

SAME SEX MARRIAGE: NIGERIA AT THE MIDDLE OF WESTERN POLITICS

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ABSTRACT

Criminalising homosexuality dates back to 1553 by the British, though the act was considered a purely moral issue and done within the preserve of the privacy of the practitioners. However, the act later became legal in Britain with no form of punishment attached. Over time, the practitioners gradually fought for recognition first attaining the status of civil partnership, until the wake of the 21st century when it attained the status of marriage which saw the passage of the gender neutrality in marriage and marriage laws which gave birth to same sex or gender marriage. This has become a policy which is being championed by the United Nations Human Rights Council. The developed nations of the world are daily embracing this phenomenon called same sex marriage. This paper examines the concept of same sex marriage in the light of the various available national, regional and international instruments with a view to determining its place in the legal regime of human rights and fundamental freedom. The paper further examines the purports of the external influence by the international community on other nations of the world, with particular reference to Nigeria to legalise same sex marriage into their legal system.

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INTRODUCTION

Homosexual practice is not a new phenomenon.¹ Homosexual activities either between male or female adults were considered as acts or activities carried out between two consenting adults as purely private affairs in society.² Different legal systems of the world at one time or the other frowned at it and by legislations criminalized³ it, thereby making it a punishable offence with terms of imprisonment.⁴ The concept of same sex marriage was unknown to legal jurisprudence till about the end of the 20th century. It was towards the tail end of the 20th century and the dawn of the 21st century that countries from the different continents of the world predominantly western societies commenced the process of reviewing their legal systems to legalise same-sex union or

¹ Genesis 19 vs 4 & 5 and Romans 1 vs. 24, 26 and 27 King James Version.

² The Wolfenden Committee (of the British Parliament) Report on Homosexuality and Prostitution in 1957.

³The Buggery Act 1533 was adopted in England in 1533 during the reign of Henry VIII, and was the first legislation against homosexuals in the country. It was one of the first anti-sodomy laws passed by any Germanic country. All Germanic codes up to this time ignored all sexual activities except adultery. The Buggery Act was piloted through Parliament by Thomas Cromwell. The Act made buggery with man or beast punishable by hanging, a penalty not finally lifted until 1861. www.turdorplace.com.ar/Documents/the_buggery_act.htm, accessed on Feb. 23, 2014); Male homosexuality had been illegal in England since the Buggery Act of 1553 (female homosexuality was never specified). That law became a lot stricter in 1885 with the Criminal Law Amendment Act which made all homosexual acts illegal and even those carried in private. Perhaps the most famous prosecution was that of the writer Oscar Wilde in 1895. The Wolfenden Report on Male Homosexuality 1957. <http://www.bl.uk/learning/timeline/item107413.html>, accessed on Jan. 20, 2014); Criminal Code Act C38/2010, section 214.

⁴ Criminal Code Act C38/2010, section 216. See also Criminal Law Amendment Act 1885, section 1885 which provides “any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years. Available at www.swarb.co.uk/acts/1885/Criminal_Law_AmendmentActs.html, accessed on Feb. 22, 2014).

association.⁵ These reviews brought about the introduction, acceptance and legal recognition of same-sex union in the form of civil partnership and later marriage between same sex partners.

THE CONCEPT OF MARRIAGE

Marriage is the world's oldest institution. In Christendom, it is believed that it was instituted by God himself,⁶ and it is as old as man's creation.⁷ Marriage therefore, is believed to be a sacred union that exists between a man and a woman. The term marriage has been described elsewhere as "a socially sanctioned union, typically of one man and one woman, in this connection called husband and wife. Typically they form a family, socially, through forming a household, which is often subsequently extended biologically, through children. It is found in all societies, but in widely varying forms."⁸ In Islam, marriage has been defined as "a contract that results in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of rights and obligations."⁹ Furthermore, "it is a mutual contract between a man and a woman whose goal is for each to enjoy the other, become a pious family and sound society."¹⁰

⁵ The Netherlands Same Sex Law 2001, Belgium Same Sex Marriage Law 2003

⁶ Genesis 2:18 King James Version.

⁷ "The institution of marriage dates from the time of man's original creation". Available at www.bible.dictionaries.org/marriage, accessed on Aug. 3, 2013).

⁸ Ibrahim B. Syed Same Sex Marriage and Marriage in Islam. http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm, accessed on February 22, 2014.

⁹ Id.

¹⁰ Id.

The common law definition of marriage is credited to Lord Bughley wherein he refers to it as, “the voluntary union for life of one man and one woman to the exclusion of all others.”¹¹ The existing marriage law in Nigeria, the Marriage Act, made no attempt to define marriage. However, recourse can be had to the Interpretation Act, which again did not define marriage. According to the Act, “monogamous marriage to mean a marriage which is recognised 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.”¹² Marriage has been further defined as “a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic and Customary Laws.”¹³ In Islam, the function of marriage has been stated thus:

*Marriage acts as an outlet for sexual needs and regulates it so one does not become a slave to his/her desires. It is a social necessity because through marriage, families are established and the family is the fundamental unit of every society...Marriage is the only legitimate way to indulge in intimacy between a man and a woman.*¹⁴

¹¹ These were the wise words of William Cecil, also known as Lord Bughley, for decades the Minister of Finance to Queen Elizabeth I and later, King James. He wrote these words to his son in approximately 1600 and one should replace the word ‘wife’ with spouse to give it contemporary spice. Marriage Definition: Available at www.duhaime.org/legaldictionary/M.Marriage.aspx, accessed on Aug. 3, 2013).

¹² Interpretation Act M6/2010, section 18.

¹³ Same Sex Marriage (Prohibition) Act, 2013, section 7. This is a recent legislation, at the time of the writing of this paper, it has not come to our knowledge that it has been published.

¹⁴ Concept of Marriage in Islam. Available at www.islamawareness.net/Marriage/marriage_article001.html, accessed on Aug. 10, 2013).

It has further been canvassed that:

*Marriage exists to bring a man and a woman together as husband and wife to be father and mother to any children their union produces. It is based on the anthropological truth that men and women are different and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children need both a mother and a father.*¹⁵

Marriage is purely a private affair, a practice within the private realm of the individuals or parties who come into it. Marriage exists by agreement of the parties who have decided to come into the union to live as husband and wife. The question is if marriage is a private affair between the parties thereto, that is man and woman, what then is the role of the state or government in the marriage institution? In all facets of human endeavors, government formulates the legal framework to govern and regulate such activities; and marriage is not an exception to such arrangement. This position has been maintained elsewhere in the following words:

Government recognizes marriage because it is an institution that benefits society in a way that no other relationship does. Marriage is society's least restrictive means of ensuring the well-being of children. State recognition of marriage protects children by encouraging men and women to commit to each

¹⁵ Ryan T. Anderson (2013) *Marriage: What it is, why it Matters, and the Consequences of Redefining it*: <http://www.heritage.org/research/reports> < accessed on Sept. 18, 2013).

*other and take responsibility for their children. While respecting everyone's liberty, government rightly recognizes, protects marriage as the ideal institution for childbearing and childrearing.*¹⁶

The relevance of marriage to the society has necessitated the need for its regulation by State apparatus through legislation or regulation. This view has been expressed elsewhere thus:

*Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state. Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for dissolution.*¹⁷

¹⁶ *Ibid.*

¹⁷ Fearon cited in Definition of Marriage. Available at www.duhaime.org/LegalDictionary/M/Marriage.aspx < accessed on July 12,2013>.

In stressing the importance of marriage and family life it has been stated elsewhere that:

Marriage is a uniquely comprehensive union. It involves a union of hearts and minds, but also and distinctively a bodily union made possible by sexual complementarity. As the act by which a husband and wife make marital love also makes new life, so marriage itself is inherently extended and enriched by family life and calls for all-encompassing commitment that is permanent and exclusive. In short, marriage unites a man and a woman holistically emotionally and bodily, in acts of conjugal love and in the children such love brings forth for the role of life.¹⁸

As a result of the place of marriage and family, government will from time to time make regulations and policies that will impact on marriage and family. This is with a view to ensure that the society will not be crippled in anyway. This position has been maintained by Spalding thus:

With good reason, states continue to recognize marriage as the union of a man and a woman. In the context of democratic government, citizens and their elected representatives must be able to deliberate and make policy decisions to uphold the institution that forms the basis for civil society.¹⁹

¹⁸ *supra* note 15.

¹⁹ Matthew Spalding, "A Defining Moment for Marriage and Self-Government". Available at www.heritage.org/research/reports/2013/03/redefining- < accessed on Dec.20, 2013 >.

AN EVOLVING TREND IN MARRIAGE AND FAMILY

The traditional concept of marriage now appears to attain a new ideology. At the dawn of the 21st century a radical change to marriage emerged, essentially based on the fundamental rights agitation and the need for gender neutrality in marriage and marriage laws. The discriminatory marriage laws against same-sex couples were seen as anti-human rights. Homosexuals (gays and lesbians) feeling that their basic rights were being trampled upon pushed for legal recognition and acceptance of the activities through legislation in the society.

The traditional definition of marriage laws which only recognize the union of different-sex as marriage seems to be gender discriminatory in nature.²⁰ It has been stated that “homosexual behavior between males has been illegal in most countries for several centuries. It was only in recent decades that a number of nations began to implement legislative reforms which allow for certain consensual homosexual acts.”²¹

The view that marriage is a union between a man and woman may have changed today with the passage of gender neutrality in marriage and marriage laws in various countries of the world which have made it possible for people

²⁰ James W. Skillen, Same-Sex ‘Marriage’ Is Not a Civil Right, 2004, [www.cpjustice.org/stories/StoryReader\\$1178](http://www.cpjustice.org/stories/StoryReader$1178), accessed on Feb. 24, 2014. “Those who want homosexual relationships to be redefined as marriages say that many aspects of their relationships are like marriage—having sexual play, living together, loving one another, etc.—and therefore they should be allowed to call their relationships marriages and should be recognized in the law as marriage partners... The answer they want is for law making and adjudicating authorities to change the law based on the principle that reality is defined by the will and declarations of individuals, all of whom should be treated without discrimination”

²¹ Melissa Bull *et al*, *Homosexual Law Reform in Australia*: Australian Institute of Criminology, 1991. <http://www.aic.gov.au> < accessed on Feb. 22, 2014 >.

of the same sex to go through the form of marriage in the same way couples of heterosexual marriage can. It may be said that couples of same sex marriage are simply exploiting their fundamental rights and freedoms guaranteed them by the various human rights instruments to which countries of their origins have obligated to honour. It is therefore, pertinent to examine a number of those instruments.

We shall begin with the provisions of the foremost human rights instrument²² which in Article 2 provides thus:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction or any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.

Further is the provision of Article 23 (2) of the International Covenant on Civil and Political Rights,²³ which provides for “the right of men and women of marriage age to marry and to found a family shall be recognised.” Further is Article 16 which provides “men and women of full age, without any limitation

²² Universal Declaration of Human Rights, United Nations General Assembly, the Palaise de Chaillot, Paris, 10th September 1948, Resolution 217A (III)

²³ International Covenant on Civil and Political Rights, United Nations General Assembly, adopted 16th December, 1966, effective 23rd March, 1976.

due to age, 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 at its dissolution.” Article 20 (1) provides that “everyone has the right to freedom of peaceful assembly and association.” Also relevant is the European Convention of Human Rights,²⁴ Article 11 thereof provides:

Everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of the national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Another relevant provision is that contained in Article 14 of the Convention which provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political

²⁴ European Convention of Human Rights, Council of Europe, Rome, adopted on 19th November 1950, effective on 1953, Resolution 2200A (XXI).

*or other opinion, national or social origin, association with a national minority, property, birth or other status.*²⁵

The African Charter on Human and Peoples' Rights²⁶ in its Article 2 provides that "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status."

Furthermore, Article 14 of the Charter provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or other status."

The plausible argument here is that the words "any status" appearing in the African Charter and "other status" in the European Convention as well as the Universal Declaration of Human Rights contemplate sexual orientation so as to accommodate the rights of same sex couples or persons who are engaged in homosexual activity thus affording them the opportunity to claim such rights.

²⁵ This provision is *in pari material* to Article 1(1), while paragraph 2 states that "no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1, of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.2000.

²⁶ The African Charter on Human and Peoples' Right, Organisation for African Unity (now African Union), Banjul, adopted on 1981, came into force on 1986, Resolution 115(XVI). Article 2 provides "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status."

Even the right to marry and found a family may be a right available to couples of same sex union as the provision is not discriminatory and did not specify which class of persons can invoke such rights in their favour.

The above accounts for the argument canvassed elsewhere while hinging the justification of same-sex marriage on fundamental rights thus:

*The Universal Declaration on Human Rights...contains the fundamental human rights principle that all human beings are born free and equal in dignity and rights. This fundamental principle of equality comprises also lesbian woman and gay men. Other human rights instruments have since been built on this principle of non-discrimination. The 1966 Covenant on Civil and Political Rights, according to the interpretation of the Human Rights Committee forbids discrimination based on sexual orientation.*²⁷

Homosexuality was seen as a private act between consenting adults and more so as a moral issue. The big question again is whether laws should be invoked to enforce moral rules in the society. There are however two divides to this. John Stuart Mill,²⁸ one of the proponents of the liberal view states:

²⁷ Toone v Austria (UN Committee for Human Rights). Cited in Katharina Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe*, (Antwerp, Intersentia, 2003) p 184 referred to in I. O. Omoruyi, *An Introduction to Private International Law: Nigeria Perspectives* (Benin: Ambik, Press Limited, 2005) p 257.

²⁸ John S. Mill *Essay on Liberty* cited in Funso Adaramola, *Basic Jurisprudence*, 2nd ed. (Lagos, Nayee Publishing Co Ltd, 2003) p 91.

*That rules of private morality concern the individual and his conscience alone. Private immorality is presumed to harm no one else, such as in cases of drug abuse, private drunkenness, private greed, lesbianism, etc., and in England, homosexuality between two consenting adults.*²⁹

He, however, based this on individual liberty wherein he gave the following reasons for his position:

- (a) The value of the personal freedom of the individuals;
- (b) The moral value of not being coerced to choose to do right; i.e., the value of individual's conscience and personality;
- (c) The misery that will result from criminal punishment of such immoralities; and
- (d) The likely impotence of the law leading to its ridicule, particularly regarding the difficulty of detection and the chances of successful prosecution.³⁰

This position was adopted and approved by the Wolfenden Committee (of the British Parliament) Report on Homosexuality and Prostitution of 1957,³¹

²⁹ *Ibid.*

³⁰ *Id.* p 92.

³¹ After WWII, arrests and prosecutions for homosexuals increased. For example Alan Turing, the cryptographer who helped to break the German Enigma Code, was victimized for his homosexuality. Charged with 'gross indecency' he was forced to choose between prison or hormone treatment. He also lost his job. His death in June 1954 was treated as suicide. This and other cases led the government to set up a Departmental Committee under Sir John Wolfenden, to consider both homosexual offences and prostitution. Wolfenden's influential report put forward the argument that 'homosexual behavior between consenting adults in private be no longer criminal offence.' Despite the recommendations of the report, it was not until July 1967 that homosexuality finally became legal in England and Wales. The

wherein it stated that “...unless a deliberate attempt is to be made by society to equate crime with sin, there must remain a realm of private morality and immorality which is not the law’s business.”³²

However, Lord Devlin of the moderate view stated that:

*...But before a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society. There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it. Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious; it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds but which cannot be rooted out. It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in the other. On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusion is manifest.*³³

Wolfenden Report on Male Homosexuality 1957. <http://www.bl.uk/learning/timeline/item/107413.html> < accessed Jan. 10, 2014).

³² *Supra* note 28, p 92.

³³ Patrick Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press), 1965, p 17-18.

A growing number of governments around the world are considering whether to grant legal recognition to same-sex marriage. More than a dozen countries have national laws allowing gays and lesbians to marry, mostly in Europe and the Americas.³⁴ Sixteen countries now give the freedom to marry to same-sex couples nationwide. Netherlands,³⁵ Belgium,³⁶ Spain,³⁷ Canada,³⁸ South Africa,³⁹ Norway,⁴⁰ Sweden,⁴¹ Portugal,⁴² Iceland,⁴³ Argentina.⁴⁴ Brazil,⁴⁵

³⁴ Pew Research Religion and Public Life Project, (2013) *Gay Marriage around the World*: <http://www.pewforum.org> < accessed on Sept. 19, 2013).

³⁵ The Netherlands was the first country to end the exclusion of same-sex couples from marriage in 2001, when their Parliament voted 107-33 to eliminate discrimination from their marriage laws. The law requires that at least one member of the couple be a Dutch national or live in the Netherlands, and it took effect on April 1, 2001. Anne-Marie Thus, a Dutch lesbian who married in 2001, explains, “it’s really become less of something that you need to explain. We are totally ordinary. We take our children to preschool every day. People know they don’t have to be afraid of us. In December 2012, the Dutch Caribbean Island of Saba also established the freedom to marry. *The Freedom to Marry Internationally*: (2013) www.freedomtomarry.org, <accessed on September 09, 2013>.

³⁶ Belgium became the second country to legalise equal marriage on February 13, 2003, when King Albert II approved the bill, which had previously been passed by the Senate and Chamber of Representatives (*Ibid*).

³⁷ After the unexpected victory of the Spanish Socialist Party in 2004, the newly elected Prime Minister Jose Luis Rodriguez Zapatero, moved to end the exclusion of same-sex couples from marriage in the country (*Ibid*).

³⁸ On June 28, 2005, the House of Commons in Canada passed the Civil Marriage Act, which was then passed by the Senate on July 19. The Civil Marriage Act, which received Royal Assent on July 20, provided a gender-neutral definition of marriage. The national legislation passed after more than three quarters of Canadian provinces and territories legalized same-sex unions (*Supra note 35*).

³⁹ In December 2005, the Constitutional Court of South Africa ruled that denying marriage to same-sex couples violates the country’s constitution and gave the Parliament one year to adjust laws to comply with the ruling. The court also made it clear enacting only a civil unions law would not work. On November 14, 2006, Parliament voted 230 to 41, to end the exclusion of same-sex couples from marriage in South Africa, making the nation the first in Africa to do so (*Ibid*).

⁴⁰ On June 11, 2008, members of Parliament in Norway approved a gender-neutral bill that ended the exclusion of same-sex couples from marriage by a vote of 84-41 (*Ibid*).

⁴¹ On April 1, 2009, a broad majority of the Swedish Parliament voted in support of a bill to end the exclusion of same-sex couples from marriage. The proposal was approved by a 261 to 22 vote, with 16 abstentions. The new legislation took effect as of May 1, 2009, replacing the

France,⁴⁶ Uruguay,⁴⁷ and New Zealand,⁴⁸ plus Britain,⁴⁹ which has passed a law that has not yet taken effect), while two others have regional or court-

legislation approved in 1995 that allowed gay couples to form a union in Sweden via registered partnership. Couples who have registered partnership can keep that status or amend it to a marriage by an application to the authorities. On October 22, 2009, the Church of Sweden's board voted to allow priests to wed same-sex couples using the term "marriage" (*Ibid*).

⁴² On May 18, 2010, Portugal's President ratified a law that was passed in January 2010 by Portugal's parliament to end the exclusion of same-sex couples from marriage. The law was upheld as constitutional by the Portuguese Constitutional Court in April and was officially published in the official gazette of Portugal on May 31 and took effect a few days later (*Ibid*).

⁴³ On June 11, 2010, Iceland's Parliament unanimously voted, 49 to 0, to end the exclusion of same-sex couples from marriage. The Althingi parliament voted to add the words "man and man, woman and woman" to the country's existing marriage legislation in 2009, the country became the first in the world to elect an openly gay head of state, when Johanna Sigurdardottir became the prime minister. Iceland is the seventh country in Europe to uphold the freedom to marry, and ninth in the world (*Ibid*).

⁴⁴ On June 7, 2010 Argentina became the first country in Latin America to uphold the freedom to marry for gay and lesbian couples. The legislation was approved by a 33 to 27 vote, with 3 abstentions by the Argentine National Congress. It gives same-sex couples the same rights and protection as different-sex couples, including the ability to adopt. The law was backed by the government of President Cristina Fernandez de Kirchner, who signed the measure into law on July 21, 2010. Marriages are only allowed only for citizens or permanent residents of Argentina (*Ibid*).

⁴⁵ On May 14, 2013, the National Council of Justice in Brazil ruled that government offices that issue marriage licenses have no standing to reject same-sex couples from marriage. Since 2011, federal marriage laws in Brazil have been somewhat confusing: On May 5, 2011, the Supreme Federal Court voted to allow same-sex couples nationwide many of the legal rights as married couples (through a mechanism called "stable union"), and since June 2011, same-sex couples joined together in "stable union" may petition judges to convert their union into a marriage. The two-step process to being married can be performed across Brazil, and in recent months, many jurisdictions have ordered a final end to the exclusion of same-sex couples from marriage. Before the May 2013 ruling, 14 of Brazil's 27 jurisdictions had passed the freedom to marry (*Ibid*).

⁴⁶ On April 23, 2013, the National Assembly in France took a final vote to approve the freedom to marry. The following month, on May 18, French President Francois Hollande signed the bill into law. The bill passed with overwhelming support in both houses- by a 331-225 final vote in the Assembly and 179-157 final vote in the Senate the first wedding occurred in Montpellier, between Vincent Autin and Bruno Boileau (*Ibid*).

⁴⁷ On April 10, 2013, the lower House of the Uruguayan legislature approved a bill to extend the freedom to marry to same-sex couples, marking the final vote in the process of ending the exclusion of same-se couples from marriage across the country. President Jose Mujica signed

directed provisions enabling same-sex couples to share in the freedom to marry (Mexico,⁵⁰ and the United States).⁵¹ Many other countries provide some protections for such couples.⁵²

the bill on May 3, and Uruguay became the third country in Latin America to end the exclusion of same-sex couples from marriage nationwide when the law took effect on August 5 (*Ibid*).

⁴⁸ On April 17, 2013, the Parliament in New Zealand took a final vote to approve a bill to extend the freedom to marry to same-sex couples. The Parliament previously cleared the bill on August 29, 2012 and March 12, 2013. Prime Minister John Key vocally supported the freedom to marry throughout the national conversation on why marriage matters. The first weddings between same-sex couples took place on August 19 (*Ibid*).

⁴⁹ On July 17, 2013, the Queen of England granted royal assent to a bill extending the freedom to marry to same-sex couples in England. The final approval came after the British House of Commons and House of Lords voted overwhelmingly in favour of the legislation multiple times. Same-sex couples in England and Wales will be able to marry in Spring 2014. The introduction, acceptance and legal recognition of same-sex marriage shows a shift in cultural values in different societies. The United Kingdom made homosexual activities legal both in England and Wales, in 1967. It progressed to the Civil Partnership Act of 2004 which gave same sex couples the same legal rights as marriage straight couples, until the recent legislation by the Houses of Commons and of Lords giving legal approval to same sex marriage. All of these are hinged on respecting the basic rights of the people (*Supra* note 35).

⁵⁰ On March 4, 2010 Mexico City's Legislative Assembly voted 39-20 to uphold the freedom to marry for same-sex couples on December 21, 2009. The law defines marriage as "the free uniting of two people." The bill also legalizes adoption by gay couples. In August 2010, the Mexican Supreme Court ruled that the law honoring the freedom to marry in Mexico City is constitutional and all states must honor same-sex marriages from other jurisdictions. In May, 2012, after dealing with a civil case that did not specifically state gender requirements for marriage, the state of Quintana Roo declared that all marriages between same-sex couples would be legal. In December 2012, the Mexican Supreme Court declared that the Oaxaca civil code restricting marriage to different-sex couples is unconstitutional. Because of Mexican law, the ruling currently only applies to the three couples who filed the suit. If the court rules the same way in two additional cases, binding national precedent is set in Mexico, and all other jurisdictions in the country will have the freedom to marry (*Ibid*).

⁵¹ Individual states in the United States have been left to decide their own marriage laws. On May 17, 2004, Massachusetts became the first state to provide the freedom to marry same-sex couples. Since then, CA, CT, DE, IA, ME, MD, MN, NH, NY, RI, VT, WA, and Washington, D.C. have also passed their own freedom to marry laws. In June 2013, the U.S Supreme Court overturned the so-called Defense of Marriage Act, a law passed by President Bill Clinton in 1996 to prohibit the federal government from respecting legal marriages between same-sex couples (*Ibid*).

However, there are a number of countries where it is illegal for same sex marriage to be practised. Recently, Uganda Parliament passed an anti-homosexuality law.⁵³ Section 2 of the Act criminalises homosexuality with a life imprisonment for any person convicted of the offence. While section 12 of the said Act treats any person who purports to contract same sex marriage as committing the offence of homosexuality punishable with a life imprisonment upon conviction. This has been signed into law by the Ugandan President Yoweri Museveni.⁵⁴ Besides, there are over 83 countries in the world today which cut across Africa, Asia including the Middle East, Americas, the Oceania and Europe where homosexuality is a crime.⁵⁵

Notwithstanding the recognition granted same-sex couples to marry, however, there are dissenting opinions or views on same sex marriage. To such people

⁵² In Australia, when couples – including same-sex couples – have lived together for more than two years, they achieve “*De Facto*” status, which extends many of the protections and responsibilities that marriage provides. Several states in Australia – Tasmania, New South Wales, Victoria, Queensland, and ACT – have created lesser mechanisms of family status, called either “relationship register” or “civil partnership” Australian Marriage Equality is currently leading the charge to win the freedom to marry in Australia. Also in late July 2011, the National Columbian Court ruled that the Colombian Congress must pass marriage or an equal alternative for same-sex couples before June 20, 2013, or else the Court would automatically allow any judge or notary to formalize a marriage between same-sex couples. In December 2012, a committee in the Colombian Senate approved a measure by a 10-5 vote to extend the freedom to marry, but in April 2013, the freedom to marry was not approved. As such, soon, same-sex couples in the state will be able to register their unions in court. *Ibid.*

⁵³The Anti-Homosexuality Act, 2014. <http://wp.patheos.com.s3.amazonaws.com/blogs/warranthrockmorton/files/2014/02/Anti-Homosexuality-Act-2014.pdf> < accessed on April 3rd, 2014>.

⁵⁴ Faith Karimi and Nick Thompson (200), *Ugandan's President Museveni Signs Controversial Anti-Gay Bill into Law*, CNN: <http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill/index.html> < accessed Feb. 25, 2014>.

⁵⁵ 83 countries where Homosexuality is illegal. <http://76crimes.com/76-countries-where-homosexuality-is-illegal/> < accessed on Feb. 22, 2014>.

the actions of the state is an encroachment on the societal values.⁵⁶ At the time Canada moved to join the league of nations that have legalized same-sex marriage by the passage of the Civil Marriage Act that redefines marriage to include same-sex marriage. A Parliamentarian while speaking against it, referred to a statement credited to former Justice Gerard La Forest of the Supreme Court of Canada:

*...marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of longstanding philosophical and religious traditions. But its ultimate raison d'etre transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.*⁵⁷

In continuation, he further stated that:

Whether we came from Britain, France, Europe, China, India, Asia or Africa, all of us came here to build a future that would respect

⁵⁶ What was once an important debate over the legal status of marriage has emerged as a critical national issue, the resolution of which will shape the future of our society and the course of constitutional government in the United States? Family is and will always remain the building block of civil society, and marriage is at the heart of the family. Redefining marriage down to a mere form of contract fundamentally alters its nature and purpose and will usher in new threats to the liberty of individuals and organizations that uphold marriage and have moral or religious objections to its redefinition.

⁵⁷ Stephen Harper, Protecting the Traditional Definition of Marriage in Canada: <http://www.catholiceducation.org/articles/marrage/mf0041.html> < accessed on Dec. 20, 2013 >.

*the values and traditions of our ancestors and build a future for our children and families. One of those was our traditional institution of marriage. For anyone irrespective of their belief to equate the traditional definition of marriage with segregation and apartheid is sad and disappointing. Our society has, over the decades come, to respect and recognize the choices of consenting adults. It is time that traditional institutions like marriage be equally recognized and respected without modifications.*⁵⁸

It is further our view that the State need not tinker with traditional marriage with the pretense that marriage laws which only accord recognition to the union of different sex amounts to trampling on the basic rights of couples of same-sex marriage or union.

The point societies which have through legislation legalized same-sex marriage may need to consider is what are the essential characteristics of marriage or the purpose of marriage in the society? It has been canvassed that the purpose of marriage among others are for “partnership, pleasure and procreation.”⁵⁹ It is our view that the foregoing stated purposes of marriage can effectively be realized through the traditional marriage which recognized the union of heterosexual sex. It is trite that couples of same-sex marriage cannot fulfill the procreation purpose of marriage, though it may be conceded without yielding that the same sex marriage or union can realize partnership

⁵⁸ *Ibid.*

⁵⁹ (2008) *Marriage as a Concept and its Purpose*: dksuresh: http://www.scribd.com/doc/2505629/marriage_as_a_concept_&_purpose < accessed Feb. 25, 2014>.

and pleasure. The existence of society will be threatened without procreation, to which couples of same sex marriage can hardly achieve.

However, in Nigeria, this practice is yet to find expression in the nation's legal system. The legal regime of marriage is still being maintained and as such, the concept of same-sex union under various legislations⁶⁰ is still regarded as a crime punishable by a term of imprisonment.⁶¹

It is the view of some that granting marriage right to same sex couples is in a way allowing the people to enjoy the basic fundamental rights of choice and association. The British Culture Secretary Maria Miller after the Royal assent to the Same Sex Law passed by both Houses of Commons and Lords stated that "marriage is the bedrock of our society and now irrespective of sexuality everyone in British society can make that commitment."⁶² The Culture Secretary stated further that:

It is a wonderful achievement and whilst this legislation may be about marriage, its impact is so much wider. Making marriage available to all couples demonstrates our society's respect for all individuals regardless of their sexuality. It demonstrates the importance we attach to being able to live freely. It says so much about the society that we

⁶⁰ Criminal Code Act C38/2010, section 214; The Armed Forces Act and the Same Gender Marriage (Prohibition) Act C20/2010, section 81 and Same Sex Marriage (Prohibition) Act, 2013, section 1.

⁶¹ Same Sex Marriage (Prohibition) Act 2013, section 5(1) spells a term of 14 years imprisonment for offenders.

⁶² Ned Simons, Gay Marriage is Now Legal in England and Wales after 'Historic' Bill Gets Royal Assent, 2013, The Huffington Post UK: <http://www.huffingtonpost.co.uk> < accessed on Sept. 20, 2013>.

*are and the society that we want to live in. this is a historic moment that will resonate in many people's lives. I am proud that we made it happen, and I look forward to the first same sex wedding by next summer.*⁶³

SAME SEX MARRIAGE: THE NIGERIAN PERSPECTIVE

The Same Sex Marriage (Prohibition) Act 2013⁶⁴ which is the extant law in Nigeria prohibits and criminalises marriage contract or civil union between persons of same sex.⁶⁵ In the Act same sex marriage means “the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship.”⁶⁶

Nigeria is a sovereign State with federating units which is governed by a federal Constitution which is the nation's grundnorm.⁶⁷ Same-sex associations and or unions have been criminalized in Nigeria during the colonial era.⁶⁸ The issue of marriage has long since been settled through legislation in Nigeria. So any association or union between or among same-sex in Nigeria is a crime.⁶⁹

⁶³ *Ibid.*

⁶⁴ Recently assented to by the President of the Federal Republic of Nigeria.

⁶⁵ Same Sex Marriage (Prohibition) Act 2013, Section 1.

⁶⁶ Same Sex Marriage (Prohibition) Act 2013, Section 7.

⁶⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended), section 1

⁶⁸ Criminal Code Act C38/2010, section 214 which provides that: any person who has carnal knowledge of any person against the order of nature; or permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years.

⁶⁹ Criminal Code Act C38/2010, section 214 and Armed Forces Act A20/2010, section 81(1) which provides “A person subject to service law under this Act who (a) has carnal knowledge of a person against the order of nature (c) permits a person to have carnal knowledge of him against the order of nature is guilty of an offence under this Act. While subsection (2) of the section makes it an offence where a person subject to the military law commits an act of gross indecency with any person or procures another person to commit the act with him or attempts

So the issue of gender neutrality in marriage and marriage law does not arise in Nigeria, as the country affirms marriage to be an association or union between heterosexual couples.⁷⁰

It may seem that the criminalisation of same sex marriage by the Nigerian government is capable of eroding the fundamental rights of persons who are inclined to such practise. The various human rights instruments make elaborate provisions for the rights of persons such as rights to marry and found a family as well as the right of freedom of association. Nigeria as a country has assented to these instruments by signing and ratifying same at various times. Would the act of the government of Nigeria in passing the same sex marriage prohibition law, which prohibits a marriage contract or civil union between persons of same sex as well as criminalises the act by making person who goes into same sex marriage contract or civil union committing an offence punishable with a term of imprisonment not amount to a breach of such international obligations? Will the enactment of the law not be said to be an infringement of the fundamental rights and fundamental freedoms of the Nigerian people more particularly the minority who considered same sex marriage as a way of life?

In international law a country is obligated to honour treaty provisions, besides the various human rights instruments, there is another human rights instrument which calls for close examination which provides:

to procure the commission of the act by any person with himself or with another person whether in public or private. And any person upon conviction of the act shall be punished for an imprisonment not exceeding seven years or any less punishment provided by this Act.

⁷⁰ Same Sex Marriage (Prohibition) Act 2013, section 3

Persons belong to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belong to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and in without interference or any form of discrimination. Persons belong to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties. States shall take measures to create favourable conditions to enable persons belonging to the minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.⁷¹

The point here is whether these persons who practise same sex activities do not come within the ambit of minority in the light of the above Declaration, whose rights should be protected? If the answer is in the affirmative, the issue therefore would be whether Nigeria is not in violation of the above Declaration.

If it is conceded here that same sex practitioners fall within the ambit of minority whose rights should be protected, it is however, important to observe

⁷¹ Declaration on the Rights of Persons Belong to National or Ethnic, Religious and Linguistic Minorities, United Nations General Assembly, New York, adopted on 18th December, 1992, Resolution A/RES/47/135. Article 2(1), (5) and Article 4(2).

that a provision in the above stated Articles provided an exemption clause. In that if the government of Nigeria views very strongly that to allow homosexual activities to operate in the society will violate the national laws, it could refuse to grant them such rights, which she has done by the introduction of the Same Sex Marriage (Prohibition) Act, 2013. What the government of Nigeria in our opinion has done was to draw a balance between the rights of the persons who are inclined to same sex activities and the need to uphold the moral fabrics of the society. The custom and cultural beliefs of the various ethnic nationalities that make up Nigeria still see marriage as a union between a man and a woman.⁷² No doubt, prohibiting and criminalising same sex marriage or union may have infringed on the rights of some persons, nevertheless, the greater good of the society have dictated the decision of the government to do so.⁷³ The enactment of Same Sex Marriage (Prohibition) Act, 2013 by the Nigerian government besides prohibiting same sex marriage practice in the country⁷⁴, it went further to criminalise the act with a term of

⁷² Talatu Usman, Nigeria to Defend Ban on Same-Sex Marriage in letter to UN – Maku, 2013 : <http://www.premiumtimes.ng.com/news> < accessed Sept. 19, 2013). “He said in relation to same-sex marriage, there were fundamental differences “within our country and so we are trying to look into it and see what position Nigeria will take. But definitely, the problem with same-sex marriage as at now is that both sections of Nigerian society, traditional society, Muslim community, Christian community that virtually make up nearly 100 per cent of the Nigerian population are still opposed to the idea of same-sex marriage. And in nations, it is not easy for you to enforce a value that is strange to your own society.”

⁷³ The African Charter on Human and People Rights, Article 18(1) and (2) which provides, “The family shall be the natural unit of society. It shall be protected by the State which shall take care of its physical health and moral. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”

⁷⁴ Section 1 of the Act.

fourteen (14) years imprisonment upon conviction⁷⁵ without an option of fine. However, the Act did not expressly criminalise homosexuality in the country.

However, Nigeria has been under tremendous pressure from the international community to reverse the law recently passed which prohibits same sex marriage in the country. The Minister of Information Labaran Maku after, one of the nation's Federal Executive Council's meetings where the President presented a memorandum seeking the Federal Executive Council's approval of Nigeria's Second Quota Universal Periodic Review Report (2008-2012) to the United Nations Human Rights Council stated that "the country has made substantial progress in 30 out of the 32 issues raised in the last report in 2009...That Nigeria had continued to differ in the other two areas which include abolition of death penalty and the clamour for same-sex marriage."⁷⁶ He further stated that "while Nigeria has made substantial progress in terms of death penalty, but with relation to same-sex marriage, it still has fundamental differences within the country and as they are trying to look into it and see what position Nigeria will take."⁷⁷

The British Prime Minister Mr. David Cameron, reacting to the passage of the Same Gender Marriage (Prohibition) Act, told Nigeria that:

Britain would not give any assistance or aid to countries that were opposed to same sex marriage. The British High Commissioner in Nigeria, Mr. Andrew Lyod, in a closed door meeting with the Jigawa

⁷⁵ Section 5 of the Act.

⁷⁶ Olalekan Adetayo, "Nigeria, UN Disagree Over Same-Sex Marriage, Death Penalty" The Punch.

⁷⁷ *Ibid.*

*State Governor, Alhaji Sule Lamido, asked the Nigerian government to rescind its decision on punishing individuals involved in same sex marriage, adding that such a law infringes on the fundamental rights of choice and association.*⁷⁸

In the same vein, the Canadian government also condemned the passage of a bill criminalizing same-sex marriage and gay activities in Nigeria by the Senate, saying that

*The bill, if assented to by President Goodluck Jonathan, would trample upon the fundamental human rights of homosexuals and gay people. The Canadian government, in a statement by its Foreign Affairs Minister, John Baird, called on Nigeria to reverse the bill so as to allow all its citizens to enjoy basic rights. He further maintained that, a bill passed by Nigeria's Senate, if ratified disregard basic human rights and fundamental freedoms.*⁷⁹

If a sovereign state is free to govern its state and its citizenry in accordance with the laws of its land. Is it appropriate therefore for such State to be coerced into accepting a practice which it finds not compatible with its cultural values and customs as they offend natural justice equity and good conscience as well as public policy and morality?

The British and Canadian governments have hinged their point on the fundamental rights doctrine. It was even stressed further by the Canadian

⁷⁸ Britain Tells Nigeria to Rescind on Gay Marriage Law or Else...” www.gistnigeria.com < accessed on Sept. 19, 2013.

⁷⁹ Ibid.

government which referred to it as ‘basic human rights.’ What then are fundamental rights and basic human rights? The Nigeria state pursuant to the Universal Declaration of Human Rights introduced into her Constitution in Chapter Four the fundamental provisions for the Nigerian people. The British High Commissioner has stated that such law is capable of trampling on the right of choice and association of the people.

Although section 37 of the Constitution of the Federal Republic of Nigeria provides that “every person shall be entitled to... associate with other persons.” It is our strong opinion that literally, the above section did not contemplate gender-neutrality in marriage to accord the right or freedom of marriage to same-sex couples in Nigeria. And to do so, would amount to overstretching the human rights provisions to a dangerous extreme.

Nigeria as a sovereign state has the authority to make laws for the good governance of the people without any form of interference or external influence of any kind. Nigeria is a member of the United Nations, the UN Charter provided for non interference of the domestic affairs of a sovereign state.⁸⁰ So laws made by the country which include laws that exclude same-sex couples from marriage and other policies should be viewed as a purely domestic matter for the State not attracting foreign or external interference or influence.

In the light of the foregoing therefore, there is likely to be problem with couples of same-sex marriage coming into the country. The Same Gender

⁸⁰ United Nations Charter, United Nations International Conference, San Francisco, 26th June 1945, entered into force on 20th October, 1945, Article 1(7).

Marriage (Prohibition) Act, 2013 in section 1(2) provides that “Marriage contract or civil union entered between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by virtue of the certificate shall not be enforced by any court of law.” By this, nationals of countries that have recognized same-sex marriage are likely to have problem with obtaining entry and residence permit in the Nigeria. Even Nigerians in Diaspora who have taking advantage of the freedom to marry to perform same-sex marriage under the laws of the countries they are resident will equally be faced with similar legal disability.

There is an interesting angle to this same-sex marriage phenomenon. It is our opinion that a sovereign state has the exclusive preserve to make laws for the good and order of the society. To this realization Nigeria has through legislation expressed clearly of her refusal to accord recognition to same-sex marriage in her legal system. We argue here that with respect to the issue of same-sex marriage in countries where the same-sex marriage is legal, to allow Nigeria citizens who are resident in those countries to go through the form of marriage, recourse should be had to the law of the country of their nationality. Except the individual applying for same sex marriage ceremony would first and foremost have abandoned her/his Nigerian nationality. A classic example is the Belgium same-sex marriage law which stipulates “that only couples from countries with the freedom to marry can be married under Belgian law.”⁸¹ It is our view that it may not be appropriate for citizens of a country whose law has not recognized same-sex marriage under its legal system to be

⁸¹ Pew Research Religion and Public Life Project, *Supra* note 35.

allowed to go through same-sex marriage in those countries, as they lack the capacity to go through that kind of marriage under a different legal system.

An interesting angle to this will be whether Nigerian government will accredit diplomats of same-sex marriage sent to the country by a foreign country that has legalised same sex marriage. If the provision of section 1(2) of the Same Sex Marriage (Prohibition) Act, 2013 is anything to go by, such people cannot be accredited by the Nigeria government. The question whether the implementation of the law to foreign diplomats who are same-sex couples having gone through that form of marriage under the laws of the sending state, assigned to Nigeria to be refused accreditation is capable of sparking diplomatic row between the sending government and the Nigerian government, is awaited.

In a situation like as we have today, where a growing number of countries are through legislation not only decriminalising homosexual activities but according the status of traditional marriage which hitherto was exclusive to heterosexual couples would have significant impact on the society. This view was taken by Adaramola when he stated that “Mill’s credo and the views of the Wolfenden Committee on the issue of private morality are obviously objectionable in traditional African societies. Devlin’s position on the matter seems to be relatively in conformity with the tenets of African customary law.”⁸²

⁸² John S.Mill, *Supra* note 28, P. 97.

CONCLUSION

Different countries of the world over time resisted the pressure and agitation by different groups to recognize same gender marriage by passing gender neutrality laws that allows same-sex couples to be married like the heterosexual couples. But at the wake of the 21st century most of those countries gave in to such pressure and then amended their laws to accommodate same-sex marriage into their legal system.

The whole idea of same-sex marriage couples is about adult pleasure desires and nothing more. This, in our opinion, could be achieved without seeking the instrumentality of the law to gain recognition and legitimacy without tinkering with the traditional conception of marriage. Same-sex couples could as well go about their activities without seeking any license from the state or government for any form of legitimacy so long as the law of the land permits them.

Our worries here are how long Nigeria would continue to resist such pressure particularly those from the international community championed by the United Nations Human Rights Council, which say the present law against same-sex marriage is anti-human rights. We are afraid that the day will come when Nigeria will decriminalize same-sex association or union and enact a marriage law that is gender neutral, to accommodate same-sex association.