

Chapter 5

Crime or Human Right?

The Criminalization of Same-Sex Relationship Conundrum in Nigeria

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ABSTRACT

To the Nigerian state, consensual sexual activity among persons of the same sex is against the order of nature and must be punished as a crime. On the other hand, to persons who engage in sexual activity with persons of the same gender and to rights' activists, the act is a right, like any other, which should be respected and protected. This chapter examines the cultural issues, the human rights angle, and the future of the criminalization of same-sex sexual conduct conundrum in Nigeria. Using the doctrinal method of legal research methodology, the chapter reviews laws criminalizing homosexuality in Nigeria in juxtaposition with human rights provisions both in the international and domestic context in search of a solution to the problem. Accordingly, it is recommended that while the law should protect cultural values, human rights are sacrosanct and must not be sacrificed.

INTRODUCTION

This chapter sets out to discuss the criminalization of consensual same-sex sexual relationships in Nigeria in relation to the fundamental rights of the lesbian, gay, bi-sexual and transgender (LGBT) community in the country. The questions the article seeks to provide answers for are two-fold: first, can a behaviour which is internationally recognized as human right be criminalised on the ground that the majority in a given country consider that behaviour to be immoral? Secondly, to what extent can society's moral values be upheld if those values infringe on the rights of the minorities? To address these questions, the discussion focuses on the crime of homosexuality (or sodomy) in Nigeria, the rationale for the criminalization of the act of persons of the same sex having sexual relationships and the quagmire that both the state and

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the LGBT community faces. This article takes into reckoning the fact that Nigeria, like many African countries, does not consider sexual minority rights as fundamental human rights (Akogwu, 2018a).

While the protection of human rights is now firmly established in Africa and in Nigeria (Ebobrah, 2012), it is of concern that homosexuality is still considered a crime in Nigeria and punished as such (Akogwu, 2018c). The argument advanced by the Nigerian state has been that homosexuality is a crime because it is immoral or un-African (Arimoro, 2018). On the other hand, there have been arguments, and rightly so, that homosexuality is innate and not a matter of choice (Arimoro, 2018). There is the need therefore to reach a point where the ideals of the majority will be respected but not at the expense of the violation of the rights of sexual minorities. To this end, this article attempts to distinguish human rights from the morality of the majority and the importance of respecting human rights even where they are contrary to the definition of what the society considers as cultural or moral values. The article begins by examining the criminalization of same-sex sexual activity in Nigeria.

THE CRIMINALIZATION OF SAME-SEX RELATIONSHIPS IN NIGERIA

To begin with, it is pertinent to define what a crime is. No one has offered and none will possibly offer a definition of the term ‘crime’ that will be accepted universal. In a legal sense, a crime is said to be committed when there is a breach of a legal rule or law for which some governing authority can prescribe a conviction (Adebayo, 2013). A crime is an act or omission against public interest, and which is prescribed by law enacted by the legislature in the interest of the public, and to which prescribed punishment is attached in the event of violation (Danbazau, 1994). Crimes, legally speaking are considered to be acts or omissions forbidden by written law that can be punished by imprisonment and/or fine (Chukkol, 1981). In the same vein, the 1999 Constitution of the Federal Republic of Nigeria (as amended) states categorically that for a conduct to be considered as a crime, it must be prohibited by a written law.¹ This is based on the legal principle of *nullum crimen sine lege*, an expression in Latin which means ‘no crime without law’ (Schaack, 2008). For the purpose of this article, the following definition of crime is apt:

A crime is held to be an offence which goes beyond the personal and into the public sphere, breaking prohibitory rules or laws, to which legitimate punishments or sanctions are attached, and which requires the intervention of a public authority...for a crime to be known as such, it must come to the notice of, and be processed through, an administrative system or enforcement agency. It must be reported and recorded by the police (or other investigator); it may then become part of criminal statistics; may or may not be investigated; and may or may not result in a court case (Scott & Marshall, 2009: 139).

The criminalization of same-sex sexual conduct in Nigeria predates the recent Same Sex Marriage Prohibition Act 2013 (SSMPA) signed into law by former President Goodluck Jonathan in 2014 (Arimoro, 2019a). Arimoro (2019a) notes that the SSMPA is a reactionary law by the Government of Nigeria, to state that the Nigerian government does not intend to succumb to the pressure of the West and rights advocacy groups in to decriminalize same-sex relationships in the country. Furthermore, even though the title of the law suggests that it prohibits same-sex marriages, the criminalization of same-sex relationships in the first place indicates that there cannot be marriages between persons of the same gender. One wonders why the Act was passed in the first place when there are already other laws criminalizing same-sex sexual activity or relationships.

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