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An overview of the law on same-sex- marriage in Nigeria

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Abstract

This article provides an in-depth analysis of same-sex marriage laws in Nigeria. It scrutinizes the country's legal framework, including definitions and systems of marriage, and the status of same-sex unions. The study explores traditional and modern views on marriage, differentiating between monogamous and polygamous unions, and the requirements under customary law and the Marriage Act. It also delves into societal, religious, and legal perspectives on same-sex marriages, highlighting the criminalization of homosexuality and the Same-Sex (Prohibition) Act. The article employs a doctrinal approach to examine legal principles, societal norms, and legislative actions, offering a nuanced understanding of Nigeria's evolving marriage laws. This comprehensive overview illuminates the complexities of regulating same.

Keywords: Same - sex marriage, Nigeria, customary law marriages, polygamy, bride price, marriage

Introduction

The article delves into the legal landscape surrounding same-sex marriage in Nigeria, providing a comprehensive overview of the definitions of marriage, the types of marriages recognized in the country, and the status of same-sex marriages within the legal framework. It explores the traditional and contemporary perspectives on marriage, the distinctions between monogamous and polygamous marriages, and the marriage requirements under customary law and the Marriage Act. Additionally, the article delves into the cultural, religious, and legal perspectives on same-sex marriages in Nigeria, including the criminalization of homosexuality and the enactment of the Same-Sex (Prohibition) Act. Through an in-depth analysis of legal principles, societal norms, and legislative actions, the article offers a nuanced understanding of Nigeria's complex and evolving landscape of marriage laws.

Definition of Marriage

The traditional concept of marriage is between a man and a woman. In fact, marriage was defined by Lord Penzance as "the voluntary union for life of one man and one woman to the exclusion of all others ^[1]." The Interpretation Act ^[2] defines a monogamous marriage as a marriage which is recognized by the law of the place where it is contracted, as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage. This strict definition of Marriage has been challenged with the current recognition and Legal acceptance of Homosexual Marriages in many countries like England, Canada, South Africa, etc. thus disturbing the presumption that marriages are always contracted between a man and a woman ^[3]. Thus, marriage is currently defined as: The Legal union of a couple as spouses ^[4]. The Merriam-Webster Dictionary ^[5] gives both the Traditional and Contemporary definitions of Marriage when it defines Marriage as: " the state of being united to a person as a spouse in a legal, consensual, and contractual relationship recognized and sanctioned by and dissolvable only by Law: The ceremony containing certain legal formalities by which a marriage relationship is created."

Types of Marriages in Nigeria

Unlike most European Countries, two marriage systems are recognized in Nigeria - the Monogamous and the Polygamous systems. These two are different in circumstance and Characteristics ^[5]. Three forms of marriage, generally speaking, are legally recognized in Nigeria, which are marriages: a).

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- a) Under Customary Law.
- b) Under Islamic Law.
- c) Under Statute.

However, Justice Palmer decided in *Obiekwe v Obiekwe* ^[6] that. "In this instance, if the parties had not been legally married according to the Ordinance, then either they are married according to native law or custom or they are not married at all."

Flowing from this pronouncement and the writing of the authors of most books on marriage, it can be settled that in Nigeria, two methods of marriage are recognized, which are.

1. Marriages performed according to Native law and customs (including marriage under Islamic law).
2. Marriages entered into according to the Marriage Act.
3. Islamic marriages are categorized as marriages done under customary law based on their polygamous nature.

In Nigeria, Customary Law marriages are those conducted under the various types of Nigerian customary laws. Here there is the union between a man and a woman or women as husband and wife, or wives, and an alliance is created between the man's family and the woman's or women's family. Marriages under customary law are polygamous by nature. Here a man can marry more than one wife if he wishes.

It is important to note that despite customary law permitting polygamy, marriage remains a union of "a man and woman," not, as is often said, of a man and one or more women. To think of marriage as of one man and one or more women is to confuse its basic nature with one of its characteristic incidents, a negative one in this instance. For a polygamist is a man who has entered into multiple separate marriage contracts concurrently with as many women, not one who has entered into one marriage contract with multiple women considered together as a legal entity. There are therefore as many marriages co-existing in a polygamous household as there are wives. To postulate the converse of this would be to imply that the various contracts are simultaneous in their inception and interdependent for their existence so that they either stand or fall together ^[7].

Marriage under customary law is beyond a contract existing between two persons, being more in essence an association of two families ^[8]. Commenting on the alliance created by a customary law marriage, Rattray stated that, perhaps, it is almost a platitude to say that marriage in Ashanti is not so much an agreement between the two groups of individuals whom they represent ^[9].

According to African customs, marriage unifies two families, not just two people. So it is crucial to have a ceremony of engagement, which is frequently a ceremony where dowry (Bride price) is also paid. These celebrations bring the entire family together and allow both sides to be acquainted with one another ^[10].

The Ghanaian High Court, in describing Marriage done under Customary Law, said in *Yaotey v Quay* ^[11] that one peculiar characteristic of this form of marriage that differentiates it from European marriages and those in other places is not just the subsistence of a uniting of this man and this woman, but a uniting of the man's family and the woman's family.

The essential requirements of a legitimate customary law marriage in Nigeria are.

The bride's consent and the family's consent

In *Osamwonyi v Osamwonyi*, ^[12] The Supreme Court maintained the lower court's ruling that a bride-to-be's permission must be secured before legally consummating a marital union under *Benin* native law and custom. As this was not established, no ongoing union existed when the respondent and petitioner got married.

Additionally required-and in some situations absolutely necessary-for a customary law marriage is parental consent. As customary law views weddings as a joining of both families, the parents' consent becomes extremely important. Another crucial prerequisite for a valid customary law marriage is for the husband to pay the bride price personally or on his behalf and the bride's family's acceptance of it. This remains an extensive and important component of most African customary weddings. Bride money was a guarantee of the woman's premarital virginity and sexual faithfulness. The groom also by this shows that he will be a capable breadwinner, and able to keep the bride ^[13].

It may take the shape of money, natural produce, or property of any type ^[14]. The form of the bride price in a place is as prescribed by its customary law. It is predominantly money payment in these modern times but no uniform rules in Nigeria prescribes the quantum. It differs from community to community.

In Levirate Marriage, otherwise called "Widow Inheritance" according to customary law, a widow may be married off to her late husband's brother, another male relative, or the son he fathered by another woman. As was already explained, "widow inheritance" is another name for this. The widow and the departed husband's marriage must be dissolved among the Igbos via an outward ceremony, and a second ceremony is necessary to unite her with her new husband. The widow remains legally "married" to the dead husband if the breaking-up ceremony is not conducted. In the past, widows' inheritances contributed to the family's maintenance.

According to Ames J. in *The Estate of Agboruja – Deceased* ^[15], This custom is founded on what may be treated as the economy of one kind of African social system, which value family as a whole. Another special kind of Customary Law Marriage is wife procurement or woman-to-woman marriage. Here a barren woman marries another woman and then gives her to her own husband. This marriage type is aimed at vitiating the woman's barrenness in the household. The required conditions for a valid customary law marriage are met. Children by this "wife" are treated as legitimate offspring of the wife who was barren and her husband. This peculiar marriage was expatiated in *JC. Egwu v Meribe*, ^[16] where the court declared that an infertile woman, can marry for her husband, or another woman and any children they have together will be treated as the barren woman's children as regards matters of inheritance and estate distribution. This arrangement was compliant with local customs and native law.

The court thought it essential to state that the term "married" in that setting is only colloquial. She rather procured [for her husband a wife] because woman-to-woman marriage violates natural justice as a condition for marriage to be legally binding is that it be between a man and a woman, producing the state of husband and wife. On appeal, the Supreme Court upheld this court's decision ^[17].

An alternative to Customary Law marriage is marriage under the Marriage Act. According to the Act's provisions,

marriage is monogamous by nature, unlike customary law marriage which is polygamous by nature. Here lies the major distinction between these two marriage systems.

By the Marriage Act, a Nigerian citizen is only eligible to marry if the following requirements are met.

1. The parties must have a single status when they want to contract the marriage. See Section 33 (1) of the Marriage Act ^[18].
2. The couple must possess the capacity to marry. Section 21 of the Child's Rights Act 2003 ^[19], states that persons below 18 years are incapable of entering into a legally accepted marriage. Section 277, (the Interpretation Section), defines "child" to mean, a person below eighteen years.
3. The third essential of a legally binding marriage contract under the Act is that the parties shall not fall within the prohibited degree of consanguinity and affinity. See (Sections 3(1) (b), 3(2), Sec 3(3), 4 and the 1st schedule of the Matrimonial Cause Act (MCA). Marriage is forbidden if the woman is or has ever been the man's ancestress, descendant, sister, mother's sister, father's daughter, sister's daughter, brother's daughter, or sister's daughter for consanguinity. Marriage of a man and his wife's mother, grandmother, daughter, son's daughter, father, grandfather, son's wife, or daughter's son's wife is forbidden for affinity reasons.

The party's gender must be opposite

The respondent in *Corbett v Corbett* ^[20] being male, underwent a sex-changing operation and had since lived as a woman. Subsequently in September 1963 "she" married the petitioner. The petitioner filed an action for nullification of the marriage due to non-consummation of marriage in December of that same year, or to declare the marriage nullified because both parties are of the same gender. Ormrod J rejected the idea that a surgical procedure could change a person's sex within the circumstances of marriage. Ashley, legally was not a woman for marriage intention. The heterosexual union of a male and a female constituted the foundation of matrimony so that no artificially made body could meet these prerequisites. Psychological sex (gender) was judged immaterial if the chromosomes, gonads, and external genitalia were in alignment at birth.

Consent

A cardinal principle of Nigerian Law is that to undertake a statutory marriage, each party thereto must have freely consented to the union else the marriage is invalid. (Section 18 of the Marriage Act and Sec 3(1) (d) of the MCA). As the relationship under statutory Marriage is essentially one of a contract it is expected that parties be *ad idem* when entering into it.

Thus, in *Mbonu v. Mbonu*, ^[21] the petitioner asserted that she did not ordinarily give her consent to the marriage but did because the respondent told her that he would reveal her pregnancy to her employers (a religious sect) who would consequently have terminated her teaching appointment. The Judge, after going through all the evidence in the case refused to accept the petitioner's evidence.

Sanity

Soundness of mind is required for parties to a statutory marriage. By Section 3(1) (d) (iii) of the Matrimonial Causes Act 1970, if a party to the marriage is insane and

therefore mentally incapable of understanding the attributes of the contract of marriage, then it is void *ab initio*.

Same-Sex Marriages

Same-sex marriage is defined as: "the ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two men or two women ^[22]. Marriage between two men or two women who are of the same sex is known as same-sex marriage ^[23]. "Same-sex marriage" refers to unions between individuals who have the same naturally occurring sex or gender status ^[24]."

Homosexuality develops when sexual attraction is focused on people of similar sex. Those who support same-sex marriage argue that the freedom of association that is provided constitutionally and by other international human rights agreements also includes the right to relate, cohabit, and be married. They contend that because homosexuality is genetically built in some people's DNA, they should not face prejudice.

In Islam, (A religion practiced by some Nigerians), the concept of marriage (*nikah*) between male and female is consistent throughout the Quran. Other forms of sexual relationships, including adultery, pre-marital, and same-sex partnerships, are forbidden by Allah's kindness and the Divine wisdom in creation ^[25]. When Jesus was asked about marriage, he spoke of marriage being between a man and his wife. He referred to the account by Moses of the first marriage in Eden saying that "for this cause shall a man leave father and mother and shall cleave to his wife: and they twain shall be one flesh ^[26]."

African Traditional religion has no place for homosexuality. The idea of homosexuality nags at Africans' consciences. The moral importance placed on having children and the focus placed on heterosexual relationships as an avenue of attaining this in African communities plays a significant role in the campaign against homosexuality. Perpetuating biological legacy ensures the progression of society's history. Therefore, it is regarded as a fundamentally crucial benefit for the community to raise children and contribute to a lineage. In this approach, heterosexual sex becomes a moral obligation for biological reproduction ^[27].

Status of Same-Sex Marriage in Nigeria

Homosexuality was already unlawful and criminalized under the criminal and penal codes in Nigeria. Sections 214, 215, and 217 of the Criminal Code already prohibit same-sex sexual relations. Section 214 of the Criminal Code Act ^[28] states that anyone who (1) engages in sexual relations with someone else in an unnatural order, (2) engages in carnal contact with an animal, or (3) enables a male to engage in carnal contact with him or her in contravention of nature's order commit a felony and faces a fourteen-year jail sentence.

Section 215 of the Criminal Code Act ^[29] States that anyone who attempts to commit any one of the crimes listed in the last section before this one commits a felony and faces a seven-year jail sentence. Without a warrant, the offender cannot be arrested.

According to Section 217 of the Criminal Code Act, any male who engages in any grossly indecent act with another man, publicly or privately, or encourages another male to engage in such an act with him, or attempts to entice another male to engage in such an act with himself or with another male, whether in public or private, commits a felony and

liable to a three-year prison sentence. Without a warrant, the perpetrator cannot be arrested. On 7th January 2014, the former president of Nigeria, Dr. Goodluck Jonathan assented to the Same-Sex (Prohibition) Act of Nigeria 2013. The Act prohibits a marriage or Civil Union between persons of the same sex ^[30]. Also, a Same-Sex Marriage or Civil Union entered outside Nigeria is void in Nigeria and unenforceable ^[31]. The Act prohibits the performance of a same-sex marriage in a church, mosque or any place of worship in Nigeria ^[32]. No Same – Sex Certificate of Marriage or Civil Union is valid in Nigeria ^[33]. Under the Act, a legitimate marriage in Nigeria must be one contracted between a man and a woman ^[34]. The Act forbids (Gay clubs, groups, and organizations from registering, sustaining, procession, and holding meetings ^[35]. Under the law, it is prohibited for members of similar sex to directly or indirectly display their romantic relationships in public ^[36]. A 14-year prison term awaits anyone who enters a same-sex marriage contract or civil union under the law ^[37]. A 10-year jail term awaits anyone who has anything to do with a Gay Club or who directly or indirectly displays same-sex amorous relationships in Nigeria ^[38]. Under the Act, anybody found guilty of supporting a Gay club or society, procession, or meeting or administering, witnessing, aiding, or abetting the solemnization of a Same-Sex Marriage or Civil Union faces a 10-year jail sentence ^[39]. The High Courts of the States and of the Federal Capital Territory are empowered with Jurisdiction over matters under the Act ^[40]. As was stated above, African Native law and custom abhor homosexuality. But there is a custom prevalent in some parts of Nigeria where a woman who cannot bear children can “marry” a prolific woman to bear kids for her. Under this arrangement, a man comes to sleep with the prolific woman with the understanding that the kids that result from this arrangement belong to the woman who married the prolific woman. In *Odigie v. Aika* ^[41], Hon. Justice Ohiwerei held that the Ishan custom, whereby a childless woman can marry another woman to bear issues for her is regarded as being repugnant to natural justice, equity, and good conscience and therefore unenforceable. I am aware that these “marriages” are still de facto contracted till date. It is submitted that this is a same-sex marriage prohibited under the Same-Sex Marriage (Prohibition) Act 2013. This is more so as section 7 of the Act expressly mentions customary marriages as being within its contemplation.

Conclusion

In conclusion, the legal landscape surrounding same-sex marriage in Nigeria is complex and multifaceted, reflecting a blend of traditional values, cultural practices, religious beliefs, and legislative actions. The article has provided a detailed examination of the definitions of marriage, the types of marriages recognized in Nigeria, and the status of same-sex marriages within the country's legal framework. By exploring the nuances of monogamous and polygamous marriages, the requirements for marriages under customary law and the Marriage Act, and the implications of the Same-Sex (Prohibition) Act, this study has offered a comprehensive insight into the evolving nature of marriage laws in Nigeria.

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