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A Reflection on the Recent Nigerian Legislation Against Same Sex Marriage Vis-A-Vis Rising Gay Activism in the Western World*  

Larry O.C. Chukwu*

ABSTRACT

The Same Sex Marriage (Prohibition) Act recently enacted by Nigeria criminalizes marriage or civil union between persons of the same sex; solemnization of same sex marriage or civil union or witnessing, aiding or abetting the same; registration, operation, membership or support of gay clubs; public show of same sex amorous relationship and related matters. Each of these offences attracts a long term of imprisonment. The Act was enacted in bold defiance of threats of economic and political sanctions by the Western powers against any developing country that enacts anti-gay legislation. This paper analyzes the Act against the backdrop of the extant laws operative in Nigeria as well as the underlying mores of the Nigerian society in contrast to Western idiosyncrasies. It concludes that the enactment is consistent with Nigerian culture, religious beliefs and pre-existing laws, whereas the human rights spin that the Western world recently puts on

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homosexual orientation, on which footing the enactment is attacked, is rooted in neither natural law nor customary international law.

I. INTRODUCTION

Nigeria is a fundamentally pluralistic society with concomitant legal pluralism. As a result, marriage in Nigeria is regulated by statute, Islamic law, and native law and custom. A statutory law marriage is essentially monogamous, while a marriage under Islamic law or native law and custom is essentially polygamous. However, a golden thread that runs through all the marriage laws in Nigeria is and has always been heteronormativity. Throughout the ages, same-sex marriage has never been allowed in this country, whether statutorily, judicially, religiously, culturally, or otherwise. Also, in Nigeria there is invariably a socio-cultural and religious element in every marriage regardless of the legal regime under which it is contracted. In the eyes of Nigerian society, a purported marriage is never recognized unless and until the parties to it have gone through some ceremony dictated by their religion or custom. Thus, in our society, marriage is not merely a legal institution, but equally a religious and social institution governed by law as well as by religious and socio-cultural norms and prescriptions.

Indeed, there is a deep-rooted interrelationship between religion and family law in Nigeria. First, our statutory definition of marriage is a replica of the definition of “Christian”

1. The governing statute throughout the country is the Marriage Act which was enacted in 1914 by the British colonial administration, now Cap. (M6), Laws of the Federation of Nigeria 2004.

2. Indeed, in the entire continent of Africa, South Africa is the only country that has legalized same-sex marriage by virtue of the Civil Union Act, which came into force on November 30, 2006. See Civil Union Act 17 of 2006 (S. Afr.).
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marriage,\(^3\) which was propounded by the English Lord Penzance in the famous case of *Hyde v. Hyde* back in 1866.\(^4\) Interestingly, the symposium where this paper was presented was held in Utah, the native land of the Hydes whose Mormon polygamous marriage instigated the litigation that produced the classic definition of marriage universally accepted throughout the entire common law jurisdictions for over one and a half centuries now.\(^3\) Second, a statutory marriage in Nigeria can be celebrated in either a licensed place of worship or a marriage registry. Non-statutory marriages could be celebrated in accordance with either Islamic law or native law and custom—an essential element of which are traditional religious rites. By and large, although state religion is constitutionally prohibited,\(^6\) Nigeria is unarguably a religious country with well-entrenched symbiosis between religion and the state.\(^7\) This explains the pervasive influence of religion in the law-making and adjudicatory processes in Nigeria.\(^8\) Again, as research has shown, there is a strong relationship between a country’s religiosity and opinions about homosexuality—with countries where religion is central to people’s lives—of which Nigeria is a perfect example—being less tolerant of homosexuality.\(^10\)

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\(^3\) See Interpretation Act Cap. (I23), Laws of the Federation of Nigeria 2004, § 18 (governing the interpretation of all statutes throughout the Federation).

\(^4\) *Hyde v. Hyde* (1866) LR 1 P & D 130 at 133 (UK) (defining marriage, as understood in Christendom, as “the voluntary union for life of one man and one woman, to the exclusion of all others.”).

\(^5\) See id.

\(^6\) CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), § 10.


\(^8\) For instance, in the process of passing the bill prohibiting same sex marriage, religious and moral considerations—stoked by the opening gambits of the bill’s sponsor at the Senate’s floor and the Senate President during the public hearing—clearly swayed National Assembly members to unanimously vote in favor of it. See Joseph Onuche, *Same Sex Marriage in Nigeria: A Philosophical Analysis*, 3 INT’L J. OF HUM. & SOC. SCI. 91, 96 (2013) (Nigeria). By contrast, a move introducing a bill to legalize prostitution was scuppered by an overwhelming majority of National Assembly members on religious grounds. See Yusuf Galambi, *Prostitution Bill: We Will Reject It*, SUNDAY TRIB., Oct. 9, 2011 (Nigeria).

\(^9\) Measured by whether they consider religion to be very important, whether they
When it comes to sexual orientation, same-sex copulation is regarded as anathema all over the country. The reprobation cuts across all religious and socio-cultural groups. What’s more, both the Criminal Code Act\(^1\) and Penal Code Act\(^2\) (which were handed down by the British colonial administration) have since criminalized homosexuality in Nigeria,\(^3\) prescribing a punishment of up to fourteen years imprisonment.\(^4\) So also, prior to the legislation under review, twelve states in northern Nigeria had enacted the Sharia Penal Code Law, which makes homosexuality an offence carrying a maximum punishment of death.\(^5\) In view of the statutory, religious, and socio-cultural prohibitions, there has never been any known case of homosexuals seeking official licence to marry or to regularize their illicit liaison in Nigeria. And a recent search at the Corporate Affairs Commission, which houses the central registry of clubs and associations, reveals the non-existence of

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\(^1\) See Cap. (C38), Laws of the Federation of Nigeria 2004 (hereinafter Criminal Code). This Act was first enacted in 1916 for the whole country, but is currently applicable throughout the southern states. \(\textit{id.}\)

\(^2\) See Cap. (P3), Laws of the Federation of Nigeria 2004 (hereinafter Penal Code). This Act first came into force on September 30, 1960, replacing the Criminal Code in the defunct Northern Region, and is currently applicable throughout the northern states. \(\textit{id.}\)


\(^4\) See Criminal Code, \textit{supra} note 11, § 214; Penal Code, \textit{supra} note 12, § 284.

\(^5\) It was the Zamfara State Sharia Penal Code Law 2000 that set the ball rolling on January 27, 2000. Each of those laws applies to all Muslims as well as non-Muslims who voluntarily submit to the jurisdiction of the Sharia courts in those states. \(\textit{See, e.g., Introduction, paragraph C, Zamfara State Sharia Penal Code Law 2000.}\)
any registered gay club or association. Indeed, the virtual absence of local literature on the subject of homosexuality/same-sex marriage in Nigeria until recently bears out the assertion that it has all the while been a non-issue in this country. That is not to say that Nigeria is totally insulated from homosexuality. Without doubt, gays and lesbians have long existed in Nigeria and, indeed, their number is believed to be growing in recent times. However, since their activity is illegal, they operate surreptitiously, thus posing little or no danger to public morals for now. Be that as it may, it appears that most of the people who engage in homosexual acts in Nigeria are not strictly gay; they are rather bisexual. Thus, as has been observed, “homosexuals in Nigeria contract heterosexual relationship to bear children and to live ‘normal lives.’” Paradoxically, this also happens in LGBT-friendly climes such as the United States.

With the impact of globalization and the tendency of Nigerian youths to imbibe Western idiosyncrasies lock, stock and barrel, there is bound to be an increase in the population of the lesbian and gay community and consequent surge of gay

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16. The official website of the Corporate Affairs Commission is www.cac.gov.ng.
19. Onuche, supra note 8, at 93.
20. Recently, the news went viral about an Ohio State legislator, Mr. Goodman, who resigned on November 14, 2017 upon being caught red-handed in a homosexual act with another man in his office. The 33-year-old legislator, who was widely known for his anti-gay campaign and for his devotion to traditional family values, was proudly married to a woman. See Curtis M. Wong, Ohio Lawmaker Quits After Having ‘Inappropriate Conduct’ With Man In His Office, Huffington Post (Nov. 17, 2017, https://www.yahoo.com/news/ohio-lawmaker-quits-having-appropriate-conduct-with-man-in-his-office-191641392.html). Likewise, a 27-year-old female teacher in Ohio, who was engaged to her long-term boyfriend, was sentenced to three years in prison for sexual battery upon her plea of guilty to having sex with a 13-year-old female student. See Steve Helling, Engaged Ohio Teacher Had Sex With 13-Year-Old Female Student From Her School, PEOPLE (Mar. 8, 2018, www.yahoo.com/entertainment/engaged-ohio-teacher-had-sex-204239808.html).
activism in Nigeria presently. The fear is that, if uncurbed, we are likely to witness in our country the sort of sexual revolution that occurred in the Western world in the 1960s. Worried by the impending danger of cross-infestation of the Nigerian society with what is considered (at least, by African standards) as a harmful and morally degenerative practice and the destabilizing legal implications thereof, the Nigerian authorities saw the urgent need to take drastic and prophylactic measures aimed at nipping it in the bud.

It was the Obasanjo regime that took the initiative in 2006 by presenting the National Assembly with an executive bill outlawing same sex marriage. That bill was, however, not passed during the life of that administration. It was left for the seventh session of the National Assembly to finally enact the Same Sex Marriage (Prohibition) Act 2013 to which former President Goodluck Jonathan promptly assented and it came into force on January 7, 2014.

As expected, Nigerians across religious, political, and socio-cultural spectra welcomed the enactment with virtually unanimous ovation. Conversely, it attracted serious condemnation and threats of economic sanctions against Nigeria by Western countries—notably the United States. Unfortunately, in the absence of any federal law legalizing same-sex marriage in the U.S., judicial opinion vacillated for years until June 26, 2015 when the Supreme Court of the United States finally decided by a slim majority of 5-4 that state legislation against same-sex marriage is unconstitutional in Obergefell v. Hodges, 135 S. Ct. 1039 (2015). This writer was part of a


23. Addressing the UN Human Rights Council at the seventeenth session of the Periodic Review in Geneva, the then Attorney-General of the Federation and Minister of Justice, Mohammed Bello Adoke, stated that opinion poll showed that 92% of the Nigerian populace supported the enactment of the Act: available at www.thisdaylive.com/articles/no-way-for-same-sex-marriage-nigeria-tells-the-world/162386/ (last visited Oct. 29, 2015). See also, Chineny Nwabueze et al., Print Media Coverage of Same Sex Marriage Law in Nigeria: A Content Analysis of Sun, This Day, Guardian and Vanguard Newspapers, 5 INT’L J. OF SOC. SCI. & HUM. REV. 79, 87 (2015).

24. Ironically, in the absence of any federal law legalizing same-sex marriage in the U.S., judicial opinion vacillated for years until June 26, 2015 when the Supreme Court of the United States finally decided by a slim majority of 5-4 that state legislation against same-sex marriage is unconstitutional in Obergefell v. Hodges, 135 S. Ct. 1039 (2015). This writer was part of a
dom, and Canada\textsuperscript{25}—which posit that the prohibition of same-sex marriage constitutes a curtailment of the fundamental rights of persons with homosexual orientation. The question is: from whence does the human rights argument draw legitimacy? Besides, whose human rights are they agitating for—Nigerian citizens or foreigners? Are Nigerian homosexuals protesting that their fundamental rights have been curtailed? If anything can be said without any fear of contradiction, it is that we are yet to witness any appreciable gay activism since the enactment of the Act. Indeed, it appears that the Western detractors are crying louder than the bereaved!

II. MAIN FEATURES OF THE ACT

The Act consists of eight sections, the first five containing the substantive provisions. For present purposes, we shall focus on the core provisions, which are addressed below.

\textbf{A. Prohibition of Marriage or Civil Union by Persons of Same Sex}

A marriage contract or civil union entered into between persons of same sex:
\begin{itemize}
\item[(a)] is prohibited in Nigeria; and
\item[(b)] shall not be recognized as entitled to the benefits of a valid marriage.\textsuperscript{26}
\end{itemize}

\textsuperscript{25} In the wake of the enactment of the Act, the Canadian government went as far as cancelling the state visit of President Goodluck Jonathan to Canada earlier scheduled for February 2014; details available at Victoria Ojeme, \textit{Gay-Marriage Law: Canada cancels Jonathan’s visit}, \textit{VANGUARD} (Jan. 20, 2014, 1:53 AM, https://www.vanguardngr.com/2014/01/gay-marriage-law-canada-cancels-jonathans-visit/).

\textsuperscript{26} \textit{Same Sex Marriage (Prohibition) Act 2013}, § 1 (Nigeria).
The prohibition and non-recognition of same-sex marriage or civil union purportedly entered into in Nigeria is rather declaratory of the pre-existing state of the Nigerian law. In the first place, although the extant Marriage Act does not state categorically that a marriage must be between persons of mixed sex, one of the essentials of a valid marriage under the Act is capacity to consummate the marriage (i.e., the ability to have ordinary and complete sexual intercourse with the spouse). Thus, a marriage under the Act is voidable where either party is incapable of consummating the marriage. Clearly, same-sex partners are incapable of achieving consummation, which requires the full penetration of the female sexual organ by the male in the ordinary sense. In the well-known English case of *Corbett v. Corbett*, a trans-sexual was held incapable of consummating a marriage, hence the purported marriage was declared null and void. Although an occasion has never arisen for the Nigerian courts to determine the issue of capacity of a trans-sexual to marry, it is submitted that the decision in the English case represents the legal position in Nigeria. Moreover, since sexual intercourse between spouses


28. *Id*. Likewise, consummation is one of the six basic elements of a customary law marriage, as ably articulated by Professor Akintunde Emiola. See *Akintunde Emiola, The Principles of African Customary Law* 64–75 (1997) (especially at page 74 where he states: “No marriage is perfected until it has been consummated.”).


30. Interestingly, a leading authority on Nigerian family law has made out a case for statutory recognition of gender re-assignment for the purpose of ascertaining the validity of a marriage under the Nigerian law. See E.I. Nwogugu, *What Next in Nigerian Family Law?* 11–13 (2006). Gender re-assignment has been statutorily recognized in several countries including Australia, New Zealand, Canada, South Africa, Singapore, Israel, and most U.S. states.
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is an intrinsic element of every marriage, and homosexuality has since been criminalized in Nigeria, it follows that same-sex marriage could not be lawfully celebrated in Nigeria even before the recent legislation.

As for the position under customary law, same-sex marriage has all the time been absolutely forbidden. The gist of a customary law marriage is well captured by Dr. Obi in the following words: “Marriage as known to customary law may be defined as the union of a man and a woman for the duration of the woman’s life.” As one learned writer aptly observes, “Same sex marriage is not practised by any known custom in Nigeria. Rather the act is an abomination and it is condemned by all customs in Nigeria and viewed as immoral.” Thus, the new legislation has done no more than restate the customary law disavowal. That said, it is perhaps pertinent to point out an old custom among some societies of southern Nigeria whereby a childless woman or one without a male child would “marry” a wife in order to raise a male child for either her husband or her maiden family. For want of a better terminology, this is prosaically described as “woman-to-woman marriage.” That terminology, however, is misleading, for such a marriage never involves any sexual activity between the two women, rather the

31. Under the Nigerian legal system, the term “customary law” encompasses both Islamic law and the various systems of native law and custom operative in Nigeria.
33. F.T. Hangeior, An Overview of the Proposed Law to Prohibit Same Sex Marriage in Nigeria, NIGERIAN L. REFORM J. 93, 100 (2011) (citing as an illustration section 5 of the Declaration on Tiv Native Law and Custom 1958). See also Onuche, supra note 8, at 98. For a similar view expressed by a Ghanaian writer, see KWASI WIREDU, CULTURAL UNIVERSALS AND PARTICULARS: AN AFRICAN PERSPECTIVE 68 (1996), (“Gay ‘marriage’ is a violation against natural law, objective truth, and the law of complementarity.”).
34. This custom has fallen into desuetude anyway. Today, adoption is resorted to by childless women wishing to achieve the same objective.
35. See M.C. Onokah, FAMILY LAW 114 (2003); E.I. Nwogugu, FAMILY LAW IN NIGERIA 79–81 (Ibadan: HEBN Publishers, 3d ed. 2014); P.A. Talbot, THE PEOPLES OF SOUTHERN NIGERIA 431, 439 (1926); N.W. Thomas, ANTHROPOLOGICAL REPORT ON THE IBO-SPEAKING PEOPLES OF NIGERIA 60–83, 130–31 (1914); Obi, supra note 32, at 157–58 (observing that “there is no difference in kind (as distinct from procedure) between the so-called ‘woman-to-woman’ marriage and the regular man-to-woman marriage.”).
wife is procured for the husband of the woman responsible for the marriage or an agreed male member of her extended family. Indeed, the philosophical underpinning of the so-called “woman-to-woman marriage” is the traditional doctrine that marriage is established for procreation and sustenance of one’s lineage—an objective that is hopelessly scuppered by same-sex marriage in the classical sense.

An acute illustration of this obsolete custom is afforded by the case of Meribe v. Egwu. In that case, the plaintiff claimed title to the land in dispute on the ground that his mother had been married to the deceased female owner on behalf of her husband. The trial court found for the plaintiff. On appeal, the Supreme Court went at length in analyzing the so-called “woman-to-woman marriage”.

Madarikan, JSC, who delivered the unanimous judgment of the Court, made the following pertinent observation:

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

37. Id. at 275.
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By those damning words and specifically drawing upon the authority of section 14(3) of the previous Evidence Act, the learned Justice of the Supreme Court, in effect, declared that same-sex marriage is repugnant to natural justice, equity and good conscience, and also contrary to public policy. In dismissing the appeal, he went further to put the facts of the case in perspective:

We however do not think, on a close examination of the facts of this case, there was a ‘woman to woman’ marriage between Nwanyiakoli and Nwany-iocha. The true nature of the arrangement was appreciated by the learned trial judge when he, rightly in our view, made the following observations: ‘the facts disclosed in evidence did not show that Nwanyiakoli married Nwanyiocha for herself, a fact naturally impossible – but that she ‘married’ in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwu to marry her. There was no suggestion in evidence that there was anything immoral in the transaction.’

B. Refusal to Recognize Foreign Same-Sex Marriages

A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by

38. Evidence Act (2011), § 18(3) (Nigeria) (“In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.”).
virtue of the certificate shall not be enforced by any court of law.\textsuperscript{40}

This provision must be viewed against the background of the rules of conflict of laws relating to the recognition of marriages celebrated abroad. Under the applicable conflict rules, a foreign marriage is recognized as valid if it complies with the formalities prescribed by the law of the place of celebration (\textit{lex loci celebrationis}) and if each of the parties has the capacity to enter into such a marriage under his or her personal law.\textsuperscript{41} As for the recognition of a foreign marriage which would have been void if celebrated in Nigeria, the test to be applied if such a case arises is that propounded by an English court, that is, “whether it is so offensive to the conscience of the English [Nigerian] court that it should refuse to recognize and give effect to the proper foreign law.”\textsuperscript{42}

It is on that basis that the courts in Western countries have in many cases refused to recognize polygamous marriages validly celebrated in foreign jurisdictions.\textsuperscript{43} Without doubt, the preponderant judicial opinion in Nigeria, drawing inspiration from the above-quoted dictum of Madarikan, JSC, in \textit{Meribe v. Egwu}, would be that same sex marriage is repugnant to good conscience and contrary to public policy.\textsuperscript{44} Today, a conservative Nigerian judge who ruminates over the uncharitable terms in which early English authorities described polygamy as, for instance, “unchristian,”\textsuperscript{45} “revolting,”\textsuperscript{46} “barbarous,”\textsuperscript{47} and “a union falsely called marriage,”\textsuperscript{48} may feel impelled to return the

\begin{itemize}
\item \textsuperscript{40} Same Sex Marriage (Prohibition) Act 2013, § 1(2) (Nigeria).
\item \textsuperscript{41} See NWOGUGU, supra note 35, at 56–57.
\item \textsuperscript{42} Cheni v. Cheni \[1965\] P 85 at 99 (UK).
\item \textsuperscript{43} For an in-depth discussion, see L.O.C. Chukwu, \textit{The Metamorphosis of Polygamy in Private International Law}, 6 KNUST L.J. 67 (2014) (Ghana).
\item \textsuperscript{44} See sources cited supra notes 35–36.
\item \textsuperscript{45} In re Bethell (1888) 38 Ch D 220 (UK)
\item \textsuperscript{46} Hyde v. Hyde (1866) LR 1 P & D 130 (UK)
\item \textsuperscript{47} Warrender v. Warrender (1835) 6 Eng. Rep. 1239.
\item \textsuperscript{48} Harvey v. Farnie (1880) 6 PD 35 (UK).
\end{itemize}
punches when asked to recognize same sex marriage celebrated abroad. He is apt to fall in with the view which this writer expressed elsewhere: that public policy or morality is by no means more outraged by polygamy than by same sex marriage. He might then wonder why his Western counterparts should view same sex marriage differently. Why should they discontinue the same human rights argument canvassed in favor of same sex marriage when it comes to their non-recognition of polygamous marriages celebrated in countries where it is legitimate such as Nigeria? Or, indeed, why is bigamy an offence in many parts of the world (including, curiously enough, Nigeria where polygamy under customary law is the predominant practice) if people should have the liberty to marry without any restriction? However, as the saying goes, in every twelve there is always a Judas. Perchance, a judge who is himself gay or an apologist for homosexuality might take a different view. The essence of the statutory prohibition, therefore, is to foreclose the chances of Nigerian courts sounding discordant tones whenever they may be called upon to recognize same sex marriages contracted abroad.

C. Prohibition of Solemnization of Same-Sex Marriage or Civil Union in Places of Worship

(1) A marriage contract or civil union entered into between persons of same sex shall not be solemnized in a church, mosque or any other place of worship in Nigeria.

49. Chukwu, supra note 43, at 83.
50. In 2013, Kody Brown and his four wives (members of the Apostolic United Brethren) won a legal victory when a federal district court held that Utah’s law against bigamy was unconstitutional. An appellate court overturned the decision in 2016. The Browns further appealed to the Supreme Court of the United States, which, without giving any reason, declined to hear the appeal, thereby leaving the decision of the appellate court in place. See Brown v. Buhman, 947 F.Supp. 2d 1170 (D. Utah 2013).
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(2) No certificate issued to persons of same sex in a marriage or civil union shall be valid in Nigeria.51

In this context, it is important to distinguish between the solemnization of marriage in a church and in a mosque. A marriage celebrated in a mosque, having satisfied all the requirements of Islamic law, is regarded as customary law marriage in Nigeria. There is no provision under the Marriage Act for the celebration of a statutory marriage in a mosque. Islamic law marriage is essentially polygamous and, as such, runs counter to an Act marriage, which must always be monogamous. On the other hand, the Marriage Act provides for the celebration of a marriage in either a marriage registry or a licensed place of worship.52 In the case of the latter, the marriage must be celebrated by a recognized minister of the church, denomination or body to which such place of worship belongs, and according to the rites or usages of marriage observed in such church, denomination or body.53

Nevertheless, the mere solemnization of a purported marriage in a church does not ipso facto give it any legal validity unless all the prerequisites prescribed by the Marriage Act are duly satisfied. The case of Obiekwe v. Obiekwe nicely illustrates this point. In that case, the court was asked to determine the validity of a marriage which was solemnized in the Roman Catholic Church in accordance with the canons of the church but without due compliance with the provisions of the Marriage Act.54 The judge, after taking a swipe at the officiating priest, had this to say:

51. Same Sex Marriage (Prohibition) Act 2013, § 2 (Nigeria).
52. See Marriage Act, § 6, 21, 27 (Nigeria). Section 6 of the Marriage Act authorizes the Governor of a State to license any place of public worship to be a place for the celebration of marriages. For obvious reasons, such a “place of public worship” must be a church, and not a mosque or a shrine for traditional worshippers.
53. Id. § 21.
A good deal has been said about ‘church marriage’ or ‘marriage under Roman Catholic Law’. So far as the law of Nigeria is concerned, there is only one form of monogamous marriage, and that is marriage under the Ordinance.\(^55\) Legally a marriage in a church (or any denomination) is either a marriage under the Ordinance or it is nothing. In this case, if the parties had not been validly married under the Ordinance, then either they are married under native law and custom or they are not married at all. In either case the ceremony in church would have made not a scrap of difference to their legal status.\(^56\)

By and large, there seems to be no room for the solemnization of same sex marriage in a church, mosque or any other place of worship in Nigeria. This is because none of the known religious groups in Nigeria allow same sex marriage. Even if any of them were to allow it, the mere solemnization of such marriage in accordance with the rites of the religious body, but in contravention of extant statutes, would be of no legal consequence.

It is interesting to note that, by the wording of section 2(1) of the Act, the prohibition is expressed to be against the solemnization of a same sex marriage or civil union only “in a church, mosque or any other place of worship,” thereby leaving out marriage registry.\(^57\) Clearly, the omission of marriage registry from the statutory provision must have been occasioned by drafting inadvertence, for there seems no policy consideration for allowing a same sex marriage entered into in a marriage reg-

\(^{55}\) Referring to the Marriage Act, which was originally titled the Marriage Ordinance when it was enacted by the colonial administration in 1914.

\(^{56}\) Okeke, supra note 54, at 199.

\(^{57}\) Same Sex Marriage (Prohibition) Act 2013, § 2(1) (Nigeria).
istry. Be that as it may, the provision of section 2(2) is not forum specific, thus making room for the invalidation of a marriage certificate issued by a marriage registry to parties to a same-sex marriage or civil union. Similarly, section 5(3), which punishes any person who administers, witnesses, abets or aids the solemnization of a same-sex marriage or civil union, makes no exception for a marriage registrar.58

D. Recognized Marriage in Nigeria

“Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.”59 This provision has now filled the gap in the Marriage Act which, as earlier observed, omitted to state categorically that a marriage can only be entered into between persons of opposite sex. Arguably, the provision is capable of being construed to also mean that only a monogamous marriage shall be recognized as valid in Nigeria. However, applying the purposive and mischief rules of interpretation and also calling in aid the long title of the Act,60 it seems clear that the purport of the provision is simply to put it beyond argument that same sex marriage is not recognized as valid in Nigeria. Indeed, by defining marriage as “a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law”,61 the Act has made two profoundly significant statements: 1) that only a mixed sex marriage is allowed, and 2) that all the existing systems of marriage in Nigeria (including polygamous ones) are still preserved. At any rate, even a polygamous marriage is ordi-

58. Same Sex Marriage (Prohibition) Act 2013, § 5(3) (Nigeria).
59. Same Sex Marriage (Prohibition) Act 2013, § 3 (Nigeria).
60. It reads: “An Act to prohibit a marriage contract or civil union entered into between persons of same sex, solemnization of same; and for related matters.” Same Sex Marriage (Prohibition) Act 2013, (Nigeria).
61. Id. § 7.
narily contracted between a man and each of his female partners one after the other. Thus, it has been postulated that:

Polygamy in reality is not so much a form of marriage fundamentally distinct from monogamy as rather a multiple monogamy. It is always in fact the repetition of a marriage contract entered into individually with each wife, establishing an individual relationship between the man and each of his consorts.62

E. Prohibition of Registration of Homosexual Clubs and Public Show of Homosexuality

1. The registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.63

The registration of clubs, societies and organizations as corporate bodies is the statutory responsibility of the Corporate Affairs Commission by virtue of the powers conferred on it by the Companies and Allied Matters Act.64 For an association to be registered, its aims and objects “must be for the advancement of any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, and must be lawful”.65 Even though a gay club may arguably be regarded as a social club, its aims and objects are unarguably unlawful by reason of the long-standing criminalization of homosexuality in

62. ENCYCLOPEDIA BRITANNICA 949 (Encyclopedia Britannica, Inc., 15th ed. 2003). Similarly, Dr. Obi argues that “a polygamist is a man who has entered into two or more separate marriage contracts concurrently with as many women, not one who has entered one marriage contract with two or more women considered together as a legal entity. In other words, there are as many marriages co-existing in a polygamous household as there are wives.” OBI, supra note 32, at 155.
64. See generally Companies and Allied Matters Act, Cap. (C20), Laws of the Federation of Nigeria 2004.
65. Id. § 591(1)(b).
Nigeria. Thus, in this respect, the new legislation can be said to be a surplusage, for, prior to its emergence, it was nigh impossible to register a gay club the chief object of which is manifestly unlawful. Even under international law, a well recognized exception to freedom of association is that such association must be for lawful objectives.

2. The public show of same sex amorous relationship directly or indirectly is prohibited.66

The purport of the Act is not that homosexuality is banned by it; that has already been done by pre-existing criminal legislation. Rather, the aim is to arrest the spread of what is traditionally viewed by Nigerians as a deviant behavior, and its cancerous effect on the society. It is for this reason that any public display of homosexuality by way of celebration of same sex marriage or civil union, open association, procession or meeting of homosexuals, or public show of same sex amorous relationship is outlawed. In this matter, the choice is between an individual’s acclaimed right to lead a bohemian life and the society’s right to protect its members as a whole from an insidious assault on its moral foundations.

F. Offences and Penalties

(1) A person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years imprisonment.

(2) A person who registers, operates or participates in gay clubs, societies and organisation, or directly or indirectly makes public show of same sex amorous relation-

ship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.

(3) A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.67

The criminalization of these acts and imposition of severe penalties for their commission can only be seen as a clear demonstration of the degree of public disgust at such deviant behaviors in this jurisdiction and the state’s resolve to curb homosexuality in all its ramifications. Hitherto, the criminal laws of this country had prohibited sodomy and indecent practices between males and tagged them (together with bestiality) as “unnatural offences”.68 It seems, however, that lesbianism is not contemplated within the scope of those extant criminal statutes, since anal penetration of the male sexual organ is essential to the offence of sodomy. Be that as it may, the web of criminalization has now been extended so as to capture not only lesbians and gays, but also any person who aids, abets, counsels, or procures them to publicly celebrate or display their illicit activities by way of solemnization or witnessing of their unions, registration or operation of their associations, holding of public processions or meetings, or otherwise making public show of their amorous relationships.

67. Id. § 5.
68. See Criminal Code, supra note 11, §§ 214, 217; Penal Code, supra note 12, § 284.
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It must be acknowledged that, quite apart from the denial of official registration, the operation of a secret gay club or any other secret association has always been illegal, for section 38(4) of the Constitution of the Federal Republic of Nigeria 1999 denies a person the right to “form, take part in the activity or be a member of a secret society.” It is equally instructive to note that, even before the recent legislation, a civil or religious official who conducted the celebration of a marriage between two male partners could be charged with conspiracy to commit or aiding, abetting, counselling, or procuring the commission of unnatural offences under the relevant provisions of the Criminal Code or Penal Code.

III. THE HUMAN RIGHTS ARGUMENT BY THOSE KICKING AGAINST THE LEGISLATION

Gay activists and apologists for same sex marriage have been striving to redefine the concepts of human rights and marriage. They argue that the prohibition of marriage between lesbians or gays amounts to a deprivation of their fundamental rights to freedom of association and non-discrimination on the basis of their sexual orientation. However, such argument misses the point that, right from the origin of mankind, there has always been a limit to every freedom. Unrestrained freedom is inimical to the very existence of any organized society. For this reason, international law allows states to impose restrictions on the fundamental rights and freedoms, provided that such restrictions are in accordance with the law and are necessary in a democratic society to protect national security, public safety

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69. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1979), §35(4).

70. For instance, the Holy Bible tells the story of how God put man in the garden of Eden and commanded him, “[y]ou may freely eat of every tree of the garden; but of the tree of the knowledge of good and evil you shall not eat.” Genesis 2:15–17. Arguably, this is the fons et origo of the declaration of the right to life, at least from the Christian perspective, for no man can survive without food.
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and order, public health and morals, and the rights and freedoms of others. Likewise, even though freedom of contract is a universally recognized principle, under the common law, certain contracts are struck down on the grounds that they are immoral, or otherwise contrary to public policy.

Basically, fundamental human rights are inherent rights that enure to the benefit of all mankind right from creation. They are rights which human beings are entitled to enjoy simply by virtue of having been created as humans, as distinct from the lower animals. The question is: were humans (or even other animals) designed to practice same-sex copulation? The answer, of course, is in the negative. From the biblical account of creation, “God created man in his own image . . .; male and female he created them. And God blessed them, and God said to them, ‘Be fruitful and multiply, and fill the earth and subdue it . . .’”

More emphatically, God commanded that a man “shall not lie with a male as with a woman; it is an abomination.” The Holy Bible gives a sordid account of how God annihilated the inhabitants of Sodom and Gomorrah because of their sin of homosexuality. What’s more, the sexual organs of both sexes have been designed by the omniscient and omnipotent creator in such a fashion that they fittingly complement each other. Thus, “homosexuality represents a tendency to want to use

72. An example of this is contracts that promote sexual immorality or prostitution. See Girardy v. Richardson (1793) 1 Esp. 13; Pearce v. Brooks (1866) 1 LR Exch. 213 (UK); Upfill v. Wright [1911] 1 KB 506 (UK). See also the English case of Shaw v. D.P.P. [1962] AC 220 (UK), for the offence of conspiracy to corrupt public morals.
73. See, e.g., Hermann v. Charlesworth [1905] 2 KB 123 (UK) (marriage brokerage contracts); Re Fentem [1950] 2 All ER 1073 (UK) (contracts in restraint of marriage); Spiers v. Hunt [1908] 1 KB 720 (UK); Shaw v. Shaw [1954] 2 QB 429 (UK); Alake v. Oderinlo (unreported), Suit No. 23A/74, High Court of Western State, Agbaje, J. (as he then was), judgment delivered on Jan. 24, 1975 (contract to marry entered into by a married person).
75. Leviticus 18:22. See also Romans 1:26–27. Parallel passages in the Qur’an are articulated by Hangeior, supra note 33, at 105–06.
76. See Genesis 19. It seems that the word “sodomy,” which means the sexual act of putting the penis into a man’s or woman’s anus, is derived from the biblical city Sodom.
body parts for some purpose other than that for which they were designed.”77 As homosexuality is unquestionably a perversion of the natural order of sexual activity, from whence do homosexuals derive the human rights that are being bandied about? Indeed, when it comes to sexual activity, laissez-faire portends grave dangers to public morality, for people would be free to do it wherever they like, whenever they like, however they like, and with whomever they like. Prostitutes, for instance, would have the latitude to practice their trade openly without any hindrance.

By analogy, it is difficult to draw a line between homosexuality and other variants of paraphilia such as bestiality (zoophilia),78 incest,79 paedophilia, necrophilia, and so on. Should the entire world community endorse such aberrant sexual behaviors under the guise of human rights, as they are either allowed or not explicitly prohibited in some jurisdictions? Should we be dragooned into legalizing marriages between man and beast,80 parent and child, brother and sister, adult and under-aged child,81 or living human being and

77. Onuche, supra note 8, at 97.
78. Whereas bestiality has been criminalized in Nigeria since 1916, it has been legalized in several countries, including at least four states and the District of Columbia in the United States. A survey of legality of bestiality by country or territory is available at Legality of bestiality by country or territory, WIKIPEDIA, https://en.wikipedia.org/wiki/Legality_of_bestiality_by_country_or_territory (last visited Aug. 28, 2017).
79. Incest is a criminal offence punishable with a minimum of five years imprisonment without option of fine under the Violence Against Persons (Prohibition) Act 2015, § 25 (Nigeria).
80. It has been reported that on July 9, 2014 in San Pedro Huamelula, Mexico, Mayor Joel Vasquez Rojas, a Mexican man, wedded a female crocodile which was dressed in a wedding gown and decorated with flowers. Details are available at Andy Wells, Snappy Wedding! Man Marries Crocodile in Lavish Ceremony, DAILY STAR (July 11, 2014, https://www.dailystar.co.uk/news/latest-news/388403/Mayor-Joel-Vasquez-Rojas-marries-crocodile). For more reports, visit Human-animal Marriage, WIKIPEDIA, https://en.wikipedia.org/wiki/Human-animal_marriage (last visited Aug. 28, 2017).
81. See TAHIRIH JUSTICE CTR., FALLING THROUGH THE CRACKS: HOW LAWS ALLOW CHILD MARRIAGE TO HAPPEN IN TODAY’S AMERICA (2017). This report reveals that between 2000 and 2015, over 200,000 children, mostly girls, were married by adults in the U.S. The report shows that at least twenty-five states have no statutory minimum age of marriage; a child of any age can get married to an adult with certain consents. Id. In South Africa, it has been reported that an eight-year-old school boy, Sanele Masilela, married a 61-year-old woman, Helen Shabangu, in March 2013. See Sam Webb, Child Brides: Eight-year-old Boy
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corpse? Surely, these other deviants are entitled to put the same human rights spin on their amorous relationships and accordingly insist on their fundamental rights to marry their “lovebirds.”

Perhaps, the most devastating effect of same-sex marriage is that it is capable of sweeping away the most important and sacred of all human rights—the right to life and the sustenance of the family as the natural unit and basis of society. For, if all humans go the way of homosexuals, sure enough, Homo sapiens will soon become an extinct species. And, before they finally wither away, the last vestiges of humanity would be reduced to non-reproductive, solitary, or, at best, twosome family life. Meanwhile, adoption by same-sex partners is not allowed in Nigeria,82 hence, at present, there is no legitimate opportunity to “be fruitful and multiply” in a same-sex relationship.83

Since self-preservation is the most natural instinct of all living beings, it is in our enlightened self-interest to save humankind from the frightening threat of extinction. For this reason, the framers of the Nigerian constitution deemed it fit to state, as part of the fundamental objectives and directive principles of state policy, that the State shall direct its policy towards ensur-

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83. Even assisted conception and surrogacy are still largely unpractised in Nigeria, and there is as yet no legal endorsement of those alternative means of reproduction here.
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ing that “the evolution and promotion of family life is encour-
aged.”84

One important observation is that the Constitution of the Federal Republic of Nigeria 1999 (which guarantees the right to freedom from discrimination in section 42) makes no provision for freedom from discrimination on the basis of sexual orientation.85 It explicitly guarantees freedom from discrimination based on one’s place of origin, ethnicity, circumstances of birth, sex (i.e., gender identity), religion, or political orientation.86 This constitutional provision corresponds with the provisions of the United Nations Universal Declaration of Human Rights87 and the African Charter of Human and Peoples’ Rights.88 This writer is not oblivious of the United Nations Human Rights Council Resolution on Human Rights, Sexual Orientation and Gender Identity89 and the African Commission on Human and Peoples’ Rights Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.90 However, the fundamental objective of these resolutions is strictly “to end all acts of violence and abuse, whether committed by state or non-state actors, including those targeting persons on the basis of their

84. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), § 17(3)(h).
85. See id. § 42. This constitutional provision is different from that of South Africa, for instance, which has entrenched freedom from discrimination based on sexual orientation as a human right in section 9 of its 1996 constitution, being the first country in the world to do so.
86. Id.
90. 275: Resolution on Protection against Violence and other Human Rights Violations against persons on the basis of their real or imputed Sexual Orientation or Gender Identity, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, www.achpr.org/sessions/55th/res olutions/275/ (last visited Apr. 8, 2018).

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imputed or real sexual orientation or gender identities . . . . “91
Of course, acts of violence and abuse92 against any person, regard-
less of their sexual orientation, are generally forbidden under both international and municipal laws.93 Surely, no sec-
tion of the Act under review can be said to violate or engender the violation of those resolutions. Therefore, it seems the claim that the Act constitutes an infringement of the fundamental rights of persons with homosexual orientation has no leg to stand on.

IV. SUMMARY AND CONCLUSION

This paper presents an intellectual analysis of the provi-
sions of the Same Sex Marriage (Prohibition) Act 2013 and the interplay between them, the stipulations of the extant legisla-
tion, and the Islamic and native laws operative in Nigeria against the backdrop of rising gay activism—especially in the Western world. This paper seeks to show that the Act is by no means revolutionary, as it merely draws upon the pre-existing Nigerian laws and religious, social, and cultural norms and values. Indeed, while its passage was being debated, Professor Nwogugu—the doyen of Nigerian family lawyers—had opined that the bill was unnecessary. “What was required,” according to him, “is an amendment of the Marriage Act to stipulate

91. Id.
92. The ACHPR Res. 275 notes that such acts of violence and abuse include ‘corrective’ rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail. There has been no report that these acts are committed against homosexuals in Nigeria whether before or after the enactment of the Act. By contrast, it has been reported that some of these acts were being flagrantly perpetrated in South Africa against homosexuals despite the decriminalization of homosexuality and legalization of same-sex marriage there. See G. Joubert, Culture and Tradition in Family Law: An Essay into the Morality of Human Rights Developments in South African Family Law (paper presented at the 15th World Conference of the International Society of Family Law in Recife, Brazil on Aug. 8, 2014).
93. In addition to the extant Criminal Code and Penal Code, which have clear provisions criminalizing acts of violence and abuse, Nigeria recently enacted Violence Against Persons (Prohibition) Act 2015— a clear testament to our society’s deep-seated revulsion against these acts. See Violence Against Persons (Prohibition) Act 2015 (Nigeria).
clearly that marriage is a union between a man and a woman.” 94 This viewpoint may be supported on the basis that the legislation, even from its title, misleadingly suggests that same-sex marriage had hitherto been legitimate in Nigeria. The present writer, nevertheless, sees the new legislation as very significant in not only criminalizing same-sex marriage or civil unions for the first time in Nigeria, but also prohibiting the public display of same-sex amorous relationships as well as other related matters, all of which, as earlier observed, were arguably not captured by prior legislation.

Since a law ought to reflect a combination of the political, social, cultural, religious, and moral matrixes of the society in which it operates—a test which the recent legislation clearly satisfies—it is submitted that the deprecation of the legislation by Western detractors under the guise of human rights advocacy is utterly baseless. As a distinguished English judge, writing extra-judicially, once remarked, “if the law becomes too far removed from generally accepted standards, it becomes discredited.” 95 An apt illustration is that since 1916 when bigamy was criminalized by the colonial administration in Nigeria, there has been only one recorded conviction for the offence, 96 even though the law is frequently violated with impunity by both the patricians and plebeians. Again, it is important to underscore that marriage creates status which enjoys universal recognition and affects not only the parties to it, but also the society to which they belong. 97 A fortiori, in Nigeria and other African societies where marriage is, to all intents and purposes, an alliance between two extended families rather than just two

97. See Sottomayer v. De Barros (1879) 5 PD 94 (UK); Fashender v. A-G [1922] 2 Ch 850 at 858 (UK).
individuals—indeed a community affair—conformity with the standards prescribed by the society is a virtual *sine qua non*.

The moral justification for the recent enactment, therefore, is to be evaluated vis-à-vis the basic notion that “what constitutes sexual immorality will to some extent differ from society to society and from generation to generation.”98 Throughout the ages up to the present day, Nigerian society has always been homophobic, hence the reprobation of same-sex marriage. This conclusion finds support in a research work published by a group of social scientists in the wake of the legislation under review. In their words, “[t]he findings from this research show that same sex marriage is not acceptable in Nigeria given the religious, cultural and moral context of the citizens in the country.”99 Even if the culture changes in the next generation, it can only evolve gradually from within, not as a result of blackmail or coercion from outside Nigerian society. Indeed, nothing can be sounder than Nicholas Bala’s proposition:

It seems unlikely that a society can go quickly from having laws that criminalize homosexual acts directly to a society that recognizes same-sex marriage; there need to be some intermediate stages to allow time for social attitudes to change in response to new legal realities and to more socially visible same-sex relationships.100

Sure enough, if the authorities in Nigeria were to succumb to Western pressure and legalize same-sex marriage under the prevailing circumstances, such an action would at-

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tract serious public condemnation, if not violent protests. We cannot afford such a risk, especially now that our country is under siege by an Islamist terrorist organization known as Boko Haram whose proclaimed primary mission is to de-Westernize and Islamize Nigeria. The Nigerian authorities should, therefore, be commended for being bold enough to resist cultural imperialism, which, to all intents and purposes, the promptings from the Western powers portend.