

ARTICLE SYMPOSIUM

“THIS MAN IS MY WIFE”: THE SAME-SEX MARRIAGE PROHIBITION ACT OF 2014 IN NIGERIA

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ABSTRACT

The increased visibility of same-sex relationships and the call for same-sex marriages have been particular challenges to the traditional marriage system in Africa in the contemporary period. While some critics have argued, erroneously, that same-sex relationships were completely unknown to the African continent until the advent of Western modernity, others have suggested that the practices speak to a greater malaise confronting African societies. Nigeria is not an exception in this case. In light of these trends, this article examines the Same-Sex Marriage Prohibition Act, which was promulgated by the Nigerian government in 2014 and has since led to infractions upon the human rights of citizens in same-sex relationships. The article examines these developments around same-sex relationships in the context of wider social and economic challenges to the traditional marriage institution in Nigeria.

KEYWORDS: same-sex marriage, Same-Sex Marriage Prohibition Act, human rights, homosexual

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.

—Same-Sex Marriage Prohibition Act (2014)

INTRODUCTION

On January 7, 2014, Nigeria’s president, Goodluck Jonathan, signed the Same-Sex Marriage Prohibition Act (SSMPA) into law.¹ The law, as is evident from its title, expressly prohibits marriage between persons of the same sex anywhere in Nigeria. The law refuses recognition to unions between same-sex persons in Nigeria. It voids and nullifies any marriage conducted between the same-sex persons in any house of worship in or outside of Nigeria. Not only that, it further reinstates the fact that only a marriage conducted between a man and a woman shall be recognized as valid as well as prohibits registration of gay clubs, organizations, or societies, and their

1 Same Sex Marriage (Prohibition) Act, 2014 (accessed in an online version at (<https://laws.lawnigeria.com/2020/01/10/same-sex-marriage-prohibition-act-2014/>)). Hereafter cited as SSMPA.

sustenance, procedures, and meetings. Any person or group of people who engages in same-sex marriage, participates in gay clubs, or helps in any form toward the solemnization of same-sex marriage has committed an offense punishable by imprisonment. The jurisdiction to entertain any matters arising from the breach of the Act is vested in the High Court of a state or of capital territory. The SSMPA's application has been expanded to include the prohibition of any form of union or cohabitation between same-sex sexual partners even as it bans and interdicts any "public show of same-sex amorous relationship" and defines same-sex relations as "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 sexual relationship." An infraction of this law can lead to a minimum of ten years imprisonment without an option of fine.²

The SSMPA is reminiscent of similar laws and bills promulgated by governments in other parts of Africa during the past two decades, all of which were designed to preserve the supposedly heterosexual identities of the African continent. For example, in 2009, a member of the Ugandan parliament presented for consideration a bill that provided the death penalty for what Joanne Sadgrove, a scholar of African religions and sexuality, has referred to as "aggravated homosexuality."³ For scholars in African studies, as well as those in the field of human rights, the promulgation of these laws has been a source of concern. It has continued to raise a number of questions not only about what constitutes marriage in Africa but also the extent to which governments on the continent could promulgate laws with the potential to infract upon the sexual rights and human rights of their citizens.

In other words, the fact of same-sex relationships in parts of Africa and the continuous efforts by African governments to clamp down on same-sex relations compel the contemplation of the following questions: How has marriage been defined and understood in Africa? How do we account for the promulgation of legislation prohibiting same-sex relations in various parts of the continent? Why is it that same-sex relationships continue to gain traction among African youths despite strong penalties prescribed against them by most African nations? And, in particular, what impact has this legislation had on human rights in Nigeria? In providing answers to the above questions, I begin by examining traditional views of marriage in Africa. I then trace the history and factors in the emergence into the open of same-sex relations among sections of Nigerian society. Through this inquiry, I provide context and insight into the impacts of the SSMPA, particularly on gay men in Nigeria.⁴

THE MARRIAGE SYSTEM IN AFRICA'S TRADITIONAL MILIEU

Before colonization, in large parts of Africa marriage was considered to be a sacred union of a man and woman, the purpose of which was the establishment of a family through the production of children.⁵ This traditional view of marriage in parts of Africa accords with the common law definition of *marriage* as the "legal status, condition, or relation of one man and one woman united in law for

2 SSMPA, §§ 1–7.

3 Joanna Sadgrove et al., "Morality Plays and Money Matters: Politics of Homosexuality in Uganda," *Journal of Modern African Studies* 50, no. 1 (2012): 103–29, at 104.

4 See, for example, Noah Rayman, "4 Men Publicly Whipped in Nigeria for Having Gay Sex," *Time*, March 6, 2014, <https://time.com/14155/nigeria-gay-sex-whipped/>.

5 William Abraham, "Sources of African Identity," in *Africa and the Problem of Its Identity*, ed. Alwin Diemer (Frankfurt: Peter Lang, 1987), 20–42, at 22.

life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.”⁶ In other words, marriage has traditionally consisted in what US legal theorist William Eskridge describes as a dimorphous pair of “one man and one woman” that is neither a triad nor a union of the same sex or gender.⁷ Thus, while there may be other forms of marriage, the one that has traditionally been celebrated in Africa has been that between a man and a woman.

Paul Kyalo posits that *marriage* refers to “several normative behavior patterns featuring . . . co-residence, division of labor, sharing of resources, sexual relationship, procreation and cooperation in child bearing and training.”⁸ In other words, whereas marriage provides an avenue for the satisfaction of emotional and psychological needs of both men and women, these have been considered by Africans across climes and times not as ends in themselves but means toward the ends of procreation and establishment of familial lineages. Further, since marriage provided the only legal avenue for procreation, premodern Africans, particularly Nigerians, considered children born out of wedlock to be illegitimate. Such children were usually treated as outcasts and were often deprived of the opportunity of benefitting from social and familial privileges and rights that were ordinarily accorded those born by couples with legal unions. The word *legal* here does not refer to a codified system of law. Until the advent of Islam and later Christianity, in most parts of the continent, there was no written or codified law. In those parts of Africa, the sacralization of marriages often began not based on love or the free choice of a man and a woman as subjects and individuals fully imbued with agency and freedom, but on the basis of pacts or agreements reached among families within given communities. These arranged marriages were contracted by parents for and on behalf of their children and were binding on the children.⁹ These marriages were often solemnized in ways based not on any written law but on traditional customs and norms. Such marriages were popular among the Hausas, Ibos, and Yorubas in Nigeria.¹⁰ These arranged marriages are still practiced by some Africans today.

Another important feature of the marriage system in premodern period in Nigeria was its polygynous nature. In this period, men not only had a homestead in which they wielded authority and enjoyed patriarchal privileges, but also could be a consort to more than one female. In fact, mention must be made of the Yorubas of southwest Nigeria during that era, whose polygynous practice had economic implications because it afforded the male the opportunity of having extra hands to deploy on the farmland. In other words, in parts of Africa, and particularly in Nigeria where it was practiced, it was believed that “polygyny often produced wealth. Where women are economically active, each additional wife means additional income for the marriage unit. Thus, higher economic status

6 *Black's Law Dictionary*, s.v. “Marriage,” 11th ed. (St. Paul: Thomson Reuters, 2019), 972 (emphasis added); Shambie Singer and Norman J. Singer, *Sutherland Statutes and Statutory Construction*, vol. 3A, 8th ed. (Eagan: Thomson Reuters, 2019), § 69:2; *American Jurisprudence 2d*, s.v. “Marriage,” vol. 52 (Eagan: Thomson Reuters, 2011), 144–45.

7 William N. Eskridge, Jr., “A History of Same-Sex Marriage,” *Virginia Law Review* 79, no. 7 (1993): 1419–513, at 1420, 1457.

8 Paul Kyalo, “A Reflection on the African Traditional Values of Marriage and Sexuality,” *International Journal of Academic Research in Progressive Education and Development* 1, no. 2 (2012): 211–18. See also Eskridge, “A History of Same-Sex Marriage.”

9 Monibo A. Sam, “Arranged Marriage: Change or Persistence? Illustrative Cases of Nigerians in the USA,” *Journal of Comparative Family Studies* 40, no. 5 (2009): 739–57, at 747–50.

10 Onigu Otite, “Marriage and Family Systems in Nigeria,” *International Journal of Sociology of the Family* 21, no. 2 (1991): 15–54.

can be both a cause and an effect.”¹¹ To be polygamous during that era, meant, archetypally, that the male was the subject most deserving of respect and honor in patriarchal circles.

The movement of Islam and Christianity across Africa, and particularly into the West Africa subregion, from the medieval period into the early nineteenth century complicated notions of marriage among peoples of the area.¹² Whereas Christianity sought to affirm the notion that marriage is meant to be a union of two different sexes in wedlock, Islam validated polygyny as a lawful form of marriage that its adherents could practice within strict regulations. Whereas both religions incentivized heterosexual orientation, culture, and practices among West Africans, Islam also granted legal validity to existing polygynous traditions among Africans. Within Islam, marriage of a man to more than one woman at a time ultimately became normative.¹³ The existence of polygynous marriage can itself be seen as a practice that opens the door to relationships beyond the standard “one man and one woman” model, albeit with the sanction and blessing of religious law.

CHALLENGES CONFRONTING THE MARRIAGE SYSTEM IN AFRICA

Polygyny is just one of the contemporary challenges confronting the institution of marriage in sub-Saharan Africa, especially Nigeria. While it is true that the practice offers some semblance of solution to existing social problems confronting Africans, including that of economic support for women lacking spouses, a practice that Augustine Nwoye refers to as “interventive polygamy,”¹⁴ it has nonetheless continued to generate concerns in regard to spousal welfare, gender equity, and the upbringing of children. In some parts of sub-Saharan Africa, many of the men who engage in polygyny are unable to provide for the children of the union. For many polygamous families, homes become places where the marital relationships are characterized by spousal conflicts and disharmony, rivalry, hatred, and violence.¹⁵

11 Judith E. Brown, “Polygyny and Family Planning in Sub-Saharan Africa,” *Studies in Family Planning* 12, nos. 8/9 (1981): 322–26.

12 Historians agree that Islam made its inroads into the West African region at the closing decades of the tenth century to the eleventh century. See ‘Abdurrahman I. Doi, *Islam in Nigeria* (Zaria: Gaskiya Corporation, 1984): 15.

13 In the contemporary period, polygyny appears to be experiencing a downward patronage among West Africans. Judith Brown summarizes: “The *United Nations Demographic Handbook for Africa* showed 17–30 percent of married men are to be polygynous in 13 sub-Saharan African nations. In most countries, less than 25 percent of the polygynous men had more than two wives. A survey in Cameroon found that 20–30 percent of married men were polygynous.” Brown, “Polygyny and Family Planning,” 322 (citing United Nations Economic Commission for Africa, *Demographic Handbook for Africa* (New York: United Nations, 1978), 85). What this points to is that polygynous practice is fast losing its appeal among Africans. In fact, it has become the subject of various legislation in parts of North Africa, all of which are designed to rein in various infractions that have become common with the practice, including abuse of women and violence.

14 Augustine Nwoye, “The Practice of Interventive Polygamy in Two Regions of Africa: Background, Theory and Techniques,” *Dialectical Anthropology* 31, no. 4 (2007): 383–421, at 384–86. See also M. A. O. Aluko and J. O. Aransiola, “Peoples’ Perception of Polygyny in Contemporary Times in Nigeria,” *The Anthropologist* 5, no. 3 (2017): 179–84.

15 For more on the engaging discussions on the practice of polygamy or polygyny in parts of Africa, see Abdulrazaq O. Kilani, introduction to *Beyond The Veil: Muslim Women in Sub-Saharan Africa*, ed. Abdulrazaq O. Kilani (Lagos: Global Da’wah Communications, 2010), 1–9, at 4–5; Amira Mashhour, “Islamic Law and Gender Equality: Could There Be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt,” *Human Rights Quarterly* 27, no. 2 (2005): 562–96; Christina Murray, “Legal Eye: Is Polygamy Wrong?,” *Agenda: Empowering Women for Gender Equity*, no. 22 (1994): 37–41.

But perhaps more fundamental is the seeming decline in the popularity of marriage as a tradition among young Africans and the increase in cohabitation among unmarried young people. There are two groups of marriageable but unmarried Africans: marriageable adults, male and female, who are single by choice; and marriageable adults who are single not by choice. The first group includes those who may have freely reached the decision not to get married; the second includes those who might desire a partner but are unable to find one. While these groups are both loci of concern with reference to the challenges confronting the marriage system in Nigeria, the circumstances of those who desire to get married, suffer no inhibitive medical conditions, and still cannot find love have become the greatest source of concern for critics and observers of the marriage system in contemporary Nigeria. Of the many reasons that can be adduced for this trend, a primary one is the harsh economic conditions in which most Africans find themselves.¹⁶ Consequently, young men and women have been unable to establish homes.

In the West Africa subregion, the increase in the number of unmarried young adults, men and women included, has been traced to unemployment or underemployment of young able-bodied men who are no longer able to finance spousal responsibilities.¹⁷ Conversely, there is the increased economic freedom of women, who, unlike in earlier periods when women were dependent on men for survival, can now live independently of men's financial support.¹⁸ In other words, the increase in access to the labor market for women has led to such unintended outcomes as marriage instability, spousal separation, and alteration of marital roles and responsibilities. Thus, the traditional notions of the family in Africa are undergoing fundamental reconstruction—husbands are becoming wives and vice versa.

Observers of the continuities and change in the marriage system across Africa have also identified the rapid and severe HIV epidemic as a factor that has had a negative impact on the positive outlook of the marriage system across the continent.¹⁹ In a country such as Nigeria, which is still greatly challenged by an inadequate health care delivery system, the outbreak of sexually

16 For example, in South Africa, lack of participation in marriage by young South African adults has been linked “directly or indirectly to the oppressive social and political structures and processes created during the apartheid era” and particularly the way in which the labor migration system instituted in that era has had “profound force of instability and change in South African family life.” Victoria Hosegood, Nuala McGrath, and Tom Moultrie, “Dispensing with Marriage: Marital and Partnership Trends in Rural KwaZulu-Natal South Africa 2000–2006,” *Demographic Research* 20 (2009): 279–312, at 281.

17 See, for example, Anne E. Calvès's recent study of Burkina Faso, “‘No Money, No Honey’? Poverty and Young Men's Unmarried Relationships in Urban Burkina Faso,” *Revue Quetelet/Quetelet Journal* 7, no. 1 (2019): 7–26, <https://doi.org/10.14428/rqj2019.07.01.01>. Calvès also cites a number of earlier studies finding similar results. For a comparison of changing marriage patterns from South Asia, see Keera Allendor, “Schemas of Marital Change: From Arranged Marriages to Eloping for Love,” *Journal of Marriage and Family* 75, no. 2 (2013): 453–69, especially 465–66.

18 Karen Oppenheim Mason, “The Impact of Women's Social Position on Fertility in Developing Countries,” special issue, *Sociological Forum* 2, no. 4 (1987): 718–45; Mary M. Kritz and Douglas T. Gurak, “Women's Status, Education and Family Formation in Sub-Saharan Africa,” *International Family Planning Perspectives* 15, no. 3 (1989): 100–05, at 100–01; compare Allendor, “Schemas of Marital Change.”

19 While reliable data on the impact of HIV infections on the delay of marriage is not currently available, multiple studies have indicated that HIV infection leads to higher rates of divorce and difficulty in remarriage. The data on remarriage suggests that HIV may also impact decisions on first marriages. See Victoria Hosegood, “The Demographic Impact of HIV and AIDS across the Family and Household Life-Cycle: Implications for Efforts to Strengthen Families in Sub-Saharan Africa,” *AIDS Care: Psychological and Socio-medical Aspects of AIDS/HIV* 21, supplement 1 (2009): 13–21; Philip Anglewicz and Georges Reniers, “HIV Status, Gender, and Marriage Dynamics among Adults in Rural Malawi,” *Studies in Family Planning* 45, no. 4 (2014): 415–28.

transmitted diseases²⁰ has increased among unmarried young people, even as the number of men and women who are single by circumstance continues to increase.

One radical instrument being deployed by Nigerians to remedy the above situation is the organization of mass weddings. Two types of mass weddings have taken place in Nigeria over the last decade: state-sponsored mass weddings and privately sponsored mass weddings. An example of the latter took place in Nigeria in December 2017, when Sokoto State-based philanthropist Alhaji Umaru Kwabbo sponsored a mass wedding for at least a hundred couples at a special ceremony in Sokoto, the state capital. Initially viewed by most Nigerians with incredulity, Kwabbo argued that the action proceeded out of his genuine desire to ensure a drastic reduction in the number of unmarried men and women in the state. He further argued, “Many of our mature people are in need of such urgent assistance, but due to certain reasons and other responsibilities associated with marriage in our society, they remain without spouses.”²¹ On Sunday, May 13, 2017, no fewer than two hundred Nigerians entered into matrimonial contracts with their spouses in a big ceremony that took place at the Abu-Huraira Jumu’at mosque in Sokoto. The newly wedded had been chosen from a pool of application totaling more than a thousand from marriageable men and women from within the northern state alone.²²

But while there appears to be a consensus across Nigeria on the necessity to facilitate access to marriage for young marriageable people, the recent increase in numbers of same-sex relationships, largely considered to be “un-African”²³ across much of the continent, has elicited at least two responses from African governments: outright denial or rejection of homosexuality as a foreign cultural import and the promulgation of legislation to curb same-sex relationships. Before I explore these responses, I provide a brief insight into the history of same-sex relationships in Africa.

SAME-SEX RELATIONSHIPS IN AFRICA: A HISTORY

One way that scholars have sought to engage the history of same-sex relationships in Africa is to attempt to situate it within the larger context of the African continent. The following can best represent how homosexuality has from time to time been part of lived experiences of African people.

A careful review of African history shows that contrary to the notion that same-sex relations are “un-African,” the practice has been known on the continent, as in other cultures and civilizations,

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- 20 Sheila A. Bishop, Hilary I. Okagbue, and Victor O. Adoghe, “Determining the Level of Sexually Transmitted Diseases (STDs) Awareness in Ota, Nigeria,” *Journal of Public Health: From Theory to Practice* (2019) (published ahead of print, Aug. 2, 2019), <https://doi.org/10.1007/s10389-019-01128-7>. While HIV rates are decreasing in Nigeria, the large population means that the threat of the virus remains significant even as transmissions decline. UNAIDS, “New Survey Results Indicate that Nigeria has an HIV Prevalence of 1.4%,” press release, March 14, 2019.
- 21 Mohammed Amino, “APC Chieftain to Sponsor Mass Wedding of 100 Couples in Sokoto,” *This Day*, December 28, 2017, <https://www.thisdaylive.com/index.php/2017/12/28/apc-chieftain-to-sponsor-mass-wedding-of-100-couples-in-sokoto/>.
- 22 In previous years, the governors of northern Nigerian states had organized similar mass weddings with the sole purpose of reducing what has been described as a “marriage deficit” in the area. See “Kano, Sokoto, Others Conduct Mass Weddings for 3,000,” *PM News Nigeria*, April 16, 2016, <https://www.pmnewsnigeria.com/2015/04/16/kano-sokoto-others-conduct-mass-weddings-for-3000/>.
- 23 Janet Bujra, “Targeting Men for a Change: AIDS Discourse and Activism in Africa,” *Agenda: Empowering Women for Gender Equity* 16, no. 44 (2000): 6–23. See also Vasu Reddy, “Homophobia, Human Rights, and Gay and Lesbian Equality in Africa,” *Agenda: Empowering Women for Gender Equity, African Feminisms One* 16, no. 50 (2001): 83–87.

since the ancient periods. For instance, in ancient Egypt, there was a known case of two high officials of the state, Nyankh-Khnum and Khnum-hotep, who lived and served the state around the fifth dynasty. Though both men were said to have wives and children, they were nonetheless regarded as homosexual because “they embraced each other and touched their faces nose to nose, an act that was regarded as foreplay in male same-sex relationships at the time.”²⁴ Evidence has also been found in two-thousand-year-old rock paintings in southern Africa that depict men having sex with other men.²⁵ Edwin Smith and Andrew Dale have also suggested that among the Ila-speaking people in the Republic of Zambia and Bantu subdivision of Africans, there was a man who was known for dressing as a woman, did women’s work, and lived and slept among women, but not with them in a sexual sense.²⁶ This denotes that same-sex relations among men and boys were common among the Ilas despite the risk involved “that the boy in question may become pregnant.”²⁷ Man-boy relationships were known, practiced, and documented in the northern parts of the continent, particularly during the Mamluk period in Egypt.²⁸ The city of Cairo played host to khawal—men who dressed like women and entertained audiences in the palace with song and dance but also engaged in sexual relationships with younger men and boys.²⁹

In the West Africa subregion, historical records show that countries such as Ghana, Burkina Faso, and Niger have histories of homosexuality.³⁰ During the eighteenth and nineteenth centuries, Asante courts (in modern-day Ghana) hosted male slaves who served as concubines to princes and the notables.³¹ These were popular subjects who were easily distinguishable by their feminine dresses and were known to perform women’s duties. In Dahomey Kingdom (now the Republic of Benin), eunuchs were known as royal wives. The eunuchs played important roles in the royal courts. Homosexuals also occupied important positions in the sociocultural life of the Dagaaba in Burkina Faso.³² They were believed to have the capacity to mediate between the spirit and the human worlds.³³ There are, for example, eras of Africa’s cultural history in which women-to-women relationships have been documented. Such is the case of Ifeyinwa Olinke, who lived in the nineteenth century in what is now known as Eastern Nigeria. Ifeyinwa Olinke was described by Eskridge as follows: “She was an industrious woman in a community where most of the entrepreneurial opportunities were seized by women, who thereby came to control much

24 R. B. Parkinson, “Homosexual Desire and Middle Kingdom Literature,” *Journal of Egyptian Archaeology* 81, no. 1 (1995): 57–76, at 60; Jackton B. Ojwang and Emily Nyiva Kinama, “Woman-to-Woman Marriage: A Cultural Paradox in Contemporary Africa’s Constitutional Profile,” *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 47, no. 4 (2014): 412–33, at 414.

25 Deborah Amory and Mark Gevisser, “Homosexuality in Africa,” in *Africana: The Encyclopedia of the African and African American Experience*, ed. Kwame Anthony Appiah and Henry Louis Gates, Jr., 2nd ed., vol. 3 (Oxford: Oxford University Press, 2005), 227–31 (accessed online).

26 See Edwin W. Smith and Andrew Murray Dale, *The Ila-Speaking Peoples of Northern Rhodesia*, vol. 2 (1920; repr. Whitefish: Kessinger Publishing, 2010).

27 Will Roscoe and Stephen O. Murray, *Boy-Wives and Female Husbands: Studies in African Homosexualities* (London: Palgrave Macmillan, 2001), 173–86, at 176.

28 This refers to the period between 1382–1517 CE, when parts of what is known as Africa today belonged to the wider world of Islam. For more on sexual practice during this period, see Philip K. Hitti, *History of the Arabs*, 10th ed. (London: Macmillan Publishers, 2002), 715–16.

29 Amory and Gevisser, “Homosexuality in Africa,” 227.

30 Amory and Gevisser, 227.

31 Amory and Gevisser, 228.

32 Amory and Gevisser, 228.

33 Amory and Gevisser, 228.

of the Igbo tribe's wealth. Ifeyinwa socially overshadowed her less prosperous male husband. As a sign of her prosperity and social standing, Ifeyinwa became a female husband to other women. Her epithet 'Olinke' referred to the fact that she had nine wives."³⁴

The story of Olinke is reinforced by what Jackton Ojwang and Emily Kinama refer to as "woman-to-woman marriage" in Kenya.³⁵ This is a "traditionally recognized union between two women, one of whom pays the dowry in order to marry the other woman. . . . It is usually a union aimed at promoting the social or economic status of the women who participate in it. . . . [and ensuring] the continuation of the family line and the enjoyment of family life."³⁶ However, the stories of Olinke in Nigeria and the tradition of woman-to-woman marriage in Kenya do not suggest a broad presence of same-sex relations between women across African cultures. In fact, since it is evident that in neither of the two instances cited is it suggested that the women engage in same-sex relations, it then means we must look beyond these two stories in order to account for the emergence of same-sex relationships in continental Africa.

East African societies have also witnessed active participation of homosexuals in the sociocultural and, indeed, the religious lives of the people. This is true with particular reference to the Meru and the Kikuyu of Kenya: the mugawe, men whose clothing and hairstyles are exactly like those of women³⁷ and were formally married to men. It is equally true of the ikihindu among the Hutu and Tutsi in Rwanda and Burundi. A similar role is reported to have been played by some men among the Swahili-speaking Mashoga, who often bear women's names and cook and clean for their supposed male husbands.³⁸

Thus, the argument that homosexuality is "un-African" lacks historical credence and validity. A more valid account would be that homosexual practices had long been in existence among peoples inhabiting what later came to be known as Africa. What is different today is that unlike earlier eras, when homosexual discourses and practices were muted and largely restricted to the "unsaid" or the "unstated," as described by critical discourse theorist Norman Fairclough,³⁹ there has been an unprecedented increase in same-sex relationships among different sections of African societies. Today, LGBTQ people feel greater freedom to express and manifest their sexuality openly. One reason for this is the increased availability of funding to combat AIDS, particularly among gay men. Further, new networks and new forms of organizing among people who identify themselves as LGBTQ have emerged.⁴⁰

Yet even with the emergence of these new freedoms and communities among LGBTQ people, the clampdown on same-sex relationships has had the effect of increasing awareness of their existence, even if they remain legally forbidden. In other words, unlike before, when same-sex relationships were largely underground, they are now being practiced more openly in African societies. The increased visibility of LGBTQ people in African public space has led to increased homophobia in most African countries. Two domains of responses are discernible. These are rhetoric of denials or

34 Eskridge, "A History of Same-Sex Marriage," 1419–20.

35 Ojwang and Kinama, "Woman-to-Woman Marriage."

36 Ojwang and Kinama, 416.

37 Rodney Needham, *Right and Left: Essays on Dual Symbol Classification* (Chicago: University of Chicago Press, 1973), 27.

38 Amory and Gevisser, "Homosexuality in Africa," 229.

39 Norman Fairclough, "Intertextuality and Assumptions," in *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003), 39–61, at 40.

40 Patrick Awondo, Peter Geschiere, and Graeme Reid, "Homophobic Africa? Toward a More Nuanced View," *African Studies Review* 55, no. 3 (2012): 145–68, at 147.

rejection of homosexuality by African leaders and the increased promulgation of legislation with the intent to extricate the practice from the African space.

THE POLITICAL DELEGITIMIZATION OF SAME-SEX RELATIONS IN AFRICA

Rhetoric of denial, rejection, and dismissal of homosexuality as a non-African phenomenon have been more strident and vociferous from a section of African leaders who have striven to label the practice as “un-African.” To this group of leaders, same-sex relations have nothing to do with human rights, but instead are viewed as a noxious campaign to destroy the fabric of the marriage system in Africa as the first step toward the destruction of the African society. For example, the former president of Namibia, Sam Nujoma, criticized the movement in support of LGBTQ rights as quoted in the *Mail and Guardian*:

Most ardent supporters of these perverts are Europeans who imagined themselves to be the bulwark of civilization and enlightenment . . . we made sacrifices for the liberation of this country and we are not going to allow individuals with alien practices such as homosexuality to destroy the social fabric of our society. We are convinced that homosexuality is not a natural and objective form of moral history but a hideous deviation of decrepit and inhuman sordid behavior. In reality lessons learned from the morals of our Namibian culture demonstrate that our morals are far more superior and acceptable to the vast majority of our people who adhered to Christianity . . . Homosexuality deserves a severe contempt and disdain from the Namibian people and should be uprooted totally as a practice.⁴¹

Evident in Nujoma’s criticism is the popular notion in Africa that the LGBTQ rights movement is nothing but a metaphor for imperialism and that same-sex marriage is a threat to “institutions of power, such as the family and the state that assume that heterosexuality is a natural, as opposed to a cultural, phenomenon.”⁴² Frederick Chiluba, the former president of Zambia, later amplified Sam Nujoma’s position, saying,

[h]omosexuality is the deepest level of depravity. . . That homosexuals are free to do as they please in the West does not mean they must be free to do the same here. There will be no end to the demand for rights as soon as they are permitted. There will also be no end to diseases. . . The things they do would multiply the rate of the spread of AIDS - which was first spotted among American sodomites in the first place . . . For a country like ours, beset by increasing problems of development, homosexuality as a constitutional right would simply bring the whole republic crashing to its back, belly up.⁴³

Similarly, the former Kenyan president Daniel arap Moi made the following statement: “Kenyans should guard against ‘dangerous practices’ such as homosexuality: ‘It is not right that a man should go with another man or a woman with another woman. It is against African tradition and Biblical teachings’ . . . ‘I will not shy away from warning Kenyans against the dangers of the scourge’.”⁴⁴

41 “Nujoma and Swapo Join Mugabe’s Gay-Bashing,” *Mail and Guardian*, February 14, 1997, <https://mg.co.za/article/1997-02-14-nujoma-and-swapo-join-mugabes-gay/>.
 42 Joseph Bristow, “Homophobia,” in *A Dictionary of Cultural and Critical Theory*, ed. Michael Payne and Jessica Rae Barbera (Oxford: Blackwell, 1996), 335–44, at 335.
 43 As quoted by Rachel Solomon, Past Present History Project (blog), accessed January 28, 2021, citing *Times of Zambia*, October 19, 1998.
 44 Quoted in Reddy, “Homophobia, Human Rights,” 85.

The above statements indicate a consensus among African leaders and appeared not to allow same-sex relations and LGBTQ rights in their countries.

While the above could be referred to as the rhetoric of negation and declamation of homosexuality in Africa, there has been a counter-rhetoric from Western powers in support of same-sex relationships in parts of the continent. At the Commonwealth Heads of Government Meeting about a decade ago, then UK prime minister David Cameron expressed the disapproval of the Commonwealth on the clampdown on LGBTQ rights across the continent: “Speaking to representatives of fifty-four nations, Cameron noted that ‘more strings’ would be attached to British aid to the developing countries and that ‘those expecting to benefit from such aid should adhere to ‘proper human rights’ and decriminalize homosexuality’.”⁴⁵

As expected, Cameron’s speech employing the rhetoric of affirmation in support of homosexuality in Africa elicited strong reactions across the continent. These included, among many other press releases and statements, a press release from a “coalition of more than fifty nongovernmental organizations working in African countries in support of LGBTQ rights” and governments from all around Africa. For example, the coalition “expressed concerns over attempts by Western governments to use the power of the purse to promote equality for LGBTQ individuals.”⁴⁶ Such interventions were said to “disregard the agency of African civil society movements and political leadership. They also tend, as has been evidenced in Malawi, to exacerbate the environment of intolerance in which the political leadership scapegoat LGBTI people for donor sanctions in an attempt to retain and reinforce national state sovereignty.”⁴⁷ The press release said further that, “the sanctions sustain the divide between the LGBTI and the broader civil society movement. In a context of general human rights violations, where women are almost as vulnerable as LGBTI people, or where health and food security are not guaranteed for anyone, singling out LGBTI issues emphasizes the idea that LGBTI rights are special rights and hierarchically more important than other rights. It also supports the commonly held notion that homosexuality is ‘unAfrican’ and a western-sponsored ‘idea’ and that countries like the UK will only act when ‘their interests’ have been threatened.”⁴⁸

A careful assessment of the situation in parts of the continent shows that both the rhetoric of denial and negation and the counter-rhetoric from the West in affirmation and support for LGBTQ rights have largely increased incidences of violent attacks on LGBTQ people across the continent. They have fueled anti-gay violence and discrimination and have exposed the political, rather than cultural nature of the backlash.⁴⁹ It has also led to the strengthening of or the

45 David W. Austin, “Sexual Orientation and Gender Identity,” *International Lawyer* 46, no. 1 (2012): 447–62, at 449–50. See also Nigel Morris, “Commonwealth Nations to Have Aid Cut for Gay Rights Abuses,” *The Independent*, October 31, 2011, <https://www.independent.co.uk/news/world/politics/commonwealth-nations-have-aid-cut-gay-rights-abuses-6255009.html>. For reactions from African leaders, see “Ghana Refuses to Grant Gays’ Rights Despite Aid Threat,” *BBC News*, November 2, 2011, <https://www.bbc.com/news/world-africa-15558769>.

46 Austin, “Sexual Orientation and Gender Identity,” 450.

47 Press Release, Statement of African Social Justice Activists on the Threats of the British Government to ‘Cut Aid’ to African Countries That Violate the Rights of LGBTI People in Africa, *Pambazuka News* (Oct. 27, 2011), <https://www.pambazuka.org/activism/statement-british-aid-cut-threats-african-countries-violate-lbgti-rights>, as quoted by Austin, “Sexual Orientation and Gender Identity,” 450. Austin quotes from an alternative version of the press release that is no longer available online.

48 Press Release, Statement of African Social Justice Activists, quoted by Austin, “Sexual Orientation and Gender Identity,” 450.

49 Omar G. Encarnación, “Global Backlash against Gay Rights: How Homophobia Became a Political Tool,” *Foreign Affairs*, May 2, 2017, <https://www.foreignaffairs.com/articles/2017-05-02/global-backlash-against-gay-rights>.

promulgation of legislations that criminalize or recriminalize homosexuality. The Nigerian setting provides an ideal example.

THE LEGAL DELEGITIMIZATION OF SAME-SEX RELATIONS IN NIGERIA

President Goodluck Jonathan’s signing of the SSMPA into law in 2014 changed the outlook for same-sex relationships in Nigeria. However, same-sex relationships had been known in parts of the country long before. The Hausa communities of the northern part of the country, without prejudice to their affiliation to Islam and their awareness of the strict Islamic prescriptions against the practice, had been aware of men who seek sexual pleasures not in women but in men.⁵⁰ What changed since earlier political periods has been the breaking of the culture of silence within which LGBTQ communities had previously conducted their lives. The promulgation of the SSMPA therefore occurred in response to the new vigor, visibility, and support that the LGBTQ communities had started to enjoy from international agencies, international human rights law, and local nonprofit agencies working on sexual minority rights. The SSMPA was therefore promulgated based on the premise that the Nigerian socio-cultural atmosphere is antithetical to homosexuality. The Nigerian state derives support in driving same-sex practices underground from mainstream religious communities of Muslims and Christians, all of whom consider LGBTQ practices as a perversion of divine sexual prescriptions for humanity.

The SSMPA, which had spent years in the parliament before it was passed and presented to the president for his approval, expressly “prohibits a marriage contract or civil union entered into between persons of same sex, and provides penalties for the solemnization and witnessing of same thereof.”⁵¹ The Act, which contravenes international conventions to which Nigeria is a signatory,⁵² equally voids such unions that are entered into outside Nigeria for the purpose of consummation in the country. It specifies: “A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing therefrom by virtue of the certificate shall not be enforced by any court of law.”⁵³ Probably out of the desire of its enactors to allow no lacuna in regard to what constitutes marriage as far as the Nigerian constitution is concerned, the Act provides as follows: “Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.”⁵⁴ Section 5 of the Act provides punishment for any infraction of the law as follows:

- (1) A person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment.

50 Rudolph Gaudio, “Unreal Women and the Men Who Love Them: Gay Gender Roles in Hausa Muslim Society,” *Socialist Review* 95, no. 2 (1995): 121–36. See also Rudolph Gaudio, “Men Who Talk Like Women: Language, Gender and Sexuality in Hausa Muslim Society” (PhD diss., Stanford University, 1996).

51 SSMPA, explanatory memorandum.

52 Some of these conventions include the Universal Declaration of Human Rights. For example, Article 2 of the Declaration provides as follows: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status. Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any limitation of sovereignty.” UN General Assembly, Resolution 217 A, Universal Declaration of Human Rights (Dec. 10, 1948). See W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives* (New York: Aspen Publishers, 2010), 79.

53 SSMPA § 1(2).

54 SSMPA § 3.

- (2) A person who registers, operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.
- (3) 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, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.⁵⁵

Given these structures, it is clear that not only will LGBTQ people face the wrath of the law in Nigeria, but so will acquaintances and allies who show sympathy to LGBTQ people in their various communities.

IMPACTS OF THE SSMIPA ON SAME-SEX RELATIONS IN NIGERIA

Human Rights Watch has detailed some of the negative impacts of the SSMIPA on LGBTQ people across the Nigerian nation. Through its report “Tell Me Where I Can Be Safe,”⁵⁶ compiled from interviews and interactions with a group of LGBTQ people across the country, widespread cases of human rights abuses and outright deprivation of same were revealed. According to the executive director of a nongovernmental organization with interest in minority rights based in Minna, Niger State, gay men, in particular, have become easy victims in the hands of the state security services, particularly the police. Whenever the police receive information about the gathering of groups of men anywhere in the state “they just head over to make arrests.”⁵⁷

It must be noted that before the promulgation of the SSMIPA, the objection or aversion for same-sex relations by the Nigerian populace was based mainly on their religious teachings and existing notion of what constitutes Africa’s cultural values and tradition. With the promulgation of this law, many Nigerians now consider it their civic duty to report homosexual gatherings to the security agents. For example, the police carried out a raid of a birthday party in Ibadan. The raid, it was suspected, must have been based on reports received by the police from members of the public that some homosexuals were gathered in a hotel. On their arrival, the police found a bag of condoms belonging to a HIV peer educator. They consequently arrested everybody at the party. The men were held in police custody for four days and eventually released, with no charges brought, but only after paying bribes to the police to avoid prison terms of up to fourteen years. The men said they had never been subjected to questioning, arrest, or detention prior to the enactment of the SSMIPA.⁵⁸

The state of insecurity within which LGBTQ people subsist has also become exacerbated by the activities of the non-state through the officially recognized security apparatus, popularly known as vigilante groups. In addition to their assignment to assist the police in maintaining law, security, and order in the cities, vigilante groups have added monitoring homosexuality.⁵⁹ The groups have taken it upon themselves not only to monitor people’s compliance with the law but also to

55 SSMIPA § 5.

56 Wendy Isaack, “Tell Me Where I Can Be Safe”: The Impact of Nigeria’s Same Sex Marriage (Prohibition) Act,” Human Rights Watch, October, 2016, <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act>.

57 Isaack, epigraph to “Tell Me Where I Can Be Safe” (quoting a comment from an executive director of an Abuja nongovernmental organization made October 2015).

58 Isaack, “Tell Me Where I Can Be Safe.”

59 Isaack.

mete out punishment to those they perceive as having committed infractions of same. In the hands of these groups, LGBTQ people have continued to suffer extrajudicial attacks and violence, including mob attacks, rape, arbitrary detention, and other human rights abuses.

Faced with conditions in which same-sex relationships have become anathema, LGBTQ people in Nigeria have devised ingenious means to self-preservation. These include self-censoring through conscious alteration of their gender identities in order to avoid suspicion and consequent arrest or attacks. It also includes avoidance of LGBTQ gatherings. In an environment where sexual minority rights enjoy little or no support, some LGBTQ people have also conformed to heterosexual practices, having children and adhering to socially prescribed gender norms.

One unexpected aftermath of the SSMPA is that it has “impede[d] sustainable national responses to HIV.”⁶⁰ The SSMPA has engendered a climate of fear in which carriers of the disease, fearing prison or detention, choose to remain silent. Gays and others whose sexual orientations do not conform to the general sexual norms in the society consequently become unwilling and unprepared to seek and adhere to HIV prevention, treatment, care, and other support services provided by government and nongovernmental agencies. In other words, the SSMPA appears to have achieved its desired result of running same-sex relationships underground in Nigeria and in establishing an atmosphere where government is not only in control of the outer rooms of life but also firmly in control of the “bedrooms,”⁶¹ but the challenges confronting the marriage system in Nigeria, and by extension other African nations, remain as acute as ever before. These are challenges that the SSMPA is probably designed not to overcome.

CONCLUSION

Across Africa, particularly in Nigeria, marriage has experienced many changes and transformations in recent decades. Challenges such as the spread of the HIV/AIDS epidemic, the increase in the number of single unmarried young adults, the inability to bear spousal financial responsibilities, and the erosion of marital values and norms such as procreation out of wedlock are now common knowledge in Nigerian society. African belief systems have been used to shape and construct notions of sexuality, and these have resulted in homophobic responses. One way that homophobic responses have found expression is in the promulgation of the SSMPA in Nigeria in 2014. As has been the case in other parts of the continent where legal instruments have been deployed to curb “the increasing visibility of homosexuality as a real and lived experience of African gays and lesbians,”⁶² the SSMPA has continued to generate fresh questions about minority sexual rights in the country. If the sociocultural factors that make homosexual practices more accepted in Nigeria are not well addressed, then the SSMPA is unlikely to achieve the objectives for which it was enacted.

60 Isaack.

61 Laurie Shrage, “Reforming Marriage: A Comparative Approach,” *Journal of Applied Philosophy* 30, no. 2 (2013): 107–21.

62 Bristow, “Homophobia,” 335.