

## RIGHT TO MARRY AND THE REVISIONISTS' ADVOCACY: A FUNDAMENTAL JURISPRUDENTIAL RE-READING\*

### Abstract

*Marriage is a natural and social institution which is recognized and respected world over. Precisely as an institution of nature, the natural law has for all times prescribed the conditions necessary for valid celebration of marriage namely: voluntariety, heterosexuality, monogamy, indissolubility and exclusivity. But under the intuition of modern ideologies definitions and approaches to marriage which contradict and so fly in the face of the natural law abound with great patronage. Among the reasons offered for this departure from the natural law marriage type is the claim that marriage should be predicated upon absolute right to privacy, freedom of association and freedom from discrimination as enshrined in the frameworks of various international and municipal laws. This work operates as a counterpoint to the above claim through a hermeneutical analysis of the essence and the limits of the claimed rights. It calls attention to the inexorable need to anchor marriage on the law of laws – natural moral law. The work finds that the advocates of marriage revision has failed to understand the nature of man, society, marriage and indeed rights and freedom. Hence a fundamental clarification of the proper meaning of these terms through legal awareness programme is highly recommended.*

**Key words:** *Right to Marry, Fundamental Rights, Freedom, Privacy, Association and Discrimination*

### 1. Introduction

The clamour for human rights and fundamental freedoms is a universal concern of all men. Various schools of jurisprudence have differently defined human right(s) and freedoms. More than every other interest group, the United Nations is concerned. Hence, the concern of the United Nations with the promotion and protection of universal respect for and observance of human rights and fundamental freedoms is an expression of the ever increasing interest of the international community in ensuring that these rights and freedoms shall be enjoyed by all human beings everywhere.<sup>1</sup>

When ideals of human right and freedoms are pursued without caution, the result will be disastrous for the society since any imaginable form of behavior/option could be claimed as proceeding from freedom and culminating into a right to be respected. But in this paper, the foundational approach to human right and freedom is the natural law jurisprudence. From that perspective, human right and freedom refer to 'rights and freedoms which every person is entitled to enjoy [as] deriving from natural law...'<sup>2</sup> They are rights inherent in all human beings, whatever the nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. All men are equally entitled to the human rights without discrimination. These rights are interrelated, interdependent and indivisible.<sup>3</sup> They flow directly from man's very nature and cannot be suspended because they are universal and inviolable.<sup>4</sup> But to properly understand the application of these rights, recourse must be had to the essence of the human nature as disclosed by classical anthropology. Without such knowledge, error by excess or defect in the interpretation of the implications of the rights and freedom will crystallise.

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<sup>1</sup> J Olakanmi *Handbook on Human Rights* (2<sup>nd</sup> edn, Abuja: LawLords Pub., 2010) p. 3.

<sup>2</sup> S Bone (ed.) *Osborn's Concise Law Dictionary* (9<sup>th</sup> edn, London: Sweet and Maxwell, 2001) p. 196.

<sup>3</sup> 'What are Human Rights' available at <http://www.ohchr.org/en/issues/pages/whatareHumanRights.aspx> accessed on 13th October 2012.

<sup>4</sup> John XXIII. Encyclical Letter, *Pacem in Terris* (Peace on Earth), April 11, 1963, n. 9

As a matter of fact, the current craze for re-definition of marriage is sustained on rights and freedom arguments which are compliant neither with the *nature(s)* of man and marriage nor the laws and society. In most countries of the world, for example Nigeria, there is a great anxiety, represented by different movements, for rights and freedoms. Often these otherwise salutary concepts are employed in the degenerate sense of licence and permissiveness. Such a situation is epitomized in the advocacy for gay-marriages, legal polygamy, easy divorce laws and other forms of degenerate statuses in the name of human rights and fundamental freedoms. It remains trite that a proper and necessary construction of 'rights' and 'freedoms' requires a reversal of the revisionist propositions.

## 2. Marriage as a Fundamental Right

The concept and institution of marriage as a civil right has been advanced by laws and courts. The Universal Declaration of Human Rights (UDHR)<sup>5</sup> provides as follows 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and its dissolution'. Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>6</sup> provides for the right to marriage and thus to the establishment of family even in stronger words, thus: the widest possible protection and assistance should be accorded to the family, which is the natural fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children, marriage must be entered into with free consent of intending spouses.

Relevant provisions of International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> the African Charter on Human and People's Rights<sup>8</sup>, Convention on Elimination of all Forms of Discrimination against Women (CEDAW)<sup>9</sup>, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>10</sup>, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>11</sup> are on all fours with that of the Universal Declaration of Human Right 1948. Of course the recognition of marriage as a fundamental right of man is not only the contemplation of international treaties and instruments but is likewise a principle deeply inherent in municipal laws. In the Nigerian Constitution,<sup>12</sup> for instance, the right of any person to do anything or receive any privilege or advantage available to citizens is explicitly protected.

There is also a plethora of cases in all jurisdictions contending that marriage is a fundamental right of man. In *Skinner v Oklahoma*<sup>13</sup>, the court observed in relation to marriage that 'we are dealing here with a legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race'. Similarly, in *Perez v. Sharp*<sup>14</sup>, Justice Traynor stated that: 'marriage is ... more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage *except for an important social objective and by reasonable means* (italics mine). Legislation infringing (marriage and procreation) must be based upon more than prejudice and

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<sup>5</sup> (1948). art. 16

<sup>6</sup> ICESCR. art. 10 (1)

<sup>7</sup> Art. 23 (1).

<sup>8</sup> Art. 18 (1).

<sup>9</sup> Art. 6 (2) (a) (b).

<sup>10</sup> Preamble, art. 1 (1).

<sup>11</sup> Art. 6 (a)-(j); Art. 7 (a)-(d).

<sup>12</sup>The Constitution of Federal Republic of Nigeria 1999 (as amended in 2011) Cap C23, LFN, 2004, S. 42.

<sup>13</sup> 316 U.S. 541- (1942)

<sup>14</sup> 32 Cal. 2d 715, 198 P.2d 17-19 (1948)

must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws’.

Now, precisely because marriage is presented and recognized as a fundamental right, advocates of marriage revision argue that in the area of marriage, one is free to exercise his/her right anyway he or she prefers. Hence, no limitations operate to circumscribe the right. In such situation, one may decide to marry or be married to multiple spouses. Similarly, a person may exercise his or her discretion in favour of divorce and remarriage, same-sex marriage, free union, transsexual marriages etc. But then it must be admitted that to be free in the exercise of a right is to be strong enough to choose what is objectively good and reject what is evil<sup>15</sup>. The implication of this submission is recognition of the fact that it flows from the very nature of man as a finite, bodily-spiritual, reasonable and social being that his freedom cannot be unlimited, as liberalism, anarchism and antinomianism (the rejection of all laws) would have it. Reason itself demands that man submits himself to the moral law on the basis of his own insights and not merely from external force...<sup>16</sup>

The substance of this argument is that granted marriage is a fundamental right, the enjoyment and appropriation of that right is not absolute and unlimited. This is because, ‘it is self-evident that all these freedoms (enjoyed by man) have some limitations so that they cannot be extended so far that they present a real danger to society and to the values that society is supposed to protect’<sup>17</sup>. Also an arbitrary extension of right to marriage beyond all limitations and/or regulation as may be imposed by right reason and morals would derogate from the real meaning of right. Thus, unrestrained freedom in the exercise of rights and in this case the right to marry would degenerate into *licentiousness*. The term licentiousness is an exaggerated expression of right in such an ambitious manner as to work against the spirit of the right itself. It directly relates to moral impunity or lasciviousness. In such an ambience, persons act without moral limits<sup>18</sup>. What crystallized from such over-reaching application of rights is the relaxation of rigid moral codes and the evolution of new concepts where ‘perversions became abnormalities, abnormalities became deviances, deviances became variances, variances became options, options became preferences, preferences became choices and choices became life enhancing experiences’.<sup>19</sup> However, an attempt to change the quintessential character of a reality by merely using euphemisms is simply put an absurdity. Nomenclature change does not remedy strict moral obligations.

On another note, licentiousness involving unregulated rights means the doing of what one pleases without regard to the rights of others; it differs from liberty in that the latter is restrained by natural or positive law, and consists in doing whatever one pleases, not inconsistent with the rights of others, whereas the former does not respect those rights of others. Simply put, in licentiousness one acts without regard to law, ethics or the rights of others<sup>20</sup>. And when this becomes the case and is sustained in multiple and differential issues of life, a permissive society crystallizes. This as it were captures a society in which social norms become increasingly

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<sup>15</sup> J Nwosu, ‘Character Formation’, Conference Talk to Seminarians, St. Paul’s Seminary Ukpok November, 16 1985.

<sup>16</sup> W Brugger, ‘Freedom’ in W Brugger (ed.), *Philosophical Dictionary* (Washington: Gonzaga University Press, 1972) p. 147.

<sup>17</sup> *Ibid.*

<sup>18</sup> D Evans, *Without Moral Limits: Women, Reproduction, and New Medical Technology* (Illinois: Crossway Books, 1989) p.1.

<sup>19</sup> *Ibid.* p. xv.

<sup>20</sup> ‘Legal Definition of Licentiousness’ available at [http://legaldictionary.com/Licentiousness.](http://legaldictionary.com/Licentiousness), accessed on 8/01/2012; see also, West’s Encyclopedia of American Law, 2<sup>nd</sup> edition, (New York: The Gale Group, Inc. 2008).

liberal<sup>21</sup>. A permissive society facilitates sexual freedom. This includes the freedom to take part in sexual activities which were previously considered unacceptable on rational grounds or even earlier criminalized. Accordingly, it presents homosexuality, gay marriage, divorce, polygamy, transsexual and hermaphrodite marriages as merely rights issues open to personal preferences. Without doubt, permissiveness in law and society 'destroys the moral and socio-cultural structures necessary for a civilized and valid society'.<sup>22</sup> The only perspective open for a valid appreciation of the right to marry is the context of the metaphysics of human rights. In that peculiar ambience, human rights are based on immutable principles of universal validity for all peoples and places. They are fundamental rights of man in society. They are meant to elevate the dignity of law and promote its effectiveness and save it from legislative aberrations...in a complementary function; human rights should instill into the operation and application of positive laws the sober principles of equity and natural justice. They should furnish ethical background to positive law.<sup>23</sup> In that vein, if the right to marry aspires to the title of 'human right', it must satisfy in its operation, the above conditions. Where, on the other hand, the title of 'right' attached to marriage is merely used to make marriage conducive for an indulgence into a nihilistic universe, then the title fails.

### 3. Marriage and the Right to Privacy Argument

Those who are at the vanguard of the movement which preaches revision of the traditional concept of marriage have regularly and substantially relied on the right to privacy. In political terms, privacy can be understood as a condition in which one is withdrawn or protected from observation.<sup>24</sup> Without doubt, this right is quite fundamental to a sustainable democracy and derives from the provisions of habeas corpus.<sup>25</sup> Put very simply, privacy in law means 'the right of a person to choose how to live his or her life and the right of a person to consent to the effects of a private party on his or her bodily integrity'.<sup>26</sup> The right to privacy is arguably the 'most comprehensive of rights and the right most valued by civilized men ... , the right to be left alone'.<sup>27</sup> As it were, advocates of 'privatism' argue that the right to privacy, precisely as inalienable makes the choice of any marriage form, mode of its conduct and sustenance, exclusively private and inexorably personal. Proponents of 'privatism' allude to many and varied interests which the international community has taken of the right to privacy. From such international support base, they conclude, albeit wrongly, that everything about marriage and family should be the exclusive preserve of 'choice'. Indeed, art.12 of the Universal Declaration of Human Rights; art.17 of International Covenant on Civil and Political Rights; art.8 of European Convention for the Protection of Human Rights and Fundamental Freedoms; art.7 of the Charter of Fundamental Rights of the European Union; art. 11 of the American Convention on Human Rights are all in support of the right to privacy.<sup>28</sup> A community reading of the above instruments brings to fore the fact that 'no one shall be subjected to arbitrary interference with

<sup>21</sup> A Petigny, 'The Permissive Society: America, 1941-1965', available at [http://en.m.wikipedia.org/wiki/permissive\\_society](http://en.m.wikipedia.org/wiki/permissive_society). accessed on 8/01/2012.

<sup>22</sup> *Ibid*

<sup>23</sup> BA Itheme 'Legal Positivism and Idealism and Practice of Courts in the United States and Nigeria: Focus on Human Rights Cases' (2003) *Abia State University Law Journal* Vol. 8 p.51.

<sup>24</sup> 'Privacy' *Compact Oxford English Dictionary*. available at <http://www.askoxford.com/conciseoedprivacy?View=ut>. accessed on 1<sup>st</sup> March 2012, 2:30pm.

<sup>25</sup> The doctrine of habeas corpus, first found expression under Henry II in 11<sup>th</sup> Century England, but has precedent in Anglo – Saxon law.

<sup>26</sup> EL Mc Donagh, 'My Body, My Consent: Securing the Constitutional Right to Abortion Funding' (1999) *Albany Law Review*. Available at <http://en.wikipedia.org/wiki/Abortion.debate>. Accessed on 21st February 2015, 7:40am.

<sup>27</sup> *Bowers v Hardwick* 478 U.S. 186, 198 (1986); TM Cooley, *The Law of Torts* (2<sup>nd</sup> ed. Chicago: Callaghan Pub. 1888) p. 29.

<sup>28</sup> Cf. F Falana, *Cases and Materials on Women Right Law* (Lagos: Legal Text Pub., 2008) pp. 157 – 221.

his privacy, family, home or correspondence. In the contemporary context, there has been a phenomenal expansion of the 'venue' of the right of privacy. According to Hittiger, the law of privacy has come to include a cluster of important human activities, security of the home, rights of association and assembly, bodily integrity, marriage, procreation, consensual sexual intercourse, and as it is most broadly construed, self-defining acts of life style choices'.<sup>29</sup>

A construction which looks directly at the wordings of this expanded definition of the right to privacy will likely fall prey to reductionistic privatism which attempts to reduce all morality related matters to the provenance of personal choice. Such interpretation will of course lead society back to the hypothetical Hobbesian state of nature where life is 'solitary, poor, nasty, brutish and short'.<sup>30</sup> The right to privacy relates to 'the idea of autonomy, the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences'.<sup>31</sup> It must be observed that it is these ideas of autonomy and freedom that introduces chaos factors into the right to privacy. That is to say, when the concepts of autonomy and freedom are given wide constructions unimpeded by purpose and morality, all imaginable human acts can conveniently be defended under the right to privacy.

Further still, right to privacy multi-dimensional though, concerns this paper in relation to 'freedom from intrusion upon oneself, one's home, family and relationship...'.<sup>32</sup> It emphasizes the fact that a person 'belongs to himself and not others nor to society as a whole'.<sup>33</sup> Hence, in making his moral choices, he is guaranteed independence and autonomy, but it is a matter of reasonableness to underscore that personal independence has a limit. For when and where an individual makes himself the sovereign in a matter of common good, he rather becomes a deviant. Exceptions are not the general rule. Connected to this argument is that such issues like abortion procured by a married woman, homosexual and gay marriages and such other conventional deviations from the traditional concept of marriage, precisely because they are moral issues relating to personal life, should be consigned to the legal venue of right to privacy. The point constantly made by privacy advocates is that 'if privacy protects self-defining and self-expressing activities, the attempt to limit such to traditional concerns of social roles, institutions and places, seems arbitrary'.<sup>34</sup>

Suffice it to point out that limitations imposed upon the right to privacy by well-meaning legal systems are not arbitrary. Such legal systems in construing the meaning of autonomy, understand that autonomy without transcendence is an affliction to society. Thus, often while observing the inviolability and/or sacrosanctity of the right to privacy, it must be understood that governments are 'allowed to invade the privacy of their citizens in some cases for 'compelling state interest'. The compelling state interest test has been developed in accordance with standards of strict scrutiny<sup>35</sup>, particularly, a clue can be taken from section 45 of the Constitution of the Federal Republic of Nigeria (as amended)<sup>36</sup> which allows derogations from

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<sup>29</sup> R Hittiger 'The World', 489, cited in KM Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press, 2008) p.405.

<sup>30</sup> T Hobbes 'The Leviathan' available at <http://oregonstate.edu/instruct/ph1302/texts/hobbes/leviathan-c.html>. accessed on 17/02/2012, 4:10pm

<sup>31</sup> JH Killian and LE Beck, *The Constitution of the United States of America: Analysis and Interpretation* (Washington: United States Government Printing Office, 1981) pp 1582 - 3

<sup>32</sup> Cf. Younger Committee Report on Privacy, 1972, CMND 5012, p.5.

<sup>33</sup> *Thornburgh v American College of Obstetricians and Gynecologists* 106 U.S 2169.

<sup>34</sup> R Hittiger, *Privacy and the Liberal Culture*, cited in KM Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press, 2008). p.413.

<sup>35</sup> 'Abortion Debate' available at <http://en.wikipedia.org/wiki/Abortiondebate>. Accessed on 18/02/2012, 11:30am

<sup>36</sup> Cap 23 2FN, 2004.

all rights as shall be reasonably justifiable in the interest of public defence, safety, order, morality or health, or for the purposes of protecting the right of others.

In this connection, assuming but not conceding that marriage is a private matter for individuals, then, the interest of morality, social health and even respect for rights of others are enough to derogate from such right to privacy. Hence, this work argues that criminalizing gay marriage, introduction of onerous conditions into divorce procedures and indeed legislative/judicial interventions against paradigm shifts from the traditional concept of marriage belongs to the ambience of that which is 'reasonably necessary' for the interest of the society. This work is critical of and indeed rejects the court's interpretation of 'necessity' to imply merely a pressing social need, which need is only for the national authorities to assess. If such court's interpretation were to hold, then it is for the government to decide what is moral. And as it has come to be in most jurisdictions like America, criminalizing homosexual acts between two consenting adults is completely outside such area of 'necessity' requiring interference with the privacy of individuals.<sup>37</sup> Thus, such a right to homosexual relationship crystallizes.

'Necessity' must have the flexibility of such morally sensitive usages as 'useful', 'reasonable' and/or 'desirable'. Understood in that sense, one will even see that it is a pressing social need that the morality of members of the society be healthy and compliant to objective standards. It is unlikely to augur well with a society which presses privacy too far. Some societies are for sure, predominated by religious views and in others, communal rather than individualistic interpretation of rights prevails.<sup>38</sup> For instance, not to criminalize gay marriage and like deviations from marriage as such is arguably not a respect for human privacy but an affliction of the dignity of human privacy, and more so, an attack on the social health of the nations. The substance of the argument is that at all times, the good, the true and the beautiful must be strictly considered in law and policy making. Looked at from a slightly different angle, pressing the right to privacy too far is objectionable because it may lead to an abysmal rehearsal of most matrimonial legislation precisely because a number of them were predicated on good morals. For example in 2003, the American Court in *Lawrence v Texas*<sup>39</sup> overruled *Bowers v Hardwick*<sup>40</sup> and held that homosexuals are protected by rights to privacy. It took the courage of Justice Scalia to dissent. He was overly critical of the majority opinion and predicted that the scope of the court's ruling left all moral based legislation vulnerable to attack. Specifically, Scalia argued that by reason of the courts questionable decision in *Lawrence v Texas*<sup>41</sup> the state laws against same-sex marriage, bestiality and bigamy, among others, were called into question. Interestingly, no sooner had Scalia rested his 'prophecy' the latest challenge to Utah's prohibition of polygamy came<sup>42</sup> Yet making a case for privatism in marriage, Goddard in his essay 'Should We Redefine Marriage', has argued that, precisely for the reason of the sanctity of human privacy naturally sought to be protected by free acts/choice of men, marriage ought to be redefined so as to situate it in the private venue of the human choice. He thinks and argues that marriage is more a personal affair than socio-communal one, and calls for a limitation of all thoughts about marriage to 'each person's marriage'. It is his conviction that nobody's marriage is going to be damaged by allowing for instance same-sex people to marry each other.

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<sup>37</sup> Cf. *European Court of Human Rights Reports, Series A*, No. 5, of 23<sup>rd</sup> Sept. 1981, 4, EHRR, 149, p.22 – 23, ss 48 – 49; see also Handy – Side Case Judgment Dec. 7; 1976, Series A No. 24. P.25, para. 52

<sup>38</sup> KM Mowoe, *op. cit.* P.411.

<sup>39</sup> 539 US 558 (2003).

<sup>40</sup> 478 US 186 (1986).

<sup>41</sup> *Supra.*

<sup>42</sup> 43 Cath. Law 409, 2004, p. 410.

He reasons that any objection to this exercise of freedom in private matters is a clear sign of homophobia.<sup>43</sup>

More still, Goddard observes that if marriage is properly seen as personal and relational, a personal choice thing over and above being a social norm/expectation, then and only then will it assume its natural orientation, namely, an act done in the perfection of individual freedom. And to prevent, by law, certain people like homosexuals, hermaphrodites, transsexuals from the exercise of that freedom would be absolutely unfair. Indeed, he reasons that in the 21<sup>st</sup> century, people should be free to make a choice of the form in which to express their special relationship of marriage.<sup>44</sup> He further makes a case for strengthening marriage as an institution of the private domain in the affairs of men by reasoning that in the light of the technological possibilities, in childbearing (IVF and AI), it makes sense to redefine marriage in a way that permits two people to marry even if they are inherently incapable of procreation because they are of the same sex.<sup>45</sup> But marriage is not a personal thing; it is the basis of the society. The family which is the first institution of marriage is the society writ large. Hence, to consign marriage to the private domain is to reduce the society to a coming together of privacies each incapable of harmonizing with the others. The result of such an experiment will be anarchy.

It is of great importance to posit the argument that marriage is first a religious and social issue before being personal. This is so because the end of marriage is the formation of a community of persons whose interactions would occasion a human society. To so constitute marriage in a way and form that will be perilous to society is an absurdity. The marriage of homosexuals, for instance, is gravely perilous to the society. It is an embarrassment to social morality and public psychology. Again, most state privileges and rights are distributed via the marriage status/pedestal. Some of such are immigration, taxation, property devolution and other considerations. The individuals, church and state are therefore together relevant stakeholders in the matrimonial causes.

#### **4. Marriage and the Right to Freedom of Association Argument**

Ardent defenders of redefinition of marriage have argued that the right to form association with others makes a very strong case for legislative empowerment of people to realize their marital desire in any form at all.<sup>46</sup> No doubt, man is a socio-political animal obviously gregarious in nature and finds fulfillment in varying forms of union and/or associations. Marriage too is a union of a type, an atypical association, to say the least. It is either a union of one man and one woman or when vitiated, a union of two or more persons, with love and the creation of family-its benchmark.<sup>47</sup> Sequel to the above consideration, the right to form association ‘is very fundamental to the very existence of man’.<sup>48</sup> It is a natural right which derives directly from the natural propensity of man to live and act in common and cooperation with his fellows.<sup>49</sup> As a consequence of its natural basis, this right is obviously inviolable and inalienable.<sup>50</sup> Also

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<sup>43</sup> A Goddard, ‘Should We Redefine Marriage?’, available at <http://www.fulcrum.anglican.org.uk/708>., accessed on 22/02/2012, 3: 30pm

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> These forms include gay marriages, marriage with or of trans –sexuals and perhaps, the marriage of hermaphrodites and more.

<sup>47</sup> L Grenfell and A Hewitt ‘Gender Regulation: Restrictive, Facilitative or Transformative Laws?’ *Sydney Law Review* (Vol. 34: 761).

<sup>48</sup> KM Mawoe, *op. cit.* p.479; See also John XXIII, *Pacem in Terris*, Oar (AAS.LV, 1963.pp262 – 263).

<sup>49</sup> NS Iwe, *The History and Contents of Human Rights: A Study of the History and Interpretation of Human Rights* (New York: Peterlang, 1986) p.214.

<sup>50</sup> *Ibid.*

coterminous with this natural inclination to congregate, is the natural propensity to seek defense in solidarity. Hence, 'the natural weakness and limitations of man, and the natural need to protect and develop himself are the practically, natural and most visible sources of man's right to form association'.<sup>51</sup> Little wonder, the Hebrew scripture observes thus; 'it is not good for man to live alone, I will give him a helper fit for him'.<sup>52</sup>

The Right to freedom of Association, for its importance, has been sufficiently provided for in the constitutions of governments of democratic and free societies. For instance, section 40 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)<sup>53</sup> 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'. Interestingly, article 20 of the Universal Declaration of Human Right and article 21 of the International Covenant on Civil and Political Rights, make similar provisions. Relying as it were on the above municipal and international instruments, the revisionists, those who make case for marriage in any preferred form, seem to argue that marriage is a kind of association. They insist that marriage is a fundamental domestic union and that for all intent and purposes, it should be guided absolutely by the inalienable freedom of association without restriction. Hence, the advocates contend that laws and policies or state's regulations ought not to preclude any person from entering into or forming any such association of marriage in any form of his or her choice. The implication is that there should be absolute freedom for all persons who wish to indulge in such union/association of polygamous, same-sex, transsexual or hermaphrodite marriages. Contingent to this is that persons should be free to agree on whether or not to keep their marriages open to procreation; to divorce or not. State legislation which circumvent or limit the exercise of such 'liberty' or license are seen by advocates of revisionism as examples of violent invasions and/or incursions into the sacred space of the fundamental freedom of man. Particularly, such restrictions or reservations enshrined in anti-polygamy, anti-same-sex and other 'questionable' forms of 'marriage' are commonly tagged legislative usurpation and violation of the right to freedom of association/expression as much as they represent infringements on the rights to privacy and family life.<sup>54</sup>

It was left for Ikpeze to securely rivet the contemporary movement for equal rights in marriage on the singular right to freedom of association in a very unique way. She argues that freedom of association, on the one hand, requires equal conditions for membership of persons; it requires, on the other hand, that equal right should be invested in all members thereto. Hence, as it concerns marriage, she reasons that equal rights of marriage should be accorded to all individuals irrespective of their preferences and sexual orientations. For her, the question of morality does not arise in the instant matter, since there is no static and objective morality. If anything, morality is a constantly changing and evolving concept. Ikpeze attempts to demonstrate her argument by reference to the point that most Christian denominations are now solemnizing same-sex marriages in accordance with modern concept of morality.<sup>55</sup> With due respect, this work disagrees with Ikpeze's position and considers it as flawed.

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<sup>51</sup> Pavan – Onofri, *La Dottrina Sociale Cristiana* (Roma: Terza Edizione, Editrice AVE, 1966) pp 208 – 209.

<sup>52</sup> Genesis 2 v 18.

<sup>53</sup> Cap 23 LFN 2004.

<sup>54</sup> SO Madu, 'A Critique of the Definition of Marriage under Hyde v Hyde: Perspectives from Human Rights and Freedom in the 21<sup>st</sup> Century' ( LLB Project Submitted to the Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria, Sept. 2013) p.37.

<sup>55</sup> OVC Ikpeze, 'Same – Sex Marriage and Human Rights: A Global Quagmire'(2010) *Capital Bar Journal*, pp 111 - 121



There are, substantially, three operative criteria and/or principles that marriage as a union must submit to if it is to be justified as a union of persons. These are: the criterion or principle of the rectitude of the interest pursued<sup>56</sup>; the criterion or principle of inviolability of the natural dignity of its members<sup>57</sup>; and the criterion and/or principles of supremacy and importance of the common good.<sup>58</sup> By equal laws, the revisionist's concept of marriage is an association without objective rules and remains flawed by reference to the three criteria/tests.

What must not be taken lightly in the debacle/diatribe is the fact that any union precisely as human, domestic or otherwise, must reflect sufficient sense of responsible freedom. This must apply both to the formation, sustenance and termination of such union. The truth is that in any union of human persons properly so called, the common good ought to be the operative principle. As it were, resort to individualistic preferences is 'not normally the result of liberty but of abuse'.<sup>59</sup> John XXIII supplies the jurisprudence proper for justifying human associations of any kind when he observed that 'since men are sociable by nature, they must live together and consult each other's interest<sup>60</sup> with a view to common good. This accords with the principle of operative solidarity in freedom. But it is doubtful how gay marriage, divorce, polygamy, polyamory, free union, transsexual and hermaphrodite marriages *et cetera* would serve the end of common good. It is all the more an absurdity to conceive such debased indulgences as promoting responsibility in freedom.

Furthermore, the definition of right to freedom of association as the natural right of man to unite and cooperate with another or others for the attainment of 'certain legitimate objectives or interests and for the perfection of himself<sup>61</sup>' provides yet another dimension to the argument of this work. The said new dimension is to the effect that while law can attach legitimacy to an immoral arrangement albeit without liceity, it cannot make the same act or arrangement perfective of man's nature. Hence, man having a unique nature, dignity and purpose can only be perfected by those conducts or preferences arising from and oriented to his objective/true nature. Thus, *agere sequitur esse*.<sup>62</sup> It is here argued and defended that following the inclinations of human nature, monogamy not polygamy, heterosexuality not homosexuality, exclusivity not inclusivity, indissolubility not dissolubility are such norms of conjugal love and marriage perfective of man as man. Contemporary normative standards below these ones mentioned above, reduce man to a nature proper to lower animals and can only destroy the natural entelechy of man.

Suffice it to underscore that for any union to be proper for human beings, the satisfaction of the principle of the rectitude and legitimacy of interests is a *desideratum*. Rectitude in this regard would reject an immoral association or union. Better put, the above criterion of rectitude would operate to disqualify membership or 'joinder' of an association with base and immoral objectives, that is, one which violates the virtue of justice and truth in terms of correspondence to nature. *Ipsa facto*, for a union (in this case marriage) to be fit for man, the objectives which

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<sup>56</sup> The end of marriage must be morally responsible. It must not be secret or accommodate immoral objectives

<sup>57</sup> Note that the human person is in itself vested with and thus represents a high estimate of spiritual, moral and ethical dignity by virtue of its relationship with God.

<sup>58</sup> The union of marriage must continuously strive for the harmony and respect of the common good of human society.

<sup>59</sup> Iwe, *op.cit.*, p.221.

<sup>60</sup> John XXIII, *Pacem in Terris*, par.34 (A.A.S.L.V, 1963) pg.265.

<sup>61</sup> SS Iwe, *op.cit.*, p.214

<sup>62</sup> Action follows being (nature); a being acts in accordance with the laws of its nature)

it pursues and enhances, must be ethically non reprehensible and legitimate, that is, just and proper and in conformity with the just and responsible laws of the land.<sup>63</sup>

All in all, the substance of the whole argument is that man enters into the union of marriage not 'to jeopardize but to ameliorate, not to destroy but to protect'<sup>64</sup> his natural and legitimate interests. As it were, no man may justly be deprived of his or her fundamental natural dignities simply because of his connection to an association or union. Same-sex marriage, polygamy and their likes do that much. They are afflictual of human dignity. Leo XIII in a very incisive document observes that:

If the citizens of a state...on entering into association and fellowship were to experience...hindrance instead of help and were to find their rights attacked instead of being upheld, that association would rightly be an object of detestation rather than desire.<sup>65</sup>

Finally, the interests and objectives of an association or union should never jeopardize the general welfare of the State nor be pursued in a manner conflictual with the common good of the whole community.<sup>66</sup> There ought to be a balance of tension between privacy and community; between personal/individual interest and the common good. What this means is that in the union called marriage, the recognition of the supremacy and the importance of the common good of humanity must be superintendent.

### **5. Marriage and the Right to Freedom from Discrimination Argument**

The principle of non-discrimination among persons is predicated upon the natural equality of all men. This natural equality preaches that in dignity and rights, no one can by nature be considered superior to his fellow men; hence the cliché that 'all men are equal but some are more equal than others' is an irregular procession in logic. It gives with one hand and withholds with the other. And obviously it is illicit as much as it is illegal to approbate and reprobate at one and the same time. Accordingly, every human person is endowed by nature with reason and free will. Every human person is thus born free with his or her natural faculties of intelligence and freedom. There lies the fundamental natural basis of the natural equality of all men. Nature has essentially no special species of supermen. In all that makes a man a human person, all men are equal. As a consequence, all men are equally entitled to be treated as human persons. This means that all men are to be respected equally as regards those fundamental rights which are based on the natural dignity of the human person, in which natural dignity all men are equal.<sup>67</sup>

As it is presently, the International Community has been preoccupied with the universality of the concept of equality of all human beings irrespective of race or colour, and the importance of freedom from discrimination in relation to respect for and enforcement of those human rights regarded as inalienable and fundamental'.<sup>68</sup> One need not essay long to establish the fact that the right to marry belongs to the said inalienable and fundamental rights. Hence, it may seem that in matters of marriage, law and policy ought to avoid all forms of discrimination as may

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<sup>63</sup> *Ibid* p.227.

<sup>64</sup> *Ibid*.

<sup>65</sup> Leo XIII, WC, par. 10 (A.A.S.XXIII, 1891) P.646.

<sup>66</sup> SS Iwe, *op.cit.* p.231.

<sup>67</sup> SS Iwe, *op.cit.* p. 352.

<sup>68</sup> KM Mowoe *op. cit.* p.499

be based on race, colour, opinion, language, religion, gender and sexual disparity. But it is this kind of open construction that crystallizes serious errors. Thus, it is on the predicate of such unrestricted concept of natural, fundamental and essential equality of all men that the advocates of marriage redefinition seem to anchor their argument for legal accommodation of same-sex, polygamous, hermaphrodite and transsexual marriages. Also on the same ground they press for the extension of such equal rights and privileges to polyamorous and free unions as if they are 'marriages' on their own rights. It is their argument that to deny some people's marriage and others benefits of marriage is outright to wander in the erroneous venue and space of such discrimination offensive to essential equality. Hence, Probert wonders why homosexuals should be denied the rights to express their love for each other in marriage except by reason of discrimination.<sup>69</sup> It is her thinking, albeit erroneous, that such apparent discrimination is essentially reductionistic of the meaning of marriage. In furtherance of this line of argument which finds the traditional concept of marriage as playing out reductionism, Crompton queries thus: should we not have marriage for the twenty-first century reflecting twenty-first century values and not those of a time 'when male homosexuality was outlawed and female homosexuality presumed not to exist'<sup>70</sup> Often, defenders of exaggerated equality or extreme forms of equality<sup>71</sup> in marriage have severally relied on the freedom from discrimination provisions in sundry international and municipal laws.<sup>72</sup> And of course, the substance of the various provisions as cited hereunder does not provide directly for the right(s) for same-sex, hermaphrodite, transsexual and other degenerate marriage forms. What is provided for is generally the equality of all persons before the law and the unlawfulness of any forms of discriminatory treatment of persons on grounds of sex, race, religion, colour, language, opinion etc.

What the defenders of revisionism in marriage on ground of right to freedom from discrimination have not carefully considered is the proper denotation of the lexical and legal term 'discrimination'. Hence, the most proper response to the arguments of the revisionists who rely on freedom from discrimination would be to raise and answer the following questions: what is the actual legal definition of discrimination? When and under what circumstances does discrimination actually crystallize? Are all forms of exclusive consideration or selective treatment of persons discriminatory in essence? To answer these questions, it may be necessary to define the term discrimination as legally understood and, from that pedestal, prescribe as to what could or could not constitute discrimination in the definition of marriage. As it were, the term discrimination has been defined as the effect of a statute or established practice which confers particular privilege on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges, or a class arbitrarily selected from a large

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<sup>69</sup> Cf. R Probert 'Hyde v Hyde: Defining or Defending Marriage' 19 *Child and Family Law Quarterly* (2007) 329.

<sup>70</sup> L Crompton, 'Civil Partnership Bill 2004: The Illusion of Equality' Cited, in *Law Does not Recognize Same-sex Marriage*, Available at [http://www.Lawteacher.net/family-law/essays/law\\_does\\_not\\_recognised\\_Same-sex-marriage.ntnl](http://www.Lawteacher.net/family-law/essays/law_does_not_recognised_Same-sex-marriage.ntnl) accessed on 9<sup>th</sup> June, 2012

<sup>71</sup> This concept refers to such anomalous sense of lack of distinctions between or among genders, sexes, number of Spouses to constitute marriage, indissolubility and terminability of marriage. It presses the argument that there is nothing intrinsically connecting marriage with sex/gender permutations or with number of parties to a marriage. Choice is by this sense seen as being at the centre of everything about marriage transactions and this choice extends to the issues of Same-sex marriage and even to the death of 'till death do us part'.

<sup>72</sup> United Nations Charter, 'preamble', 26 June 1945(San Francisco) (NUOI, vol. 15, p. 365; The Universal Declaration of Human Rights, 10 December, 1948, A.G. Re. 217 A(iii) Doc NU. A/8/10(1948); Art.4 European Convention for the protection of Human Rights and Fundamental Freedom, 1950; European Framework Convention for the Protection of National Minorities 1955, Council of Europe, STE NO. 157; Art. 24, America Convention on human Rights, 1969, OAS, Treaty Series, No. 36. Art. 3 & 14 Africa Charter on Human and people Rights, 1981, OAU DOC. CAB/LOG/67/3 rev.5. See also s. 42 1999' Constitution of Federal Republic of Nigeria (as amended) Cap 24 LFN, 2004.

number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of race, age, nationality or religion, a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.<sup>73</sup>

Gasiokwu sees discrimination from the perspective of an unjustifiable favour; that indeed is what it is in essence. It is precisely 'the differentiation in the treatment of individuals based upon group categorization having no rational relation to the genuine potential of the individual for contribution to the common interests...'<sup>74</sup> In all cases, discrimination relates to all, some or one of the following bases: sex, gender, religion, place origin, race, political opinion, etc. But suffice it to mention that any close analysis of the issues arising in the marriage revision debate, showcases sex and gender differentiation as paramount. A proper construction of the concept of discrimination in law discloses the following elements as particulars:

- I. Arbitrary conferment of privileges by law.
- II. Granting favours/rights to person(s) or group(s) against others between whom there is no reasonable distinction.
- III. Denial of normal privilege and or rights because of the various indices of sex, gender, religion, race, age etc.
- IV. Refusal to treat persons or groups equally where no reasonable distinction can be found.
- V. Unfair categorization of persons without genuine rational relation to the identity of persons and/or groups.

First, applying the above outcomes to the marriage polemics, one finds that considering the nature and purpose of marriage, considering also the general continuity of human specie, the difference between man and woman, male and female, 'two' and 'one' is not of degree but of kind. Hence, the conferment of marriage to one man and one woman alone is not arbitrary but quintessential; it is *cum fundamentum in re* (with foundation in reality). It is a natural difference and is of essence.

Second, to argue that between the groups/kinds/classes mentioned above (men and women, males and females, one and many, hermaphrodites and asexuals), there is/are no reasonable distinction is to argue into absurdity. It is equivalent to saying that frogs reason and man crows. Third, since nature does not act without a purpose and everything/person is naturally directed to some purpose (entelechy), to indulge man or any of his powers or faculties to purposes alien to his nature is an invitation to disaster. This is popularly called the 'Inversion of Correct Order of Things.'<sup>75</sup> It is therefore not discriminatory to use things and indulge persons and their powers/faculties to their proper teleology. Hence to attach the right to marry to same-sex, sexless, genderless, intersex and perhaps dual-sex persons, is to lapse into the fallacy of improper/irregular categorization which is inimical to nature and purpose of marriage.

Fourth, equality in dignity of persons giving rise to equality before the law is not to be seen and understood as indistinguishability or amorphousness. In fact, there can be distinction in true equality. It does not imply coincidence of identities, sameness, conformism in uniqueness, uniformism, parallelism, parity or similitude. There can be essential equality in essential

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<sup>73</sup> *Baker v California Land Title Co.*, D.C Cal., 349 F Supp. 235, 239.

<sup>74</sup> MOU Gasiokwu, *op.cit.* p. 223, quoting from Human Rights and World Public Order (1980) p.501.

<sup>75</sup> JM Mchugh, *op.cit.*, p.18

difference and that is the sort that holds between man and woman and among classes of persons mentioned above in the matrimonial equation. Indeed, in marriage, there ought to be equality in complementarity. Failure to recognize this one natural presupposition crystallizes into an anomalous equalism and absurd parallelism.

Fifth, insisting by some state's laws that in the traditional concept of marriage, only males and females should properly be admitted to marriage, one observes a reliance on a rational relationship between complementarity of sexes and the union called marriage. It means that for marriage to hold its functional and natural meaning, the complementarity of a man and a woman who are properly gendered as male and female, is exclusively necessary. Any other combination will not hold a rational relationship to marriage. 'Rational in this context connotes *naturality*, *reasonability* and *necessity*. While *naturality and reasonability* belong to intelligibility of marriage, *necessity* implies an inexorable connectedness to the nature of marriage without prejudice to the will (moral freedom) to invert the order of nature. To dispute this exclusive rational connectedness and redefine marriage so wide as to include every form of union possible among men lapses into the logical error of overgeneralization of the meaning of essential terms.

In all, there is no discrimination in the Penzancean definition of marriage as a union of a man and a woman, for the course of their lives and to the exclusion of all others. To argue otherwise will do violence to the very nature of marriage and to the great detriment of the society. Suffice it to underscore that 'equalism' is a great departure from equality and that is what the exponents of revision are clamoring for. 'Equalism' refers to such anomalous sense of lack of distinction between genders, between sexes, concerning number of spouses in a marriage, between modes of entry and dissolution of marriage and between indissolubility and dissolubility. Equalism presses the argument that there is nothing intrinsically connecting marriage with sex and gender permutations or with number of parties to a marriage. Equalism places choice at the centre of everything about marriage transactions and this choice extends to the question of terminability and/or indissolubility of a marriage. This sort of understanding of equality as set out above is flawed as argued.

## 6. Conclusion

In order to understand the nexus between natural law and the natural right to marry, it is necessary to analyze the term right as follows: (a) The English term '*right*' is *in pari materia* with the Latin term '*jus*'. As it were, there are two senses to it; the '*right*' on the one hand relates to the moral sense of that which is righteous as opposed to the evil. Hence, it is said that man is under obligation to do *the right*. *The 'right*' in this sense means the morally sound, the morally correct, the just and the morally obligatory. (b) Men also speak of '*a right*' as in '*a right to life*' or '*a right to reputation*' etc. The question is; what is the relationship holding between '*these rights*' expressed in (b) and *the right* expressed in (a) above? To answer this question, Mullaney observes that; "Every '*a right*' is simply a claim to pursue '*the right*'.<sup>76</sup> For instance, I have '*a right*' to marry because it is morally good thing (the right) to do in stewardship of my life and society. But the critical question for a natural law Jurisprudence is; how does '*the right*' give rise to '*a right*'? The answer is simple; through law. Hence, the function of natural law is to make *the right* obligatory, that is, binding on the human person. Now when law commands some phase of *the right*, it gives rise to a duty in the persons so commanded. And duty in turn gives rise to *a right*, a moral claim to the means necessary to

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<sup>76</sup> JV Mullaney, 'The Natural Law, Family and Education', 24 *Fordham L. Rev.* 104 (1955).

fulfill the duty. The sequence is as follows: (1) *the right* (righteousness), (2) is made obligatory by law, (3) which gives rise to a duty in those bound by the law (4) which postulates in those so bound a right to the means necessary to fulfill that duty. The right, law, duty, a right: such is the sequence.<sup>77</sup> Accordingly, it is trite that my rights, spring proximately from my duties; intermediately from law; and ultimately from the claims of righteousness, the right, the moral universe upon me. This indeed is the history of natural right. *Ipsa facto*, the natural right to marry derives from and must be guided by the moral universe in terms of righteousness. Any other way to it is flawed. In this way, the revisionists' right arguments against the traditional marriage type fails and cannot be recovered or redeemed neither in logic nor in law and morals.

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<sup>77</sup>*Ibid.*