ANALYSIS OF THE PROHIBITION OF SAME SEX MARRIAGE UNDER NIGERIAN LAW

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DECLARATION

I solemnly declare that this project is the product of my personal endeavour and it has not been presented to the best of my knowledge, anywhere before. All ideas from previous writers have been duly acknowledged. I remain solely responsible for all views expressed and errors therein.

_____ _____

Francis Chukwujekwu ANOZIE DATE

CERTIFICATION

This Project titled: "Analysis of the Prohibition of Same Sex Marriage under Nigeria Laws" by Francis Chukwujekwu ANOZIE meets the regulation governing the award of degree of MA. Law of Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is sincerely dedicated to God Almighty for His infinite mercy and His loving kindness since the days of my life and for giving me the strength to complete this piece of work, and to the loving memory of my Late Parents.

ACKNOWLEDGEMENT

My deepest appreciation goes to God Almighty the giver of all knowledge. And also to my Supervisor, DR A.M. MADAKI for his patience, time and continuous guidance in supervising and ensuring that this work comes out worthwhile. He was simply the best ever seen.

Then to my friends, Fabian Augustine and Faith Anderson, for their immense assistance, correction, contributions towards this work; remain blessed. And finally, to those who in one way or the other contributed to the success of this work. I said may God Almighty reward you abundantly, Amen.

TABLE OF ABBREVIATION

Cap.	Chapter
E.U.	European Union
i.e.	*id est* - "that is"
ibid.	ibidem
L.F.N.	Laws of the Federation of Nigeria
L.G.B.T.	Lesbian, gay, bisexual and Transgender
Loc. Cit.	Loco Citato
No.	Number
Op. Cit.	Opus Citato
p.	Page
Pp.	Pages
s.	section
U.N.	United Nations

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Jadesimi v. Okotie – Eboh *28*

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ABSTRACT

Marriage as an institution has been for ages the image of unity despite differences in culture, religion and civilization, and to some extent, has reflected the belief that neither man nor woman is perfect or complete without the other. This institution of marriage is today under serious attack from many quarters such that any keen observer can discern in the secular mentality of the contemporary world, an effort to undermine its natural and religious meaning. The meaning of Marriage is today being distorted to include same sex relationships. In view of this, a law has been passed in Nigeria to protect marriage as a union of a man and a woman; thus banning, prohibiting and criminalizing all forms of same sex marriages in Nigeria. This research examines the meaning of the concept 'Marriage' distinguishing it from other types of marriages 'in quote' including 'same sex marriage' trying to analyze the implication of redefining Marriage as a union of two Persons; analyzing the essential elements / ingredients of these marriages as well as the likely implications if accepted as marriages in Nigeria. In the course of making these analyses, the researcher took cognizance of the challenges likely to impeach the enforcement of the same sex marriage prohibition Act considering the position of the human right activists as well as other human right laws applicable to Nigeria. The researcher thus discovered that there are some lacunas in the Act as it failed to spell out in clear terms the necessary ingredients of what constitutes the offence of same sex, thereby creating opportunity for possible abuse of people's rights. Thus the researcher recommends that the Act be amended to fill up the loopholes and that the ban against same sex marriage in Nigeria be more strengthened by reflecting the definition of marriage as a union between a man and a woman in the constitution by amending item 61 of part 1 of the second schedule to the Constitution.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Research

Marriage as an institution has been for centuries the image of unity despite differences in culture, religion and civilization, and to some extent, has reflected the belief that neither man nor woman is perfect or complete without the other. Marriage as an institution[1] is established by God the creator in both the holy Bible and holy Quran as a union of a man and a woman. The Bible in Genesis 2:21-24 made us to understand that a woman was created from the rib of a man which explains the reason why man is so attached to his wife[2]. A similar provision also exists in the holy Quran as we find in Qur'an 4:1: "O humankind! Be conscious of your Lord Who created you from a single soul, and out of it created its mate, and out of the two spread countless men and women. Be conscious of your Lord through Whom you demand your mutual rights and honor the wombs; God always watches over you."[3] The marriage institution seems to be the largest institution in the world because of its universal nature. It also contributes to the well being of the rest of other institutions of the country including the Government. This institution is established to ensure the fiscal and legal protection of families.

The institution of marriage is today under serious attack from many quarters such that any keen observer can discern in the secular mentality of the contemporary world, an effort to undermine its natural and religious meaning. The identity of the family as a natural institution based on the valid marriage of a legally qualified man and woman, for the attainment of the universally recognized noble marital ends is today being distorted. Many countries of the world

[1] An institution here means a significant practice, relationship or organization in a society or culture.
[2] Grogan, P. (ed.), *Christian Community Bible*, Thirty-Sixth edition, Claretian Publications, Philippines, 2004. p. 9.
[3] What does the Quran say about Women's creation, http://www.discoverislam.com/poster.asp?poster=DIW2004_02 &page=2, 7/07/15.

today have either fully legalized same sex marriage or have conceded certain civil rights to them.[4]

Today in Nigeria, a law has been passed to protect marriage as a union of a man and a woman and a ban has been made against same-sex marriage. There has been a lot of furore especially from the outside of Nigeria since the enactment of the same sex prohibition Law. Nigeria is being severely criticized and threatened by the so-called developed nations and their agents.[5]

The anti-gay law was, no doubt, enacted in line with the country's religious and cultural beliefs. Laws are created to reflect the political, social and economic relationships in a society. Law is not merely the command of the sovereign; it represents the idea of right or wrong based on the prevalent morality of the people. The new law is therefore certain to please most people in Nigeria, where anti-gay sentiment is rife. However, the new anti-gay law has been described in some quarters as discriminatory and incompatible with international human rights laws to which Nigeria is a signatory.[6]

1.2 Statement of the Research Problem

Marriage cannot and should not be seen as a creation by government or by the judges, for it is not merely a legal construct. However, because marriage as a meaningful social institution is so intimately related to the generation and the protection of children, the government has always been seen to have a legitimate role in regulating its civil effects. But where does the role of government start or end.

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[4] Bello, R., Civilization, homosexuality and Nigerian laws, http://www.punchng.com/feature/the-law-you/civilisation-homosexuality-and-nigerian-laws/. 23/06/15.
[5] Ibid.
[6] Ibid.

The inability of the same sex marriage prohibition Act to give a satisfactory meaning or definition to what marriage is posses a possible danger in the future. Thus the Act seems to give the impression that marriage is just a legal union or contract between a man and a woman. And there are implications when marriage is viewed from the above perspective. Marriage as an institution is naturally meant to be permanent and should not be seen from the perspective of legal agreement or contract that can easily be done with or changed at will.

This is why the state or government must exercise special care through her laws not to undermine the traditional meaning of marriage by redefining it, for this would amount to "building a house in a hurricane" and inadvertently institutionalizing and perpetuating a harmful social change capable of imploding and destroying the fabric of the society. Human nature exists and sets limits on what law can accomplish by fiat alone, and so when it comes to marriage, law must respect the reality of the ways in which human biology, human nature and social relationships are intertwined.

Again, the enactment of the same sex marriage (prohibition) Act has defined marriage as a union between a man and a woman. This may be a welcome development to save marriage institution but it may not last without doing more. This is because of the numerous definitions and interpretations of what marriage is all about in various laws in Nigeria. These various understanding can easily be abused by any activists or clever Judge in the future to rubbish the intention of the Act by given a contrary direction to the meaning of marriage as it has happened in America and Europe. There is need to fill this lacuna.

More so, the prohibition of same sex marriage seems to be touching a number of constitutional issues especially as it relates to the fundamental rights as claimed by some human right activists, thereby making the law prone to international attacks. There is need therefore to

analyze the law side by side other existing laws in Nigeria especially in the context of what marriage ought to be in order to see its adequacy or inadequacy.

If there is a change to the legal definition of marriage, pressure will be brought to bear on Catholic schools, agencies and other institutions to teach and to accept that this form of sexual union is equal in worth to the committed, monogamous and heterosexual union sealed in marriage. This is an unacceptable infringement of the freedom of association and religious liberty, including not only freedom of worship but also freedom of religious practice"[7]

Looking at the contents of this law, the question that comes to mind is whether Nigeria would be able to sustain this position in the future considering the international pressure and politics surrounding it. Can one really say that Nigeria has finally nailed the issue of same sex marriage to the board completely looking at the contents of the law or are there some lacunas that must be filled. This is the focus of this research. This research will critically examine the prohibition of same sex marriage in Nigeria from all ramifications.

1.3 Research Questions

1. Whether the law is in fact adequate to prohibit Same Sex marriage

2. Whether or not the law is compatible with other law like the Fundamental Human Right provision in the Constitution and the International human rights instruments

3. What are the challenges in the enforcement and application of the law

4. Whether woman to woman marriages being practiced under native law and custom in some parts of Nigeria are punishable under the Act

[7] Catholic Bishops' Conference of England and Wales, *Response from the Catholic Bishops' Conference of England and Wales to Government Consultation on 'Equal Civil Marriage (June 2012*), www.catholic-ew.org.uk/.../CBCEW-response-equal-civil-marriage-cons. 9/12/14.

1.4 Aim and Objectives of the Research

The main aim of this study is to critically analyze the prohibition of same sex marriage under Nigeria laws. This research aims at showing the strengths and weaknesses in the arguments for and against the prohibition of the same sex marriage in Nigeria and the likely implications of such arguments or positions in the face of the present day society and the law. It will also go ahead to analyze some of the position for instance the claim that the prohibition is merely based on sentiments on morality and religion. These will be done from the perspectives of the laws as applicable to statutory, customary and Islamic marriages which constitute the three marriages recognized in Nigeria. The opportunity to do this presented itself due to the amount of pressure in the world today on the recently enacted law in Nigeria prohibiting and criminalizing same sex marriage.

The objectives of the research are:

a) To analyze the Nigerian same sex marriage (prohibition) Act in the light of existing laws in Nigeria and its implications on the rights of individuals.
b) To consider the possible loopholes or lacuna in the Act.
c) To critically examine the implication of the Act in the light of the human rights position on same sex marriage.
d) To examine the possible challenges same sex marriage will pose to the society or to marriage institution if not prohibited.
e) To examine whether woman to woman marriages being practiced under native law and custom in some parts of Nigeria amounts to Same Sex marriage punishable under the Act.
f) To critically analyze the penal provisions of the Act to determine what ingredients are necessary to establish the offence of Same Sex marriage.

1.5 Significance of the Research

In all its intents and purposes, this research is considered worth doing because of some lacuna that needs to be filled in the minds of many concerning the reality about marriage. This research is thus born out of the feeling that there is some kind of imperfection in most of the statutes dealing with the issue of marriage which the current same sex marriage (prohibition) Act did not also address properly. This research will be beneficial to the society in throwing more light on the issue of marriage as an institution as against the idea of marriage as mere contractual arrangements.

This research will not only be of great addition to literary work but it will also be more beneficial to Nigerians as a nation in their effort to resist international pressure and politics on the issue of same sex marriage which the wordings of the Act has not properly captured.

1.6 Scope of the Research

This study is primarily concerned with critically analyzing the prohibition of same sex marriage bringing to limelight its pros and cons especially in the light of the contemporary challenges to the meaning of marriage itself. Basically there are three different types of marriage that a man and a woman can contract in Nigeria. They are:

(a) Statutory/Church Marriage

(b) Customary Marriage

(c) Islamic Marriage

Thus, we shall in this project be analyzing the same sex marriage prohibition Act in the light of laws governing these marriages.

1.7 Research Methodology

The method of research employed in this project is doctrinal and empirical. The primary sources consulted are the Nigerian Same sex marriage (prohibition) Act[8], Marriage Act[9], Matrimonial Causes Act[10], Interpretation Act[11] and other relevant civil marriage statutes applicable in Nigeria. The secondary sources consulted are textbooks, journal articles, dictionaries, encyclopedias and articles from the internet. Some oral interviews were equally conducted in the course of the research.

1.8 Literature Review

Nigerian same sex marriage (prohibition) Act is a topical issue, being a new enactment and coming at a time when the meaning of marriage is being challenged across the world.

Marriage from the civil law perspective is generally defined as the legal union of a couple as husband and wife, which has the following essential characteristics for validity: 1) parties legally capable of contracting to marry, 2) mutual consent or agreement, and 3) an actual contracting in the form prescribed by law [12]. As good as this definition maybe, it was not able to show the gender of the couple in question, nor was it able to indicate whether such a husband and wife can be of opposite sex or not. In fact, it also sees marriage as a legal contract, thereby not recognizing the permanent nature of marriage.

In the popular case of *Hyde v. Hyde,* Sir James Wilde, who is better known to posterity as Lord Penzance, in a judgment he delivered on March 26, 1886 defined marriage as a voluntary

[8] Same sex marriage prohibition Act, 2013.
[9] Marriage Act 1914, Cap. M6, Laws of the Federal Republic of Nigeria, 2004.
[10] Matrimonial Causes Act, 1970, Cap220, Laws of the Federal Republic of Nigeria, 2004
[11] Interpretation Act, 1964 No.1 Cap. 123, Laws of the Federal Republic of Nigeria, 2004.
[12] Garner, B.A. (ed.), Black's Law Dictionary, (8th ed.), Thomson West, Minnesota, (2004), p.992.

union for life of one man and one woman to the exclusion of all others[13]. This definition was able to bring out the permanent nature of marriage as against legal contract. However, he was unable to recognize the existence of other types of marriages like the Islamic and Customary marriage which need not be monogamous in nature.

The Nigerian Interpretation Act apparently echoing Lord Penzance defines a monogamous marriage as one which is recognized by the law of the place where it is contracted, as a voluntary union of one man and one woman to the exclusion of all others, during the continuance of the marriage[14]. This definition also fails because it merely defined monogamous marriage and sees marriage as a contract.

For Nwogugu[15], in his book Family law in Nigeria while quoting Lord Penzance, defined monogamous marriage as a voluntary union for life of one man and one woman to the exclusion of all others. While a polygamous marriage for him is a voluntary union for life of one man with one or several wives. On the issue of same sex marriage, Nwogugu recognizes the fact that some customs practice what looks like woman to woman marriages in some part of Nigeria but he went ahead to state that there is always at the background a man in whose name or behalf such marriages are contracted.

Even though, the author was able to define both monogamous and polygamous marriages, however he failed to address the issue of same sex marriage as a possibly challenge to the meaning of marriage today.

[13] Hyde v Hyde, (1866) L.R.P & D 130, p. 133.
[14] Section 18, Interpretation Act, 1964 No.1 Cap. 123, *Laws of the Federal Republic of Nigeria*, 2004
[15] Nwogwugwu, E.I., Family Law in Nigeria, (Revised Edition), Heinemann Educational Books, Ibadan, 2006, p.63.

The Supreme Court of Nigeria gave the meaning of marriage in the case of *AMOBI v. NZEGWU & ORS*[16] thus: "Marriage under the Marriage Act generally means the legal union of a couple as spouses. In other words, it is the voluntary union for life of one man and one woman to the exclusion of all others." This definition does not suffice as it deals only with marriage under the Act and has nothing to say on other types of marriages as applicable in Nigeria including the issue of same sex marriages.

The Nigerian Marriage Act made no attempt to define or give any meaning to what marriage is all about but only dealt with the issues such as preliminaries to marriage, consent to marriage, forms for celebration of marriage, registration of marriage[17].

Section 114 Matrimonial Causes Act[18] which is the interpretation section only tried to explain what a matrimonial cause is in terms of marriage petitions to the court; without any effort to define marriage or to explain the issue of gender of persons who enter into marriage. Considering the fact that marriage is currently under attack, the Witherspoon Institute identified four threats to Marriage, which they described as especially troubling: divorce, illegitimacy, cohabitation and same-sex marriage[19]. Among these four threats, the issue of same sex seems to be the most controversial as it touches the root of marriage itself. This again failed to define marriage.

It merely made an assumption of what marriage entails and went straight to identify same sex marriage as a threat to marriage.

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[16] (2013) LPELR-21863(SC).
[17] Marriage Act 1914, Cap. M6, *Laws of the Federal Republic of Nigeria*, 2004.
[18] Matrimonial Causes Act, 1970, Cap220, *Laws of the Federal Republic of Nigeria*, 2004.
[19] The Witherspoon Institute, *Marriage and the Public Good: Ten Principles*, (2008), www.princetonprinciples.org. 10th November, 2014.

In *Meribe v. Egwu*,[20] the court defined marriage as a union between man and woman. And while reacting to the custom of woman to woman marriage it held:

> In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to Section 14(3) of the Evidence Act and ought not to be upheld by the court.

Even though this case tried to define marriage as a union of a man and a woman, it focused mainly on customs which are repugnant in nature. It failed to associate woman to woman marriage as being equal to same sex marriage as envisaged today in the same sex marriage prohibition Act 2013.

In Tulane Journal of International Affair, Lindsay[21] while discussing the issue of Same Sex marriage in his article 'Legalizing Same-Sex Marriage: An Obligation Not a Decision', wrote extensively on why Same Sex marriage should be legalized irrespective of culture or ethnicity. For him:

> International human rights law creates a universal right to marriage that includes gay and lesbian couples, and denying same-sex couples this right is a clear violation. In accordance with both treaty law and international customary law, states are obliged to recognize all individuals' fundamental right to marriage. Refusing same-sex couples the right to marry violates the principle of nondiscrimination and the individual's right to privacy, marriage, association, and dignity[22].

This article despite its significant contribution to the issue of marriage and Same Sex relationship, mainly focused on the rights of individuals to marry as provided

[20] (1976), L.P.E.L.R.- 1861(SC).

[21] Gus, L., Legalizing Same-Sex Marriage: An Obligation Not a Decision, In: Tulane Journal of International Affairs, https://library.tulane.edu/journals/index.php/TJIA/article/view/132, accessed 19/10/2015.

[22] Ibid.

by the international law but failed to give any internationally acceptable definition of what constitutes marriage as different from Same Sex marriage.

Margaret Weigel and Leighton Walter Kille[23] writing in the 'Journalist's Resource Research on today's news topics' Compared the well-being outcomes of children residing within same-sex and different-sex parent families and concluded that the differences that exist in child well-being are largely due to socioeconomic circumstances and family stability. Although this contribution is quite enriching, it does not answer all necessary questions under review in the Nigeria same sex marriage prohibition Act, as it was purely based on western culture only, neither did it discuss other challenges same sex marriage will pose to the marriage institution if not prohibited.

Again, Nan D. Hunter[24] in his article titled 'The Future Impact of Same-Sex Marriage: More Questions Than Answers' focused on raising relevant questions on the future impact of same sex marriage where there is federal recognition of such marriages, and the question of a distinctive marital status for couples (gay or straight) who raise children. The author concluded with a call for agnostic empiricism as developments in gay and lesbian family law continue to influence how law regulates all family structures.

The author's contributions raised a lot of relevant questions on the issue of same sex marriage, but it did not deal with a situation where same sex marriage is prohibited by law and in fact made a crime as we have in Nigeria.

[23] Weigel, M.,and Kille, L.W., Same-sex marriage and children's well-being: Research roundup In: Journalist's Resource Research on today's news topics: http://journalistsresource.org/studies/society/gender-society/same-sex-marriage-children-well-being-research-roundup, accessed 19/10/2015.

[24] Hunter, N.D., The Future Impact of Same-Sex Marriage: More Questions Than Answers, In: Georgetown University Law Center, http://scholarship.law.georgetown.edu/facpub/1089, accessed on 19/10/2015.

1.9 Chapters Outline

Chapter one introduces the research, states the problems and outlines the aims and objectives of the research. Here also, the researcher formulates the research questions, discusses the method to be applied in answering the questions while also reviewing authors that has written on the topic or other related topics. The researcher concludes this chapter by discussing the Justification and organizational layout of the research.

Chapter two focuses on the conceptual discourse on marriage. Here, the research examines the meaning of the concept 'marriage' as well as types of marriages, especially as applicable under Nigeria laws considering the prerequisites of these marriages. Again, the researcher discusses the various obligations applicable to parties under marriage relationship, as well as other vital elements that are common to all marriages in Nigeria.

Chapter Three discussed the issue of same sex marriage analyzing the meaning and the implication of Redefining Marriage as a Union of Two Persons. The researcher also delved into the issue of the causes and solution to same sex relationship. The study finally looked into same sex marriage prohibition Act 2013 vis a vis other laws especially as it relates to woman to woman marriages applicable in many parts of Nigeria taking cognizance of Nigeria case laws as well as the issue of repugnancy test.

Chapter four focuses on the challenges likely to impeach the enforcement of the same sex marriage prohibition Act. Here, the issue of human right and chapter four of Nigerian constitution is discussed as well as international law provisions as it relates to individual freedom and rights. Then, the position of Law, Morality and Culture in the light of these human right arguments is considered vis a vis rights of children and other members of the society. Finally, the possibilities of abuses by the enforcement agencies are also highlighted.

Chapter five discusses the future of the of the Same Sex Marriage (Prohibition) Act and makes comments on the present agitation over it. It also provides the best possible recommendations on the substance of the subject matter in thoughtful and well considered conclusions on the subject matter.

CHAPTER TWO

CONCEPTUAL DISCOURSE ON MARRIAGE

2.1 INTRODUCTION

The concept of marriage is not a recent practice. It has been there in our society since ages. In fact we are here because our parents got married to each other. Marriage is the socially recognized union between two individuals. It is a kind of relationship involving mutual rights and duties where two people are socially approved to establish a family. Hence, it is a universally accepted social institution.

Marriage as an institution has been for centuries the image of unity despite differences in culture, religion and civilization, and to some extent, has reflected the belief that neither man nor woman is perfect or complete without the other. The institution of marriage is today under serious attack from many quarters such that any keen observer can discern in the secular mentality of the contemporary world, an effort to undermine its natural and religious meaning. The identity of the family as a natural institution based on the valid marriage of a legally qualified man and woman, for the attainment of the universally recognized noble marital ends is today being distorted.

The socio-juridical problems affecting marriage institution today in view of the nascent, spurious family policies in some cultures prompt the need for sober reflections in order to re-establish the distorted image of the family, which is an institution of nature rooted in marriage. In this chapter, we examine the concept of marriage as a natural institution as well as a civil union and then look at the specific types of relationships around the world today that claim to be marriage including two persons of the same gender.

2.2 Meaning of Marriage

The current problem facing marriage and family today, especially as being championed by Europe and America, has made it paramount to go back to the meaning of what marriage is all about. Going by the civil law dictionary definition of Marriage, it is defined as a legal union of a couple as husband and wife, which has the following essential characteristics for validity: 1) parties legally capable of contracting to marry, 2) mutual consent, and 3) an actual contracting in the form prescribed by law[1] Obviously, this definition is only concerned with monogamous marriage as different from polygamy.

Lord Penzance's definition of marriage as a voluntary union for life of one man and one woman to the exclusion of all others[2] as earlier stated is today under serious criticism by many. Majority of the argument against this definition is based on the fact that the definition of marriage by Lord Penzance, which the courts have applied for many years now, has a Christian flavor and was unduly influenced by Christian Theology. Capitalizing on this argument, a lot of effort has been made from several quarters, especially gay activists, to re-engineer the concept of marriage and by so doing have undermined marriage as an institution; and this equally has led to very profound changes in family life in recent times.

In view of all these changes, the question that is agitating the mind of many family law experts is whether the definition of marriage offered by Lord Penzance, in practice still

[1] Garner, B.A. (ed.), Black's Law Dictionary, (8th ed.), Thomson West, Minnesota, (2004), p.992.
[2] Hyde v Hyde, (1866) L.R.P & D 130, p. 133.

represents the meaning of marriage at the global level in this 21st century or has it become a mere window dressing[3].

Some of these experts even express the view that in defending traditional marriage, it would appear that one is probably defending something that no longer exists[4]. For instance, with the introduction of no-fault principle of divorce, and with the ease and frequency of obtaining divorce, the impression now created is that a statutory marriage or marriage from the civil law perspective is no more for life, and has actually ceased to be so for many people. Further, the fundamental principle of marriage as a union between one man and one woman has been beclouded by the problems created by the existence of hermaphrodites, pseudo-hermaphrodites, and transexualism[5].

According to Ormerod, J. "Marriage is and always had been recognized as a union of man and woman, it is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. The characteristics that differentiate it from all other relationships can only be met by two persons of the opposite sex."[6]

The Matrimonial Causes Act did not specifically define marriage. But section 114(1)(a) defines matrimonial causes to mean proceedings for dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights and jactitation of marriage.[7]

[3] Ifemeje, S.C.,*Contemporary Issues in Nigerian Family Law*, Nolix Educational Publications, Enugu (2008), p.11.
[4] Ibid.
[5]Corbett v Corbett (1970) 2N.W.L.R. 308. See also, Arinze-Umobi, C. & Umobi, A.D., *Crisis in Family Law*, Folmech Printing and Publishing co. Ltd. Onitsha, (2009), pp. 16-17.
[6] Corbett v. Corbett, (1971), P.D.A. 105
[7] Section 114(1) (a), Matrimonial Causes Act, 1970, Cap.220, *Laws of the Federal Republic of Nigeria*, 2004.

The Nigerian Interpretation Act apparently echoing Lord Penzance defines a monogamous marriage as: "a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage"[8].

2.3 TYPES OF MARRIAGES

Marriages are of different types across the world. Types or forms of marriage vary from society to society mostly according to their customs, practices and systems of thought[9]. In some societies marriage is a religious sacrament whereas in others it is a social contract[10]. Nowadays, new forms of marriage are coming up which is perhaps beyond our knowledge. Some might also seem weird to us, but they are legalized in their countries, and people practice it with complete freedom and liberty. In this research we shall look at a few of such marriages as listed below:

1. **Polygamy**

It is a form of marriage in which one man marries more than one woman at a given time. It is of two types: Sororal Polygamy and non sororal Polygamy

(a) Sororal Polygamy

It is a type of marriage in which the wives of the man are invariably sisters. It is often called sororate.

(b) Non-sororal Polygamy

[8] Section 18, Interpretation Act, Cap. 123, L.F.N., 2004.
[9] Supriya, J., Top 10 Different types of Marriages, http://listdose.com/top-10-different-types-marriages/, accessed on 18/10/15.
[10] Laws of India, a common man's guide: Is Hindu Marriage a sacrament or a contract or a semblance of both? : https://bharatchugh.wordpress.com/2012/03/29/is-hindu-marriage-a-sacrament-or-a-contract-or-a-semblance-of-both/, accessed on 18/10/15.

It is a type of marriage in which the wives are not related as sisters.

2. **Polyandry**

Polyandry is a form of union in which a woman has more than one husband at a time or in which brothers share a wife or wives in common. It is less common than polygamy. It is of two types: Fraternal Polyandry and non fraternal polyandry.

(a) Fraternal polyandry

This is a practice where several brothers share the same wife. The practice can be called alelphic or fraternal polyandry. This practice of being mate, actual or potential to one's husband's brothers is also called levirate. It was prevalent at the dawning of human civilization and across the world throughout the Indian subcontinent, in areas such as the Canadian Arctic and in parts of Africa, China and Americas[11].

(b) Non Fraternal Polyandry

In this type the husband need not have any close relationship prior to the marriage. The wife goes to spend some time with each husband. So long as a woman lives with one of her husbands; the others have no claim over her.

3. **Monogamy[12]**

It is a form of marriage in which one man marries one woman. It is the most common and widespread form of marriage.

[11] Heaphy, L., Polyandry, or the practice of taking multiple husbands, http://www.kashgar.com.au/articles/Polyandry-or-the-practice-of-taking-multiple-husbands, accessed on 18/10/2015.
[12] Supriya, J., Top 10 Different types of Marriages, http://listdose.com/top-10-different-types-marriages/, accessed on 18/10/15.

(a) Serial Monogamy

In many societies individuals are permitted to marry again on the death of the first spouse or after divorce but they cannot have more than one spouse at one and the same time.

(b) Straight Monogamy: In this type, remarriage is not allowed unlike in serial monogamy.

4. **Group Marriage**[13]

This is a marriage of two or more women by two or more men. Here the husbands are common husbands and the wives are common wives. Children are regarded as the children of the entire group as a whole.

5. **COMMON LAW MARRIAGE**[14]

This is also known as 'defacto' or informal kind of marriage where two people are married to each other on a contract basis. Well, it is actually legalized in many countries and in places where it has not yet been legalized, it is known as 'cohabitation'. Though it might seem very modern and westernized kind of concept, you will be surprised to know that it is one of the oldest forms of marriage which is still in practice. They are generally monogamous in nature, and legal divorces after a particular time period ends the marriage tenure. Example of such a marriage could be a situation where for instance a couple is legally considered married, without that couple having formally registered their relation as a civil or religious marriage.

6. BOSTON MARRIAGE[15]

[13] Ibid.
[14] Ibid.
[15] Ibid.

We all have heard about the current trend of gay and lesbian marriages. But this is an older version of the same concept practiced generally in the early 19th and 20th century where two women lived together which might or might not be sexual. They were engaged in a relationship and would interact in public as a couple rather than female friends. Thus what we see today is just a modified concept of the same. Boston marriages hold a unique place in history and were mostly practiced by those women who felt they had a better connection with females rather than males. Its origin took place through a novel (Bostonians) written by Henry James in 1886[16].

7. HYPOGAMY AND HYPERGAMY[17]

Both of them are opposite in meaning, but we have collectively dealt with them since both focus on one aspect and their main theme remains the same. Hypogamy is a kind of marriage practice in which a woman is married to a husband of lower social status, rank or age. Hypergamy on the other hand is a complete vice-versa case where a woman is married to a family of higher social status and is more recognized. It is generally practiced in societies with dowry rituals where the bride's family pays a heavy sum to match up to the groom's level. Also,it signifies patriarchy and male dominance in the society.

8. LEVIRATE AND SORORATE

Levirate originates from the word 'levir' which means husband's brother. It is basically a specialized kind of polygamy in which the man marries the widow of his dead brother. Its origin

[16] Ibid.
[17] Ibid.

ies in the ancient Hebrew and Christian societies. In places like Southern Sudan it is known as 'ghost marriage'. Sororate on the other hand means a kind of the marriage system in which the widower marries one of his wife's sisters. Also, due to infertility and several other factors a sororate marriage was practiced in few societies. One of them is the Maricopa Indians of Arizona.[18]

9. Endogamy or Endogamous Marriage[19]

This is similar to group marriage. Endogamy or endogamous marriage refers to the marriage within one's own group such as within one's own caste, sub-caste, varna and tribe. In other words there are several types of endogamous marriage such as caste endogamy, sub-caste endogamy, varna endogamy and tribal endogamy.

(a) Caste endogamy

Caste endogamy is a type of endogamous marriage in which marriage takes place within one's own caste. In a caste based society endogamy is strictly followed. Members of each caste marry within their own caste group.

(b) Sub-caste endogamy

It is another type of endogamous marriage. In a caste based society each caste is divided into many sub-castes. Like caste each sub-caste is also an endogamous unit. In sub-caste endogamy marriage takes place within one's sub-caste only.

(c) Varna endogamy

[18] Ibid.

[19] Jessica, Whitteore, Incest, Endogamy & Exogamy: Definition & Examples, http://study.com/academy/lesson/incest-and-exogamy.html, accessed on 18/10/2015.

Varna endogamy is another type of endogamous marriage. In the traditional Indian Society we found the existence of four varnas such as Brahmin, Kshatriya, Vaisya and Sudra. In varna endogamy, the choice of mate is restricted to one's own varna only.

(d) Tribal endogamy

Tribe is a territorial group. Tribal endogamy is a type of endogamous marriage in which the choice of mate is restricted to one's own tribal group. Like caste tribe is also an endogamous unit.

10. Exogamy or Exogamous marriage[20]

It is just opposite to the endogamy or endogamous marriage system. It refers to a system of marriage in which an individual has to marry outside one's own group such as gotra, pravara, sapinda or village. This is a sound marriage system which leads to the creation of healthy and intelligent children. However there are several forms of exogamy such as:

(a) Gotra exogamy

Gotra refers to clan. Members of a particular gotra or clan are supposed to have close blood relation among themselves. Hence according to gotra exogamy one has to marry outside one's own gotra.

(b) Pravara exogamy

[20] Ibid.

Pravara means siblings. People originating from a common saint are said to belong to a particular Pravara. According to Pravara exogamy one has to marry outside one's own pravara. Marriage within pravara is forbidden.

(c) Sapinda exogamy

Sapinda means-lineage. People belonging to five generations from father side and three or seven generation from mother side are known as sapindas. They are believed to belong to a particular pinda. Hence according to sapinda exogamy marriage within one's own sapinda is forbidden. They are supposed to marry outside their own sapnida.

(d) Village exogamy

According to this principle, marriage within one's own village is forbidden. Each and every society prescribes certain rules relating to marriage. Some societies put several restrictions on marriage among kins, whereas some other societies allow marriage between a limited number of kins. Hence, in those societies, marriage is sanctioned on the basis of preference or priority. Accordingly, socially sanctioned marriage among kins is known as preferential marriage. In other words, on the basis of preference, marriage may be divided into four types such as cross-cousin marriage, parallel cousin marriage, levirate and surrogate marriages.

11. OPEN MARRIAGE

This is the type that allows extramarital affairs for both the spouses and both of them have the option of maintaining outside relationships beyond the marriage terms. It can be one sided as well. Swinging is one kind of open marriage. The only difference is that swingers are emotionally monogamous. The origin of this kind of marriage practice is dated back to 1960s and 70s. This type of marriage is not yet socially accepted because of which people generally

hide it from their family and friends coupled with religious obstacles in context to this kind of marriage.

12. AFTER DEATH MARRIAGE

This is another kind of bizarre form of marriage which is legalized in countries like France where a person is allowed to marry a person of the opposite sex even after his death. Also it is socially accepted due to various reasons. There comes the concept of romantic quotient where a person is so much in love that he decides to marry even after the death of his/her beloved.

2.4 MARRIAGES UNDER NIGERIAN LAWS

Nigerian law recognizes only three types of marriages. These are: statutory marriage, Islamic marriage and customary marriage. But each of these marriages equally takes different forms as discussed below.

2.4.1 STATUTORY MARRIAGE IN NIGERIA

This type of marriage is in accordance with the Marriage Act which is a federal legislation which makes provisions for the celebration of marriages in Nigeria[21]. It is clear that the Act is designed only for the celebration of marriage between a man and a woman, and the marriage has to be a monogamous one. A monogamous marriage has been defined in section 18 of the Interpretation Act as follows: "A marriage which is recognized by the law of the place where it is contracted is

[21] Anzaki, M. B. Types of marriages under Nigerian law, http://thelawyerschronicle.com/types-of-marriages-under-nigerian-law/, accessed on 2/08/15.

a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage"[22].

2.4.1.1 What Constitutes Statutory Marriage in Nigeria

The following form of marriage makeup statutory marriages in Nigeria:

(a) The Civil or Court Marriage

This is the marriage recognized by the laws of Nigeria and can on its own serve as proof of a marriage contract between 2 people. The Civil marriage is celebrated at the marriage registries. There are two types of Marriage Registries in Nigeria:

i. The Federal Marriage Registries (located at Lagos and Abuja)

ii. All States have various Registries at the State and Local Government level.

The intending bride or groom fills necessary forms at the Registry of their Choice to indicate their intention to marry and pay necessary fees. After which a date is fixed for the marriage when the necessary publications have been made. After the celebration of the marriage, the Registrar

who is usually the minister would print the marriage certificates in duplicate and with counterfoils as in the FORM E of the marriage Act.

At the end, the Registrar will register the marriage and the certificate in a book called the 'marriage register book' according to the FORM F of the Marriage Act[23].

[22] Section 18, Interpretation Act, Op. Cit.
[23] Section 30, Marriage Act, 1914, L.F.N., 2004.

(b) Registered Christian Marriage

Under Nigerian law, Christian marriage on its own is not a statutory marriage until it complies with the marriage Act by getting it registered in the marriage registry. Where it does not comply with the marriage Act, it is at best a customary marriage. Christians see marriage as a divine institution, thus, Christian marriage is like a blessing of civil marriage. This explains why in law, this religious marriage is optional. Many couples are free to do without it. Generally churches expect the couple to legalize their marriage by going to the court prior to the church wedding to sign the legal papers that is if they chose to have a church wedding instead of a court wedding.

Christian marriage is not only characteristically contractual and sacramental; it is also essentially monogamous, for it consists in the consensual union of one man and one woman, to the exclusion of others. The implication of this is that throughout the duration and subsistence of the marriage, there can be only one man and one woman as parties thereto. In other words, neither of the parties has the legal capacity to contract another marriage with a third party while the marriage is still in existence. In effect, the essential properties of marriage are unity and indissolubility, which then in a Christian marriage obtain a special firmness in virtue of the sacrament.[24] Christian Marriage has two fundamental ends or purposes towards which it is oriented, namely, the good of the spouses and the procreation of children. Consequently, the Church teaches that marriage is both unitive and procreative, and that it is inseparably both. These essential characteristics are far from being possible in the same sex relationship which obviously would rely on adopting children rather than contributing in procreation.

[24] Coriden, J.A., Green, T.J. et al., (eds.), Canon.1055-1056. *The Code of Canon Law*, Theological Publications, Bangalore India, (1999), p.737.

2.4.2 CUSTOMARY MARRIAGES IN NIGERIA

Marriage is a human institution with a cultural tinge. Some analysts have argued that the meaning of what constitutes marriage depends on once cultural environment. Marriage under Customary Law creates a relationship not only between a man and woman but also between the two families involved. The wife is regarded by the members of her husband's family as having been married not solely to her husband but into the family and therefore a member of their family. The husband on the other hand, is not so regarded by his wife's maiden family, even though there exists a continuing relationship with that family.

There is no commonly accepted definition of customary marriage. This is because there are various ethnic communities in Nigeria and the various ethnic groups have their different marriage customs. There are however some generally accepted customs common to most of them which will be discussed here. Obi S., argues that "marriage may be defined as the union of a man and woman, being normally the gist of a wider association between two families or sets of families."[25] This definition merely tells us that marriage under native law and custom does not involve only the man and woman but includes their families.

Marriage under Customary Law is largely polygamous. A polygamous marriage is the union of one man with several wives. There is no limit to the number of wives a man can marry under customary law. It must be noted however that many couples initially get married under customary law and thereafter marry under the Act.

This is valid provided the marriage is between the same persons. The legal implication of the marriage is that, it would have to remain a monogamous marriage. Section 47 of the

[25] Obi, S.N.C. *Modern Family law in Southern Nigeria,* Sweet and Maxwell, London, (1966), p. 155.

Marriage Act[26] provides that, where a man is married under customary law with one woman and subsequently marries another different woman under the Marriage Act, the second marriage is void. This was also the decision of the Supreme Court in the case of *Jadesimi v. Okotie – Eboh*.[27]

2.4.2.1 Prerequisites of marriage under native law and custom

It is pertinent to note that, in terms of the prerequisites of what forms marriage in Nigeria, there is no difference between the meaning of marriage under customary law and church marriage as such. Thus, in the case of *Nwangwa & Anor v. Ubani & Anor*, Niki Tobi JCA (as he then was) held that a church marriage merely gives divine blessing to the customary law

marriage under customary law[28]. But when it comes to statutory marriage, then the parties must consciously take steps and adopt the procedure contained in the marriage Act, 2004[29].

Generally, the following are pre-requisites for a valid customary marriage:

(a) Betrothal

(b) Capacity of the parties

(c) Consent of parties as well as consent of parents/family

(d) Marriage consideration/dowry

(e) Solemnization of the marriage

(f) Consummation of the marriage

(g) Consortium

(a) Betrothal

[26] Section 47, Marriage Act 2014, Cap. M6, L.F.N., 2004.
[27] (1996), 2 N.W.L.R. (Pt.429) 128.
[28] Anyafulude, T., Principles of Practice and Procedure of Customary Courts in Nigeria through the Cases. Mercele Press, Enugu, (2012), p. 323.
[29] Sections 21 – 29 Marriage Act 2014 Cap. M6, L.F.N., 2004.

Betrothal is simply an agreement to marry. The two parties agree to marry and their parents or families take over. They make discreet investigation of each other's families with a view to deciding if their children should marry into the other family. This process is carried out by intermediaries and if positive, both parties gear up for further ceremonies. Since betrothal is just a mere promise to marry, a breach of the promise to marry is not actionable under customary law[30].

(b) Capacity of parties

Most systems of customary law in Nigeria do not prescribe any age for the solemnization of customary-law marriage. This lacuna in the rule of customary law has to a large extent encouraged a high incidence of child marriage, with all its attendant evils. While in some areas child betrothal is rampant, marriage does not in fact take place until the parties have attained the age of puberty.

However, where a girl under sixteen years marries under customary law, the consumation of that marriage does not constitute the sexual offence of having unlawful carnal knowledge of her under the Criminal Code Act. This is because Section 6 of the Code defines 'unlawful carnal knowledge' to exclude sexual relations between husband and wife[31]..

(c) Consent

[30] Ayegba v. Ajunwa, Suit. No. MD/350/77 of 1/2/80, High Court Markurdi (Unreported).
[31] Section 6, Criminal Code Act, Cap. C. 28, L.F.N. 2004.

The intending couples have to give their consent to a customary marriage. The Supreme Court, in the case of *Osamwonyi v. Osamwonyi*[32] held that, under Bini Native Law and Customs, the consent of the parties was necessary for a valid marriage under customary law. Furthermore, under the Criminal Code Act[33], it is an offence punishable with seven years imprisonment for any person who, with the intent to marry a female person of any age or to cause her to be married by any other person, takes her away or detains her against her will. Furthermore, parental consent is necessary before a valid customary marriage can take place.

In *Okpanum v. Okpanum*[34], the High Court of East Central State of Nigeria held that, in order to constitute a valid customary marriage, there must be parental consent and mutual agreement between the parties.

(d) Payment of Dowry

Marriage consideration, otherwise called dowry, bride price or even purchase price in some communities, is again one of the essential requirements of a valid customary marriage. By whatever name called, the bride price includes any gift or payment in the form of money, natural produce or any kind of property given by an intending husband and his family to the parents or guardian of a female person on account of the marriage. Payment of bride price is an important element in customary law marriage. In *Edet v. Essien*[35]. The wife of Mr. A who had got married to him under native law and custom, left him to live with Mr. B. The wife had two children for Mr. B from this illicit union. Mr. A consequently claimed that in accordance with customary law, the two children belonged to him. The Court held that it was contrary to natural justice, equity

[32] (1973) N.M.L.R 26.
[33] S. 361 of Criminal Code Act Cap. C. 28 Laws of the Federation, 2004.
[34] (1972), 2E.C.S.L.R. 561.
[35] (1932), 11 N.L.R. 47

and good conscience to allow Mr. A to claim the children of Mr. B just because Mr. A had been deprived of his wife and without a refund of the bride price he paid on her.

A dowry is usually paid to the parents or guardian of a woman married[36] which is a clear indication that there is no room for payment of a dowry to parents of a man in any custom in Nigeria.

This is why a rule of customary law where an adulterous wife becomes the wife of the adulterer would not be judicially enforced by the Courts as held in *Chanwere v. Aihenu*[37] because marriage is not acquired through adultery.

(e) Solemnization

Solemnization is an essential ingredient of a valid customary law marriage. It generally involves breaking kola, pouring libation, sharing drinks and other activities. The bride is invariably handed over to the bridegroom and his family. In *Omoga v. Badejo*,[38] the court held that there must be a formal handing over of the bride to the groom in the presence of the two families and witnesses, and the acceptance and taking away of the bride to her husband's house for marriage under Yoruba Native Law and Custom, to be valid. This notwithstanding, until bride price or dowry is refunded, a customary marriage remains intact even if the woman has left the matrimonial home to live with another man[39].

(f) Consummation

[36] Anyafulude, T., Principles of Practice and Procedure of Customary Courts in Nigeria through the Cases, Mercele Press, Enugu, (2012), p. 297.
[37] (1935), 12 N.L.R. P.5.
[38] (1985) N.C.N.L.R. 1075.
[39] Eze V. Omenka (1977) 1 A.N.S.L.R. 136.

Consummation of the marriage under Native Law and Custom is essential. Consummation simply means having sex, with a view to making a marriage complete. In traditional societies, the very night of the marriage is eagerly awaited by the groom's family as he is expected to announce his exploits to his family and state if his wife was found intact or not. Thus the rule is that until that first sexual intercourse is performed by the couples, the marriage remains unconsummated and invalid. And what amounts to consummation is a full sexual intercourse that includes penetration. Therefore any same sex relationship in any custom fails to qualify as marriage if full sexual intercourse is excluded.

(g) Consortium

The spouses of a customary law marriage are entitled to each other's consortium. Customary law requires the cohabitation of the spouses. Each of the spouses is entitled to the company of each other. Under customary law, each spouse owes the other a duty to submit to the other's reasonable sexual demands.

This is why Customs whereby a husband is entitled to the children of his wife, fathered by another man until bride price is refunded is pronounced repugnant to natural justice, equity and good conscience as held in *Edet v. Essien*[40]. This is also why woman to woman marriage under any guise would not be sanctioned by the Courts no matter how much we argue that sexual affair is not part of such marriage since consortium is all about submission to sexual demand as part of requirement of a customary marriage.[41] In *Mojekwu v. Ejikeme,*[42] the court declared that "Nrachi" custom which enables a man to keep one of his daughters unmarried perpetually under his roof to raise issues, more especially males to succeed him indirectly legalizes fornication as

[40] (1932), 11 N.L.R. P. 39.
[41] Ibid.
[42] (2000) 5N.W.L.R. (Pt. 657), pp. 422-423.

the woman stays unmarried for the rest of her life, procreating outside the bounds of marriage. This is because any form of cohabitation outside normal consortium known to customary marriage is against public morality.

2.4.2.2 Types of customary marriages in Nigeria

There are other relationships which are regarded as marriage in some communities under the customary law. While some of them possess the characteristics of some of the marriages already discussed, others display different and unique features.

(a) Sororate Marriage
(b) Widwo inheritance or levirate marriage
(c) Big dowry / small dowry marriage
(d) Woman to woman marriage
(e) Polyandry

(a) Sororate Marriage

This is a marriage in which on the death of a wife; the widower 'husband' is presented with a substitute by his deceased wife's family without a fresh marriage procedure. In this type of relationship, on the death of a wife, the widower may be presented with a substitute by her family without a fresh marriage procedure. In such cases, the first marriage is regarded as continuing, with the new wife, taking the place of the deceased relative. It has been established that sororate marriage is not part of Igbo customary law. No evidence exists today of its survival anywhere in the country.

(b) Widow Inheritance Or Levirate Marriage

This is similar to sororate marriage. Here, on the death of a man his widow may become a wife of his brother or other close relative. The new relationship becomes effective without the need for a fresh bride-price or formal marriage. The term ‘inheritance' gives a wrong impression of the operations in customary law in this respect as it suggests an automatic acquisition by right of a wife. The general practice recognizes the right of a widow to elect whether to remarry within her late husband's family or not. If she chooses to do so, she has a preference as to which brother or close relative to accept as a husband. Some communities allow sons to 'inherit' their late father's wives other than their own mother; others admit brothers and other relations only. The custom obtains in both the Igbo and Yoruba communities. In some Nsit communities of Akwa-Ibom state widows prefer marrying within their late husband’s family, including their late husband’s brother[43].

(c) Big Or Small Dowry Marriages

In some part of River state especially the riverine areas of Ijaw and Okrika, there are two types of marriage and each is characterized by the quantum of the bride price paid. Where the “iya” or "big dowry" marriage is contracted, the woman becomes part of her husband's family and her children belong to that family also.

But in the “igwa”, or 'small dowry' marriage, the woman remains part of her original family and her children become members of their mother's family and inherit from it.

But the distinction between these systems of marriage is rapidly breaking down. This has been due to social and legislative changes, of which the Eastern Region Limitation of Dowry Law, 1956 is the most significant. The Law, limited bride price in respect of customary law

[43] Interview conducted by the researcher with Uwem Bassey, Trader, Obotim Nsit Village, 10/03/15.

marriages to not more than sixty Naira. The effect is to blur the distinction between the bride-price payable in respect of lya and Igwa marriages. Other factors are the declining economic importance of the 'house' system and the acceptance of European and Christian ideas of monogamy.

(d) Woman To Woman Marriage

Woman-to woman marriage has been an age- long customary practice in some parts of Nigeria[44]. It has been in existence since the pre-history period. A woman who is a husband and father may sound as a contradiction, yet it is a cultural practice in some parts of the Nigerian society: the *Igbo, Yoruba, Ijaw, Nupe, and Esan* tribes.[45] Other communities where these practice is common include Ibibio, Annang, Oron and Efik communities of Eastern Nigeria among others. Elders interviewed in Ibiono, Ikono, Itak and Ediene admitted its existence in their areas. In Nkwa Ibiono in Ibiono Ibom Local Government Area of Akwa-Ibom state, Prophetess Ikwo Idio was said to have married many wives and took them to her house. She brought young men to work for her as palm fruit harvesters and to service women to procreate children for her.[46] Prophetess Ikwo Idio was a rich woman. Before she died in 2003, she had through the practice of female husband owned many children who now inherit her property and keep her name alive. However, it appears the real blood relation of Ikwo do not allow the children she got through this practice to inherit all her properties as they are claiming that her property should revert to her family.[47]

(e) Polyandry

[44] Achebe, N., Pre-colonial Igboland: On Woman-to-Woman Marriage, https://eccentricyoruba.wordpress.com/2013/01/30/pre-colonial-igboland-on-woman-to-woman-marriage/, accessed on 18/10/2015.
[45] Uchendu, V.C. *The Igbo of South-Eastern Nigeria,* Holt, London, (1965), p.50.
[46] Ibid.
[47] Interview with Christogonus Udo Ekpo, Village Council Member/ Farmer, Uyo-Obio. 8/7/15.

Attempts have been made in the past to claim that polyandry (where a woman is entitled to marry two or more husbands at the same time) is part of Tiv custom. In a decided case[48], the woman married Mr. A under native law and custom and had four children for him. She left Mr. A and took the four children with her and set up home with Mr. B. She claimed that she was married to both men and that Tiv custom allowed it. The Upper Area Court of Northern Region agreed that the woman was "a common wife" to both men, and gave the eldest and youngest children to Mr. B, and gave the two other children to Mr. A. The High Court on appeal overturned the judgment and held that the Tiv custom that allowed polyandry was not proved. In reality, marriage under customary law is essentially polygamous.

2.4.3 ISLAMIC LAW MARRIAGE

2.4.3.1 The Concept of marriage under Islamic Law

The original meaning of marriage for Islam can be traced to an Arabic term 'Nikah' which means "contract" while the Quran specifically refers to marriage as "mithaqun Ghalithun" Which also mean "a strong agreement". (Quran 4:21). The seriousness of this covenant becomes very obvious when one finds the same term i.e., Mithaqun Ghalithun, being used for the agreement made between Allah and the Prophet before granting them the responsibility of the Prophet hood. (Quran 33:7).

According to the Islamic law, God has created everything in pairs each endowed with physical and psychological characteristics to complement and complete one another. The Quran (4:1) indicates that human beings have been created from one living entity (nafs), which represents the origin of both the male and the female. The human species though has included male and female since its existence. The "mating" or "spousing" of male and female sexes is

[48] Kpelanya v. Tsoka, (1971), N.M.L.R. p. 86.

original in human nature and out of this instinctive relationship the human race develops, continues and spreads.

Between the two sexes a gravitating combination of love, tenderness, and care is engendered, so that each finds in the other completeness, tranquility, and support (Quran 30:21). Having children and loving them represents another fulfillment of the human nature (Quran 42:49-50). It is through this spousal complementation and completion, according to the Quran (7:189), that each spouse achieves comfort, and enjoys peace of mind, satisfaction, and fulfillment. These relationships extend beyond the physical sexual contact and to psychological, spiritual relations.

The blessings of this completeness are not ended by their accomplishment, but they continue and develop through bringing forth children, raising them, and providing the whole family with material, emotional, and moral needs.

The pleasures of completion and procreation may well be extended and multiplied, when one is granted grand children, who not only represent genealogical continuation, but are also a dynamic revitalization of the human race. Such physical-psychological-spiritual development through spousing and mating, followed by procreation, that may continue for more than one generation, ought to lead every sensible human being to be grateful to God for His successive and multiplying favors with his own family throughout his lifetime. Such persons and their happy veritable families would be models for the whole society (Quran 25:72).

2.4.3.2 Purpose and Obligation of Marriage under Islam

In Islam, marriage has two main purposes: To ensure preservation of the human species and continuation of the human race. The holy book provides: [49]"O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women"

.Marriage also provides spiritual and legal foundation of the family, "And of His Signs is this: He created for you mates from yourself that you might find rest in them, and He ordained between you love and mercy. Lo, therein indeed are portents for folk who reflect."[50]

Through Marriage, the conjugal relationship between a man and a woman becomes lawful. It provides a legitimate outlet for recreation as well as procreation. Islam regards sex as natural and good, but restricts it to the partners of marriage so as to ensure the responsibility for its consequences. "Your women are a tilth for you so go to your tilth as you will, and send good deeds before you for your souls, and fear Allah, and know that you will one day meet him. Give glad tidings to believers, O Muhammad".[51]

Marriage provides spiritual, physical, emotional and psychological companionship. This companionship generates and sustains love, kindness, compassion, mutual confidence, solace and succor (sakinah). It lays a spiritual and legal foundation for raising a family. The children born of the matrimonial union become legitimate and mutual rights of inheritance are established.

[49] Quran: 4:1, English Translation, http://corpus.quran.com/translation.jsp?chapter=4, accessed on 18/10/2015.
[50] Quran 30:21, Ibid.
[51] Quran 2:223, Ibid.

Marriage in Islam is recommended as a religious requirement. "Marry those among you who are single and marry your slaves, male and female that are righteous"[52] Fulfillment of deen (the full practice of religion) is accomplished through marriage. In Islam, we recognize that marriage is the state to which we aspire - a situation that supports, in every aspect, our attainment of the state that will please our Creator[53]. To fulfill the role Allah designed specifically for us, marriage is important. It is through marriage that these roles are fulfilled.

For women, marriage provides support and protection, "Men are the protectors and maintainers of women, because Allah has given one more (strength) than the other and because they support them from their means. Therefore, the righteous women are devoutly obedient and guard in (the husband's) absence what Allah would have them guard" (Ali Imran: 34-36).

Satisfying sexual desires/needs is one of the major obligation to be accomplished through marriage, especially as sex outside of marriage is forbidden and considered a major sin with capital punishment under Islam[54]

Marriage still remains the trend in Muslim communities. This provides for the safety and security of women and children. It provides a safeguard against sexual sin for the man as well as for the woman. It provides two-parents homes for children and strong ethics that will support a lifestyle that is consistent with the practice of Islam. It provides loving and kind companionship.

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[52] Quran 24:32, Ibid.

[53] Ali Imran: 34-36, http://islamic-world.net/sister/purpose_and_obligation.htm.. Accessed on 26/07/15.

[54] Siddiqi, M., How Islam Views Sex outside Marriage, http://www.onislam.net/english/ask-the-scholar/crimes-and-penalties/adultery-and-fornication/174396-obliged-not-to-marry-how-to-have-sex.html?Fornication, accessed on 18/10/2015.

Islam provides clear and ideal direction for all aspects of life. This is a perfect example of those directions. The religion tells Muslims to marry early. It provides clear guidelines for husbands and wives and, as they become parents, for parenting and for the behaviour of children.

2.4.3.3 Types of Islamic Marriage

There are several types of marriage that are rarely found outside of Muslim communities. These include:

(a) Mutah

One example is mutah, or temporary marriage. Here, a man and woman marry for a predetermined length of time, which may be anything from a few hours to many years. While most Muslims forbid this type of ceremony, many Shiite Muslims continue to allow it.[55]

Mesyar

Mesyar, or "traveler" marriage, can be found in Arab countries with many foreign workers. Often, men leave behind their families when they travel to these countries to work, and it may be years before they return home. Rather than live as single men while they are away, many men enter mesyar marriages or unofficial unions with local women. Generally, they do so without telling their families back home. Although Islamic law does not officially forbid this type of relationship, most Muslim scholars warn against it[56].

(b) Marriage with the Quran

[55] Iyad, El-Baghdadi, Sex Jihaad and different forms of marriages in Islam, http://www.el-baghdadi.com/index.php/item/140-sex-jihaad-and-different-forms-of-marriages-in-islam, accessed on 18/10/15.
[56] Ibid.

In a few impoverished and uneducated parts of the Muslim world, some families force their daughters into what they call "marriage with the Quran." This ceremony, which most Muslims condemn, proclaims the girl married to the Muslim holy book and say that therefore, she cannot ever marry a man. Generally, families perform this ritual because they can't afford to pay their daughter's dowry or don't want any of their land to go to her husband's family.[57]

(c) Urfi

Urfi or secret marriage is becoming increasingly common in Egypt, where economic problems are forcing many young adults to wait years before they can afford an official marriage

eremony. Urfi marriages, which are unofficial and do not require the same financial commitments from the husband, can be performed very simply with only two witnesses.

These ceremonies are extremely controversial, and many Muslim leaders encourage women in particular to avoid them, because of the financial devastation they could face if their urfi husbands leave them.

2.5 OBLIGATIONS OF PARTIES UNDER MARRIAGE

It is a disturbing trend to view and treat marriage as a mostly private affair, an individualistic project not related to the common good but oriented mostly to achieving personal satisfaction; a trend that reduces marriage primarily to emotional bonds or legal privileges,

[57] Uzma, Mazhar, Married to the Quran, http://www.islamawareness.net/Marriage/Quran/married.html, Accessed on 18/10/2015.

regardless of gender. A trend whose primary focus is the belief that marriage is a creation of the State or mere product of the human will, such that the State has the liberty to mold its structure according to society's tastes and needs, thereby overlooking the ontological nature of marriage.[58] Articulating this trend, Monte Neil Stewart, calls it the marriage issue: "The marriage issue of our time is whether constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of two persons"[59].

One vital question we need to answer in the course of this research, is whether same sex marriage does truly exist. Calling something marriage does not make it marriage. Marriage has always been a covenant between a man and a woman which is by its nature ordered toward the procreation and education of children and the unity and wellbeing of the spouses. The promoters of same-sex "marriage" propose something entirely different. They propose the union between two men or two women. This denies the self-evident biological, physiological, and psychological differences between men and women which find their complementarity in marriage. It also denies the specific primary purpose of marriage: the perpetuation of the human race and the raising of children.

Two entirely different things cannot be considered the same thing. By legalizing same-sex "marriage," the State becomes its official and active promoter. The State calls on public officials to officiate at the new civil ceremony, orders public schools to teach its acceptability to children, and punishes any state employee who expresses disapproval.

In the private sphere, objecting parents will see their children exposed more than ever to this new "morality," businesses offering wedding services will be forced to provide them for same-

[58] Grech, M., *The Harmonization of the Religious and Civil Dimensions of Canonical Marriages in Malta: A Review of Canon Law and Jurisprudence*, Forum Journal publication, vol.11 no. 1, (2000) p.25.
[59] Stewart, M.N., *Marriage Facts*, http://protectmarriage.com/wp-content/uploads/2012/11/marriage_-facts.pdf; 30/12/14.

sex unions, and rental property owners will have to agree to accept same-sex couples as tenants. In every situation where marriage affects society, the State will expect Christians and all people of good will to betray their consciences by condoning, through silence or act, an attack on the natural order and Christian morality. In the 1960s, society was pressured to accept all kinds of immoral sexual relationships between men and women. Today we are seeing a new sexual revolution where society is being asked to accept sodomy and same-sex marriage.

The parental role in raising and supporting children will be further hampered with same sex marriage, unless the societies develop laws forcing sperm donors and surrogate mothers to support children they biologically fathered or carried in their wombs under penalty jail. But common sense tells us that such a law will not be sensible as a male or female sexual partner cannot be expected to legally support the child of her sexual partner or lover.

One of the most important purposes of marriage is to continue and increase the population of the Muslims. Clearly, this goal could be achieved without marriage, but it should be stressed that the goal is not simply to produce any child that will live in the next generation. It is to produce righteous children who will be obedient to Allah and who will be a source of reward for their parents after they die.

The desire of men and women for each other is an urge, which needs to be fulfilled. If it is left unfulfilled, it will be a source of discord and disruption in society. For this reason, the Prophet (sas) ordered all men who are capable of meeting the responsibilities of marriage to do it:

2.5 SOME VITAL ELEMENTS COMMON TO ALL MARRIAGES IN NIGERIA

(a) Permanence

The permanent nature Of Marriage as opposed to other contracts is an important element in marriage. Although Marriage is often viewed as a contract, yet this is essentially a special contract, between a man and a woman to bind themselves in a perpetual and indissoluble union of life and love. Thus unlike other social contracts, it has a special element of permanence. This is because Marriage is a natural institution, a universal phenomenon that is common to all human societies and cultures. Marriage, as a fact of nature and an expression of a social reality, is endowed with its own proper, innate and permanent characteristics. It has always around it a complex of norms which govern its establishment and the rupture of the bonds thus created between partners of different sexes, and which are characterized by economic cohabitation. These norms usually determine the rights and duties of the spouses, and that of their relatives and dependants[60].

According to the Marriage Act[61], the Registrar, while celebrating marriage is expected to state as follows:

> Know ye that, by the public taking of each other as man and wife in my presence and in the presence of the persons now here, and by the subsequent attestation thereof by signing your names to that effect, you become legally married to each other, although no other rite of a civil or religious nature shall take place, and that this marriage cannot be dissolved during your lifetime, except by a valid judgment of divorce, and if either of you, before the death of the other, shall contract another marriage while this remains undissolved, you will be thereby, guilty of bigamy and liable to punishment for that offence.

[60] Ernst, W. Marriage as Institution and the Contemporary Challenge to it, **In**: Malone, R., Connery, J.R. (eds.), *Contemporary Perspectives on Christian Marriage*, University Press, Illinois, (1984), p.44.
[61] Section 27, Marriage Act, (supra).

This permanent nature of marriage cannot be foreseen in the same sex relationship which is likely to die off the moment the sexual orientation associated to it fades as a result of age especially where such relationship cannot be sustained by the presence of children as applicable in the family of the normal traditional marriage of a man and a woman.

(b) Family

Another vital element in marriage is the traditional family. Marriage is recognized, accepted and respected as that institution by which the family is established. It is the family that produces, nurtures, and socializes children. It is the family that cares for the frail and the elderly members, provides the labours needed for the economy, and meets the emotional needs of its members. In other words, marriage as a natural institution has God as its author, and has natural law as its fundamental principle. To that effect, the basic and general principles of natural law cannot be eradicated from human nature. It is from this point of view that the very core of this natural reality is the union of a man and a woman.[62.]

It is therefore obvious that promoting same sex marriage amounts to an attack on the traditional family. According to Pope Francis, the man/woman nature of marriage is an anthropological fact that cannot be qualified based on ideological notions or concepts important only at one time in history.[63] Recognition of same sex marriage amounts to putting the identity and survival of the family at great risk.

(c) Consummation

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[62] Nnabugwu, T., Childless Marriage in Africa and Indissolubility: A Canonical Appraisal, **In**: Achunike, H.C. (ed.), *Evangelization in the Third Millennium: A Contemporary Analysis,* Africana-Fep Publishers Ltd., Onitsha, (2002), p.192.

[63] Pope Francis Criticizes Gay Marriage, http://www.cruxnow.com/church/2015/01/16/pope-francis-criticizes-gay-marriage-backs-contraception-ban/. 2nd July, 2015.

Consummation is another vital element in a marriage. It has been held that a marriage is consummated where the parties have full sexual intercourse. It is necessarily characterized by a sexual commitment, which must correspond to the procreative or co-active character of sexual complimentarity, from which derives the capacity of sexual intercourse to express the uniqueness of the conjugal relationship and donation[64.]

What matters in a consummation is the ability to have full sexual intercourse. It does not matter whether the intercourse is able to lead to giving birth to a child or whether the husband is sterile or uses contraceptives[65]. And where there is willful refusal to consummate a marriage, the statutory marriage laws holds such marriages as null and void[66]. The question to ask is whether consummation is possible in a same sex marriage. The answer would definitely depend on the definition of consummation. According to the dictionary definition of consummation, it is a legal completion of marriage by an act of sexual intercourse between the spouses[67]. And the word spouse refers to husband and wife, and if we go by the dictionary interpretation of husband; it means a man to whom a woman is married, while wife is defined as a woman to whom a man is married[68].

Homosexual acts must be seen for what they are, namely, acts of grave depravity, acts intrinsically disordered, acts contrary to natural law, for they do not proceed from a genuine affective and sexual complementarity.[69] Sexuality is ordered to the conjugal love of man and woman and concerns the innermost being of the human being. Consequently, it is realized in a

[64] Burke, C., *The Object of Matrimonial Consent: A Review of Canon Law and Jurisprudence*, Forum Journal Publishers, vol.9, no.1 (1998) p.71.
[65] White v white, (1948), Probate 330.
[66] Matrimonial Causes Act. Op. Cit. S. 15(2).
[67] Microsoft Encarta 2009, http://microsoft_encarta.en.downloadastro.com/. *On 02/06/15.*
[68] Hornby, A.S., *Oxford Advanced Learner's Dictionary*, sixth edition, Oxford University press, New York, (2000).
[69] Catechism of the Catholic Church (CCC), no. 2357, Publications service, Ontario, Canada, (1994).

truly human way only if it is an integral part of the love by which a man and a woman commit themselves totally and irrevocably to one another in an exclusive and permanent relationship. The so called same-sex union or "marriage" cannot in any way achieve this goal of conjugal or sexual complementarity.

(d) Children

Again, same sex marriage has a lot of implication on the rights of a child. It is in the child's best interests that he be raised under the influence of his natural father and mother. This rule is confirmed by the evident difficulties faced by the many children who are orphans or are raised by a single parent, a relative, or a foster parent.

The unfortunate situation of these children will be the norm for all children of a same-sex "marriage." A child of a same-sex "marriage" will always be deprived of either his natural mother or father. He will necessarily be raised by one party who has no blood relationship with him. He will always be deprived of either a mother or a father role model. Same-sex marriage ignores a child's best interests.

One of the main reasons why the State bestows numerous benefits on marriage is that by its very nature and design, marriage provides the normal conditions for a stable, affectionate, and moral atmosphere that is beneficial to the upbringing of children—all fruit of the mutual affection of the parents. This aids in perpetuating the nation and strengthening society, an evident interest of the State.

Homosexual "marriage" does not provide such conditions. Its primary purpose, objectively speaking, is the personal gratification of two individuals whose union is sterile by nature. It is not entitled, therefore, to the protection the State extends to true marriage. At stake

are the lives of many children who will be discriminated against in advance, and deprived of their human development.

CHAPTER THREE

SAME SEX MARRIAGE

3.1 Introduction

Same-sex marriage has become one of today's leading social issues in the world and has created a social movement that is akin to the civil rights era of the 1960s and 1970s.[1] Progress has been sporadic, though more frequent in recent years. America's first same-sex marriages were performed in San Francisco in February 2004, only to be annulled months later by the State Supreme Court. Later that year, Massachusetts became the first state in the nation to legalize same-sex marriages, after which more states followed while others enacted laws banning same sax marriage.[2]

The fight for same-sex marriage had its beginning long before the 1990's, but didn't gain momentum until the Clinton administration, when the Defense of Marriage Act known as 'DOMA'[3] was enacted in 1996. It narrowed the definition of marriage as that between one man and one woman, and the provision provides that "states need not recognize a marriage from another state if it is between persons of the same sex"[4] Because federal law does not recognize Same-sex marriage, individual states are left alone to make decisions on this issue.

Ever since then, same sex advocates have been mounting pressure for a redefinition of marriage as a union of two persons. This pressure has been resisted by the religious bodies especially the Catholic bishops who felt that "If there is a change to the legal definition of

[1] The Civil Rights Era (1865 – 1970), http://www.sparknotes.com/history/american/civilrights/summary.html, accessed on 20/10/2015.
[2] Same Sex Marriage, State by State, Pew Research Center, http://www.pewforum.org/2015/06/26/same- sex-marriage-state-by-state/, accessed 20/10/2015.
[3] DOMA Watch: http://www.domawatch.org/index.php. 22/12/14.
[4] Ibid.

marriage, pressure will be brought to bear on Catholic schools, agencies and other institutions to teach and to accept that this form of sexual union is equal in worth to the committed, monogamous and heterosexual union sealed in marriage. This is an unacceptable infringement of the freedom of association and religious liberty, including not only freedom of worship but also freedom of religious practice"[5] Well, today in the United States, this concern has already become a reality. Thomas Messner has documented multiple instances in which redefining marriage has already become a nightmare for religious liberty.[6] He pointed out that after the State of Massachusetts redefined marriage to include same-sex relationships, Catholic Charities of Boston was forced to discontinue its adoption services rather than place children with same-sex couples against its principles. Again, the "Religious Freedom Protection and Civil Union Act" has forced Catholic Charities out of foster care and adoption services in Illinois. This goes to show that the right to religious freedom in the final analysis would be breached by the State rather than protected by getting involved in the redefinition of marriage.

Unfortunately, all that has changed since 26th June, 2015, where in a long-sought victory for the gay rights movement, the Supreme Court ruled by a 5-to-4 votes that the Constitution guarantees a right to same-sex marriage.[7] As Justice Kennedy finished announcing his opinion from the bench on Friday, 26TH June, 2015, several lawyers seated in the bar section of the court's gallery wiped away tears, while others grinned as the ruling was announced. This

[5] Catholic Bishops' Conference of England and Wales, *Response from the Catholic Bishops' Conference of England and Wales to Government Consultation on 'Equal Civil Marriage (June 2012*), www.catholic-ew.org.uk/.../CBCEW-response-equal-civil-marriage-cons. 9/12/14.
[6] Thomas, M. M., *Same-Sex Marriage and the Threat to Religious Liberty, (2008),* http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty; 20/12/14.
[7] Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide:* http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0, 29/06/15.

decision has made same-sex marriage a reality in the 13 states that had continued to ban it in the united states.[8]

In Nigeria, the Federal Ministry of Justice in 2006 first presented a *Same Gender Marriage (Prohibition) Bill 2006*, which criminalized same-sex marriage punishable with five years' imprisonment for anyone who involves in it, aids or abets such marriage.[9] A change of government in 2007 truncated the realization of this Bill. On July 25, 2011, the Bill for an Act to Prohibit Marriage of Same Gender, Solemnization of Same and For Other Matters Related therewith *(Same Gender Marriage (Prohibition) Bill, 2011)*, was re-introduced. Today Nigeria, refusing to bow to international pressure and politics, has formally passed into law this Bill thus effectively criminalizing all forms of same-sex relationships punishable with up to fourteen years imprisonment. In other words, the only valid marriage in Nigeria is one contracted between a man and a woman under Islamic Law, Customary Law or Marriage Act.

3.2 Concept of Same Sex Marriage

Cambridge dictionary defined same sex marriage as a romantic relationship between two men or between two women;[10] While oxford dictionary defines it as Marriage between partners of the same sex (as recognized in some jurisdictions).[11] What is common in the two definitions is that Same-Sex marriage is between two people who are of the same sex. Nigeria same sex marriage prohibition Act defined 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"[12].

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[8] Ibid.
[9] Arinze-Umobi, C. & Umobi, A.D., *Crisis in Family Law*, Folmech Printing and Publishing co. Ltd. Onitsha, (2009), pp. 46-48.
[10] http://dictionary.cambridge.org/dictionary/british/same-sex. 12/12/14.
[11] http://www.oxforddictionaries.com/definition/english/same-sex-marriage
[12] Section 7, Same Sex Marriage Prohibition Act, 2013. Laws of the Federal Republic of Nigeria, 2013.

Same-sex marriage includes amongst others a willful human sexual intercourse relations and the social license related to those relationships, such as mores, law, stigma, or the social legitimacy of the relationship as perceived by those with social power. There are different forms of same sex marriage which includes: lesbianism, gay, transgender and bisexuals (LGTB).

The concept of same sex marriage is, of course, not a new behavior. It has existed in practically all cultures and among all people, but usually in fewer numbers and in secrecy, not with boldness as it is in the west now. This is the reality of the times we live in today especially with the advancement in technology. The same sex group in an attempt to polish their image, constitute a very active and powerful lobby group. They have strong political and social ties and access to the elites of the society, especially in the western world. Some has likened to a civil union otherwise known as civil partnership or registered partnership, legally recognized as form of partnership similar to marriage.

3.3 The same sex marriage prohibition Act

Section 7 of same sex marriage prohibition Act[13] has recognized marriage to mean "a legal union entered into between persons of opposite sex in accordance with the marriage Act, Islamic law or customary law". It also went further under the same section to define 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"[14].

Section 1(2) of the same sex prohibition Act[15] prohibits marriage between same-sex persons in Nigeria, while Section 1(3) prohibits recognition of any marriage between persons of the same sex entered into in other countries. Section 1(1) provides: "A marriage contract or civil

[13] Same Sex Marriage (Prohibition) Act, 2013, (supra).
[14] Ibid.
[15] S. 1(2), Ibid.

union entered into between persons of same sex: (a) is prohibited in Nigeria; and (b) shall not be recognized as entitled to the benefits of a valid marriage". Section 1(2) again provides: "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 there-from by virtue of the certificate shall not be enforced by any court of law"[16].

Section 5 creates the offenses and penalties for holding same sex-marriages, or for performing, witnessing or aiding or abetting the ceremony of same-sex marriages. Engaging in same-sex marriage is punishable by 14 years imprisonment, while the crime of participating in gay organizations, public show of amorous same-sex relationship, witnessing and abetting the solemnization of same-sex marriage, registering or supporting the registration and operation of gay clubs, societies and organizations in Nigeria attracts a penalty of 10 years imprisonment[17]

The import of the new Act touches on validity and recognition of marriages between man and woman only, and consequent prohibition of same sex marriage and the prohibition of adoption of children by persons of same sex, non-recognition of same sex marriage entered in other countries, prohibition of celebration of same sex marriage in a place of worship and prohibition of registration of gay clubs and societies and publicity of same sex sexual relationship.

3.3.1 The Penal Provisions of the Act

There have been fears being expressed over possible abuse by the enforcement agencies. These fears are not unfounded. The Same Sex marriage prohibition Act failed to cover necessary loopholes to checkmate such abuses. Taking a look at the penal provisions of the Act, Section

[16] Ibid.
[17] S. 5, Ibid.

5(1) of the Same Sex Marriage prohibition Act provides that: "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[18]". Our point of argument here is not on the 14 years sanction which is a mere replication of section 284 of the penal code[19] which provides that 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. The question is on how to prove that a person has entered into a same sex marriage contract or a civil union. Existence of marriage is usually proved through things like certificate of registration or payment of dowry as the case maybe. But since registration of same sex marriage is already a crime according to the Act, it is therefore difficult to establish that persons living together is for the purpose of being husband or wife.

The interpretation of civil union has made the offence must complicated to prove. According to the Act 'civil union' means[20]: any arrangement between persons of the same sex to live together as sex partners, and includes such descriptions as:

(a) adult independent relationships;
(b) caring partnerships;
(c) civil partnerships;
(d) civil solidarity pacts;
(e) domestic partnerships;
(f) reciprocal beneficiary relationships;
(g) registered partnerships;
(h) significant relationships; and
(i) stable unions.

Obviously, some of these relationships mentioned above are normal friendly relationships with no intent of same sexual acts.

[18] Same Sex Marriage Prohibition Act, 2013.
[19] Penal Code Law, Cap. 89 Laws of Northern Nigeria, 1963.
[20] Section 7 Same Sex Marriage Prohibition Act, Op. Cit.

Again, Section 5(2) of the Act[21] provides that "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". While Section 5(3) states that:

> A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of I0 years imprisonment.[22]

These are ambiguous provisions as the extent of involvement in abetting or aiding in the crime is not clear. Is the registration envisaged in section 5(2) limited to the trustees of the company or does it include the institution like the Corporate Affairs Commission or even the lawyer who is performing his professional duty. The issue of aiding and abetting or supporting registration is obviously vague. What is the extent of involvement to imply aiding, abetting or support, taking cognizance of the freedom of expression guaranteed by the constitution.[23]

3.3.2 **What Constitutes the Offence of Same Sex Marriage**

There must be some tests or ingredients of same sex acts which the prosecution needs to prove to establish same sex offence. The Act defined "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. Taking a look at the definition of same sex

[21] Same Sex Marriage Prohibition Act, 2013.
[22] Ibid.
[23] S. 39, Constitution of the Federal Republic of Nigeria 1999 (as amended), Cap. C.23 L.F.N. 2004.

marriage, the question to ask is, when will a person said to have committed the offence of same sex marriage?

How does one begin to prove that the intention of two persons living together is for the purpose of being husband and wife or for the purposes of same sexual relationship? This is obviously a herculean task especially since the act has banned registration or solemnization of Same Sex marriages.

Taking a closer look at the second part of the definition of same sex marriage which states[24]: "… for other purposes of same sexual relationship", the Act did not provide the necessary tests or ingredients which must be in existence to prove that the offence has been committed. Take for instance section 284 of the penal code[25] which has a similar provision named 'unnatural offences'; it states that the prosecution has to prove:

1. That the accused had carnal intercourse with a man, woman or animal
2. That such intercourse was against the order of nature
3. That the accused did the act voluntarily
4. That there was penetration

Similarly, in the offence of rape, the law provides that a man would be said to have committed rape if he has unlawful sexual intercourse with a woman who, at the time of the intercourse, did not consent to it. At the material time, he must have known that she did not consent to the intercourse or he must have been reckless as to whether she consented to it.[26] Thus it is obvious that the prosecution has a bounded duty to prove the following ingredients:

a). that the accused had sexual intercourse with the prosecutrix;

[24] Section 7, Same Sex Marriage Prohibition Act, 2013.
[25] Section 284, Penal Code Law, Op. Cit.
[26] Ogunbayo v. State (2007), 8 N.W.L.R. (Pt.1035), 157.

b). that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat intimidation, deceit, or impersonation.

Such ingredients or tests to prove a crime as described above seems to be lacking in the Same Sex marriage prohibition Act. Thus a lot of questions are bordering the minds of many Nigerians: what actually constitutes the offence of same sex. Apart from things like anal sex and oral sex, does same sex acts also include other things like body contact, hugging, belly to belly contact, peck, touching etc. Where does one draw the curtain that the persons who come together have the intention to commit same sex offence. Does the Act require some physical sexual actions in order to establish the crime of same sex or is it enough that the persons were found together naked. These questions and many more are obviously begging for answers in the Act.

Therefore, a note of caution needs to be sounded in the enforcement process of this new Law. The State, as well as other enforcement institutions and individuals must ensure that overzealous enforcement agencies do not use the new law as a tool to abuse the rights of Nigerians and foreigners in Nigeria. There may also be need to consider an amendment to stipulate the test to grounding an allegation of homosexuality or similar acts under the Law. The test must be clear and based on credible evidence pointing irresistibly to the commission of the crime such as finding suspects in the alleged criminal acts like "a pestle in the mortar" or "a rope in a well"[27] for instance belly to belly as the case may be.

3.4 The Rationale for the prohibition of same sex marriage in Nigeria

Marriage is not just any relationship between human beings. It is a relationship rooted in human nature and thus governed by natural law. Natural law's most elementary precept is that "good is to be done and pursued, and evil is to be avoided." By his natural reason, man can

[27] Bello, R**.,** Civilization, homosexuality and Nigerian laws, http://www.punchng.com/feature/the-law-you/civilisation-homosexuality-and-nigerian-laws/, 23rd June, 2015.

perceive what is morally good or bad for him. Thus, he can know the end or purpose of each of his acts and how it is morally wrong to transform the means that help him accomplish an act into the act's purpose. Any situation which institutionalizes the circumvention of the purpose of the sexual act violates natural law and the objective norm of morality. Being rooted in human nature, natural law is universal and immutable. It applies to the entire human race, equally. It commands and forbids consistently, everywhere and always. Traditional marriage is usually so sacred that those who would frustrate its end must do violence to nature.

The implication of changing the definition of marriage to a union of two persons, and thereby attributing to it a significance alien to its natural meaning, is that the essential link between marriage, conception and biological parenthood would be eclipsed and lost. It would undercut the idea that procreation is intrinsically connected to marriage. It would reduce marriage merely to sentimentality and to sex, and with emotional or romantic connection becoming the sole criterion by which the State is to determine what constitutes marriage. Moreover, it would corrode marital norms of sexual fidelity since the advocates of same-sex marriage and same-sex couples themselves tend to downplay the importance of sexual fidelity in their definition of marriage. Taken to its logical conclusion, the redefinition of marriage as a union of two persons would also amount to legalizing amorous lifestyle or group marriage, and produce a culture in which marriage loses its significance and standing, with disastrous results for children begotten and reared in a world of post-marital chaos.[28]

3.5 Same sex marriage under Islamic law

[28] The Witherspoon Institute, "Marriage and the Public Good: Ten Principles" (2008), www.princetonprinciples.org. accessed on 30/12/2014.

Islamic scholars vociferously condemn same-sex marriage as a "severe transgression" that according to their interpretation of the Islamic sources of law is "totally and unequivocally rejected in Islamic law.[29] While Some human rights advocates who sympathize with the goal of achieving same-sex marriage in Muslim nations argue that, at this point in history, a debate among Islamic jurists on same-sex marriage is inappropriate because it might fuel a backlash against lesbian, gay, bisexual, and transgender ("LGBT") rights—and potentially other human rights, including women's rights (particularly in the context of family legal regimes)."[30] However, the enactment of the same sex marriage prohibition Act of 2013 in Nigeria which has generated a lot of controversies both within and outside Nigeria has made this discourse inevitable.

There is no doubt that in Islam homosexuality is considered 'sinful'. Homosexuality as far as Islam is concerned is a profound mistake (as are all sins if they are not intending to do wrong). Humans are not homosexuals by nature. People become homosexuals because of their environments. Particularly critical is the environment during puberty. Suggestions, ideas and strange dreams are symptoms of confused attempts to understand new and blunt sexual desires and are rashly interpreted as defining someone as being one sexuality or another. If these conclusions are accompanied by actual homosexual acts they are even more strongly reinforced.

The advocates of same-sex marriages point out that the scriptures do not expressly prohibit a marriage between members of the same gender. In light of the prohibition of homosexuality, this argument does not have much utility. Also, for those who follow God's

[29] Syed, I. B. Same Sex Marriage and Marriage In Islam, http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm. accessed on 27/05/2015.
[30] Ibid.

scriptures, marriage is a divine institution (Quran 30:20-21). The scriptural references to marriage always imply a union of a man and a woman (Quran 7:189).

Again, proponents of same-sex marriages argue that this scriptural restriction deprives them of enjoying equal rights under the law. Married couples typically enjoy tax, medical, inheritance and other benefits which are denied to same-sex partners. The problem here is one of financial and procedural difficulties that same-sex marriage partners endure. These issues are relevant to human laws and are addressable by the law-making bodies. This also serves to highlight the fact that religious and civil unions are two separable entities. God defines religious unions and lays down what constitutes a marriage in His eyes. Consequently, a woman and a man may fulfill the requirements specified in the scripture (e.g., mutual attraction and dowry—Quran 4:24) and be a married couple by God's rules, but may not necessarily be recognized as a couple by the state.

There are various verses in Quran where Allah clearly teaches that same sex marriage is not allowed in Islam. In more than one place in the Holy Quran, Allah recounts to us the story of Lot's people, and how He destroyed them for their wicked practice. There is consensus among both Muslims and the followers of all other religions that sodomy is an enormity. It is even viler and uglier than adultery. "Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women. Ye are indeed a people transgressing beyond bounds."[31]

[31] Quran 7:80-81, English Translation, http://corpus.quran.com/translation.jsp?chapter=4, accessed on 18/10/2015.

Again, Quran 26:165-166 teaches: "of all the creatures in the world will ye approach males and leave those whom Allah has created for you to be your mates? Nay ye are a people transgressing all limits!"

The end result for not giving up homosexuality was the destruction of the entire cities of Sodom. The Quran forbids any sexual relationship other than in a marriage between a man and a woman. Many homosexual men and women claim that they are born with their sexual preferences and that they have no choice. Although this point is very much in dispute in the medical world, it has no support in the Quran[32].

The Bible which is the greatest book that guides the life of Christians did not say something different from the Islamic teaching on same sex marriage. For instance, the book of Leviticus 18:22 states that: "You shall not lie with a male as with a woman; it is an abomination"[33] and Leviticus 20:13 provides for the punishment for such behavior thus: "If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them."[34]

3.6 SAME SEX MARRIAGE UNDER NATIVE LAW AND CUSTOM

Same Sex Marriage advocates argue that the socio-juridical problems affecting marriage institution today by way of same sex marriage may not be totally alien to Nigeria culture in view of some cultural practices in some parts of Nigeria. This argument makes it relevant to look into

[32] Zafar Khan, Islamic view about Homosexuality, http://www.islamawareness.net/Homosexuality/homo.html, accessed on 27/05/15.
[33] Christian Community Bible, Claretian Publishers, Quezon City, Philippines, 2004
[34] Ibid.

some of the customs in Nigeria as they relate to marriage in order to see how it gives credence or disapproval to the idea of same sex marriage.

3.6.1 The Concept of Same Sex Marriage under Nigeria Customary Law

Marriage in some Nigerian communities is not and has never been restricted to a union of a man and woman alone. Marriage has never been understood as an affair involving males and females only. Nwogugu,[35] a Professor of law, has thrown more light on the African institution of female husband when he writes:

> Under some customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. On the surface, such arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman. However, there is much in these cases than meets the eye. The true position in each case is that there is at the background a man in whose name or behalf the marriage is contracted.

On the surface, such arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman. However, there is more to it than meets the eye. A marriage contracted under native law and custom is not invalidated on the grounds that it is not of the male-female combination and has always been part of marriages recognized in Nigeria before the same sex marriage prohibition Act 2013 was enacted. Let us consider the following situations:

(a) A married woman with children providing dowry to her husband to marry another woman;

(b) A woman, married or unmarried, providing dowry for her son or other relative to marry because the man in question is unable to pay the dowry for his own marriage;

[35] Nwogwugwu, E.I., Family Law in Nigeria, (Revised Edition), Heinemann Educational Books, Ibadan, 2006, p.63.

(c) A married childless woman purportedly marries another woman for her husband on behalf of a male relation of hers.

(d) A married childless woman marries another woman on her own behalf while her marriage is still subsisting;

(e) A childless single woman marries another woman on her own behalf;

(f) A childless widowed and/or divorced woman marries another woman on her own behalf.

(g) Female Children Marrying for their deceased Sonless Father

(a) A married woman with children providing dowry to her husband to marry another woman

It is not strange to see some married woman marry young girls for their husbands as a means of securing her position in the family. They merely happens where the women has given birth only to female children. The wife provides her husband with funds for the bride-price in respect of a new wife who is expected to bear male children in her place. They prefer marrying new wives to their husbands to leaving their matrimonial home or allowing their husbands to die without children. This practice cannot be likened to same sex marriage nor is it same with woman-to-woman marriage practiced in some cultures because the dowry is provided for her husband to marry.

(b) A woman, married or unmarried, may provide the dowry for her son or other relative to marry because the man in question is unable to pay the dowry for his own marriage

This is another case of marriage on behalf of another. Obviously, a woman providing dowry for a son or a relative does not tantamount to woman to woman marriage or same sex

marriage. At best, she can be likened to a mere sponsor of another person's marriage. There is more to marriage than provision of dowry. Therefore a mere provision of dowry alone on another person behalf does not create any legal or cultural bond between the woman who provides the dowry and the woman on whose behalf the dowry is paid. No such bond is created on the offspring of the marriage. The true position in each case is that there is at the background a man in whose name or behalf the marriage is contracted.

(c) A married childless woman purportedly marries another woman for her husband on behalf of a male relation of hers

A married but barren woman may decide to marry for her husband through any of her relations in order to secure her position in the family. The marriage here is contracted in the name of the husband who is often late as of the time of the marriage. In which case, the childless woman pays the dowry of the new wife through any of her male relations. Thus the marriage is either made on behalf of a male member of the family of the financier thereof, or that of her late husband in which case it can be regarded as a type of 'ghost marriage'. It is therefore difficult to conclude that this is equal to same sex marriage or woman to woman marriage as the case maybe.

(d) A married childless woman marries another woman on her own behalf while her marriage is still subsisting

There is sometimes a situation whereby a married childless woman whose husband is still alive and probably has married other women, may decide also to pay a dowry on the head of another woman on her own behalf to enable her have a child of her own. Although this rarely happens, but when it does, it is a clear case of woman to woman marriage. However, we are not

sure whether, it can be likened to same sex marriage going by the nature and intention of such woman to woman marriage.

This type of marriage sometimes creates confusion as to the real identity of the children of the marriage. In *Meribe v. Egwu*[36], the court had to decide whether a child born of a woman married to a childless woman while the latter was also married to a man is the child of the woman husband or the child of the "male husband" of the "woman husband". The facts were as follows: Nwanyiokoli, one of the wives of Chief Cheghekwu, because she was childless married her niece, Nwanyiocha, and contracted her husband (Cheghekwu) for the purposes of raising heirs for her. The niece had children from the affairs between her and Chief Cheghekwu, one of whom was the plaintiff in this case. Nwanyiokoli had brought the plaintiff up as own her son; she played the role of the plaintiff's natural and biological father. Nwanyiocha, her niece and wife, lived with her and she played the role of a husband. These happened while Nwanyiokoli was living in Chief Cheghekwu's house as one of his wives. When Nwanyiokoli died, the plaintiff performed the burial ceremony as the son of the woman. He inherited her properties including the land which was the subject of dispute. He had farmed on the disputed land from the time of Nwanyiokoli's death in 1937, until 1971 when the defendant trespassed on it. The defendant was one of the children of Meribe, eldest son of Chief Cheghekwu, by another wife. When his father died, Meribe has inherited Nwanyiokoli under native law and custom. The defendant claimed that when Nwanyiokoli died, it was his father, Meribe, who performed the burial rites and inherited her properties including the disputed land, not the plaintiff. During the trial, evidence was given and accepted by the lower court to the effect that: "it is the custom of our place that if a woman has no issue, she can marry another woman… any issue from the said woman would be

[36] (1976), 3 S.C. 23.

regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance".[37]

The trial judge accepted the evidence adduced before the court but argued that while (a) the evidence was in accord with native law and custom, (b) Nwanyiokoli did not marry Nwanyiocha for herself but for her husband, a fact naturally impossible because Nwanyiokoli is a woman; (c) it was indisputable that Nwanyiokoli treated the plaintiff as her son. According to the judge "the word marriage in the context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwu to marry". The court found for the plaintiff, on the grounds that the marriage was validly contracted. The defendant appealed to the Supreme Court of Nigeria which did not uphold the judgement of the lower courts.

According to Madarikan, J.S.C.:

> in every system of jurisprudence known to us one of the essential requirements for a valid marriage is that it must be the union of man and a woman thereby creating the status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a woman-to-woman marriage, and where there is proof that a custom permits such an association the custom must be regarded as repugnant by virtue of the provision of section 14(3) of the Evidence Act and ought not to be upheld by the court.[38]

The court, thus, set aside the decisions of the lower courts. It declared the system of woman-to-woman marriage repugnant to natural justice, equity and good conscience.

(e) A childless single woman marries another woman on her own behalf

[37] Ibid.
[38] Ibid.

In some parts of Nigeria, an unmarried but prosperous woman who has no children to inherit her property and preserve her family line, if she desires to have a family of her own may, if she cannot bear children, marry another woman on her own behalf. She attains this objective by providing the bride-price on the head of another woman who then while living with her bears children for her. Usually, internal family arrangements are made whereby the new wife bears children by specially chosen male members of the family or by a paramour. The marriage is always arranged or in fact contracted in the name of a male member of the family of the female husband. This custom is obtainable in Asaba, Delta State[39]and some other parts of Igbo communities in Nigeria.

(f) A childless widowed and/or divorced woman marries another woman on her own behalf.

This is another scenario whereby a married childless woman who has been divorced by her husband; or a childless woman whose husband is late, may decide to pay a dowry on the head of another woman on her own behalf to enable her have a child of her own. This is common in so many communities in Nigeria. However, we are not sure whether, it can be likened to same sex marriage especially as such relationship is always devoid of any sexual affair between the female husband and the wife. Thus the essence of such marriage is for a childless divorced to have a child of her own.[40]

(g) Female Children Marrying for their Sonless Father[41]

[39] Iweze v. Okocha, *(*1967/68), M.S.N.L.R.64; see also, Esenwa, F.E. 'M*arriage Custom in Asaba Division', The Nigerian Field (19*48) vol.XIII No.2 Talbot, P.A. *Tribes of the Niger Delta: Their Religions and Customs,* (London: Frank Cass, 1967), pp.195-196. African Journal of Law and Criminology, Volume 4 Number 1 (2014), pp. 42-60.
[40] Otakpor, Nkeonye, A woman who is a husband and father: An essay in Customary Law, http://www.afrilegstud.com/calsreview/PDF/Otakpor.pdf, accessed on 20/10/15.
[41] Ibid.

It was and still is common to see some female children of a family collectively pay bride price of a younger girl after the death of their sonless father in the name of their eldest sister so that the new bride would give birth to male children to preserve their father's lineage and for inheritance purposes. The bride would choose a bedmate from the family of her female husbands so that she would procreate male children. The choice of bedmate was critically determined and the female husband had, as a matter of compulsion, to assist the bride in choosing her sex partner. There are reasons for the involvement of the female husband in choosing a bedmate for the girl. The reasons are: (i) to ensure that the bedmate was a blood relation of the female husband; (ii) to preserve the blood tie of the family; (iii) to ensure that the bride would not pollute the family by raising children fathered by miscreants, thieves or persons with ailment; (iv) to prevent the introduction of undesirable traits into the family. The female children can also marry for their father while alive but have no children or sons[42].

3.6.2 The Nature and Form of woman to woman marriage

In the instances, where a woman marries another woman under our native law and custom by undergoing formal marriage rites; the requisite bride price is paid by one party as in a heterosexual marriage. The woman who pays the bride price for the other woman becomes the sociological 'husband'. The couple may have children with the help of a 'sperm donor', who is a male kinsman or friend of the female husband, or a man of the wife's own choosing, depending on the customs of the community. The female husband is the sociological father of any resulting offspring. The children belong to her lineage, not to their biological father's. In some Nigerian communities where female husband marriage is practiced, resulting offspring do not belong to the lineage of the female husband, though she is recognized as the sociological father. It is

[42] Ibid.

conventional, even law like, that no sane man takes the wife of a woman husband, while the marriage between both women is still subsisting. In some communities, it is an abomination to do so. The punishment for such an offence is ostracism in its most severe form. In a face-to-face relationship, only very few people or perhaps none are willing to damn the consequences arising from that kind of situation. In other communities such men are banished from the village for a very long time. Yet in some others, prior to ostracism or banishment, friends, wife or wives of such an offender, his age mates and relations disown him publicly through the village town crier. The reason for these measures is obvious. In communities where female husbands are common and accepted practice, there is neither a logical nor material difference between "a male husband" and a female husband." All husbands bear the same denominator. The customary rules, regulations, conventions, principles and norms which are used to protect a male husband and his wife or wives are logically extended to a female husband and her wife or wives of a neighbour applies to all husbands irrespective of the sexual designation of the individual.

3.6.3 Woman-To-Woman Marriage and Lesbianism

While some of the same sex marriage advocates have always argued that woman-to-woman marriage is a kind of "primitive" lesbianism, others who oppose same sex marriage think that this assumption is more than naive because for them, woman-to-woman marriage is a solution to a problem. It is dictated by need not lust. It is therapeutic because it is, indirectly, a practical way of allowing a childless woman to have children. It is a means employed by a barren woman to avoid losing her position in the household. African practice of female husband is not the practice of lesbianism and has nothing to do with woman to- woman sexual intercourse. Rather, African practice of female husband is adopted by barren women to produce children when all other options had failed. Usually, although the female husband is the one that pays the

bride price on the girl's head, she (i.e. the female husband) has a man who would be performing duty of a husband, especially sexual function to make the girl bear children for the female husband. It is therefore not a way of getting rid of the natural desire for sexual intercourse on the part of a woman husband because she neither hates men nor abstains from intercourse. Most women husbands live very active sexual lives because they have regular sexual relations with the men in their lives. Their problem is simply that they are infertile, not that active sexual activity with men has no meaning in their lives. This is different from lesbians who marry other women not because they (lesbians) are barren but probably because they either hate the men folk or do not like sexual intercourse. For them, Lesbians willfully choose homosexual relationship as a way of life. While there is no sexual relationship between a woman husband and her wife, lesbians actively engage in pseudo sexual relations among themselves. Woman-to-woman marriage and lesbianism have different meanings and purposes. The practices are not the same and cannot be. A latin maxim '*Nullum simile est idem' means* 'Nothing that is like another is the same', that is to say, although woman to woman marriage may literally speaking look like same sex marriage, the meaning and purpose are quite different.

3.6.4 Justification for Woman To Woman Marriage

The truth about woman to woman marriage is that it arises out of the desire to have children. There is the natural desire to have children who will bear one's name. This is deeply rooted in human nature. Having children is a means of perpetuating the family name. It is a means of perpetuating one's name. While most human beings have the potential to procreate, some for medical and other reasons cannot actualize this desire. For the latter category, life is incomplete. Not having one's own children is a nightmare of unquantifiable dimension and magnitude. To most Nigerian women infertility is an anathema. The Idea is dreaded and the

reality is regarded as a curse. Without children, for most Nigerians, the goal of life has been defeated. It remains unfulfilled. The value system places more premium on children than material wealth. There is nothing resembling children in this world. There is no substitute for children. It is the person who has children that is believed to have lived a successful and fulfilled life. No matter how wealthy a person may be, if that person is childless, that person's life is regarded as a frustrated one. A childless life is a frustrated life. According to Leonard:

> a childless woman is regard as a sort of monstrosity, indeed, it is unknown that when such a woman dies, in order to express the contempt in which she is held, her abdomen is slit across prior to her burial. She has failed to fulfill her function in life, and this mutilation of the corpse is the token of her failure, her name is blotted out for ever.[43]

Beyond this quest for children of one's own is a quest for an endless life here on earth. Death is indubitably certain. Neither reincarnation nor the gloomy post-mortem life in the spiritual world satisfies this quest for immortality. The most satisfactory solution is self perpetuation, here and now, through one's children, grand children and great grand-children. Continued life and existence is only assured and ensured through one's children. Hence procreation is imperative not merely for biological purposes or for the purpose of ensuring the survival of the species, but also for personal needs in terms of immortality. The desire is that of perpetuation in children of our own. Having children is the solution to death and mortality. For women unable to have their children, there is the strong belief that life stopped, that life has no meaning anymore; that life has come to an end. Indeed, for infertile women, they have failed as daughters, wives and mothers. Without children, such women live in a meaningless world. The abuses and insults heaped on them can (has indeed) lead some to suicide. The consequences of infertility are particularly difficult for women.

[43] Arthur G. L., *The Lower Niger and Its Tribes,* Macmillan, London, (1906), PP.215 – 216.

Childlessness goes with a lot of stigmatization[44] and because of the stigmatization of infertility; childless women are subjected to psychological abuse in their husband's family. Since marriage in Nigeria is patrilocal, it is considered a great misfortune for her family of birth if a woman is childless and returns to her parents because of her unsuccessful marriage. A childless marriage is without equivocation, an unsuccessful marriage. It is a failure for the family and it is particularly hard on a woman's family of birth.

Evidence of marital disharmony, disruption and dysfunction due mainly to infertility is legion. In many ethnic groups in Nigeria, childlessness is a strong and significant risk factor for separation and divorce.[45] Women bear much more clearly the burden of infertility and suffer serious emotional, social, cultural and economic consequences than men. Not having children results in a sense of role failure for women. It places women at the risk of social, cultural and familial displacement. Infertility destroys peace for men and women. It leads to marital insecurity, rejection and nurtures the fear of abandonment for women. On the part of men, those without children have less status than men with children. Thus a childless woman who begets children by marrying another woman has (a) escaped the stigma and socio-cultural censure of sterility and (b) her security and comfort at old age are guaranteed.

3.6.5 The Legal Position

The legal position of Nigerian courts on woman to woman marriage from the customary courts to the Supreme Court appears contradictory, difficult and challenging. The reason for the contradiction is not farfetched. First, the Nigerian Matrimonial Causes Act 1970 is abysmally silent on woman-to-woman marriage. Secondly, the Customary Court Edict in some states of the

[44] Inhorn, M.C. *Infertility and Patriarchy: The Cultural Politics of Gender and Family Life in Egypt,* University of Pennsylvania Press, Philadelphia, (1969), P. 205.
[45] Ibid.

federation, for example, the defunct Bendel State,[46]seems to have declared it repugnant. Thirdly, customary law is an unwritten law but recognized by the communities where it is practiced as their way of life. And lastly, there was no Federal legislation prohibiting woman to woman marriage or even same sex marriage before the recent same sex marriage prohibition Act, 2013.

The truth is that the Customary Court recognizes female husband or woman-to woman marriages as valid marriages. Similarly, as will be shown later, some High Courts recognize female husband or woman-to woman marriages as valid marriages. However, the superior Court of record, to wit: Court of Appeal and the Supreme Court never hold this brand of marriage to be valid. In other words, the lower Courts seem to have recognized some of the customary law marriages in some respects. Professor Nwogugu writes that customary law recognized the practice of female husband marriage in that "a barren wife may, in an effort to fulfill her obligation to bear children for her husband, "marry" another wife for her husband by providing the bride price for the marriage. But the children born of the other wife are regarded as the legitimate children of the husband[47].

In *Helina v. Iyere*[48] where the court had to decide whether a child born of a woman married to another woman is the child of the woman husband going by an Esan custom whose practice is that a childless woman who desires to raise a family is permitted to marry a girl on the

[46] Section 22(a), Customary Court Edict 1978, provides as follows: Subject to other provisions of this Edict a customary court shall administer (a) the appropriate customary law specified in section 23 of this Edict… Repugnant to natural justice, equity and good conscience nor incompatible either directly or indirectly or by necessary implication with any law for the time being in force.

[47] Nwogugu, E.I. *Family Law in Nigeria.* Ibadan: Heineman Educational Books, (2001), pp.287-288.

[48] *Helina Odigie v Iyere Aika.* High Court of Bendel State, Ubiaja Judicial Division, Suit No. U/24A/79 (Unreported). See also G.O. Okogeri, "Repugnancy of Customary Law", (1985), *I Nigerian Bulletin of Contemporary Law* 51 – 52.

payment of dowry and to lay claim to any offspring of such a girl. The lower court held in favour of the plaintiff's claim by upholding the custom. But on appeal to the High Court, the counsel for the appellant argued that the practice is repugnant to natural justice, equity and good conscience, and as such would be inconsistent with dictates of justice to declare such marriage between a woman and another woman as valid. The trial judge agreed with the submissions of the counsel to the appellant and setting aside the decision of the lower court held that woman-to-woman is repugnant to natural justice, equity and good conscience.

The Supreme Court on the other hand seems to have been consistent in holding that woman to woman marriage is repugnant to natural justice, equity and good conscience since the decision in *Meribe v. Egwu*.[49] The case of *Okonkwo v. Okagbue*[50] is not logically different from Meribe's case. In that case, under Onitsha native law and custom a sister whose deceased brother is childless can marry another woman for her deceased brother even where such a deceased has issues surviving him. In this case, the members of Okonkwo family endorsed the action of Mrs. Okagbue and Mrs. Victoria Obiozo in marrying Rose as a wife for their late brother. Delivering judgment at the trial court, Nwokedi J., argued as follows:

> I am satisfied that some members of Okonkwo family endorsed the action of Mrs. Okagbue and Mrs. Victoria Obiozo in marrying Rose as a wife for their late brother. I have no alternative but to declare that the marriage of Rose was valid under Onitsha native law and custom, the six children are perfectly legitimate and belong to Okonkwo family. This is more so as there is as of now no law in Nigeria on legitimacy or otherwise.[51]

Dissatisfied with this judgment, the appellant went to the Court of Appeal. Dismissing the appeal Macaulay J.C.A in a unanimous judgment had this to say:

[49] *Meribe v. Egwu (supra),* p. 23.
[50] *Okonkwo v. Okagbue,* (1994), 9 N.W.L.R. p. 301.
[51] *Ibid.*

in view of the evidence led that both before and after the marriage, the necessary consents were obtained, I am satisfied that the learned trial judge was correct in finding that marriage was the consent of the family in accordance with Onitsha native law and custom… this appeal is totally without merit and hereby dismissed. The custody of the children is granted to the family of the father into which their mother had been married.[52]

Still dissatisfied with the judgment of the Appeal Court the appellant went to the Supreme Court of Nigeria where among the issues raised is to whether indeed the Onitsha native law and custom, that allow sisters to marry another woman for their deceived childless brother is not repugnant to natural justice, equity and good conscience and contrary to public policy?[53]

Allowing the appeal, Uwais J.S.C in the lead judgment observed *inter alia*:

> In the present case when Mrs. Lucy Okagbue and Mrs. Victoria Obiozo purported to have married Rose for the deceased 32 years after his death, the marriage cannot rightly be said to be valid. It is a fiction and a fallacy, for there is no way in which a dead person can naturally get married to the living. It is utterly impossible. Therefore, what, at best, happened is a marriage between Rose and Mrs. Okagbue and Mrs. Obiozo, which is marriage between a woman and two women. This is what this court has held in *Meribe v. Egwu's (supra)* that must be regarded repugnancy to natural justice, equity and good conscience. I have no hesitation holding that this marriage for the deceased is invalid since the custom by which the marriage was contracted is repugnant to natural justice, equity and good conscience. What then is the status of the children of Rose? Are they the children of the deceased? It is obvious from my finding that if there was no marriage between the deceased and Rose; it is a fiction to talk of children of such a marriage. In reality a dead person cannot procreate 32 years after his death.[54]

The ratio that is quite germane to this judgment includes:

[52] *Okonkwo v. Okagbue*, Supra, p. 318-320.
[53] Ibid.
[54] Ibid.

(a) For a woman or two women to marry another woman in the name of a dead and non-existent relation who cannot consummate the marriage is equivalent to a marriage between a woman (women) and a woman.

(b) Such a marriage is nothing but a euphemism for open prostitution and would definitely encourage promiscuous intercourse which is against public policy.

(c) The marriage was not validly contracted

(d) A custom that allows the six children of this marriage to be in custody of Okonkwo family gives license to immorality and cannot be said to be in consonance with public policy and good conscience. Such a custom is primitive.

(e) The facts of the case disclose a weird and unnatural form of marriage.

(f) Rose was never a wife of late Nnanyelugo Okonkwo and her children are not his either.

One vital question here which seems difficult to answer following the above Supreme Court judgement that the six children are not the children of late Okonkwo but said nothing concerning their status is that if Okonkwo is not their father because of the reasons adduced, then who is their father especially as most native law and custom has no room for bastards.

3.6.6 The Position of Female Husband Marriages in the Light of Same Sex Marriage Prohibition Act

Almost all the authorities cited indicate that the Courts, especially the superior Courts of records, do not approve of female husband or woman-to-woman marriage. In most cases, the superior Courts see all forms of female husband marriages not only being repugnant to equity to natural justice and good conscience but also contrary to public morality and public policy. The likely legal effect is that the traditional practices and their consequences may not be enforced by

the Court of law in Nigeria. The reason is that the customary practices are held to be contrary to public policy. Obviously, the Same-Sex Law 2014 will now give the Courts powers to declare illegalize such female husband marriages in Nigeria. The Courts may not enforce the continuance of these customary law marriages. In *Omaye v. Omagu*[55] the Court of Appeal said "custom is a rule which, in a particular district has from long usage, obtained the force of law". However, the Court went further to hold that "no custom relied upon in judicial proceeding shall be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience."[56]That Court appears to have sanctioned the customary practice where a married barren wife marries for her husband so that the new wife procreates children for the family. Children born by the wife married by the barren woman belongs to her husband and not to the barren woman or her relatives. The Court has also held that a child born by a widow after the husband had died and she continued to live in his house does not belong to the dead man but to the man that conceived her.

In the *Okagbue* case, the Supreme Court *per* Mohammed Uwais, JSC posited that once a custom has been challenged in a court of law by anyone who is interested or adversely affected by its application and a call has been made to examine whether it offends natural justice, the Courts would pursue such complaint in order to establish whether the custom is inconsistent with sound reason and good conscience. Justice Uwais said, "Occasions have however arisen where the courts had found it necessary to declare certain customs repugnant to natural justice, equity and good conscience or against public policy and morality." The Justice of Supreme Court went on to cite the *dictum* of Osborne, CJ in *Lewis v. Bankole*[57]and *Meribe v. Egwu*[58] where

[55] *Omaye v. Omagu* [2008] 7 N.W.L.R. See also section 18 of the *Evidence Act*, 2011 for the meaning of custom
[56] Ibid.
[57] *Lewis v. Bankole* (1908) 1 N.L.R. p. 81
[58] *Meribe v. Egwu* (supra), p. 23

Madarikan, JSC had held, *inter alia*, "…the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage…" In view of the recently enacted Same-Sex Marriage Law 2014, enlightenment of the Nigerian people on the age-long practice of female husband or woman-to woman marriages is very necessary, because as it is often said "enlightenment is superior to enforcement."For a custom to have the force of law it must be approved by consent of those who follow it".[59]

3.6.7 Repugnancy Test Analysis

Etymologically, 'repugnancy' means contrary or contradictory to; inconsistent or incompatible with; distasteful or objectionable to. To say that SP is repugnant means that SP is contrary or contradictory to X; inconsistent or incompatible with X; distasteful or objectionable to X. When the courts apply this and declare woman-to-woman marriage repugnant, the question then is, to whom is the custom to be regarded as repugnant? Who is the target audience? For the communities in which the custom is accepted as a solution to a problem it has a history and thus a past which is authoritatively present. It is not discontinuous with the present in terms of their current mode of existence, expectations and experiences. It has significance for their lives, thoughts and activities. There is neither opposition, distaste nor objection to the practice in the communities where it is (has been) part of their pattern of life. The courts seem to have observed that their application of this test and the declaration that eventually follows has had minimal or no significant effects in the communities where the practice is regarded as a way of life. According to Ogundare, J.S.C.:

> a declaration by the courts that a particular custom is repugnant to natural justice, equity and good conscience, does not necessarily imply that such customary law is illegal, for sometimes the

[59] *Okonkwo v. Okagbue, (*Supra), at p. 345.

> practice goes on publicly after the judge's decision. In such a case, all that the courts can legitimately do, and have done, is to refuse to enforce the customary law in question.[60]

This explains why in spite of the Supreme Court's warning in plethora of cases beginning with *Meribe's* case, that "where there is proof that a custom permits such an association of 'woman to woman' marriage, the custom must be regarded as repugnant" and that "society should abhor and express its indignation of a 'woman to woman' marriage", many Nigerian communities appear not to heed the clarion call. In a very recent case of *Ojukwu v. Agupusi* [61], decided by the Court of Appeal in 2014, part of the issue for determination was whether it was abominable or repugnant to natural justice or good conscience for the four children born after the death of the deceased to be credited to the deceased as allowed under Nnewi native law and custom especially where the deceased's wife have not remarried. Following the decision in *Meribe v.Egwu* made 1976, the Court of Appeal held that it "…involves the value judgment of the Judge/Court which should be objectively related to contemporary mores, aspirations, expectations and sensitivity of the people of this country and the consensus opinion of civilized international community which we share."[62] What one can make out of the above statement is that the last is yet to be heard on the issue.

For the advocates of woman to woman marriages, repugnancy test is an obsolescent remnant from a colonial past. For them, even though there is a saying that 'the law does wrong to no one'- '*Lex nemini facit injuriam',* but this may be an example where the law does wrong to some people, in this case, childless women. *Lex non deficit in justitia exhibenda:* the law does not fail in showing justice. Yet from the decisions of the courts, the law failed abysmally to show

[60] *Okonkwo v. Okagbue, (Supra),* at pp.344 – 345.
[61] *Ojukwu v. Agupusi* , (2014), 21 W.R.N. p. 126. See also, African Journal of Law and Criminology, Volume 4. No. 1 (2014), pp. 42-60.
[62] Ibid.

justice to childless women, their wives, their children, the communities and the intricate network of relationships that are involved, maintained and lubricated by the practice. How true and justified are these claims.

It must also be admitted that woman-to-woman marriage has certain inherent legal and sociological problems upon which the courts had based most of their reasons for declaring the practice as being repugnant. Such problem include validity of the marriage, determination of the real owner of the children of the marriage, children's right to inheritance and right to occupy traditional stool in their respective communities. In truth, some forms of the woman-to-woman marriages appear to be sources of Social political and traditional problems in modern societies. It encourages promiscuity and prostitution and ends up in broken homes. Children born of such marriages may be wayward and constitute nuisance in the society because they lack full parental control and care. In most communities, such children may not be allowed to contest for any elective political position when they group. They might be discriminated against on the ground that they cannot trace their paternal roots. In addition, such persons may not be allowed by the elders to occupy traditional seat as traditional rulers. The question as to whether the constitutional rights may avail them is a different ball game altogether.

3.7 ADOPTIONS AS UNACCEPTABLE OPTION TO CHILDLESSNESS UNDER ISLAMIC AND CUSTOMARY LAWS

The childlessness, barrenness or infertility is a problem common to the human family. It is a problem that is universally human. While this is true, the cultural responses are as diverse as there are human groups. The diversity is a reflection of the inherent diversity in the cultural

agenda of the human family. Each human group has developed its own way or ways of helping childless couples and childless women. In some parts of the world adoption is a way out of the problem. Adoption is the taking of a child of a known or unknown parentage, but known for sure not to be that of the adopter as his or her own child[63]. Adoption takes different forms and may be done under Statutory, Customary or Islamic laws. But while adoption has worked in some societies it has not worked in others. Adoption as a solution to childlessness has had a minimal effect in many Nigerian communities because of the value placed on having children of one's own.

Under the statutory law, the Child's Rights Act 2003[64] specifically Part XII makes far-reaching provisions regulating adoption throughout Nigeria. However, although the Act is deemed to have come into force since 2003, the Adoption Laws enacted by the States are still extant. The reason is that adoption, in particular, and the rights and welfare of children, in general, are matters within the legislative competence of the States under the Constitution of the Federal Republic of Nigeria 1999. Hence, the National Assembly has no constitutional power to foist the Act on the States. While some States Houses of Assembly have already passed the Child's Rights Act into law, others are still in the process of doing so.

Customary law adoption in Nigeria differs from one custom to another. In the real sense what is obtained under customary law is guardianship or foster parenting[65]. Cases of guardianship under customary law are common, while adoption cases are rare. Most, if not all, of such adoptions are between blood relations. Customary law adoption does not seem to effect a

[63] Ibraheem, T.O. *Adoption Practice in Nigeria- an Overview,* Faculty of Law Adekunle Ajasin University Akungba Akoka, Ondo State, Nigeria. Journal of Law, Policy and Globalization, Vol.19, 2013, *http://www.iiste.org/Journals/index.php/JLPG/article/viewFile/8922/908, accessed on 13/08/15.*
[64] Ibid.
[65] Ibid.

clear and permanent severance of the parental rights and obligations between the infant and his natural parents. No writer has identified any system of customary law in Nigeria which recognizes adoption as a concept that entails a permanent and irreversible severance of the parent-child relationship existing between a child and his biological parents and the extinction of the consanguineous relationship between the child and his original family. In most Nigerian communities, a barren woman or an impotent man has never been left in the cold despite the social stigma attached to their condition. Although they seem to be in a hopeless situation, their condition is not entirely helpless. Under some Nigeria native law and custom, the solution that is recognized, accepted, widely practiced and culturally legitimated is for such a childless woman to marry another woman, thus becoming a husband and a father.

Under Islamic marriage, adoption is not among the options at all. Men are allowed to marry up to four wives. However, no option seems to be available to a barren woman, an unmarried childless woman or an impotent man on how to have a child of her own. What is recognized is the issue of guardianship. Thus under Islamic law, the child's biological family is never hidden; their ties to the child are never severed. The Qur'an 33:4-5 specifically reminds adoptive parents that they are not the child's biological parents[66]:

> *...Nor has He made your adopted sons your (biological) sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way. Call them by (the names of) their fathers; it is more just in the sight of Allah. But if you know not their father's names, call them your brothers in faith, or your trustees. But there is no blame on you if you make a mistake therein. (What counts is) the intention of your hearts. And Allah is Oft-Returning, Most Merciful.*[67]

[66] Quran 33: 4-5, http://islam.about.com/cs/parenting/a/adoption.htm, accessed on 15/08/2015
[67] Ibid.

CHAPTER FOUR

THE CHALLENGES OF ENFORCEMENT OF SAME SEX MARRIAGE PROHIBITION ACT

4.1 Introduction

Ever since the enactment of same sex marriage prohibition law, there has been a growing sentiments especially across the world that the law is unjust to some group of persons. Jurists often say that law is a tool of social engineering. And from whichever angle one views this; it may have positive or negative effects. It could be used to create a legal monster that has an appetite for humanism or it could be used to create a law that is out of touch with prevailing sentiments. This simply means that it can be used to protect many and oppress the few or vice versa. It can be used to move the society forward and carry the interests of minorities along, or it can, like a runaway train, abandon society and being driven by a maniac, destroy everything in its path.

Recently, a Federal High Court in Abuja has struck out a suit brought before it by a United Kingdom based Nigerian, Mr Teriah Ebah, contending that the newly enacted same sex marriage law, is inconsistent with the provisions of sections 34 and 37 of the Nigerian Constitution, as amended. He also contends that the Act is an impediment constituting disabilities to Nigeria citizens' fundamental rights enshrined and protected in section 40 and 37 of the Constitution of the Federal Republic of Nigeria.[1] **In the suit, the applicant is seeking an order of perpetual injunction, restraining the Nigeria government, from**

[1] Court Strikes Out Suit Challenging Same Sex Law In Nigeria., http://www.channelstv.com/2014/10/22/court-strikes-out-suit-challenging-same-sex-law-in-nigeria/. Accessed on 2/08/2015.

enforcing the provisions of same sex marriage prohibition Act, 2013. He urged the High Court to declare the law as unconstitutional.

In his ruling, Justice Abdul kafarati[2] stated that Mr Ebah had no right to file a case of fundamental human rights for Nigerians, since the suit did not say his personal rights were deprived of him. He also emphasized that there was no group in Nigeria known as the lesbian, gay, bisexual and transgender and that as such the case was lacking in merit and is thereby struck out.

In this chapter, we try to weigh the challenges likely to inhibit the implementation or enforcement of the same sex marriage law. We also examine the same sex prohibition Act from the perspective of other applicable laws of Nigeria including the Constitution and international laws, to see the possibility of its enforcement. We finally examine the penal provisions of the Act to see whether they are adequate as well as how easy or difficult it is to establish the offence under the Act.

4.2 Nigerian Same Sex Marriage Prohibition Act Vis -a-Vis the Human Right Position

The greatest challenge in enforcing same sex marriage prohibition Act is the human right position on the law. Some human Right activists claim that the same sex marriage prohibition law has made same sex marriage advocates victims of discrimination and bigotry, and that they are being denied their civil and constitutional rights. They try to invoke the liberal principles of justice such as equal rights, equal treatment, equal opportunity and neutrality. For others **"Error**

[2] Ibid.

has no rights."[3] But the question to be asked is, 'has there been a time same sex relationship was accepted or recognized in Nigeria'? Same-sex marriage was not currently legal in Nigeria before the enactment of same sex marriage prohibition Act, as Nigerian law recognizes the following classes of marriage: Christian, statutory, customary and Islamic. None of the laws governing these marriages countenances marriages between persons of the same sex.

Additionally, Nigerian law already criminalizes homosexual conduct. Therefore, the prohibition of same sex marriage in the "same sex marriage prohibition Act" is not really a new development as widely believed. The Act has only strengthened and widened the scope of the existing legal framework against LGBT acts in Nigeria particularly on issue of validity and recognition of same-sex marriage.

A close look at the "Same Sex Marriage (Prohibition) Act" will reveal that it was enacted to prohibit sexual relationship between persons of the same sex, celebration of marriage by them and for other matters connected therewith. While introducing the bill at the floor of the Senate, Banda cited the need to curb and protect Nigerians from destructive and foreign moral influence. The Law thus defines marriage as a legally binding union between a man and a woman whether performed under the authority of the State, Islamic Law or Customary Law. The fact that new law was widely acclaimed by majority of Nigerians, speaks huge on its acceptability. This is not to say that the opinion or rights of a few who might have been affected by the law counts less; thus the reason for critical assessment of the law and the possibility of its enforcement.

[3] Aglialoro, T., Four Ways that Same-Sex Marriage Will Affect You, http://www.catholic.com/blog/todd-aglialoro/four-ways-that-same-sex-marriage-will-affect-you, Accessed on 13/08/15.

One of the claims by the human right activists is that the Act contravenes individual rights of the people and affects Nigeria democracy. For them, the new law is against the provisions of the 1999 Constitution (as amended) thereby violating individual rights of the people as guaranteed in the constitution. According to Ugwu Damian[4], the bill would have a devastating effect on a range of civil society organizations in Nigeria while inciting hatred and violence against anyone suspected of practicing or supporting same-sex relationships, including but not limited to LGBT persons and activists. He further opined that it is frightening in its possibilities for doing great damage to the fundamental rights of citizens and that the provisions of the Act are in clear violation of the Nigerian Constitution and other international laws. The European Union Managing Director for Africa, Dr. Nicholas Westcott, was reported to have alleged that the new anti-gay law contradicted the 1999 Constitution[5]. He posited that the Law violates the human rights and freedoms of all Nigerians as enshrined in the 1999 Constitution.

There were equally more reactions especially from member countries of E.U, Canada the United States all of whom have alleged that the law is a violation of the fundamental human rights of Nigerians with same sex orientation[6]. In there thinking of those in the western world, the law is obnoxious and contravenes fundamental human rights.

There is a saying that most of what we believe as human beings is affected, influenced and at times even caused by the availability of information. Again, it is an obvious aphorism that information is neutral but what it is used for, determines a great deal. There is no gainsaying the fact that the concept of rights has expanded over the years with 1st, 2nd, and 3rd generation rights,

[4] Ugwu, D. *Nigerian same sex marriage ban Infringes Individual Rights*, http://jurist.org/hotline/2011/12/damian-ugwu-nigerian-marriage.php. accessed on 25/05/15.
[5] Ibid.
[6] Sexual Orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender

and these are meant to exist within the global society. However, the position of the national ethos on human relationships has a lot in common with what forms their law. And in view of same sex relationships, it is far more direct, to say the least. It is direct because most of Africans would agree that it is abhorrent, evil and decadent. In fact, it insults the religious sensitivities of most nations in the world whose rights must also be protected by the same law. Some of the specific rights of the same sex persons claimed to have been violated by the same sex marriage prohibition law are discussed hereunder.

4.3 The Same Sex Marriage prohibition Act Vis-à-vis the Constitutional Rights

Constitution defines the relationship between the state and the individual, the organs, roles, responsibilities, powers and limits of the government and the rights and duties of the citizens. This is not a detailed definition but one that can present the focus of this chapter in the proper light. All constitutions, whether written or unwritten, provide for protection of their citizens, they also provide rights that the government must seek to protect. This stems from the Social Contract theory[7] which presupposes that due to the harshness of the state of Nature and its constant capability to degenerate into conflict, people voluntarily consented to form a civil society. Though this may have been to avoid the state of war which ultimately derived from the State of Nature, individuals formed a social contract. This social contract established a government that would protect their natural rights better than they were able to do themselves in the state of nature. If the government violated the natural rights of those who consented to be governed, then the citizens could legitimately dissolve that government.[8]

[7] Propounded by John Locke (1632-1704)
[8] See Thomas W. Simon, Law and Philosophy: An introduction With Readings, on p. 165.

By virtue of Section 4 (3) of the 1999 Constitution (as amended), the National Assembly is competent to legislate on what becomes law in Nigeria with respect to the peace, order and good governance save as otherwise provided in the constitution and on any other matter included in the Exclusive Legislative list. And Item 61 of the Exclusive Legislative List is on the formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary Law including Matrimonial causes relating thereto[9]. Since the enactment of the same sex marriage prohibition Act by the National Assembly as empowered so to do by the Constitution, the human right activists has alleged that the same sex marriage Law contravenes the freedom of expression, association and discrimination as guaranteed under Sections 39, 40 and 42 of the 1999 Constitution respectively. We now take a closer look at these rights alleged to have been violated.

4.3.1 Freedom of Expression

Section 39(1) provides that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference[10]. Section 39(2) also provides that every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions provided that no person, other than the Government of the Federation or of a State or any other person or body authorized by the President on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever. The import of the above provisions is that it guaranteed freedom of expression, opinion as well as right to information without interference. Same Sex marriage

[9]Bello, R., *Civilization, homosexuality and Nigerian laws*, http://www.punchng.com/feature/the-law-you/civilisation-homosexuality-and-nigerian-laws/, 23rd June, 2015.
[10] Constitution of the Federal Republic of Nigeria 1999 (as amended), Cap. C.23 L.F.N. 2004.

prohibition Act has not interfered with these rights of expression except where such expression amounts to aiding or abetting Same Sex Marriage which tantamount to an offence by virtue of section 5(3) of the Act[11].

Freedom of expression does not mean 'my right to say whatever I want' as it is also subject to limitations such as libel and slander. It is rather concerned about act of seeking, receiving and imparting information or ideas regardless of the medium used. Freedom of expression is one's political right to speak against bad government politics and the irresponsibility of public officers. It is also a person's social right to speak against vices. It could also mean one's moral right to champion the course of good and castigate evil or even a human right to share knowledge and ideas with everyone in other to contribute to making society a better place. It is a tool by which great men and women who shared their ideas and opinions have shaped the history of the world. In practice, this right is not absolute in any country as it is commonly subject to other limitations defamation, obscenity, and sedition including ethnic hatred. Obviously, the critics grossly misconstrued the provisions of Section 39 by not construing them together with other Sections of the constitution particularly Section 45. A cardinal principle of interpretation of statute is that its provisions must not be read in isolation.[12] Therefore a decision to express oneself sexually, emotionally etc is only covered by section 39 to the extent that such expression of one's sexual opinion complies with other Constitutional provisions like public safety, public order, and public morality as provided under section 45 of the same constitution[13].

4.3.2 Freedom of Association and Liberty

[11] Section 5(3) Same Sex Marriage Prohibition Act, (Supra)
[12] Chime v. Ude (1996), 3 N.W.L.R. (Pt. 461), 379.
[13] Section 45 Constitution of the Federal Republic of Nigeria 1999 (as amended), Op. Cit.

These are rights guaranteed both at the international, and national levels. The right to freedom of association is guaranteed at the international level under article 23 of the Universal Declaration of Human Rights, article 22 International Covenant on Civil and Political Rights, and article 8 of the International Covenant on Economic and Social Cultural Rights, article 10 of the African Charter on Human and People's Rights all guarantee the right to freedom of association. At the national level, Section 40 of the 1999 Constitution of Nigeria provides that: Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.[14]

Based on the above provisions, the same sex marriage advocates have argued that section 4 of the same sex marriage prohibition Act violates their right of association and liberty. Section 4 provides:[15] (1) the registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited (2) the public show of same sex amorous relationship directly or indirectly is prohibited. According to pro same sex argument, it would have been understandable if the Nigerian government simply defined marriage strictly in terms of the union of one man and one woman, thereby shutting the door to same-sex marriages. But to deny homosexuals the right of assembly, and to criminalize homosexuality even where it finds expression in private among consenting adults, is a gross violation of the fundamental human rights of a significant, even if minority, segment of the population.

The argument may sound tenable but the question remains that if indeed the act is done secretly, then it shouldn't be known by anyone as the law is strictly on public show of same sex amorous relationship. Although the right to freedom of association is guaranteed internationally

[14] S. 40, Ibid

and locally, the enjoyment of this right is not absolute. Thus section 45 of the Constitution provides: "Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons"[16].

The truth is that if same sex group is allowed absolute enjoyment of their rights, others who are in the majority will have their own right violated. Take for instance, if there is a change to the legal definition of marriage, pressure will be brought to bear on Catholic schools, agencies and other institutions to teach and to accept that this form of sexual union is equal in worth to the committed, monogamous and heterosexual union sealed in marriage. This is an unacceptable infringement of the freedom of association and religious liberty, including not only freedom of worship but also freedom of religious practice"[17]

4.3.3 Rights against Any Form of Discrimination

Same sex marriage advocates have argued that the Act is clearly discriminatory as it singles out one group of people to be deprived of rights that all people enjoy as guaranteed by the constitution and international human rights treaties to which Nigeria is a state party. In particular,

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[15] Same Sex Marriage prohibition Act, (Supra).
[16] Section 45 Constitution of the Federal Republic of Nigeria 1999 (as amended), Op. Cit.
[17] Catholic Bishops' Conference of England and Wales, *Response from the Catholic Bishops' Conference of England and Wales to Government Consultation on 'Equal Civil Marriage (June 2012*), www.catholic-ew.org.uk/.../CBCEW-response-equal-civil-marriage-cons. 9th December, 2014.

it violates the rights against any form discrimination as guaranteed in Section 42 of the Nigerian Constitution[18] which provides:

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Discrimination against anyone on the bases of perceived or real sexual orientation, gender expression and identity is a core violation of his rights. However, the limit of freedom to fundamental rights of one is in an attempt to infringe on the rights of others.

The question often asked by the human rights activists in favour of same sex advocates include: (1) does same sex consensual relationship hurt anyone? (2)How does same sex marriage infringe on other persons right. (3)What is harmful about same sex marriage relationship?

[18] Ugwu, D. Nigerian same sex marriage ban Infringes Individual Rights, http://jurist.org/hotline/2011/12/damian-ugwu-nigerian-marriage.php. 25th May 2015.

According to Slick Matt[19] harm is a relative term. What might be considered harmful to one person might not to another. According to him, there are different kinds of harm: physical, emotional, spiritual, financial, etc. So, when we ask how gay marriage harms anyone, we have to look at more than just one aspect.

Marriage has been universally acknowledged throughout history as a legal contract between a man and a woman in which there is emotional and sexual fidelity, along with childbearing. But homosexual marriage would change this. Since marriage is also a moral issue, redefining marriage is redefining morals. Furthermore, marriage is an extremely wide-spread practice within any society and has many legal and moral issues attached to it. So, when marriage is redefined, the society is *dramatically* affected. Legalizing gay marriage means changing the laws of the land. The ramifications are vast, and we are seeing the effects of homosexual legal "rights" affecting housing, education, the work place, medicine, the armed forces, adoption, religion, etc. Are all the changes good? Or are at least some of them harmful? That is hotly debated. But we have to ask, is it morally right to force all of society to adopt the morals of a minority?

Harm is defined as damage to a person physically, emotionally, mentally, spiritually, financially, morally, etc[20]. Slick has gone further to enlist different ways People experience harm if same sex marriage is legalized[21]:

1. It can bring huge financial and emotional stress. Homosexuals can sue people who are exercising their religious beliefs. For example, a heterosexual married couple with children who do not want to rent a room in their own family household to homosexuals could be sued for discrimination based on "sexual orientation." This can incur significant financial and

[19] Slick, M., How could gay marriage harm anyone? https://carm.org/gay-marriage-harm. Accessed on 20/08/15.
[20] Ibid.
[21] Ibid.

emotional stress upon the family, not to mention the "prior restraint" effect of the fear of being sued, which results in a family not renting out a room and losing the income. In addition, consider the 2015 Colorado case involving a baker who refused to bake a wedding cake for a gay couple's wedding on religious grounds. The subsequent fine of $135,000, upheld by the Colorado Supreme Court, bankrupted the baker. Was that not harmful? Of course it was, not only to the baker and his family but also to countless others who were denied the baker's services.

2 The health risks are enormous to themselves and others. The fact is that homosexuals do not live as long as heterosexuals due to the health risks associated with the lifestyle, and billions of dollars are spent annually in health care for them. Statistics on HIV/AIDS and health related issues shows that the HIV/AIDS epidemic is more in the homosexual community.[22] We are not saying that HIV/AIDS is a homosexual disease, but the fact is that it is highly prevalent among the gay and lesbian community due to their great number of sex partners.[23] Thus the collateral damage to the rest of society as far as health risks are concerned cannot be denied.

3 Gay Marriage means having the morals of the minority forced upon the majority. This can also be said in the reverse. Either way, there is a problem. Normally, morals should not be forced on anyone though there are exceptions. We force morals on others by preventing them from stealing, raping, murdering, etc. So, it is not automatically wrong to force morals on someone. But the issue then becomes what is morally right and wrong in the first place, and altering morals in a society definitely causes stress. The percentage of homosexuals in society is less than 5%, yet it is being forced upon the other 95% of society in movies, TV, literature, and political periods.

[22] Ibid.
[23] Ibid.

4 Gay Marriage means a redefinition of sexual morality, and with it other sexually related practices will be affected, and this can be harmful with collateral damage effect as a result the change in sexual morals which brings increase in pedophilia, pornography, child pornography, prostitution, and sex trafficking that are occurring in the world. These increases are not due to an increase in conservative sexual morals but a reduction of conservative sexual morals.[24]

5 Gay Marriage reduces the number of children born in society, and we need a stable population base to operate properly. If gay marriage increases and heterosexual marriage decreases, society population will be harmed.

6 Gay Marriage affects people spiritually. We cannot assume that people's spiritual beliefs are irrelevant. People consider spiritual issues to be extremely important, and the stress imposed on religious people by forcing them to "accept" and/or support homosexual practice and/or intimidate them into silence harms a person's spiritual and emotional health.

Slick **posses the following questions to same sex marriage advocates:**[25]

1. If a parent objects to a school teaching pro-homosexuality and pulls his child out of school and because of it is ridiculed and/or jailed, is he harmed?
2. If a self-employed business owner with strong religious convictions refuses to offer his services to homosexuals and he is sued and goes bankrupt, is he harmed? Examples of such businesses where a person should be free to refuse services could be things like wedding photographers, masseuses, tutoring, etc.

[24] Ibid.
[25] Ibid.

3. If a Catholic orphanage is forced to shut down because it is against its religious moral code to turn children over to homosexual couples, is someone hurt?
4. If a public school teacher voices his disapproval of homosexuality on Face book on his own time, away from work, in his own home, on his own computer and is fired from his teaching position, is he harmed? Additionally, is the First Amendment right to free speech harmed?
5. If a group of pro-homosexual activists (Act-UP) disrupt the worship service of a Christian congregation by throwing condoms at the pastor, is the congregation harmed?
6. If Christians are forced into silence because of fear of legal, social, and financial retribution, are they harmed?

7. When morally conservative people who disapprove of homosexuality are labeled as "moral dinosaurs," "bigots," "hate mongers," "right wing fanatics," "preachers of hatred," "intolerant," are they harmed?

We can see that most of the arguments from the same sex marriage supporters' borders on those rights and freedom provided under sections 39, 40 and 42 of our constitution. According to Ambassador Entwistle:

> I read the bill, it looks to me that it puts significant restrictions on the freedoms of assembly and expression; in my opinion which applies especially in advanced democracies, once government begins to say something in these areas, freedom no longer applies. It seems to me that this is a very worrisome precedent.[26]

[26] Ndiribe, O. Eyoboka, S. & Ojeme, V., http://www.vanguardngr.com/2014/01/gay-marriage-law-us-threatens-sanction-nigeria/ 25th May 2015.

Freedom is obviously been misused when it fails to recognize its boundaries. If same sex marriage is universally accepted as the present step in sexual "freedom," what logical arguments can be used to stop the next steps of incest, pedophilia, bestiality, and other forms of unnatural behavior and such other aberrations.

If LGBTs were guaranteed freedom under our law to display their affections publicly, our already fragile public order will be further threatened and children's sense of morality will be lost! The Nigerian State therefore had a duty to intervene to protect public morality. In the words of Gilchrist[27], "The individual moral life manifests itself in manifold ways. The state is the supreme condition of the individual moral life, for without the state no moral life is possible." The state, therefore, regulates individuals in the common interest as Lagos State Government has done by proposing to ban smoking in public places. Recognition of LGBTs' homosexual rights would have lit the pyre of public morality had the Nigerian State not intervened through the instrumentality of the Same Sex (Prohibition) Act. The gay movement, whether we acknowledge it or not, is not a civil rights movement, not even a sexual liberation movement, but a moral revolution aimed at changing people's view of homosexuality.

4.4 The Same Sex Prohibition Act and the International Laws

People have argued that even if Nigeria insists on enforcing the same sex marriage prohibition Act, the United Nations which Nigeria is a member will make Nigerian government unable to enforce the law. Some same sex marriage advocates has equally argued that the same sex marriage prohibition Act contravenes the provisions of so many regional and international laws ranging from the African Charter on Human and Peoples' Rights (Articles 2, 3, 11 and 28);

[27] Bello, R., Civilization, homosexuality and Nigerian laws, http://www.punchng.com/feature/the-law-you/civilisation-homosexuality-and-nigerian-laws/, 23rd June, 2015.

the International Covenant on Civil and Political Rights (ICCPR) (Articles 2, 18, 19, 21, 22 and 26); the Yogyakarta Principles[28] especially principles 19, 20 and 21 which are purely Principles on the application of international human rights law in relation to sexual orientation and gender identity. The argument by the same sex advocates is that if Article 7 of the Universal Declaration of Human Rights prohibits any incitements to discrimination; then the present prohibition Act will act as a license for torture and ill treatment based on sexual orientation. Article 2 of the Banjul Charter provides that "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status"[29]. Again, the International Convention on Civil and Political rights (ICCPR) provides in article *2.* 1 that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

We submit that the human right laws are not absent in Nigeria Constitution to warrant looking for a substitute elsewhere, except that Nigeria constitution put restriction[30]to reckless exercise of such rights. Again, even though the 1st optional Protocol to ICCPR is aimed to allow individuals claiming to be victims of violations of their rights by their States to make their complaints for implementation of such rights. However, we need to point out to the advocates of same sex marriage that the U.N. Human Rights Committee has also established in Joslin V. New

[28] Yogyakarta Principle 2007, yoogyakarta_Principles.pdf-adobereader.com.7th July, 2015.
[29] African (Banjul) Charter on Human And Peoples' Rights, 1986. https://www1.umn.edu/humanrts/instree/z1afchar.htm. *7th July 2015.*
[30] 1999 Constitution, Op. Cit. section 45.

Zealand[31]that the I.C.C.P.R. does not recognize a fundamental right to marry for same-sex couples under Article 23(2).[32] More so, by article 11 of the Banjul Charter:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.[33]

This restriction recognized by the international law empowers the Nigeria legislatures to make laws for the interest of national security, the safety, health, ethics and rights and freedoms of others. More importantly, we need to understand that international law can only lay down principles, rules and standards that govern nations and other participants in international affairs in their relations with one another. The purposes of international law include: resolution of problems of a regional or global scope, regulation of areas outside the control of any one nation and adoption of common rules for multinational activities. International law also aims to maintain peaceful international relations when possible and resolve international tensions peacefully when they develop, to prevent needless suffering during wars, and to improve the human condition during peacetime. Nigeria, being a member of the body of nations recognizes and is bound by principles of international law. Several international instruments and custom have been addressed towards the better cooperation and coexistence of states and the protection of individuals. It is only in the enforcement of international law, within the municipal courts of a country that the rights of individuals, as expressed in international law can be protected. However, enforcement of international law is often difficult because nations are sovereign and are likely to put their own interests ahead of those of the international community.

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[31] Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

[32]International Covenant on Civil and Political Rights 1976, http://www.ohchr.org/en/professionalinterest/pages/ccpr .aspx, 6th June, 2015.

[33] African (Banjul) Charter on Human And Peoples' Rights, 1986. https://www1.umn.edu/humanrts/instree/z1afchar.htm. *7th July 2015.*

The law that seeks to make international law enforceable in Nigeria is section 12 of the Constitution of the Federal Republic of Nigeria, 1999. It provides that no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

Some nations make international law automatically part of the law of their land, while some other states provide for the subjugation of international law to their municipal law. For the latter states, international law can only become part of the law of their country upon transformation and adoption which occurs after the state legislature have re-enacted international law into their domestic law. Thus, international law does not become effective until it has passed through internal scrutiny and acceptance. Therefore the validity of municipal law is not conditioned by international law, such that within a state, the rules of international law cannot be applied as such, but only after being transformed or received into that legal system.

Then as regards the Yogyakarta principles mentioned above, we equally submit that the Yogyakarta principles are yet to become law. The principles have not been adopted by States in a treaty, and are thus not by themselves a legally binding part of international human rights law.[34] Hence, the Principles are only intended to serve as an interpretive aid to the human rights treaties.

4.5 Law, Morality and Culture in the light of human right same sex arguments

What is the role of the law in a society? Law is an instrument of social control. Jurists have also stated that it is a tool of social engineering. And from whichever angle one views it, it is likely to have positive or negative effects on the society. It could be used to create a legal

[34] Paula L. E. and Alia T. Z., The Impact of the Yogyakarta Principles on International Human Rights Law Development http://ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf, *7th July, 2015.*

monster that has an appetite for humanism or it could be used to create a law that is out of touch with prevailing sentiments. This simply means that it can be used to protect many and oppress the few or vice versa. This is how same sex advocates has viewed the same sex marriage prohibition Act. For them, the law is not worth enforcing as it does not reflect through characteristics of a good law in a democratic setting.

The question to be asked is what same sex marriage protagonists expect the society to do? To watch the family system destroyed or to protect it. Same-sex marriage serves to validate and promote homosexual lifestyle in all its bisexual and transgender variants. Civil laws are structuring principles of man's life in society. As such, they play a very important and sometimes decisive role in influencing patterns of thought and behavior. They externally shape the life of society, but also profoundly modify everyone's perception and evaluation of forms of behavior. Legal recognition of same-sex "marriage" would necessarily obscure certain basic moral values, devalue traditional marriage, and weaken public morality.

Law does not operate in isolation. Thus the relationship between law and culture in a given society cannot be ignored. Human Right activists have argued that Nigerian jurisprudence has a long history of separating the institution of religion from the law[35]. It has been argued that the same sex prohibition law in Nigeria is purely based and engineered from the religious point of view on the premise that same sex relationship is sinful in the eyes of God. This argument has been that religious experiences are subjective and the concept of the nature of God differs, even in the two most common religions in Nigeria. And that the difficulty is created from the difficulty to clarify what "sin" means and what would classify as "sin".

[35] Ugwu, D. *Nigerian same sex marriage ban Infringes Individual Right*s, http://jurist.org/hotline/2011/12/damian-ugwu-nigerian-marriage.php. 25th May, 2015.

Culture and Tradition encompasses the opinions, belief, and customs of a people, handed down from one generation to another. A legal system which has no place for the opinions, beliefs and customs of the people from whom it originated and for whom it is put in place is, surely, in need of redefinition and refinement. For without grounding in tradition, a legal system has no base. It is homeless. Culture, in which we all participate and by which we're all affected, is the sum total of the ideas that shape it. The power of those ideas, and their shaping, is proportionate to the number and importance of the cultural categories they affect.

Sex, marriage, children and family relationship are the most pervasive cultural categories in human history. One doesn't have to postulate great leaps of causality to see that rapid and radical changes in these areas affect *everyone.* Western culture as we know it is built on thousands of years of viewing marriage, sex, and family life in certain ways. To say that we can redefine those views and not change the culture is just funny, or else willfully naïve.

Therefore culture, tradition and law are not necessarily opposites. They are inseparable companions on the long road to justice. Law, if it is to retain its sapiential quality and not degenerate into a heap of crystallized absurdities, must remain constantly open to the yearnings of the people it is supposed to serve. According to the President of the Christian Association of Nigeria (CAN), Pastor Ayo Oritsejafor, while thanking the President and the National Assembly for taking the bold step in "outlawing the immoral culture of same-sex marriage in Nigeria." Oritsejafor said: "The culture and morality of a people must not be taken into cognizance because it is important to remember that culture and morality are intricately linked with each other. By the beliefs of most Nigerians, same-sex is offensive to us. In the circumstance, we call on all those talking about human rights and international conventions to remember that there is always a limit to certain rights and that those who go out of their ways to overstep the limits now

know the consequence of their actions. We also appeal to those who are choosing their interests above others to allow individual countries to develop according to their cultures and moral worth or importance.[36]

Although, the use of the term "sin" could be misleading especially as it does not have a simple and easy method of verification and standardization, there was no mention of sin as the basis for the law, neither was religion or morality mentioned as the bases for enacting the law against same sex marriage. And by virtue of Section 10 of the Constitution, the Government of the Federation or of a State shall not adopt any religion as State Religion.[37]The Act was simply enacted to capture the desires of the Nigerian people irrespective of religion.

4.5.1 Same sex as a Civil Right

Same sex marriage activists have also argued that same-sex "marriage" is a civil rights issue similar to the struggle for racial equality in the 1960s and as such should not be linked with issues of culture religion and morality. Many will see this argument as false. First of all, sexual behavior and race are essentially different realities. A man and a woman wanting to marry may be different in their characteristics: one may be black, the other white; one rich, the other poor; or one tall, the other short. None of these differences are insurmountable obstacles to marriage. The two individuals are still man and woman, and thus the requirements of nature are respected. Same-sex "marriage" opposes nature. Two individuals of the same sex, regardless of their race,

[36] The storm over same sex marriage Prohibition, http://www.thisdaylive.com/articles/the-storm-over-same-sex-marriage-prohibition/169716/, 28th May, 2015.
[37] Section 10 Constitution of the Federal Republic of Nigeria, 1999 (as amended), Op. Cit.

wealth, stature, erudition or fame, will never be able to marry because of an insurmountable biological impossibility.

Secondly, inherited and unchangeable racial traits cannot be compared with non-genetic and changeable behavior. There is simply no analogy between the interracial marriage of a man and a woman and the "marriage" between two individuals of the same sex. This is the most important reason. Adopting Same Sex Marriage will have a thousand ripple effects on the society. The society will need to rewrite family law and develop new speech codes to do it. As artificial reproductive technologies mature, we will have to recognize legal parenting arrangements comprising virtually any number of persons and gender combinations. While we're at it, we'll need some new genders, too. All this matters because we believe people with same-sex attraction are profoundly wounded and in need of healing. When by power of law, the state applauds woundedness, deepens it; when it creates conditions that will increase the numbers of wounded; when it prioritizes making the wounded into adoptive parents, giving them leadership positions in government, education, religion, and the military, and lionizing their condition in public observances, school curricula, and the media. All these will affect the culture and life of the people.

4.5.2 Same Sex Civil Rights to adopt Children

While the argument of civil rights posited by same sex advocates sounds tenable, children are also entitled to civil rights. Same-sex "marriage" is intrinsically sterile. If the "spouses" want a child, they must circumvent nature by costly and artificial means or employ surrogates. This is because the natural tendency of such a union is not to create families. The traditional institution

of marriage protects children, men and woman, and the common good. It is based on the anthropological truth that men and woman are different and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children need both a mother and a father.[38] In other words, the institution of marriage has intrinsic characteristics which contribute not only to the building up of the unitive relationship between husband and wife but also the relationship they have with any children of their marriage, with their extended family, their local community and with the wider society in which they live.[39]

Although some Western countries allow same-sex couples to adopt children, others forbid them to do so, or allow adoption only in specified circumstances. In the United States for instance, the term *civil union* is used to connote a status equivalent to marriage for same-sex couples. The implication where government tries to recognize same sex civil rights to adopt children is that the same government will infringe on the rights of the children to be adopted by such same sex couples. Thus, same sex advocate by forcing government to get involved in changing laws to suit same sex couples, automatically infringe on the rights of other members of the society especially the children who will be forced to grow up to live with a stigma of having same sex parents for ever contrary to the order of nature.

4.6 Abuse as a Challenge towards Enforcement of Same Sex Marriage Prohibition Act

[38] Anderson, R.T., *Marriage: What it is, why it Matters and the Consequences of redefining it*, http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it; 6th November, 2014.

[39] Catholic Bishops' Conference of England and Wales, "*Response from the Catholic Bishops' Conference of England and Wales to Government Consultation on 'Equal Civil Marriage'*" (June 2012), www.catholic-ew.org.uk/.../CBCEW-response-equal-civil-marriage-cons. 9th November, 2014.

The United States Human Rights Commissioner, Navi Pillay, reacting on Nigeria This-day newspaper on the Same sex marriage prohibition Act accused Nigeria of trampling on the rights of lesbian, gay, bisexual and transgender people, claiming just like other gay rights activists that the law "legitimized homophobic violence and increased fears of persecution.[40]Other people have also expressed some fears that Section 5(3) of the same sex marriage prohibition Act which attempts to criminalize anybody who witness, aids or abets the solemnization of same sex union, is very problematic as it introduces widespread censorship. For instance, according to the United Nations Secretary-General, Ban Ki-Moon, "the law may fuel prejudice and violence," giving instances on how the police in northern Nigeria had arrested individuals believed by the authorities to be homosexuals and tortured them.[41]

The above reactions from the critics of the new law is an indication that they are unaware of the earlier existing laws in various states and regions of Nigeria which also prohibit all forms of LGBT culture, often referred to as unnatural offences, which simply means offences against the order of nature. The new anti-gay is not a new development but a rehash of our existing laws against same sex behaviour. What the new law has done is to broaden the offences by taking them to the realm of validity and celebration of marriage which the Federal Government is competent to legislate on. We have had laws prohibiting LGBT behaviours and indecent acts that threaten our public morality and tend to corrupt children. Examples of such laws can be seen in Chapter 16 of the Criminal Law of Lagos State, 2011 which provides for offences against morality. Sections 134, 135 and 136 of the Lagos State Criminal Code Law criminalize indecent

[40] The Storm over Same Sex Marriage Prohibition, http://www.thisdaylive.com/articles/the-storm-over-same-sex-marriage-prohibition/169716/, 28th May, 2015.
[41] Ibid.

acts generally. Section 134 provides, " that any person who willfully and without lawful excuse does any indecent act in any public place; or willfully does any indecent act in any place with intent to insult or offend any person is guilty of a misdemeanor and is liable to imprisonment for two years"[42]. Then Section 136 forbids indecent practices generally stating, "Any person who commits any act of gross indecency with another person in public or procures another person to commit any act of gross indecency in public with him or another person is guilty of a felony and is liable to imprisonment for three years."[43]

Also, by the provisions of section 214 of criminal code: "Any person who has carnal knowledge of any person against the order of nature; or has carnal knowledge of an animal; or permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years."[44] A similar provision is provided in Section 284 of the Penal Code applicable in Northern Nigeria.[45] These laws are meant to preserve natural laws. And by these provisions, homosexuality is viewed as unnatural. Worthy of mention here is section 217 of the Criminal Code Act which provides that:

> 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 ant of gross indecency with him, or attempts to procure the commission of an 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.[46]

In fact the entire chapter 21 of the Criminal Code Act is captioned offences against morality which comprise the whole of sections 214 to 233 which goes to buttress the fact that

[42] Lagos State Criminal Code Law, Laws of Lagos State, 2011.
[43] S. 136, Ibid.
[44] Criminal Code Act, (supra).
[45] Penal Code Law, Cap. 89 Laws of Northern Nigeria, 1963.
[46] Criminal Code Act, Op. Cit. s.217.

law and morality are so intertwined such that a claim on right and freedom must recognize its limitations when it comes to moral issues especially as it affects the public morality.

In the states of Kaduna and Yobe for instance, sodomy is said to be committed when a man has anal coitus with another man[47]. But in the states of Kano and Katsina, sodomy is committed when a man has carnal intercourse against the order of nature with any man or woman through her rectum. While in the states of Bauchi, Gombe, Jigawa, Sokoto, and Zamfara, sodomy is committed when a man has carnal intercourse against the order of nature with any man or woman[48].

Lesbianism on the other hand, is committed in the states like Bauchi, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe, and Zamfara when a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another. But in Bauchi, Jigawa, Katsina, Kebbi, Sokoto, Yobe and Zamfara states, the offence is committed by the unnatural fusion of the female sexual organs and/or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement[49].

Coming to punishment for same sex offences in Gombe, Jigawa, and Zamfara; a person who commits the offence of sodomy shall be punished with caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for the term of one year; or if married with stoning to death. Also in the state of Kano, a person who commits the offence of sodomy shall be punished with caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for the term of one year; or if married or has been previously married with stoning

[47] The Storm Over Same Sex Marriage Prohibition, http://www.thisdaylive.com/articles/the-storm-over-same-sex-marriage-prohibition/169716/, accessed on 28th May, 2015.
[48] Ibid.
[49] Ibid.

to death. But in the state of Bauchi, a person who commits the offence of sodomy shall be punished with stoning to death or by any other means decided by the state[50].

In the states of Kaduna, Katsina, Kebbi, and Yobe, a person who commits the offence of sodomy shall be punished with stoning to death. While in the state of Sokoto, a person who commits the offence of sodomy shall be punished with stoning to death; but if the act is committed by a minor on an adult person the adult person shall be punished by way of '*ta'azir*'[51] which may extend to 100 lashes and minor with correctional punishment.

Punishment for the offence of lesbianism in the states of Gombe, Jigawa, Kebbi, Sokoto, Yobe, and Zamfara, is caning which may extend to fifty lashes in addition to a sentence to a term of imprisonment which may extend to six months. In Bauchi state, a person who commits the offence of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to up to five years. Then in the state of Kaduna, the punishment for committing the offence of lesbianism is ta'azir, which means "any punishment not provided for by way of *hadd"*.[52]And in the states of Kano and Katsina, the punishment for committing the offence of lesbianism is stoning to death.

We do not rule out the possibility of abuses as expressed by many on the enforcement of Same Sex marriage prohibition law as already discussed earlier. However, we submit, that the Same Sex marriage prohibition Act is not an exception to the other laws that are also abused in

[50] Ibid.
[51] In Sokoto, "ta'azir" means "a discretionary punishment for offence whose punishment is not specified
[52] Hadd means "punishment that is fixed by Islamic law.

our Country, yet they are good laws. Therefore, Same Sex marriage Prohibition Act is still crucial as it is the way out of so many chaotic laws already existing in so many parts of the country since it brings a more uniform approach to same sex related offences as well as the penalty. It also provides a uniform understanding on what same sex relationship mean rather than individual interpretations given in various laws existing in the states with all sorts of punishments attached thereto.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 SUMMARY

Marriage understood as a union of a man and a woman remains the foundation of the family which is the bedrock of every society. The threat of civil partnerships, cohabitation, divorce, and same-sex marriage to the traditional concept of marriage is today very evident. What started in many countries as a child's play has spread like wild fire engulfing and devastating many jurisdictions.

The Nigerian same sex marriage legislation will not only protect the rights of children but will also protect public morality of majority of Nigerians whose upbringing will make it extremely difficult to accept public display of homosexual or lesbian behaviours prohibited in the Act.

The claim of same-sex activists that they are victims of discrimination and bigotry, and that they are being denied their civil and constitutional rights cannot but be far from the truth. The word 'discrimination' should not be taken as a synonym for 'unfair treatment' or 'injustice' but should be understood as a valid social concept, as discrimination simply means to distinguish or to differentiate, and there are prudent reasons why societies discriminate on the basis of good social policy. To deny driving licenses to the blind does not assume that they do not deserve equal respect and consideration as persons, but that they are different from other persons in respects relevant to driving. Since positive differentiation is important, it is submitted that it is thus not unjust discrimination against homosexual or lesbian couples to uphold marriage as being

between a man and a woman. Marriage and same-sex unions are essentially different realities, and justice requires that this difference should be recognized and respected.

Consequently, the right to marry, though fundamental, does not contemplate the right to marry members of one's own sex or to marry a domestic animal. Same-sex marriage is not about civil rights either. It is about seeking for validation and social respect. It is nothing but a radical attempt at civil engineering of marriage using the government muscle to strong-arm the people into accommodating a lifestyle many find deeply offensive, contrary to nature, socially destructive, and morally repugnant.

Marriage cannot and should not be created by government or by judges, for it is not merely a legal construct. However, because marriage as a meaningful social institution is so intimately related to the generation and the protection of children, the government has always been seen to have a legitimate role in regulating its civil effects.

The fact that in Africa, South Africa has broken the regional taboo by legalizing same-sex marriage should make Nigeria and Nigerians to be wary and alert. The gay activists and advocates of same-sex marriage are using it as a political pressure and tool to entangle many developed and developing nations. The present stand of the Federal Government of Nigeria at the United Nations Human Rights Council in Geneva that it will not bow to international pressures to allow same-sex marriage in the country is encouraging and must be sustained. The Government said: "Nigeria does not accept recommendation of some countries on same sex marriage, because it is against its national values. Recent polling data suggests that 92% of Nigerians support the Anti Same-Sex Marriage Bill passed by the Senate".[1]

[1] Anaba, I. *Nigerians against same-sex marriage – FG*, *Vanguard*, October 23, 2013, p.8.

This is why the state or government must exercise special care through her laws not to undermine the traditional meaning of marriage by redefining it, for this would amount to "building a house in a hurricane" and inadvertently institutionalizing and perpetuating a harmful social change capable of imploding and destroying the fabric of the society. Human nature exists and sets limits on what law can accomplish by fiat alone, and so when it comes to marriage, law must respect the reality of the ways in which human biology, human nature and social relationships are intertwined.

5.2 FINDINGS

1. The same sex marriage prohibition Act as it is today is not adequate enough as it would not technically be binding to marriages under Islamic law and customary law including matrimonial causes relating thereto pursuant to item 61 of Part 1 of the Second Schedule to the Constitution.
2. Woman to woman marriages though repugnant does not have the same ingredients of Same Sex Marriage as it is devoid of sexual acts and as such it would be unjust to link it to Same Sex marriage.
3. Same Sex marriage prohibition Act did not spell out in clear terms the necessary ingredients of what constitutes the offence of same sex.
4. Same Sex marriage if not prohibited will give rise to more worrisome and scandalous movements like incest which will bring total collapse of public morality which the Same Sex marriage prohibition Act is trying to protect.

5.3 RECOMMENDATION

1. We recommend that item 61 of Part 1 of the Second Schedule to the Constitution, on the formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto, should be amended to include Islamic law and Customary law including matrimonial causes relating thereto. This will make the Same Sex marriage prohibition Act enforceable to all marriages in Nigeria.
2. We recommend that the custom of woman to woman marriages being practiced in some of Nigeria, apart from being declared repugnant by the court should also be made illegal irrespective of the justification for such marriages. This will help in the enforcement of same sex marriage prohibition Act, such that it can now be an offence to practice such under the guise of any custom.
3. We recommend an amendment to Same Sex marriage prohibition Act to stipulate the test to grounding an allegation of Same Sex under the law to avoid overzealous enforcement agencies using the law as a tool to abuse the rights of Nigerian and foreigners in Nigeria.
4. It is strongly recommended that Nigeria and other African countries that are strongly opposed to same-sex marriage should as a matter of urgency amend their Constitutions and clearly and unequivocally define marriage as a union between a man and a woman to avoid future collapse of Africa's long preserved sense of sacredness to marriage institution and public morality as it happened in America and Europe.

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