

Demonstrating the Christian-Canonical Jurisprudence Grounding the Definition of Marriage in the English Case of *Hyde V. Hyde*

Maurice Okechukwu Izunwa

Lecturer, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria
Law, International Law and Jurisprudence
mauriceizunwa@gmail.com, mizunwa@yahoo.com, mauriceizunwa@yahoo.com

Abstract: *The celebrated case of Hyde v. Hyde is a locus classicus in the English law of marriage. It is trite that all such definitions of great approval and all such, recondite loci-classici in law are always anchored on some rather veritable jurisprudential presuppositions, secular or religious, which are often remote. Lord Penzance definition of marriage in the aforesaid case is a legal 'graft' on the many ancient roots of Christian legislation on marriage. The details of the law lord's definition of marriage require that marriage should be: freely entered into, between a man and a woman, and for the course of life. In this way, the instant definition merely rehearses the ancient and modern christo-canonical norms relating to marriage. Note that it is of the Christian-canonical principle that a man leaves his father and mother, joins to his wife, forming an indissoluble unity. Thus "no longer two but one" and this unity endure throughout, the joint life time of the partners. This establishes "unity" and "indissolubility" as the non negotiable "legal minimum" for the possibility of Christian marriage. What is however regrettable is the alarming rate at which this salutary Christian jurisprudence is being either discarded, renegotiated, or at best not being considered for its weight and value by modern legislature. Accordingly, in several jurisdictions of the world, there are bills struggling for attention on the floors of the parliament and quite a number of others being passed into law with a 'conspired' intendment of establishing legal homosexual and/or polygamous marriages which are absolutely dissoluble at the instance of either of the parties or both. This work first, methodically demonstrates the Christian – canonical inspiration of the definition of marriage in Hyde v. Hyde. Second, it makes a case for a global legislative return to that legal ancestry of marriage laws axiomatized in the case of Hyde v. Hyde.*

Keywords: *Hyde v Hyde, Voluntariety, Heterogeneity, Indissolubility, Monogamy, Exclusivity, Canonical.*

1. INTRODUCTION

According to Lord Penzance in *Hyde v. Hyde* [1886] and Woodmansee¹ "Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others." The petitioner and the respondent in this case were married at Salt Lake City in 1853 in a Mormon ceremony. At that time, polygamy was part of the Mormon doctrine and common custom in Utah. The petitioner left the respondent in 1856. Accordingly, a sentence of excommunication was read against him and his wife was declared free to re-marry. She remarried. The petitioner now brings an action for dissolution of the marriage on grounds of adultery. The court declined jurisdiction to hear the case on the grounds that: a marriage contracted in a country where polygamy is lawful is not a marriage as understood in Christendom. Notwithstanding the fact that such marriage is valid by lex-loci; the English matrimonial court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other. It is then that the judge made the above famous statement: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

As it were, this definition and understanding of marriage has become the accepted definition of marriage in English law. Yet, it is precisely of a Christian ancestry. This is one of the most celebrated instances of 'civilization' of canon laws or rather adoption of Christian normative standards into the body of civil laws for the proper regulation of the marriage institution. The jurisprudence of this

¹ I.(L.R.) I P. & D. 130

adoption was proved in the stability, sanity, and respectability of the marriage institution in those legal regimes that found the Christian formula commendable and reasonable and thus recommended it for a social standard to be enforced by law. It is argued that the Christian formula was not adopted by the English court merely because it was a religious alternative or option but because it appealed to reason and was workable. By reasoning upon the various experiences of the English people in the sphere of marriage traditions, the Christian style prevailed quite above others. The law and the courts proffered it because it was recommended by reason and justified by experience. In what follows, we shall give a short compassed presentation of the elements of the definition of marriage in *Hyde v. Hyde*² which were a translation of Christian and Natural Law provisions.

2. THE ELEMENTS OF THE DEFINITION OF MARRIAGE IN THE CASE OF *HYDE V. HYDE*

In the case of *Hyde v. Hyde*³, the following elements of a valid marriage in all English jurisdictions were extemporized as follows:

- It must be a voluntary union.
- It must be for life.
- It must be between a man and a woman, and;
- It must be observed to the exclusion of all others.

The element of voluntariety requires that for any marriage to be valid, it must be entered into with the consent of both parties, otherwise it becomes void.⁴ It is the law that, fraud or duress, mistake as to the identity of one party by the other, mistake as to the nature of the marriage performed and incapacity to understand the nature of marriage vitiates consent.⁵

Further, it is quintessential to the validity of marriage under *Hyde v. Hyde*⁶ that such a marriage must be contemplated to last throughout the joint life of both parties. The whole issue of legal divorce and/or contract marriages were alien to the spirit of the decision in the case under study. However, separation does not appear to be legally antithetical to the intendment of the above legal regime (*Hyde v. Hyde*). It is important to point out that some contemporary jurists like Probert Rebecca are of the opinion that Lord Penzance did not set out to define marriage but to defend it. Accordingly, such jurists argue that Lord Penzance did not argue that marriage is meant to be for life but recommends that it be so. Hence, when considering availability of divorce, the courts have not insisted that a marriage be for life.⁷

The next factor which causes great concern in the modern society is the question of “One man, one woman”. Where this element is strictly followed, the implication is that a valid marriage under the Act can only exist between a biological male and a biological female. What are clearly excluded by this provision are all forms of same-sex marriages, woman-to-woman marriages in their various appearances. Here, monogamy is upheld as the proper paradigm of marriage under the Act, and polygamy, polyamory, and polyandry in their different manifestations are rejected. Of particular interest under this head is the fate of transsexuals under the English Law of Marriage.⁸

It remains to be pointed out that the decision under-study holds that all valid marriages must be between a man and a woman to the exclusion of all others. What is implied by this requirement is fidelity to one’s partner. No concubines, and/or extramarital sex-mates, be that heterosexual or

² *Supra*.

³ *Supra*.

⁴ Sec. 3 *Matrimonial Causes Act* (MCA) Cap. 220, LFN., 2004.

⁵ Sec. 3(1) (d) *Matrimonial Causes Act* (MCA) Cap. 220, Laws of the Federation of Nigeria (LFN), 2004. See also *Buckland v. Buckland*, [1967] 3All ER. 300; *Valier v. Valier* [1897] 2P.D, 263; *Osamawonyi v. Osamawonyi* [1972] 10 SCI.

⁶ *Supra*.

⁷ P. Rebecca (2007) “*Hyde v. Hyde: Defining or Defending Marriage?*” *Child and Family Law Quarterly*, vol.19, No.3, pp.222-236. See also <http://wrap.warwick.ac.uk/39328/>, accessed 22/11/2011.

⁸ Cf. *Corbett v. Corbett* [1970] 2 W.L.R. 1310; *R. v. Tan* [1986] QBD.

homosexual in form. Experience has shown that it is easy for persons to enter into monogamous marriages under the Act but most of such marriages are violated by other marriage-like arrangements which are more or less informal but are nevertheless sustained to the detriment of the legal union under the Act.⁹

3. CHRISTIAN CANONICAL MARRIAGES: INSPIRATIONS/FOUNDATION *HYDE V. HYDE*

Marriage is fundamentally a natural institution.¹⁰ Yet most marriage legislations are always referable to some religious or moral framework. Hence we have customary marriages which build more or less on the morality of the various traditional religions. In Nigeria for instance one can identify Islamic customary law marriages. Suffice it therefore to underscore that there is no system of marriage recognized by any law which has no religious ancestry albeit by conscious or unconscious assumption and/or presupposition.

Christian canonical marriage as marriage practiced in Christianity has a very long history drawing from the teachings of Jesus Christ as recorded in the bible to the canonical forms it has assumed over the times in the Christian churches. Particularly, the Christian teaching on marriage has been taken over by the Catholic Church and built into a tacit system of marriage institution. That system of marriage built on a particular Christian legal system is called the Canonical marriage. This canonical marriage has a long history of influence over the English marriage laws. This stretches down to the middle ages when there was no “English law of marriage” but just the Canon law¹¹ which regulated all marriages and fixes the principles of their validity and/or invalidity. This canon law was not under the control of the king or Parliament but of the Pope. At that time, “A common law marriage ... might be more aptly termed a Canon law marriage, since it derives its origin from the canon law at the time when the canon law was the common law of Western Europe.”¹²

As a matter of fact, “the rise of Christianity produced a profound change in European marriage laws and customs, although this change came about only gradually.”¹³ And since the colonial times, Christian marriage has been taken as a sign not only of religious commitment but also as an indication that the spouses decided to follow a westernized way of life. This assumption had a direct bearing on what law was chosen to govern the marital relationship: the form of marriage was deemed to indicate the spouses’ intention that their rights and duties inter se and their relations with their children should be governed by the common law.¹⁴ Indeed, the influence of the Christian canonical marriage laws did not frizzle out with the demise of the common law marriages but managed its way into the foundational framework of the English Marriage Act. As a matter of fact, M. Dodds in his *Family Law* observed that “Up until the nineteenth century the Church’s ecclesiastical courts dominated Family Law.”¹⁵ And even when the states transferred jurisdiction to the High Court, the Christian principles were far prevailing. For instance, the Council of Trent ruled that in future “marriage was only valid in Roman Catholic Countries if it was witnessed by a priest of the Roman Catholic Church or, if obtaining a priest was impracticable, by other witnesses.”¹⁶ When the marriage Act abolished the common law in 1753, the Act required marriages to be performed by a priest of the Church of England.¹⁷ This however created its own problems.¹⁸ What is argued here is that the marriage

⁹ Cf. www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?_r=1&pagewanted=all, accessed on 22/11/2011.

¹⁰ V. Nyoroh, *Legal Security to Christian Marriage*, (Calabar: Jamel pub., 2004), pp. 57 – 58.

¹¹ In Medieval Europe, marriage came under the Jurisdiction of Canon Law. http://en.Wikipedia.org/wiki/marriage_law

¹² Per Phillimore J. in *Lazarewicz v. Lazarewicz* [1961] p. 171, 177; see also *Merker v. Merker* [1962] p. 283, 293, per sir Jocelyn Simon P., confer also P. Lucas “Common Law Marriage”, *Cambridge Law Journal*, vol. 49, No. 1, March 1990, pp. 117 – 134.

¹³ <http://www2.hu-berlin.de/sexology/html/7/9/2001>

¹⁴ URL://www.saflii.org/za/other/zalc/ip/4/4-chapter-5.html; accessed 17/22/2011.

¹⁵ London, Old Bailey Press, 1997, p. 1.

¹⁶ The Council of Trent was convened in 1545 and it lasted till 1563.

¹⁷ <http://en.wikipedia.org/wiki/marriagelaw>, accessed 10/11/2011.

popularized by Lord Penzance in the Case of *Hyde v. Hyde* has its obvious inspiration from Christian canonical marriage forms. Little wonder Lord Penzance in his definition of statutory marriage started by saying “Marriage as understood in Christendom ...”¹⁹ In this way, Christian Marriage when properly celebrated meant an ordinance marriage.²⁰ The implication of this development is that the essential elements of the Christian canonical marriage *viz* unity, indissolubility, and heterosexuality, were what Lord Penzance structured into the definition of Statutory marriage in the English jurisdiction. And from there, the same perception of marriage was transmitted to all the colonial jurisdiction of the English –Nigeria not excluded. According to Ernst Troeltsch in his classic work, *The Social Teaching of the Christian Churches*:

From the very beginning the Church set before its members (regarding marriage) a high and strict ideal; it required them to observe the ideal of monogamy, of chastity before marriage (for both husband and wife), of conjugal fidelity to exercise an ethical and religious discipline in the case of children, to reject all regulation of the birth rate by the exposure of children or by artificial sterilization; and after the church was established by the state, as far as possible this ideal was made a general principle of society, partly by the influence of the church upon ecclesiastical law ... and partly by its influence upon the law of the state. According to the religious philosophy of the church, which was based upon that of the Bible, the monogamous family is the basis of the society and the state, which has itself been formed by the expansion of the family.²¹

The substance of the argument is that the Christian ethic and the provisions of the moral law as codified in the canon law has an overriding influence on the statutory marriage legislations. Particularly, “in the twelfth century, civil law was brought into complete conformity with canon law and absolute divorce almost disappeared from Europe.”²²

It is all too important to remark that the Christian albeit canonical concept of marriage which downrightly influenced most state legislations on marriage is not exclusively based on the oracles of the bible but also on the dictates of the natural law. Hence the medieval canonists saw marriage as a natural institution founded upon a contract and blessed by the Church. Interestingly, Mr. Justice Story while expressing the American legal thought in the 19th Century in his *Commentaries on the Conflict of Laws* observed that marriage is treated by all civilized nations as a peculiar and favoured contract. It is in its origin a contract of natural law, thus, the parent not the child of the society.²³ A number of implications flow from this; the first being that social conventions are incompetent to prescribe for order and form of marriage. A second one is that “In most countries acting under a sense of the force of sacred obligation, it (marriage) has had the sanctions of religion added. It then becomes a religious, as well as, a natural and civil contract”²⁴ at once. Note that at any time when the civil – contractual dimension of marriage is emphasized over and against its natural law and religious foundation; all forms of absurdities emerge to the great detriment of marriage institution and the society at large. Such absurdities will include – same sex marriage, civil unions, civil partnership, forced marriages, polyandry, polygamy, no fault system of divorce etc. In essence:

¹⁸ The Requirement that a valid marriage is to be performed by a priest of the Church of England created special problems in predominantly Roman Catholic Ireland. The marriage Act as applicable to Nigeria today required that the marriage be performed by a proper minister of the religion of the parties. This solves the problem.

¹⁹ *Hyde v. Hyde* [1886] L.R. I P & D.

²⁰ <http://www.jstor.org/pss/745340>; see also H.F. Morris, “The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa” in *JSTOR: Journal of African Law*, Vol. 23, No. 1 (Spring 1979), pp. 37-64.

²¹ E. Troeltsch, *The Social Teaching of the Christian Churches* ...

²² As a matter of fact, the Medieval Latin Church rejected the Old imperial Civil law doctrine on regulated divorce and allowed only separations from bed and board. Annulments were however possible and these largely satisfied the social demand for divorce. According to Hove such annulments were not divorces but declarations that the marriage never occurred in the first place.

²³ J. Story, *Commentaries on the Conflict of Laws*, (London: Pemberton-Row, 1834), p.266.

²⁴ *Ibid.*

The crisis in marriage (today) (emphasis mine) presents the Christian ethics with the most serious and the most difficult problem with which a Christian ethic has to deal; indeed, in comparison with this problem even the questions of economic and political justice are of secondary importance. For not only are we here dealing with the foundations of human existence, but here too, all the ethical problems are condensed into a complex at one point Today we are not concerned merely with the problem of divorce, or with that of birth control, but with marriage itself. We are challenged to give a fundamentally new interpretation of marriage, and to give a new meaning to it from the standpoint of faith.²⁵

The strange situation of today is that, the society is forcing the church to reconsider its conception of marriage, even as the Church made the society to do in former times.

4. BIBLICAL FOUNDATION OF CHRISTIAN MARRIAGES

The Sacred Scripture begins with the creation of man and woman in the image and likeness of God and concludes with a vision of “the wedding feast of the lamb.”²⁶ Scripture speaks throughout of marriage and its “mystery”, its institution and the meaning God has given it, its origin, and its various realizations throughout the history of salvation. It speaks of the difficulties arising in marriage from sin and marriages renewal “in the Lord” in the New Covenant of Christ and the church.²⁷ What is arguably certain is that:

The bible has a high view of marriage. It is a serious commitment, made for a lifetime It involves caring for the other person as much as one cares for oneself, which can mean at times subordinating one’s own desires to those of another.²⁸

Precisely because the bible is the primary source of the Christian marriage laws, it is in it first, that the essentials of a Christian Jurisprudence of marriage can be isolated for the purposes of critiquing modern options.

5. MARRIAGE IN THE OLD TESTAMENT

The earliest biblical allusion to marriage is found in the creation account in the book of Genesis. In that *pericope* an initial preference for monogamy is made by the creator and so God said, “It is not good that man should be alone; I will make him a helper as his partner.”²⁹ Note the operative word “a helper”. By this, polygamy is intentionally excluded because it is both a principle of law and reason that “the express mention of one thing results in the exclusion of others.”³⁰ And further, God created mankind in his image, “male and female he created them”.³¹ What is more, in the biblical conception of a helper fit for him” the scriptures alludes to and/or lays foundation for what was to become in our laws “the ensemble of rights which spouses have over the body and partnership of one another”.³² Next in the book of Genesis God after creating man and woman, blessed them (solemnized their relationship in pre-figuration of what Christ was to perfect in the New Testament) saying, “be fruitful and multiply and fill the earth.”³³ In this way an indication is given even in the Old Testament that marriage ought to be open to procreation and education of children.

²⁵ Emil Brunner, *The Divine Imperative: A Study in Christian Ethics*, (Cambridge: The Luther worth Press, 1941), pp.341-355.

²⁶ Cf. Rev. 19:7, 9; cf. Gen. 1:26-27.

²⁷ *The Catechism of the Catholic Church* (CCC), (Nairobi: Pauline’s Publications Africa, 1994), No. 1602. See also I Cor. 7:39 and Eph. 5:31-32.

²⁸ J.S. Lang, *Biblical Quotations for All Occasions*, (New York: Three Rivers Press, 1999), p. 283.

²⁹ Gen. 2:18-19.

³⁰ Expressio Unius est exclusio alterius.

³¹ Gen. 1:27

³² This is technically referred to as Consortium – the benefits that one person, especially a spouse is entitled to receive from another, including compensation, cooperation, affection, aid, financial support and sexual relationship.

³³ Cf. Gen. 1:28

Soon after the dominical act of creation and the intention attaching thereto, marriage suffered great degeneracy in the succeeding generations among the people of Israel. Hence, one finds instances of full blown polygamy in the book of Kings.³⁴ Also in those times, the Old Testament did not attempt to prohibit marriage for reasons of such things like consanguinity and/or affinity. Thus marriage between in-laws was often even required to perpetuate physical descent.³⁵ In those degenerate regimes of Israel, divorce was permissible for indecent conduct. According to Ronald de Vaux, something indecent could be anything ranging from adultery to mere misconduct; from bad cooking to being nude to visitors or coming back late at night.³⁶

However, it must be noted that despite the obvious degeneracy noticeable in the life and marriage culture of the ancient Israel, at all times, there was a tension in favour of the original mandate of God for monogamy. And so, the prophets were down rightly calling men back to practical monogamy.³⁷ In the book of the Prophet Malachi, such practices as divorce were demonstrated to be hateful in the sight of God.³⁸ Particularly, the book of proverbs urges men to abide in loving fidelity to the wife of their youth.³⁹ The prophets always compared the Covenant relationship between God and the people of Israel to that between a husband and a wife. Thus, despite a series of breaches, rifts and infidelity on the part of the people, God always keeps faith. Hence:

The Lord calls you back like a wife forsaken and grieves in Spirit. A wife married in youth and then cast off, says your God. For a brief moment I abandoned you, but with great tenderness I take you back.⁴⁰

In fact, Israel was constantly unfaithful to God yet God relentlessly strives to bring them back and to rehabilitate them in love.⁴¹ Such is the road map for the love and unity between husband and wife as provided in the Old Testament.

6. MARRIAGE IN THE NEW TESTAMENT

In the sense of new dispensation, the New Testament is the fulfilment of the Old Covenant and includes all that Christ did and said during his visible stay on earth. "It also means the new Laws, operative since the time of Christ and destined to remain until the last day."⁴² Standing out as a teacher of the New Law intent on saving men from the ignorance and ineptitude of the Old, Christ says "I have come not to abolish the law but to fulfil it."⁴³ An essential aspect of that fulfilment was that Christ during the marriage at Cana, demonstratively raised marriage to a significantly sacred reality by turning water into wine.⁴⁴ By this he intends that human categories and concepts alone are incompetent to contain the reality of marriage. Thus great caution must be assumed in all positive legislations relating to marriage. Though the divine economy of salvation begins with a family⁴⁵ there seem to be several legal and doctrinal references to the nature of marriage, even on indissolubility of marriage. Thus:

Have you not read that at the beginning the creator made them male and female, for this reason a man shall leave his father and mother and be joined to his wife and the two became one flesh? So

³⁴ Cf. 1 Kings 11:1-3 presents Solomon as having Seven Hundred (700) wives of princely ranks and three hundred (300) concubines.

³⁵ See Deut. 24:1-5.

³⁶ R. De Vaux, *Ancient Israel*, (New York: McGraw Hill, 1961), p. 34.

³⁷ Hosea 1:1-3.

³⁸ Malachi 2:15.

³⁹ Proverbs 5:15-20.

⁴⁰ Isaiah 54:6-7.

⁴¹ Cf. Jeremiah 2:2; 32; Ezekiel 16:23; Hosea 1:1-3.

⁴² J.A. Hardon, *Modern Catholic Dictionary*, (London: Robert Hale, 1981), p. 376.

⁴³ Mtt. 5:17.

⁴⁴ Jn. 2:1-14.

⁴⁵ Mt. 1:3; Jn. 2:1-2.

they are no longer two but one flesh. Therefore, what God has joined together, no human being must separate.⁴⁶

Here the non-negotiable principles of Unity and Indissolubility of Christian marriage are touched upon. In this way the New Testament excludes polygamy and divorce.⁴⁷ Equally relevant for consideration is the fact that the *pericope* under construction reads, “A man shall leave his father and mother”. Here, the tune of voluntariness is immediately implied. Neither the man nor the woman is forced or compelled to marry. It is purely by voluntary assent and consent.

The New Testament, especially through the Pauline writings legislated on the equality of both spouses and prescribed for exchange of rights of consortium. Thus: “the wife... does not rule over her own body, but the husband does; likewise the husband does not rule over his own body but the wife does.”⁴⁸

As it were, it is found that there is no independence or autonomy of any of the parties. They share life in common, a sharing of life and love symbolized in the love existing between Christ and his Church. Accordingly the bible prescribes: “wives obey your husband’s as to the Lord. Husbands love your wives even as Christ loves the Church.”⁴⁹

It is therefore in the New Testament much more than in the Old that a clearer outline of the foundation of marriage which came to influence the decision in *Hyde v. Hyde* is found.

7. NATURE AND PURPOSE OF CHRISTIAN MARRIAGE: TOWARDS DETERMINING THE EXTENT OF INFLUENCE ON STATUTORY MARRIAGE

Marriage precisely as a sacred union of a man and a woman for life provides the platform for the construction of stable families in particular and ordered society in general. Consequently the family, church and society place much premium on the nature and purpose of marriages. It follows that once marriage is compromised in the society a lot of inevitable damages follow. These include but not limited to: irresponsible children who eventually challenge the security of state and persons; drastic population drop leading to possible extinction of human species and or to paucity of labour force; sundry socio-economic tensions etc. Yet in the modern society, no attention or at best insufficient of it, is given to the nature and purpose of marriage. The result includes the rise of a culture of death detrimental to the survival of society and which culture is sustained by all manners of union having the appearance of marriage. Little wonder Hart rightly observes that “if there is a single cause for most of today’s malaise, both religious and secular, it is the weakening of marriages and families...”⁵⁰ It therefore urges itself that what is needed in today’s culture of death is a counter-cultural marriage inspired by the Christian norms and enforced by the laws, a marriage of which its purpose and nature have profound Christian orientation. This is because:

...the message we hear from much of modern culture and modern psychology is profoundly destructive of marriage. It is the “gospel” that the happiness of “me the individual” comes first, before the good of my spouse, my marriage, my family or my children. It is the gospel of respectable selfishness.⁵¹

There is indeed no dependable and/or reliable determination of the nature and purpose of Christian marriage which will not root it in the divine economy as revealed in the constitution of the Christian peoples – the bible. Hence marriage:

⁴⁶ Mt. 19: 4-6.

⁴⁷ However what appears in Mtt. 19:9 as a contradiction to the effect that divorce may be lawful is as a result of improper translation of the original text. The word used was “Porneia” which in the context refers to incestuous relationship existing between pagans who joined the Christian family. Indeed, Christ intended to declare such marriage void by consanguinity.

⁴⁸ Cf. 1 Cor. 7:4.

⁴⁹ Ephesians 5: 21-23.

⁵⁰ L.E. Hart, *Catholic Worship*, Section 6: Matrimony, p. 5.

⁵¹ *Ibid.* pp. 5-6.

- Begins in the eternal essence of God himself, for God's institution of marriage manifests its institutor. And God is a society of mutual self giving love among the three persons of the Trinity.
- Sacred scripture begins with the creation of a man and a woman in the image and likeness of God⁵² and therefore in the image of love. God's very first command to them was to marry, to "be fruitful and multiply."⁵³
- Like everything else in life, marriage is now fallen from innocence and infected with sin.
- Moral conscience concerning marriage developed under pedagogy of the law.⁵⁴
- Christ revealed the deepest meaning of marriage by marrying and saving the human race by his incarnation and sacrificial death.
- In the New Law (Christian moral law of Christ) marriage was "raised by Christ the Lord" to the dignity of a sacrament (an outward sign of an inward reality)⁵⁵
- Finally, the scripture "concludes with a vision of the wedding feast of the lamb".⁵⁶

Suffice it to appreciate the principal contribution of the New Testament to the biblical view of marriage:

...to underscore the original principles of the indissolubility of marriage and equal dignity of women.... By raising women to a position of equal personal dignity with men, marriage is made truly "one flesh", for the unity implied in the expression necessarily presupposes that both partners be given opportunity to develop their full potentialities. This equality need not raise difficulties with the biblical doctrine of subordination of married women (Eph. 5:22-23). This doctrine refers to a hierarchy of function, not of dignity or value. There is no inferiority of person implicit in the doctrine.⁵⁷

The jurisprudence of these issues raised discloses the necessity of a renewed ethical orientation of laws relating to marriage: The marriage Act,⁵⁸ the Matrimonial Causes Act⁵⁹ and the customary laws. Such orientation richly provided by the Christian laws was what situated the framework of statutory marriage as it is presently constituted. A further attempt in the discourse of the principal areas where the Christian marriage influenced the Statutory Marriage will properly demonstrate the instant argument of this work.

8. ISSUES WITH NATURE OF CHRISTIAN MARRIAGE

Marriage in the Christian community is itself built up and manifested at its most natural, filial level.⁶⁰ Being natural, it rejects all forms of option imposed by new and alien trends in science and modernity. As well, precisely as being filial, it orientates more towards love and unity. Hence over and above the concept of contract, marriage in its Christian understanding is elevated to the nature of a covenant, which is sealed by an "irrevocable personal consent"⁶¹ What is more; marriage in the Christendom is further seen as a sacred reality with implication for the secular realm. And for this idea, "marriage is not just a ceremony by which two people are legally bound together ...; it is an act of worship, an

⁵² Canon 1602.

⁵³ Gen. 1:22.

⁵⁴ Can. 1610.

⁵⁵ Can. 1601.

⁵⁶ Rev. 19:7,9; see also Canon 1620.

⁵⁷ L.I. Granberg "Marriage Theology of" in W. Ellwell, *The Concise Evangelical Dictionary of Theology*, (London: Marshall Pichering pub., 1991), p. 303.

⁵⁸ *Laws of Federation of Nigeria*, Cap M6, 2004.

⁵⁹ *Ibid.* Cap 220, 2004.

⁶⁰ R. McBrien, *Catholicism*, 1981, p. 851.

⁶¹ *Pastoral Constitution on the Church in the Modern World*, n. 48.

expression of faith, a sign of the Church's unity, a mode of Christ's presence."⁶² In other words, Christian spouses by virtue of marriage signify and share in the mystery of that union and fruitful love which exists between Christ and the Church.⁶³

The Christian (Church's) teaching on marriage, reiterates a truth that is evident to right reason and recognized as such by all major cultures of the world. It shows that marriage is not just any relationship between human beings. It was established by God with its own peculiar nature, essential properties and purpose. Indeed:

No ideology can erase from the human spirit the certainty that marriage exists solely between a man a woman, who by mutual personal gift, proper and exclusive to themselves, tend towards the communion of their persons. In this way, they mutually perfect each other, in order to cooperate with God in the procreation and upbringing of new human lives.⁶⁴

Suffice it to observe that the nature of the Christian marriage can be abstracted and/or isolated from the three fundamental elements of Gods plan for marriage as narrated in the Book of Genesis.

In the first place, man, the image of God, was created "male and female" (Gen 1:27). Men and women are equal as persons and complementary as male and female. Sexuality in the context of marriage is something that appertains to the physico-biological realm and has also been raised to a new level – where nature and spirit are united.

Second, marriage is instituted by God, as a form of life in which a communion of persons is realized involving the use of sexual faculty, "that is why a man leaves his father and mother and clings to his wife and they become one flesh"⁶⁵.

Third, God has willed to give the union of man and woman a special participation in his work of creation. Thus, he blessed the man and the woman with the words "be fruitful and multiply".⁶⁶ Therefore in God's plan, sexual complementarity and fruitfulness belong to the very nature of marriage.⁶⁷

9. ON THE ESSENTIAL PROPERTIES OF CHRISTIAN MARRIAGE

The canon law, articulating the Christian laws of marriage states that "The essential properties of marriage are unity and indissolubility in Christian marriage they acquire a distinctive firmness by reason of the sacrament."⁶⁸

10. UNITY

This relates to that property of Christian marriage relationship, by which it is exclusive that is, between one man and own woman. By the provision of this property, Christian marriage cannot be extended to embrace a third party that is, a second wife or husband. This is clearly taught in Gen. 2:18-24, where the woman though pictured as the help-mate of man, is his equal in nature.⁶⁹

Accordingly, Christian marriage is between one man and one woman and is indicated in our Lords answer to the Pharisees "a man shall leave his father and mother, and cleave to his wife, and the two shall become one flesh. Therefore they are no longer two but one flesh."⁷⁰ The unity in question is

⁶² R. Mc Brien, *op. cit.*, p. 856.

⁶³ *Dogmatic Constitution on the Church*, n. ii.

⁶⁴ Congregation for the Doctrine of Faith, http://www.vatican.va/roman_curia/congregationsoffaith/documents/rc_cfaith_doc_200...8/4/2001

⁶⁵ Gen. 2:24.

⁶⁶ Gen. 1:28.

⁶⁷ *Ibid.*

⁶⁸ Canon 1015.

⁶⁹ G.T. Taylor and E de Bekker, *Parish Priests and Marriage Cases*, (Bangalore: Theological Publication in India, 2008), p. 5.

⁷⁰ Matt. 19:5.

physically that of their bodies and spiritually of their minds and hearts. As they grow in marital love, they “will strive to unite their character, trying to do everything together...”⁷¹ Pope Pius XI exhorting this unity says that:

By matrimony, therefore, the minds of the contracting parties are joined and knit together more directly and more intimately than are their bodies, and that, not by any passing affection of sense or heart, but by a deliberate and firm act of the will; and from this union of minds by God’s decree, a sacred and inviolable bond arises.⁷²

Joseph M. de Torre particularly observes that this unity excludes polygamy, and enhances complementarity of husband and wife which would be upset by a third and fourth parties.⁷³ Once marriage looses and/or compromises unity in the sense of exclusivity it does no longer relate to conjugal pact and such would “transform marriage into an exercise in egoism.”⁷⁴ It further degrades the woman who has to share a man with other women; makes the female sex inferior in practice (a thing contrary to the essential equality of the sexes; and thus provides a source of enmity and strife.⁷⁵

Pope John Paul II at Kinshasa in 1980 exulted the Unity property of Christian marriage in these words:

This pilgrimage to the sources (first pages of the bible) also reveals to us that the initial couple, in God’s plan, is monogamous. This is again surprising for civilization – at the time when the bible narratives took shape –is generally far from this cultural model. This monogamy which is not of western but Semitic origin, appears as the expression of the interpersonal relationship, the one in which each of the partners is recognized by the other in an equal value and in the totality of his person. This monogamous and personalistic conception of the human couple is an absolutely original relationship which bears the mark of God, and which deserves to be studied more and more deeply.⁷⁶

The Pope further points out that polygamy which contradicts the property of Unity, “directly negates the plan of God which was revealed from the beginning...”⁷⁷ That polygamy was practiced in the Old Testament does not clothe it with Christian legitimacy. Indeed, it was left for the dawn of the full light of the New Testament, to arrive at the idea that Polygamy was opposed to Natural Law. God being a wise pedagogue revealed that full moral truth only gradually. Therefore, “that God tolerated it in the Old Testament” was not a positive approval but a juridical toleration.”⁷⁸

11. ON THE PROPERTY OF INDISSOLUBILITY

The Implication of indissolubility is that Christian marriage is a permanent bond. And the

...permanence of the marital bond means that the marriage covenant cannot be dissolved by any human power while the man and the wife are living. In every Christian marriage there are three parties: God, the man and the wife. Since God desires that the marital bond be permanent, neither the husband nor the wife nor any other human power can put it asunder.⁷⁹

Hence, what God has joined together, let no man put asunder.⁸⁰ Only death can dissolve a Christian marriage and set at liberty the surviving partner to remarry.⁸¹ According to Gbuji, indissoluble union

⁷¹ Cf. P. Onyero Okolie, *Fundamentals of Christian Marriage*, (Mumbai: St. Paul’s pub., 2008), p. 28.

⁷² Pope Pius XI, Ency. *Casti Connubii*, Dec. 1930, No. 7.

⁷³ J.M. de Torre, *Christian Philosophy*, (Philippines: Vera-Reyes Inc., 1980), pp. 258-259

⁷⁴ D. Composta, *Moral Philosophy and Social Ethics*, (Bangalore: Theological publication in India, 1998), pp.133-134.

⁷⁵ J.M. de Torre; *op. cit.*, p. 259.

⁷⁶ John Paul II, *African Addresses*, Bologna, 1980, p. 29.

⁷⁷ John Paul II, *Familiaris Consortio*, 22 November, 1981, no. 19.

⁷⁸ B. Haring, *Marriage in the Modern World*, Cork, 1965, pp. 263-266

⁷⁹ P.O. Okolie, *op. cit.*, pp. 28-29.

⁸⁰ Mtt. 19:6 (Cf. Luke 16:18, Mk. 10:2-12, Romans 7:2-3, Mal. 2:13ff).

is a demand of the dignity intrinsic to marriage. Hence, man cannot divide what God has united. The property of indissolubility is therefore a function of the unity of marriage.⁸² Thus, the indissoluble union in time and love is rooted in the personal and total self-giving of the partners and in the fact that they are no longer two but one body. “It is an institution confirmed by the divine law and receiving its stability, even in the eyes of society, from the act by which the partners mutually surrender themselves to each other.”⁸³ Indeed, the indissolubility of the Christian marriage should be safeguarded because:

To introduce into marriage easy separations or the legalization of divorce, is to encourage the dissolution of conjugal love, putting in danger the dignity of the man-woman relationship, the welfare of the children and of the family....⁸⁴

Social considerations ground the Christian insistence on indissolubility of marriage. The first is the good of the offspring. A dissoluble marriage would jeopardize the education of the children of that marriage. Aside the above, a dissoluble marriage would endanger the good of the marriage by destroying the relationship of filiations and parenthood, which is one of the deepest relationship among men.

The second consideration relates to justice. Here, the rights acquired under the marriage would be injured by the dissolution of the contract.

The third consideration is the unique friendship that exists in marriage, whose sign is the spontaneous feeling that marriage love is exclusive and forever. Indeed:

It has always and everywhere been felt that while indissolubility and marital fidelity are values (goods), divorce and marital infidelity are counter values that should animate and guide cultures, institutions and laws, in order to pursue the common good.⁸⁵

The fourth consideration is that, by knowing that they are united inseparably, husband and wife love each other more faithfully, consciously and willingly. This helps them to “take better care of domestic matters and feel more responsible for the household, which would be endangered by the sense of insecurity and the lack of mutual trust deriving from the possibility of dissolving the marriage bond.”⁸⁶ The fact that divorce is not permitted was clearly expressed by our Lord Jesus Christ when he said, “Everyone who divorces his wife and marries a woman divorced from her husband commits adultery.”⁸⁷ Christ further corrected the wrong impression held by the Jews that divorce was right as long as the law of Moses was followed by observing as follows: “For your hardness of heart, Moses allowed you to divorce your wives, but from the beginning it was not so.”⁸⁸ There are those who in the present day attack indissolubility in marriage. They include the divorcists; the propounders of the so called “free love”. Among divorcists we mention the socialists and among the propounders of “free love” mention must be made of Sterner, Nietzsche and more recently Bertrand Russell and Leon Blum. These try to inspire a legal system and marriage laws that would jettison the element of indissolubility in marriage.⁸⁹

12. UNITY, INDISSOLUBILITY AND COMPLEMENTARITY IN CHRISTIAN MARRIAGE

⁸¹ “For the married woman is bound by the law while her husband is alive, but if her husband dies, she is set free from the law of the husband. Therefore, if the husband is alive, she will be called an adulteress if she is with another man ... but if her husband dies, she is free” (Cf. Rom. 7: 2-3).

⁸² Cf. A. Gbuji, “Pastoral Care of Marriage and Family Life” in B. Etafo and H.O. Okeke, *Marriage and Family in Nigeria*, (Onitsha: Rex Charles & Patrick’s, 1993), p. 115.

⁸³ Cf. *Gaudium et Spes*, no. 48.

⁸⁴ A. Gbuji, *op. cit.*, pp. 115-116.

⁸⁵ J.M. de Torre, *op. cit.*, p. 258.

⁸⁶ *Ibid.*

⁸⁷ Cf. Luke 16:18.

⁸⁸ Mtt. 19:8.

⁸⁹ Cf. D. Composta, *op. cit.*, p. 135.

Marriage love in Christian understanding involves a totality, in which all the elements of the person are involved: appeal of the body and instinct, power of feeling and affectivity, aspiration of the spirit and the will. It aims at a deeply personal unity, a unity that is beyond union in one flesh, but which leads to forming one heart and soul; it demands indissolubility and faithfulness in definitive mutual giving; and it is open to fertility.

The love of the spouses requires, of its very nature the unity and indissolubility of the spouses' community of persons, which embraces their entire life: "so they are no longer two, but one flesh."⁹⁰ The Christian couples are called to grow continually in their communion through day-by-day fidelity to their marriage promise of total self-giving.

In essence, a particularly Christian marriage must be both "absolute and unfailing", both a gift of one's whole life and for the whole of one's life. There are many forms of love in human life, but only conjugal love has the two-fold privilege of totality and indissolubility.

However, the fact of unity and indissolubility does not give rise to an amorphous fusion. In that unity and indissolubility there is identity and co-operation. It is the evidence of the scripture that man and woman were created for each other. Hence "it is not good that man should be alone."⁹¹ The man is for the woman and the woman is for the man. They are "complementary". Each exists for the other, not for self, and thus images the nature of God's Trinitarian love.

Man and woman are equal in value; different in nature and complementary in purpose. This divinely revealed truth about the nature of man and woman fundamentally construed opposes all the three popular secular alternatives found in our society; chauvinism; which denies their natural equality; unisexism which denies their natural difference and individualism which denies their natural complementarity.

13. PURPOSE/ENDS OF CHRISTIAN MARRIAGE

Hitherto it has been fashionable to distinguish between primary and secondary ends or purposes of marriage. The primary was taken to be the begetting and upbringing of children; while the secondary end comprises of all other ends which can be summarized under mutual help and companionship. It was thought by Christian thinkers that since companionship can be achieved outside marriage, the primary end of marriage, without which there cannot be valid marriage, was procreation and education of children.⁹² Hence:

...in all decisions of husband and wife the first consideration must always be the good of the children... And the mutual love and friendship of husband and wife must be for the sake of the children: otherwise it will not be a rightful love and friendship. This is why every sexual act which is deliberately deprived of its function of generation goes directly against the common good of the family and is therefore intrinsically evil.⁹³

But in the light of deeper appreciation of the scriptures there has dawned a significant shift in the Christian understanding of the purpose/end of marriage. Without precisely designating it as such, the formation of a community of love now operates as the primary end of marriage (*finis operis*); while the secondary end now consist in the procreation and education of children. The two ends are however linked together. This is because in the Christian Scriptures the creator right from the origin had ordained that a man and a woman should be joined together essentially for the purpose of partnership and friendship. Thus, "I will give him a helper fit for him". Thereafter he commanded them to increase and multiply.⁹⁴ It is not however sufficient to procreate, it is further necessary to bring the children up in integral education. Indeed without the education or upbringing of the children as an end, it would be like animal-mating. A temporary union would not guarantee this upbringing and therefore the union has to be for life.

⁹⁰ Mtt. 19:6; cf. Gen. 2:24.

⁹¹ Gen. 2:18.

⁹² J.M. de Torre, *op. cit.*, p. 257.

⁹³ *Ibid.*

⁹⁴ V. Nyoroh, *Legal Security to Christian Marriage*, (Calabar: Jamel pub., 2004), p. 65.

It was left for J.M. de Torre to describe the interplay of the ends of Christian marriage in terms of the unity of material and formal causes of dynamic entities. According to him:

The material causes of marriage are the bodies of the spouses as originators of human life. They give themselves to each other and thereby acquire a right to each other's body: they no longer belong to themselves, so to speak, but to each other. And the formal cause or what makes the union a marriage is the mutual consent to accept each other as husband and wife, outwardly and publicly manifested, and made for life.⁹⁵

The Canon Law is clear on this issue when it provides that "the marriage covenant, by which a man and a woman establish between themselves a partnership of the whole life, is by its nature ordered towards the good of the spouses and procreation and education of offspring."⁹⁶ The establishment of the community of love (good of spouses) is prompted by a special kind of love, conjugal love. Though this love may be experienced and expressed in a variety of ways, it is essentially rooted in the will. It prompts the spouses to give themselves to one another. As a will act, it is aimed not at Self fulfilment but the good of the other.⁹⁷ This community of the whole life is not simply an attribute of marriage. It is marriage itself. Concerning the acts, attributes, or elements that properly constitute the marital community of life, the list may be unending and varies from society, culture and personality. The basic ones are: heterosexual companionship, interpersonal friendship, and then spiritual and material support.⁹⁸ Indeed, it grounds what the English and Statutory law refers to as consorsium.⁹⁹

What is more, the procreation and education of children though presently subordinated to the formation of a marital community of love is nevertheless not inferior to it. This is because for there to be marriage in any Christian sense, the marriage must be open to procreation and education of children. Hence while the existence of a true and valid Christian marriage does not depend on procreation,¹⁰⁰ there must nevertheless be openness to procreation by all who choose marriage in a Christian way. Hence:

The fulfilment of this purpose of marriage is not exhausted with physical procreation. The spouses are obligated to see that the children procreated receive a Christian education. This formation takes place primarily in the context of the marital community wherein the children learn the meaning of love of God and neighbour through the long example and instruction of their parents.¹⁰¹

As it were, the aforesaid two ends of marriage, namely: good of the spouses (*bonum coniugnum*), and the procreation and education of Children, are so intimately related that one cannot separate them from the meaning of marriage itself. In a very peculiar way, they constitute unselfish giving of selves in the context of marriage, and promote the natural and spiritual good of the spouses.¹⁰²

14. CANON LAW PROVISIONS ON MARRIAGE: PERSPECTIVES TO THE DECISION IN *HYDE V. HYDE*

The canon law provisions on marriages were exhaustive. They cover all aspects of Christian marriage and effectively regulate issues arising from the marriage contract/covenant. Indeed the scope of the provisions is as follows:

⁹⁵ J.M. de Torre, *op. cit.*, p. 255.

⁹⁶ *Code of Canon Law*, Canon 1055 n. 1.

⁹⁷ Pius XI, *Casti Connubii*, Dec. 31, 1930, translation in Macklin, 217.

⁹⁸ J.A. Coriden et al., *op. cit.*, p. 740.

⁹⁹ The ensemble of all the rights which each spouse has and shares in and of the other spouse in a statutory marriage.

¹⁰⁰ For instance marriages between the aged and sterile.

¹⁰¹ Cf. Augustine, *De Civitate Dei*, 15, 16; Thomas Aquinas, *Summa Theologiae*, iii, 29, 2; Raymond of Panafort, *Summa de Matrimonio*, ii, 12.

¹⁰² J.A. Coriden et al, (eds.), *The Code of Canon Law: A Text and Commentary*, (London: Geoffrey Chapman, 1999), p. 740.

- Pastoral care and what must precede celebration of marriage (cc. 1073-1082)
- Diriment Impediments specifically (cc. 1083-1094)
- Matrimonial Consent (cc. 1095-1107)
- The Form of the Celebration of Marriage (cc. 1108 – 1123)
- Mixed Marriages (cc. 1124-1129)
- Marriages secretly celebrated (cc. 1130-1133)
- The Legal effects of marriages (cc. 1134-1140)
- The separation of the spouses (cc. 1141-1155)
- Dissolution of the bond of marriages (cc. 1141-1150)
- Separation while the bond endures (cc. 1151-1155)
- Convalidation of marriage (cc. 1156-11650)

However, out of all these provisions set out in the canons, this work will critically examine only those that directly relate to the elements of statutory marriage as outlined in the decision in *Hyde v. Hyde*¹⁰³. The areas will include those that border on Monogamy, Voluntariness of marriage and life partnership. This discussion is done with a view to demonstrate that Christian/Canonical marriage provisions did indeed influence the decision in *Hyde v. Hyde* and subsequently the provisions of the statutory laws on marriages, especially in the common law jurisdictions.

15. CANONICAL PROVISION ON THE MONOGAMY AND HETEROGENEITY OF CHRISTIAN MARRIAGE

The law provides in relation to the number of parties to a valid marriage as follows:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole life, is by its nature ordered toward the good of the spouses and procreation and education of offspring;....¹⁰⁴

The proper jurisprudence of this Canon is to the effect that a Christian marriage cannot be validly established between two men or two women in what is popularly called homosexual (gay) marriages. Further hermeneutics of the same canon discloses that Christian marriage is void between a man and several women (polygamy) or between a woman and several men (Polyandry). The provisions of *Canon 1055 n. 1* also invalidate all forms of woman-woman marriages as observable in most native African cultures.¹⁰⁵ If anything, the canon contemplates a heterosexual companionship¹⁰⁶ in all its ramifications.

It is noteworthy that most national laws relating to marriage which insist on monogamy and heterosexuality were heavily under the influence of Christian law of life via the Canon law. For instance, “American law ...began with mandatory monogamy, which it derived from the Canon law.”¹⁰⁷ Harold J. Berman, a professor of Emory School of Law in Atlanta, and the author of “Law and Revolution: The Formation of the Western Legal Tradition” observed that western jurisprudence traces its origins to Canon law as it was practiced in the 11th and 12th centuries.¹⁰⁸ He further stated

¹⁰³ *Supra*.

¹⁰⁴ Can 1055, n. 1

¹⁰⁵ Generally *Meribe v. Egwu* [1976] IALLNLR 266; see also *Helina Odigwe v. Nyere Aika*, suit No. U/24A/79 (Unreported) of 23rd March, 1982; further see *Okonkwo v. Okagbue* [1994] 9NWLR (pt 368) p. 301.

¹⁰⁶ J.A. Coriden et al, *op. cit.*, p. 741.

¹⁰⁷ http://books.google.com.ng/books?id=jfnylk_bv5cc&pg=PA106&ipg=PA106&dg=monogamy%2B+canon+law&source=61B (accessed 19/09/2011).

¹⁰⁸ <http://tampabaycolition.homestead.com/files511lawExplainBreakingAgreement.htm> (accessed 17/09/2011).

that “our law is full of Canon law principles that are now not considered Canon law, such as monogamy”¹⁰⁹

In all, the Catholic Church in advancing the ideal of monogamy clearly condemns polygamy in the Canon law. The Catechism of the Catholic Church which is grounded on the Canon law principles, in its paragraph 2387 under the head “Other offences against the dignity of Marriage” states that polygamy is not “in accord with the Moral law.” Also paragraph 1645 under the head “The Goods and Requirements of Conjugal Love” states that “The Unity of Marriage, distinctly recognized by our Lord, is made clear in the equal personal dignity which must be accorded to man and wife in mutual unreserved affection. Polygamy is contrary to conjugal love which is undivided and exclusive.”¹¹⁰

16. VOLUNTARIETY IN MARRIAGE: PERSPECTIVES FROM CANON LAW

In the Canon Law, there cannot be any valid marriage where any or all of the partners do not voluntarily enter into the covenant/contract. Any impediment affecting voluntariety is said to affect free consent and therefore flaws the marriage. The law defines matrimonial consent as:

...an act of the will by which a man and a woman by an irrevocable covenant, mutually give and accept one another for the purpose of establishing a marriage.¹¹¹

This consent is what guarantees voluntariety. It brings marriage into existence and is the most essential element in the celebration of marriage. Without a clear legal manifestation of consent, there is not marriage in place.¹¹² It is a willed act, freely given without internal or external coercion, in view of a lifelong union with another partner. Note that the marital covenant begins with this exercise of exchange of consent between the would-be spouses. And since marriage is a specific way of life which demands a total gift of self, the mutual exchange of consent must be a free act of the will on the part of each party. Necessarily, consent may be given only by the spouses. It may not be given on their behalf by any outside person(s) such as parents, guardians, etc.¹¹³

Before the 12th Century, there was a radical tension between the secular model of marriage by which consent was supplied by parents or secular authorities for economic, political or familial gains and the peculiar ecclesiastical model which insisted on consent being a private preserve of the spouses.¹¹⁴ But after the 12th century, most societies came under the canonical influence and allowed the sacred and private nature of consent to prevail. Issues of consent are usually construed very rigidly against the defecting party. Hence, the maturity of the contracting parties is very essential to a valid marriage. Accordingly, persons proposing to enter into marriage must be seized of sufficient knowledge about the meaning of marriage. They must also have the capacity to make due deliberations as well as to exercise internal freedom to choose and commit themselves to marriage and they must appreciate the requisite obligations of and benefits arising from marriage.¹¹⁵

As a matter of law, nobody can contract a valid marriage who labours under the following defects of consent:¹¹⁶

- Lack of sufficient use of reason (can. 1095)
- Grave defect of discretionary judgment (can. 1095, n.2)

¹⁰⁹ *Ibid.*

¹¹⁰ <http://www.newworldencyclopedia.org/entry/polygamy> (accessed on 15/09/2011).

¹¹¹ Canon 1057.

¹¹² It is the intendment of the Canon that consent must be legitimately manifest. The internal act of the will must not only be expressed by external signs such as words or gestures, but it must take place within the context of certain prescribed formalities. These formalities are set out in the Canon Law and for most secular societies, in civil law as well. Cf. J.A. Coriden et al, *op. cit.*, p.743.

¹¹³ J.A. Coriden et al., *op. cit.* p.742.

¹¹⁴ See G. Duby, *Medieval Marriage*, (Baltimore: John Hopkins, 1978).

¹¹⁵ P.O. Okolie, *op. cit.*, p. 64.

¹¹⁶ See Generally, Code of Canon Law, Nov. 27, 1983.

- Inability to assume the essential obligations of marriage (can. 1095, n. 3)
- Ignorance (can. 1096)
- Conditional consent (can. 1102)
- Force and Fear (can. 1103)
- Deceit or Fraud (can. 1098)
- Error of quality (can. 1097)
- Total simulation (can. 1101)
- Exclusion of Children (can. 1097)
- Exclusion of indissolubility (can. 1101, 2)
- Exclusion of fidelity (can. 1101, 2)

The church further provides that for consent to be valid and real, both parties to the marriage must be legally capable of contracting marriage. This simply requires that none of the parties should have been barred from marrying at all or from marrying each other by any of the diriment impediments of divine law, natural law or positive law.¹¹⁷ Such diriment impediments include:¹¹⁸

- Age (can. 1083)
- Antecedent and perpetual impotence (can. 1084)
- Previous Bond of Marriage (can. 1085)
- Disparity of Cult (can. 1086)
- Impediment of Sacred Orders and Public perpetual vow of chastity (can. 1087 & 1088).
- Abduction for the purpose of marriage (can. 1089)
- Crime of Coniugicide (can. 1090)
- Consanguinity (can. 1091)
- Legal adoption (can. 1094)

It is the position of the law that a diriment impediment, or defect in the Form or complete absence of it merely renders ineffective the consent. However, the natural incapacity to give marriage consent or perhaps the presence of such causes capable of vitiating consent¹¹⁹ or the exclusion of that which is essential for marriage will render the consent itself substantially defective.¹²⁰ Granted that both ineffective consent and defective consent invalidate the marriage contract, the remedy varies. While a substantial defect in consent can only be remedied by giving the consent again an ineffective consent can be saved by a dispensation from the causative diriment impediment or the obligation to observe the required Form when the marriage contract is validated.¹²¹

What is more, the object of the marriage consent is the parties' gift of themselves to and acceptance of each other to form a conjugal partnership. This further implies a mutual exchange of rights and obligations to those acts and elements required for the establishment of a marriage. Accordingly, "if either or both partners give a fictitious consent... or exclude by a positive act of the will either of the essential properties ... or any essential element ... they contract invalidity."¹²²

¹¹⁷ G. Taylor and W.F.E. de Bekker, *Parish Priests and Marriage Cases*, (Bangalore: Theological Publications in India, 2008), p. 6.

¹¹⁸ Culled from instructions for presenting a Bill of Complaint, Onitsha Inter-diocesan Tribunal.

¹¹⁹ For instance grave fear, ignorance, error etc.

¹²⁰ Cf. G. Taylor and E. de Becker, *op. cit.* p. 7.

¹²¹ *Ibid.*

¹²² *Ibid.*

17. CANONICAL PROVISIONS RELATING TO PARTNERSHIP FOR LIFE

Through an exhaustive and integral construction of the provisions of the canon law as well as other relevant texts, especially the text and rubrics for the official administration of marriage, the fact is increasingly made clearer that marriage is intended to be a partnership for life. The element of indissolubility which characterises Christian marriage is the hermeneutico-theological language symbol for the life partnership. Indissolubility, the glimpses of which are got from canons 1056, 1057, and 2065 involves and relates to:

...all marriages, whether sacramental or natural. Canonical tradition distinguishes between intrinsic indissolubility and extrinsic indissolubility. All marriages, whether sacramental or natural, are intrinsically indissoluble. Only sacramental marriages are considered to be extrinsically indissoluble by any cause except death.¹²³

Where in *canon 1057 n.2* the word “irrevocable” is used to qualify the covenant of marriage, an abiding impression is given in favour of life partnership.¹²⁴

18. CONCLUSION

It is incontrovertible that before the decision in *Hyde v. Hyde*¹²⁵, the Christian doctrine of marriage has been quite prevailing among contrary and various winds of doctrines relating to marriage. And precisely because the Christian option is solidly rooted in the Natural Law, it provided long since, a juridical platform against which most marriage laws and traditions are judged for validity. Hence, it is not surprising that the Christian culture and norms of marriage became the accepted as the proper paradigm of marriage laws. It was because of this great and overriding influence that Lord Penzance defined marriage exclusively in Christian categorical framework. That civil definition of marriage adopted all the properties of marriage as is understood in Christendom, namely: Unity, Indissolubility, Voluntariety, Monogamy, Heterosexuality, and Complementarity. Accordingly, most statutory marriages round various legal jurisdictions rehearse and adopt the elements of marriage rooted in the Christian moral law. Unfortunately, modern culture emerging from the Enlightenment is beginning not only to question but to attack all such standards deriving as it were from the absolute and universal principles of Natural Law. What we have flooding the floor of the parliaments today are bills struggling to be signed into laws which seek to legalize gay marriages, contract marriages, free unions, made-easy divorce laws, polygamy, etc.

If the marriage institution will survive the present attack, there is the need to consider once again, for purposes of reviewing our laws the attributes of Unity, Indissolubility, Voluntariety, Monogamy, Heterosexuality, and Complementarity which have been taught in the Christian doctrines and formidably defended in the canon laws.

A case is hereby made for a return to the pristine provisions of *Hyde v. Hyde*¹²⁶ which was inspired and shaped by the Christian and canonical norms and where marriage will remain:

- A voluntary union;
- Between a man and a woman;
- For life;
- To the exclusion of all others.

19. RECOMMENDATION

In order to salvage the marriage institution especially marriage under the Act and bring it closer to the intendment of its Christian origins, it is recommended as follows:

¹²³ J. Burke, *A Dictionary of Canon Law*, (Akure: Don Bosco publications, 2004), p.267.

¹²⁴ Indeed the text for the Christian matrimonial celebration on the altar, is explicit “in plenty and poverty, in health and sickness, I will love you until death do us part.”

¹²⁵ *Supra*.

¹²⁶ *Supra*.

- That the legislature will generally review the Marriage Act and the Matrimonial Causes Act in the spirit of the Canon Law so as to renew the ancient inspiration.
- That all bills pending on the floor of the National and State Houses of Assembly seeking to legalize all the mentioned degenerate options, be struck out.
- That there be made, a return to the fault-based divorce laws so as to very closely mirror the ideal of Indissolubility in *Hyde v. Hyde* which is a Christian paradigm.

AUTHOR'S BIOGRAPHY



Rev. Fr. Dr. Maurice Okechukwu Izunwa, priest of the Catholic Diocese of Nnewi, is a Lecturer in the department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria. He holds the following degrees: PhD (Phil); M.Ed; MA (Rel.); BL; LLB; B.Th; B.Phil. He also holds Diploma in Latin and Diploma in Mass Communication from Urban University, Rome and Enugu State University respectively.

He is a member of so many scholarly organizations which includes Nigerian Philosophical Association, Nigerian Bar Association, Catholic Theological Association of Nigeria, International Society for African Philosophy and Studies, Nnewi Diocesan Priest Association, Igbo Studies Association etc.

He has published over sixty scholarly articles in both International and Local Journals and he is currently a visiting Scholar at St Paul School of Theological Studies, Nnewi, Anambra State. He is the Legal Adviser to the Catholic Diocese of Nnewi and is an associate pastor at St John the Apostle and Evangelist Catholic Church Nnewi.