The Sexual Orientation Question in Nigeria: Cultural Relativism Versus Universal Human Rights Concerns

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Abstract

We note that a political consensus on LGBT rights equating human rights is nowhere in sight in contemporary Nigeria. We rekindle the debate between universalism, as represented by the claim that human rights are the same everywhere, and cultural relativism, the conservative platform of the resistance to gay rights. We assert that the argument in favour of gay rights is rationally compelling but that the opinion of the overwhelming majority of Nigerians who oppose homosexuality cannot be easily dismissed. We examine arguments for and against the decriminalisation of homosexuality and conclude that supportive arguments validated by the harm principle present a convincing case for decriminalisation, notwithstanding the prevalence of anti-decriminalisation sentiments in Nigeria.

Keywords: Religion; Universalism; Cultural relativism; Homosexuality; Human rights; Gay rights

Introduction

The main argument of this paper is that given the widespread anti-gay sentiment in Africa, and Nigeria in particular, which is not going away any time soon, and in view of the increasingly loud clamour for gay rights worldwide, a compromise between advocates of the immediate decriminalisation of homosexuality and its continued criminalisation can be effective as an interim solution.

Western societies today put much premium on the issue of human rights. Developments in Europe such as the 1957 John Wolfenden Report that called for the decriminalisation of adult consensual homosexual behaviour in England had raised awareness about the difficult position of the LGBT community (Martin 1987, p. 240). But it was not until landmark judicial pronouncements reverberated from human rights and national courts in Europe and elsewhere[Footnote 1] that it finally dawned on the world that the West was becoming increasingly tolerant of homosexuality and that debates about human rights must include debates about LGBT rights. These judicial pronouncements emboldened the gay rights movement to the extent that by 2015 the movement had become strong enough to push for the legalisation of gay marriage in the United States. The international gay rights

movement includes alliances like the International Lesbian and Gay Alliance (ILGA) and the Organisation for Sexual Equality. The success of the gay rights movement in the West spawned a number of gay rights organisations in Africa, such as the Coalition of African Lesbians (CAL), Gay and Lesbians of Zimbabwe (GALZ), Gay Association of South Africa (GASA), Gay and Lesbian Organisation of the Witwatersrand (GLOW), Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Changing Attitude Nigeria (CAN), etc. The level of seriousness on the part of these mushrooming gay rights organisations in Africa varied from country to country. In Kenya, Uganda, and Zimbabwe the LGBT groups recorded some success as they procured judicial pronouncements which kept hope of the decriminalisation of same-sex conduct alive despite the overwhelming opposition to homosexuality in the countries where they operated.[Footnote 2]

Even if the African LGBT groups had been more vociferous, it is doubtful whether they could have recorded more success than what was eventually recorded given the stiff resistance to gay rights that characterises the great majority of African states. In South Africa where gay rights are constitutionally guaranteed, the majority still finds homosexuality offensive (see Bonthuys 2008, p. 480). This anti-gay stance of the majority holds in spite of the rash of judicial pronouncements by South African courts affirming LGBT rights.[Footnote 3] At the heart of the rejection of what is derogatorily called 'the gay agenda' by Africans is the almost ingrained belief that homosexuality is alien to African culture. Arising from this widespread but unsubstantiated perception is the question of cultural relativism and universal values.

Large swathes of the developing world regard the enthusiastic defence and promotion of certain values cherished by the West, for instance gay rights, with suspicion in the belief that this kind of enthusiasm mirrors the expansionist zeal that drove Western imperialism in Africa, Asia, and elsewhere (Donnelly 1984, p. 402; Mutua 2001, p. 202; Woodiwiss 2002, p. 139). Yet, regardless of the justification for the anti-imperialist stance vis-à-vis the question of human rights enforcement worldwide, there can be no doubt that some values agree across cultural divides and that respect for human dignity is one such value. There seems to be no valid reason for one culture to uphold human rights on the grounds of a shared dignity while another culture rejects such on the grounds that cultural diversity supplies the warrant to degrade humanity. Consequently, Western scholars like Halliday (1995, pp. 152–167) and de Varennes (2006, pp. 70–71) have risen in stout defence of the universality of human rights thesis. While a 'value' can mean whatever is held to be desirable in the class of things and beliefs regarded as conferring some form of benefit, we use the term in this paper in a fundamental sense of what is fundamentally desirable because it is basically true across cultures in respect of human and gay rights. In the same vein, a 'right' is employed in this paper to mean a rule-guided privilege available to all members of a society and put in place to regulate social behaviour (Martin 1993).

Nigeria is one of the most anti-gay nations in Africa and in the world. Multiple Nigerian laws criminalise homosexual conduct. The latest anti-gay law is the Same Sex Marriage (Prohibition) Act of 2014 which bans gay marriage throughout the territory of Nigeria.

A survey of the literature on LGBT rights in Nigeria reveals that there are two main camps. One camp, representing the dominant position of the overwhelming majority of Nigerians, takes a hard-line approach and demands the continued criminalisation of homosexuality

and gay marriage (see Onuche 2013; Obasola 2013; Chiroma and Magashi 2015, p. 22; Odiase-Alegimenlen and Garuba 2014). The other camp, a very small minority, insists that public objection to homosexuality carries little moral weight and that the Nigerian state should commence the process of decriminalisation in deference to international trends (Ezekiel-Hart 2014; Igwe 2015; Azuah 2016). In this paper we will steer a middle course, mindful of the shortcomings of the positions of the two opposing camps. The first section of this paper will clarify the concepts of cultural relativism, universalism, and human rights in the context of the debate between cultural relativists and universalists. The second section will focus the relativism-universalism debate on the LGBT question in Nigeria and evaluate the argument for and against the decriminalisation of homosexuality. The third section will examine the harm principle and the conclusive case it makes in favour of decriminalisation. The paper will conclude by once again highlighting the Nigeria dilemma which consist of the necessity of decriminalisation based on available evidence and knowledge about the phenomenon of homosexuality and strong public opposition to homosexuality.

The Concepts of Cultural Relativism, Universalism, and Human Rights

The clash between relativism and universalism generates arguments and counter-arguments because ethical judgment and decision-making go with one victorious claim or the other. The subject of gay rights has provoked passionate outburst from Africans and Westerners. While many Africans consider homosexuality alien to African culture and immoral, Westerners, or the majority of Westerners, consider it yet another sexual orientation, as harmless as heterosexuality can be and an indubitable fact of human existence. According to Donnelly (2001), gay rights are human rights precisely because the rights due gay persons are rights due human beings who only happen to have non-traditional sexual preferences. For Donnelly (2006):

> Human rights… are ordinarily understood to be the rights that one has simply because one is human. As such, they are equal rights, because we either are or are not human beings. Human rights are also inalienable rights, because being or not being human usually is seen as an inalienable fact of nature, not something that is either earned or can be lost. Human rights are thus "universal" rights in the sense that they are held "universally by all human beings. (p. 3)

Consequently, Donnelly (2001, p. 554) sees a nexus between the persecution of LGBT persons and rights-denying social ills like racism and religious persecution. The reference to human rights as inalienable rights implies the general applicability of privileges established in a community. That human rights are inalienable does not mean that the state, in the exercise of legitimate coercive powers, cannot deprive a criminal of their basic rights. While rights can be constrained as situations warrant, they are yet inalienable by reason of their equal application to all members of a functional society guided by the rule of law. A right, then, is a good or benefit accruable in principle to a member of an orderly society by reason of their humanity (natural right) or as a legal stipulation (legal right). Thus construed, human rights are legitimate moral demands derived from the understanding that to be human is to possess certain general characteristics like autonomy and agency (Griffin 2008) even as these moral demands are subject to political practice and interpretation (Raz 2010).

Relativism is the claim that there are no universal moral standards while universalism is the claim that moral values are universal or are the same everywhere, regardless of local peculiarities. Cultural relativism is a type of relativism which claims that "there are distinct, historically constituted, cultures, of equal ethical and political worth" (Halliday 1995, 162). In the context of human rights, strong or normative cultural relativism selects culture and seeks to ground ethical rules and substantive human rights in it while strong universalism disregards cultural nuances and upholds the uniformity of moral values across cultures (Donnelly 1984, p. 400). Culture captures the total way of life of a people, encompassing their language, religion, habits, customs, values, worldviews, science, etc. African cultures are strongly communitarian, which accounts for the privileging of cultural relativism over the idea of the universality of human rights. African brand of communitarianism is a metaphysical and ethical doctrine that describes the African value of togetherness which privileges the community over the individual. Research in this area was originally promoted in the works of Tempels (1949), Kagame (1956), Mbiti (1970) and articulated into a proper metaphysical and ethical doctrine by Menkiti (1984, 2004). Metaphysically, African communitarianism prioritises communitarian ontology over individualistic ontology.

In ethics, the doctrine also prioritises community values over individual rights. Recognising the conflict between communitarianism and the idea of the universality of human rights, the Ghanaian philosopher Kwame Gyekye in his idea of "moderate communitarianism" (1992, pp. 103–106) along with the Nigerian philosopher Michael Eze in his "Realist Perspectivism" (2013, pp. 393–396) and the Zimbabwean philosopher Bernard Matolino in what he calls "limited communitarianism" (2014, pp. 160–186), as advocates of African communitarianism, have sought to reconcile community morality–which is collectivist and prone to eclipsing individualism–with moral universalism which is largely sympathetic to individualism; whether they are successful in these attempts is a matter for another essay. In another work, Gyekye (2004, pp. 25–32), explains that relativism makes the objective evaluation of conflicting moral claims impossible since it approaches the problem of justification not from a sweeping (universalist) perspective but from the point of view of cultural diversity, with each culture having the right to choose and reject moral claims in accordance with the demands of customs and traditions. Cultural relativism will, therefore, appear to strongly endorse the assumption that all practices are justified as long as they have the backing of a particular culture. Universalism within the basic African communitarian framework will demand a shift from straight or traditional communitarianism to a moderate position. Gyekye thinks this shift in perspective is possible. He calls the diluted version moderate communitarianism (Gyekye 1992, p. 103 and 2004, pp. 35–69; cf. Metz 2014, pp. 318–319). But not everyone agrees that Gyekye's effort was successful; for example, Ikuenobe (2006), Eze (2013), Matolino (2009), as well as Chimakonam (2018), have variously criticised or expressed dissenting opinion to Gyekye's position.

Like Gyekye, Kwasi Wiredu thinks that there are values and beliefs that transcend cultures. He calls such values and beliefs cultural universals. Wiredu (1996, p. 21) accepts the basic definition of a universal as a general conception exemplified in individual or particular instances. He thinks that the very fact that people engage in cross-cultural communication means that cultural relativism is objectionable. He predicates universalism on the uniform possession of reason, as a distinct mark of the human species. To drive home his point,

Wiredu appeals to what he calls the Golden Rule which sanctions “sympathetic impartiality” or what we will regard as compassionate justice. The notion of sympathetic impartiality transcends local nuances and other peculiarities (Wiredu 1996, pp. 29, 31).

However, Keita (1997, p. 134) is of the view that Wiredu’s cultural universals do not in fact belong to any special universal category but are merely forms of cultural particulars. The possibility of Wiredu’s universals being merely the conceptualisation of particulars returns the debate to the continuing relevance of cultural relativism. Consequently, Henry Odera Oruka replaces Wiredu’s cultural universals with the idea of cultural fundamentals. Cultural fundamentals are distinctive ways of thinking and judging propositions and evaluating situations that are profoundly conditioned by the cultural prism (Oruka 1990). Precisely, a cultural fundamental “helps to mark one culture from another” (Oruka 1990, p. 32).

Gyekye provides a strong argument for universalism. But, then, his commitment to African collectivism brings universalism and relativism into an uneasy cohabitation. As Oruka’s notion of cultural fundamentals implies, cultural peculiarities cannot be wished away by simply appealing to human commonality since this commonality derives its validity from the fact that humanity converges on one horizon from divergent backgrounds. A dark-skinned person, for instance, is a human being, because he or she is dark or of African descent. Nevertheless, the very realisation that a value can be fundamental to a particular culture implies that people immersed in this culture regard it as objectively valid and more attractive than alternative perspectives from other cultures even if adherents of the fundamental cultural value are willing to tolerate the alternative perspectives. This tolerant stance will seem to be the reason behind the thinking that cultural relativism is radically opposed to moral universalism. The culturally relative manifests a universalist aspiration, which is why many contemporary African philosophers have sought to reconcile relativism and universalism in the very process of reconciling the community (which exemplifies relativist claims) with the individual (which exemplifies universalist claims). In the next section, we will explore the conflict between culture and human rights.

LGBT Rights in Nigeria: Culture Versus Human Rights

Nigeria’s Anti-gay Laws

When the British colonialists were leaving Nigeria, they left behind their criminal law system. Given the established presence of Islam in northern Nigeria, the British created the Penal Code for this region to assuage Islamic sensitivities. The Penal Code embedded mild forms of the Sharia legal system. In the south the Criminal Code was operational. Both codes criminalise homosexuality. Section 214 of the Criminal Code Act, Caps 77, Laws of the Federation of Nigeria 1990, categorises sodomy under unnatural acts together with bestiality. This means that even a woman can be found guilty of this offence if she allows a man to have sex with her “against the order of nature”. The prescribed punishment for sodomy in this section is 14 years imprisonment. Section 217 pointedly targets male homosexuality acts which may not amount to sodomy itself. Section 217 states that:

> Any male person who, whether in public or private, commits an act of gross indecency with another male, or procures another male person to commit any act of

> gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for 3 years.

Section 284 of the Penal Code in force in northern Nigeria has similar provisions. It prescribes 14 years imprisonment and a fine for “carnal intercourse against the order of nature”.

At the turn of the twenty-first century, twelve northern states—Jigawa, Borno, Gombe, Bauchi, Kaduna, Niger, Sokoto, Kano, Katsina, Kebbi, Zamfara, and Yobe—proclaimed the full operationality of the Sharia legal system in their territories. With the proclamation, a new twist was added to the history of the criminalisation of homosexuality. For the first time homosexual practices were banned on purely religious grounds and in deference to the dictates of a religion. The various state Sharia codes prescribe penalties for homosexuality in varying degrees of severity. While some states prescribe the death sentence, others prescribe severe lashing, with the severest penalties reserved for married offenders.[Footnote 4] The Same Sex Marriage (Prohibition) Act 2014, passed in response to liberal developments in the West, covers gay marriage which was largely overlooked by the older laws. Section 5 of the Act punishes any individual who enters a same-sex marriage or civil union in Nigeria with 14 years imprisonment. Sections 2 and 3 forbid an individual from carrying out activities that aid and abet homosexual marriage.

Objections to Homosexuality

Homosexuality is as topical as it is controversial in many places. Michael Woodford (2010, p. 2) observes that “[T]he legal recognition of same-sex relationships remains an important but also divisive issue worldwide”. The main objections to homosexuality find their bearing under the umbrella of cultural relativism. We will lump public morality and religious objections to homosexuality under the broader cultural objection. The public morality objection is invigorated by majority sentiments. 87% of Nigerians support the anti-gay marriage law (Ngozi Okonjo-Iweala Polls [NOIPolls] 2015). 95% oppose gay marriage (NOIPolls 2015). The Nigerian society considers homosexuality as so radical in its deviation from the norm that it passes as a perversion (Obasola 2013; Onuche 2013). Arguing from a religious perspective, Obasola (2013, p. 80) asserts that homosexuality is regarded by Africans as “a perversion…totally abhorrent to God.” For Obasola, deviation from the norm is not in itself the problem but rather the degree of deviation. Thus, while there is hardly any outcry over adultery or fornication which religious and cultural practices condemn, homosexuality, regarded as unnatural and stifling human procreative capacity, attracts strong societal aversion. While explaining the high level of support for the Same Sex Marriage (Prohibition) Act of 2014 among Nigerians, Onuche (2013) writes:

> Marriage constitutes the focus of existence. Life in the community in its different facets revolves around and climaxes in marriage and procreation. This traditional concept of marriage is being challenged by the demand for legal recognition of same sex couple. (p. 91)

Opponents of the Same Sex Marriage (Prohibition) Act of 2014 insist that its passage was a violation of the 1999 Constitution of the Federal Republic of Nigeria which guarantees the right to privacy, among other fundamental human rights, for all Nigerian citizens. Igwe (2015), a tireless defender of gay rights and a believer in gay rights equating human rights, insists: "[T]he campaign for the recognition of the rights of gay people in Nigeria goes on…It is about the rights of Nigerian citizens." He rejects the cultural objection to homosexuality on the grounds that Christianity and Islam largely inform the anti-gay sentiments in Nigeria even as these oriental religions were never originally part of African cultural appurtenances. Azuah (2016) endorses Igwe's line of thinking, adding that homosexuality has always been a fact of African existence. Azuah's interviews with LGBT Nigerians confirm the strong anti-gay sentiments of the Nigerian society. For Azuah, the only solution to the problem of homophobia in Nigeria is the complete repeal of all anti-gay laws. She rejects the appeal to majoritarian morality in the belief that consensual adult homosexual conduct is harmless and that homosexuality is just another sexual orientation. Supporters of the law like Chiroma and Magashi (2015) retort that the anti-gay marriage law did not violate the 1999 Constitution because the Constitution permits the passage of laws in the interest of public morality. The pro-ban camp points to Section 45(1)(a) of the Constitution for Justification. Section 45(1)(a) states that: "Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health". Sections 37, 38, 39, 40 and 41 guarantee right to privacy, freedom of conscience and belief, freedom of expression, freedom of association and freedom of movement. The anti-gay laws operative in Nigeria are presumed to violate the right to privacy and the freedom of association of homosexual individuals. It may be argued that the reference to "reasonably justifiable" in Section 45(1)(a) creates a leeway for judicial activism. However, this opening can only be exploited in an atmosphere of growing tolerance towards homosexuality. For Ezekiel-Hart (2014, pp. 5–6), since Nigeria claims to seek the establishment of a just and egalitarian society, discrimination against gay persons contradicts the stated socio-political goal of the country. Ezekiel-Hart (2014) asserts the right of adults to "choose their partners and the kind of sexual expression they prefer" (p. 7). If the constitutionally guaranteed rights of gay persons are violated on account of their sexual orientation, it is argued that here is a case of both human rights violation and discrimination.

Advocates of the repeal of Nigeria's anti-gay laws will point out that culture is not a static phenomenon. This is no doubt true, but what is to be done when a culture firmly resists newer trappings and developments from the outside as is the case in Nigeria where the two dominant religions, Christianity and Islam, firmly condemn homosexuality? These two religions have been grafted onto Nigerian culture, their foreign origin notwithstanding. Can there be recourse to the argument that homosexuality was already culturally rooted in Nigeria prior to the advent of Christianity, Islam, and colonialism, and that it is an indisputable fact of human existence? Numerous studies have shown that homosexuality existed in pre-colonial Africa although the extent to which it was tolerated has not been clearly determined given the ideological leanings of opponents and proponents of gay rights (see Ojoade 1983; Fremont 1983; Amadiume 1987; Gaudio 2009; Ajibade 2013; cf. Olanisebe and Adelakun 2013, pp. 199–200; Obasola 2013). The presence of homosexuality in pre-colonial Africa meets the objection that homosexuality is a Western import, but it

does not alter the fact that contemporary Nigerian society is very strongly opposed to homosexual behaviour.

The Scientific Argument for LGBT Rights

Scientists have argued that there may, after all, be a biological basis of homosexuality. Empirical data from twin studies and fraternal birth-order, for example, support the biological thesis. Studies by Bailey and Pillard (1991), Bailey and Benishay (1993), and Hershberger (1997) found a high level of sexual orientation concordance in identical twins. In Bailey and Pillard's study, up to 52% of identical twins were concordant (that is, when one twin is gay the other too is gay) compared to 22% in non-identical twins. The high rate of concordance is assumed to support the biological thesis. Bogaert's (2006) study of fraternal and non-fraternal older brothers found that the chances of a man being homosexual is proportional to the number of elder brothers he has; that is, the more male children a woman gives birth to the higher the chances of the next male child turning out gay. This established trend supposedly supports the biological determinism thesis because it indicates that there is a pre-natal root of the fraternal birth-order phenomenon. Bogaert's work corroborated the findings of earlier researchers in the field like Blanchard and Zucker (1994). Hamer et al. (1993) claimed to have discovered an Xq28 region of the X chromosome in male homosexuals which may be largely responsible for the transfer of gay characteristics in men. The fact that it is the mother who contributes the X chromosome fuelled speculation that maternal genetic constitution plays a role in male homosexuality. These genetic linkages have not been as strongly established among homosexual women as is the case with homosexual men.

While there is no conclusive evidence that homosexuality is inherited or that there is a gay gene, the empirical data generated by proponents of biological determinism are convincing. The data undermine cultural relativism and support objective universalism to the extent that they come down heavily on the side of the claim-type "scientific research in recent years has established a high likelihood of the biological basis of homosexuality in men". The general reference to 'men' rather than 'African men', for instance, clearly indicates the validity of the trans-cultural claim of the phenomenon of homosexuality. Scientific data generalise homosexuality rather than restrict it to a particular set of people. In the next section, we will argue that the harm principle supplies conclusive argument for the decriminalisation of homosexuality.

The Harm Principle and the Case for the Decriminalisation of Homosexuality

The harm principle was first formulated by the British philosopher J.S. Mill. The principle limits the powers of the state to interfere with the private business of rational adults. In keeping in line with the Western liberal tradition of safeguarding the private sphere of the individual from state encroachment as well as unjustified interference of one individual in the affairs of another, Mill (2003, p. 80) asserts that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their members, is self-protection". The second part of the principle submits 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" (Mill 2003, p. 80). The harm

principle sets out the conditions under which the state and public opinion can restrict the rights of the individual and mete out punishment proportionate to offences committed. According to the principle, it is better to let the individual go to the bad than to try to coerce them to act against their will, provided the voluntary actions of the individual pose no harm to others.

It does not matter how offensive or contrary to other people's beliefs the individual's actions may be since "Over himself, over his own body and mind, the individual is sovereign" (Mill 2003, p. 81). The harm principle has been invoked to defend individual liberty on issues ranging from gay rights to freedom of speech (Holtug 2002). We focus the scope of application here on the criminalisation of homosexuality in Nigeria. We pointed out in an earlier section that public morality and religious objections to homosexuality in Nigeria come under the rubrics of cultural relativism. On the basis of cultural relativism, the objector will assert that homosexual practices violate the beliefs and traditions of Nigerians. We showed earlier that cultural relativism manifests a universalist aspiration since it views its claims as fundamental and true. If this is the case, then the cultural relativist who objects to homosexual practices seeks to impose their beliefs on homosexuals. Such imposition cannot be justified in the light of the harm principle.

If it can be demonstrated that consensual homosexual practice poses a measurable threat to the welfare of members of the society, then the criminalisation of homosexuality by the Nigerian state is justified. If, on the other hand, consensual adult homosexual practice is deemed harmless and considered a sexual orientation no more prone to abuse than heterosexual practice, then the laws criminalising homosexuality will appear unjust and universal human rights concerns will trump relativist objections. Against the objection that homosexuality is immoral and offends public moral sentiment, we note that majoritarian sentiment cannot be the basis of the denial of gay rights since the majority is not infallible. Scientific evidence so far strongly supports the idea that homosexual persons cannot help being who they are. Dissatisfied, the objector to homosexuality may want to strengthen their case by reinforcing the argument from tradition and refer to cultural practices and religious beliefs. The objector may say Afrocommunitarian views approve procreation as a social good and that homosexuality is wrong precisely because it does not prioritise procreation which the community has endorsed as a good (Matolino 2017, pp. 70–71). The harm principle again defeats this objection since one person deciding not to have children does not threaten the welfare of other members of the society in a directly measurable way, although it is possible that in the long run the decision not to have children may lead to depopulation and reduce the workforce available to the community. But this point does not necessitate the denial of gay rights since consensual homosexual practice among adults involves individuals who make free choices with full cognizance of the consequences of their actions. We showed earlier that Afrocommunitarianism is compatible with individualism and the universalism that goes with individualism. Consequently, Afrocommunitarianism cannot be invoked to deny gay rights.

The objector may say that since Nigeria is a country dominated by people of religious sensibility, it is right to criminalise homosexuality. Biblical injunctions found in Leviticus 20:13, Romans 1: 26–27, and elsewhere expressly forbid homosexuality. Koranic verses in Surat Al-Anbiya and Surat An-Naml disapprove of homosexuality. The objector will point to

the religious factor in defence of criminalisation. But while it is reasonable for a Christian or Muslim to conscientiously object to homosexuality, it is unreasonable for the believer to impose the burden of restriction of liberty on homosexuals for the flimsy reason that the former opposes homosexuality on religious grounds. This imposition or the demand for the imposition will be deemed wrong since homosexual practice does not pose any harm to the religious objector. Additionally, it can be argued in support of decriminalisation that the Bible and Koran are open to modern interpretation, having been written at a time when little was known about the causes of homosexuality.

Now that there is a consensus that homosexuality is in itself a harmless sexual orientation, there is no good reason to criminalise it. Christian theologians like Boswell (1980) have seized this idea to argue against homophobia, emphasising the fact that Christianity is a welcoming religion built on mercy and love.

Consequently, the criminalisation of homosexual practice in Nigeria poses a moral question. The case against homosexuality presented on the basis of tradition, built on elements of majoritarian morality and religious and cultural sentiments, fails to defeat the harm principle. Fairness will seem to demand that laws criminalising homosexuality in Nigeria be expunged from the legal framework since they clash with objective moral considerations vis-à-vis the homosexuality question. For, we are confronted with a situation of individuals having their basic rights of association denied for doing things that do not threaten the welfare of the society.

But if it is agreed that the argument so far favours decriminalisation, a major obstacle remains, which may necessitate an interim solution based on compromise between the two opposing camps in Nigeria. While the argument favours the pro-gay camp, public opinion is firmly on the side of the anti-gay camp. It will be difficult for any democratic government, no matter how sympathetic to the case for decriminalisation, to muster the political will required to suddenly and completely implement decriminalisation policies if 87–95% of Nigerians are opposed to homosexuality and gay marriage (NOIPolls 2015). Nigeria's anti-gay laws are layered, being enactments at secular and religious levels. Even if politicians, who must win elections, somehow summon enough courage to repeal the anti-gay laws (cf. Ebobrah 2012), it is difficult to see how the Islamic north can be convinced to hastily jettison the Sharia legal system that prescribes death by stoning for homosexuality. Noteworthy is the relative impotence of the rule of law in Nigeria and the ongoing struggle to contain the Boko Haram Islamic insurgency in the north-eastern tip of Nigeria. The insurgency has as its goal the transformation of Nigeria into an Islamic republic governed by strict Sharia laws. A sudden and broad repeal of the anti-gay laws will almost certainly trigger a violent reaction from an already unruly population.

Consequently, a compromise between opponents and proponents of gay rights is desirable. But is such a compromise possible? This is not an easy question to answer in today's Nigeria, but we think it is possible for the government to, in the meantime, quietly decriminalise private consensual adult same-sex conduct without lifting the ban on public display of homosexuality.

Conclusion

The compromise suggested in this paper may not go down well with 'radical' proponents of gay rights and their 'radical' opponents in the other camp. The rhetoric of radical proponents may resonate in the Western world where the liberal narrative dominates social life; however, the Nigerian situation differs profoundly from the situation in the West. As compelling as the argument for the decriminalisation of homosexuality is, the thesis of cultural relativism continues to provide a counter-narrative. Gallor and Fassinger (2010, pp. 287–288) have indicated that it is important to take ethnic and cultural diversity/differences into consideration in gay and lesbian related research. In this regard, one may grant the position of the cultural relativists as important. Nigeria, for example, is indeed modernising, but it appears that Nigerians have found a way of selecting the aspects of Western-inspired modernity that they find attractive while resisting other aspects. Scholars like Tamale (2014, p. 166) have tried to avoid this stark fact by blaming Africa's heightened anti-gay sentiments on external factors such as pressure from American conservative evangelists. This position is simplistic as it denies agency to Africans (cf. Anderson 2011, p. 1602).

Given the remarkable intensity of the opposition to homosexuality in Nigeria and the strength of the case for decriminalisation that is hinged on the harm principle, we argued in this paper for a compromise between respect for public sentiments and deference to the demand of human rights. The compromise we offer is the immediate decriminalisation of private consensual adult homosexual conduct and the continued ban on the public display of homosexuality. This compromise may not satisfy radical proponents of gay rights like Igwe and Azuah and radical opponents of gay rights in Nigeria like Obasola, but it is the most attractive and realistic interim measure. Wisdom resides in this compromise because, short of the use of physical force, gay rights activists cannot impose their wish on Nigerians and gay rights opponents, short of uprooting Nigerian homosexuals from their country, cannot erase the fact that there are homosexuals in Nigeria who will continue to agitate for their rights.

Ethics declarations

Conflict of interest

There are no conflicts of interest in this research.

Ethical Approval

This article does not contain any studies with human participants or animals performed by any of the authors.

Funding

This research was not funded by any organisation.

Notes

[1.] See *Dudgeon v United Kingdom* ECHR (23 September 1981) Ser A 45, *Karner v Austria* Application No 40016/89, *L and V v Austria* Application No 39392/98, *Modinos v Cyprus* Application No 15070/89, *Toonen v Australia* Communication No 488/1992/UN Doc CCPR/C/50/D/488/1992/(1994), *Lawrence v Texas* 539 US 558 (2003), *Naz foundation v Union of India* WP(C) 7455/2001.

[2.] See the cases *Eric Gitari v Non Government Organisation Coordination Board & 4 others* (2015), Petition 440 of 2013 Kenya Law Report 2016, *Victor Juliet Mukasa & Yvonne Oyo v Attorney General* Misc Cause No 247/06, and *Banana v the State* (2000) 4 LRC 621 (ZSC).

[3.] See *Minister of Home Affairs v Fourie* (2006) 1 SA 524 (CC), *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) (1) SA 6 (CC), *National Coalition for Gay and Lesbian Equality & Others v Minister of House Affairs* (2000) (2) SA 1(CC), *Suzanne Du Toit & Anor v The Minister for Welfare & Population Development* (2000) 10 BCL 1006 (CC).

[4.] Jigawa State Sharia Penal Code, for instance, prescribes 100 lashes and a year's jail term for single male offenders while married offenders are to be stoned to death (*rajm*). Female offenders receive a milder punishment as they are given up to 50 lashes and a six-month jail term. Kano State punishes male homosexuality with death by stoning for married offenders and 100 lashes, including a one-year jail term, for single offenders. The Kano and Katsina laws prescribe equal penalties for male and female homosexuality. Like married male offenders, married female offenders face death by stoning. See Jigawa State Sharia Penal Code Law 2000, Law No. 12 of 2000, Gazette Vol 1, No 12, 2000, Kano State Sharia Penal Code Law 2000, Katsina State Sharia Penal Code Law 2001, Gazette Vol 12, No 23.

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