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The Nigeria Same Sex Marriage (Prohibition) Act, 2013 and the Concepts of Justice, Law and Morality

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Abstract

There is no ground for the arguments in support of legalization of same sex marriage other than that it gives weight to the recognition and protection of human rights. Legalization of same sex marriage no doubt depicts further protection of such rights as the Right to Freedom of Thought and Conscience. Even this seems a cogent reason for like the suffragettes of the early 20th Century England, same sex couples actually do have some sort of rights to claim. Yet there is something fundamental about the struggle for universal suffrage that is obviously lacking in the clamour for granting legal status to same sex marriage. The suffragettes envisioned a right that emphasized our common humanity as fellow sufferers who needed concern and respect. On the contrary, same sex couples only had an atomistic view of right, a view of right which sees the individual as a possessor of rights and who is entitled to claim such rights against all odds. This paper stated that the problem with the atomistic conception of right which same sex couples claim is that it overlooks certain yearnings of mankind that are universal. Thus, a right of that kind even contradicts the idea of 'human right' for which human rights are declared 'universal'. *The Nigeria same sex marriage (Prohibition) Act, 2013* exemplifies an attempt to avoid a conception or right in line with atomistic view of human nature. Such an act is not unsusceptible to attack by individuals who support same sex marriage as well as to countries that have legalized that act. This paper by scrutinizing the Act in the light of the requirements of justice law and morality, absolves if of the criticisms that may come from the supporter of same sex marriage. According to this paper, the right

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to same sex marriage when juxtaposed with the right to marriage between the opposite sexes is a wrong right. The right to marriage between people of the opposite sexes as recognized by the Nigeria Act emphasizes our common humanity as fellow beings with the instinct for not only self- preservation but also for the elongation of the human species.

Key Words: same sex marriage, justice, law and morality

Introduction

On 17th December, 2013 the Nigeria Senate passed the same sex marriage (Prohibition) Bill, 2013 into law and this gave rise to the Same Sex Marriage (Prohibition) Act, 2013). Explanatory Memorandum of the Act "prohibits a marriage contract or civil union entered into between persons of the same sex and provides penalties for the solemnization and witnessing of same thereof" (Same Sex Act 2013). Prior to this enactment by the Nigeria National Assembly, the United States of America had legalized such marriage or union in some of its states. The process could be said to have culminated in the US Supreme Court ruling in the case of Obergefell V. Hodges on Friday 26th June, 2015. Bayo Akinloye notes that: "In 5-4 ruling, the apex court stated that the Constitution required all 50 states to carry out and recognize marriage between people of the same sex. The ruling made the US the 21st country in the world that recognizes same sex marriage as legal" (Akinioye 2015 p.8). This statement makes it clear that before the US some other countries of the world have legalized same sex marriages. Some of the countries that have legalized such marriage include Belgium, Brazil, New Zealand, Uruguay, South Africa, Spain and Ireland. The issue is why has Nigeria not followed the path of those countries that have legalized same sex marriages? Are there cogent reasons for Nigeria prohibiting such marriages? In this paper, we shall expose the Nigeria Same Sex Marriage (Prohibition) Act of 2013 and attempt to critique this Act in the light of the tripartite concepts of justice, Law and Morality. Same sex marriage is the Union or solemnization of a union of marriage between two individuals of the same sex (male and male; female and female) by virtue of which one of the two individuals assume the status of a husband and the other assumes the status of a wife. It could also be defined as recognition whether legal or otherwise given to such acts as homosexuality and lesbianism. While these acts could be said to have been

Practiced in almost all the societies of the world some countries of the world see reasons to make them formal by according them the status of marriage while other countries do not. It is thus taken for granted that such acts exist and are actually regarded as marriages by some people in the society. The issue of according such relationships legal status, such that they could be referred to as statutory, Islamic or customary marriages, is debated in many nations today. It raises questions of justice as well as that of the relationship between law and morality.

The Nigeria Same Sex Marriage (Prohibition) Act, 2013

The Act is divided into eight sections. However, attention is to be focused on the first seven sections as section 8 of the Act merely stated its title. Section 1 of the Act prohibits marriage

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or civil union by persons of same sex. According to Section 7 of the Act, 'marriage' means a legal union entered into between persons of opposite sex in accordance with the marriage Act, Islamic law or customary law; 'civil union' means any arrangement between persons of the same sex to live together as sex partners in one of the nine descriptions listed by the Act; 'same sex marriage' means the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of the same sexual relationship. It is obvious that this Act also regards as same sex marriage, homosexuality and lesbianism whether the parties involved have the intention of becoming husband and wife or not. This section also declares that parties to same sex marriages shall not be recognized as entitled to the benefits of a valid marriage and that even if such unions are by virtue of a certificate issued by a foreign country, it is void in Nigeria. Section 2 of the Act prohibits the solemnization of same sex marriage in places of worship such as Churches and Mosques. The section equally adds that no certificate issued to persons of same sex in a marriage or civil union of that nature shall be valid in Nigeria. According to Section 3 of the Act, only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria. Section 4 of the Act prohibits the registration of gay associations of any kind as well as the public show of same sex amorous relationship directly or indirectly. In Section 5 of the Act, the various offences and penalties for same sex marriages or relationships in Nigeria are enumerated. According to Section 5 (1) a person who enters into same sex marriage or a civil union as prohibited by Section 1, has committed an offence and is liable on conviction to a term of l4 year's imprisonment. Section 5 (2) provides that a person who goes contrary to the provisions of Section 2 commits an offence and is liable on conviction to a term of 10 years imprisonment. Section 5(3) of the Act adds that:

> A person or group of persons, who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, and organizations. Processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.

Section 6 of the Act provides for court jurisdiction on matters of offences as regards same sex marriage in Nigeria. It states that "The High Court of a state or of the Federal Capital Territory shall have jurisdiction to entertain matters arising from the breach of the provisions of the Act. In Section 7 also, 'Court' is defined as High Court of a state or of the Federal Capital Territory. The provisions of the Nigeria Same Sex Marriage Prohibition Act as exposed above show that the country prohibits same sex relationships of all forms. Such relationships are also criminalized by the Act since engaging in them implies committing offences. It therefore implies that such relationships as are prohibited by the Act could only be practiced in Nigeria as secret acts.

The Nigeria Same Sex Marriage (Prohibition) Act and the Concept of Justice

Justice is a complex concept and it is difficult to define. D.D. Raphael (1971) wrote of justice thus:

> Justice may be regarded on the one hand as a concept concerned with the order of society as a whole on and the other hand as an expression of the rights of individuals in contrast to the claims of general social order. Finally, Justice is a Janus-like concept looking both to past and to Future, conserving and reforming (p. 166).

Three angles from which justice could be seen are expressed in Raphael's statement. One angle is that justice is one of the measures needed to ensure that society remains cohesive. That is to say that the social fabric of the society is to be maintained and kept intact by the application of the principles of justice. This trend of view is expressed in Aristotle's concept of justice. Aristotle regards justice as the highest virtue needed to ensure the common good, that is, the good of the society as a whole. He asserted that:

> Those who care for good government take into consideration virtue and vice in states, Whence it may be further inferred that virtue must be the care of the state which is truly so called, and not merely enjoys the name, for without this end the community becomes a mere alliance, (Aristotle 111 p. 9).

With this conception of justice advocated by Aristotle the state actually has the right to prohibit acts which may endanger the actualization of the aspirations of the society as a whole. In this case, the aspiration is the common good. Now, what common good could the Same Sex Marriage (Prohibition) Act, enacted in Nigeria possibly be protecting? The most serious objection against same sex marriage is that it does not encourage pro-creation which also has multiplier effects such as depopulation and possible extinction of a race or human beings as the case may be. One may argue that in the case of Nigeria population increase should not be a much valued common good given the over-whelming population of the country. This argument fails because, the need for survival, be it of an individual or a state, like Nigeria, supersedes the need for catering for an over whirring population which can even, when individuals efforts are united, provide for their sustenance and even surplus. On the basis of Aristotle's concept of justice, therefore, the Same Sex Marriage (Prohibition Act of Nigeria is a just measure to secure the survival of the Nation as a whole. The utilitarian conception of justice, especially, as advocated by Jeremy Bentham, will support this position. The second angle from which, as Raphael notes, we can look at justice is from the angle of protecting individual rights, if necessary, against the claims of general social order like the state. Protection of individual rights becomes necessary when such rights are in conflict with the general social interest represented by the state. The question here is, are there any rights of the individual who enter into same sex marriage that the Same Sex Marriage (Prohibition) Act violates? If there are, then their violation can amount to injustice. Another question is, what could justice ultimately demand for the individual? To answer this question, we take two examples of rights, namely, the right to survival and the right to pleasure. We then ask, which of these rights could justice have demanded more than the other? There may be no argument to defeat the view that justice would demand the protection of the right to survival of the individual interwoven in the survival of the state more than the right to pleasure, which more accurately qualifies the right that an individual

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could be entitled to by indulging in same sex marriage. Therefore, in the light of John Raw[s' theory of justice which stipulates that "Everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what Justice demands", (Rawls 1971, p. 94), the Same Sex Marriage (Prohibition) Act is a just measure. People who enter into such marriages should not be corded equal liberty with people who enter into the types of marriage recognized bySection 3 of the Act to pursue their aims because the two unions are different with respect to what justice demands, that is, survival of both the individual and the state.

On the other hand, the liberal conception of justice, especially, as advocated by Joseph Raz, seems to maintain that the provisions of the Act are unjust with respect to the protection of individual rights to liberty. Raz could be interpreted to mean that government enacts a law that protects same sex marriage. He argues that "One of the main goals of government authority is to ensure for all persons an equal ability to pursue in their lives and promote in their societies any ideal of the good of their choosing", (Raz 1986, p. 115). A closer look at this postulate shows that the individual is at liberty to pursue and promote, not the ideal of the 'good' as he or she thinks, but an ideal of the good as probably determined by the society. Now, marriage could be seen as a good in itself, which is also determined by the society. Raz is only obliging the individual to identified an ideal of this good (marriage) which he can pursue and promote. Only when the individual has acted in this manner, could the government or the authority recognize and protect his right to pursue and protect such ideal of the good. In Nigeria, and it could possibly be the case in most of the countries that have legalized same sex marriage, that kind of marriage cannot be regarded as an ideal of marriage as a good already recognized by the society. The 5-4 ruling of the US Supreme Court attests to the fact that same sex marriage is not accepted by just a minority of the US populace. The Nigeria Same Sex Marriage ('Prohibition) Act has in its Section 3 recognized the forms of marriages that are the ideals of the good (marriage). Consequently, even in the light of Raz's liberal theory of justice. The Act is a just measure so long as same sex marriage is concerned.

The third angle from which according to Raphael justice could be viewed is from the point of view of futuristic tendencies. That is to say that the concept of justice keeps spreading its tentacles as the society continues to witness new development. This means that the meaning of the concept is not static or fixed; it could be modified to accommodate new circumstances. To elaborate on this nature of justice, the legalization of same sex marriage could be seen as a measure that increases and enhances the understanding of the fundamental human rights, such as the right to freedom of association, the right to freedom of expression and the right to freedom of thought and conscience, (Universal Declaration of Human Rights 1948). However, it could be understood that the fundamental human rights are not absolute rights as such but are also subject to certain factors such as the cultural, economic and political situations of any country or society that recognizes and protects them. Nigeria being a country in Africa, known for its communal, conservative and multi- ethnic nature, same sex marriage could but only make nonsense of these cherished cultural values. It is worthy of

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note that inter-tribal marriages are encouraged in Nigeria and entrenched in the Constitution, (1999 Constitution S. 15), not only for a better synergy to exist between people of different tubes, but also for the purpose of pro-creating new generations that would not take recourse to tribalism and nepotism. Same sex manages cannot encourage such positive factor nor can it be beneficial to any other vital consideration for Nigeria. Hence, the argument that the Same Sex Marriage (Prohibition,) Act is unjust because it does not protect the rights listed above as regards individuals who enter into same sex marriage does not hold water.

The Nigerian Same Sex Marriage (Prohibition) Act and the Concept Law and Morality

Law and Morality are usually regarded as opposite but compatible concepts. Their opposition manifests in the argument that while law has a public character because it regulates the conduct of the individual in the public, morality regulates the conduct of the individual in his or her privacy. Law is said to regulate conduct through enacted rules while morality is seen as regulating conduct through individual's conscience. Their compatibility owes much to the fact that both of them regulate human conduct. However, when the issue of a particular conduct is raised with respect to law and morality questions that arise include:

1. Are law and morality mutually exclusion in which sense there could be no necessary connection between them as the legal positivists of the Austinian type have argued?
2. Is their relationship such that there is a necessary connection between them as the natural law theorists of the Aquinas disposition argue?
3. Are they compatible such that though both cannot be parted in terms of regulation of human conducts, they remain separate spheres, one assuming no greater value than the other?

Okere attempts to answer these questions with the following statement:

> The view that law relates exclusively to external conduct while morality is interested in inner motivation cannot be accepted as a generally valid explanation of the relation between these two agencies of social control. This relation is more complex and fluid than is suggested by the Kantian policy. No modem legal system can isolate law and morality within water tight compartments (Okere 2002-2010, p.1 3).

Immanuel Kant advocated for a fundamental distinction between law and morality with respect to the regularization of the individual's conduct. According to him, law requires external compliance with existing rules and regulations, regardless of the underlying motive; while morality appeals to the conscience of the individual (Kant 1965, pp. 13-14).The view expressed by Okere is that law and morality interfere with each other as regards proper and effective regulation of human conduct. What the nature of the interference is, especially, as regards those conducts which elicit conflict between the interest of the state and that of the individual is also subject to debate. The issue is, if the state interest usually regulated by law, and individual interest, usually regulated by morality are in conflict, how can the issue be resolved? Here, conflict is envisaged between state neutrality and perfectionism, that is to

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say, the negative duty of the state not to interfere with the private realm of the individual as against the positive duty of the state to always strive to attain perfection even if it means subduing individual interests. The issue of same sex marriage presents a clear example of such situation in which the relation of law and morality are called to question. It is argued that since marriage is a private affair, it belongs to the private sphere and therefore should not be subject to state regulations. At most, issues pertaining to marriage should be left to the sphere of morality where the conscience of the individual is the best judge. The utilitarian, John Stuart Mill, has, through his harm principle advocated for a separation of the public realm from the private realm Mill argues that, "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good either physical or moral, is not a sufficient warrant", (Mill 1960, pp.72-73). In relating Mill's assertion to the issue of same sex marriage, only when such action is capable of harming others should the Government intervene to stop it. Mill has made a distinction between public morality, which could attract the sanction of law of the state, and private morality which according to him, could only by rightfully regulated by the individual conscience signified by the church or the Mosque in the case of Nigeria. Reacting to the Wolfeden Report which is a report of the Concussion on Homosexual Offences and Prostitution and whichadopted Mill's 'harm principle', Patrick Devlin argued for the abolition of the private public sphere distinction. He argued that our morality is deeply and thorough1 woven into our social fabric, so that to tolerate private immorality like same sex marriage or to leave it unchallenged, is to encourage the dissolution of society from within, in the same way omitting an injunction against treason may encourage traitors to betray their country and so help destroy' it from without (Devlin 1965). Devlin is also of the view that the state should criminalize any action which attracts wide spread personal disgust.

Hart (1957) criticized Devlin by insisting that the private! Public realm distinction maintained by the Millian Protectionist doctrine which Devlin attacked is ideal. He also objected to Devlin's position that wide spread personal disgust could criminalize behavior. Hart says that this distinction is novel and also very important. For on it depends the weight to be given to the fact that when morality is enforced, individual liberty is necessarily cut down, (Hart 1956). Personal disgust means the feeling of resentment which people may have towards a particular action and based on which they may regard such action as immoral. It is wide spread when the majority of the people who witness an action have such feelings towards the action. The summary of the Hart/Devlin debate is that while Devlin sees such feeling as enough to negate Mill's 'harm principle', Hart feels differently. According to Hart, some other requirement is needed in conjunction with wide-spread personal disgust to warrant state intervention in the way of sanctioning a particular behaviour.

With respect to the Same Sex Marriage Prohibition Act therefore, Mill would argue that there should be a proviso, maybe in the Explanatory Memorandum, to the effect that the Act should be effective only when same sex marriage is capable of harming people in Nigeria. Of course Mill may have had in mind only physical harm. This is because the issue of personal disgust acknowledged by Devlin could be a form of harm or indication of threat of

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harm, physical and otherwise. Also, for Hart to have identified such expression of emotion even though he insists it is not sufficient, as part of what could necessitate state intervention in the private sphere implies that actually it could be a form of harm in respect of any action it is directed at. Such feeling, though mostly geared towards pricking the conscience of the individual or individuals involved in the particular action it is directed at, has in most cases been the precursor of enacted legal rules, especially, the rules of the criminal law which Hart refers to as primary rules of obligation. On the basis of these points therefore, the Nigeria Same Sex Marriage [Prohibited] Act. 2013 is a welcome development. It is a direct measure to tackle the menace headlong given the wide-spread personal disgust it elicits from the majority of Nigerian's and would also elicit in any true African country.

Conclusion

This paper has examined *The Nigeria Same Sex Marriage* (*Prohibition) Act, 2013* and has shown that this Act is needed not only because it accords with the principles of justice, but also because it evinces the interrelationship of law and morality as both gear towards maintaining order in the human society. Even though Nigeria, may look less sophisticated in the eyes of those countries that have legalized same sex marriage, the Act is a step in the right direction. It not only stands to protect and preserve our most cherished cultural values of chastity, fidelity, and honesty. It is also a symbol of independent thought pattern that is distinctively Nigerian. Thus, the Nigerian nationals should overlook such spurious fear of denial of economic support from some bourgeois countries that have legalized same sex marriage. Notwithstanding these positive dimensions of the Act, it should be noted that morality is a shifting concept. The argument of the moral relativist has some merit. Morality can charge from one society to the other and at particular times. One could think of a time in Nigeria when teenage pregnancy was seen as a taboo and pre-marital sex was conceived immoral, yet today even our laws have provision for women who got pregnant out of wedlock and children born out of wedlock. This however does not mean that the Nigerian legal system regards as ideal, bearing children out of wedlock. It only shows that even in certain relationships seen as immoral, the law can intervene to lessen the sugaring of would-be victims. Domestic violence, for instance, is now a legal concern with respect to relationships between couples of opposite sex. Can we not conceive domestic violence as capable of accruing among homosexual and lesbian couples? It will not be odd to see among such couples, a situation where a spouse beats the other to submissiveness anytime they want to indulge in the act. Should the one who falls victim come to seek refuge in the law, what will be the law's reaction? If the provisions of *The Nigeria Same Sex Marriage (Prohibition) Act, 2013* is to go by, one who has suffered any form of maltreatment in a same sex relationship has no right to seek redress from the law. Once the victim approaches the law to lay allegations against the partner, the relationship which is outlawed, is made public and he or she immediately becomes a suspect. Consequently, if a homosexual or a lesbian is wronged by his or her partner while committing the act, for him or her to seek redress from the law, the relationship has to be kept out of the immediate and remote causes of harm. Once it is discovered that the victim's suffering is as a result of the act, the law comes in to

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punish rather than to redress. It will not therefore be of help to curbing or preventing same sex relationships in Nigeria if the law cannot intervene to safeguard the rights of individuals who indulge in the act in secret. This amounts to saying that there may be the need to modify *The Nigeria same sex marriage (Propitiation) Act, 2013* to make room for those who indulge in same sex relationships in secret to seek redress from the law when they suffer any form of harm from that form of relationship. If this is done, the rate at which that type of relationship occurs in the country could be determined. It will equally help to determine when the people's conception of and perception of same sex relationships change.

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