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A COMPARATIVE EXAMINATION OF SAME SEX MARRIAGE AND THE USE OF SEX TOYS IN NIGERIA AND UNITED STATES

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Abstract

The practice of homosexuality can be traced to the biblical days in Sodom and Gomorra. However, before then, at creation, God created male and female for the purpose of procreation. It is homosexuality that is now in legal Jurisprudence called same sex. And where the parties involved are in marriage, it is called same sex marriage. A Sex toy is an object or device that is primarily used to facilitate human sexual pleasure, such as a dildo or vibrator. Many popular sex toys are designed to resemble human genitals and may be vibrating or non-vibrating. Some examples of sex toys are Strap-ons, vibrating panties, double ended dildos, cock cages or known as chastity cages, hands-free vibrators, penis rings, nipple clamps etc. The concept came to legal jurisprudence at the dawn of the 21 century. The aim of this paper is to look at the legal and cultural dialectics of same sex marriage and the use of sex toys in Nigeria and United States and their acceptance in the different climes. The paper adopts the doctrinaire method wherein relevant primary and secondary source materials were utilized. This includes a critical examination of relevant literature. The paper subsequently finds that the concept is criminal and alien to the Nigerian criminal jurisprudence, Culture and Tradition, as it is only marriage contracted between a man and a woman that is legally recognized. Whilst in the United States, in the last sixty years, it is encouraged legally and has its attendant rights, privileges and benefits due to a traditional marriage and protected under their laws.

Keywords: Marriage, Homosexuality, Same Sex Marriage and Sex Toys.

1. Introduction and The Concept of Marriage

Marriage is the world's oldest institution. Religiously, it is believed marriage was instituted by God himself,¹ and it is as old as man's creation. Marriage therefore, is believed to be a sacred union that exists between a man and a woman. The term marriage has been described else

¹ Genesis 2:18 King James Version

where as "a socially sanctioned union, typically of one man and one woman, in this connection called husband and wife. Typically, they form a family, socially, through forming a household, which is often subsequently extended biologically, through children. It is found in all societies, but in widely varying forms."² In Islam, marriage has been defined as "a contract that results in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of rights and obligations."³

Furthermore, "it is a mutual contract between a man and a woman whose goal is for each to enjoy the other, become a pious family and sound society."⁴ The common law definition of marriage is credited to Lord Bughley wherein he refers to it as, "the voluntary union for life of one man and one woman to the exclusion of all others."⁵ The existing marriage law in Nigeria, the Marriage Act, made no attempt to define marriage. However, recourse can be had to the Interpretation Act, which again did not define marriage. According to the Interpretation Act, "monogamous marriage means a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to be exclusion of all others during the continuance of the Marriage"⁶. Marriage has been further defined as "a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic and Customary Laws"⁷.

In Islam, the function of marriage has been stated thus Marriage acts as an outlet for sexual needs and regulates it so one does not become a slave to his/her desires. It is a social necessity because through marriage, families are established and the family is the fundamental unit of every society... Marriage is the only legitimate way to indulge in intimacy between a man and a woman.⁸

It has further been canvassed that Marriage exists to bring a man and a woman together as husband and wife to be father and mother to any children their union produces. It is based on the anthropological truth that men and women are different and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children need both a mother and a father⁹

Marriage is purely a private affair, a practice within the private realm of the individuals or parties who come into it. Marriage exists by agreement of the parties who have decided to

² Ibrahim B. Syed Same Sex Marriage and Marriage in Islam.

http://www.irfi.org/articles/articles_151_200/same_sex_marriage_and_marriage_i.htm, accessed on April 13, 2019

³ *ibid*

⁴ *ibid*

⁵ These were the wise words of William Cecil, also known as Lord Bughley, for decades the Minister of Finance to

Queen Elizabeth I and later, King James. He wrote these words to his son in approximately 1600 and one should replace the word 'wife' with spouse to give it contemporary spice. Marriage Definition: Available at www.duhaime.org/legaldictionary/M.Marriage.aspx, accessed on April. 13, 2019)

⁶ Interpretation Act Cap. M6 Law of the Federation of Nigeria (L.F.N) 2010. Section 8.

⁷ S. 3 Same Sex Marriage (Prohibition) Act, 2013, section 7.

⁸ Concept of Marriage in Islam. Available at www.islamawareness.net/Marriage/marriage_article001.html, accessed on April. 15, 2019).

⁹ Ryan T. Anderson (2013) Marriage: What it is, why it Matters, and the Consequences of Redefining it: available on <http://www.heritage.org/research/reports> accessed on 14 April, 2019

come into the union to live as husband and wife. The question is if marriage is a private affair between the parties thereto, that is man and woman, what then is the role of the state or government in the marriage institution? In all facets of human endeavors, government formulates the legal framework to govern and regulate such activities; and marriage is not an exception to such arrangement. This position has been maintained elsewhere in the following words: Government recognizes marriage because it is an institution that benefits society in a way that no other relationship does. Marriage is society's least restrictive means of ensuring the wellbeing of children. State recognition of marriage protects children by encouraging men and women to commit to each other and take responsibility for their children. While respecting everyone's liberty, government rightly recognizes, protects marriage as the ideal institution for childbearing and childrearing.¹⁰ The relevance of marriage to the society has necessitated the need for its regulation by State apparatus through legislation or regulation. This view has been expressed elsewhere thus:

Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state. Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for dissolution.¹¹

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

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

¹⁰ *ibid*

¹¹ Fearon cited in Definition of Marriage. Available at www.duhaime.org/LegalDictionary/M/Marriage.aspx accessed on June 19, 2020

bodily, in acts of conjugal love and in the children such love brings forth for the role of life¹²

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

With good reason, states continue to recognize marriage as the union of a man and a woman. In the context of democratic government, citizens and their elected representatives must be able to deliberate and make policy decisions to uphold the institution that forms the basis for civil society.¹³

2.0 What is Same Sex Marriage?

Same sex marriage or Gay marriage is a union that allows any two consenting individuals of the same biological sex to form an intimate relationship. Same sex marriage is the marriage between two persons of the same gender identity that is, a marriage that exists between two persons of the same biological sex.¹⁴ The marriage could be between two males or between two females, referred to as 'gay marriages' and 'lesbian' marriage respectively. Thus, same sex marriage comes into existence when two individuals of the same sex take solemn vows to become married. However, the term "gay marriage" has become the general term use to define marriage between same sexes whether between males or females. There are various names same sex marriage is called which include homosexual marriage, gay marriage, and gender neutral marriage. The issue of same sex marriage is a controversial discourse in international relations today. The various dimensions of the discourses on the subject of gay marriage show a paradigm shift in the concept of marriage from the traditional and orthodox conception of a male- female consensual relationship to the coming together of any two individuals of any sex - even of the same sex. the politics of gay marriage diplomacy reveals the clash between western civilization, globalization, sovereignty, territorial integrity of states, human right and traditional societal beliefs or norms.

3.0 Same Sex Marriage an Evolving Trend in Marriage and Family

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

¹² Ryan T. Anderson (n. 10)

¹³ Matthew Spalding, "A Defining Moment for Marriage and Self-Government". Available at www.heritage.org/research/reports/2013/03/redefining - < accessed on June 20, 2020

¹⁴ Faith Olanrewaju; Felix Chidozie, Phd; Adekunle Olanrewaju, International Politics Of Gay Rights And Nigeria-US Diplomatic Relations, Covenant University, Ota, Ogun State, Nigeria. available at <http://webcache.googleusercontent.com/search?q=cache:VGQWEXyYLUcJ:m.covenantuniversity.edu.ng/content/download/34444/236874/file/Abstract%2Bon%2BInternational%2BPolitics%2Bof%2BGay%2BRights%2Band%2BNigeria-US%2BDiplomatic%2BRelations.docx+&cd=10&hl=en&ct=clnk&gl=ng> last visited 23rd April, 2019.

society. The traditional definition of marriage laws which only recognize the union of different-sex as marriage seems to be gender discriminatory in nature.¹⁵ It has been stated that "homosexual behavior between males has been illegal in most countries for several centuries. It was only in recent decades that a number of nations began to implement legislative reforms which allow for certain consensual homosexual acts."¹⁶ The view that marriage is a union between a man and woman may have changed today with the passage of gender neutrality in marriage and marriage laws in various countries of the world which have made it possible for people of the same sex to go through the form of marriage in the same way couples of heterosexual marriage can. It may be said that couples of same sex marriage are simply exploiting their fundamental rights and freedoms guaranteed them by the various human rights instruments to which countries of their origins have obligated to honour. It is therefore, pertinent to examine a number of those instruments.

This paper begins with the provisions of the foremost human rights instrument¹⁷ which in Article 2 provides thus:

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

Further is the provision of Article 23 (2) of the International Covenant on Civil and Political Rights,¹⁸ which provides for "the right of men and women of marriage age to marry and to found a family shall be recognized." Further is Article 16 which provides "men and women of full age, without any limitation due to age, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution." Article 20 (1) provides that "everyone has the right to freedom of peaceful asse

¹⁵ James W. Skillen, Same-Sex 'Marriage' Is Not a Civil Right, 2004, [www.cpjjustice.org/stories/StoryReader\\$1178](http://www.cpjjustice.org/stories/StoryReader$1178), accessed on June 24, 2020. "Those who want homosexual relationships to be redefined as marriages say that many aspects of their relationships are like marriage—having sexual play, living together, loving one another, etc.—and therefore they should be allowed to call their relationships marriages and should be

recognized in the law as marriage partners...The answer they want is for law making and adjudicating authorities to change the law based on the principle that reality is defined by the will and declarations of individuals, all of whom should be treated without discrimination"

¹⁶ Melissa Bull et al, Homosexual Law Reform in Australia: Australian Institute of Criminology, 1991.

¹⁷ <http://www.aic.gov.au> < accessed on June 22, 2020>

¹⁸ Universal Declaration of Human Rights, United Nations General Assembly, the Palaise de Chaillot, Paris, 10th September 1948, Resolution 217A (III)

¹⁹ International Covenant on Civil and Political Rights, United Nations General Assembly, adopted 16th December, 1966, effective 23rd March, 1976.

mbly and association." Also relevant is the European Convention of Human Rights,¹⁹ Article 11 thereof provides:

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

Another relevant provision is that contained in Article 14 of the Convention which provides for the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²⁰

The African Charter on Human and Peoples' Rights²¹ in its Article 2 provides that: "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status."

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

5.5 The plausible argument here is that the words "any status" appearing in the African Charter and "other status" in the European Convention as well as the Universal Declaration of Human Rights contemplate sexual orientation so as to accommodate the rights of same sex couples or persons who are engaged in homosexual activity thus affording them the opportunity to claim such rights. Even the right to marry and found a family may be a right available to couples of same sex union as the provision is not discriminatory and did not specify which class of persons can invoke such rights in their favour.

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

²⁰ This provision is in pari material with Article 1(1), while paragraph 2 states that "no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1, of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.2000.

²¹ The African Charter on Human and Peoples' Right, Organisation for African Unity (now African Union), Banjul, adopted b in 1981, came into force in 1986, Resolution 115(XVI). Article 2 provides "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or any status."

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

The Universal Declaration on Human Rights...contains the fundamental human rights principle that all human beings are born free and equal in dignity and rights. This fundamental principle of equality comprises also lesbian woman and gay men. Other human rights instruments have since been built on this principle of non-discrimination. The 1966 Covenant on Civil and Political Rights, according to the interpretation of the Human Rights Committee forbids discrimination based on sexual orientation.²²

Homosexuality was seen as a private act between consenting adults and more so as a moral issue. The big question again is whether laws should be invoked to enforce moral rules in the society. There are however two divides to this. John Stuart Mill,²³ one of the proponents of the liberal view states:

That rules of private morality concern the individual and his conscience alone. Private immorality is presumed to harm no one else, such as in cases of drug abuse, private drunkenness, private greed, lesbianism, etc., and in England, homosexuality between two consenting adults.²⁴

This position was adopted and approved by the Wolfenden Committee (of the British Parliament) Report on Homosexuality and Prostitution of 1957,²⁵ wherein it stated that "...unless a deliberate attempt is to be made by society to equate crime with sin, there must remain a realm of private morality and immorality which is not the law's business."²⁶ However, Lord Devlin of the moderate view stated that:

²²Toone v Austria (UN Committee for Human Rights). Cited in Katharina Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe*, (Antwerp, Intersentia, 2003) p 184 referred to in I. O. Omoruyi, *An Introduction to Private International Law: Nigeria Perspectives* (Benin: Ambik, Press Limited, 2005) p 257.

²³ John S. Mill. *Essay on Liberty* cited in Funso Adaramola, *Basic Jurisprudence*, 2nd ed. (Lagos, Nayce Publishing Co Ltd, 2003) p 91.

²⁴ *ibid*

²⁵ After WWII, arrests and prosecutions for homosexuals increased. For example Alan Turing, the cryptographer who helped to break the German Enigma Code, was victimized for his homosexuality. Charged with 'gross indecency' he was forced to choose between prison or hormone treatment. He also lost his job. His death in June 1954 was

treated as suicide. This and other cases led the government to set up a Departmental Committee under Sir John Wolfenden, to consider both homosexual offences and prostitution. Wolfenden's influential report put forward the argument that 'homosexual behavior between consenting adults in private be no longer criminal offence.' Despite the recommendations of the report, it was not until July 1967 that homosexuality finally became legal in England and Wales. The Wolfenden Report on Male Homosexuality 1957. http://www.bl.uk/learning/timeline/item_107413.html < accessed June 20, 2020)

²⁶ John S. Mill. (n. 23)

...But before a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society. There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it. Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious; it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds but which cannot be rooted out. It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in the other. On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusion is manifest.²⁷

A growing number of governments around the world are considering whether to grant legal recognition to same-sex marriage. Many countries have national laws allowing gays and lesbians to marry, mostly in Europe and the Americas.²⁸ These countries now give the freedom to marry to same-sex couples nationwide. Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Brazil, France, Uruguay, New Zealand, and Britain. While countries like United States of America and Mexico have regional or court-directed provisions enabling same-sex couples to share in the freedom to marry.

However, there are a number of countries where it is illegal for same sex marriage to be practised. Recently, Uganda Parliament passed an anti homosexuality law.²⁹ Section 2 of the Act criminalises homosexuality with a life imprisonment for any person convicted of the offence. While section 12 of the said Act treats any person who purports to contract same sex marriage as committing the offence of homosexuality punishable with a life imprisonment upon conviction. This has been signed into law by the Ugandan President Yoweri Museveni.³⁰ Besides, there are over 83 countries in the world today which cut

²⁷ Patrick Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press), 1965, p 17- 18.

²⁸ Pew Research Religion and Public Life Project, (2018) *Gay Marriage around the World*: <http://www.pewforum.org> < accessed on June 19, 2020>.

²⁹ The Anti-Homosexuality Act, 2014.

<http://wp.patheos.com.s3.amazonaws.com/blogs/warranthrockmorton/files/2014/02/Anti-Homosexuality-Act-2014.pdf> < accessed on June 23, 2020>

³⁰ Faith Karimi and Nick Thompson (200), Ugandan's President Museveni Signs Controversial Anti-Gay Bill into Law, CNN: <http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill/index.html> < accessed June 25, 2020>.

across Africa, Asia including the Middle East, Americas, the Oceania and Europe where homosexuality is a crime.³¹

However, in Nigeria, this practice is yet to find expression in the nation's legal system. The legal regime of marriage is still being maintained and as such, the concept of same-sex union under various legislations³² is still regarded as a crime punishable by a term of imprisonment.³³

4.0 Same Sex Marriage in Nigeria and The United States

This paper in its scope shall be examining same sex marriage under two jurisdictions which is Nigeria and the United States. On June 26, 2013 the Supreme Court of the US issued its first two decisions on same-sex marriage. *Hollingsworth v. Perry* (*Perry*)³⁴ and *United States v. Windsor* (*Windsor*).³⁵ In *Perry* the Supreme Court did not advance any substantive opinions on whether same-sex marriage was constitutionally protected, allowed or prohibited. It did, however, have the effect of allowing same-sex marriage in California.³⁶ The *Windsor* case was not about legalizing same-sex marriage but about challenging the restriction of marriage as a union between a man and a woman for federal purposes. *90 In this decision the Supreme Court could have refrained from providing arguments in favor or against same-sex marriage. It chose, however, to advance arguments that, while working well in the narrow field of restricting the power of the federal government to define marriage for federal purposes, also paved the way for broader challenges to the constitutionality of same-sex marriage in general.³⁷ However in Nigeria, same sex marriage is outrightly criminalized by law with various terms of prisons for offenders.³⁸

In the United States couples in same sex marriage are entitled to the same rights, privileges and benefits due to traditional marriage.³⁹ Meanwhile, same cannot be said of Nigeria in that same sex marriage is not recognized in Nigeria. Couples in same sex marriage are seen as criminals and are punished under the Law

According to a 2013 Pew Research Report, Nigeria is the world's least tolerant country of homosexuality with roughly about 98 percent of the country's population opposing society's acceptance of homosexuality⁴⁰ and same is not protected under any known law in

³¹ Countries where Homosexuality is illegal. <http://76crimes.com/76-countries-wherehomosexuality-is-illegal/> < accessed on June 22, 2020>.

³² Criminal Code Act C38/2010, section 214; The Armed Forces Act and the Same Gender Marriage (Prohibition) Act C20/2010, section 81 and Same Sex Marriage (Prohibition) Act, 2013, section 1.

³³ Same Sex Marriage (Prohibition) Act 2014, section 5(1) spells a term of 14 years imprisonment for offenders

³⁴ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013).

³⁵ *United States v. Windsor*, 133 S. Ct. 2675, 2682, 186 L. Ed. 2d 808 (2013).

³⁶ The U.S. Supreme Court decided that the official sponsors of the California ballot initiative "Proposition 8" did not have standing to challenge the decision of the District Court that had declared Proposition 8 unconstitutional. Proposition 8 had limited marriage to

the union of one man and one woman. *Perry* made the District Court decision final, allowing same-sex marriage in California.

³⁷ Macarena Sáez, SAME-SEX MARRIAGE IN THE UNITED STATES. American University Washington College of Law (2015) available at https://works.bepress.com/macarena_saez/14/ last visited 22nd June, 2020

³⁸ Same Sex Marriage (Prohibition) Act 2014

³⁹ Macarena Sáez (n. 38)

⁴⁰ Cox, D. Nigeria's Intolerance of Homosexuality Disturbs Human Rights Activists. The Pendulum. (February 12, 2014). Retrieved on 20 June, 2020 from <http://www.nigeria-s-intolerance-of-homosexuality-disturbs-human-rights-activists/>

Nigeria. However, the position in the United States is different in that a lot of Americans are receptive and more opened towards same sex marriage. The United States has a supreme court judgment recognizing and protecting same sex marriage in America.⁴¹ Nigeria's position against same sex marriage is rooted in inherent socio-cultural ideological complexes of the African society and the cultural proclivity of the African society does not allow for such marital unions.⁴² The African traditional view of marriage holds that homosexuality and lesbianism are "animalistic and degrading to humanity"; "it is defiant to virtues such as value, moral, respect and honour that being African stands for"; "it is an unacceptable social behaviour and a taboo that is anti-thetical to the African Culture".⁴³

Over the last century, western societies including the United States, have slowly accepted that citizens cannot use their political power to discriminate on the basis of race. Western societies have also accepted, albeit at an even slower pace, that political majorities cannot discriminate on the basis of gender. The same-sex marriage debate shows that sexual orientation is gradually becoming a protected category such as gender and race.⁴⁴

Nigeria's moral frame recognizes that marriage is the coming together of a male and female each as partner of a complete life giving whole within a heterosexual union which is not obtainable in gay marriage.⁴⁵ In Nigeria, morality is based on the beneficiary values of collective family and community well being. The moral system of most Nigerians declares homosexual relations to be wrong and unacceptable. That is homosexuality is a challenge to the moral foundation of Nigerian. Nigerians believe that it is not part of their culture therefore it should not gain ground. Gay marriage is not part of any one's culture but it emerged out of responses to life development process e.g. urbanization, education international travel, internet spread etc. He further argues that same sex relationship is not alien in our society but it is not societally acceptable. It has failed moral test due to Nigerians' understanding of marriage and its communitarian foundation.

Standing on the socio-cultural ideological complexes of the African society, most Nigerians stood as one forgetting their multi-cultural character to collectively condemn the acceptance of gay marriage in Nigeria. In other words, despite tribal affiliations, Nigerians stood together to condemn the act of homosexuality as a taboo against the socio-cultural context of African societies. Various reasons can be linked to this wide spread consensus against homosexuality. Some of them are discussed in the following paragraphs:

The first is the religious beliefs of most Nigerians. explained that religious beliefs of the Bible and Quran condemn and abhors homosexuality. same sex marriage or relationship cannot qualify as a proper marriage because it lacks the necessary sexual counterparts or complements. This marital ethical value is found or rooted in the Jewish and Christian sexual ethics. Faith based arguments against same-sex marriage views homosexuality as a sin that must be avoided. There are cases of homosexuality in the bible that incurred the

⁴¹Macarena Sácz (n. 38)

⁴²Okoli, C. & A.S. Halidu. Betwixt Civil Liberty and National Sensibility: Implications of Nigeria's Anti-Gay Law. *International Affairs and Global Strategies*, 19(2): 17-24.

⁴³Okey, N., S. Eyoboka & V.Ojeme (January 21, 2014). Gay-Marriage Law: US Threaten to Sanction Nigeria. Vanguard Newspaper. Retrieved on June 23, 2020 from <http://www.vanguardngr.com/2014/01/gay-marriage-law-us-threatens-sanction-nigeria/>

⁴⁴Macarena Sácz (n. 38)

⁴⁵Onuche, J. Same Sex Marriage in Nigeria: A Philosophical Analysis. *International Journal of Humanities and Social Science*, (2013) 3(12): 91-98.

wrath of God. The most common of such story is the punishment of Sodom and Gomorrah by fire.⁴⁶ According to the Christian faith, from the beginning of creation, God made a man and gave him a wife (a woman)⁴⁷. In another portion of the bible, it is stated that a man shall leave his father and his mother and cleave to his wife and the two of them shall be one flesh.⁴⁸ This is the strong believe of most Nigerians.

The next is the essence of marriage. marriage in Africa is a union between a man and a woman, which brings together families, communities and ethnic groups.⁴⁹ The institution of marriage exists for various reasons amongst which are for procreation and for companionship. This means that couples should be able to reproduce. Gay marriage, due to sexual similarities cannot allow for procreation.

Another reason why gay marriage is unacceptable in the Nigeria state is that it has the capacity to weaken the marriage institution, the family and societal values. A new family structure is emerging all over the world arising from the platform of gay marriages and relationship. In upholding this, gay marriage has been described as an insult to the institution of marriage and family and it unacceptability can also be attributed to the role the family plays as an agent of socialization. In the light of the above, once the family values are weakened there are implications for the society at large. The aftermath of this is that the society itself will be weakened and the future of the country is at risk.⁵⁰

6.0 The Same Sex Marriage (Prohibition) Act 2014

The Same Sex Marriage (Prohibition) Act 2014 which is the extant law in Nigeria prohibits and criminalizes marriage contract or civil union between persons of same sex.⁵¹ In the Act same sex marriage means "the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship."⁵² Nigeria is a sovereign State with federating units which is governed by a federal Constitution which is the nation's grundnorm.⁵³ Same-sex associations and or unions have been criminalized in Nigeria during the colonial era.⁵⁴ The issue of marriage has long since been settled through legislation in Nigeria. So any association or union between or among same-sex in Nigeria is a crime.⁵⁵

⁴⁶ Genesis 19

⁴⁷ Genesis 1 verse 18

⁴⁸ Ephesians 5 verse 31

⁴⁹ Ola, T.M. The Socio-Cultural Perception and Implications of Childlessness Among Men And Women in an Urban Area, Southwest, Nigeria. *Journal of Social Science*, (2009) 21(3): 205-209.

⁵⁰ Cassandra, A. Nigerians Rebuff Threats from UK, Back True Marriage (2011). Retrieved June 24, 2020 from http://www.igbofocus.com/html/gay_marriage.html

⁵¹ Same Sex Marriage (Prohibition) Act 2014, Section 1.

⁵² Same Sex Marriage (Prohibition) Act 2014, Section 7.

⁵³ Constitution of the Federal Republic of Nigeria 1999 (as Amended), section 1

⁵⁴ Criminal Code Act C38/2010, section 214 which provides that: any person who has carnal knowledge of any person against the order of nature; or permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years.

⁵⁵ Criminal Code Act C38/2010, section 214 and Armed Forces Act A20/2010, section 81(1) which provides "A person subject to service law under this Act who (a) has carnal knowledge of a person against the order of nature (c) permits a person to have carnal knowledge of him against the order of nature is guilty of an offence under this Act. While subsection (2) of the section makes it an offence where a person subject to the military law commits an act of gross indecency with any person or procures another person to commit the act with him or attempts to procure the commission of the act by any person with himself or with another person whether

So the issue of gender neutrality in marriage and marriage law does not arise in Nigeria, as the country affirms marriage to be an association or union between heterosexual couples.⁵⁶ It may seem that the criminalization of same sex marriage by the Nigerian government is capable of eroding the fundamental rights of persons who are inclined to such practice. The various human rights instruments make elaborate provisions for the rights of persons such as rights to marry and found a family as well as the right of freedom of association. Nigeria as a country has assented to these instruments by signing and ratifying same at various times. Would the act of the government of Nigeria in passing the same sex marriage prohibition law, which prohibits a marriage contract or civil union between persons of same sex as well as criminalises the act by making person who goes into same sex marriage contract or civil union committing an offence punishable with a term of imprisonment not amount to a breach of such international obligations? Will the enactment of the law not be said to be an infringement of the fundamental rights and fundamental freedoms of the Nigerian people more particularly the minority who considered same sex marriage as a way of life?

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

Persons belong to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belong to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and in without interference or any form of discrimination. Persons belong to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties. States shall take measures to create favourable conditions to enable persons belonging to the minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.⁵⁷

What the government of Nigeria has done was to draw a balance between the rights of the persons who are inclined to same sex activities and the need to uphold the moral fabrics of the society. The custom and cultural beliefs of the various ethnic nationalities that make up

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

⁵⁶ Same Sex Marriage (Prohibition) Act 2013, section 3

⁵⁷ Declaration on the Rights of Persons Belong to National or Ethnic, Religious and Linguistic Minorities, United Nations General Assembly, New York, adopted on 18th December, 1992, Resolution A/RES/47/135. Article 2(1), (5) and Article 4(2).

Nigeria still see marriage as a union between a man and a woman.⁵⁸ No doubt, prohibiting and criminalising same sex marriage or union may have infringed on the rights of some persons, nevertheless, the greater good of the society have dictated the decision of the government to do so.⁵⁹ The enactment of Same Sex Marriage (Prohibition) Act, 2013 by the Nigerian government besides prohibiting same sex marriage practice in the country⁶⁰, it went further to criminalise the act with a term of fourteen (14) years imprisonment upon conviction⁶¹ without an option of fine.

The SSMPA also criminalises a number of activities associated with homosexual identity, including free association through 'gay' organizations. This includes prohibitions on: Registering gay clubs, societies and organisations, and their sustenance, processions and meetings.⁶² Public showing of same sex amorous relationships directly or indirectly.

7.0 Alternating Sex Toys and Bisexuality in Nigeria and The United States.

Sex toys have been a controversial topic and discussion across the globe. It has also been a context in sexual, personality and identity development for teenagers, adults in accepting and regaining their identity. According to urban dictionary, Sex toy is an object or device used for sexual stimulation or to enhance sexual pleasure.⁶³

Some men see pillows, balms, mat, drugs, herbs, fluids and incense as sex aid/toys, not that these are used internally or externally but it helps in arousal, stimulation use before, during or after. Most sex toys are not necessarily erotica or enchantments. The intentions that these toys are used for is usually for cleansing, sensing, ambience and presence. It provides a good temperature, feeling during sex. Some couples cannot have sex without these aids and sex toys, such as candle, balm, wax, wood, and contemporary sex toys like dildo, vibrator, butt plug used in stimulation, and orgasmic creations. Using these toys have been controversial issue as many generations have condemned contact with genital and alien object that are not conventional in sex.⁶⁴

In Nigeria where morality is ethical and principles are held high, sexuality still rolls down to individual sexual self. Back to present age, Nigerians or people of Nigerian cities, despite laws concerning sexualities, many Nigerians have been victim of sexuality either in acceptance, living and livelihood etc, as sexualities flowered to extreme and erotic. However, in the United States, people are more open to the use of these sex toys. Most

⁵⁸TalatuUsman, Nigeria to Defend Ban on Same-Sex Marriage in letter to UN – Maku, 2013: <http://www.premiumtimes.ng.com/news> <accessed June. 19, 2020>. "He said in relation to same-sex marriage, there were fundamental differences "within our country and so we are trying to look into it and see what position Nigeria will take. But definitely, the problem with same-sex marriage as at now is that both sections of Nigerian society, traditional society, Muslim community, Christian community that virtually make up nearly 100 per cent of the Nigerian population are still opposed to the idea of same-sex marriage. And in nations, it is not easy for you to enforce a value that is strange to your own society."

⁵⁹The African Charter on Human and People Rights, Article 18(1) and (2) which provides, "The family shall be the natural unit of society. It shall be protected by the State which shall take care of its physical health and moral. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community." 74 Section 1 of the Act.

⁶⁰Section 1 of the Act.

⁶¹Section 5 of the Act.

⁶²Section 4(1).

⁶³Researchgate, Alternating Sex Toys (Article · September 2016) available at <https://www.researchgate.net/publication/308562616> last visited 23 June, 2020.

⁶⁴ibid

people seek independence and pursue sexual satisfaction independently instead depending on others before one can be sexually satisfied. But looking close some sect still keeps the existence and being of sexualities regarding paranoia, restrictions, perception attached to sexuality will never be forgotten as many African has pledge allegiance to these restrictions. These few minorities are people who kept sodomy, homosexuality, bisexuality and asexual with few minorities who are heterosexual.⁶⁵

The use of sex toys is alien to Nigerian culture but it has become usual in the United States. Although, there are a lot of Nigerians who have some of these sex toys in their closet, they usually will not admit openly of having one due to stigmatization of people using sex toys. Nigeria, view most ladies using some of these sex toys as Bisexual is a form of sexual orientation where a particular gender is sexually attracted to both his gender and the opposite gender and can get sexual satisfaction from both genders. This sexual orientation is alien to the Nigerian culture. They are generally categorize under the LGBT which is Lesbian, Gay, Bisexual and Transgender.

8.0 Conclusion

In conclusion, The Concept of same sex marriage or homosexuality is alien to the Nigerian Culture and Tradition. However, it has become generally accepted in the United States and same protected under their Laws. In Nigeria, only marriage contracted between a man and woman that is Legally recognized. In fact, no one can successfully, openly contract same sex marriage due to the fact that the Nigerian Legal system has criminalized same to the extent that the priest that conducts such marriage and every person that witnesses same will be criminally liable and punished with the appropriate term of imprisonment as stipulated by the Law. Meanwhile same sex marriage is not criminalized in the United States and in fact, couples in same sex marriages are also entitled to rights, privileges and benefits due to a traditional marriage. The concept of same sex marriage is against public policy in Nigeria. Africans generally are not exposed to that kind of marriage and in fact, most African cultures see same sex or acts of homosexuality as 'taboo' any perpetuator can be banished from the community. While public policy has changed in the last sixty years towards same sex marriage in the United States.

There is a huge pressure on a lot of African countries, especially Nigeria by the western world and the international community to recognize the right of adults to contract same sex marriage and decriminalize same. In fact, countries like Britain has threatened to stop sending aids to Africa. However, most African countries including Nigeria has refused to succumb to this pressure.

⁶⁵ *ibid*