INCIDENCE OF 'WOMAN TO WOMAN' MARRIAGE AT CUSTOMARY LAW AND THE 'CHALLENGE' OF SAME SEX MARRIAGE PROHIBITION IN NIGERIA: A CONTEXTUAL OVERVIEW*

Abstract
This paper appears to immediately suggest a study between the 'ancient' and 'modern' tendencies of life. Yet embedded therein is an attempt to unravel the seeming challenges of a misconceived amalgam of the 'ancient', yet organic and the 'modern', beneath the scenario of a disjunctive reality. The paper grapples more with a seeming interplay of this 'ancient' and 'modern' informed by the imperatives of deep introspection and due comprehension of underlying primordial philosophical undertones anchored on ontology. This is in the light of the exigencies of emergent contemporary living and attendant revisionism. The paper calls on the apex court as the guardian of our jurisprudence to set proper perspectives to 'right' the 'wrongs'. Welcome on board.

Keyword: *Woman to Woman, Marriage, Customary Law, Same Sex Marriage Prohibition, Nigeria*

1. Introduction

Every society from primordial times to the present has a set of customs which regulate its affairs generally and guide its development from one generation to another. 'Custom' is understood to mean the established or commonly acceptable usage of a people in a given society.[1] These customs constitute the customary law of the people. Thus, customary law is statutorily defined us: 'a body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question'.[2] Accordingly, customary law has been judicially described as 'a mirror of accepted usage'.[3] It must have the assent of the native community. It is this assent that gives a custom its validity. It must therefore be shown that the custom is recognized by the native community as regulating its affairs.[4] The custom is not static but flexible. As Osborn CJ held in *Lewis v Bankole*,[5] 'One of the most striking features of West African native custom … is its flexibility. It appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character'. The Customary Law is thus, the organic or living law of the people, regulating their lives and transactions.[6] The marriage institution is one of such societal 'transactions' in traditional society, governed by the custom of the people.

2. Nature of Marriage at Customary Law

Marriage is defined as the 'instance of a legal union of a man and woman as husband and wife'.[7] Marriage is understood as a universal institution, recognized and respected as a global phenomenon. Its foundation derives from the social and religions norms of society and is regulated by it. Marriage is indeed, the root of the family and the society.[8] It is also important to underscore the fact that the social and religious norms of society derive their intrinsic existence and meaning on the ontology of the people. Thus, an understanding of customary marriage must be predicated on an understanding of this ontology viewed from the prism of the native people.[9] Marriage at Customary Law is distinguishable and indeed, different from the foregoing definition of marriage in the Oxford dictionary or conception of marriage under English Law as conveyed in the definition by Lord Penzance in *Hyde v Hyde*[10] as follows: 'I conceive that marriage as understood in Christendom, may … be defined as the voluntary union for life of one man and one woman to the exclusion of all others'. The English Law conception of marriage has foundation in biblical teachings wherein marriage is understood as a Divine institution. Thus, God at creation declared that:

> It is not good that the man should be alone; I will make him an help meet for him … And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his

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[1] O. N. Ogbu, *Modern Nigerian Legal System*, 3rd edn, (Enugu: SNAAP Press Ltd, 2013) p.92.
[2] S.2, Customary Courts Law, Cap 32, Revised Laws of Enugu State, 2004 (As Amended in 2011).
[3] Bairaman FJ in *Owonyin v Omotosho* (1961) 1 All NLR 304 at p. 309.
[4] Atkin LJ in *Eshugbayi Eleko v Officer Administering The Government of Nigeria* (1931) AC 662 at p. 673.
[5] (1908) 1 NLR 81 at pp 100 – 101.
[6] See Obaski JSC in *Oyewunmi v Ogunesan* (1990) 3 NWLR (pt. 137) 182 at p. 207.
[7] A.S. Horby *et al, Oxford Advanced Learner's Dictionary of Current English* (London: Oxford University Press, 1980) p. 521.
[8] E.I. Nwogugu, *Family Law in Nigeria, (Ibadan: Heinemann Educational Books Nig. Ltd, 1985) pp. xxi – xxii.*
[9] The Concept of "ontology" will be discussed *infra*.
[10] (1866) LRIP & D 130 at p. 133.

> ribs, and closed up the flesh instead thereof; And the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man. 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. Therefore shall a man leave his father and mother, and shall cleave unto his wife: and they shall be one flesh.[11]

Thenceforth, marriage became a reality of human existence.

However, marriage at customary law goes beyond the 'cleaving of a man unto his wife' and *a fortiori,*' a union for life between one man and one woman to the exclusion of all others'. It is rather conceived as a union of one family and another family. 'Family' in this sense or 'extended family' called *umunna* is understood in Igbo customary law as referring to all blood relations who are descendants of a common ancestory.[12] Customary Marriage cannot therefore, be validly contracted by an individual, whether man or woman to the exclusion of his or her *umunna* family led by the oldest man in the family or somebody duly appointed by him in that behalf. Family consent to such marriage was essential, even though the prior consent of the individual parties to the intended marriage is also necessary. However, in primordial traditional society, the former consent overrides and preponderates over the latter one. Accordingly, customary marriage could fail if family consent was not granted, notwithstanding that the intended parties to such marriage had indeed, consented to it.

The foregoing is reinforced by the fact that although the spouses were the persons to cohabit in the marriage, the family members of the spouses conceive themselves and were indeed, regarded as critical stakeholders in the marriage. Thus, the 'new wife' in the marriage was regarded by her spouse's family members as 'our wife' and *a fortiori,* each member of such family considered it his responsibility to commit himself to the care and needs of the new wife. And so, the new wife was generally regarded as not solely married to her husband, but into the family with such assimilating consequence that the problems and challenges that might confront the new wife were considered those of the family. By this process therefore, marriage became a means of achieving family solidarity and communal cohesion. This by extension translates into social integration and stability.[13]

Besides consent, there are ceremonial activities associated with customary marriage which convey the reality of family and community interests apart from those of the spouses in such marriages. Such ceremonials include presentation of kolanuts, palm wine, performance of *Igbu Ewu (Igbu Enwe)* and payment of bride price. These are essential pre-requites of customary law marriage in Igbo land and they essentially involve the entire family, kindred or community. Marriage ceremonials also find expression in the performance of the customary rite of sweeping the respective compounds of members of the *Umunna* kindred by the new wife. This in turn attracts presentation of gifts and tokens to the new wife as demonstration of her acceptance to, and bonding with, the family.

Marriage at customary law also goes beyond its conception as a monogamous arrangement of one man and one woman. No, marriage at customary law can also be polygamous. A monogamous, marriage can be conceived as the voluntary union of one man and one woman. Such a monogamous customary marriage is usually voluntary. It may also be for life but may be dissolved during the life time of the parties to such marriage in accordance with the wishes of the parties and the custom of the community. Such marriages are therefore, not indissoluble. Besides, although a monogamous marriage at customary law is not usually envisaged to admit of taking more than one wife during the subsistence of such marriage, this does not *stricto sensu* mean that such a marriage is 'to the exclusion of all others' as envisaged by Lord Penzance.[14] This is so, because customary marriage of whatever variant is an affair between families, kindreds and communities and not limited to the parties to such a marriage *per se.*

A polygamous customary marriage on the other hand, is a voluntary union between one man and more than one wife. Under this marriage arrangement, what is critical is that the man is at liberty to take as many wives as he pleases. The only possible limitation on the number of wives a man could marry is his capacity to provide for the needs and welfare of the wives except perhaps under Islamic Law, which is also part of customary law in Nigeria,

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[11]The Holy Bible, King James Version, Genesis Chapter 2, verses 18, 21 – 24.
[12]A. N. Aniagolu J (as he then was), "Aspects of Customary Marriage and Divorce and Their Incidents Upon Family Life" in T.O. Elias (CJN) *et al* (ed), *African Indigenous Laws,* Proceedings of Workshop, Institute of African Studies, University of Nigeria, Nsukka, August, 1974 (Enugu: Government Printer, 1975) pp. 91 and 99.
[13]*Ibid,* p.99.
[14]*Hyde v Hyde supra.*

under which a man appears to be limited to marry not more than four wives.[15] Polygamous marriages may last for life. However, such marriages just like in monogamous marriages may be dissolved during the life time of the parties. The dissolution must also be in accordance with the wishes of the parties and the custom of the community, the *lex domicilii.*

There is yet another variant of customary marriage which is contextual and has apparently been erroneously termed 'woman to woman' marriage. The incidence of this type of 'marriage' can seemingly be appreciated with a proper comprehension of the underlying customary concept of ontology. Otherwise, any meaningful discourse of the subject would appear quite illusive. What then, is 'woman to woman' marriage at customary law?

3. 'Woman to Woman' Marriage at Customary Law

Let it be said at once that there is no such thing known to customary law as 'woman to woman' marriage. This is because no woman under native custom can take kolanuts and palm wine to any other family purporting to perform customary marriage rites and to pay bride price without the consent, concurrence and participation of her husband's family. It is in this wise that marriage at customary law is said to be cemented between families and kindreds, and not just between individual spouses.

The concept of 'woman to woman' marriage took its root from the practice of the native custom of *obodo echina.* The custom is based on the philosophical understanding of the compelling need to prolong the lineage of families and prevent the incidence of extinction of families which either do not have male offsprings or any offsprings at all. Thus, in such circumstances, a woman in the family can approach her husband's family for consent to 'marry' a woman into the family. It is the family upon its consent, and not the woman that performs the other subsequent marriage rites. It cannot therefore, be said that such a custom approximates to 'woman to woman' marriage.

The underlying philosophical basis of the custom of *obodo echina* may not be properly appreciated without an understanding of the ontology of the people. It is in this wise therefore, that we intend to interrogate this custom. Ontology is the philosophical understanding of the nature of beings, existence or reality as well as the basic classifications of beings and their interaction. Ontology often deals with fundamental questions about the existence of entities or beings and their categorization and relationship within a hierarchy, including their sub-divisions depicting their similarities or otherwise as well as their interactive relations. The whole essence of life for the native African is based on their ontology. And so, to him 'being' is synonymous with 'force'. Accordingly, the African speaks, acts and lives as if 'beings' were 'forces'. Force, in the African conception, is not an accidental reality. It is more than a necessary attribute of being. It is the nature of being. Force, is being and being, is force.

African ontology envisages a hierarchal ordering of forces reflecting their primogeniture with God at the apex; the man (living and departed); animals; plants; and minerals.[16] The origin, subsistence, or annihilation of beings or of forces, is expressly or exclusively attributable to God and accordingly, one force that is greater than another can paralyse it, diminish it, or even cause its operation totally to cease, but for all that, the force does not cease to exist. And so, existence in the understanding of the native African comes from God and cannot be taken from a creature by any created beings.[17] Thus, the African ontological ideas give meaning to African notions of customs and norms as a means of regulating social interaction and social relationships.

In this wise, notions of evil are understood to constitute injustice towards God and towards the natural order which is the expression of the will of God. By the same token, evil and injustice towards ancestors and others in the ontological hierarchy consist in making an attempt against their 'vital rank' and thus, their 'vital force'. The life of the African is not limited to his own person, but necessarily extends to all that is fathered by his 'vital influence' and thus, ontologically subject to him – posterity, land possessions, beasts and all other goods. Every attack or attempt thereof on or against any person(s) who depend on him, or upon his material possession, will be considered as an injury to the integrity of his being, the intensity of his life, his vital rank and by implication, his vital force. It is the victim of such attack on a person or persons or materials under his vital influence and *a fortiori* his vital rank and vital force who decides what will assuage him and restore his vital force.[18]

Obodo echina custom is one of the devices accepted by native people to address such dislocation and distortion in the ontological hierarchy. And so, one of the devices of preventing extinction in family formations in the

[15]E.I. Nwogugu, *op cit* (n.8), p. xxiii.
[16]Plecide Tempels, *Bantu Philosophy*, (Paris: Presence Africaine, 1969) pp. 51 – 52.
[17] *Ibid*, p. 61.
[18]C. U. Agbo, "An Overview of the Ontological Basis of African Jurisprudence", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 9 (1) 2018, p. 52.

community and restoring vital link, vital force, vital rank, vital influence and indeed, 'vitality' between the living and the dead in such families, is what has apparently been called 'woman to woman' marriage, albeit erroneously. What is perhaps of critical importance is whether the custom is 'ancient' or still in existence and accepted by the people as regulating affairs *inter se*. It is thus, instructive to emphasize that once this custom of *obodo echina* is shown to be in existence and accepted among the indigenous people as the organic or living law of the people regulating their lives and transactions, [19] then, it stands as justification against extinction at customary law in accordance with the people's ontology. Its practice therefore, seems to preponderate over the vagaries of nomenclature.

4. 'Woman to Woman' and 'Same Sex' Marriages

We have attempted in the preceding paragraphs to show that it is a misnomer to talk about 'woman to woman' marriage at customary law. It is also contra-factual to approximate *obodo echina* native custom to the obnoxious practice of same sex or gay marriages. This is re-enforced by the fact that there is no such thing as 'man to man' marriage as is the practice in gay marriages.

Same sex marriage, also known as gay marriage is the marriage of same sex couples entered into in a civil or religious ceremony.[20] It is thus, the legal union between two people of the same gender. Throughout history, same sex unions have taken place around the world. However, laws recognizing such marriages did not start occurring until in more modern times. Thus, as at 2015, only 17 countries around the world have put laws in place to permit same sex couples to become legally married. There appears to be rising support in some countries that do not allow same: sex marriages, leading many to erroneously believe that acceptance thereof will continue to grow. In the United States of America for instance, where the clamour for same sex marriage rights appears most vociferous, the Supreme Court of the State of Massachusetts on the 18th day of November, 2003 became the first to hold that the State's ban on same sex marriages was unconstitutional. Thus, the decision in *Goodridge v Department of Public Health* (2003) opened the floodgates to this 'modern' sensation in the State of Massachusetts for issuance of marriage licenses to same sex couples. The *Goodridge* case was an appeal against a 2002 Suffolk County Court decision predicating the purpose of marriage on procreation which some sex couples will be unable to achieve. The Massachusetts Supreme Court by a decision of 4 to 3 preferred to overrule the lower court based on 'the superiority of the constitutional rights of same sex couples.'[21]

Similarly, in *Windsor v United States* (2013)[22] the Supreme Court of the United State of America struck down part of the provisions of the Defence of Marriage Act (DONA) which was signed into Law in 1996 by President Clinton. Section 3 of the Law specifically defined marriage as a union between a man and a woman and thus, preventing the Federal Government from recognizing same sex marriages. In consequence, DONA deprived same sex couples the basic rights, responsibilities and protection that are associated with marriage. The suit against the US government was filed in 2010 by Edie Windsor, who had been in a 40-year relationship with her partner, Thea Spyer. Both partners were married in Canada in 2007. When Thea died, she left all the assets of the estate to her partner, Edie Windsor who sought to claim the federal estate tax exemption for surviving spouses. The exemption was denied by the US Inland Revenue Service (IRS) ostensibly because they did not recognize the women as a married couple. As a result, Edie was compelled to pay hundreds of thousands of dollars in estate taxes. On the 6th day of June, 2012 a district court held that section 3 of DONA was unconstitutional. And the following year (2013), the US Supreme Court reviewed the case and upheld the decision of the lower court without fully overturning DONA. [23]

5. The Challenge of 'Woman to Woman' Marriage and 'Same Sex' Marriage Prohibition in Nigeria

It is not within the purview of this paper to canvass the merits or demerits of same sex marriages. However, same sex marriages are prohibited in Nigeria by law.[24] Under the Nigerian Law, 'marriage' is defined as 'a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law', while 'same sex marriage' is expressed to mean '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'.[25] 'Civil union' under the enactment means 'any arrangement between persons of the same sex to live together as sex

[19]See Ow*onyin v Onotosho supra; Kimdey & Ors v Military Governor of Plateau State* (1988) 2 NWLR (pt. 77) 445*; Oyewunmi v Ogunesan supra.*

[20]<https:/en.m.wikipedia.org >Wiki> same sex mamage accessed on 25/08/2018.

[21]<https://legaldictionary. net> same sex marriage accessed on 25/08/2018.

[22] *Ibid.*

[23] See also the US Supreme Court decision in *Hollingsworth v Perry* (2013*)* to the same effect, *Ibid.*

[24] Same Sex Marriage (Prohibition) Act 2014.

[25] *Ibid,* s. 7.

partners…'.[26] The general purport of the Nigerian Law is to prohibit a marriage contract or civil union entered into between persons of same sex. It also provides for penalties for the solemnization and witnessing of such marriages and civil unions.[27] It is immaterial whether such marriages and civil unions were contracted outside Nigeria, because a certificate issued in respect thereof is void.[28] It is also instructive that registration of gay clubs, societies and organizations, their sustenance, processions and meetings as well as public display of same sex amorous relationships howsoever, are prohibited.[29]

The customary practice whereby a woman is married into a family where there is either no male child or no child at all, to help raise children for such a family to prevent extinction under the *obodo echina* custom is clearly distinct from same sex or gay marriages and civil unions which the Same Sex Marriage (Prohibition) Act prohibits in Nigeria.

Under the *obodo echina* custom, erroneously termed 'woman to woman' marriage, the 'spouses' do not live together for the purpose of same sex relationship, nor do they approximate howsoever, to any arrangement to live together as sex partners as is the case in gay relationships of homosexuality and lesbianism. Thus, the criminal sanctions provided for in section 5 of the same Sex Marriage (Prohibition) Act cannot apply to the customary practice of *obodo echina*. This is because the requisite elements of *actus reus* and *mens rea* needed to establish criminal responsibility are absent in the so called 'woman to woman' marriage. Indeed, gay practices at customary law constitute abominations *(nso ani)* and are strictly prohibited. This perhaps explains why usually, women who were already pregnant were considered most suitable for such marriages under the *obodo echina* custom. Besides, specific arrangement is made in the family for a particular male member to be responsible for the emotional and physical care of the woman. Such a family male member acts in all intents and purposes as 'husband' to the woman and provides for her needs. Such an arrangement does not promote promiscuity. Any impressions to the contrary, seem to be attributable to an insufficient comprehension of the underlying philosophical ontology of the *obodo echina* custom.

6. 'Woman to Woman' Marriage and the Validity Question

The incidence of 'woman to woman' marriage at customary law as contextually embodied in the practice of *obodo echina* custom is already in existence and accepted in various native communities in Igbo land, nay Africa. Thus, the necessity of discussing its establishment by evidential proof by witnesses, experts or assessors, or as conveyed in books and manuscripts on the one hand; or by judicial notice thereof on the other, does not seem to arise. Besides, these issues have, in our view, been adequately discussed elsewhere.[30] Our focus will therefore be channeled to examining the validity of the said custom as required by law. In doing so however, due notice must also be taken of the fact that the Evidence Act is not applicable in the proceedings at customary courts.[31]

Various enactments enabling the courts to apply and enforce customary law also set conditions for determining the validity of the specific customs or rules of customary law sought to be applied and enforced. For instance, by the provisions of paragraph (a) of sub-section (1) of section 15 of the Customary Court Law of Enugu State,[32] a customary court shall subject to the provisions of the Constitution and the Customary Court Law administer:

> The customary law prevailing in the area of jurisdiction of the court or binding on the parties to a dispute, so far as that customary law is not repugnant to natural justice, equity and good conscience, and is not incompatible either directly or by necessary implication with any written law for the time being in force.

Besides the foregoing requirements that customary law must not be repugnant to natural justice, equity and good conscience nor incompatible, with any written law for the time being in force, sub-section (3) of section 18 of the Evidence Act[33] imports the requirement of 'public policy'. In other words, the customary law must not be contrary to public policy. We will attempt an examination of the validity tests in reverse order viz – public policy test, incompatibility test and repugnancy test.

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[26]*Ibid*.
[27]Ibid, ss. 1, 2, 3 and 5.
[28] *Ibid*, s. 1(2)
[29] *Ibid*, s. 4.
[30]A. O. Obilade, *Nigerian Legal System*, (London: Sweet & Maxwell, 1978) pp. 84 – 99; O. N. Ogbu, *Modern Nigerian Legal System, op cit* (n.1) pp. 104 – 112.
[31]See for instance Order 10 rule 1 of the Customary Court Rules of Enugu State 2011.
[32]*Op cit* (n. 2).
[33]2011

The Evidence Act which imports the requirement of 'public policy' test, failed to define the purport of the phrase. What constitutes 'public policy' like 'national interest' seems to escape precise definition and is susceptible to social dynamics dictated by the exigencies of space and time. It is a fluid concept, mirroring essentially the changing mood of society. It includes the mandatory provisions of a State's domestic law as well as the most basic concepts of morality and justice that society regards as sacred.[34] Public policy is also judicially pronounced to connote the ideas in vogue for the time being in a community as to the conditions necessary to ensure communal welfare such that anything which is generally regarded as injurious to communal interest is treated as against the public policy. Thus, public policy is not fixed, but fluctuates in accordance with changing circumstances of the time.[35]

In any event, notwithstanding that the Evidence Act is not applicable in proceedings at customary courts, the public policy test imported thereby is not satisfactory. This is because the test appears susceptible to the whims and sensibilities of the individual assessor or decision maker. It also creates the problem of lack of certainty and predictability of the law because what constitutes public policy itself is dynamic, changing with changing times. It seems quite doubtful whether such changing yardstick could constitute the basis for assessing the validity of the *obodo echina* custom which is vitally in existence, and still accepted by the people. It is still the root of the existence of many a people in Nigeria today. This existence is further protected *vide* sub-section (2) of section 42 of the Constitution of the Federal Republic of Nigeria 1999 as amended.

With respect to the incompatibility test, it has been shown in the preceding paragraphs that the particular custom of *obodo echina* is not within the contemplation of the Same Sex Marriage (Prohibition) Act and is not incompatible therewith. Under the enactment, no customary court, not even the hallowed Customary Court of Appeal is vested with jurisdiction to entertain such complaints. Section 6 thereof confers the jurisdiction to entertain such matters on the High Court of a State or the High Court of the Federal Capital Territory, Abuja. And for the avoidance of doubt, 'court' is defined in the Act to mean the courts aforesaid.[36] It seems therefore, that it was not the intendment of the legislature to extend the frontiers of the Act to customary usages and norms. If it were so, then the jurisdiction of the courts to entertain such matters would have been extended to Customary Courts and Customary Courts of Appeal.

Besides, it is a daunting task to determine whether a particular custom is compatible with any written law for the time being in force, because it presupposes the knowledge of all written law in force. Such knowledge may not be easy. It is even doubly daunting to determine whether such custom is impliedly or indirectly incompatible with such written law.

Can the custom of *obodo echina* masqueraded as the so called 'woman to woman' marriage be said to be repugnant to natural justice, equity and good conscience? What really, is the purport of the repugnancy test as to constitute a valid test in determining the applicability and enforcement of a rule of customary law? It seems that a proper understanding and application of the phrase 'repugnant to natural justice, equity and good conscience' will depend on the individual doing the appraisal and the prism through which he does it. Thus, such an enterprise will often times be seemingly subjective, being contingent upon individual notions of the subject – matter and proper limits thereof. In this wise, conceptions are influenced and dictated in the main, by the idiosyncrasies of the individual and that of the society to which he belongs. These tendencies are quite often implicitly embedded than explicitly avowed and they shape individual and societal spacio-temporal dispositions to the dynamics of existence.

It can be vividly recalled that in colonial Nigeria, most judicial officers were non-Nigerians and so, were in the main, embodiments of what Professor Ogbu describes as 'self-righteous indignation' in their disposition towards 'strange' cultures.[37] These judges conveniently considered such cultures as not only inferior viewed from their background, but also generally 'barbarous'.[38] These attitudes and tendencies find eloquent manifestations in the

[34]A. I. Okekeifere, "The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria", *Journal of International Arbitration*, 1997, Vol. 14, No. 3, p. 236.
[35]*Okonkwo v Okagbue* (1994) 9 NWLR (pt. 368) 301 at p. 321.
[36]Same Sex Marriage (Prohibition) Act, *op cit* (n. 24), s.7.
[37]O.N. Ogbu, *op cit* (n.1), p.115.
[38]*Ibid*.

holdings of English judges such as for instance, Lord Wright[39] and Lord Atkin.[40] Some indigenous Judges with all due respect, joined in this misconception.[41]
It seems right therefore, that conformity with standards of behaviour acceptable in advanced societies such as England or even conformity with the principles of English law should not be the guide in deciding the test of repugnancy *vis-à-vis* the customary law. Niki Tobi JCA (as he then was) rightly in our view, admonished that, the determination of whether a custom is repugnant, must be anchored on an inward look. This 'inward' approach is predicated in the context and content of the Nigerian jurisprudence.[42] However, an understanding of the Nigeria jurisprudence must be predicated on a corresponding understanding of the Nigerian peoples' ontology which is the basic foundation of that jurisprudence. And a proper appreciation of native law and custom must flow from this ontology.[43]

If therefore the repugnancy test is interpreted to mean 'fair and just or conscionable' as Professor Gaius Ezejiofor opines,[44] then such 'fairness' cannot be understood in abstraction. It must be encapsulated within existential realities of a people as accepted by them. And so, while one may agree that some native customs of yesteryears such as human sacrifice, burial of a human being alive as slave to a dead 'prominent' chief or *Ozo* title holder, and the like, may be said to be obnoxious, there is absolutely no justification in our view, to make a blanket condemnation of native custom as 'barbaric', 'uncivilized', etc particularly viewed by people from a different background. Much less, can a life-giving and life propagating custom of *obodo echina*, erroneously called 'woman to woman' marriage be said to be obnoxious and repugnant to natural justice, equity and good conscience. It is in this light apposite to contend that an inappropriate appreciation of native custom may lead to manifest miscarriage of justice. It seems, with all due respect, unfair to impose a blanket condemnation of any custom which permits of a so called 'woman to woman' marriage as either encouraging promiscuity[45] or homosexuality and thus, repugnant. Such interpretation seems with due respect, to approximate to overlooking the essential peculiarities of native custom viewed from the perspective of native people.

In *Okonkwo v Okagbue*,[46] the appellant as plaintiff instituted a suit in a representative capacity for himself and for and on behalf of his four brothers against the respondents as defendants in the High Court at Onitsha Division. The appellant and four others on whose behalf be brought the action were the surviving sons of Nnanyelugo Okonkwo (deceased) of Ogbotu village, Onitsha who died in 1931. The late Nnanyelugo Okonkwo had two sisters, the 1st and 2nd respondents, who survived him. Neither the 1st nor the 2nd respondent had any child by either their respective husbands or indeed, anyone else. About 1968, the 1st and 2nd respondents without the requisite knowledge and consent of the appellant and his said four brothers, purportedly married the 3rd respondent for and on behalf of late Nnanyelugo Okonkwo, their brother. Pursuant to the said 'marriage', the 3rd respondent gave birth to a string of six children purporting them to be children of late Nnanyelugo Okonkwo. The 1st and 2nd respondents also held the children out as those of their late brother, Nnanyelugo Okonkwo despite repeated protests and demands by the appellant, that the children be returned to the people of late Okagbue and late Obiozo who by Onitsha native law and custom should be their fathers. Thus, the appellant instituted the action, claiming as follows:

1(a) A declaration that under Onitsha native law and custom, the 1st and 2nd defendants by themselves cannot marry the 3rd defendant for their late brother, Nnanyelugo Okonkwo, and that the alleged marriage is *null* and *void*.
(b) That the 3rd defendant is not the wife of late Nnanyelugo Okonkwo.
2. An order of court that all the children of the 3rd defendant are not issues of late Nnanyelugo Okonkwo.
3. A declaration that the (said) children cannot inherit both the real or personal property of late Nnanyelugo Okonkwo or succeed to any seat temporal or spiritual in Ogbotu village, through Nnanyelugo Okonkwo lineage and, or in the alternative, that the children of the aforesaid marriage are the children of Okagbue

[39]*Laoye v Oyetunde* (1934) AC. 170.
[40]*Eshugbayi Eleko v Officer Administering the Government of Nigeria, supra*.
[41]See for instance, *Jibowu J. in Dawodu v Danmole* (1962) 1 WLR 1053 with respect to his Lordship's interpretation of the *Idi Igi* and *Ori Ojori* rules of Yoruba custom
[42]*Mojekwu v Ejikeme* (2001) 1 CHR 179 at p. 209.
[43]C.U. Agbo, *op cit* (n.18), pp. 53 – 55.
[44]G. Ezejiofor, "Sources of Nigerian Law" in C. O. Okonkwo (ed), *Introduction to Nigerian Law,* (London: Sweet & Maxwell, 1980) p. 43.
[45]The Supreme Court unfortunately took this position in *Meribe v Egwu* (1976) 6 ECSLR 208; and in *Okonkwo v Okagbue supra,* anchoring same on the vacillatary public policy.
[46]*Supra*.

> and Obiozo and belong to Ogbeodogwu and Ogboli families according to Onitsha native law and custom.

At the conclusion of the hearing, the learned trial judge dismissed the appellant's (plaintiff's) claim. The appellant's appeal to the Court of Appeal failed. On further appeal by the appellant to the Supreme Court, the apex court unanimously allowed it. The Supreme Court held that marriage is a union of a man and a woman. That is to say, between two living persons. And so, for a marriage to be meaningful, it is necessary for the husband to physically exist to ostensibly consummate the marriage. The apex court then came to the conclusion that a custom that allows a woman to be married to a deceased man as in the instant case, cannot be said to be in good conscience or in accord with public policy. According to Ogundare JSC, a claim that the children of the 3rd defendant are those of Nnanyelugo Okonkwo (deceased) 'is nothing but an encouragement of promiscuity' and thus, his lordship concluded that 'a custom that permits of such a situation gives license to immorality and cannot be said to be in consonance with public policy and good conscience…'.[47]

Given the peculiar set of facts of the *Okonkwo* case, the 'marriage' of the 3rd defendant to late Nnanyelugo Okonkwo was *ab initio* not in accordance with native law and custom. The requirement of prior consent of the Okonkwo family was not sought and obtained by the 1st and 2nd defendants before purporting to contract the marriage. It has also been canvassed that no woman can, without the consent and concurrence of the family purport to proceed to enter into a marriage contract. No woman can also perform the customary marriage rites and ceremonies such as presentation of kolanuts, palm wine, payment of bride price and *Igbu Ewu (Igbu Enwe),* to the exclusion of the family into which the 'new wife' is sought to be married. Marriage at customary law is a union of families. Besides, there was no threat of extinction of the Okonkwo family to entitle the invocation and application of the *obodo echina* custom since late Nnanyelugo Okonkwo had surviving sons. These grounds seem, in our view, to be more cogent and compelling grounds to have allowed the appeal. However, they constitute no justification for the seemingly wide and over generalized assumption that any custom that permits of a so called 'woman to woman' marriage encourages promiscuity or immorality. It also seems that much less can a decision as reached in the *Okonkwo* case be anchored on the shifty sands of the fluid public policy. Even the syllogistic conscience is ultimately anchored on fairness, and fairness itself is pro-life free from discrimination as to circumstance of birth. It will take the apex court to set more satisfactory standards for interpreting, applying and enforcing native customs and norms, anchored on surer grounds.

For the avoidance of doubt, practice of the custom of *obodo echina* does not encourage promiscuity because under a family arrangement, a kinsman is assigned to care and cater for the woman married into the family on a 'woman to woman' arrangement as if he were the woman's 'husband'. By the same token, the practice does not tolerate of any dint of lesbianism as envisaged under the prohibition Act.[48]

7. Conclusion

To fully comprehend and appreciate the customs and usages of a people, due circumspect ought to be attached to a fundamental study and understanding of the underlying ontological philosophy of the people in accordance with their own norms of conduct acceptable to them and not by external standards imposed by other people from other cultural or moral backgrounds. It follows therefore, that one may not appreciate the practice of *obodo echina* custom masqueraded as 'woman to woman' marriage in the face of the seeming 'challenges' of the Same Sex Marriage (Prohibition) Act without an appreciation of the rational grounds and spirit which underline the principles and logic of the former in the light of the exigency of modern life and emerging revisionist morality of the latter. Whatever be the case, a fair assessment must be predicated on the peoples' disposition viewed from their prism. It is our view that the apex court must take the lead to set proper perspectives in order to 'right' the 'wrongs' as the guardian of our jurisprudence.

[47] *Ibid,* at pp. 195-196.
[48] Same Sex Marriage (Prohibition) Act, *op cit* (n. 24).