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A Critical Appraisal of Lord Penzance's Definition of Marriage in *Hyde v Hyde*: Perspectives from Human Rights and Freedom in the 21st Century

C.J.S. Azoro *

Abstract

The family as seminarium rei publicae is founded on the concept of marriage as a social institution. Against this backdrop, Lord Penzance, as far back as 1886 in the celebrated case of Hyde v Hyde, propounded what at common law may till date be referred to as the classical definition of marriage, to the effect that it is "the voluntary union for life of one man and one woman, to the exclusion of all others". The common law as part of Nigeria's colonial heritage paved way for the statutorization of the essence of this definition of marriage in section 18 of the Interpretation Act and section 1 of the Criminal Code Act. However, the customary practices of the various ethnic groups in Nigeria as well as the realities of modern existence in the 21st century continues to question the validity and continuous acceptance of Lord Penzance's definition. This work therefore makes a critical analysis of Lord Penzance's traditional definition of marriage in Hyde v Hyde from the perspective of its implications on human rights and freedom in the 21st century. Though particular emphasis was laid on the Nigerian situation, developments in other jurisdictions were taken into consideration. This work, inter alia, found that unless a deliberate attempt is made to equate human rights and freedom with absolute liberty (with its concomitant ills to social relations and human existence), the continued adoption of Lord Penzance's definition of marriage has no negative implications on human rights and freedom, except for its tendency to override the customary practices of the various ethnic groups in Nigeria.

Keywords: Marriage, Hyde v Hyde, Human Rights, Transsexual, Same Sex.

* *LL.B (Hons), B.L, PCHRM, PCPM*; Associate at IUC Global Chambers *(Legal Practitioners)*, Awka, Anambra State, Nigeria.

Introduction

Marriage, as an institution, is considered as being the foundation on which the family, as the fundamental unit of any society, is built.[1] It is generally recognized and accepted all over the world.[2] The essence of marriage in the society cannot be overemphasized, as some marry for the sake of children, while some marry to satisfy their sexual urge. The former Prime Minister of England, apparently acknowledging the importance of the marriage institution in the society succinctly remarked that:

> We cannot say that we want a strong and secure society when we ignore its very foundation, family life. This is not about preaching to individuals about their private lives. It is addressing a social problem….[3]

The term 'marriage' has no universally acceptable definition, hence it is dynamic in the sense that it cuts across jurisdictions, race and tribes and the definition given to the concept depends very much on the social and religious beliefs of the particular society.[4] According to Professor Nwogugu, "Marriage is a universal institution which is recognized and respected all over the world. As a social institution, marriage is founded on and governed by the social and religious norms of society".[5] The Blacks' Law Dictionary defines the term 'marriage' as "the legal union of a couple as husband and wife".[6]

The extent of the validity of such orthodox conceptions which restrict marriage to the union of couples of different sexes has been the subject of

[1] SC Ifemeje, *Contemporary Issues in Nigeria Family Law* (Enugu: Nolix Educational Publications Ltd, 2008) p. 1.
[2] EI Nwogugu, *Family Law in Nigeria* (Ibadan: Heinemann Educational Books Ltd, 1990) p. xxviii.
[3] GT Olajide, 'Double-Decker Marriage in Nigeria: Issues, Problems and Solutions', Unpublished Long Essay submitted to the Faculty of Law, University of Ilorin, Ilorin, 2011, p. 15.
[4] *Ibid.*
[5] EI Nwogugu, *op cit.*
[6] BA Garner, *Blacks Law Dictionary* (9th ed, St. Paul: Thomson Reuters, 2009) p. 1059.

heated debates considering the existence of hermaphrodites,[7] pseudo hermaphrodites,[8] advancements in modern technology and medical science vis-à-vis human traditional background. No matter the position one may adopt on the issue, there is a universal consensus as to the fact that marriage, as a social union founds a legal contract between the spouses and thus, creates several rights and obligations as between the spouses *inter se,* as between they and their children and sometimes, as between they and their close relatives.[9]

Generally speaking, in Nigeria, marriage is not a mere personal matter concerning only the husband and wife. Indeed, it involves the two families coming together in union of kinship. Thus, most marriages are arranged between the two families; in some cases, with little or no input by the spouses themselves. Procreation and co-operation are considered the basic marital duties. Basically, two systems of marriage are practiced in Nigeria, i.e. statutory and customary marriage. While the former involves a union between one man and one woman, the latter may involve a union between one man and more than one woman. Indeed, the practice of the former is premised generally on the dictates of the Christian faith as supplemented by the provisions of the Marriage Act[10] and the Matrimonial Causes Act.[11] The practice of the latter is basically rooted in the customary practices of the various indigenous communities cum ethnic groups that constitute the Nigerian state.

Types of Marriage[12]

It is instructive to emphasize that the current regime of the Nigerian legal system generally recognises only two forms of marriage, *viz*: statutory marriage and customary marriage.

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[7] The true hermaphrodite has both a testis and an ovary and some of the other physical characteristics of both sexes.

[8] The pseudo-hermaphrodite has either testis or ovaries and other sexual organs which do not correspond with the gonads which are present.

[9] Haviland *et al,* 'The Human Challenge' in <en.m.wikipedia.org/wiki/marriage> last accessed on 16th January 2015.

[10] Cap M6 *Laws of the Federation of Nigeria* 2004.

[11] Cap M7 *Laws of the Federation of Nigeria* 2004 (hereinafter referred to as the MCA).

[12] For a comprehensive discussion on the different types of marriage, see 'A Libertine's Thoughts: 20 Types of Marriage' <http://libertinethoughts.blogspot.com/2008/01/20-types-of-marriage.html> last accessed on 27th March 2015.

a. Statutory Marriage

The term statutory marriage refers to a marriage celebrated in Nigerian in accordance with the provisions of the Marriage Act. Such a marriage is monogamous and must be distinguished from what is normally called a 'Christian Marriage' in Nigeria. Indeed, a Christian marriage is also a monogamous marriage. However, though a valid statutory marriage may be celebrated in a church, it must conform with the provisions of the Act and the church must be a licensed place of worship. If there is a failure to conform with the provisions of the Act in the celebration of such marriage, then it cannot be deemed a statutory marriage, the fact that it was celebrated in a church notwithstanding. At best, it will be regarded as a 'Christian marriage' or 'church wedding'. The distinction between the two is one of importance for purposes of the law on intestate succession.[13]

The parties to a marriage under the marriage Act must possess the necessary capacity.[14] Parties will be deemed to have the capacity to marry if they satisfy the Registrar that:[15] (i) either of them has been resident within the district in which the marriage is intended to be celebrated at least 15 days preceding the grant of marriage certificate; (ii) each of them (not being a widow or widower) is twenty one years old, or where he or she is under that age, that the written consent of the father or the mother or the guardian – where both of the parents are dead, of unsound mind or absent from Nigeria - has been obtained and attached to the affidavit; (iii) there is not any impediment of kindred or affinity, or any other lawful hindrance to the marriage;[16] (iv) neither of them is married by native law and custom to any person other than the person with whom the Act marriage is proposed to be contracted.

b. Customary Law Marriage

This type of marriage, just as the name implies, is governed by customary law. It is polygamous in nature. There is no uniform system of customary law prevailing throughout Nigeria. The term 'customary law' therefore covers a

[13] AB Kasunmu and IW Salacuse, *Nigerian Family Law* (London: Butterworths, 1966) p. 45.
[14] *Ibid.*
[15] Marriage Act, ss. 11 and 18. In order to satisfy the Registrar as to such matters, the parties must depose to an affidavit either before the Registrar, or an administrative officer, or a minister of religion. See s. 11(2).
[16] Matrimonial Causes Act, s. 3.

multitude of systems of law which differ from one locality to another. In Nigeria, customary law marriages include Islamic marriages.[17]

Although customary law marriage is polygamous in nature thereby allowing a man take more than one wife, the converse situation known as polyandry by which a woman may have more than one husband concurrently is not permitted under customary law in Nigeria. In *Kpelanya v Tsoka and Anor*[18] it was held that under Tiv customary law, a woman cannot be lawfully married to two men at the same time.

The parties to a customary law marriage must possess the capacity under that law to marry each other. Payment of bride price is an essential ingredient of a valid customary law marriage. There is no uniformity in the rules governing the quantum of bride price throughout Nigeria. It varies from one locality to another. If a husband fails to pay bride price in respect of his wife, the family of the wife may recall her and keep her until her husband fulfils this obligation. In some areas the family has an alternative remedy of instituting legal proceedings against the husband to recover such payments. In most system of customary law in Nigeria, there is no marriage until the bride is led to house of the bride groom or his parents and formally handed over by parents or guardian to a representative of the bridegroom's family. A valid Yoruba or Igbo marriage is not contracted until the formal handover of the bride takes place.[19] In Igbo custom, the ceremony is sometimes known as *idu-uno*.

Dissolution of Marriage

a. Dissolution of customary Marriage

The customary law rules relating to dissolution of marriage are not well developed. Sometimes, the family plays an important role in the dissolution

[17] Indeed, Islamic law is considered as customary law in Nigeria. See s. 2 of the Native Courts Law No. 6 of 1956 applicable in the defunct Northern Region of Nigeria. Further see JO Asein, *Introduction to Nigerian Legal System* (2nd ed, Lagos: Ababa Press Ltd, 2005) p. 115.

[18] (1971) NNLR 86; also s. 6(2) of the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order of 1959 where it is an offence for a woman to have more than one husband.

[19] *Beckley v Abiodun* (1943) 17 NLR 59; *Ikedionwu v. Okafor* (1966/67) 10 ENLR 178. The same is true of Bini customary law.

of a customary marriage. A customary marriage may be dissolved either by non-judicial divorce or by the order of an appropriate customary court. In non-judicial divorce, the customary marriage may be dissolved without recourse to the law courts. It may be effected by the mutual agreement or unilateral action of the spouses. In the former case, where the couple fall out and reconciliation fails, they may agree before the members of their families to bring the marriage to an end. By the unilateral procedure, a husband may for instance drive his wife away intending thereby to bring the marriage to an end. Conversely, the wife may run away from the matrimonial home and return to her parents with the intention of breaking the marriage.

The judicial dissolution of customary marriage falls within the exclusive jurisdiction of customary courts.[20] Indeed, it has been held that a customary marriage validly contracted can only be dissolved by a court and it is not sufficient that one of the parties to the marriage declares that he/she no longer wants the marriage.[21] However,

Generally, customary law has no standardized/strict grounds for dissolution of marriage. However, the customs of each locality include the grounds on which a marriage may be ended. In the case of non-judicial divorce, the marriage is dissolved when the bride price is refunded to the husband.[22] Customary law confers on each spouse a right to remarry after the dissolution of their marriage. The death of a customary law wife terminates the marriage, but the death of a husband does not necessary terminate a customary law marriage.[23]

b. Dissolution of Statutory Marriage

Except where divorce proceeding are based on the fact of wilful and persistent refusal to consummate, adultery, or the commission of rape, sodomy or bestiality, no proceedings for divorced may be instituted within two years of a marriage without leave of court.[24] The provisions of sections 15 - 33 of the Matrimonial Causes Act regulates the dissolution of a statutory

[20] High Court Law of Northern Nigeria 1959, s. 17(1)(b); High Court Law, Cap. 44 Laws of Western Nigeria 1959, s. 18.
[21] *Agbeja v Agbeja* (1985)3 NWLR (pt 11) 11.
[22] *Registrar of Marriages v. Igbinonomwanhia;* Unreported Judgment in Suit No B/16m/22 delivered on 5th August 1972 by the High Court of Bendel State.
[23] *Re the Estate of Agboruja* (1949)19 NLR 38.
[24] MCA, s. 30(1)(a) and (2).

marriage in Nigeria. Section 15(1) of the Act provides to the effect that the single ground for divorce is the irretrievable breakdown of a marriage. Section 15(2) then stipulates the different circumstances, proof of any of which will lead to the conclusion that a marriage has broken down irretrievably. These include: (a) wilful and persistent refusal to consummate marriage;[25] (b) adultery and intolerability;[26] (c) conduct which the petitioner cannot reasonably be expected to bear;[27] (d) desertion;[28] (e) separation for 2 years and respondent's consent to dissolution;[29] (f) 3 years separation;[30] (g) failure to comply with a decree of restoration of conjugal rights;[31] and (h) presumption of death.[32]

Nature of Human Rights and Freedom

The welfare of the individual has become the matter of concern to the international community. With the development of the concept of 'family of nations', the human rights problem of a particular State is the problem of the entire humanity. The fundamental freedoms of all human beings without the distinction of race, language or religion constitute the text of human rights all over the world. The concept of human rights was evolved originally by the domestic legislation of some states in the form of natural law documents like the *Magna Carta* in England, the Bill of Rights in the U.S.A. and the Declaration of Rights of Man in France. After the Second World War, all the civilised nations of the world being obsessed by the brutality of nuclear war decided to adopt the 1948 Universal Declaration of Human Rights (UDHR). The preamble to the UDHR emphasizes that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

However, though there is widespread acceptance of the importance of human rights to mankind, there is considerable confusion as to the precise nature and role of such rights.[33] The question of what is meant by 'rights' is itself

[25] *Ibid*, s. 15(2)(a).
[26] *Ibid,* s. 15(2)(b).
[27] *Ibid,* s. 15(2)(c).
[28] *Ibid,* s. 15(2)(d).
[29] *Ibid,* s. 15(2)(e).
[30] *Ibid,* s. 15(2)(f).
[31] *Ibid,* s. 15(2)(g).
[32] *Ibid,* s. 15(2)(h).
[33] M Shaw, *International Law* (New Delhi: Cambridge University Press, 2008) p. 265.

controversial and the subject of intense jurisprudential debate.[34] While some 'rights' for example, are intended as immediately enforceable binding commitments, others are intended to specify a possible future pattern of behaviour.[35] According to the Encyclopaedia Britannica, human rights are understood to represent both individual and group demands for political power, wealth, enlightenment, and other cherished values or capabilities, the most fundamental of which is respect and its constituent elements of reciprocal tolerance and mutual forbearance in the pursuit of all other such values or capabilities.[36] Indeed, the conceptualization of such rights is closely allied with ethics and morality such that they are perceived as emanating from the nature of man. The natural law view as expressed in the traditional formulations of that approach is that certain rights exist as a result of a higher law than positive or man-made law. Such a higher law constitutes a universal and absolute set of principles governing all human beings in time and space. The natural law approach of the 17th century, associated primarily with John Locke, founded the existence of such inalienable rights as the right to life, liberty and property upon a social contract marking the end of the difficult conditions of the state of nature. This theory enabled recourse to be had to a superior type of law and thus was able to provide a powerful method of restraining arbitrary power.[37] Although this approach fell out of favour in the 19th century due to the problems of its non-empirical and diffuse methodology, it proved of immense value in the establishment of human rights as universal principles. Positivism as a theory emphasized the authority of the state and as such left little place for rights in the legal system other than specific rights emanating from the constitutional structure of that system.[38] The Marxist doctrine, although based on the existence of certain immutable historical laws governing the development of society, nevertheless denied the existence of rights outside the framework of the legal order.[39] All these theories emphasize the complexity of the concept of human rights in the

[34] WN Hohfeld, 'Fundamental Legal Conceptions as Applied to Judicial Reasoning', (1913)23 *Yale Law Journal*, 16.
[35] M Shaw, *op cit,* p. 266.
[36] Encyclopaedia Britannica 'Defining Human Rights', <http://www.britannica.com/EBchecked/topic/ 275840/human-rights/219324/Defining-human-rights> accessed on 26th March 2015.
[37] MN Shaw, *op cit.*
[38] *Ibid,* p. 267.
[39] *Ibid.*

context of general legal and political processes, and also portray the importance of such notions.

Human rights can be classified and organized in a number of different ways. At the international level the most common categorization of human rights has been to split them into civil and political rights, and economic, social and cultural rights. Despite the classification, the generally accepted notion is that human rights are indivisible. Thus, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his social, economic and cultural rights.

Legal Framework for Protection of Human Rights and Freedom in Nigeria

The legal framework of human rights in Nigeria encapsulates the constitutional embodiment of human rights, the statutory scheme, and the domestic application of regional and international human rights norms in Nigeria.

a. The Constitutional Framework

The Nigerian Constitution engenders a bifurcated regime of human rights. On one hand, Chapter IV makes provision for "Fundamental Rights" which it expressly makes justiciable.[40] On the other hand, Chapter II makes provision for "Fundamental Objectives and Directive Principles of State Policy", which should ordinarily constitute the fulcrum of economic, social and cultural rights, and expressly makes them non-justiciable.[41]

In specific terms, Chapter IV embodies civil and political rights (which are primarily libertarian in character) and, in the generational paradigm of human rights discourse, form the bedrock of first generation rights. These include the right to life,[42] dignity,[43] personal liberty,[44] fair hearing,[45] private and family life,[46] freedom of thought, conscience and religion,[47] freedom of expression

[40] 1999 Constitution of the Federal Republic of Nigeria (as amended), s. 46.
[41] *Ibid,* s. 6(6)(c).
[42] *Ibid,* s. 33.
[43] *Ibid,* s. 34.
[44] *Ibid*, s. 35.
[45] *Ibid,* s. 36.
[46] *Ibid,* s. 37.

and the press,[48] peaceful assembly and association,[49] freedom of movement,[50] freedom from discrimination,[51] and the right to acquire and own immovable property anywhere in Nigeria[52].

Chapter II of the Nigerian Constitution, as earlier noted, makes provision for 'Fundamental Objectives and Directive Principles of State Policy'. Section 14(2)(a) proclaims that "sovereignty belongs to the people of Nigeria from whom government through…[the] Constitution derives all its powers and authority". Sections 16 and 17, dealing with economic and social objectives, oblige the State to direct its policy towards ensuring that "the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group"; "all citizens…have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; "conditions of work are just and humane"; "suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens."

Regrettably, although section 13 imposes a duty and responsibility on "all organs of government, and…all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply" the provisions of Chapter II of the Constitution, section 6(6)(c), as earlier noted, makes a caricature of this obligation, as it provides that judicial powers "shall not…extend to any issue or question as to whether any act or omission by any authority or person…is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution." Thus, one of the recurrent themes in political and legal discourse in Nigeria is the propriety of the non-justiciability of economic, social and cultural rights (otherwise known as "second generation rights" in

[47] *Ibid,* s. 38.
[48] *Ibid,* s. 39.
[49] *Ibid,* s. 40.
[50] *Ibid,* s. 41.
[51] *Ibid,* s. 42.
[52] *Ibid,* s. 43.

the trilogy of the generational construct of human rights) under the Nigerian Constitution.[53]

b. The Statutory Framework

The statutory framework refers to human rights-specific statutes or instruments enacted by the legislature (with executive assent or where executive veto is overridden) at the various tiers of government. The Child Rights Act of 2003 and corresponding child rights laws in the states that have taken a clue from the federal legislation, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[54] among others, fall under this category. In institutional terms, the statutory scheme includes the laws establishing, among others, the National Human Rights Commission[55] and the Legal Aid Council.[56]

c. The International Framework

In the aftermath of the atrocities of World War II, there was increased concern for the social and legal protection of human rights as fundamental freedoms. The adoption of the UDHR, the subsequent foundation of the United Nations and the provisions of the United Nations Charter provided a basis for a comprehensive system of international law and practice for the protection of human rights. Since then, international human rights law has been characterized by a linked system of conventions, treaties, organizations, and political bodies, rather than any single entity or set of laws.[57]

Thus, In 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted by the United Nations, between them making the rights contained in the UDHR binding on all states that have signed this

[53] DCJ Dakas, "A Panoramic Survey of the Jurisprudence of Indian and Nigerian Courts on the Justiciability of Fundamental Objectives and Directive Principles of State Policy" in E Azinge & B Owasanoye (eds), *Justiciability and Constitutionalism: An Economic Analysis of Law* (Lagos: NIALS Press, 2010), pp 262-323; J Ihonvbere (ed), *The Political Economy of Crisis and Underdevelopment in Africa: Selected Works of Claude Ake* (Lagos: Jad Publishers Ltd, 1989) p. 91.

[54] Cap A9 *Laws of the Federation of Nigeria* 2004.

[55] Cap N46 *Laws of the Federation of Nigeria* 2004.

[56] Cap L9 *Laws of the Federation of Nigeria* 2004.

[57] Wikipedia 'Human Rights', <http://en.wikipedia.org/wiki/Human_rights> accessed on 26th March 2015.

treaty, creating human-rights law. Since then numerous other treaties have been offered at the international level, *viz:*[58]

a. 1966 Convention on the Elimination of All Forms of Racial Discrimination (CERD);
b. 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
c. 1984 United Nations Convention Against Torture (CAT);
d. 1989 Convention on the Rights of the Child (CRC);
e. 2006 Convention on the Rights of Persons with Disabilities (CRPD);
f. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW or more often MWC).[59]

The Geneva Conventions which came into being between 1864 and 1949 also safeguard the human rights of individuals involved in armed conflict, and build on the Hague Conventions of 1899 and 1907. The Hague Conventions represent the international community's first attempt to formalize the laws of war and war crimes in the nascent body of secular international law. The conventions were revised as a result of World War II and readopted by the international community in 1949.[60] In addition, customary international law may protect some human rights, such as the prohibition of torture, genocide and slavery and the principle of non-discrimination.[61]

Summary of the Facts and Decision in *Hyde v Hyde*[62]

The case was a petition by a husband for a dissolution of marriage on the ground of adultery. The petitioner was an Englishman by birth, and in 1847, when he was about sixteen years of age, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. He made the acquaintance of the respondent, then Miss Hawkins, and her family, all of whom were Mormons, and they became engaged to each other. In 1850, Miss Hawkins and her mother went to the Salt Lake City, in the territory of Utah, in the United States; and in 1853 the petitioner, who had in

[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*.
[62] LR 1 P & D 130

the meantime been employed on a French mission, joined them at that place. The marriage took place at Salt Lake City in April, 1853, and it was celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory, according to the rites and ceremonies of the Mormons. They cohabited as man and wife at Salt Lake City until 1856, and had children.

In 1856, the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival at the Sandwich Islands, he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in December, 1856, and his wife was declared free to marry again. In 1857 a correspondence passed between the petitioner and his wife, who continued to live in Utah. In his letters he urged her to leave the Mormon territory, and abandon the Mormon faith, and to join him. In her letters she expressed the greatest affection for him, but refused to change her faith, or to follow him out of the Mormon territory. He did not return to Utah, and one of the witnesses was of opinion that he could not have done so after he had left the Mormon church without danger to his life. In 1857 he resumed his domicile in England, where he has ever since resided, and for several years he has been the minister of a dissenting chapel at Derby. In 1859 or 1860, the respondent contracted a marriage according to the Mormon form at Salt Lake City with the co-respondent, and she has since cohabited with him as his wife, and had children by him.

At the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine, and was the common custom in Utah. The petitioner had never taken a second wife. A counsellor of the Supreme Court of the United States proved that a marriage by Brigham Young in Utah, if valid in Utah, would be recognised as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage.

For the petitioner, it was argued that the Court cannot perhaps recognise a polygamous marriage, but that this is not a polygamous marriage, for both the parties were single at the time when it was contracted. The petitioner maintained that the fact that polygamy is permitted by the law of the country where the marriage was contracted does not render it invalid, or there can be no such thing as a valid marriage in polygamous countries. A marriage

between two persons competent to contract marriage, and valid by the law of the place where it was contracted, is valid in every country in the world.
After a careful consideration of the facts and circumstances of the petition, the court held *inter alia:*

a. that in Christendom, marriage means the voluntary union for life of one man and one woman, to the exclusion of all others.

b. that a marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.

c. that it does not follow that because the consequences of a marriage in Utah and in England are different, the marriage in Utah is not to be recognised as valid in England. The validity of the marriage must be determined by the law of the place where it was contracted; the consequences of the marriage depend upon the law of the country where the parties reside, whether temporarily or permanently, after the marriage.

d. that it would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage in this country. Different incidents of minor importance attach to the contract of marriage in different countries in Christendom, but in all countries in Christendom the parties to that contract agree to cohabit with each other alone. It is inconsistent with marriage as understood in Christendom, that the husband should have more than one wife.

e. that the union of man and woman as practiced and adopted among the Mormons is not really a marriage in the sense of the persons so united being considered 'husband' and 'wife' under the Divorce Act. Accordingly, the court cannot exercise jurisdiction over issues arising from such union.

Analysis of the Definition of Marriage in *Hyde's Case*

A critical analysis of the definition of marriage as propounded by Lord Penzance in the case of *Hyde v Hyde* necessitates a breakdown of same into four component parts, *viz:*

a. the union must be voluntary;
b. the union must be for life;
c. the union must be between one man and one woman;
d. the union must be to the exclusion of all others.[63]

The said components will be considered *seriatim.*

a. The Union Must be Voluntary

As far as this ingredient of Lord Penzance's definition is concerned, it is not in doubt that consent is a *conditio sine qua non* for a valid celebration of a marriage. This can never be over-emphasized. Every marriage must have been voluntarily entered into by the parties. There must be no fraud or duress. Lack of consent of either party will render the marriage void *ab initio.*[64] Section 3(1)(d) of the Nigerian Matrimonial Causes Act[65] states the circumstances in which consent can be said not to be real:

1. where it is obtained by duress or fraud;
2. where a party is mistaken as to the identity of the other party or as to the nature of the marriage performed;
3. where either party is incapable of understanding the nature of the marriage contracted.

From the foregoing, it is quite clear that 'consent' is an essential element in the definition of 'marriage', and can never be dispensed with. In fact, its absence renders a marriage void *ab inito* under section 3 of the MCA. This arm of Lord Penzance's definition is therefore still valid.[66]

b. The Union Must be for Life

Some English family law experts, have attacked the validity of this arm of Lord Penzance's definition of marriage in view of the global upsurge in divorce rate. In Canada for instance, 50% of all the marriages ended in

[63] SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Pub. Ltd, 2008) p. 12
[64] *Ibid,* p. 13.
[65] Cap M7 *Laws of the Federation of Nigeria* 2004 (hereinafter referred to as the MCA).
[66] SC Ifemeje, *op cit,* p. 15.

divorce. An analysis of Canadian divorce rate further shows that after the first marriage anniversary, divorce rate was 5.1 per 1,000. This increased to 17.0 after the second anniversary, 23.6 after the third, and to the peak of 25.5 after the fourth anniversary.[67] In 2003, the London Guardian also printed an article declaring the incidence of divorce to be 7 years high having risen to 125,350 to 147,735.[68] In America, the Georgia court docket revealed that nearly 20% of the court cases were divorces. Statistical abstract of the United States further showed that the divorce rate increased by 279% from 1970 to 1992.[69] Nigeria is not totally left out in this increase in divorce rate. A research survey of divorce petitions filed in six randomly sampled High Courts in Anambra, Lagos, Rivers, FCT – Abuja, Abia and Enugu States showed a marginal increase. In 1969, for instance, the number of divorce petitions filed at Ikeja High Court divisions was 73. By 1980, it had risen to 113, and by 2004 it had almost tripled by 20. In Awka judicial division, divorce petitions as at 1994 were 8, but by 2001 they had risen to 20. In 2002, however, a sharp decrease to 8 divorce petitions was observed. In Port Harcourt Judicial Division, divorce petitions rose from 33 in 1995 to 116 in 2005. In FCT – Abuja, divorce petitions rose from 14 in 1990 to 95 in 2005.[70] The above statistical analysis reinforces the observation of Weitzman to the effect that divorce has taken over from death in most countries as a major terminator of marriage.[71]

The issue at stake now, is whether it is still correct to say that a statutory marriage is for life when it is clear that today, in a country like America, many people remarry several times in their lifetime. Besides, the ease and frequency of obtaining divorce since the introduction of the no-fault principle of divorce gives the impression that this arm of Lord Penzance's definition of marriage as a life union has ceased to be valid for many people.

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[67] 'Divorce', <www.realwomenca.com> in SC Ifemeje, *op cit.*

[68] *London Guardian*, 29th August 2003 in SC Ifemeje, *op cit.*

[69] 'Statistical Abstract of the United States' (1993) *Journal of Divorce and Remarriage* in SC Ifemeje, *op cit.*

[70] SC Ifemeje, *op cit,* pp. 16 – 17.

[71] LJ Weitzman, 'Equity and Equality in Divorce Settlements: A Comparative Analysis of Property and Maintenance Awards in the United States and England' in JM Eekelaar and SN Katz (eds), *Resolution of Family Conflict: Comparative Legal Perspectives* (Toronto: Buttersworth, 1982) p. 450.

c. The Union Must be Between One Man and One Woman

This arm of Lord Penzance's definition of marriage appears to be the most controversial. The legalisation of same-sex marriage in many countries of the world like Britain, Canada, the Netherlands, Spain, Belgium, South Africa and many states in United States of America, etc has been a major source of this controversy. Secondly, the advancement of medical technology has led to successful sex transplants and persons who have undergone same are also involved in the agitation for the enforcement of their rights to marry in accordance with their newly acquired sexual identity.[72] Thirdly, both homosexuals and transsexuals have been agitating for the redefinition of the word 'marriage' to include their union. All these issues appear to have whittled down the potency of this arm of Lord Penzance's definition in the contemporary society.

d. The Union Must be to the Exclusion of All Others

This arm of Lord Penzance's definition of marriage has not really suffered any criticism outside Africa where the concept of monogamous marriage holds sway. The same cannot be said of the African situation, particularly Nigeria where the indigenous customary practices of the various ethnic groups endorses the concept of polygamy. Since customary law forms a veritable part of the Nigerian legal system,[73] the current position is that both statutory marriage which endorses monogamy and customary marriage which endorses polygamy are all legally recognised forms of marriage in Nigeria. To this extent, the validity of this arm of Lord Penzance's definition becomes doubtful, at least in so far as the Nigerian legal system is concerned.

The 21st Century Conception of Marriage Vis-a-Vis Hyde's Case

It is important to emphasize that with the different types of marriage in existence today and the growing agitation for the redefinition of marriage, it appears that the conception of marriage in the 21st century has transcended the traditional cum orthodox conception of marriage as propounded by Lord Penzance in *Hyde v Hyde*. Although it is undoubtedly true that the definition of marriage in the *Penzancian* perspective represents the conception of marriage in Christendom, this definition may no longer represent the modern

[72] SC Ifemeje, *op cit,* p. 19.

[73] Evidence Act 2011, s. 14; *Nzekwu v Nzekwu* [1989]2 NWLR (pt 104) 373; *Nsirim v Nsirim* (2002)12 WRN 581; *Mojekwu v Mojekwu* (1997)7 NWLR (pt 512) 283; *Uke v Iro* (2001)17 WRN 172.

universal conception of marriage considering the fact that in today's world, there are diverse people with diverse beliefs. Muslims for instance, are allowed by the *Sharia* to marry up to four wives at every point in their life time. A similar position obtains in the various customary systems in Nigeria and other societies. In this type of situation, one cannot validly say that the *Penzancian* definition of marriage is of universal application because surely, it is inapplicable to such types of marriage.[74]

In Nigeria for example, despite the existence of various types of marriages, only monogamous marriage is statutorily recognised under the Marriage Act,[75] Matrimonial Causes Act and the Interpretation Act.[76] This is without prejudice to the provisions of the new Evidence Act which extends the definition of 'husband' and 'wife' to include couples of customary and Islamic marriage.[77] Clearly, the Evidence Act is not a marriage legislation and its provisions merely define the term 'husband' and 'wife' only as used in that statute. Credence is lent to this view by the fact that the Criminal Code Act[78] defines the term 'husband' and 'wife' as used in that statute in the same terms as that under the Interpretation Act. However, the existence of these different definitions of the same concept 'marriage' under the current framework of the Nigerian legal system proclaims the fact that the monogamous definition of marriage in the *Penzancian* perspective does not give a true picture of a generally accepted definition of marriage in Nigeria.

The global agitation for the recognition of the rights of homosexuals and transsexuals to marry also casts a lot of aspersions on the continued validity of Lord Penzance's definition *vis-a-vis* the 21st century conception of the subject matter. Moreso, the ever-increasing rate of divorce in the 21st century further immerses Lord Penzance's orthodox definition of marriage in a convoluted web of argumentative debates as to the continued acceptance of its validity. Professor Nwogugu, defending this arm of Lord Penzance's definition of marriage states that:

> This does not imply that the union should be indissoluble. The cardinal

[74] SC Ifemeje, *op cit,* p. 36 – 37.
[75] Cap M6 *Laws of the Federation of Nigeria* 2004.
[76] Cap I23 *Laws of the Federation of Nigeria* 2004.
[77] Evidence Act 2011, s. 258.
[78] Cap C38 *Laws of the Federation of Nigeria* 2004, s. 2.

> requirement here is that, at the time of contracting the marriage, the parties intended that it should be for life, unless dissolved earlier by a process prescribed by law.[79]

Poulter, on the other hand, has strongly argued that it will be more appropriate to expand or enlarge Lord Penzance's definition of marriage, by adding the phrase 'until the grant of a decree of annulment of divorce'. He argued that to retain the phrase 'for life' is totally lacking in realism and purports to hide the perhaps unpalatable fact that our divorce rate is currently showing an unprecedented increase.[80]

Thus, much as it is conceded that Lord Penzance's definition of marriage remains a reference point in the philosophical rationalization of the concept, the various issues and arguments elicited by the realities of life in the 21st century clearly show a slow but remarkable shift in paradigm since the epoch-making decision in *Hyde v Hyde*.

Rationale for the Paradigm Shift since Hyde's Case

The remarkable shift in paradigm with relation to modern conception of marriage since the decision in *Hyde v Hyde* may be rationalized from various perspectives. First, as has long been recognised, one of the major shifts that have taken place is the remarkable change in perception of marriage from being a social institution to a personal relationship. So, people think in terms of their own marriage or that of friends and families. They do not think in terms of a legal and social (let alone divinely created) institution which is a social good protecting and nurturing particular human goods. Thus, one of the key arguments of advocates of change encourages people to limit their thinking about 'marriage' to each person's marriage. It asserts that, as nobody's marriage is going to be damaged by allowing people of the same-sex to marry each other, to object is simply a sign of homophobia.[81] Secondly, related to the reduction of marriage to the purely personal and

[79] EI Nwogugu, *Family Law in Nigeria* (Ibadan: Heinemann Educational Books, 1990) p. xxxi.

[80] S Poulter, 'The Definition of Marriage in English Law', (1979)42 *Modern Law Review,* 409.

[81] A Goddard, 'Should we Redefine Marriage?', <http://www.fulcrum-anglican.org.uk/708> last accessed on 24th March 2015.

relational concept is the framing of it as not in any sense being a social norm and expectation. It is understood much more simply in terms of a personal choice. In the past, society expected a man and a woman in a committed sexual relationship, particularly one open to children or with children, to marry. Now marriage is viewed much more in terms of individual freedom and as one of a number of relationship options which people should be able to choose between. In such a context, with its consumerist mentality, it appears unfair to prevent certain people from being given the option of 'marriage' as a choice of the form in which to express their special relationship when others have it.[82]

Thirdly, marriage and the birth and upbringing of children are no longer tied closely together in our society's thinking or practice. A significant number of babies are born outside of marriage and the widespread view is that contraception and reproductive technologies which separate sexual union and procreation are either of no moral significance or even unqualified moral goods. To suggest that a couple entering marriage with no intention of having children have misunderstood the nature and meaning of marriage is to invite either ridicule or even opprobrium. In such a situation, it is not a great problem to redefine marriage to permit two people to marry even if they are inherently incapable of procreation because they are of the same sex.[83]

Fourthly, legislation in relation to civil partnerships has already redefined traditional familial relationships. Although the civil partners are not spouses, all other traditional family relationships (e.g. parents-in-law, uncles, aunts etc) are created through a civil partnership whereas before they could only come into existence through marriage. Similarly, changes to adoption law have, infamously, prevented even faith-based adoption agencies from following policies that are limited to opposite-sex couples. With everything else redefined, why not marriage?[84] Fifthly, marriage no longer has a unique and special status socially and legally. This is due to various of the factors noted above – the rise in cohabitation, the equivalence of civil partnerships and marriage, the ever-increasing rate of divorce, the recognition of various types of union of couples, the redefinition of the family etc – and changes in the tax system to remove any economic privileging of marriage.[85]

[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

Sixthly, the issue as to the gender of the two people who marry is today recognised as a personal characteristic which is not a fixed and natural phenomenon but a matter of social and legal convention. Under the laws of some states, someone who is biologically male can legally become female and vice versa, provided the person successfully undergoes the requisite medical surgery. There are, therefore, already 'same-sex' marriages where both partners are biologically of the same sex.[86] Seventhly, sexual orientation is viewed as a fixed, given and a protected characteristic under equality legislation. Some people, in other words, simply are 'gay' or 'lesbian' and, it is claimed, they are being treated unjustly and denied their rights if they cannot legally marry. Of course, there are many more people (particularly women) who experience both same-sex and opposite-sex attraction rather than only same-sex attraction and in some countries, there is currently nothing to stop anyone who is 'gay' or 'lesbian' from legally marrying. However, to exercise that freedom or right to marry (someone of the opposite sex) would be considered by most other people not only as foolish but as effectively a denial of their very nature. The current marriage law is thus viewed as discriminating against a group of people by denying them a basic human right.[87]

The Decision in *Hyde v Hyde,* Human Rights and Freedom in the 21st Century *vis-a-vis* the Global Agitation for the Redefinition of Marriage

a. Homosexuals and Right to Same Sex Marriage

It is trite that the global debate on the redefinition of marriage is principally championed by the advocates of homosexualism and concomitantly, same-sex marriage. This perhaps, is as a result of the astronomical increase in the number of homosexuals. To such persons, to deny them the right to marry persons of the same sex amounts to a violation of their fundamental right to freedom of association and expression, and respect for their private and family life.

The orthodox legal position traditionally adopted by most countries as exemplified in the case of *Hyde v Hyde* forbids the accordance of the status

[86] *Ibid.*
[87] *Ibid.*

of marriage to any such union.[88] With time, arguments against the continued adoption of the definition in *Hyde's Case* continued to gain fervent momentum. As Crompton states, "should we not have marriage for the twenty-first century reflecting twenty-first century values and not those of a time...when male homosexuality was outlawed and female homosexuality presumed not even to exist?"[89] Similarly, Probert argues that the definition in *Hyde's Case* is merely defends the orthodox conception of marriage instead of defining the term 'marriage' and wonders why homosexuals should be denied the right to express their love for each other through the age-long institution of marriage.[90]

With the increased pressure from the community of homosexuals and the advocates for their rights to the legal recognition of their union as being a marriage in the full sense of the term and with all rights and privileges incidental thereto, the law in some countries witnessed a remarkable shift from the orthodox view espoused in *Hyde's Case.* The first phase of the paradigm shift witnessed legislative and judicial actions in some countries towards recognizing such unions and according some rights to them, although not outrightly elevating such unions to the status of marriage. The name civil union or civil partnership was used to describe such unions. However, some countries refused to accord them the same status as married couples. In the case of *Wilkinson v Kitzinger,*[91] the same-sex couple sued for the recognition of their marriage. The High Court, in its judgment, held that the union would continue to be recognized as a civil partnership in England and Wales, but not as a marriage. A similar decision was reached in the United States case of *Goodridge v Dept. Of Public Health*[92] where it was held that there is a fundamental dissimilitude between civil marriage and civil union such that the couples of such union cannot enjoy the same rights as those in a marriage.

[88] *Skinner v Oklohama* (1942)316 US 535; *Okonkwo v Okagbue* [1994]9 NWLR (pt 368) 301.

[89] L Crompton, 'Civil Partnership Bill 2004: The Illusion of Equality' cited in 'Law Does not Recognize Same Sex Marriage', <http://www.lawteacher.net/family-law/essays/law_does_not_recognize_same_sex_marriage. html> last accessed on 29th March 2015.

[90] R Probert, 'Hyde v Hyde: Defining or Defending Marriage', (2007)19 *Child and Family Law Quarterly*, 322-336.

[91] (2006) EWHC 2022 (Fam), (2006) HRLR 36.

[92] (2002) US Mass Super Lexis 153.

Increased agitations saw to the accordance of more rights and privileges to such unions, and in some countries they enjoyed identical legal status cum rights with spouses of a full marriage.[93] Some countries have even gone to the extreme position of redefining marriage so as to accommodate the rights of homosexuals to same-sex marriage. Most states in the United States have redefined marriage as a union of two people and some United States Supreme Courts have held that an opposite sex definition of marriage is unconstitutional and discriminatory.[94] A similar situation obtains in Canada and South Africa.[95]

In the light of the above exposition, it is clear that the 21st century conception of human rights which recognizes and protects the rights of homosexuals to same-sex unions have been embraced by some countries to the extent that in some jurisdictions, it is regarded as a full and legal marriage with all privileges incidental thereto. Some countries, Nigeria inclusive, still embrace the *Penzancian* conception of marriage and have continued to deny homosexuals any right to marry. Thus, there is no universally accepted position as to whether homosexuals have a right to marry and it is within the province of each state, in the exercise of its sovereignty, to determine which side of the debate to align its laws with.

b. Transsexuals and Right to Marry

Sex-transplant has been a global issue for some years now. With the advancement of medical technology and science, there has been numerous cases of successful sex transplants, especially in the advanced countries of the world. This situation has over the years culminated in this category of people, who have undergone a delicate and high-risk surgical operation to effect a change in their gender, to increase their demand for the legal enforcement of their right to marry in their newly acquired sexual identity.

The common law position on the matter was espoused in the case of *Corbett v Corbett.*[96] In that case, the petitioner and the respondent went through a ceremony of marriage. The respondent, to the knowledge of the petitioner was naturally a male who had undergone a sex-change operation.

[93] OVC Ikpeze, 'Same-Sex Marriage and Human Rights (A Global Quagmire)', (2010) *Capital Bar Journal,* July, 101.
[94] *Baerhr v Lewin* (1993) US 825 P 2d 44.
[95] OVC Ikpeze, *op cit,* pp. 103 – 104.
[96] (1970)2 WLR 1308.

Subsequently, when the couple became estranged, the petitioner sought for an order declaring the marriage as null and void on grounds of incapacity or wilful refusal to consummate. The marriage was declared null and void on grounds that the respondent was, at all material times, a biological male. Many cases subsequently followed the decision in *Corbett Case.*[97] Parker J, for instance, in the case of *R v Tan*[98] held that both commonsense and desirability for certainty and consistency demand that the decision in *Corbett v Corbett* should apply.

Transsexuals have since the decision in *Corbett's Case* not rested on their oars in their fight to be legally allowed to marry in their newly acquired identity. The question therefore is, whether it is fair and proper that a person, who has undergone such a high risk operation, be barred from getting married, in his or her newly acquired sexual identity? Does such denial not amount to an infringement of the fundamental rights and freedoms of the individuals involved, especially their right to freedom of association and respect for private and family life? Conversely, should government policy makers not outlaw the act of sex transplant altogether?

Kennedy is of the view that the Judge in *Corbett's Case* over-emphasized physical criteria for the determination of sex at the expense of psychological factors. He stated that:

> Both April Ashley and Jan Morris (the parties in *Corbett's Case),* have felt an overpowering need to act and live as women and have taken female roles in the society with considerable success. Lord Ormrod, J. was influenced by the fear that if gender identity were to be afforded eminence, this might lead to the recognition of marriage between homosexuals. However, there would surely be little difficulty in drawing the line at

[97] *Marriage of C and D (Falsely called C)* (1979) FLC 90-363.
[98] (1986) QBD 17.

> transsexuals, who had actually undergone the surgery already described.[99]

Despite all objections, the law remained virtually the same until the United State's decision in the case of *MT v JT.*[100] In that case, the husband defended a claim for maintenance brought by the 'wife' by alleging that, as an operated transsexual who had been born male, she could never have been validly married to him. Justice Handler, rejecting the reasoning of Ormrod, J. in *Corbett's Case,* upheld the wife's claim. It was held that having successfully undergone the sex-change surgery, the 'wife' was no longer a biological male and thus, the marriage was valid. The learned Justice expressed his hopes that the English courts would take a similar view when the opportunity next arises. This hope became a reality when the European Court of Human Right, in the case of *Christine Goodwin v UK*[101] formally recognized that transsexuals had a right to marry. In so doing, the Court explicitly made social sex (that is to say the kind that refers to the social identity experienced by a person) prevail over biological sex. By stating this proposition, the Court interpreted the words 'man' and 'woman' in a non-ordinary sense. However, the court recognized that two people of different biological sex are required to start a family.

It must however, be stated some countries still adopt the *Penzancian* conception of marriage with relation to this issue and have refused to yield to the debate cum arguments to recognize and accord any form of right to transsexuals to marry in their new identity.

From the above exposition, it is apparent that there is no universally accepted view on the issue of the right of transsexuals to marry in their new identity. However, it appears that the 21st century conception of the rights and freedom allows any two persons to get married.[102] This does not automatically override the existing municipal laws in the various countries who still maintain the orthodox definition of marriage.[103] Indeed, some states have initiated the process of amending their laws towards accommodating

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[99] I Kennedy, 'Transsexual's and Single Sex Marriage', (*1973)2 Anglo-American Law Review, 112 – 116;* R Green, 'Transsexualism and Marriage', *(1970)120 LJ 210.*

[100] (1976)355 A. 2d. 20k.

[101] (2002) ECHR 588.

[102] *Re Kevin (validity of marriage of transsexual)* (2001) FamCA 1074.

[103] *Rees v UK* (1986)9 EHRR 56*; Cossey v UK* (1990)13 EHRR 622.

the rights of transsexuals to marry in their new identity. Since every state, in exercise of its sovereignty is at liberty to determine its laws, the 21st century idea of human rights with relation to transsexuals will not affect the legality of the municipal laws of any state that refuses to accord them that right.

c. Hermaphrodites and Right to Marry

The orthodox definition of marriage in the *Penzancian* perspective raises a problem with respect to the case of hermaphrodites and pseudo-hermaphrodites. Such people, due to no fault of theirs are naturally born with the sexual characteristics associated with both male and female genders. Thus, they cannot be classified either as being male or female. The implication of this is that a union between a hermaphrodite or pseudo-hermaphrodite and a normal individual of either sex cannot be classified as a marriage between a man and a woman.

The law in almost all jurisdictions is silent on the issue of whether such persons have a right to marry and the 21st century perspective of human rights together with arguments in support of it appears not to have taken the position of such individuals into consideration. It is therefore safe to assume that the law is yet to take a stand as to whether such persons have a right to marry and the nature of such marriage.

Jurisprudential Perspective to Arguments for and against Redefinition of Marriage

a. Natural Law and Redefinition of Marriage

The term 'natural law' relates to the philosophical school of thought on the nature of law which conceptualizes law as a universal precept or command intended by nature to regulate human behaviour.[104] It is the belief of the natural law protagonist that man is naturally endowed with the faculty of reason which enables him adopt rules acceptable as law. Unreasonable rules are adjudged as not containing any element of law and are in fact illegal.[105]

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[104] JI Omoregbe, *Philosophy of Law: An Introduction to Philosophical Jurisprudence* (Lagos: JERP Ltd, 1997) pp. x-xi; F Adaramola, *Jurisprudence* (Durban: LexisNexis Butterworths, 2008) p. 13; ON Ogbu, *Modern Nigerian Legal System* (2nd ed, Enugu: CIDJAP Press, 2007) p. 12.

[105] GN Okeke, *Introduction to Consular Immunities and Privileges, Jurisprudence and Constitutional Law* (Enugu: NEP Nig. Ltd, 2010) p. 134. This view is summed up in the maxim, *lex injusta non est lex* (literally meaning that an unjust law is not law) – F Adaramola, *op cit; J Finnis* 'Natural Law Theories', *Stanford Encyclopaedia of*

The natural law school posits that there are certain fundamental and generally accepted principles inherent in human existence in all social groups. These principles emanated from some supernatural force or abstract universal truth and exist irrespective of any human enactment.[106] These principles can be deduced by logical reasoning from nature, i.e. from the nature of man, from the nature of society and even from the nature of things. Thus, by a careful examination of the facts of nature, man can find a just solution to the social problems in his society.[107] The natural law view on the concept of marriage is aptly depicted in the following excerpt from the writings of Brendan Brown:

> The necessity of some kind of marriage ...is obviously deducible from the basic ideal of the natural law, since without propagation and the rearing of children, the human race would become extinct. This ideal demands some form of abiding union between man and woman, even if it be only for a limited period. All men realize that there must be some fixed, definite and settled arrangement, which will enable man and woman not only to procreate, but also to protect the offspring until they are capable of looking after themselves. It is self-evident that marriage differs from the mating of animals, to the extent that will and reason are distinguishable from blind instinct. No demonstration is needed to show that marriage must uphold the unique dignity of human personality.[108]

Philosophy, cited in CJS Azoro, 'The Place of Morality in the Nigerian Legal System: A Jurisprudential Approach', an unpublished LL.B Long Essay submitted to the Faculty of Law, Nnamdi Azikiwe University, Awka in July, 2012, p. 9.

[106] W Hazou, *The Social and Legal Status of Women, A Global Perspective* (New York: Praeger, 1990) p. 30.

[107] A Sanni (ed), *Introduction to Nigerian Legal Method* (Ife: OAU Press Ltd, 2006) p. 15.

[108] BF Brown, 'The Natural Law, the Marriage Bond, and Divorce', (1955)1 *Fordham Law Review*, vol. 24, 84.

The above position summarizes the natural law view on same sex marriage, transsexuals, polygamy and divorce. This school of thought views with high opprobrium any move to legalize any sort of union between homosexuals, transsexuals and decries polygamy. It however admits the fact that marriage may be dissolved but maintains that same should be under very exceptional circumstances also justified by the nature of man in respect of the dignity of his person.[109]

b. Positivism and Redefinition of Marriage

Positivism is the philosophical school of thought on the nature of law that conceptualizes law as a command by humans to humans. Once such commands has been laid down as law, they must be accepted and kept separate from any notional conception of what such commands ought to have been albeit from the moral perspective.[110] According to the positivist conception of law, the fact that a policy is just, wise, efficient or prudent is never sufficient reason for holding it to actually be the law, and the fact that another policy is unjust, unwise, inefficient or imprudent is never sufficient reason for holding that it is not law; law is a matter of what has been posited.[111]

The positivist view on the issue of same sex marriage, transsexuals, and polygamy is that such practices are neither universally good nor bad, since what is good or bad will depend on the position of the laws in each legal system. Marriage, as an institution, is not a natural phenomenon but is rather a legal structure, and, as such, it is one that is defined artificially by the law. So the law has the choice of how to define marriage and how to limit access to it. In other words, it is the state of the laws as posited in each legal system that determines whether such practices are good or bad. An analysis of the jurisprudence of the European Court of Human Rights (ECHR) tends to justify the above position. In interpreting the provisions of article 8 of the European Convention on Human Rights (ECHR) which provides for the right to respect for private and family life, the Court has consistently maintained

[109] B Christensen, 'Why Homosexuals Want What Marriage Has Now Become', *The Family in America (Online Edition)*, 2004, vol. 18 No. 4, 1 *et sequentes.*

[110] HLA Hart, 'Positivism and Separation of Law and Morals', (1957-58) *Harvard Law Review,* vol. 71, 601 -602; F Adaramola, *op cit,* pp. 109 – 126; MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th ed, London: Sweet & Maxwell, 2008) pp. 247 -303; GN Okeke, *op cit,* pp. 146 – 150.

[111] CJS Azoro, *op cit,* p. 11.

that same is to be read disjunctively. The right to 'private life' has been given a wide interpretation by the ECHR to include the right to establish relationships[112] and that sexual orientation is one of the 'most intimate aspects' of one's private life.[113] Therefore, same-sex relationships came within 'private life' and deserved respect. However, this did not extend to place a positive obligation on the state parties to the ECHR to recognise same-sex marriages.[114] Thus, provided a country has created a form of legal partnership recognising the commitment of persons in same-sex relationships to each other, there was no other obligation on it to recognize such relationships as a marriage, with all the rights and privileges incidental thereto. By prohibiting same-sex marriages, private life of citizens is not being interfered provided the relationship is not 'criminalized, threatened or humiliated'.[115] Thus, in the case of *Estevez v Spain*[116] the state's failure to give a surviving same-sex partner an allowance available to a surviving spouse was held not to be within the ambit of family life. The ECHR has consistently ruled that the concept of marriage within article 12 of the ECHR refers to marriage between a man and a woman,[117] though the sex does not have to be naturally defined.[118]

From the above, the positivist view as presumable adopted by the ECHR is that it is for the states to determine what constitutes marriage within their respective jurisdictions. However, they must not do so in a manner that would infringe their obligations under the ECHR which also forms part of their laws. This obligation is met once homosexuals and transsexuals are not criminalized, threatened or humiliated. However, there is no duty on the states to elevate the unions between such persons or even polygamy to the status of a legal marriage properly so called.

c. Sociological Jurisprudence and Redefinition of Marriage

This philosophical school of thought on the nature of law conceives law as a means of giving effect to social interests. They maintain that social forces bear a remarkable influence on the legal institution. Law is merely a means of

[112] *Niemietz v Germany* (1992) 16 EHRR 97.
[113] *Dudgeon v UK* (1982) 4 EHRR 149.
[114] *Wilkinson v Kitzinger, supra.*
[115] *M v Secretary of State for Work and Pensions* (2006) 2 WLR 638.
[116] (2001) ECHR 896.
[117] *Rees v UK, supra.*
[118] *Christine Goodwin's Case, supra.*

ordering the society by regulating conflicting interests.[119] Thus, as the human society is a dynamic one, so also the nature of law shares in this dynamism. Law is not static in the face of a changing society. As the needs or interests of the society changes, law must rise up to the challenge and provide for those needs and interests, a means of social engineering.[120]

The position of sociological *jurisprudes* on the subject of marriage is to the effect that every society defines marriage in a way that makes sense for itself and for its own needs and different societies define it differently. Indeed, they change their definitions as time goes by, the better to reflect contemporaneous social values. Thus, as the society changes and new categories of interests emerge with relation to marital relationships, the laws must also change to accommodate such interests. This position is aptly stated thus:

> Marriage has different social-legal, cultural, economic and religious meanings in different times. For example in the 1866 case of *Hyde v Hyde,* the legal definition of marriage used to be a union between a man and a woman 'for life' under Christendom. This *Hyde* definition was supported by the Anglican churches in the past and it still coincides with the current definition of the governing body of the Roman Catholic Church. The common law definition of marriage in *Hyde* was upheld by the British court in *Wilkinson v Kitzinger* but abandoned by the Canadian courts in *Halpern v Canada and Hincks v Gallardo.* As time changes, the ...requirement in *Hyde* is no longer essential today even within the Church of England and Church in Wales which tolerate divorce.[121]

[119] D Lloyds, *The Idea of Law* (London: Penguin Books, 1979) pp. 207 – 208.
[120] GN Okeke, *op cit,* p. 163.
[121] E Hou, 'Marriage (Same Sex Couples)', Memorandum submitted to the Public Bills Committee of the UK Parliament, <http://www.parliament.uk/business/publications/hansard/commons/bill-committee-debates/Publi c-Bill-Committee> last accessed on 24th March 2015; *Halpern v Canada (Attorney General)* (2004)1 SCR 827; *Hincks v Gallardo* (2013) CanLII 248 (ONSC).

The effect of the above is that sociological jurisprudence does not outrightly approve or disapprove of homosexualism, transsexualism, polygamy and divorce. It simply maintains that each state must strive, through the medium of its legal system to accommodate the dynamics associated with the evolving interests associated with the human nature instead of sticking to age-old rules that have practically lost touch with the reality of existence in the modern world. In this wise, the interests in all countries will necessarily not be the same such that the laws in all countries with relation to the subject matter of marriage need not be the same, provided it accords with the realities of life in the particular society at the particular time. Indeed, the fact that some countries have aligned themselves with the emerging trend of legalizing such unorthodox unions while others remain unprepared to move their position from the traditional *Penzancian* perspective supports the views of this school of thought.[122]

Implications of the Decision in *Hyde's Case* on Human Rights and Freedom

It is undoubtedly true that human rights and freedom remain a constantly evolving concept which must always be interpreted in the light of the social, cultural, political and economic systems in which it operates. On one had of the divide is the argument that all human have a right, irrespective of their sexual orientation, to private and family life. This extends to the right to marry any and as many persons as they like, irrespective of their sexual orientation and for as long as they wanted the union to last. On the other hand, it is clear that *Penzancian* conception of marriage does not accommodate the rights of homosexuals to same-sex marriage nor the rights of transsexuals to marry in their new identity; polygamy is unwelcome while the fact of divorce is only permissible only in restricted circumstances. The issue at hand is as to whether such a right exists as a human right and if so, whether *Hyde's Case* infringes same. There is no universal consensus on the issue and a lot actually depends on both the perception of the particular society in question and legal framework operational therein. For instance, under the current regime in Nigeria, the answer is clearly in the negative.[123] It is submitted that unless a deliberate attempt is being made to interpret human

[122] The position in the United States of America where same sex marriage is legal in some states and illegal in others is a typical example.

[123] Sodomy is even an offence – Penal Code Cap P3 *Laws of the Federation of Nigeria* 2004, section 405; *Mogaji v Nigerian Army* [2008]8 NWLR (pt 1089) 338; Also, see the Same Sex Marriage (Prohibition) Act, 2014.

rights and freedom to mean absolute liberty with the dire and ugly consequences of such situation considering the nature of man, the decision in *Hyde's Case* has no negative impact on human rights and freedom but rather promotes same.

A Critique of the Nigerian Position

The current legal regime in Nigeria does not recognize same sex marriage nor does it recognize the rights of transsexuals to marry in their new identity. This is quite unlike the position in most other jurisdictions where same has been recognized. Indeed, the Same-sex Marriage (Prohibition) Act of 2014 criminalizes any union between persons of the same sex as determined by nature, amongst other similar provisions. This complements other statutory provisions in Nigeria that are against indecent practices between persons of same sex.

As regards the concept of divorce, Nigerian law appears to steer a middle course. The Matrimonial Causes Act[124] in sections 15 and 16 only recognizes the ground of irretrievable breakdown of a marriage as the sole ground that can justify its dissolution, and the breakdown need not be brought about by the fault of any of the parties.[125] This position is in consonance with the position in other advanced countries. However, to the extent that the Act specifies certain facts the proof of any of which is the only reason why a court can hold that a marriage has broken down irretrievably, it appears that the Act also recognizes the fault principle. The continued relevance of the doctrines of condonation, connivance, collusion and other discretionary bars as allowed under the MCA are all relics of the fault principle. Though bigamy remains an offence in Nigeria, yet the customary law remains part of the Nigerian legal system and both customary practices and Islamic law all permit polygamy.

Conclusion

The marriage institution is a *conditio sine qua non* for a stable society and the family, which is the product of the marriage institution, is the foundation of the society. Where this foundation is sickly, the entire society will also be

[124] Cap M7 Laws of the Federation of Nigeria 2004.

[125] *Oni v Oni* CCHCJ/17/1976 at 1936; *Shokunbi v Shokunbi* CCHCJ/7/76 at 1913; *Erhahon v Erhahon* [1997]6 NWLR (pt 570) 687.

infected by one social menace or the other. It was in the bid of protecting the time-hallowed principle of sanctity of the marriage institution that Lord Penzance in *Hyde's Case* propounded a classical definition of marriage which has in recent times elicited severe debates both for and against his conception of marriage. Indeed, according to Rebecca Probert, Lord Penzance's conception of marriage is merely a defence as opposed to a definition of marriage.[126] Thus, it has been observed that several factors militate against the potency cum validity of Lord Penzance's definition of marriage.

Whatever be the case, the primary need of mankind is security, both for the living and future generations. This supersedes all other notions and conceptions of both human rights and morality such that no form of evolution or dynamism in the human nature cum society can override this need. It therefore follows that any popular notion of human rights and freedom, or newly perceived idea of morality that militates against this ideal threatens the very essence of human existence, the dignity inherent in his nature and ought to be derecognized as a social evil. Polygamy is such a threat, for it inflicts serious socio-economic pressures on the society, not to talk of the emotional and psychological effects it has on the products of such marriage. Divorce is also another, and should only be allowed as a last resort. Same sex marriage and transexualism threaten the very order of nature and should be outlawed.

In all, it must be emphasized that marriage affirms the equal value of men and women, and promotes the welfare of children. The logic of equal recognition of the rights of homosexuals and transsexuals means that the boundaries of any new definition of marriage will be far more vulnerable. Challenges to its exclusivity, its permanence and even its sexual nature will be unavoidable. Marriage risks becoming any formalized domestic arrangement between any number of people for any length of time. On such a trajectory, the institution of marriage which is better protected by the *Penzancian* conception of marriage as applied in *Hyde's Case* will eventually crumble altogether.

[126] R Probert, '*Hyde v Hyde :* defining or defending marriage?', (2007) Child and Family Law Quarterly, vol.19 No.3, pp. 322-336.