THE MORAL AND LEGAL FRONTIERS OF HOMOSEXUALITY, LESBIANISM AND GAYISM: A PARADOX FOR THE THIRD MILLENNIUM

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> "Reservations about any concept do not automatically discredit it but allow for healthy and open debate to take place… the discussions that can arise from any such criticism, constructive or otherwise, can often lead to a greater awareness of the values of the system and ways in which it can be strengthened and made more effective in the interest of the general public".**

1. PREFACTORY STATEMENT

What will marriage and humanity be like a quarter of this millennium from now? The risible wedding of over seven hundred (700) homosexuals on 14th February, 2004 at San Francisco, U.S.A.[1] and some court decisions in U.S.A. as well as the ordination of V. Gene Robinson as a bishop not minding his public declaration of being gay, are enough to cause alarm. This has dared not only the asking of this question but also to start attempting answering it. This article therefore, is intended as a piece of 'legal futurology'. Rather than concentrate on wedding of same-sex 'couples', child adoption by same – sex 'couples' and cloning, the said masochistic activities is used as a platform to launch an exploration of how human activities will affect the psychology, anthropology, social, political or economic face of this earth. From creation we have noticed the evolution of law relating to marriage and procreation which has followed a relatively orderly progression.

This treatise predicts that if the current trend of zig-zag turn of events is not checked; nature, with respect to marriage, divorce, incurable disease worse than HIV/AIDS may change the world out of all recognition. However, prediction is of course, always a risky activity and imponderable. That notwithstanding, there may be a point where family tree may be a thing of the past nor ancestry or family behavioural

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** Brown & Marriott, ADR Principles and Practice, (1993) p. 394.

1 On 14th February, 2004 over 700 same – sex 'couples' converged at San Francisco, USA for their certificate of marriage according to BBC News of 15/2/2004, 3, 45GMT.

pattern or traits. Africans are advised not to imitate the current trend in the western world. The inmalleability of United States of America as shown in America led war to Iraq may make the prediction come true as they (Americans) have upper hand in same-sex 'marriages'.

In fact, if all religions adopt the amoeba – like reaction to stimulations of event, all may be in great danger of ending up in the present global village that may epitomize hell. No matter how inane this article may be, we should adopt a proactive approach to see the future result of same-sex 'coupling'.

Brevity is not always a virtue when expounding the law especially this area of the law that can make or mar humanity. However, whatever comments that will be made here should not be the end of it so that those on the others side of the sex divide should comment. For this, I shall leave the door slightly ajar by admitting their rather paradoxical comments. A caution is that the world should not just give a cursory look at the anathema of homosexuality or same-sex marriage milieu which is the new sexuapolitics in this dawn of 21st century. Humanity is now living on its nerve ends as homosexuals, lesbians and Gay beckon on the wrath of God.

2. INTRODUCTION

One other aim of this article is to try to bring together for examination two apparently contradictory trends in contemporary issue of hetrosexual and same-sex 'marriages' in what used to be called developed countries and the third world countries. The focus of the contradiction is on the fact that most developed countries colonized most of the developing countries. It was the developed countries that evangelized the developing ones. Notwithstanding that the only difference between the black and the white races are the colour and geographical locations; the whites create the impression that every thing that is 'white' is good and what is 'black' is bad. Also that what is 'white' is in the likeness of God while what is 'black' is in the likeness of Satan. The question now is; Is white lesbian or homosexual in the likeness of God?

Most of the black races that are developing countries were colonized by the white races. During this colonization, the blacks were evangelized and the white

man's religions were brought to the black races. The biggest tool and accoutrement of religious independence and of this evangelisation is THE HOLY BIBLE. In educating the blacks the white taught them philosophy, law, jurisprudence etc. It is in these areas of study that the notion of Natural Law, Positivism etc were made known to the blacks. In fact it is said that it is natural law and law of nature for mankind to reproduce itself. Therefore, it would be contrary to this natural law for human beings not to produce children. This is in agreement with the provisions of the Bible as follows:

> "And the Lord God said: It is not good for man not to be alone; let us make him a *help like* unto himself… wherefore a man shall leave father and mother, and shall cleave to his wife; and they shall be two in one flesh"[2].

From the Bible also we learnt–

> "So God created people in his own image; God patterned them after himself; male and female He created them God blessed them and told them; multiply and fill the earth and subdue it"[3].

In the same Bible is found–

> "And Adam said, This is now bone of my bones, and flesh of my flesh; she shall be called woman, because she was taken out of man"[4].

The above shows that God created man and woman who were Adam and Eve not Adam and Steve or Eve and Evelyn or Anne. 'Male' and 'Female' are the essential correlatives of human kind. You cannot distort one half of a correlative without necessarily and ***ipso fact*** distorting the other.

Humanity has taken all the above and the fact that only an exceptional few saints in heaven were from the developing countries or from the black world. If we take it that canonisation of saints is a function of the piety then it will be difficult to reconcile the same – sex 'marriage' that is now in vogue in the white world with the teachings of the Bible. Just as Chinese proverbs says – The beginning is everything. There is a clear contradiction. Everyone, even the anarchist, would agree that in many circumstances individuals have specific prima facie obligation to obey specific laws (eg law which will make only a man and a woman to marry as husband and wife) to

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2 Genesis 2: 18 – 24, The Holy Bible, King James Version, 10th Print, march 1997

3 Genesis 1: 27-28, The Holy Bible, King James Version, 10th

4 Genesis 2:23 ibid

avoid untoward consequences of disobedience. This view is equally shared by ***Pappe H.O.*** who said that "the question of the acceptance of or obedience to law is important not only from the angle of the moral justification of fidelity to law (as ***Fuller*** treated it) but also in a factual, sociological sense"[5] obligation to obey the law is nothing more than a special case of the general moral obligation to act as one expects others to act. This view is well represented by a symposium on law and philosophy by ***Professor Monroe Beardsley*** – he said that:

> "The obligation of a particular individual to obey a particular law derives from his express or tacit invitation of others to like behvaiour. And this primary obligation does not depend upon the utility of the law or on the manner in which it originated[6].

When certain minimum moral qualities cease to exist in a legal system, it ceases to have a claim to citizen's obedience[7]. In the same way when the laws of some American States are amended to accommodate same – sex 'marriages' the citizens may not obey. As ***St. Augustine*** asked rhetorically: "what are states without justice but robber – bands enlarged"[8]. For him, a law that is unjust would not seem to be law – ***De Libero arbitro[9].*** Also ***St. Thomas Aquinas*** quoted it and offered his own – that unjust laws are 'mere outrages than laws; ***(Magis sunt violentiae quam leges)*** Not law but a corruption of law[10].

3. HISTORY

It is sometimes said that same-sex 'couples' may not marry because, whatever their mental affection, they cannot procreate. From a historical and religious point of view there is force in that proposition. For example, the introduction to the 1928 marriage service in the Anglican Book of Common Prayer says that the First cause for which matrimony was ordained is the increase of mankind; in the 1662 version the word procreation was used. This perspective undoubtedly influenced the common law in its adoption of the traditional concept of marriage. But superimposed on the

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5 Pappe H.O., ***"On the Validity of Judicial Decisions in the Nazi Era",*** 1960 M.L.R. p. 272

6 Hall R.T., ***The Morality of Civil Disobedience*** (New York/London: Harper, 1971, p. 63

7 Cotterrel, R., ***The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*** (London/ Edinburgh: Butter worths, 1989), p. 130

8 Harris, J.W., ***Legal Philosophies*** (London: Butterworths, 1980) p. 8.

9 Finnis, J.M., ***Natural Law and Natural Rights*** (New York: Oxford Press, 1980) p. 363)

10 Ibid

common law, we now have relevant statutes such as the Marriage Act, the Bill of Rights and the Human Rights Act. In the Marriage Act itself, the prohibited degrees of affinity reached beyond matters relevant solely to procreation and associated genetic concerns, to matters involving deep seated social taboos which have no direct procreative rationale[11].

In America there are 203 prosecutions for consensual adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880 to 1995[12]. Records also show that 20 sodomy prosecutions and 4 executions were done during the American Colonial period[13].

However, the pertinent question to ask is: Is same – sex 'marriage' really a modern invention? The Bible has some instances of same – sex marriages under the Jewish tradition. One of the most extolled being the story of Ruth. Among the Jews, it was proper that where a man died without a male issue, the widow though she remarries and bears a male child, that child belongs to her later husband in order to ensure the continuity of his lineage. Thus although Ruth's husband died and she re-married, the son she bore was handed over to Naomi who took care of the baby and cared for him as if he were her own. Ruth, though widowed, chose to stay with her mother-in-law, Naomi who actively encouraged her liaison with Boaz and the subsequent marriage and grandson. Biologically, there is no connection between Naomi and Obed, Ruth's son by Boaz, yet the Bible states that he was given to Naomi to care for and that she took care of him as if he were her own[14]. It will be observed that there is no trace of lesbianism or homosexuality in the said account otherwise a child could not have resulted.

In Nigeria particularly in Igbo land, South-East of the Niger, there are records of woman to woman marriage[15]. However, this does not have the same characteristics with lesbianism. This is because a woman married to a family but without a male child and the husband predeceased her would want the name of the family to

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11 See Quilter V A.G. (New Zealand) (1998) 3 LRC p. 119 at p. 176 per Tipping. J.

12 See W. Eskridge, ***Gay law: Challenging the Apartheid of the Closet***, (1999) p. 375; Lawrence et al V Texas of 6/26/2003 at http:// Laws, find law.com/US/000/02-102 htm//p. 26

13 See Lawrence et al V Texas (supra) at p. 21 of 26 para. 1

14 Ruth 4:13-17, The Holy Bible, King James Version, 10th Print, March 1997

15 Meribe V Egwu (1976) 1 All NLR p. 266; Iweze V Okocha (1967) M.S.N.L.R. p. 64; Cole V Akin Yele (1960) 5 FSC 84

perpetuate as our society is male oriented. What happens is that the members of the extended family determines who procreates with the newly married woman. Also in Nnewi, here is the "Nrachi" custom[16]. This custom enables a man to keep one of his daughters unmarried perpetually under his roof to raise male issues, to succeed him. With the custom performed on a daughter, she takes the position of a man in the father's house. Technically, she becomes a 'man'. The daughter normally should not procreate with no other than the person known to the family and the entire community. To circumvent the problem that normally arises in Igboland they evolve different means of solving them subject to repugnancy test[17]. Exchange of daughters in marriage by their fathers is permissible in Islam. For instance, father A tells father B who has come to marry his daughter;

> "I have given in marriage to thee this my daughter on condition of thy giving in marriage to me thy daughter so and so".

Both marriages are valid and each of the wives is entitled to her dower[18].

In Nigerian jurisprudence, customary law is regarded as a fact and therefore must be specifically pleaded like other facts[19]. It is good law that customary law cannot be said to be repugnant to natural justice, equity and good conscience merely because it is inconsistent with or contrary to English law as the test of the validity of customary law should not be English law[20].

4. DEFINITION OF TERMS

With ***Julius Stone's*** caution about the shortcomings of definition which is quite instructive. He said:

> "Definitions are essentially mnemonics for classification. They may be perambulatory mnemonics foreshadowing elucidation to follow, or summation mnemonics recalling what has already been expounded. In

16 See Muojekwu V Ejikeme (2000) 5 NWLR (pt. 567) 402. For 'custom' see Section 2 (1) of the Evidence Act, 1990, Aromolaran V Kupolugi (1994) 2 LWLR (pt. 235) p. 221.

17 Repugnancy could be punishment – Ashogbon V Oduntan; procedure – Thomas V Ademola II (1945) 18 NLR 12; Substantive Law – Martin V Johnson

18 Al-Farghani: Fatawa –I- Qazi Khan with ***Arabic Text Relating to Islamic law*** Ed. Bahadur and Husian p. 101 at 145 para 1281. See also Quran 4:4.

19 Onwuchekwa V Onwuchekwa (1991) 5 NWLR (pt. 194) p. 739.

20 Rufai V Igbirra Native Authority (1957 NNLR p. 178; Dauodu V Danmola (1958) 3 F.S.C. p. 46; Kano N.A. V Obiora (1960) NRWLR 42; Standard in civilized' society should not be used as a basis for repugnancy. However out dated and by-gone customs must be declared repugnant to natural justice. Lewis V Bankole (1909) 1 NLR p. 82; Ashighayi Eleko V Govt. of Nig. (1931) A p. 662.

> either case "definition" cannot frutfully be more definite nor more definitive than the exposition which it calls to mind".

This means that definitions are not conclusive as to meaning nor can they prejudge exposition of content. However, it is, we may have to attempt the definition of 'husband', wife, 'sex', 'sexual relations', marriage etc.

The word 'husband' means married man[21] and 'wife' means man's partner in marriage, married woman[22]. Christian marriage is contracted under the Marriage Act[23] but the said Act is silent with regard to the religion of the married couple. So agnoistics and atheists may also contract marriages under the Act. It is also interesting to note that nowhere in the Marriage Act are parties to the marriage contract specified as 'man' and 'woman'. The Marriage Act again did not in any place define 'husband ' and 'wife'. However, the legislature intended the marriage Act to apply to conventional marriages, that is, marriages of men and women, and that must remain the meaning to be ascribed to the term today. It is waste of executive time to go beyond the common usage of the word 'marriage'. Not every word requires definition. The meaning of some words, such as, 'husband' and 'wife', are so well-established that no explication is required to ascertain the meaning. The legislature used, and continues to use the word 'marriage' in its common meaning[24]. ***Thomas J.*** said "Although I consider this meaning is plain on its face, I also endorse the aids to interpretation found in both the Marriage Act and other enactments".

Even if the mutual understanding to be 'husband' and 'wife' by homosexuals could be said to be an 'agreement' (and it probably bears all the outward characteristics of a collateral agreement other than an intention to create legal relations"), not only would it, in the circumstances, be void as between parties on the ground of public policy[25].

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21 Collins Gem English Dictionary, 1984, p. 264

22 Op cit p. 590

23 Cap 218 Laws of the Federation of Nigeria 1990

24 Quilter V A.G. (New Zealand) 1998) 3 LRC 119 at 145 per Thomas J.

25 See Brodie V Brodie (1917) p. 271 where it was held that a pre-marriage agreement to live apart was void and did not affect the validity of the marriage. Thus, ***Sachs J***. took the view that an agreement not to have sexual intercourse, even though the parties intend to cohabit, is as much against public policy as an agreement to live totally apart.

"Sex" means "the sum of the peculiarities of structure and function that distinguish a male from a female[26]. Sex plays a very important role in marriage relationships. Therefore for a person to establish the existence of a valid marriage, it must be proved that the persons who are involved are man and woman.

"Sexual relations" – Sexual intercourse (2) Physical sexual activity does not necessarily culminate in intercourse. Sexual relations usually involve the touching of another's breast, vagina, penis or anus. Both persons (the toucher and the person touched) engage in sexual relations. Also termed sexual activity[27].

'Marriage' is the legal union of a man and a woman as husband and wife. Although the common law regarded marriage as a civil contract, it is more properly the civil status or relationship existing between a man and a woman who agreed to and do live together as spouses. The essentials of a valid marriage are (1) parties legally capable of contracting marriage, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law[28]. The qualities of marriage are cohabitation, commitment, intimacy, companionship, mutuality, empathy, devotion, sharing, supportiveness, financial interdependence and sensitivity peculiarly the property of hetrosexual couples. Homosexual is defined by behaviour not innate such as skin-colour.

5. THE MORAL FRONTIERS

Morality is that notion that furnishes the criteria for the proper evaluation of our interests and actions. God hates homosexuality, lesbianism and gayism[29]. This is illustrated by His destruction of Sodom and Gomorrah[30]. In fact, a man should not lie with a man as it is with a woman for it is detestable in essence an abomination. This is why the Bible said – "for this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature"[31]. Continuing the Bible says "And likewise also the men leaving the natural use of the

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26 Bryan A. Garner et al, Black's law Dictionary, 7th Edn., 1999 p.
27 op cit p. 1379.
28 op cit p. 986.
29 See Quran 7: 80-84 English Translation of the Holy Qur-an King Fahd Holy Quran Printing Complex Al-Munawarah
30 Genesis, 19: 4-11, The Holy Bible, King James Version, 10th Print, Mark 1997
31 Romans 1:26-27 Ibid, See also

woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet[32]. Islam also hates homosexuality, lesbianism as it sees homosexual as a crime punishable by death. Again, it advocates that people who are born homosexuals are from the Kutaar and not based on Islamic law thus people chose to do it, however, lesbianism is not punishable by death.

One question that must be asked is, what makes a person, a homosexual or gay? It may not be possible to enumerate all the causes. However, one can list just a few such as:

a. Childhood experience(s). For instance, in Lagos State, Nigeria, a little girl of about six (6) years was raped by a man of about 36 years. This horrific experience may linger on in the girl's memory to make her not to trust or wish to relate/associate with man when she grows up. A similar incident took place in Baptist High School, Jos, Plateau State, Nigeria. In the school, a male teacher unknown to the school authorities, forcefully had sex with about 40% of the J.S.S. 1 male students, to whom he was the house master. Some of the students were injured in their anus and as such they were going through pains for a long time and did not want to report or disclose due to fear and shame. When they eventually disclosed, the teacher escaped to France. It is likely that the boys may have tendency to be homosexuals like their teacher, later in life.

b. Seclusion with same-sex members over a long period of time eg. prison, Remand Homes etc. (c) Spiritual motives – The notion that one acquires higher spiritual strength with same – sex intercourse. (d) Crew men on very long journeys (e) Religious confinements (f) Persons without stable horizontal and vertical personal life. (g) Frustration, shyness, psychological/ideological mirage. Etc.

The duality instituted by nature made it that things in life are two kinds. For day, there is night and day. For events, there is bad and good. For neutrality, there is positive and negative. Then for human being, there is man and woman. There is nothing any one could do about it because God made it that we increase and multiply.

[32] Ibid Romans 1:27

This is because the world will be empty or extinct if people die and birth is not given particularly now that there is HIV/AIDS pandemic. Since women are destined to bring us up, let us give honour through graceful and sincere helps, attitudes and acknowledgements. By distorting "the female" we have necessarily, distorted "the male" and thereby humanness itself, since 'male' or man and 'female' or woman are the essential correlatives of humankind. One half of a correlative cannot be distorted without necessarily and ***ipso facto*** distorting the other.

Since male does not get pregnant and cannot nurse a child, he was historically the one assigned the role of leaving the cave (now the home) to meet the challenges of the hunt (now providing for the family) or of self defence. From this simple division of labour, there gradually developed the myth that child bearing and tending the kitchen are the woman's quint – essential roles and fulfillment and that outside of this domesticity and sexual function, a woman lacks real meaning. God's plan was for a unity between the sexes and not superiority or inferiority deriving from the different roles[33]. One should note that the ensconced privileges have never yielded their places volumtarily in any society and at any time; as always required by some homosexuals, lesbians and gay people should not be allowed the latitude even the longitude of being who they are. It has never helped humanity. It was the event of allowing Hitler be who he was that cost humanity over 62 million people at a time and space.

Homosexuality is an error of nature, a freak – produced no doubt by nature but not in accordance with her grand plan. It is produced when efficient causality fails to push in the direction that final seems to pull, for example, the general tradition of psychoanalytic theories of homosexuality which includes arrested maturation, unresolved oedipal complexes and the like all depict homosexuality as something that in each individual case should not have happened, homosexuality arises because a fundamental psychic development that normally does occur, in this case for some reason did not. Homosexuality in some part of a population might be a ruse of nature to promote population survival.

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33 Hon. Justice C. Oputa, ***Women and Children as Disempowered Groups, Women & Children under Nigerian Law,*** Fed. Min. of Justice, Lagos p. 3.

It is generally conceded that if sexual orientation people have for others are ones we have, virtually no control over just as African – Americans have no control over the colour of their skin. Firstly, people's sexual orientation partly constitutes who they are. Secondly, it is always good to allow people to be who they are and thirdly, it is morally wrong to discriminate against gays and lesbians and not allow them to be who they are[34]. According to ***Mohr,*** the moral frontiers as regards homosexuality ought to be the following –

1. Anyone who does an act that they did not volumtarily choose should not be held responsible for that act.
2. One's engaging in some-sex sexual acts is not something that was chosen.
3. Hence gays and lesbians should not be held responsible for their acts.
4. We should never discriminate against any person or group that is not responsible for their situation.

Mohr seems to put homosexuality on the same ground as alcoholism in the sense that people who are alcoholics often know society discourages excessive drinking but due to their disease they cannot help it.

If an act is morally wrong some discrimination may be acceptable[35]. The next angle is the naturalness and unnaturalness and the argument in general is the following-

1.Gay and lesbian acts are unnatural (2) Any act that is unnatural is morally wrong (3) Gay and Lesbian acts are morally wrong.

One question that must be answered is what "unnatural" means here. It cannot mean that homosexual acts break the law of nature, are man-made or are not normal. The most promising definition of "normal" here refers to "an object's proper function". In supporting premise one ***Michael Levin***[36] says that the penis was made for the vagina, procreation is what the penis and vagina were intended for and using

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34 Richard Mohr, ***Little Book of Gay Rights and in Gay/Justice: A study of Ethics, Society and law***. This argument seems implausible because if allowing people to be who they are means allowing people to act on their feelings, then premise two appears false because I do not think it is morally right to allow pedophiles to be who they are in this sense determined, his acts were wrong and he should have been stopped.

35 See Ramsey Colloquium Report of 1996 generally

36 Michael Levin, ***Homosexuality, abnormality and Civil Rights***, Public Affairs Quarterly, Jan. 1996, p. 100.

these organs in any other way is unnatural. He uses an analogy with teeth; he says the teeth were made for chewing and to use them otherwise is unnatural; for example suppose a man decides to take all his teeth out, makes a bracelet out of them and eat pureed food. Even if he enjoys his bracelet, we would say what he is doing is unnatural, he is misusing his teeth.

6. THE LEGAL FRONTIERS

Sexuality as a critical concept in a society is as much a matter for legal regulation as to other matters concerning and affecting the society. According to ***Von Ihering***, law is an instrument for securing the needs of man in society. To him, the success of a legal process depends upon the degree to which it was possible to gain a correct balance between the conflicting interests: the interests of a man in society and the interest of man as an individual as well, every person exists for the world, and the world exists for everybody. This aphorism embody the essence of culture and morality. It is the reconciliation of all the purposes of man and society that necessitates to the present level of social motion resulting in "sexuapolics "of same-sex marriage certificate racket.

The world as a global village has continued to witness numerous social phenomena which have given rise to new concerns and new calls for legal responses: fear of HIV/AIDS, advances in reproductive and contraceptive technology, terrorism and the increasing political activism of sexually perverse minorities. Take it or not, the population of women out number that of men world over. Sexual matters are now of public concern and debate, and the parameters of the interface of law and sexuality are highly contested[37]. This range between (homosexuality, lesbianism, gayism or same-sex couples) trans-sexuals and ages of consent for same sex and hetro-sexual sex. According to ***Sir Ahmadu Bello*** "do not make legal what God Himself has made illegal"[38].

37 Mary Childs, ***Sexual Autonomy and Law***, the Modern Law Review Ltd (2001) (MLR 2, March) Vol. 64, pp. 309 – 323 at 309.

38 See generally, Chukkol, Sufiyan Kharisu (quoting Ibraheem Sulaiman in the Radiance of 1980) ***"The Penal Code: its genesis and standing"*** (1981 – 84) Journal of Islamic & Comparative Law from p. 16.

Law can be understood and evaluated only in the political context of the state or society in which it operates and when we talk of legislation, we must understand that it is not the whole of the law even today. However, constitutions as they have been understood in modern times, are conceptually inseparable from states[39]. Having this in mind, we say that Marriage which is now being sought by same-sex couples' is universally known as the union for life of one man and one woman to the exclusion of all others[40]. This usually results in a family. We have to characterize the family which has its basic and atomic bonding in the coming together of one man and one woman as husband and wife in the institution of marriage. This is pivotal and preeminent natural principle which is "the unity of all human beings of all colours, geographical locations, language etc as equally dignified members of one human family, who in turn can, within a framework of unity, develop and take pride in one universally uniform institution ordained by God on the dawn of creation. There is no living person that is not born of a woman. Any one known to man is an illusion, fiction, fake and aberration. Women are the cornerstones of the world. No revolution will take it away and no revolution will take place without them. God has an intention in creating a woman[41].

The only deliberately instituted unity in diversity by God is marriage and it is now being tempted and attempted by delusion; Constitutional provisions and Human Rights posture notwithstanding. No matter one's religious inclination, it is believed that all religions teach the same eternal spiritual truth which also bestows on marriage between man and woman an immutable constant. When a state has lost the grip of marriage, they have lost family which is the basic unit of any society.

In nearly all cultures and climes, when a woman marries, the most immediate change in her legal status is her name. She takes the name of her husband. A husband and wife were regarded as one person and that person was the husband. The personality of the wife is thus submerged into that of her husband. The trend of

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39 C.M.G. Himsworth, ***In a State No longer: The End of Constitutionalism***, (1996) p.6 Winter Sweet & Maxwell and contributors, p. 639 at p. 648.

40 See Hyde V Hyde (1948) 1 ALL.E.R. 362

41 Genesis 2:18-24 op cit.

modern legislation notably the ***Married Women Property Act 1882*** [42] and ***Law Reform (Married Women and Tort (Feasors) 1935)*** is to restore to a married woman that lost personality, to make her "***a feme sole*** capable of suing or being sued ***eo nominee*** and capable of acquiring, holding and disposing of her property as if she were ***feme sole***. All these follow the injunction of God that:

> "…a man shall leave father and mother and shall cleave to his wife (a woman); and they shall be two in one flesh"[43].

The question then is; The man who seeks marriage to a (s)he man should shamefully change his name to the name of the 'husband'. If the name is changed, as a 'wife'(s) he, can he fit into the provisions of the statute as applicable to women? Can (s) he 'wife' bear children and how?[44] The great ***St Augustine*** expressed this depersonalization of the woman in its purity when he wrote:

> I do not see what other help woman would be to man if the purpose of generating was eliminated"[45].

Also ***Justice Bradley*** was full of admiration for the timidity and delicacy of the female sex when he said –

"The paramount mission and destiny of women are to fulfil the *noble* and *benign* office of a wife and mother. This is the law of the creator"[46].

However, not all men are men. It should not be this that will make an effeminate man not be chromosomally male with (xy). To Nigerian and in fact African, the prcreation of children as ordained and intended by God is the funadamental essence of marriage. A childless marriage is a source of anxiety not only to the husband but to his relations who in most cases bring pressure to bear upon him to take a second wife[47].

It is because Nigerians and Africans are against homosexuality, lesbianism bestiality, sodomy and others that necessitated the provisions in the criminal code and the penal code against the unnatural offences. The offences connected with those

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42 This is a statute of General Application still operational in some States in Nigeria. However, similar provisions may still be found in the laws of some other states that have amended their own laws.

43 See fn 37 op cit

44 The sad event of Corbett V Corbett (1970)2 W.L.R. p. 1308 did not leave a good precedent as to encourage homosexuals have repeat performance

45 Genesis according to the letter 9 – 7 (Vienna – Corpus scriptorum Ecclesiasticoum 1866), 28 p. 275. As quoted in Women Children Under Nigerian law p.4

46 op cit.

47 C.O. Okonkwo, ***Bigamy in a polygamous Society*** (Nig.) (1976) 1 Nig. J.R. p. 76

behavioural tendencies are unAfrican. It is believed that some of those tendencies are psychological and they are grouped together under the criminal Codes applicable in the Southern states of Nigeria under the term "unnatural offences". They are so called only because they involve sexual intercourse contrary to the accepted normal practice in the matter[48].

The sexuapolitics in advanced countries run neck-to-neck with their technological developments and feats. Buggery was at one time in England punishable by death or by the offenders being buried alive[49]. Later it became punishable with life imprisonment. In recent times, the English public have modified considerably their views on those offences. ***The Sexual Offences Act 1967***[50] had age limit of 21 years while ***Sexual Offences Amendment Act 1999*** pegged it at 16 years. The ages are for homosexuality act between two consenting men. An age above the stated provisions are no crime if it took place in private. What a shame!

Records show that what happened in the area of unnatural sex in the developed countries do not have room in our culture and background. For instance in ***RV Bourne***[51] the prisoner sexually excited his dog and compelled his wife to submit to the animal (dog) having sexual intercourse with her ***per vagina.*** It was held that both the man and his wife were rightly convicted of the offences of buggery[52], under ***Section 61 of the Offences Against the Person Act of 1861***[53]**.** In ***Lawson V Lawson***[54] a husband who had forced the wife to permit sexual intercourse ***per anum*** was held guilty of the offence of buggery. So also was the husband in the similar case of ***R V Blanchard***[55]. It has to be noted that provisions similar to above exist under the Northern states Penal Code. Under that code also the offences are known as "unnatural offences" and the punishment appear the same as under the criminal codes

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48 The offences as contained under Section 214 of the criminal code of Lagos State and the Eastern States, and Section 152 of the Criminal Code of then Western and Mid-Western States are: (a) sexal intercourse between a male and another male usually called homosexual act; (b) Sexual intercourse between a male and a female otherwise than *per vaginam*, eg *per anum*; and (c) sexual intercourse with an animal. The current trend of Lesbians in the world was unknown to Africans till very recently.

49 See Blackstone's (Commentaries on the laws of England, Vol. 4 page 218.

50 See Section 1, Sexual offences Act, 1967.

51 (1952) 36 C. App. R. 125

52 Need we still ask the origin of HIV/AIDS? The darkness is now visible following from this case and others.

53 Later became section 12 of the sexual offences Act, 1956

54 (1955) 1 W.L.R. 200; (1955) 1 ALL E.R. 241 C.A.

55 (1952) 1 ALL E.R. 114.

which is 14 years imprisonment on conviction. ***Section 284 of the Penal code*** provides as follows:

"Whoever has carnal intercourse against the order of nature with any man, woman or animal is guilty of an office". Speaking of a similar provision of the Indian Penal Code[56] *Kennedy, A.J.C.* in ***Emperor V Khanu***[57] said that any ***coitus per os*** is punishable under this provision as being against the order of nature.

Because the natural object of carnal intercourse is that there should be the possibility of conception of human begins which in the case of ***coitus per os*** is impossible.

Nevertheless, the impossibility of conception due to use of contraceptives or the infertility of the woman would not make intercourse ***per vaginam*** unnatural[58]. In this view sexual intercourse with a woman in the mouth is not buggery under the law of England, and in a case which came before the High Court in Madras, India, ***Govindarajulu Naicken***[59] some doubt was expressed as to the position.

A law is not law merely because it bears that label. It becomes law only if it satisfies the basic norms of the legal system of the country and receives the stamp of validity from the law courts[60]. In Nigeria, it is clear that there is no law against homosexuality, and Lesbianism. It is not even a crime because a crime by definition in Nigeria, both the criminal Code and Penal Code "is an act that offends a written law and attracts penalty"[61] so ill feelings cannot criminalise homosexuals or lesbians. However, we cannot because most of our laws have their genesis in the wider morass of the common law replecate Sodom and Gomorrah which even the citizens presently do not want to be identified or associated with.

The law does not punish *all* immorality; it does not condone *any* immorality. It is always necessary to investigate the links between sin and the purpose and tasks of the Criminal Law. ***Devlin*** put three (3) questions and answered them. (1) Whether a

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56 See Section 377 of the Indian Penal Code

57 (1925) A.I.R. (Sind) p. 286.

58 See the Hon. Justice A. Aguda, Select Law Lectures and Papers, Associated Publishers (Nig) Ltd. 1971, pp. 167 – 183 at p. 182.

59 (1886) 1 Weir p. 382

60 Jilani V Government of Punjab, Pale, L.D. (1972) SC. P. 137 at 261 per Sajjad Ahmat, J. See also Oppenheiner V Catter mole (1975) 1 ALL E.R. 538 at 567 and 571 – 2.

61 See Aoko V Fagbemi (1961) 1 ALL NLR 400; Udokwu V Onugha (1963) 7 ENLR p. 1. See also S. 36(8) of the 1999 Constitution FRN.

society had the right to pass judgment at all on matters of morals, and whether there ought to be a public morality, or whether morals should always be amatter for private judgment. He answered this question this way. He said 'Yes'. If the bonds of that morality are relaxed too far, then members of society will drift apart. These bonds are a part of the 'price of society' and, because mankind has a need of society, the prince must be paid. (2) Whether, if society has a right to pass a judgment, it may use the law to enforce it. The answers are. A society is entitled to use the law in order to preserve its morality in precisely the same way that it uses the law to safeguard anything else considered essential to its existence. It is not possible, says ***Devlin***, to set any theoretical limits to the government's power to legislate against immorality. A society has an undeniable right to legislate against internal and external dangers – the law of treason provides an example. The loosening of communal bonds may be a preliminary to total social distintegration and, therefore, a society should take steps to preserve its moral code. (3) Whether the weapon of the law should be used in all cases or only in some, and, if only in some, what principles should be kept in mind. To this he answered; this involves the circumstances in which a government ought to act in the event of a threatened disintegration of its moral basis. That the moral judgment of society will be a scertained by reference being made to the judgment of 'the right – minded man' (not to be confused with 'the reasonable man'). Let *his* judgment prevail and, for the purposes of the law, let immorality be thought of as what 'every right-minded man' considers to be immoral. It was ***Devlin*** who described the concept of morality as a 'seamless web' which will collapse unless the community's vetoes are enforced by law[62].

6. HOMOSEXUALITY AND LESBIANISM AND CONSTITUTIONAL PROVISIONS

The claimed content of the rights of citizens has a direct bearing on the powers of state institutions. Rights are defined by reference to those powers and can be understood only in the context of the same state – based integrity essential to an

62 L.B. Curzon, Q & A series on Jurisprudence 3rd Edn; Ch. 14, Cavendish Publishing Ltd, 2001 p. 318-319.

understanding of the relationships between institutions themselves. The core idea of equality is one which sustains but is also sustained by that of integrity[63]. Citizenship it has been argued, can lose its underlying justification and, therefore, its utility. Rights can also lose their conceptual force. Ideas of justice, fairness and due process float free from their state – based underpinnings. Assertions of the continuing validity of any of these historically important constitutional values, whether in the reasoning of judges or their critics, ring hollow and it is a hollowness which affects every aspect of a constitutional order.

Most national constitutions have provisions on discrimination[64], liberty[65], freedom of association[66] among others, as part of its Fundamental Human Rights provisions. The Constitutional provisions of discrimination and personal liberty should be given its full effect in the necessary process of interpretation, but it may not be used as a concealed legislative tool. The legislature has reserved to itself as contained in ***Section 4 of the 1999 Constitution of Nigeria*** all legislative functions. It should be understood that to differentiate is not necessarily to discriminate. Discrimination generally is understood to involve differentiation by reference to a particular characteristic (Classification) which characteristic does not justify the difference. Justification for differences frequently will be found in social policy resting on community values. The Marriage Act classifies as eligible the marriage of couples of opposite sexes. That distinguishes couples not of opposite sexes. Differentiation has long been conventional in the concept of marriage as embodied in the Marriage Act and other statutes and should not be ruled unjustifiable only by the legislature because of the social policy implications.

Creating by law the status of child, adult, male, female is not discriminatory though there may be discrimination in the law when rights or restrictions are attached to persons having such status. So too the establishment and maintenance of the institution of marriage is not itself discriminatory[67]. For instance, denial of choice always affects only those who wish to make the choice. It is not for that reason

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63 See T.R.S. Allen, ***Law, Liberty and Justice*** (1993) pp. 44-47

64 See Section 42 of 1999 Constitution of Nigeria

65 See section 35 of 1999 Constitution of Nigeria.

66 See section 40 of the 1999 Constitution of Nigeria.

67 See Quilter V A.G. (New Zealand) (1998) 3 LRC p. 119 at p. 131

discriminatory. Denial of the choice of marrying a child or someone already married whose marriage has not been dissolved or neglecting the provisions of consanguinity and affinity prohibited could not be said to be discriminatory on the grounds of sex or sexual orientation just because a homosexual male wants to make such a choice. Discrmination is a nebulous and complex concept. What is or is not discrimination in any given situation is not straightforward. Discrimination must be positively targeted by law. It is accepted that all distinctions between individuals and groups of individuals will be discriminatory for the purposes of the guarantee in the Constitution. Distinctions between people must be made if governance is to be effective and provide for the inevitable variety of differences between people and groups. Identical treatment may itself produce a significant inequality[68]. The existence of discrimination or otherwise can only be determined by 'assessing the prejudical effect of the distinction against the fundamental purpose of preventing the infringement of essential human dignity'[69].

For personal liberty, one can quickly dismiss the claim because where one person's liberty stops is where the other person's liberty starts. Outside this, one may have the liberty of human flesh as meat for lunch daily. So one should not be allowed the liberty to distort natural and state policy. The state has reserved to itself the power to regulate that status of marriage. The power to regulate includes the power to determine the requirements of a valid marriage, to control the capacity and qualifications of the parties to a marriage, to stipulate the formalities to be complied with before marrying, and to lay down the procredures necessary for the solemnization of the marriage.

The essential justification advanced for refusing marriage licence or certificate to homosexuals or lesbians should be that they do not have the biological ability to satisfy the status to which they aspire. The major or principal purpose of the institution of marriage is said to be the founding and maintaining of a family in which children will be produced and cared for, a procedure which is necessary for the continuance of the human species: the 'institution of marriage as intended by the state

68 Egan V Canada (1995) 2 SCR p. 513 at p. 622; Quilter V A.G. (supra)
69 Egan V Canada (supra) at p. 676

by religions and by society is to encourage the procreation of children'.[70] Marriage is firmly grounded in a legal tradition which reflects long-standing philosophical and religious traditions, its ultimate *raison d'etre* transcends all of these and is firmly anchored in the biological and social realities that –

> "hetrosexual couples have a unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship".

Procreation in most cases sustains and lubricates the relationship of the hetrosexual couples. This cannot be true of same-sex 'couples'.

The sexuapolitics presently with its gale of homosexual, lesbian force are not of equal strength on the moral conscience of all nations. In South Africa the case of ***National Coalition for Gay and Lesbian Equality & Anor. V Minister of Justice & Ors.***[71] came up. Here it was declared that the common Law offence of Sodomy is inconsistent with the South African Constitution, 1996 to the extent that it criminalizes acts committed by a man or between men which if committed by man and woman would not constitute an offence. Similarly, this was supported by ***Section 200 Sexual offences Act, 1957*** which provides that an act of sexual intercourse between males is an offence; but is inconsistent with ***Section 9(1) of the 1996 Constitution of South Africa*** which states that "everyone is equal before the law and as such has a right to equal protection and benefit of the law. Again ***Section 9(3)*** provides that the state was not unfair to discriminate directly or indirectly against anyone on the ground of sexual orientation.

Also in New Zealand the facts of the case of ***Quilter & Ors V A.G.***[72] revealed that the appellants; three 'couples' in stable relationship applied to the Registrar for marriage licences under the ***Marriage Act, 1955***, the Registrar refused to grant same on the grounds that marriage could not take place between a same-sex 'couple' notwithstanding that the term marriage was not defined in the Act. The High court refused the appellants application for a declaration that they were entitled to marriage licences and thereafter they appealed to the court of Appeal contending that the New

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70 Layland V Ontario (1993) 104 DLR (4th) p. 214 at 222 – 223 per Greer J.
71 (1998)3 LRC p. 648
72 (1998) 3 LR C p. 119

Zealand *Bill of Rights Act* ***1990*** required a new approach to the interpretation of the marriage Act as to permit same-sex 'marriage' in violation of ***Section 19 of the Bill of Rights Act*** whose grounds of discrimination were imported by reference to ***Section 21 of the Human Rights Act, 1993.***

The Appeal was dismissed on the basis that discussion of choice did not assist in identifying discrimination and that the law denied them the choice of partners they had made was not necessarily discriminatory as the marriage Act classified those eligible to marry, couples of opposite sex as opposed to 'couples' not of opposite sex. However, **Thomas J.** dissenting, observed that to the extent that the Marriage Act restricted marriages to homosexual 'couples', it established a sex-based classification and as such, a matter of logic, the exclusion of gay and lesbian 'couples' from the status of marriage was discriminatory and contrary to ***Section 19 of the Bill of Rights Act*** as they were denied the right to marry the person of their choice in accordance with their sexual orientation.

In U.S.A. by 1960 all the 50 states maintained sodomy laws. But in 2003 only 13 states[73] still maintain it.

7. ADOPTION OF CHILD (REN) BY HOMOSEXUALS AND LESBIANS

There are provisions for adoption of children in most countries. The provisions have some requirements and criteria. These requirements obviously will not allow people like the Episcopal priest now Bishop V. Gene Robinson a divorced father of two grown daughters who has lived openly with another man for 13 (good) years[74] should not be allowed to adopt child(ren). To allow or permit same-sex 'couples' to adopt children should be admitted to being queasy and "meanspiritness".

How can same-sex 'couple' adopt child(ren)? Since they have rejected opposite-sex marriage or relationship/sex, they should as well reject the by-product of opposite-sex marriage as ordained by God. This is because any person that detests cassava should not have tapioca as a delicacy. Same-sex 'couple' do not agree that marriage is the Union for life of one man and one woman to the exclusion of all

73 These States are: Texas, Kansas, Missouri, Oklahoma, Alabama, Florida, Idaho, Utah, Virginia, North, and South Carolina and Missisipi.

74 See Calaudia Wallis, *A House Divided*, Time Magazine, August 18, 2003 p. 44.

others. But, this is the Universal concept of marriage. Short of this definition, no relationship ought to be accepted by the state as marriage. The hostile belligerent HIV/AIDS should occupy their (L)ove portions. If same-sex 'couples' are allowed to marry then bachelors and spinsters could be allowed to adopt children at a time. God for bid. Also in matters of custody of children, no homosexual or lesbian parent should be allowed custody of a child(ren).

8. CONCLUSION

The preservation of the human specie requires the coming together of the male and the female. If the Western World embrace homosexuality and lesbianism, when humanity goes into extinction it may not be possible for their cloned people to clone others and that Iraq war and others of the same nature may be fought by cloned people or computers. Again the same-sex 'marriage' by the Western world made possible by sex revolution perhaps presages an unpredicatable reaction of God in future[75]. It is a pernicious gamble that may result in startling resonance to make marriage a flotsan phase. The countries that are now experimenting same-sex marriage should attract the attention of the United Nations. America should have to quickly "need to look to living reality rather than the paper description"[76] of their constitution as an undergrowth of irrelevant ideas that had gathered round American Constitution and their other laws. However the hope is that the President of America has assured humanity that he will do all he could to preserve the sanctity of marriage.

African values are different from European values. Negative cultural emulation could generate cultural confusion, where the society will not have a clearly defined character. Africans should guard their cultural values jealously and contend with their under development. There are now no homogeneous world religion due to the politics of marriage in *same-sex marriage age* in the hitherto sovereignty of an embryonic world public. The ripple of gay Bishop and Reverend Fathers of Roman Catholic Church molesting sexually over 10,000 children[77] continue to disrupt

75 Recall the Bible account of Sodom and Gomarrah Ibid.

76 Walter Bagehot, The English Constitution, first published in 1867; See now the 1993 edition by R.H.S. Crossman

77 British Broadcasting Corporation (BBC) News on 28th Feb., 2004 at 4.06 GMT as Bishop Gregrey apologized on behalf of the Bishops and over 4000 fathers involved.

religions – political horizons. This is now peculiar "Western globalisation". Till this is sorted out Africa may wish to be irrelevant in the Western religious globalisation as the Wrath of God may not be far if there is no change of attitude and heart.

The various provisions in our criminal jurisprudence and other laws which violation will result in crime may have indirectly criminalized Homosexuality and Lesbianism. However, it is only express provisions that can be the basis of prosecution and the latin maxim applicable here is *expressio urius est exclusio alterius* literally "that what is expressly mentioned excludes what is not".

Again, there are instances in the law where these acts are criminalized when conducted in public but when not in public the law is silent; the case of ***Shaw VDPP*** affords a good illustration. It is pertinent, however, that when homosexual acts are not committed in public it will amount to waste of state funds and "looking" for a crime where there is none. Thus it appears that the moral and legal frontiers of homosexuality and lesbianism bother on idealism and positivism, whilst positivism generally speaking refers to positive laws, that are made and so called, idealism on the other hand may be taken to mean what the law ought to be. According to ***Lord Devlin*** **"**there are, have been, and will be bad laws, bad morals, and bad societies… unfortunately bad societies can live on bad morals as good societies on good ones". *The issue of homosexuality and lesbianism are, man-bite-dog news that cause alarm.*

United Nations is now invited to set up Same-sex 'marriage' Committee as the evils of homosexuality, lesbianism are as dangerous and nebulous as terrorism that has Counter – Terrorism Committee (CTC). With time the Gay will take the realms of governments as they sponsor themselves into political offices. If all men's actions were wholly unchecked by external authority, we should not obtain a world in which all men would be free. The strong would oppress the weak or the majority would oppress the minority or the lovers of violence would oppress the more peaceable people[78]. There are two things which I am sure, (1) that the debate will continue; and (2) that I have had a contribution to it. However, evil be to him who evil thinks ***"Honi soit qui mal y pense"***[79]**.** But what is preferable is that good must be done and evil avoided ***"Bonum faciendum Halumque Vitandum".***

78 Bertrand Russell, ***Road To Freedom*** p. 82.

79 King Edward III (1312 – 77) of England, Alleged remark at the falling of the countess of salisbury's garter, presumably when the Order of the Garter was founded in 1344: no contemporary evidence whatsoever, but the traditional tale was current in Henry VIII's reign when polydore Vergil wrote his **Anglicae Historiae.**