

## AFRICAN SAME-SEX MARRIAGE VARIANT

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### ABSTRACT

A Same-Sex Marriage is a marriage where the parties are members of the same sex. It is a marriage between two men or two women. It is the marriage of two people of the same sex. African Scholars have been very emphatic in their submission that same - Sex Marriages have no place in the African experience and that it is abhorred in Africa. There has therefore been a wholesale condemnation of Same-Sex Marriages in Africa with most of its leaders and people refusing to be proselytes in the ongoing mass movement to legalize Same - Sex/ Gay Marriages, a resistance that approached its crescendo with the then President Robert Mugabe of Zimbabwe declaring that he was going to the White House to propose to the then President Barak Obama of the US. This article aims at showing that there is a variant of same-sex marriages that is indigenous to Africa as could be seen in the practice of same by the Anioma people of Delta State of Nigeria. This article uses the analytical research method in achieving its aim. It finds that there are pockets of same-sex marriages which might be christened African instituted same-sex marriages as it appears indigenous to Africa, using its practice by the Anioma people as a prototype. The article finds also that even though the extant laws criminalize such practices where they are found, it is still currently practiced with parties thereto enforcing their rights under the marriage by threats of metaphysical harm. The article further finds that the purpose of this African-instituted same-sex marriage is similar to the purpose of surrogacy, which is assisted reproduction. It, therefore, recommends a hybrid from both concepts where the nomenclature of marriage is removed from this customary practice and the payment of bride price replaced with the payment of commission as it is done under surrogacy which the law does not frown at. In this way, the criminality attached to same-sex marriages will be removed even when the couple cohabit. This paper has contributed to knowledge in showing that in fact,

same-sex marriages are not truly alien to Africa, as some variants of it exist and proffers possible ways to make it legally acceptable.

## INTRODUCTION

This article aims at pointing out the fact that, contrary to the vehement submission of African scholars and leaders that same - Sex Marriages are alien to Africa, there exist pockets of Same-Sex Marriage that are indigenous to Africa, a practice that is timeless and still currently practiced. It also does a comparison between the African variant and the Same - Sex Marriages practiced in other climes, particularly in the Western world.

African scholars vehemently assert that same - Sex Marriages have no place in Africa and that it is abhorred in Africa. These lines of argument reached their crescendo when the then-president of Zimbabwe, Robert Mugabe declared that he was going to the White House to propose to the then-president of the United States, President Barack Obama, in response to the latter's insistence that African countries should allow Same - Sex Marriages in their domains.<sup>i</sup> The existing legal literature has not focused much on this variant of Same-Sex Marriage practiced in Africa. The ongoing international discussion on Same-Sex Marriages, as regards Africa, is for the recognition and decriminalization of Same-Sex Marriages in African countries.<sup>ii</sup> The international discussion on Same-Sex Marriage, as it relates to Africa, has to do with acceptance of the practice in the Countries that make up the Continent without emphasizing that at least this phenomenon exists in some variants in the Continent. This article further focuses on the enforceability of this African variant of Same-Sex Marriage against the background of existing laws criminalizing traditional Same Sex Marriages in countries where the variant is found.

This article points out that though this variant of Same-Sex Marriage is *de jure* unenforceable, it is *de facto* enforced through the threat of extra-legal coercive forces. The article examines the possibility of its legal inclusion, noting its similarity with surrogacy. It is against this background that this article will examine the legal implication of African-instituted same - Sex Marriages as typified by the practice among the Anioma people of Delta state, Nigeria.

## HISTORIC BACKGROUND ON SAME SEX MARRIAGE

### *Marriage Defined*

The Traditional definition of Marriage is defined by Lord Penzance as follows: "...the voluntary union for life of one man and one woman to the exclusion of all others."<sup>iii</sup> This strict definition of Marriage has been challenged with the current recognition and Legal acceptance of Homosexual Marriages in many countries like England, Canada, South Africa etc. thus disturbing the presumption that marriages are always contracted between a man and a woman. Thus, marriage is currently defined as The Legal union of a couple as spouses.<sup>iv</sup> The Merriam-Webster Dictionary<sup>v</sup> gives both the Traditional and Contemporary definitions of Marriage when it defines Marriage as: "the state of being united to a person as a spouse in a legal, consensual, and contractual relationship recognized and sanctioned by and dissolvable only by Law: The ceremony containing certain legal formalities by which a marriage relationship is created

### *Same-Sex Marriages*

A Same-Sex marriage is defined as: "the ceremonial union of two people of the same sex; a marriage or marriage-like the relationship between two men or two women."<sup>vi</sup> Same-sex marriage is the practice of marriage between two men or between two women.<sup>vii</sup> Same-Sex marriage is marriage between two persons of the same biological sex or gender identity.<sup>viii</sup>

When sexual attraction is directed at individuals of the same sex, homosexuality is said to have emerged. Individuals who are in favour of same-sex marriage argue that the freedom of association guaranteed by the constitution and other international human rights accords also includes the right to relationships, to live together, and to be married. They argue that because homosexuality is a genetic trait present in certain people, discrimination against them should be avoided.

Islamic or Sharia law advocates marriages between a man and a woman. Men having sex with each other should be punished, the Koran says, but it doesn't say how - and it adds that they should be left alone if they repent. The death penalty instead comes from the Hadith, or accounts of the sayings of the Prophet Muhammad. The accounts differ on the method of killing, and some accounts give lesser penalties in some circumstances.<sup>ix</sup>

In Islam, the concept of marriage (*nikah*) being the union of two sexes between male and female is consistent throughout the Quran. By Allah's mercy and Divine wisdom in creation, all other forms of sexual relationships, like fornication, pre-marital or same-sex sexual relationships, are prohibited.<sup>x</sup> When asked about marriage, Jesus spoke of marriage being that of a man and his wife. He referred to the first account of marriage by Moses in Eden saying that "for this cause shall a man leave father and mother and shall cleave to his wife: and they twain shall be one flesh."<sup>xi</sup>

African Traditional religion has no place for homosexuality. Homosexuality nags at the conscience of Africans. In African societies, an important factor in anti-gay agitation is the moral weight assigned to having children, and emphasis on heterosexual intercourse as a way to achieving this. Procreation ensures continuation of biological heritage, through which the history of society unfolds. Hence raising children and contributing to a lineage is upheld as a vitally important good for community. In this way, biological reproduction through heterosexual sex becomes a moral responsibility.<sup>xii</sup>

Same - Sex married couples in many countries do not share all of the same rights and benefits as different-sex married couples, such as the right to adoption. In some countries, same-sex couples also experience additional restrictions. For example, in Taiwan same-sex marriage was only available to Taiwanese citizens or a citizen of a foreign country that recognizes same-sex marriage who seeks to marry a Taiwanese citizen.<sup>xiii</sup> Taiwan has now moved to recognize Transnational Gay couples with spouses from countries that do not recognize same-sex marriage, in a major victory for marriage equality. Couples with non-Taiwanese partners from jurisdictions that do not allow same - Sex marriage, including Hong Kong and Macao, can now wed in Taiwan. But Gay couples involving citizens of mainland China are still not eligible to tie the knot in Taiwan.<sup>xiv</sup>

### ***Status of Same-Sex Marriages in Nigeria***

In Nigeria, under the criminal and penal codes, Homosexuality was already unlawful and criminalized. Sections 214, 215, and 217 of the Criminal Code already prohibit same-sex sexual relations.

Section 214 of the Criminal Code Act<sup>xv</sup> states that:

*Any person who (1) has carnal knowledge of any person against the order of nature; or (2) has carnal knowledge of an animal; or (3) 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.*

Section 215 of the Criminal Code Act<sup>xvi</sup> States:

Any person who attempts to commit any of the offences defined in the last preceding section is guilty of a felony and is liable to imprisonment for seven years. The offender cannot be arrested without a warrant.

Section 217 of the Criminal Code Act<sup>xvii</sup> states:

*Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant.*

On 7<sup>th</sup> January 2014, the then-president of Nigeria, Dr Goodluck Jonathan signed into law the Same-Sex Marriage (Prohibition) Act of Nigeria 2013. The Act prohibits a marriage contract or Civil Union between persons of the same sex.<sup>xviii</sup> Also, a Same-Sex Marriage Contract or Civil Union entered outside Nigeria is void in Nigeria and unenforceable.<sup>xix</sup> The Act prohibits the solemnization of such marriage in a church, mosque, or any place of worship in Nigeria.<sup>xx</sup> No Same-Sex Certificate of Marriage or Civil Union is valid in Nigeria.<sup>xxi</sup> The Law recognizes a valid marriage in Nigeria as that contracted only between a man and a woman.<sup>xxii</sup> The Act also prohibits the registration, sustenance, procession, and meetings of gay clubs, societies, and organizations.<sup>xxiii</sup> Under the law, public show of amorous relationships directly or indirectly by members of the Same-Sex is Prohibited.<sup>xxiv</sup> A 14 years jail term awaits anyone who enters a same - Sex Marriage Contract or civil union under the law.<sup>xxv</sup> A 10-year jail term awaits anyone who has anything to do with a Gay Club or who directly or indirectly displays same - Sex amorous relationships in Nigeria.<sup>xxvi</sup> Also under the Act, any person who administers,

witnesses, aids, or abets the solemnization of a Same-Sex Marriage or Civil Union or supports the existence of a Gay club or society, procession, or meeting is liable to 10 years imprisonment if found guilty<sup>xxvii</sup>. The High Courts of the States and of the Federal Capital Territory are empowered with Jurisdiction over matters under the Act.<sup>xxviii</sup>

The Same-Sex Marriage (Prohibition) Act 2013 did not make allusion to the provision in the Criminal Code or marry its provisions with those of the Criminal Code on Homosexuality. There is also a lacuna in the Act as it did not determine the status of Transsexuals - whether they will be taken to have become their acquired Gender or whether they will be regarded as still belonging to their biological gender for the purposes of marriage.<sup>xxix</sup>

It has been submitted that Article 16 of the Universal Declaration of Human Rights (UDHR) states that Men and women of full age, without any limitation due to race, 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. In this sense, the same-sex partner may be entitled to marriage.<sup>xxx</sup>

## **AFRICAN VARIANT OF SAME-SEX MARRIAGE TYPIFIED BY THE PRACTICE BY THE ANIOMA PEOPLE OF DELTA STATE OF NIGERIA**

### ***The Anioma People of Delta State of Nigeria***

Anioma is the second largest ethnic group in Delta State. They are made up of Igbo communities which span across 9 Local government areas. They occupy Delta North Senatorial District, which consists of the Enuani (Oshimili/Aniocha), Ika, and Ukwuani/Ndokwa linguistic zones of Delta State. Anioma means "Good Land" in the Igbo language, and it has an estimated total population of approximately 1.8 million people.<sup>xxxi</sup> Chief Osahon of Umunede in March 1976, christened the Ibo-speaking area of the West Niger, Anioma.<sup>xxxii</sup>

The area boasts of progenies like Dr. Ngozi Okonjo Iweala of the World Trade Organization, Prince Demas Nwoko, a Nigerian artist, protean designer, master builder, and world-renowned architect who was awarded the Golden Lion for Lifetime Achievement at the 2023 Venice

Architecture Biennale, Professor 'Zulu Sofola, first female Professor of theatre in Africa (now deceased but never forgotten), General Lucky Eluonye Onyenuchea Irabor, the erstwhile chief of defense staff, the dogged Dr. Benjamin Okwumabua who arrived America with just 10 Dollars in his pockets and eventually became President of Watson Industries, a multimillion Dollar company, a feat that *Ebony magazine* graphically captured, Dr. S. W. Martins who as far back as 1920 had earned a Bachelors and master's Degree in America (even before the equally legendary Dr. Nnamdi Azikiwe) to become the first Nigerian graduate of an American university and first African US commissioned officer (He was the founder of the pilgrim Baptist Mission ), Ken E. Mozia S.A.N, the election petition guru and astute lawyer, and the legendary hot-headed Major Chukwuma Kaduna Nzeogwu, whose activities were the traceable cause of the Nigerian civil war, to mention but a few citizens from that region who are well read and well bred .

### ***The Practice of Same-Sex Marriages among the Anioma People***

In this Anioma area, there exists a custom where a woman is allowed to marry another woman by paying her bride price and fulfilling other customary incidents of marriage. This happens when such a woman cannot bear her own children and is wealthy enough to marry another young prolific woman to bear kids for her. Under this arrangement, the wealthy woman pays the other woman's bride price who then moves in, to live with her as wife. Men or a man are/is procured to come in and sleep with the prolific woman only with the understanding that the resultant kids would belong to the wealthy woman.

Writing on this phenomenon, E.I. Nwogugu,<sup>xxxiii</sup> had this to say:

*In some parts of Nigeria, an unmarried but prosperous woman who desires to have a family of her own may, if she cannot bear children, 'marry' another woman to do so on her behalf. She attains this objective by providing the bride price for a new wife who while living with her bears children. Usually, internal family arrangements are made whereby the new wife bears children by specially chosen male members of the family or by a paramour. The marriage... may be regarded as a type of 'ghost marriage'.*

Obi,<sup>xxxiv</sup> writing on this, said:

*In those cases ... unmarried women sometimes "marry" other women, the fact is that these women actually effect such marriages in the name of their deceased fathers - a sort of "ghost marriage" said to be encountered in East and Central Africa. We are therefore driven to the conclusion that there is no difference in kind (as distinct from the procedure) between the so-called "woman-to-woman" marriage and the regular man-to-woman marriage.*

I have encountered an instance of this kind of woman-to-woman Marriage at Issele uku (An Anioma town). The woman in question contracted this kind of marriage with a younger woman. She was quite wealthy and had built a house on her father's land. One of her brothers was particularly hostile to the wife and her kids, insisting vehemently that they have no inheritance in their father's land. The said brother was charged to court for conduct likely to cause a breach of peace. A Will was written by the woman to ensure that the kids inherit the property after her demise. After the death of the woman, the resistance against the kids was so stiff that they and their mother were reluctant in coming to hear the Will being read, up till the time of this writing (21/05/23)

#### ***Same-sex Marriage Rights of the Omu (The Queen Mother)***

Another instance of the practice of same-sex marriage among the Anioma people is the situation where the queen mother, called the *Omu*, has an inherent right to take a wife or wives for herself. Talking about the *Omu* institution and the functions of an *Omu*, the *Omu* of Anioma, Obi Martha Dunkwu, had this to say:

*An Omu is leader of women. She is also the custodian of the market. Thirdly, she is the spiritual guide to the community and the traditional ruler. She is the only female member of the traditional council. The traditional ruler is the father of the community, while the Omu is the mother of the community. Together, the father and mother govern the community. This is what the Omu is. Now, at the point of coronation, once you are pronounced an Omu, you have to leave your marital home, because the Omu can't be married. At the point of coronation as an Omu, you are bestowed with male rights. So, as an Omu, you are a man and woman put*



*together. As an Omu, you have to leave your marital home and return to your father's home, where a palace would be built for you. At this instance, like any other king, you are now entitled to marry two wives or more that is, if you decide to. They will bear children, and the children are yours as an Omu.*<sup>xxxv</sup>

In another interview, she further said:

*Once you are pronounced as Omu, and you had married, you must leave your marital home and return to your father's house. You are now a man. A palace will be built for you in your father's place. You stop contacting your husband but that is not to say he cannot come and say hello, however he cannot stay with you for hours. He cannot come and sleep with you, so you have no responsibility to the man whatsoever. If you had children before you became Omu, the children would still be yours. And if you had one child before you became Omu and now wish to have more children, you can marry a woman, who will give you more children. This is because you cannot live with man again. And in such a situation, the child you previously had and the one the woman had will have the same rights. That is, your two sets of children will have the same rights the child or children you had before you became Omu and those you had in the institute. But for me, I have one son and I never married. I used to say that marriage is by choice but for the past couple of years, have seen it as providential. I have one son who is married with a son now and is a lecturer in the university. I am man and woman put together. I'm not under a man, rather different spiritual person. During my coronation, male rights were bestowed on me.*<sup>xxxvi</sup>

These *Omus* (Queen Mothers) of the Anioma areas were highly revered, powerful, and believed to possess spiritual powers. There are known *Omus* today who have children from their wives whom they married in the exercise of this inherent right to marry, though it must be admitted that it is no longer commonplace in these present times. It is submitted that those *Omus* who have exercised this right to marry wives are engaged in a same-sex marriage that has an African flavour.

## THE LEGALITY AND ENFORCEABILITY OF AFRICAN-INSTITUTED SAME-SEX MARRIAGES

Apart from these marriages being outlawed by the Same-Sex Marriage (Prohibition) Act, of 2013, the courts have before this present dispensation ruled that such customary practices are repugnant to natural justice, equity, and good conscience. In the seminal case of *Edet v Essien*,<sup>xxxvii</sup> it was held that a custom that denied a biological father of his child is repugnant to natural justice, equity, and good conscience, and therefore cannot be upheld. In *Odigie v Aika*,<sup>xxxviii</sup> Hon. Justice Ohiwerei held that the Ishan custom, whereby a childless woman can marry another woman to bear issues for her is regarded as being repugnant to natural justice, equity, and good conscience and therefore unenforceable.

It is to be observed that though our courts and laws have held and legislated against these customary practices, it is still practiced to date, showing that it is almost impossible to change a people's inherent belief through legislation alone. A case that I handled some time ago illustrates this perfectly. In this case, a woman had paid the bride price of a young girl so she could bear children for her. True to it, the young wife bore some children. She was impregnated on each of the occasions by Mr X who sometime later lured the young woman away from the woman who paid her bride price and actually claimed the children as his, legally. He started cohabiting with the young woman. Much later certain calamities started befalling the couple. One of the children was crushed by a car on his way from their farm. Much later another of the children died of a strange ailment that could not be diagnosed by doctors. Their mother was also subsequently hit by a car that left her with a broken leg. The last straw that broke the camel's back and made him rethink happened at a funeral ceremony of a hunter. Mr X was a part-time hunter and a hunter had died in the community. As is customary, all the hunters gathered to mourn their deceased colleague each armed with his gun. At a point in the ceremony, there was a gun salute in honour of the departed hunter. Mr X's gun did not shoot despite the fact that it was loaded. It was a double-barrelled gun. He therefore went aside to check why the gun did not shoot when he pulled the trigger. His 12 years old son followed him and was beside him holding a bag which contained other cartridges of the double-barrelled gun. Mr X was still attending to his double-barrelled gun, cocking it when it discharged, and accidentally killing his son on the spot. The bullet went straight into his heart. There was commotion. The boy was taken to the mortuary while Mr X was taken by his kinsmen to the

police station to report the matter where he was detained pending investigation for the charge of murder of his own son. The case was later charged to court. That was the latent facts of the case of *State v Ikpeoyi*.<sup>xxxix</sup> Mr. X was later admitted to bail. It was discovered that the woman whom he had, enticed and harboured her wife and children had cried to a deity (*Juju*) over the wrong and kept her peace. Mr. X and his kinsmen now went on a peace trip to the family of the woman with the remaining children with many drinks and peace offerings to beg the woman to appease her and her *Juju* and also to return the remaining children to her as the rightful owner.<sup>xl</sup>

It is submitted that these are same-sex marriages under the Same-Sex Marriage (Prohibition) Act 2013. This is more so as section 7 of the Act expressly mentions customary law marriages as being within the contemplation of the Act.

These same-sex Marriages, or the rights arising from these Marriages have continued to be enforced up to date through the coercive force of threats of metaphysical harm as the above account revealed. It appears that Africans have through the ages believed in recourse to supernatural forces in guiding their personal and national issues. According to the Jewish historian Josephus, in the days of yore, the Ethiopians invaded old Egypt and routed the army sent against them, and threatened Memphis. In panic, the oracles were consulted which recommended that Moses (then a young prince in Egypt) be entrusted with the command of the royal troops. He took the field, surprised and defeated the Ethiopians, and captured their principal city, returning to Egypt laden with the spoils of victory.<sup>xli</sup>

The re-emergence of this practice in these present times has been noted by scholars and other observers of events as there is now the recourse to what may be described as backward integration in dispute resolution whereby disputes are taken before Shrines and temple officials for resolution rather than any of the regular Courts or recognized alternative dispute resolution agencies. Apparently, this practice is not new, for as far back as 1939, our case law reported a case in which there was the practice of recourse to unorthodox means of dispute resolution. It is the case of *R v Nwaoko*<sup>xlii</sup> in which the deceased refused to pay back the money she borrowed from the accused. The creditor was heard to say, "Since you refused to pay me my money this *Juju* will kill you and you shall no more eat or drink." The accused/creditor left the *Juju* at the deceased/debtor's house who became severely depressed thereafter and six days later went out and hung herself on a high tree. It is the re-emergence of this practice that is worrisome. If it

were possible to knight the devil and give him his due, it would be the general concession among many that this unorthodox dispute resolution method has resolved many knotty disputes that would probably not have gotten off the ground yet if the same had been taken to the law Courts. It is claimed to have untied even the Gordian knot and humbled the most overbearing of men.

The average transgressor would have a sleepless night on receiving a summons from a *juju* temple attendant dressed up in reddish attire, barefooted with a sinisterly powdered face. This same person would most probably sleep the sleep of the just if he were to receive a summons from a bailiff of a court of law. An aged Senior Advocate of Nigeria recalled how he was approached by a troubled landlord in Southwest Nigeria. His tenant had refused to quit despite taking him to court. All his efforts to quit him from his house even through court processes had been frustrated by the stubborn tenant and he did not know what else to do. After considering the situation the learned senior advocate advised him to hire someone who will dress in the attire of a witchdoctor (powdered eyes, red clothes, wearing bangles made from cowries, and barefooted) and place a clay pot stuffed with fetish things like the skull of a cat, dead bats and all that, at the door post of the tenant. The landlord complied in detail with the advice. The recalcitrant tenant hurriedly packed out a few days after the appearance of the phantom witch doctor.

Itohan Mercy Idumwonyi, and Solomon Ijeweimen Ikhidero, in their article,<sup>xliii</sup> related a classic example of this practice from one Madam Osayamen Maria, as follows:

*I am a caterer and had gone to cook for a man who had been bereaved and was burying his father. As part of my contract, I loaned him my food warmer. At the end of the funeral ceremony, one of my food warmers could not be found. I kept going back and forth to my client's house to ask for my food warmer or an equivalent in monetary form. Each time I went, I was told a different story. On this particular day, I was returning from church (my usual morning prayers), I stopped by his house, and it was the usual story. Out of frustration, I told his wife that since he refused to pay for my food warmer, I was going to invite aiyelala [the Benin goddess that dispenses justice and protects morality] to his house to arbitrate between the two of us. I was stunned when on the following day; my client came to my house to give me the monetary value of my food warmer. I am a*

*Christian, I have no business with aiyelala, but because that is what they fear/respect most, I decided to threaten him with that, and you see, it worked for me. The fear of aiyelala is the beginning of wisdom.*

Recounting another of such instances, they stated as follows:

Sometime in 2005 the Oba Market, located in the Benin City centre went into flames. As the fire raged, hoodlums in the area had a field day looting goods belonging to traders in the market. A prominent citizen in the area, Osamede Adun, invited the chief priest of *Aiyelala*, a goddess widely feared and revered in Benin, to place a curse on the unknown criminals. Alas! The following morning items earlier carted away resurfaced in the market.<sup>xliv</sup>

Whilst this curious method of dispute resolution may appear nonsensical to those in other climes, it must be emphasized here that there is no absolute truth. ‘...truth is real but absolute truth is unattainable. There is no foreseeable end.’<sup>xlv</sup> Perhaps the Roman Governor -Pontius Pilate- before whom Christ was tried and who must have been well versed in Roman jurisprudence, from whence devolved our received English Laws, had this in mind when he cross-examined Christ thus: “What is truth”? In response to Christ’s assertion that he came into this world to bear witness unto the truth and that every one that is of the truth hears his voice. That question was evidently never answered by the Master, implying a tacit admission that there was no single absolute definition of truth.<sup>xlvi</sup> Everyman is a product of his time and his environment. The Bible declares: ‘... as thou hast believed, so be it done unto thee.’<sup>xlvii</sup> Meaning, in our view, that the reality of things to a person or a people is a by-product of their collective belief system. It is to them as they have believed. The belief system of people may differ or even contradict each other but each may be right in his eyes and believe he is, reminiscent of the story of the six blind men who went on to describe an elephant, in the poem by John Godfrey Saxe titled *The Blind Man and The Elephant*,<sup>xlviii</sup> which goes as follows:

It was six men of Hindustan, to learning much inclined,  
who went to see the elephant (Though all of them were blind),  
that each by observation, might satisfy his mind.

The first approached the elephant, and, happening to fall,  
against his broad and sturdy side, at once began to bawl:  
"God bless me! but the elephant, is nothing but a wall!"

The second feeling of the tusk, cried: "Ho! what have we here,  
so very round and smooth and sharp? To me tis mighty clear,  
this wonder of an elephant, is very like a spear!"

The third approached the animal, and, happening to take,  
the squirming trunk within his hands, "I see," quoth he,  
the elephant is very like a snake!"

The fourth reached out his eager hand, and felt about the knee:  
"What most this wondrous beast is like, is mighty plain," quoth he;  
"Tis clear enough the elephant is very like a tree."

The fifth, who chanced to touch the ear, Said; "E'en the blindest man  
can tell what this resembles most; Deny the fact who can,  
This marvel of an elephant, is very like a fan!"

The sixth no sooner had begun, about the beast to grope,  
than, seizing on the swinging tail, that fell within his scope,  
"I see," quoth he, "the elephant is very like a rope!"

And so these men of Hindustan, disputed loud and long,  
each in his own opinion, exceeding stiff and strong,  
Though each was partly in the right, and all were in the wrong!

So, oft in theologic wars, the disputants, I ween,  
tread on in utter ignorance, of what each other mean,  
and prate about the elephant, not one of them has seen!

This is similar to a story from my Anioma folklore of two men who were bald-headed; one was very rich, while the other was very poor. The people in the place where the rich bald-headed man resided were full of praises and eulogy, amazed at how God could so bless a man that He gives him a natural crown! The people where the poor bald-headed man lived on the other hand made him an object of derision, wondering how God could so curse a man that He even left his head bald! This account is graphically captured in the following poem entitled: *Two Faced*<sup>xlix</sup>

Dives is bald-headed.

"Oh, how beautiful!"

Say they,

"So blessed is he,

That the gods have

Crowned him forever."

Lazarus is bald-headed,

"What a pity"

Say they,

"So cursed is he

That the gods have

Left his head naked forever."

Fools!

Two faced.

Twin minded mortals!

Blown hither and thither

By the wind.

The above poem illustrates how there could be different perspectives on a single subject.

## **ESSENTIAL FEATURES OF SAME-SEX MARRIAGES**

### ***The Aims of Same-Sex Marriages***

The Major aim of Same-Sex marriages is the gratification of the homosexual desires of the couple in such a union. Homosexual behavior has led to the emergence of species of unconventional family patterns, namely: families arising from same - Sex unions, families based on same - Sex or Homosexual cohabitation and families based on Heterosexual cohabitation, families based on non-marital parenthood, extended family patterns, and the blended family patterns. Same-Sex Unions are unions between two males or two females which are officially recognized and registered by the State, whereas Same Sex Cohabitations are the coming together of two males or two females whose relationships are not registered by the state. These species of families are based on emotional and psychological relationships rather than status, biological, marital, and heterosexual relationships that characterize conventional family patterns.<sup>1</sup>

### ***The Aims of African instituted Same-Sex Marriages***

The principal aim of the specie of Same-Sex Marriage that is practiced in Africa is that the woman who marries another younger woman wants her to assist her in reproduction. She wants to have kids by proxy and thus efface her barrenness.<sup>li</sup> It is akin to what Sarah wanted to achieve and indeed achieved with her handmaid Hagar.<sup>liii</sup> Here, unlike the conventional same - Sex Marriages, the women in the marriage are not interested in having sexual intercourse with each other. Though there is cohabitation, a paramour comes to impregnate the wife.



### *A Comparative Analysis between African Instituted Same Sex Marriages and Surrogacy*

Surrogacy has been defined as the process of carrying and delivering a child for another person.<sup>liii</sup> The word 'surrogacy' literally means 'substitute'. Therefore, a surrogate mother is a substitute who conceives, carries, and then gives birth to a child for another person with the full aim of later giving the kid to the person. There are several reasons why a couple can decide on surrogacy. Infertility is the main issue. Modern women are not the only ones who deal with the issue of infertility. When women in the past had problems getting pregnant, one method they managed to create a family was with the aid of a surrogate mother.

Surrogacy is a process in which a woman carries and delivers a child for a couple or individual. People who may benefit from gestational surrogacy include: women without a functioning uterus, women who have acquired disorders that make their uterus unsuitable for pregnancy, such as extensive fibroids or scarring of the uterine cavity, women who have a medical condition that puts them at significant medical risk if they become pregnant, women who have a history of recurrent pregnancy loss, gestational surrogacy is also an excellent option for male same-sex couples who want to have children.<sup>liv</sup>

The first recorded case which was like Surrogacy comes from the Bible. It is the story of Abraham and Sarah. Sarah experienced infertility, and asked her handmaiden, Hagar, to carry a child for her and Abraham.<sup>lv</sup> Similarly, Rachel, Jacob's wife, asked her handmaid Bilhah to have a child for her through Jacob, the husband. Also recorded further in the Bible is the other wife of Jacob, Leah who asked her handmaid Zilpah to have a child, through her husband Jacob.

The first official surrogacy contract was negotiated by Keane Noel in 1976 on behalf of a pair of intended parents and a Traditional Surrogate mother. There was no payment made to the surrogate mother in connection with this agreement. Elizabeth Kane, a pseudonym, who was 37 at the time, made history in 1980 when she gave birth to a boy via a traditional surrogate. She made history as the first verified paid surrogate mother arrangement. Ms. Kane was awarded \$10,000 for having her baby safely delivered. The first gestational surrogacy pregnancy occurred in 1985. In this case, the surrogate mother is not related to the child genetically. The hysterectomy patient's biological kid was carried by a surrogate who also possessed her ovaries.

There are several types of surrogacy. The commissioning mother could be the genetic mother since she supplies the egg, or she might not have done anything to start the pregnancy. The spouse of the commissioning mother, the carrying mother, or an anonymous donor might be the genetic father. As a result, there are a variety of possible pairings of individuals who are important to the child's conception, delivery, and early surroundings. Perhaps the most likely of these several types is surrogacy using artificial insemination, in which the bearing mother is the genetic mother and is inseminated with the semen from the commissioning couple's male partner.

In vitro fertilization is another kind of surrogacy when the commissioning couple's egg and semen are used, and the resulting embryo is transported to and placed in the bearing mother. Surrogacy offers infertile women the chance to parent a child who is at least partially (if one uses the father's sperm and the surrogate's egg) or entirely (if they ask the surrogate to carry an embryo made from the mother's egg and the father's sperm) their genetic offspring. If they decide on an open arrangement, the couple will be directly involved in every aspect of the pregnancy and may even be there when the child is born.

There are two main types of surrogacy:

- i. Traditional surrogacy
- ii. Gestational Surrogacy

And two types of surrogacy arrangements

- i. Altruistic Surrogacy
- ii. Commercial Surrogacy

Gestational surrogacy is a type of surrogacy where the surrogate (or carrier of the pregnancy) is not genetically related to the foetus because they did not provide the egg used for fertilization. The intended parent's egg or a donor egg is used in this type of pregnancy. The gestational surrogate carries the pregnancy and gives birth to the baby. It is the most common type of surrogacy. In most cases, at least one parent is genetically related to the child, but the carrier is not. This makes the process less legally complicated. Traditional surrogacy is when the carrier of the pregnancy is genetically related to the foetus. Their eggs are used to create the

pregnancy, and they carry and deliver the baby. Then, as the child's biological parent, they must surrender parental rights to the intended parents (or parent). This type of surrogacy is illegal in many states and has many legal complications.<sup>lvi</sup>

***Types of Surrogacy Arrangement:***

**i. Altruistic Surrogacy:** Is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing and other related expenses). This arrangement is done on compassionate grounds by any person, especially a friend or a close relative to the intended parent.

**ii. Commercial Surrogacy:** This is a form of surrogacy in which a gestational carrier is paid to carry a child to term in her womb and is usually resorted to by higher-income infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents.

These are the different types of surrogacies to meet the aspiration of a couple who want to be a parent in life. As mentioned earlier, the purpose of African-instituted same-sex marriages as typified by the practice among the Anioma people of Delta State, Nigeria, is assisted reproduction. That is, the woman that marries the younger prolific woman does so pursuant to the agreement that the younger woman would produce children for her. It is a way of effacing her own barrenness. Therefore, Surrogacy and African-instituted same-sex marriages, it is submitted, are geared towards a similar purpose, which is assisted reproduction.

***Surrogacy Defined***

Surrogacy has been defined as the process of carrying and delivering a child for another person.<sup>lvii</sup> The word "surrogate" is rooted in the Latin "Subrogate" (to substitute), which means "appointed to act in the place of." It means a substitute, especially a person deputizing for another in a specific role, so the surrogate mother implies a woman who becomes pregnant and gives birth to a child with the intention of giving away this child to another person or couple, commonly referred to as the "intended" or "commissioning" parents.<sup>lviii</sup>

The term "surrogacy" describes the practice of doing specific duties in another person's place. It describes the act of carrying and giving birth to a child on another person's behalf. A woman

(the surrogate mother) consents to bear the baby for someone else or for someone who will raise the child after it is born. A legal agreement is commonly used to support the practice of surrogacy. The word "surrogacy" refers to becoming a mother by using a female surrogate who elects or accepts payment to carry a pregnancy on behalf of another couple. She gives birth, and the commissioning parent receives the child.

### *The Aim of Surrogacy*

Surrogacy is a method of assisted reproductive technology. It is resorted to when a couple cannot reproduce due to infertility, hysterectomy, or when it is not convenient for the couple or a woman to have a child or children by themselves. A school of thought has hailed the process as lending a hand in a situation that could be distressing especially when it is done for altruistic consideration. Even the Holy books give recorded accounts where it has been resorted to and successfully utilized as in the case of Sarah<sup>lix</sup>

Another school of thought condemns the process as akin to prostitution and questions the morality of a mother giving up her child because of monetary consideration and commercializing her body. Here a woman rents out her womb to another woman to help her bear children. It is akin to prostitution.

The surrogacy method has long been debated among Islamic scholars. Among Shia Muslims, this method is seen as assisted reproduction that can fulfill the dream of many couples struggling to conceive a baby naturally. On the other hand, Sunni (Muslim) Scholars state that this technique is entirely haram in Islam, hence forbidding married couples to undergo the procedure. In addition, Muslim Scholars and Clerics view surrogacy as similar to "Zina" or adultery because the surrogate mother is carrying a baby from someone who is not her husband.<sup>lx</sup>

The Catholic Church strongly condemns it as they see it as an affront to the sanctity of marriage. Catholics see surrogacy as an immoral act that violates the child's dignity, while Protestants display a liberal attitude toward surrogacy. On the cumulative strength of Quran 23: 5-7,70: 29-31 and 16: 72 on the preservation of chastity, the prohibition of inseminating one's semen into the womb of a woman who is not one's wife, gestational surrogacy, is prohibited in Islam.<sup>lxi</sup>

Surrogacy has raised many ethical debates in the past. The prime ethical concerns raised in the whole system of surrogacy is regarding the concern about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between intended parents and surrogates. However, the counter to it is a woman's right to enter into a contract and to make decisions regarding her own body. Womb commodification is a term sometimes used due to the economic agents engaged in the practice. The commodification arrangement raises the argument of whether women are being given control over their bodies or being exploited for their individual body parts. The other major argument against womb commodification is that it allows the rich to take advantage of the willingness of poor women to perform any job as long as they are able to earn a wage.<sup>lxii</sup>

While it might be commendable to criticize the process and those involved in it, it might be necessary to just imagine and step into the shoes of a woman who is experiencing the stress and agony which such a condition presents before condemning or judging those who resort to it. The prayers of the Sioux Indians should be adopted which goes thus: ‘O Great Spirit, keep me from ever judging and criticizing a man until I have walked in his moccasins for two weeks.’<sup>lxiii</sup>

As surrogacy becomes more widespread, many countries have enacted legislation to regulate surrogacy. Nigeria is not one of these countries, as, although the country does not prohibit surrogacy, it has not laid down any legal framework to govern the surrogacy process. This leaves both the couple and the intending Surrogate mother in a legal vacuum, wherein the parties are exposed to legal risks. While Surrogacy is not expressly prohibited in Nigeria, it also is not legally acknowledged, as there is currently no Legal framework regulating Surrogacy in Nigeria. Unlike many other countries, Nigeria lags in Surrogacy agreement regulation, which is disappointing considering the increasing number of Surrogacy agreements entered on a daily basis in the country.<sup>lxiv</sup>

A woman’s right to privacy and reproductive autonomy is protected under international human rights law.<sup>lxv</sup> It has been noted that a woman has a right to privacy and reproductive autonomy under international human rights law and, as such, attempts to limit these rights must be reasonably justified.<sup>lxvi</sup>

In Nigeria, surrogacy is not regulated, and there have been reports of young ladies either submitting themselves to or being coerced into an arrangement similar to surrogate motherhood. In view of this, it is necessary to have laws and policies that will protect the rights of parties to surrogate agreements as well as prescribing standards for the practice.<sup>lxvii</sup> People rely on the simple laws of contract to effect the purpose. It could be argued that even in the realms of the law of contract, such a contract is an immoral contract that cannot be enforced in court if it comes to court for adjudication. It is arguable that surrogacy (especially commercial surrogacy) is an illegal contract in Nigeria as it contravenes the provisions of section 30 of the Child Rights Act<sup>lxviii</sup> which provides that: “No person shall buy, sell, hire, dispose of or obtain possession of or otherwise deal in a child.” According to Onyekachi Umah, Esq.<sup>lxix</sup> Until there is a legal framework for surrogacy and an express decriminalization of surrogacy; if parties in a surrogacy “... buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child”, it is criminal and punishable under the Child Rights Act and its equivalents in states across Nigeria. No matter how bad a law may be, the law is valid until it is amended or repealed by the legislature. The Child Rights Act and Child Rights Laws in Nigeria, criminalize all forms of exchange of babies for money (buying and selling of babies), which is a major ingredient and element in surrogacy. To this end, surrogacy is unlawful in parts of Nigeria where there are Child Rights Acts or Laws.

## **CONCLUSION / RECOMMENDATIONS**

We submit that African-instituted same-sex marriages could be included within acceptable legal practice. It appears that the only objection to it is the method of arriving at its aim, which is assisted reproduction. Section 1 of the Same Sex Marriages (prohibition) Act 2013 prohibits marriages involving members of the same sex. Section 7 mentions customary marriages as being within the contemplation of the Act. In surrogacy, the same aim is achieved without marriage. Rather a commission is paid to the surrogate mother, and this does no harm to the law. If the toga of marriage is removed from the African-instituted same-sex marriage and rather than going through all the formal requirements of marriage, the nomenclature of bride price is now replaced simply with the word "commission" with the concomitant legal contract of assisted reproduction, then it is our submission that the aims of African instituted same-sex

marriages can be accomplished within the ambits of the law even when the parties cohabit. It just remains for relevant laws on surrogacy to be put in place in Nigeria as it is in other climes.

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