



THE DYNAMICS OF MARRIAGE IN CONTEMPORARY WORLD

By

Adebiyi Anthony Adepoju*

Abstract

Marriage is an institution recognised across the globe. Union of man and woman is founded on the principle of law that recognised it to be between a man and a woman, but today, universality of marriage institution is threatened and it is on the verge of collapsing due to the existence of other forms of marriage like; gay-marriage, or lesbianism, open marriage and right of transsexual persons after surgical procedures. The objective of this paper is to examine the universality of marriage under different legal systems and see what can be done to preserve the sanctity of marriage despite the rising threat against the institute. Findings show that marriage can no longer be between a man and a woman due to the civilisation and technological advancement in an advance world. The study revealed new forms of marriage across different countries of the world, e.g., gay-marriage and lesbianism in countries like South Africa, USA, Europe and some Latin American countries, while “Open marriage” has just come up in Nigeria and in some other African countries. It was finally shown that advancement in technology has also contributed to the shift in marriage doctrine through surgical operation to become transsexual person. The paper was however, concluded that marriage sanctity can be restored through strong institution and legal reform.

Keywords: Dynamics, Marriage, Contemporary, World

1.0 INTRODUCTION

1.1 Marriage as a Universal Institution

Marriage is a universal institution that is recognized and respected all over the world. As a social institution, marriage is founded on and governed by social and religious norms of society. Hence, the sanctity of marriage is a well-accepted principle in an egalitarian society¹. The Court, in the case of *Hyde v Hyde*² defined marriage as “the voluntary union for life of one man and one woman to the exclusion of all others”. From this definition of marriage, the following can be deduced, firstly, the marriage/union must be voluntary. Secondly, it must be for life. Thirdly, the union must be heterosexual, meaning that, it must be between persons of opposite sex, that is, a man and a woman. Fourthly, marriage must be monogamous³ in case of statutory marriage.

However, the culture and the principle that marriage must be between persons of opposite sex has faced serious threats and challenges in several jurisdictions across the world. In some countries, same-sex marriage has been legalized while in others, substantial legal attributes of

* LLB, LLM, M.Phil, PhD (Ife); PhD (Babcock), Reader & Ag. HoD, Public & Int'l Law, Faculty of Law, University of Ilesha, Ilesha, Osun State; anthony_adepoju@yahoo.com; 08037545270

¹ E. I. Nwogugu: “Family Law in Nigeria (Ibadan, HEBN Publishers Plc, 3rd ed, 20154) pg 4.

² (1866) LR 1 P & D, 130

³ O. O. Olomola: “Family Law & Succession in Nigeria (Ikeja, Princeton & Ass. Publishing, 2021) pg 16.



marriage have been conferred on cohabiting couples. This development has generated a lot of criticisms and it is presently shaping the legal arena of the long-aged institution. To this end, concerns have been expressed particularly in religious circle as to the threat which the development has brought unto marriage institution across the globe⁴.

It is thus, complex to really tackle this threat to marriage institution due to the tripartite system of laws that govern marriage institution in Nigeria and in some other countries like Kenya, Ghana, Sierra Leone⁵. This threat to marriage institution may be seen in the area of different types of marriages evolving, that is, coming on board. In this regard, it is described as, the type of marriage where people of the same sex are allowed to marry one another and in that, man is permitted to marry another man and woman can or may be permitted to marry another woman. Lesbianism is what is being called in another quarters or jurisdictions of some other countries.

1.2 Recognition of Same Sex Marriage Internationally

Furthermore, recently, Netherlands legalized same sex marriage in 2001⁶, followed by nations in Europe (Belgium⁷, Spain⁸, Portugal⁹, Ireland¹⁰, France¹¹, and others) where same sex marriage and related activities were legalized the same year (2001) in these aforementioned countries. Also, around the same period, countries like United States of America (USA)¹², and some countries in Latin America, such as, Canada¹³, Argentina¹⁴, Brazil¹⁵, Mexico¹⁶ also institutionalized and legalized same sex marriage otherwise called gay marriage. The development brought about shift in marriage institution in these aforementioned countries. In the same vein, South Africa¹⁷, also legalized the same sex marriage in 2006 and today, up to thirty-eight (38) countries of the world have legalized and institutionalized this new system of marriage otherwise known as Gay Marriage with strong laws put in place to back it up in their respective countries.

Furthermore, related to the above name shift in the marriage system is what is called “Open Marriage”, this has just emerged in some parts of Africa, most especially in Nigeria, Ghana, Mali, Kenya and so on. In this type of marriage, wife and husband who legally married may go and attract another suitor outside the marriage but reserve right to have babies to their legal spouse when it is time to have a child. In this type of arrangement, either the husband or the wife may decide to have suitor outside marriage and any one of them is at liberty to live and stay with another suitor outside their marriage or their matrimonial home.

⁴ A. A. Adepoju PhD: (Author’s observation on the new trend of marriage in Nigeria) The emergence of other forms of marriages such as same-sex marriage, open marriage and marriage of those who have undergone sex transgender operation which today as posed threat to marriage institution across the globe.

⁵ (Ibid) O. O. Olomola

⁶ Same sex marriage law became operational on 1st April, 2001

⁷ Same sex marriage law became operational in 2003

⁸ Same sex marriage law became operational in 2005

⁹ Same sex marriage law became operational in 2010 (it replaced civil union of 1995)

¹⁰ Same sex marriage law became operational in 2015

¹¹ Same sex marriage law became operational in 2013 (first same sex marriage was conducted in May 2013)

¹² Same sex marriage law became operational on 26th June, 2016 (it was further stated that USA Supreme Court ruled in Obergefell v. Hodges. That the constitution guarantees same sex marriage in all 50 states)

¹³ Nationwide legalisation of same sex marriage in Canada was On 20th June, 2005

¹⁴ Same sex marriage law became operational in 20th July, 2010

¹⁵ Same sex marriage law became operational in 14th May, 2013

¹⁶ Mexico is a bit different because marriage law is State-based, nor Federal. However, Mexico city adopted same sex law marriage on 4th March, 2010, while it became nation law in 2022

¹⁷ Same sex marriage law became operational on 30th November, 2006

**Open Marriage¹⁸**

“Open Marriage” has just evolved, gaining recognition and influence but not yet secured the recognition of law or being prohibited by any law. An Open Marriage is a recognised marriage where both spouses consensually agree that sexual and/or romantic relationships with other people are permitted. The marriage remains the primary partnership, the “openness” refers to only the agreed external relationship. This could be traced back to “1972 book open marriage” where a new lifestyle for couples by Nena and George O’Neill was stated that couples can leave their legitimate spouses to have sexual affairs with someone else outside the marriage. From the foregoing, it can be rightly said that marriage is shifting from traditionally duty-bound institution to a dynamic, egalitarian partnership that focused on companionship and emotionally built union.

1.3 Key dynamic factors shaping modern marriage across the globe includes:

- (i) Shift to Egalitarian Roles: traditional, strict gender roles are being replaced by flexible arrangements where both partners often work, share financial responsibilities, and navigate domestic duties jointly.
- (ii) Focus on personal fulfillment: Instead of solely for social or economic stability, and mutual emotional support, increasing the pressure for the relationship to meet high satisfaction levels.
- (iii) Delayed Marriage and Cohabitation: Many couples are delaying marriage or opting for cohabitation first, leading to a rise in the average age of marriage and in some regions a decline in total marriage rate.
- (iv) High Volatility and Turnover: Increased options for divorce and remarriage means that contemporary marriage is less of a permanent institution and more of a “dynamic” partnership that requires constant nurturing, with many marriages failing to last for a longer term.
- (v) Redefining Family Structure: modern couples are defining family in more flexible ways, including dual-income households and diverse partnership structures that go beyond traditional definitions.

However, whether Gay-marriage, Lesbianism or Same Sex Marriage and Open Marriage will secure full recognition of the law in Nigeria or in other African countries, time will tell, and as a researcher, the writer of this article is watching to really bring it to the knowledge of the world, the “transient” of marriage from traditional forms to “hybrid” nature¹⁹.

2.0 Recognized types of Marriage in Nigeria and across the Globe

Three types of marriage are legally recognized in Nigeria and internationally, namely, monogamous marriage under the Marriage Act, Customary law marriage under different cultures and Islamic Law Marriage as stated by Almighty Allah in Holy Quran and Deeds of Prophet Muhammad (S.A.W.), a marriage is allowed to take place between a male slave and female slave²⁰.

The question has arisen as to the types of marriage recognized under Nigeria law and International laws. The answer involves the pertinent issue as to whether Islamic law is part of

¹⁸ O. O. Olomola “Family Law & Succession in Nigeria (Ikeja, Princeton & Ass. Publishing, 2021) pg 16, in her own contribution to the trend of marriage across Africa reiterated the emergence of new system of marriage of which Open is one of them. Also, love news from some media stations in South-Western Nigeria, e.g. Agidigbo FM, Ibadan 12 midnight programme; Lagelu FM, Ibadan, 10-12p.m.; Fresh FM midnight Saturday programme

¹⁹ Opinion of the author, Anthony Adebisi Adepoku PhD, on dynamic of marriage on contemporary world as being practiced in Nigeria, 2026.

²⁰ Holy Quran 30:21 “Nikah” it is considered a sacred contract an a Sunnah of the Prophet, not just a social custom. Also, in Holy Quran 24:32 “...and marriage shall be between a male slave and female slave”



customary law. Some writers²¹ contend that the term “customary law” includes Islamic law. To reach this conclusion, reference is made inter alia to earlier Nigerian legislations. Other writers²², however, argued that Islamic law from its historical basis, nature and geographic application cannot be properly regarded as part of customary law, this was the position of the Court. In *Usman v. Usman*, Bello, C.J.N drew a distinction between Islamic law and customary law thus;²³

...Furthermore, to my mind, the definition of ‘customary law’ in section 2 of the Customary Court of Appeal Law which means ‘the rule of conduct... as established by Custom and usage is incapable of including ‘Moslem law.’ Since the decision in *Lewis v Bankole* ... customary law has been stated to be unwritten customary law, recognized as law by members of an ethnic group and it is ‘a mirror of accepted usage...’ On the other hand, it is notorious fact that Moslem law is written in the Holy Quran, in numerous books of Hadiths...

Further support for this view may be found in the fact that recently some northern states have sought to transform Islamic law and practices from a Customary to statutory status²⁴. from this juncture, it is noted that writing is not an absolute criterion as some parts of Islamic law are unwritten, for example, the acts of the Prophet Muhammad otherwise known as the books of Hadith. Turning to the specific issue of types of marriage in Nigeria, the 1957 Constitution which first introduced marriage on the enumerated Federal Exclusive List indicates that there are only two types of recognized marriages, that is, marriage under the Marriage Act and those “under Moslem law or Customary law”. The words used suggest that Moslem law is a species of customary law²⁵. A different approach was taken in the drafting of the same item in the 1999 Constitution which adopted the formulation, “...other than marriages under Islamic law and Customary law²⁶”

By this drafting, the Constitution recognizes three legal forms of marriage in Nigeria. The acceptance of three distinct types of marriage does not however change the relationship of Islamic law vis-à-vis the Marriage Act in that the Act cannot apply to Islamic marriages. The Act recognizes only two types of marriages – marriage under the Act and Customary law marriage²⁷.

2.1 Customary Law Marriage

Customary law is one of the sources of Nigerian law. It is the indigenous legal system in various communities in Nigeria and possesses three unique features: it is written, it must be “a mirror of accepted usage” in the area where it is applicable and its rules change with time²⁸.

²¹ A. E. W. Park: *The Sources of Nigerian Law*, (London, African University Press) (1964) Okonkwo (ed): *Introduction to Nigerian Law* (London, Sweet & Maxwell, 1980) p. 14.

²² O. N. Ogbu: *Modern Nigerian Legal System* (Enugu, CIDSAP Press, 2007) pp 91-92

²³ (1992) 7 NWLR (pt. 254) 277.

²⁴ E.g. Section 29(4) of the Kano State Sharia Penal Code Law, 2000 provides that “the provision of existing laws in the state which define customary law to include Islamic law or Moslem law are hereby accordingly amended and such provisions shall be deemed statutory laws wherever they occur”.

²⁵ Ibid.

²⁶ Constitution of the Federal Republic of Nigeria 1999, Second Schedule Item 61.

²⁷ See sections 33, 46 and 47 of the Marriage Act.

²⁸ Osborne, in *Lewis v Bankole* (1909) 1 NLR 81, 101; *Oyewunmi v Ogunesan* (1990) 3 NWLR (pt 137) 137. see also, O. N. Ogbu ; *Modern Legal System*, (Enugu, 2nd (Ed), Sweet and Maxwell, 2007) Chapter 4.



there is no uniform customary law applicable throughout Nigeria. Rather, customary law varies from one community to another. However, some uniform principles may be discerned from the various systems of customary law.

Customary law marriage may be defined as the union for life of one man and one or several women. Its essential characteristics is the capacity of the man to take more than one wife at a given time. Consequently, a marriage remains one under customary law where there is only one wife provided that the man retains throughout the union, the capacity to take additional wives. There is no limitation on the number of wives that may be taken under customary law. This depends on the man's circumstances. Customary law does not recognize Polyandry, that is, the capacity of a woman to have more than one husband. In *Kpelanya v. Tsoka and Anor*²⁹, it was held that under TIV Customary law, a woman cannot lawfully be married to two men at the same time. Indeed, under Idoma Customary law, it is an offence for a woman to be married to two men.

The free consent of the parties is an important ingredient in contracting a customary law marriage. However, the system also admits of child marriage in which the consent to the marriage may be given by the bride's parent. This unsatisfactory aspect of the system has been made unlawful under various legislation³⁰.

There are various sources of customary law applicable to marriages. An intrinsic feature of customary law is its unwritten feature. However, increasingly rules of customary law appear in written form. Several state legislatures have made laws to regulate various aspects of customary marriage including quantum of bride price, child betrothal and the rights and duties of customary law spouses³¹.

In the exercise of powers conferred by the relevant , the state executive may make an order declaring or unifying the customary law applicable in a particular locality of the state³². Moreover, pursuant to states local government laws, local government councils are conferred with the power to make a declaration stating the customary law which appears to it to apply in its area of authority relating to matrimonial causes. Declarations made under such authority become the applicable customary law on the particular subject:

Once a declaration of customary law has been made and registered with regard to Any subject, that declaration becomes the native law and custom to the exclusion of any other laws and practices and the courts only duty is to enforce it.³³

Under the local government legislation in some states of the federation, the commissioner charged with responsibility for local government matters is authorised to make adoptive by-laws on any matter for which the local government may make. Such adoptive by-laws are to be published in the states' official gazette. Any local government in the state may adopt any

²⁹ (1971) NNLR 66

³⁰ Section 25(1) The Local Government (Declaration of Tiv Customary Marriage Law) Order, 1985. 16

³¹ Customary Marriages (Miscellaneous Provisions Law, Cap. 3 Laws of Anambra State 1999); Customary Marriages (Miscellaneous Provisions Law, Cap. 33 Laws of Enugu State 2004)

³² The Local Government (Declaration of Tiv Customary Marriage Law) Order 1985 B.S.L.G.L. of 1985. The Otukpo Local Administration (Modification of Idoma Native Marriage Law and Custom order, 1970).

³³ *Daramola v. A-G Ondo State* (2000) F. W. L. R. (Pt. 8) 997 at 1023; *Governor of Kwara State v. Eyitayo* (1997) 2 NWLR (Pt. 485) 118, 129; *Ayoade v. Military Governor of Ogun State* (1993) 8 NWLR (Pt. 309) 111.



such published by-laws. This machinery serves the additional purpose of unifying rules of customary law within a state³⁴.

2.2 Islamic Law

Islamic law, sometimes referred to as “Moslem law” or “the Sharia” is partly written. It is a legal system based on the Islamic religion. Its sources are the Holy Quran, the practices of the Prophet (the Sunnah), the consensus of scholars on obscure points, and analogical deductions from the Holy Quran³⁵. The Moslem law of the Maliki School operates in Nigeria. Islamic law is not indigenous to Nigeria but followed the Jihad, which occurred in the northern part of the country. It prescribes the marriage of one man and not more than four wives at the same time.

Although, Islamic law remains the personal law in vast areas of the northern states, there are pockets of population who continue to rely heavily on the indigenous customary law. Moreover, the application of rules of Islamic law has been influenced in some areas by the preexisting customary law.³⁶ While Islamic law recognizes the place of free consent of the parties to a marriage, it also admits of child marriage which results from the power of a father to give his infant daughter away in marriage. Efforts to minimize or abolish this practice are having the desired effect.

Initially, Islamic personal law applied in Nigeria in respect of subjects as marriage, succession and gifts. Moreover, the Penal Code of 1959 applicable to the then Northern Region (northern states) recognized some offence sourced from Sharia. The Islamic law therefore a personal law. However, from 1999, some northern states adopted comprehensive Islamic criminal law³⁷. Islamic law applies on a territorial rather than personal basis. This system of law is confined primarily to the northern states. Although, there is a large population of Moslem in the Yoruba South-West of the country, customary law rather than Islamic law applies in personal matters including marriage.

Adesanya³⁸ has explained the situation thus:

...although, the Islamic law which obtains in Southern Nigeria apart from an admixture largely of customary law and a few rules of Islamic law, also differs diametrically from the Islamic law which obtains in the Muslim Emirates of Northern Nigeria. It is Islamic law because it is so regarded by local adherents ...for want of better term will be termed “local Islamic law in- contradistinction to customary law so called.

It is however, pertinent to note that Yoruba customary law continues to apply to various aspects of matrimonial causes. A good illustration is the case of *in the Estate of Alayo, Deceased*³⁹. In that case, the question arose with respect to the distribution of the estate of an intestate Yoruba woman from Ijebu land. The deceased was an Ijebu and a Moslem. She was married under Islamic law. There was no divorce up to the time of her death, but she had ceased to live with her husband for about forty-five years before her death. She was survived by her husband, an

³⁴ Section 170(1)

³⁵ Ibid,

³⁶ Y. M. Kanan: “The Effect of Custom on certain aspect of Maliki Law in the Northern States of Nigeria” *Journal of Islamic and Comparative Law*, Vol. 2 (1968) 79, 83-85.

³⁷ For instance, Sharia Penal Code Law 2000 in Zamfara State. It reveals the power of the state to introduce religion in that state.

³⁸ S. A. Adesanya: “Marriage according to the Local Islamic Rites of Southern Nigeria, *Journal of Islamic and Comparative Law*, Vol. 2, (1968) 26, 32

³⁹ (1946) 18 NLR 88, Anderson



adopted child and some collateral - the descendants of her maternal grandfather. It was argued on behalf of some claimants to her estate that the distribution should be governed by Islamic law. Other claimants urged the court to apply Ijebu law and custom. Brooke, J. held that "Ijebu was not a Moslem area and pointed out that there was no provision for the application of Moslem law there. The proper law to govern the distribution was Ijebu native law and custom.

2.3 Marriage Under the Marriage Act

Monogamous marriage, as it is, in the case in most other countries of the world, is a voluntary union for life of one man and one woman to the exclusion of all others until divorce or death⁴⁰. A number of important questions arise in respect of this definition. The union must be the result of the free consent of the parties. Absence of such consent will vitiate the marriage. Moreover, at every stage in the marriage, only one man and one woman are involved to the exclusion of all others. There may be subsequent consecutive marriages by either party provided that only one partner is involved on each occasion. Furthermore, the union is for life. This means that at the formation of the marriage, the parties must have intended to take each other as husband and wife for life. Nonetheless, this may be subsequently disrupted by divorce or death of one of the spouses. The Interpretation Act, 2003 defines 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.

Going forward from the definition of marriage as captioned in the case of *Hyde v Hyde*. The definition presumes that the parties to a marriage must be of opposite sex. While this prescription may look straightforward, difficulties may arise with respect to determining the sex of a person. This is particularly the case with hermaphrodites⁴¹ and pseudo-hermaphrodites⁴². Also, advances in medical science have made sex-changes operation feasible and in turn raised the complex legal question of determining the legal sex of such persons for purposes of contracting a valid marriage.

Although our courts in Nigeria and in most of African countries have not yet been confronted with this particular question, the chances of that happening is not too far-fetched. It is therefore useful to review the approaches of other jurisdictions particularly those of commonwealth countries.

In the English case of *Corbett v. Corbett*⁴³, the court applying the three criteria of chromosomal, gonadal and genital tests refused to recognize the new sex of a person who underwent sex change operation. This decision has not been followed in many countries which now recognize the legal capacity of post-operative transsexuals to marry a person of opposite sex to their acquired gender. English law has been influenced in this capacity, by the decision of the European Court of Human Rights in *Godwin v. United Kingdom*⁴⁴. In this case, the applicant was born a *transsexual*. Initially he adopted a male gender and married a woman. Later he underwent gender re-assignment surgery to become a woman. The national insurance agency refused to alter her records to reflect her new gender and continued to apply to her rules

⁴⁰ See *Hyde v. Hyde* (1886) L.R.I.P & D 130, 133.

⁴¹ The true hermaphrodite has both testis and ovary and some of the other physical characteristics of both sexes – *Corbett v Corbett* (1971) P. 83, 100.

⁴² The pseudo-hermaphrodite has either testes or ovaries and other sexual organs which do not correspond with the gonads which are present. *Ibid*.

⁴³ (1971) P. 83; "Transsexualism, sex reassignment surgery and the law" 56 *Cornell L. R.* 963, 992-1002 (1971); "Transsexuals in Imbo" 31 *M.L.R* 236, 244 (1971); Kum W.K. Transsexuals in England still of both sex even if this transgresses European Human Rights Convention (2003) *Singapore J. Legal Studies* 274.

⁴⁴ 41 ILM (2002) 1285. 12.



intended for males. The applicant claimed in the European Court of Human Rights *inter alia* violation of her rights under articles 8 and 12 of European Convention on Human Rights which re-affirmed the right of men and women to marry. The court concluded that there was an emerging European and international consensus in favour of legal recognition of transsexual's new gender and found for her. It cited with approval the dicta of Chisolm J. in the Australian case of *Re Kevin*⁴⁵ which dealt with the recognition of transsexual person's assigned sex for the purposes of validating their marriages:

I see no basis in legal principles or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to developments in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society.

Because the words 'man' and 'woman' have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus, it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex, or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's 'brain sex'. To determine a person's sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals, and chromosomes); the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage.

For the purpose of ascertaining the validity of a marriage under Australian law the question whether a person is a man or a woman is to be determined as of the date of marriage...⁴⁶

⁴⁵ (2001) Fam. CA 1070; *Attorney General v Otahuhu Family* (1995) INZLR 60.

⁴⁶ Same sex marriages have been recognised in Canada, France and some states in the US – C. Richards: The legal recognition of same-sex couples as observed: the French perspectives 51 *ICLQ* 305 (2002). Same sex marriage practices in the following states – Massachusetts, Connecticut, Maine, Vermont, Iowa, and New York. *Hampshire – Daily Independent* Friday June 5, 2009 page All columns 5&6.



It is noted that the Goodwin's case did not arise in matrimonial proceedings involving the validity of the marriage. That however was the case in *Bellinger v Bellinger*⁴⁷. In that case, the House of Lords refused to apply the decision in Goodwin and to declare that a marriage celebrated between Mr. and Mrs. Bellinger in 1981, in which Mrs. Bellinger was a transsexual was valid. It was of the view that a change of the law was the responsibility of parliament.⁴⁸

A related but different question has been raised in respect of same-sex marriages: two major contentions have been proffered in support of such arrangement.⁴⁹ First, it is argued that the local Marriage Act like similar legislations in Europe and the US, did not explicitly prescribe for marriage between persons of the opposite sex. In response, it has been countered that universally, the understanding which underpinned marriage legislations is that only persons of the opposite sex are involved. Consequently, it was not necessary in most cases, to state that principle expressly. That presumption is reflected in several sections of the applicable legislations on marriage in many countries. The exclusion of same sex couples from the right to marry has also been challenged on constitutional grounds of due process and equal protection under the law. The answer to the challenge may depend on one's social and religious approach to what constitutes a right in this respect.

The foregoing challenges have been raised by lesbian and gay groups in Nigeria. This development and the resulting public pressure encouraged the Federal Executive Council to introduce Same Sex Marriage (Prohibition) Bill, 2006.⁵⁰ The Senate has passed the Same Sex Marriage (Prohibition) Bill, 2011⁵¹ which now awaits action by the House Representatives and the eventual approval of the President. Section 1(1) prohibits the conclusion of any marriage contract or civil union in Nigeria between persons of the same sex. Any such contract or union is declared invalid and illegal and will not give rise to the benefits of a valid marriage. Furthermore, section 1(3) declares void any certificates of a marriage contract or civil union entered into between persons of the same sex in a foreign country. Any benefits which accrue from such certificate will not be enforced by any court in Nigeria. Section 2 prohibits the solemnization of marriage or civil union between persons of the same sex in any place of worship either church or mosque or any other place in Nigeria. Any certificate issued in respect of such marriage will not be valid in Nigeria.⁵² Section 4 proscribes the registration of gay clubs, societies and organizations, their sustenance, processions and meetings. The public show of same sex amorous relationship is prohibited. Section 5(1) makes the solemnization of same sex marriage an offence punishable on conviction by 14 years imprisonment. A lesser period of imprisonment of 10 years is prescribed for the registration or operation of gay clubs or societies and for aiding and abetting any prohibited acts. It is instructive to note that the bill applies to all marriages celebrated in Nigeria whether under the Marriage Act, customary law or Islamic law.⁵³ The laws which govern the celebration and incidents of monogamous marriage in Nigeria are found principally in the Marriage Act and the Matrimonial Causes Act.

It is however, important to know that monogamous marriage in Nigeria is governed by the Marriage Act, Cap M6 Laws of the Federation of Nigeria, 2004 and the Matrimonial Causes

⁴⁷ (2003) 2ALL ER 593 (HL).

⁴⁸ See Gender Recognition Act, 2004 (UK)

⁴⁹ See Brown, A.B *The Evolving Definition of Marriage* 31 *Suffok L. Rev.* 917 (1998)

⁵⁰ Cf. Executive bill No SB 2941. See the US Federal Legislation prohibiting marriage between persons of same sex – Defence of Marriage Act (DOMA) Public Law No. 104 – 199, 110 Stat. 2419 (1996). Walen, A. "Defence of Marriage Act" and authoritarian morality 5 *William and Marry Bill of Rights Journal* 619; see "Homosexual besiege NASS, Seek stoppage of same-sex marriage bill: *Daily Independent* Thursday, March 12, 2009 A2."

⁵¹ Passed on November 29, 2011

⁵² Section 3.

⁵³ Section 7.



Act, Cap M7, Laws of Federal of Nigeria 2004.⁵⁴ These makes the issues of marriage to be contained under the exclusive legislative list under the 1999 Constitution of the Federal Republic of Nigeria (As amended). Due to this, only the National Assembly has the legislative power to alter, amend any aspect of these two provisions.

Furthermore, by virtue of provision of Section 4(2) and (5) of the 1999 Constitution, only the National Assembly can legally deals with any alteration in it, State Houses of Assembly cannot and does not have Constitutional power to legislate on monogamous marriage except marriages contracted under Islamic and Customary laws which fall within the purview of the State Houses of Assemblies.⁵⁵

3.0 Findings on Marriages

(i) There is a threat to marriage institution in the world due to emergence of new forms of marriage like same-sex marriage and despite the enactment of the Same-Sex Marriage Prohibition Act 2013 in Nigeria to criminalize same-sex marriage and related acts.⁵⁶ Since no country can be island of herself, there are a lot of pressures from powerful countries which Nigeria as a developing nation has so much depended on in the area of economic assistance and aids and they are leaving no stone unturned to ensure that Nigeria reverse herself from criminalizing same-sex marriage in Nigeria. For instance, foreign aids from Europe is under threat due to the enactments of same-sex marriage in 2013.

(ii) Also, the emergence of ‘Open marriage’ in Nigeria and other parts of Africa posed another threat to the marriage institution, this is movement from traditional form of marriage where husband and wife are compelled to be living together as husband and wife and due to the marriage sanctity, procreation is limited to legitimate sexual intercourse of husband and wife to produce a child, but where sleeping with another man during substance of marriage will not be tagged as infidelity but another form of marriage called “open marriage”, this is against the sanctity of marriage and it constitute ground for divorce as stated in Matrimonial Causes Act of 1970.⁵⁷

(iii) Technological breakthrough in sciences has also posed threat to the marriage institution because, through it, people can change their status in respect of marriage not their status at birth. Despite changes in status, sciences have not proven it that, those who have undergone transsexual procedure thereby changing their gender to suit marriage have not been able to procreate through such procedure.

(iv) Transsexual changes through surgery or surgical operation which in most occasions have changed the status of a person from either a woman to a man or from a man to a woman leaving the status of a person at birth irrelevant because after transgender operation the person will automatically move from status he or she had at birth to a new one which will definitely change the narrative of marriage which originally limited to a man and a woman as stated in the Marriage Acts⁵⁸ and pronouncement of court in *Hyde v. Hyde*.⁵⁹

(v) Another finding is that laws of marriage namely Marriage Act 1914 and Matrimonial Causes Act 1970 are Federal laws and too centralized for a country of many tribes and cultures and different religions. Hence, amending it will be automatically be cumbersome and rigid to

⁵⁴ Preamble to Marriage Act Cap M6 Laws of Federation of Nigeria, 2004 and Matrimonial Causes Act Cap M7, Laws of Federation of Nigeria 2004.

⁵⁵ Section 4(2) and (5) of 1999 Constitution of the Federal Republic of Nigeria (As amended).

⁵⁶ Section 1(2) of the Same-Sex Prohibition Act, 2014.

⁵⁷ “Section 15(1), 2(A) & (B)) of Matrimonial Causes Act 1970.

⁵⁸ Marriage Act 1914 and MCA 1970

⁵⁹ (Supra)



meet current yearning and aspirations of 21st century people. It is also rigid to accommodate different peculiarities.

4.0 Conclusion

Marriage is a legal contract and it finds its base in law. Formation and consummation must strictly adhere to the rule of law, failure of which will make the contract of marriage to be illegal. The fact that there is emergence of new forms of marriage across the globe which posed threat to the traditional ones does not mean union of man and woman to become husband and wife is dead. The honour which sanctity of marriage has brought to those who have validly contracted it cannot be over emphasised.

Till this present time that this paper is written, study has not shown or revealed that gay union or marriage has produced a child. Though, gay marriage or lesbianism as the case may be in some states in United States of America, European countries, Asian countries and Latin America are legitimately contracted due to high level of civilization in those countries, it is not seen as bad because their cultures in those countries practising it allow it, but here in some parts of Africa, where people cherished and valued their cultures so much, it will be difficult to replace traditional marriage with gay marriage or lesbianism.

Nigeria in 2013 enacted Same Sex Prohibition Act purposely to prohibit and discourage her citizens from embracing or promoting same sex marriage in the country. Though, fundamentally speaking, Same Sex Prohibition Act 2013 is discriminatory in nature in the area of fundamental human right as it is stated in Section 42(2) of 1999 Constitution of the Federal Republic of Nigeria. Also, till this present time, there is no known law to prohibit transsexual changes for those who derive pleasure in changing their status both at birth and sexually.

The emergence of 'Open marriage' in Nigeria and other African countries, is another threat to marriage institution and those practising it are of the opinion that where the desired values are no longer getting in their unions, there should be alternative without divorcing or leaving the original marriage. Majorly, economic reason might be the cogent one for a woman to leave her husband and get succour in another suitor outside marriage.

From the foregoing, and to address all the challenges and threats which emergence of new forms of marriage had brought or introduced, reforms is hereby recommended as soon as possible for the yet unborn children to be able to have safeguarded futures, homes and marriages.

5.0 Recommendations

- Amendment to Marriage Act at the Federal level is advocated to meet the yawning needs of this present dispensation. Among these, unification of laws of marriage is urgently needed to ascertain and to resolve the problem associated with the appropriate and applicable choice of laws when marriage conflicts arise at different quarters in Nigeria.
- Laws on marriage at present are incoherent, in the sense that different system of laws governed marriage institution in Nigeria, for instance, Marriage Act 1914 and Matrimonial Causes Act 1970 governed and regulate statutory marriage otherwise known as monogamous marriage in Nigeria while customary marriage and Islamic marriage are governed and regulated by state laws. This is not good enough for a country of about over 250 million people and these need to be harmonized for uniform enforcement and regulation in Nigeria.
- Coherent and unambiguous marriage law, is what can make marriage institution strong and to defeat all manner of threat posed against it through or due to civilization and advancement in technology or sciences.



- Finally, pluralism/dualism of the family law is another area that needs amendment and all efforts should be concentrated on how unambiguous law of marriage be made across different levels of government in a period not too long from this time.

Bibliography

Books

E. I. Nwogugu: "Family Law in Nigeria (Ibadan, HEBN Publishers Plc, 3rd ed, 2015) pg 4. (1866) LR 1 P & D, 130.

O.O. Olomola: "Family Law & Succession in Nigeria (Ikeja, Princeton & Ass. Publishing, 2021) pg 16.

A.E. W. Park: The Sources of Nigerian Law, (London, African University Press) (1964)

C. O. Okonkwo (ed): Introduction to Nigerian Law (London, Sweet & Maxwell, 1980) p. 14.

O.N. Ogbu: Modern Nigerian Legal System (Enugu, CIDSAP Press, 2007) pp 91-92

Acts

Same Sex Marriage (Prohibition) Act 2013

Matrimonial Causes Act 1970

Marriage Ordinance Act 1948

Cap M6, Laws of the Federation of Nigeria, 2004

Constitution of the Federal Republic of Nigeria 1999, Second Schedule Item 61.

Section 25(1) The Local Government (Declaration of Tiv Customary Marriage Law) Order, 1985. 16

Customary Marriages (Miscellaneous Provisions Law, Cap. 3 Laws of Anambra State 1999)

Customary Marriages (Miscellaneous Provisions Law, Cap. 33 Laws of Enugu State 2004)

The Local Government (Declaration of Tiv Customary Marriage Law) Order 1985

B.S.L.G.L. of 1985. The Otukpo Local Administration (Modification of Idoma Native Marriage Law and Custom order, 1970).

Sharia Penal Code Law 2000 in Zamfara State. It reveals the power of the state to introduce religion in that state.

Journals



Y. M. Kanan: “The Effect of Custom on certain aspect of Maliki Law in the Northern States of Nigeria” *Journal of Islamic and Comparative Law*, Vol. 2 (1968) 79, 83-85.

S.A. Adesanya: “Marriage according to the Local Islamic Rites of Southern Nigeria, *Journal of Islamic and Comparative Law*, Vol. 2, (1968) 26, 32

Cases

Hyde v. Hyde (1886) L.R.I.P & D 130, 133.

European Court of Human Rights in *Godwin v. United Kingdom*; 41 ILM (2002) 1285. 12.

Corbett v Corbett (1971) P. 83, 100.