

A SUMMARY OF THE ANTI-LGBT CRIMINAL LAWS OF NIGERIA – by Legal Koboko

Due to the Federal system of Government practiced in Nigeria, the Federal Government through the National Assembly and the Governments of each of the 36 States through their various Houses of Assembly are empowered by the constitution to make laws for the citizens of Nigeria.

Both the Federal Government and the each of the State Governments of Nigeria have enacted laws prohibiting and punishing crimes in Nigeria.

The Federal Government operates with both the Criminal Code Act, which was made in 1916 by the Colonial Government, and the Penal Code Act which was made in 1960 by the same Colonial Government.

The Criminal Code Act is applicable to southern Nigeria, while the Penal Code Act is applicable to northern Nigeria. The offences contained in those Acts are ordinarily prosecuted in Federal Courts.

As for the criminal laws enacted by the States, they are basically contained in their respective Criminal Code Laws (for States in the south) or Penal Code Laws (for States in the north). The offences contained in those laws are prosecuted in State Courts. The contents of those laws are however usually a verbatim reproduction of either the Criminal Code Act or the Penal Code Act.

In addition to the laws made by the Federal and State Governments, Sharia law also forms part of the body of criminal laws applicable in some parts of northern Nigeria.

It must be noted that the Constitution of the Federal Republic of Nigeria 1999 is the basic law of the land. This basic law is the law that gives validity to all other laws in force in Nigeria. All other laws take their validity from the constitution. What this means in practical terms is that where the provisions or letters of any law in Nigeria goes contrary or is inconsistent with any of the sections of the Constitution, the Nigerian courts should be approached and asked to declare those provisions null and void to the extent of the inconsistency.

The current Nigerian laws, some provisions of which presently infringes on the rights of every LGBT Nigeria, includes:

- a. The Criminal Code Act
- b. The Penal Code Act
- c. The Criminal and Penal Code Laws of the various States of the Federation
- d. The Same Sex Marriage (Prohibition) Act
- e. The Sharia laws applicable in the northern States of Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.

Some provisions of these laws infringes on the fundamental rights of members of the LGBT community. They are yet to be challenged in court.

THE CRIMINAL CODE ACT

The relevant sections of the Act here are sections 214, 215 and 217.

Section 214 provides:

“Any person who has carnal knowledge of any person against the order of nature, or has carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.”

EXPLANATION:

This section prohibits and seeks to punish penetrative sex (aka anal sex) between a man and a woman, and a man and another man. It also provides for punishment for penetrative sex between a man and lower animals (i.e. bestiality). The section does not contemplate lesbianism because the law talks about having “carnal knowledge”. Carnal knowledge is complete when there is penetration. A woman cannot penetrate another woman or man, or an animal. Therefore lesbians are not caught up with this section.

To break it down further, the aim of this section is to punish any man (not just a gay man) who penetrates his boyfriend or girlfriend or wife or female/male sex mate through the anus. It also punishes the Bottom in a gay relationship who allows a Top to have sex with him.

The Court of Appeal in the case of **Magaji vs. Nigerian Army** [2004] 16 N.W.L.R (pt. 899) – while interpreting section 81(1)(a) of the Armed Forces Decree No. 105 (as amended), which is similar to section 214 of the Criminal Code Act – held that “penetration of any other orifice (apart from the vagina) such as anus and mouth comes within the ambit of the phrase “against the order of nature”.

So, this section also seeks to punish oral sex between men. The punishment is 14 years imprisonment.

Notice how the colonial authorities decided to tar bestiality and anal sex with the same brush. This might be part of the roots of the homophobia that persistently compares homosexuality with bestiality.

Section 215 provides:

“Any person who attempts to commit any of the offences defined in the last preceding section is guilty of a felony, and is liable to imprisonment for seven years. The offender cannot be arrested without a warrant”.

EXPLANATION:

This section seeks to punish all attempts made at engaging in anal sex. It will not be a defence in court to claim that you and your boyfriend or sex mate tried having anal sex but then ended up not having it.

If, for instance, you hook up with a man on social media and he invites you to his house for the purpose of having anal sex with you, but you eventually decided not to have sex again because, upon getting to his house, he finds out that his family had decided to pay him a surprise visit and were waiting for him at his door, putting both of you out of the mood for having sex, this section

says you will still be punished with 7 years imprisonment for attempting to engage in the act in the first place.

Section 217 provides:

“Any male person who, whether in public or private, commits any act of gross indecency with another male person, 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 three years. The offender cannot be arrested without warrant”.

EXPLANATION:

It will not be a legal defence to claim that you and your boyfriend or sex mate do not engage in anal and oral sex. Even when you engage in other forms of sexual activities apart from anal sex with him, this section was designed to catch up with you. It also punishes you for merely attempting to engage in that kind of sexual activity, even where you ended up not doing it, just like in section 215 above.

The section goes further. Let us assume you feel the need to have sex, and you call an old friend asking him to help you hook you up with any “market.” Once your friend agrees and hooks you up, or even tries to hook you up but fails for any reason, probably because “market” has refused to sell, he will be liable to conviction under this section.

The punishment is three years imprisonment.

THE PENAL CODE ACT

The relevant sections of the Act here are sections 284, 285, 407 and 408.

Section 284 provides:

“Whoever has carnal intercourse against the order of nature with a man, woman or any animal, shall be punished with imprisonment for a term of which may extend to fourteen years and shall also be liable to fine.”

EXPLANATION:

If you live in northern Nigeria, this section applies to you. Just like section 214 of the Criminal Code Act, this section seeks to punish all forms of penetrative and sex generally between a man and a woman, another man or an animal. The punishment, just like in the Criminal Code, is also 14 years imprisonment.

However, I have noticed a curious aspect of this section. While section 214 of the Criminal Code Act also punishes both the woman and the gay Bottom who allow themselves to be penetrated “against the order of nature”, this section is silent on that. This means that this section will only punish the active partner (aka gay Top) and or the straight man who engages in such sexual

activity, while the woman and the passive partner (aka gay Bottom) cannot be convicted under this section.

Section 285 provides:

“Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of that act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine. Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or a person or persons entrusted with his care or education shall not be deemed to be consent within the meaning of this section”.

EXPLANATION:

This section is similar to section 217 of the Criminal Code Act as stated above in the sense that it prohibits and seeks to punish “gross indecency”. That is where the similarity ends.

While section 217 of the Criminal Code Act specifies that it is interested in punishing only male persons who engage in “gross indecency”, this section does not show such a bias. Furthermore, unlike section 217 of the Criminal Code Act, this section introduced the element of consent to the offence. It will therefore not be an offence under this section if your boyfriend or sex-mate consents to engage in this kind of sexual activity with you. In very practical terms, this section is saying that where two gay men get charged to court for “having sex” with each other, they can, in their defence, plead that what they had was not penetrative sex of any kind, and that the sexual contact they did have was done with mutual consent. If they plead this section in their defence and state that both of them consented to the act, I am of the opinion that the court will be minded to discharge and acquit them.

But then, this is yet to be tested in court. I am not aware of any judicial authorities where this section has been put to the test.

Section 405(2)(e) provides:

“The term ‘vagabond’ shall include any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession”.

Section 405(3) also provides:

“An ‘incorrigible vagabond’ shall mean any person who after being convicted as a vagabond commits any of the offences which would render him liable to be convicted as such again”.

Section 407 provides:

“Whoever is convicted as being a vagabond shall be punished with imprisonment which may extend to two years or with fine which may extend to four hundred and fifty naira or both”.

Finally, Section 408 provides:

"Whoever is convicted as being an incorrigible vagabond shall be punished with imprisonment which may extend to three years or with fine which may extend to six hundred naira or with both."

EXPLANATION

These sections seek to label and punish male cross-dressers and gay prostitutes. The cross-dressers and prostitutes are labeled as 'incorrigible' when they refuse to allow their conviction and detention serve as deterrence to being themselves and/or plying their preferred trade. 'Vagabonds', if convicted, get punished with 2 years imprisonment with an option to pay a fine instead of going to prison. 'Incorrigible vagabonds', on the other hand, get punished with 3 years imprisonment when found guilty. However, an option of fine is still made available to them.

THE SHARIA LAW

Under Sharia law, there is what is known as Hudud. It means "limit, boundary." It is an Islamic term referring to punishments which under Islamic law (sharia) are mandated and fixed by God.

Traditional Islamic jurisprudence divides crimes into offences against God and those against man. The former are seen to violate God's hudud or "boundaries", and they are associated with punishments specified in the Quran and in some cases inferred from hadith. The offences incurring hudud punishments are zina (unlawful sexual intercourse which includes gay sex), unfounded accusations of zina, drinking alcohol, highway robbery, and some form of theft.

Hudud punishments range from public lashing to publicly stoning to death, amputation of hands and crucifixion.

Meeting hudud requirement for zina and theft was virtually impossible without a confession, which could be invalidated by a retraction.

All schools of traditional jurisprudence agree on the basis of hadith that zina offences are to be punished by stoning if the offender is muhsan (adult, free, Muslim, and married), with some extending this punishment to certain other cases and milder punishment such as lashing prescribed in other scenarios. The offenders must have acted of their own free will.

Unfounded accusation of zina is punishable by 80 lashes.

There are certain standards for proof that must be met in Islamic Law for zina punishment to apply. In the Shafii, Hanbali, and Hanafi law schools, Rajm (public stoning) or lashing is imposed for religiously-prohibited sex only if the crime is proven, either by four male adults witnessing at first hand the actual sexual intercourse at the same time or by self-confession.

If a person alleges zina and fails to provide four consistent Muslim witnesses, or if witnesses provide inconsistent testimonies, they can be sentenced to 80 lashes for unfounded accusation of fornication, itself a hadd crime.

EXPLANATIONS:

If you are a Muslim gay man and reside in the northern States of Nigeria where Sharia law applies, that law applies to you. (I have heard some Muslims who say that it applies to Muslims

who chose to. I am not clear on that). But the one thing that is clear is that where you are not a Muslim, Sharia Law will only apply to you if you choose it as your personal law.

Where a person is found guilty of having gay sex under Sharia law, the punishment is the death penalty if he is married, and a stipulated number of lashes if he is unmarried.

However, the catch is in the standard of proof which must be met before a man can be found guilty of such an offence. In practical terms, if you are charged under Sharia law with having gay sex, you cannot be convicted without the evidence of four male witnesses whose evidence must be consistent with each other and who must testify that they were there, present, when the sexual act was going on between you and your partner.

If the evidence of any of the four witnesses is found to be contradictory, or it is discovered that any of them was not there present to witness the sexual activity, the witnesses will be found guilty and punished with 80 lashes. You cannot be convicted on the evidence of three consistent witnesses. They must be four.

You are free to volunteer a confessional statement, and you can be convicted based on your confessional statement. However, you are free to recant your statement. Once you do that, you cannot be convicted based on the confessional statement.

THE SAME SEX MARRIAGE (PROHIBITION) ACT

Interestingly, this law has only 7 Sections.

SUMMARY OF THE SECTIONS:

Section 1 of the Act prohibits all marriages and civil unions between persons of the same sex both in Nigeria and abroad.

This means that if you finally decide to travel to an LGBT friendly country and get married to your lover, the marriage will not be recognized here in Nigeria. The marriage and the marriage certificate will be void here. And because it is not recognized here in Nigeria, you cannot enjoy any of the legal benefits the Nigerian State makes available to married people. Section 5 goes ahead to punish such a marriage or civil union with 14 years imprisonment.

Section 2 forbids the solemnization of marriages between you and your lover. So whether you decide to get married abroad or in the privacy of your house, you still cannot solemnize same in a place of worship in Nigeria. Section 5(3) of the Act will punish the pastor or priest who solemnizes that marriage.

Section 3 doesn't want to leave any room for ambiguity. It specifically says that the only marriage contract that shall be recognized in Nigeria is the one between a man and a woman.

If you decide to register a gay club, gay society or organization, section 4(1) of the Act frowns on it. The question here is: what makes a club or organization gay? Is it because the majority of the customers or members are gay? If the answer is yes, then this would mean that if a gay man decides to open a bar just like everyone else, and his business starts attracting more and more clients and customers who happen to be gay, he will, without intending it, automatically be on the wrong side of the law by merely being the proprietor of such a business. And if he decides to register it, that act of registration could be another count in the charge sheet at the High Court. Section 5(2) seeks to punish such a person with 10 years imprisonment.

Section 4(2) seeks to punish what it calls “the public show of same-sex amorous relationship.” In practical terms, if you are gay and you live in Nigeria with your boyfriend, do not flaunt him on the internet or anywhere public. That could get you a 10 year jail term.

Finally, section 7 of the Act defines same sex marriage 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.”

In practical terms, if you finally decide to live together in the same house with your lover, this law can punish you for it with a prison term of up to 14 years.

However, the ingredients of this offence are two. One, the prosecutor must prove that you and your lover are living together. The mere coming together between you and your lover e.g. a visit for a few days or weeks, is not sufficient proof of living together. I think it must be established with sufficient evidence that your lover’s residential address is the same as yours.

The second ingredient is the purpose of the living together. The prosecution must prove beyond reasonable doubt that the reason why your lover shares the same apartment with you is for sexual purposes. It is only when these two are established with cogent and compelling evidence that the court can go ahead and convict you and your lover.

CONCLUSION

The conclusion one is forced to draw, after this brief summary of the laws affecting the LGBT community in Nigeria is that the Law does not understand the meaning of human sexuality. The criminal laws against the LGBT community seek to protect a normative order; the so-called order of nature, which has at its base a presumption that every male person is and ought to be sexually attracted to females. The belief is that sometimes, some male persons may decide to deviate from this order by engaging in sexual activities with other males.

When the case of *Magaji v. Nigerian Army* [2008] 8 NWLR (pt. 1089) went up to the Supreme court, a very renowned Justice of the Supreme Court, Niki Tobi J.S.C, had this to say about Major Bello Magaji, the man who was convicted for having gay sex:

“What the appellant decided to do was to dare nature in his craze for immoral amorphous satisfaction. By his conduct, the appellant reordered God's creation. Has he got the power to do that? No. No human being, whether in the military or not, has the power to reorder God's creation. After all, we are not talking of fighting a war. By his conduct, the appellant has brought shame to himself. Although a bit of the dent is on the Army, I am not prepared to hold that Force guilty of the conduct of the appellant. The Army did not ask him to commit this heinous and atrocious offence. He is a terrible criminal. And he is alone, clearly alone.”

Since the Law does not understand or contemplate the idea of two males or two females getting sexually attracted to each other, it does not and cannot prohibit it. **The Law does not prohibit and punish the fact of one being gay. It only prohibits the activities which proceed from that fact. Being gay is not illegal in Nigeria. The police should not arrest anyone merely for being gay.** If that happens, the person should go to court to enforce his fundamental rights. Gay sex is illegal in Nigeria. But the sexual activity must be proven beyond reasonable doubt in court.

This whole summary can be further broken down thus:

1. In Nigeria, you cannot go to jail merely because you are out as a gay man.
2. Before you can be convicted and sentenced to a term of years in prison by a court of competent jurisdiction on gay sexual offences, you must be linked with a particular sexual activity with all the elements of the offence which took place between you and another male person at a particular date and venue.
3. Contrary to what people think, it appears the anti gay laws in the North are less stringent than in the South.
4. The burden of proof under Sharia law is so high that it is nearly impossible to convict anyone charged under it. Even where the convictions are secured, the sentence is almost always not carried out.
5. In Nigeria, it is legally not safe to go public with the news of having a boyfriend or girlfriend.
6. You may be charged with the offence of being in a gay marriage if you share an apartment with your partner or anybody of the same sex you regularly have sex with.
7. If a business attracts customers who happen to be gay, registering, or financing or patronizing such business is considered a criminal act.