

HUMAN RIGHTS AND LEGAL IMPLICATIONS OF THE SAME SEX MARRIAGE PROHIBITION BILL, 2011 FOR EVERY NIGERIAN CITIZEN

A briefing Communiqué for
His Excellency, the President of the Federal Republic of Nigeria,
&
The Senate and the House of Representatives
of the Federal Republic of Nigeria

An analysis prepared by Nigerian civil society organizations, human rights organizations, feminist and women's rights groups, social health workers, social and economic justice activists and NGOs

This is the third time a Bill prohibiting same sex marriage is introduced by the Nigerian parliament. The proposed law is titled "Same Sex Marriage Prohibition Bill, 2011", however, it goes well beyond the title to criminalise every Nigerian person(s), individual and group who may be suspected of any trace, exhibition, association and or characteristic of same sex relationship, friendship, association or gesture.

It is very important when Bills are proposed by members of parliament that all Nigerians look closely into them to see what implications they would have for every Nigerian, irrespective of gender, sex, religion, creed, culture, sexuality, tradition, origin, ethnic group and political opinion. Often, when laws are introduced, most Nigerians do not understand their provisions and implications for their daily lives as citizens of Nigeria. Civil society organizations in Nigeria have a duty to inform and educate the citizens, as well as lawmakers, about oppressive and dangerous implications in potential legislation.

The proposed Same Sex Marriage Bill 2011 was passed by the Senate on the 3rd reading on 29th November, 2011. It also passed through a first reading at the House of Representatives on 7th December, 2011. This analysis seeks to analyse and highlight its grave implications on the daily lives of every Nigerian.

With this bill Nigeria and Nigerians will be shown to be untrustworthy and incapable of upholding and domesticating international treaties and conventions which they have signed and ratified. From the perspective of foreign investors, the inability to uphold international agreements raises the question of whether their investment and personnel can be safe in the hands of such untrustworthy partner. At a time when the country is on a drive to attract direct foreign investment, this bill also stands as a threat to the economy.

According to the 2010 UNGASS (United Nations General Assembly) report on Nigeria, 3.6% of the population is comprised of people living with HIV/AIDS – i.e. more than 5.5 million people. The bulk of the support to curb the spread of the virus and support those already infected or affected is coming from international donors. Many of the people living with HIV/AIDS are heterosexuals and if organizations geared to help them are barred, as in this bill, this will have a

catastrophic effect on stopping the rate of new infections and helping those already infected.

It is worth noting for all Nigerian citizens that the proposed bill aims at:

- a) prohibiting any form of de facto cohabitation between two individuals of the same sex or gestures that connotes same sex relationship directly or indirectly. If this bill becomes law male-male or female-female holding of hands, touching each other, making eye gestures, hugging or any display of affection will be evidence for conviction and 10 years imprisonment

The Bill also aims to:

- b) restrict the right to freedom of expression;
- c) restrict the right to freedom of association;
- d) restrict the right to freedom of thought, including the freedom of conscience and religion;
- e) target human rights defenders who speak out for the human rights of individuals and communities, as well as advocates for sexuality, reproductive rights and the right to health;
- f) and, ultimately, target the rights and safety of persons who either identify as lesbians, gays, bisexuals, transgenders, or, who simply do not fit conservative gender roles and stereotypes, as well as anybody who is related to them or sympathetic of them
- g) promote widespread social control, intrusive to individual privacy.
- h) Finally it targets any legal defense and representation for persons or groups involved in in any real or perceived same-sex related case.

Thus if the proposed legislation is passed into law Nigeria would violate many of its obligations under our own constitution, our own laws, and, international human rights law.

Violations of international human rights law which would result from the bill, include of Article 22 (freedom of association), Article 19 (right to freedom of opinion and expression) of the ICCPR (International Covenant on Civil and Political Rights). Similarly they would violate Article 9 (freedom of expression), Article 10 (right of free association), Article 11 (right of assembly), Article 12 (right of residence) and Article 8 (the right to have one's cause heard and to a defense – including by the counsel of one's choice) of the African Charter on Human and Peoples Rights (ACHPR). Since the ACHPR was adopted into Nigerian law in 1983, the provisions of this bill violate our own national laws also.

Of principal concern for all Nigerians is that Sections 5 and 7 of the revised and final copy of the bill reach far beyond its scope to attack freedom of assembly and speech, among other rights. The bill, as currently revised, is extremely likely to encourage discrimination against all individuals regardless of their sexuality, and in fact constitutes an incitement to violence, ill-treatment and torture.

Specific sections for concern to all Nigerians

SECTION 4 (2) of the proposed Bill

In a very tactile society as ours, where people of the same sex frequently hold each other's hands, wrap their arms around each other's waists, embrace each other warmly, it will be difficult, if not impossible to know when such actions are a display of amorous relationships or

expressions of human intimacy and affection that are devoid of any sexual intention. This provision of the bill opens up the possibility for witch-hunting and vindictive accusations which could impact on every Nigerian, and create a climate of fear and repression.

SECTION 5 of the proposed Bill

The prohibition of “ gay clubs, societies and organizations,” and of any person involved not only in registration, but even in sustenance and meetings, registration, participation even in private, directly or indirectly, and the further prohibition of publicity, procession, and “public show of same sex amorous relationship.” may potentially affect anybody and any group; For example:

- a) Any Muslim **or Christian women’s rights group** teaching the Qu’ran or the Bible could be targeted as a “lesbian group” and persecuted by those who do not appreciate women understanding for themselves the liberatory potential in religious texts. In general, any women’s rights group could be easily targeted by those who do not support women’s empowerment.
- b) Any member of any **same gender organization**, even students in **same gender schools and clubs (like the boy scouts or girl guides)**, could be targeted by anyone holding a grudge against members of the group or opposing the aims of the group.
- c) **Any person who does not fit the conservative understandings of traditional or social norms** of his or her community, such as an unmarried person in his or her 30s or 40s, or even a woman who happens to be in trousers could be easily accused of being gay or lesbian.
- d) Section 5 could also be a powerful tool in the hands of unscrupulous politicians and aspirants against their **political opponents** and thus undermine the electoral process and the democratic development of the country. For example, any politician or candidate could be maliciously accused of privately supporting either same sex amorous relationships or gay societies or of being gay. And whether proved or not in court, even being accused under the law would likely ruin that person’s political career.
- e) Any **journalist, newspaper, radio, or television station** reporting objective information related to gay issues could easily be accused of promoting publicity of same sex amorous relationships. The bill could be easily used as a tool of **censorship** for political purposes.
- f) Any human rights, civil rights, women’s rights or health advocacy group, including those working on HIV/AIDS prevention, could be accused of indirectly supporting same sex amorous relationships just by applying international human rights and health standards. **Groups doing controversial work on any topic** could be attacked with the excuse that they also support gay rights or promote same sex sexual relations. This law could potentially affect a wide variety of **civil society activists and/or organizations** in the country.
- g) If this bill became law, nobody could even **advocate** against the human rights implication of the law itself without being found guilty of indirectly supporting same sex amorous relationships. This would be an **inherent contradiction for a democratic system**.
- h) Under the proposed law no **lawyer or paralegal** will be able to **offer legal representation or support** and in fact such a lawyer or paralegal personnel could be

criminalized for representation, defense or support of any case perceived to be same sex related.

SECTION 7 of the proposed Bill

Rather than simply defining marriage as an act between one man and one woman, Section seven's sweeping inclusion of any two people of the same sex living together allows anybody to be targeted, even when they do not have any sexual relationship at all.

- a) Many **people** in Nigeria **share** their **housing for economic reasons**. If two roommates are of the same sex they could be accused by anybody with whom they have a personal or public dispute of "living together as husband and wife" and be prosecuted under the law.
- b) **Their relatives, friends or visitors** could be accused of indirectly supporting in private a same sex amorous relationship just by visiting them.

SECTIONS 1 (3) and Section 2(2)-

Section 1 (3) and 2 (2) states that even if there are valid same sex marriages or civil unions entered into outside Nigeria, they will not be recognised in Nigeria. This may be aimed at non-Nigerians – it would clearly discourage same-sex partners from visiting or working in Nigeria (or investing in Nigeria). But there are also Nigerians living in the diaspora who are married to same sex partners or planning to do so. Many talented Nigerians live in the diaspora openly as gays, lesbians, bisexuals, and transsexuals. They contribute positively to the development of their country of residence but are afraid to come and contribute to the development of our motherland because of fear of victimization. Nigerian LGBTIs living in the diaspora do not want to be isolated from home, family and childhood friends – this bill would virtually enforce that.

Furthermore, criminalizing same sex relationships will force many Nigerian Lesbians, Gays Bisexuals and Intersex (LGBTI) to leave the country and become refugees and asylum seekers in other countries. This also affects Nigeria by contributing to brain drain.

In summary, the implications and effects of the bill, will go far beyond the prohibition of same sex marriage (which is discriminatory in itself), and will result in widespread human rights violations, censorship, impediments to open and democratic process, fear, repression and the break up of family relationships, as well as the loss of talented and patriotic individual – for all Nigerian citizens irrespective of their sexuality. In fact, even though this Bill is still only potentially law, there are increasing reports of people being harrassed, intimidated, discriminated against and physically aggressed, on the basis of their actual or perceived sexuality already.

In recognition of this, we make an **Urgent call for action to His Excellency, the President of the Federal Republic of Nigeria, members of the Senate and House of Representatives of the Federal Republic of Nigeria**

We, the undersigned members of Nigerian civil society organizations, human rights defenders, women's rights activists, media advocates, social health workers, and concerned Nigerians hereby ask His Excellency, The President of the Federal Republic of Nigeria, and Distinguished members of the Senate and House of Representative to;

- Withdraw immediately the proposed Same Sex Marriage Prohibition Bill, 2011 due to its implications for gross human rights violations of all Nigerans irrespective of their sexuality and the likelihood that it would bar Nigeria from the community of democratic nations.
- Take measures to stop extrajudicial actions taken by law enforcement and other state agencies which are human rights violations – including all those directed against individuals who may be (or are suspected of being) LGBTI.
- Ensure that law enforcement and other state agencies address and stop individual and mob action aimed at or resulting in the intimidation, inhuman and degrading treatment of people and individuals on the basis of the actual or perceived sexuality.
- Take immediate measures for consultation with the human rights commission, civil society and stakeholders in the preparation, review and amendment of all proposed legislation to consider their implications for human rights and democratic process
- Uphold democratic principles and parliamentary procedures for ensuring balanced and diversified debate from all sectors – ensuring no shortcuts of process.
- Take into account the report of the Integrated Bio- Behavioral Surveillance Survey (IBBSS)-2007 conducted by NACA which further stresses the importance of integrating Men who have sex with men (MSM) into HIV/AIDS programming in Nigeria (which based would become criminal if this Bill was based).

List of Organisations and Individuals who are signatories.

APPENDIX

CONTENTS AND CRITIQUE OF EACH CLAUSE OF THE PROPOSED BILL

**A BILL
FOR
AN ACT TO PROHIBIT MARRIAGE OR CIVIL UNION ENTERED INTO BETWEEN PERSONS OF
SAME SEX, SOLEMNIZATION OF SAME AND FOR OTHER MATTERS RELATED THEREWITH**
by the Senate of the Federal Republic of Nigeria as follows-

Clearly the new bill is totally unnecessary because since same-sex sexual conduct between consenting adults is already prohibited and criminalized under the Criminal Code, the Penal Code and various Shari'a Penal Codes, consequently, same-sex marriages are already unlawful in Nigeria.

It is also unnecessary, because there has not been any demand for same sex marriage in Nigeria.

The proposed law will violate several fundamental human rights enshrined in the 1999 constitution.

35 -(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty...

Although several countries have chosen not to allow same sex marriage by defining marriage as the union between a man and a woman, Nigeria would be the first country in the world to prohibit same sex marriage *with criminal provisions*.

If this law passes, every Nigerian could be at threat, or liable under the law, whether they are in real same-sex relationship or merely perceived to be so, or even know others who are in same-sex relationships.

1. Prohibition of Marriage or Civil Unions by Persons of Same Sex

1(3) A Marriage Contract or Civil Union entered into between persons of same sex by virtue of a certificate issued by a foreign country shall be void in Nigeria, and any benefit accruing there from by virtue of the certificate shall not be enforced by any court of law in Nigeria

The scope of these provisions is unclear. Since same sex marriage is not allowed by the legal definition of marriage, clearly any same sex marriage however celebrated is legally void and there are no legal consequences and effects. Therefore, these provisions are redundant.

The provisions concerning the prohibition to recognize same sex marriage validly contracted abroad are unnecessary also. Under international private law, the obligation for state parties to the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages to recognize same sex marriage validly celebrated abroad is highly disputed and rejected so far. In any case, Nigeria has not signed that convention: this means that Nigerian authorities have full jurisdiction with regard to the definition of marriage under domestic law. Nothing in sections 49 and following of the Marriage Act 1990 makes possible the recognition of a marriage celebrated abroad which is contrary to domestic law.

2. Solemnization of same sex marriage in places of worship.

- (1) Marriage or civil union entered into between persons of same sex shall not be solemnized in any place of worship either Church or Mosque or any other place or whatsoever called in Nigeria.
- (2) No certificate issued to persons of same sex in a marriage shall be or civil union shall be valid in Nigeria.

This provision violates article 18 of the ICCPR, as it would restrict the right to freedom of religion of those groups that might choose to bless same sex union, even if no legal consequences are attached to such unions. This has been the case of several Christian churches and Jewish temples in several countries, and the state prohibition clearly interferes with such a freedom.

The exception of article 18(3), with reference to the protection of morals, does not apply in this case: the interpretation of the Human Rights Committee to the notion of morals, General Comment no. 22 (1993) on article 18 clearly states that the notion of morals “derives from many

social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition” (8).

Finally General Comment no. 22 explains that the right to freedom of religion must be interpreted broadly, precisely because article 18 recognizes the exercise of such right “either individually or in community with others and in public or private” (4).

This provision is therefore unconstitutional under the Nigerian Constitution as it violates article 38 that recognizes the freedom of religion, and constitutes the basis for separation between state and churches. It also violates Article 8 of the African Charter on Human and Peoples’ Rights and therefore also Nigerian domestic law.

3. Recognized Marriage in Nigeria.

Only marriages contracted between a man and a woman shall be recognized as valid in Nigeria.

Again this replicates existing law and is therefore redundant.

4. Registration of Homosexual Clubs and Societies.

This provision raises the most serious concerns in terms of violations of human rights obligations by Nigerian authorities under the ICCPR, the African Charter and the Nigerian Constitution.

4(1) The Registration of Gay Clubs, Societies and organizations, their sustenance, processions and meetings are hereby prohibited.

The prohibition of LGBTI organizations to be registered under Nigerian law, especially in the light of the criminal offense introduced by paragraph 1 of section 4, is **contrary to Article 10 of the ACHPR (which is domesticated as Nigerian law), and Article 22 of the ICCPR** which reads:

1. Everyone shall have the right to freedom of association with others (...).
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. (...)

As explained above, the exception of the protection of morals is not acceptable according to the Human Rights Committee in *Toonen*, where they concluded that the derogation to the right to privacy could not be justified in the name of the protection of public health, in particular to prevent HIV/AIDS spread. The Committee argued that the ban on same-sex sexual conduct might have an impact on HIV/AIDS education and prevention, causing in fact the spread of the disease among certain stigmatized groups.

Similarly, the provision would violate article 10(1) of the African Charter establishing that “[e]very individual shall have the right to free association provided that he abides by the law”,

as well as the Resolution on the Right to Freedom of Association (1992) that was later drafted by the African Commission on Human and Peoples' Rights stating that:

[t]he competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards;

2. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;

3. The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.

For the same reasons, this provision would be unconstitutional constituting a violation of article 40 of the Nigerian Constitution.

4(2) The public show of same sex amorous relationship directly or indirectly is hereby prohibited.
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As already indicated, Section 4 breaches article 19 and 22 of the ICCPR by criminalizing any activity *directly or indirectly* related to LGBT issues or same sex amorous relationship. The restriction is so severe that it reaches activities carried out and thoughts as well as opinion expressed in private.

The gravity of this violation is certainly confirmed by several reports issued in the past 10 years, starting from 2001, by the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The reports highlight and criticise cases of censorship, restriction and criminalisation of rights to freedom of speech, as well as abuses, attacks and restrictions by state authorities against LGBTI advocates or individuals whose behaviors do not confirm to conservative social norms and expectations of acceptable gender or sexuality.

The criminalization of any form of expression and association related to LGBTI rights therefore exposes all human rights defenders operating in the fields of sexual rights, health rights and LGBTI rights. Abuses, especially of LGBTI human rights defenders have been extensively reported by the Special Representative of the Secretary-General in the past 10 years. This Bill would increase that abuse. It would result in a situation contrary to the Resolution on the Protection of Human Rights Defenders in Africa (which Nigeria has signed) and would expose the Nigerian authorities to the scrutiny of the Special Rapporteur on the Situation of Human Rights Defenders established by the African Commission on Human Rights.

Section 4 will also have a significant impact on social rights, such as right to sexual health and HIV/AIDS prevention. General Comment no. 14 of the Human Rights Committee, on the Right to the Highest Attainable Standard of Health recognizes that the principle of non-discrimination of Article 2(2) "proscribes any discrimination in access to health care" on grounds of, amongst other things, health status (including HIV/AIDS) and sexual orientation (**Article 12 of the International Covenant on Economic, Social and Cultural Rights - ICESCR**). The right to the best attainable state of physical and mental health is also protected by Article 16 of the African Charter, and thus also in Nigerian domestic law.

As repeatedly underlined by the U.N. Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, discrimination and

stigma would certainly restrain the access to health and sexually transmitted disease prevention for all Nigerians, irrespective of their gender and sexuality.

Finally, these provisions in particular might seriously endanger the lives of all Nigerians who are real (or perceived to be or simply accused of being LGBTI);exposing them to increased risk of degrading, inhuman and cruel treatments and punishments, torture, extrajudicial executions, arbitrary deprivation of their liberty. It is precisely because of incidents of human rights violation against LGBTI defenders that the Special Rapporteur’s report states that “discrimination on grounds of sexual orientation and gender identity may contribute to the process of dehumanization of the victim.” The fact that even private forms of expression, speech and association would be subject to the scrutiny of the criminal law promotes rigid social control, even by non state actors, as well as the concrete risk of a political use of this legislation

5. Offences and Penalties

(1) Persons who entered into same sex marriage contract or civil unions commit an offense and are laible and are each liable on conviction to a term of term of 14 years imprisonment.

(2)Any person who registers, operates or particpate in gay clubs, societies and organization, or directly or indirectly make public show of same sex amorous relationship in Nigeria commit an offense and shall each be laible on conviction to a term of 10 years imprisonment.

(3)Any person or group of persons that witness, abets and aids the solemnizationof a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions in Nigeria commits an offense and shall be liable on conviction to a term of 10 years imprisonment.

The fact that the bill explicitly confines the jurisdiction with regard to the application of the law does not mitigate the seriousness of the human rights violation and the concerns about a wider social control and abuse that constitute the reasonable consequences of the enactment of this law.

2. Interpretation

”Civil Unions” means any arrangement between persons of the same sex to live together as sex partners, and shall include such descriptions as adult independent relationships, caring partnerships, civil partnerships, civil solidarity pacts, domestic partnerships, reciprocal beneficiary relationships, registered partnerships, significant relationships, stable unions, etc.

The bill is unnecessary to prohibit same sex marriage in Nigeria: section 27 of the Marriage Act 1990 already implicitly defines marriage as the union of a man and wife, whilst all the Criminal and Penal Codes of Nigeria already make same-sex sexual conduct non-permissible.

“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 same same sexual relationship. .

The proposed definition of same sex marriage goes far beyond the notion of same sex marriage as accepted in those countries that have legally recognized the marriages between persons of the same sex. This definition actually refers to *any* form of same sex relationship, including de facto cohabitation of same sex couple. This is inconsistent with international and foreign legislation, case law and legal literature.

This provision clearly violates the ICCPR. Although the Human Rights Committee has established in *Joslin v. New Zealand*¹ that the ICCPR does not recognize a fundamental right to marry for same-sex couples under article 23(2), in *Young v. Australia*² the Committee itself recognized that different treatment between unmarried same-sex and different-sex couples may constitute a breach of state parties' obligations under the prohibition of discrimination of article 26, which includes discrimination on the basis of sexual orientation. As a consequence, the ban introduced by the bill, by reaching out to any form of cohabitation between individuals of the same-sex, is contrary to ICCPR Article 26.

Also, because the bill bans the intimate and emotional choices of consenting adults, it is extremely intrusive of the privacy of those persons whose behaviors do not conform with conservative gender and social roles. Such a definition of same sex marriage and the provisions that follow go far beyond the boundary established in *Toonen* and violates Article 17 of the ICCPR and, consequently, the constitutional provision of article 37. Furthermore, in practice, the Bill also would implicate the likelihood or simple resemblance of such choices (by defining same sex marriage as “other form of same sex relationship for the purposes of cohabitation as husband and wife”).

By criminalizing any form of same sex relationship the bill does not protect family and traditions as required by Article 18 of the African Charter, but rather jeopardizes individual dignity and security, respectively protected by articles 5 and 6 of the Charter. It also clearly withdraws protection from LGBTI people and their families who under Articles 5(2) and 5(3) may find themselves imprisoned for 10 years if they do not denounce family members who are LGBTI.

This intrusiveness into the private sphere in fact promotes stigmatization against individuals and groups already at risk of marginality, exposing them to violence and abuses both by local authorities and non state actors. Both the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on the Question Of Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment have, over the past years, extensively reported on how discrimination, marginalization and the failure of states to protect gays, lesbians, transgenders and other groups that do not fit with “sexual norms” have been the cause of killings by non state actors and state authorities, as well as tortures and other abuses by state authorities. They have thus held governments responsible for the violation of article 6 and 7 of the ICCPR. Similar conclusions have been argued by the Special Rapporteur on Violence against Women, Its Causes and Consequences, as well as by the observations of treaty bodies, such as the Committee against torture in its interpretation of the Convention against Torture (CAT) in the past 10 years.

¹ Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (1998).

² Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).