ Lord Penzance defined marriage, as a voluntary union of one man and one woman for life, to the exclusion of all others. There are a host of other similar definitions. These definitions of marriage depict the heterosexual relationship and not the gay and lesbian relationship which is also known as homosexual relationship. It then logically follows that the issue of same-sex relationship is a matter of serious legal concerns, for its introduction and injection has greatly threatened the marriage institution, which is a fundamental institution.

Legal Framework in each Jurisdiction

The approaches adopted by these jurisdictions in dealing with the issue of gay and lesbian relationships vary. They include; recognition, legalization, prohibition, and criminalization. Gay and lesbian relationship is either accorded recognition and legalized or prohibited and criminalized through new legislations or amendments of some sections of existing legislations or court rulings based on Constitutional provisions depending on what obtains in a particular jurisdiction. This ability and power of every jurisdiction to determine the status of gay and lesbian relationship within its jurisdiction without interference is attributed to the principle of sovereignty of States, and the provisions of United Nations Charter on non-interference with the domestic affairs of every sovereign State⁷ which enables sovereign States to enact their domestic laws and to domesticate treaties which they are signatories to without interference. Another factor that contributes to this divergence in laws in different jurisdictions is the effect of social and cultural orientation obtainable in different countries. The cultural and social norms or values in Nigeria differ from what obtains in Canada or any other country. It then means that an act which is recognized in a particular jurisdiction may be prohibited in another. Hence, it may be right to state that consequent upon these factors, the status or position of gay and lesbian relationship differs in Nigeria and Canada respectively. We shall look at these differences under these headings:

⁴ (1942) 316 US 533- 541.

⁵ (1994) NWLR (Pt 365) at 38.

⁶ 1866 L.R.I.P.O 150.

⁷ Article 2(7) of the United Nations Charter of 1945.

Homosexuality

The Criminal Code Act⁸ and the Penal Code Act⁹ are the statutes that regulate crime in Nigeria. Both were introduced into Nigeria as a result of colonialism. The crime of sodomy which is commonly associated with homosexuals is provided for in both the Penal and Criminal Code as unnatural offence being offences against morality as follows: ‘Whoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.’

Section 214 of the Criminal Code provides as follows: ‘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.

Furthermore under Section 217,

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 warrant.

The States in the Northern region that had implemented Sharia have enacted their new Sharia Penal Code: which also provides as follows: ‘Whoever has carnal knowledge against the order of nature with any man or woman is said to commit the offence of Sodomy.’

The precise sexual acts meant by the term sodomy include any sexual act deemed unnatural. These acts typically include oral sex, anal sex, and bestiality. In practice, such laws have always been enforced against homosexual couples. These Laws have not been repealed or amended, but enforcement is rare in Nigeria because those provisions are ambiguous and

⁸Criminal Code Act, cap C38 Laws of the Federation of Nigeria, 2004 .

⁹Penal Code(Northern States) Federal Provisions Act Cap P3 Laws of the Federation of Nigeria, 2004.

difficult to prove. We therefore recommend that the above Criminal and Penal Code provisions in Nigeria should be made to be clear and unambiguous on the crime of homosexuality and Sodomy with means of proof clearly defined. This is a sharp contrast with the position in Canada where such laws have been repealed. Prior to the 1970s, homosexuality was a criminal offence in Canada under the Criminal Code. In the 1960s, men engaging in homosexual activities were subjected to criminal charges and imprisonment. In 1969, the reforms of Canada's criminal law were instituted, which included decriminalizing homosexuality. In discussing the amendment of the law, Pierre Trudeau, Justice Minister as at that time, stressed the importance of individual freedom in the context of sexuality.

Marriage

In Nigeria, the Federal legislations regulating marriage which are the Matrimonial Causes Act,¹⁰ and the Marriage Act,¹¹ did not expressly provide a definition of marriage, but however it is clear that any marriage celebrated under the Marriage Act, is a monogamous marriage because of the provision of section 33 (1) of the said Act which renders invalid any Marriage celebrated while either party is still married to a third party. Also section 3 (1) of the Matrimonial Causes Act provides that a marriage is void, where either of the parties is at the time of the marriage lawfully married to some other person. The question that comes to mind is what is a monogamous marriage? The answer to this question was provided in the Interpretation Act¹² which is the Nigerian legislation that defined monogamous marriage. Section 18 of the Interpretation Act provides as follows:

A monogamous marriage is one which is recognized by the law of the place where it is contracted, as a voluntary union of one man and one woman to the exclusion of all others, during the continuance of the marriage.

It can be observed that the Interpretation Act adopted Lord Penzance's definition in the 19th century in the case of *Hyde v Hyde*, and many other cases that followed. It is very clear that the traditional definition of marriage in Nigeria is between a man and a woman and not between people of same sex. We shall look at the other type of marriage acceptable in Nigeria other than the statutory marriage, which is marriage under custom. This is a marriage according to custom. Customary marriage is polygamous in nature,

¹⁰ Cap M7 Laws of the Federation of Nigeria, 2004.

¹¹ Cap M6 Laws of the Federation of Nigeria, 2004.

¹² Cap 123 (1964 no 1) Laws of the Federation of Nigeria, 2004.

thereby allowing a man to take more than one wife. Islamic marriage which is also a form of customary law marriage for the muslims only, allows a man to marry more than one wife, but not more than four wives. Islamic marriage which is based on the provisions of the Holy Koran¹³ prohibits gay and lesbian relationship. The position therefore is that in the Nigerian marriage laws, marriage existing between man and woman is the only recognized form of marriage.

In addition to that, any party who performed statutory or customary marriages, may thereafter desire a religious ceremony namely, Christian marriage so as to receive God's blessings on their marriage. This is also celebrated between the opposite sexes as the provisions of the Holy Bible¹⁴ are against marriage between the same sex.

There are other provisions of some legislation in Nigeria which make certain provisions envisaging the heterosexual monogamous marriage only. For example, Section 166 of the Evidence Act¹⁵ provides that,

When in a proceeding, whether civil or criminal, there is a question as to whether a man or woman is the husband or wife under Islamic or customary law, of a party to the proceeding the Court shall, unless the contrary is proved, presume the existence of a valid and subsisting marriage between the two persons where evidence is given to the satisfaction of the Court, of cohabitation as husband and wife by such man and woman.

Also Section 36 of the Criminal Code provides as follows:

When a husband and wife of a Christian marriage are living together, neither of them incurs criminal liability for doing or omitting to do any act with respect to the property of the other, except in the case of an act or omission of which an intention to injure or defraud some other person is an element, and except in the case of an act done by either of them when leaving or deserting, or when about to leave or desert the other.

¹³Holy Quran- 16:72, 7:80-81,26:165-166,11:82-83.

¹⁴Genesis 9:4-11,Leviticus 18:22,20:13,1 Corinthians 6:8-10.

¹⁵ Cap E14 Laws of the Federation of Nigeria , 2004.

Christian marriage is defined in the Criminal Code, section 1, as follows ‘marriage which is recognized by the law of the place where it is celebrated as the voluntary union for life of one man and one woman to the exclusion of all others.’ A good analogy of the above will clearly show that gay and lesbian relationship is not an acceptable norm in Nigeria. Based on these observations, we submit that though private sexual activities between gays or lesbians may be in existence in Nigeria, they cannot develop into a valid marriage. Marriage is usually regulated and controlled by legislations and Governments; it cannot be said to be purely a private affair and it entirely differs from private sexual activities by individuals who have not contracted a valid union under the law. In fact, marriage is a public property. Thus, gay and lesbian Marriage is a public issue and should entertain Government interference. To further curb this menace, the Same-Sex marriage (Prohibition) Act 2013, a legislation which prohibits marriage and civil unions between persons of same-sex and similar relationship, the solemnization of same and amorous public display of such relationship is currently in force .The Act prescribes punishments for parties who enter a same sex marriage or civil union and those who abet, witness or aid them, and further provides that any such relationship performed in another jurisdiction will not be recognized in Nigeria. The Act also prohibits direct and indirect amorous public display of such relationship and not private display.¹⁶ The Act reaffirms the traditional definition of marriage as a marriage contracted between a man and a woman, and as the only valid and recognized marriage in Nigeria. This legal framework has simply put to an end the debate on the issue of gays and lesbians entering into legal relationship in Nigeria. Though this law generated a lot of criticisms from gays and lesbians and their supporters, it has at the same time been applauded by the majority who support the maintenance of public morals, and like other pieces of legislation, the Act should be enforced to the letter. This is sharp contrast to the current position in Canada. In Canada, the legal definition of marriage is under the jurisdiction of the Federal Government, while the provinces are vested with the jurisdiction over the solemnization of marriage. However, Federal Legislation did not define marriage. Definition of marriage in common law or judicial decisions were accorded legal recognition in Canada. The definition of marriage in *Hyde v Hyde* was one of earliest relied on. Gay and lesbian marriage was not recognized traditionally in Canada. The definition of marriage, based on common law definition, was “the lawful union of one man and one woman to the exclusion of all others.” In other words, only marriage between people of

¹⁶Sections 1,2,3,and 5.

different sexes was formerly legal in Canada. In June 1999, Canada's Parliament reaffirmed this traditional definition when the motion defining marriage as being between a man and a woman was passed.¹⁷ Also in 2000, Bill C-23¹⁸ included the traditional definition of marriage. Following gay activism, in 2003, the Ontario Court of Appeal in *Halpern v Canada*¹⁹ ruled that the exclusion of same-sex couples from the definition of marriage violated equality rights under the *Canadian Charter of Rights and Freedoms*. Several Courts also ruled that the traditional definition of marriage violated the equality rights under the Charter. What then are the equality rights provided for under the Charter?, and how did the traditional definition of Marriage violate these rights? Section 15(1) of the Charter provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is very clear that this section does not expressly prohibit discrimination on the basis of sexual orientation; however, the Supreme Court of Canada in the case of *Egan v Canada* interpreted that section to mean that discrimination based on sexual orientation is analogous to discrimination based on race, national or ethnic origin, or colour, and, as such, is prohibited under section 15 of Canada's *Charter*. We submit with respect that the Court was bent on importing sexual orientation into the provision of this law, as that was clearly seen in their interpretation of the section. In Nigeria, section 42 of the Constitution²⁰ did not expressly provide for discrimination based on sexual orientation, and there are no judicial decisions interpreting that section to that effect like what happened in Canada. Section 42 of the 1999 Constitution of Nigeria (as amended) provides as follows: 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion, or political opinion shall not , by reason only that he is such a person....'

It is important to point out that discrimination of gays and lesbians based on sexual orientation is not an issue in Nigeria, there is no law prohibiting any

¹⁷Majority support keeping traditional definition of Marriage, Catholic Civil Rights League. Accessed on 10-05-2014.

¹⁸ A legislation, which made changes to spousal and common-law benefits and obligation

¹⁹ 95 C.R.R (2d)1.

²⁰ Constitution of the Federal Republic of Nigeria, 1999(as amended).

*C. Umeobika: An Appraisal of the Issue of Gay and Lesbian Relationships:
Nigeria and Canada as Case Studies*

gay person from gaining employment or any law providing for the termination of job of gays, or prohibiting gays from gaining admission into schools, or venturing into any business, or even renting or constructing houses, or entering an environment, or using any government amenities made for public use, or acquiring and owning immovable property anywhere in Nigeria. What obtains in Canada is different, as before decriminalization of homosexuality, some groups of gays were discriminated against. Thus, several legislative reforms were made in an attempt to end discrimination against gay and lesbian persons based on sexual orientation in areas such as immigration, employment, military service, pensions, and income tax. Some notable examples are: Canada's Immigration Act was amended to remove the ban on homosexuals as immigrants; government ban on homosexuals in the military was lifted. The Canadian Charter of Rights and Freedom was added to the Constitution and the Supreme Court ruled in *Egan v Canada*, that the Charter would be interpreted to prohibit discrimination on the basis of sexual orientation, and that gay and lesbian couples should enjoy the same rights and benefits as common-law couples with regard to pensions, income taxes, and other such matters. Subsequently, *an attempt* to reaffirm the traditional definition of Marriage as a union between one man and one woman in 2003 failed and the Federal Government did not appeal the decision in *Halpern's case* but rather made a new legislation that will change the traditional definition of marriage so as to accommodate the gays and lesbians. This legislation was referred to the Supreme Court of Canada for review, and the Court ruled that only the Federal Government has the authority to make laws relating to marriage, in other words, provinces have no constitutional jurisdiction over the definition of marriage and must abide by the decision of the Federal Government. That made the protests of some Provinces against changing the definition of marriage inconsequential. Following the Supreme Court's decision, the *Civil Marriage Act* emerged on July 20, 2005. The *Civil Marriage Act* changed the definition of Marriage to include same-sex couples. The legal definition of marriage under the *Act* is as follows: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."²¹

The *Act* extended full legal benefits and obligations of marriage to same-sex couples, and clearly provides that officials of religious groups are free to refuse to perform marriages that are not in accordance with the religious views of their respective faiths. Thus Canada became the fourth country in

²¹ Canada legalises Gay Marriage <http://www/foxnews.com2005-7-20>. Accessed on 10-05-2014.

the world, after the Netherlands, Belgium, and Spain, to legalize same-sex marriages nationwide.²²

Conclusion and Recommendations

It can be deduced from the discussions in this work that the approaches given to gay and lesbian relationships vary in different countries. Nigeria and Canada were used as a case study in this work to show the diverging scenarios. It is clear that gay and lesbian relationship in its entire ramifications is repugnant to public morals since public morality is vital to the stability and continuance of the society. The very fabric of the society will be undermined if one allows private acts of gross immorality. Again one must point out that gays and lesbians are human beings and should live their normal lives, but when it comes to issues of a valid relationship, caution should be applied as other immoral relationships like human and animal sexual relationship, father and daughter relationship, mother and son relationship will also arise in the future and the definition of marriage will also be redefined to accommodate such relationships, should they be left alone. One must therefore insist that such fundamental institution as marriage should not be toyed with and/or destroyed by the mere debate that marriage is evolving. Countries like Canada and a host of others that have followed this trend, should be prepared to face future agitations for marriage between human beings and animals because any denial in future to any other similar group will amount to discrimination. Recently many reports of animal and human sexual relation are heard on television and news, and just like the gay and lesbian relationship, it will soon become a marriage right issue that should also be addressed. It is pertinent to point out that the Same Sex Marriage (Prohibition) Act, 2013 is indeed a stitch in time that saves nine, as it did not just curb this menace but also will serve as a deterrent to other similar forms of immoral relationship that may spring up in future. We also support the views of opponents of gay and lesbian relations, that such relationship is sterile, hinders procreation, and should not be encouraged. Finally this work also recommends that various ambiguous sections of the law with respect to homosexual activities and gay and lesbian relationship should be amended to be clear and unambiguous to enhance enforcement.

²² Gay Marriage approved , Canada, Netherlands, Spain, Belgium, New York Times, 2005-01-21. Accessed on 10-05-2014.