

Stable Democracy through Religious Equality: Redressing the Inequities in Marriage Regulation in Nigeria - A Case for Legal Reform

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Abstract

This paper has critically explored the role of the marriage regulation regime of the 1999 Constitution in enhancing the stability of Nigeria's tender democracy from the backdrop of the indispensability of religious equality of citizens for a stable democracy. The paper examined how the constitution treats all the religious models of marriage in the country. The finding is that the Constitution is discriminatory in favour of the religious-polygamous system of marriage followed by Muslims and traditional religionists, and against the religious-monogamous model of marriage followed by Christians and others. The paper recommends legal reform, sincere appreciation of the religious plurality of the country, and respect for the right to freedom of religion. The methodology used was critical analysis while the theoretical framework of the research is structural functionalism.

Keywords: stable democracy, religious equality, marriage regulation, constitution

1. Introduction

This paper examines how far the marriage- regulation regime put out by the 1999 Constitution of Nigeria, as amended, has contributed to building a stable democracy in the country through treating the various religions models of marriage fairly. Stable democracy is a value that easily translates to the political stability of a country, which is a matrix without which it is difficult to have any meaningful development in the country. This paper draws strength and value from the fact that the importance of national stability can never be gainsaid particularly as it relates to Nigeria. It was the bogging concern of the fathers of the independent Nigeria, for which it is not the stability of a homogenous county, but the stability of a heterogeneous country with various spheres of diversity such as in ethnicity, culture, and language. But diversities in religions stand out particularly with the *Boko Haram* Islamic extremists insisting that all the country must be brought under Islam. Islam is mostly in the North, Christianity in the South, and traditional Religion cuts across the length and breadth of the country, being that it was the religion of the territories that compose Nigeria prior to the advent of Islam and Christianity. As the world today has become a global village, more religions have been added to these. Religion is very important in the life of many Nigerians. Jamo thinks that this is because religious organizations appear to be the only survivor of long years of military penchant to suppress, stifle and proscribe all meaningful and lawful windows of dissents.² This has negatively resulted in religion taking the front burner in political campaign and politicking.³ Oraegbunam considers the veracity of Jamo's assessment to be partial and feels that it is rather complemented by Mbiti's perception of the reality.⁴ Mbiti holds that an African man is generally deeply religious.⁵ Everything taken into consideration, Oraegbunam concludes that "religion in Nigeria today proves to be a sensitive and potentially explosive weapon which could help to make or mar the nation's democracy."⁶ The destructive potentials would be defused and its constructive powers harnessed for the nation's democracy if it is appreciated in many quarters in the country that according all religions the same rights and privileges both conceptually and practically is a means of forging a stable nation. This paper is an advocate of this equal treatment of all religions particularly in the context of the regulation of marriage in the country. The paper discusses first stable democracy and religious equality in general. It goes further to situate the discussion of stable democracy and religious equality in the context of Nigeria. At this level the paper explores constitutional foundations for equality of religions as an instrument for stable democracy. Backed by constitutional and jurisprudential

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² N. M. Jamo, "The Nature and Scope of the Freedom of Thought, Conscience and Religion under Section 38 of 1999 Nigerian Constitution" in *Ahmadu Bello University Zaria Journal of Private and Comparative Law*, Vols. 2 & 3, p. 5, 2009, pp. 5-15.

³ I.K.E. Oraegbunam "Islamic Law, Religious Freedom and Human Rights in Nigeria", *African Journal of Law and Criminology*, vol 2. No. 1, p. 1, 2012, pp. 1-25.

⁴ *Ibid.*

⁵ J.S. Mbiti, *African Religions & Philosophy*, (London: Heinemann, 1969) p.17.

⁶ I.K.E. Oraegbunam, above n 2.

authorities on equality of religions being a *sine qua non* for stable democracy, the paper goes further to review the constitutional regime for regulating marriage in Nigeria. The finding of the review is that the marriage-regulation regime entrenched by the Constitution is discriminatory against the religious-monogamous model of marriage practiced by Christians and others. This situation contradicts the anti-discrimination provisions of the Constitution. Constitutional amendment becomes therefore an urgent necessity in order to put all the models of marriage on the same pedestal for a more stable democracy.

2. Stable Democracy and Religious Equality in General

According to the *Oxford Advanced Learner's Dictionary*, 'stable' means 'firmly fixed; not likely to move, change or fail'.¹ And for the *Chambers Twentieth Century Dictionary*, it means 'standing firm; firmly established; durable; firm in purpose or character; constant; not ready to change'.² From these definitions, 'stable' conveys the idea of durability and permanence. Democracy, from two Greek words '*demos*' (people) and '*kratia*' (art of governing), means etymologically the art of governing by the people.³ Abraham Lincoln defined it as "a government of the people, by the people, and for the people."⁴ It is that form of government that belongs to the people, and is run by them, and for their welfare. In democracy, the *fons et culmen*, that is, source and summit, of government is the citizens. Thus, Daver calls it 'the sovereignty of the people and majority rule'.⁵ Malemi takes democracy to its elementary features by identifying three core features that a true democracy must have. That is, it must be: (i) a government made up of the generality or representatives of the people; (ii) a government formed and installed by the people; and (iii) a government that exists for the welfare of the people.⁶ Democracy is thus that government that carries along all the people in its constitution and operation, as well as in its welfare packages including rights and privileges. For democracy to be the government of, by, and for the people or the sovereignty of the people, it means that the people are equal in status before the law. Democracy would cease to be democracy when people and their legitimate interests are not equal before the law. The sovereignty of the people implies the equality of the people as citizens. This is not denied by the fact that it operates on the principle of the rule of the majority. The principle does not connote a permanent majority, but instead a fluid majority in the sense that the people who constitute the majority on one point may not be the same people that would constitute the majority when another subject comes for decision. Thus the people that constitute the majority change depending on the subject matter that calls for decision.

The next key term in the paper is 'equality'. 'Equality', from the Latin '*aequalitas*' connotes 'evenness', and its exact meaning is dependent on the circumstance in which it is applied. In the context of ground surfaces or places it means smoothness.⁷ In socio-political and legal milieu it conveys the idea of treating people evenly and fairly by the state⁸ which in a democratic parlance belongs to all the people. In socio-political and legal settings, equality, as treating people evenly, has been held to be applicable in three levels.⁹ First is in the administration of public institution.¹⁰ At this level, equality is principally justice as regularity in the interpretation and application of the rules in such a way as to treat similar cases similarly.¹¹ In other words, the interpretation and application of rules should not be arbitrarily done. They must be done consistently. Second is at the substantive structure of institutions;¹² that is, at the level of the formulation of rules or laws governing an institution.¹³ At this level rights and privileges recognized by an institution are created. Equality demands here that equal basic rights be given to all persons. The third level at which equality is discussed is that of the subjects of equality. This level seeks to answer the question; who or what kind of being should be treated equally with others? Rawls stated that it is moral persons that should be treated equally.¹⁴ Moral persons are distinguished by two features: first they are capable of having a conception of their good (as expressed by a rational plan of life),

¹ *Oxford Advanced Learner's Dictionary*, (Oxford-New York: Oxford University Press, 2010) p. 1447.

² *Chambers Twentieth Century Dictionary*, (Edinburgh: Chambers Ltd, 1981) p. 1313.

³ "Democracy" <http://beta.merriam-webster.com/dictionary/democracy>,

⁴ Ese Malemi, *The Nigerian Constitutional Law*, (Lagos: Princeton Publishing Co., 3rd ed., 2012) p. 38

⁵ B. Daver, "The basic principles of democracy and their importance in dealing with Terrorism", www.politics.ankara.edu.tr/.../Bulent_Daver_The_Basi..., (visited Dec.1, 2015, 8.43AM).

⁶ Ese Malemi, above n 4.

⁷ D. P. Simpson, *Cassell's Latin dictionary*, (New York : Wiley Publishing, Inc., 1968) p. 25.

⁸ B. O. Nwabueze, "Equality before the Law" in *Essentials of Nigerian Law*, Nigerian Institute of Advanced Legal Studies Lagos, N.I.A.L.S. Law Series No. 2, 1989, p. 39.

⁹ J. Rawls, *Justice as fairness*, (ed. by E. Kelly), (Massachusetts: The Belknap Press of Harvard University Press, 2001) p. 441.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

and second, they are capable of having a sense of justice. The fact that equality is for moral persons means that it does not extend to treatment of animals. Human beings are therefore moral persons who should be treated equally as citizens. Religious equality thus means treating all the religions of the citizens equally at these three levels. In the end, the equality of people as citizens becomes an inherent principle of democracy such that without it, a democracy can hardly be conceived, let alone being practiced. Thus a stable democracy is one that must be necessarily anchored on equality of citizens together with their legitimate interests such as religion.¹

After researching on *How to Construct Stable Democracies*, Golden and Ulfelder observed that "...the key to maintaining stability appears to lie in the development of democratic institutions that promote fair and open competitions, avoid political polarization and factionalism, and impose substantial constraints on executive authority."² The research analyzed the fates of democracies and dictatorship around the world from 1955 to 2002.³ The study examined more than 130 onsets of political crisis identified as having occurred within the above-stated bracket of years⁴ and found that economic, ethnic, and regional effects, usually held to be of great impacts on political instability, have only a modest impact on a country's risk of political instability.⁵ On the contrary, the research found that a relatively small number of factors consistently preceded most political crises.⁶ Arranged in the descending order of factors with grave impact on the vulnerability to instability, these factors are:

- (a) Nominal democracies with factionalism and dominant executives – 29.7 points;
- (b) Autocracies with some political competition – 8.2 points;
- (c) State-led Discrimination – 2.6 points;
- (d) High Infant mortality Rate – 2.3 points;
- (e) Bad neighborhood – 1.7 points; and
- (f) Low openness to International trade – 1.5 points.⁷

Nominal democracies with factionalism and dominant executives tops the list and *State-led discrimination* comes third. Although *Nominal democracies with factionalism and dominant executives* and *State-led discrimination* are listed as distinct risk factors for instability, some nexus exists between them as manifestations of a mentality averse to treating people equally as citizens. The end product of both of them is discrimination amongst citizens. A faction is "a small group of people within a larger one whose members have some aims and beliefs different from those of the larger group".⁸ Factionalism refers to the tendency of people aggregating in smaller groups within a broader group in order to pursue their sectional interests. In the end it leads to discrimination against those who do not belong to their faction while those that belong constitute the elect that are favoured. Also the end product of executive dominance is discrimination amongst the citizenry. Executive dominance, also known as elective dictatorship, is a political science terminology with immediate background in United Kingdom and which refers to a situation where the legislative business of the parliament is dominated by the government of the day.⁹ Analogously applied to democratic politics in general, it refers to a situation where the executive arm of government dominates every other political institution thereby ignoring in actual fact the principle of separation of powers.¹⁰ When this is done, the result is that the in-built checks and balances implied by separation of powers are cast over board. The end result is the dictatorship of the executive. As dictators operate under personal whims and caprices, there is no guarantee for equal treatment of citizens. State-led discrimination refers to a situation where the government of a country would champion the discrimination of a segment of the country. This could occur where the structures of government are positively skewed to favour some while marginalizing some segments of the country. State-led discrimination is theoretically different from factionalism and executive dominance. It is different because factionalism is not an official government action whereas State-led discrimination could be so. The same is, to a good extent, true of executive dominance; no state executive would declare that he wants to dominate the other arms of government. It is often seen than stated. State-led discrimination has, together with factionalism and executive dominance, the same end result of marginalizing some groups while favouring some others, thereby creating inequality amongst citizens. An instance of state-led

¹ See T. Christiano, "Democracy as Equality", available at <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/christianodemocracy.pdf>, (visited Dec. 2, 2015, 6.08 AM)

² J. A. Goldstone & J. Ulfelder, "How to Construct Stable Democracies" in *The Washington Quarterly* p. 10, pp.9—20 (Winter 2004-05).

³ *Ibid.*, at p. 9.

⁴ *Ibid.*, at p. 12.

⁵ *Ibid.*, at p. 9.

⁶ *Ibid.*, at p. 12.

⁷ J. A. Goldstone & J. Ulfelder, "How to Construct Stable Democracies" in *The Washington Quarterly* p. 13, pp.9—20 (Winter 2004-05).

⁸ *Oxford Advanced Learner's Dictionary*, (Oxford-New York: Oxford University Press, 2010) p. 526.

⁹ "Elective dictatorship", https://en.wikipedia.org/wiki/Elective_dictatorship, (visited 2 Dec. 2015, 4.58PM)

¹⁰ "The Dominant Executive and the Power Elite", <http://countrystudies.us/egypt/106.htm>, (visited 2 Dec. 2015, 5.44 PM)

discrimination would be the 1962 Ugandan Federal Constitution that gave lopsided powers to the Buganda region to the detriment of the other four regions of the country. The political power and financial resources constitutionally heaped on this one region could compare with what all the other regions altogether had.¹ This led to a crisis that resulted to the overthrow of the constitution.² This ultimately leads to the conclusion that government treatment of citizens unequally destabilizes democracy.

In the context of the stability of democracy religious equality is not demanded simply because it is a legitimate interest of a citizen but more by its positive influence in the life of the people who in turn are the *fons et culmen* of democracy. Religion gives meaning and purpose to human life and experience, without which a citizen may not make the best of democracy.³ O’Dea wrote that “the contents of commitments of faith are data that must be understood to the extent that they enter into human action by affecting both men’s definition of situations and their motivational structure.”⁴ He observed further that “men are propelled to ‘breaking points’ in mundane experience and questions are raised and can be answered only by going beyond the empirical world of mundane experience.”⁵ For Anan, “Religion is frequently equated with light.”⁶ Associating religion with light implies that it draws out darkness from people and society. It dispels fear in life and creates confidence and stability in spite of the challenges in life. Democracy, particularly in a religiously heterogeneous society like Nigeria, needs all the energies from the light of the different religions in a country in order to maintain a stable course. A citizen that can contribute to democracy is thus one that has found meaning in his or her existence. Anan also added that religious extremism constitutes a dark side of religion as it oppresses or discriminates against women and minorities.⁷

The feeling in some quarters that religion is an attraction for the poor, uneducated, or uninfluential, which culminates in the cliché that religion is the opium of the masses has been disproved by strong presence of religion in areas of the developed and rich Western world, like the U.S., where there is great freedom in having or not having a religion. Concerning the U.S., Wald wrote:

By most conventional yardsticks, the United States was one of the first nations to achieve modernization, and it continues to lead the way in many aspects of social development. If modernization leads inevitably to the decline of religious institutions, practices and feelings – what I have called the ‘naïve’ understanding of secularization – then the erosion of religion ought to show up first in such a mobile, affluent, urban, and expansive society. Yet American religion, like Mark Twain, has obstinately refused to go along with reports of its imminent death. . . . By all the normal yardsticks of religious commitment – the strength of religious institutions, practices, and belief – the United States has resisted the pressures toward secularity. Institutionally, churches are probably the most vital voluntary organization in a country that puts a premium on “joining up.” A tabulation by the National Council of Churches list approximately 340,000 churches in the United States with a total membership of about 135,000,000. Depending on how ‘membership’ is defined, the 135,000,000 church members amount to somewhere between three-fifths and three-fourths of the adult population.⁸

China represents areas of the world where formal state atheism has crumbled, and Onaiyekan noted:

As we know, for 50 years, China was kept away from religion. But recently, the Chinese government did agree that you can be a member of the ruling Communist Party, an active politician in China, as well as a believer. The result now is that there are a good number of Chinese high-level government

¹ B. O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, (London: Sweet & Maxwell, 1983) p. 18. See Cathrine Johannessen, “Kingship in Uganda: The role of the Buganda kingdom in Ugandan politics”, <http://www.cmi.no/pdf/?file=/uganda/doc/Johannessen-kingship%20in%20Uganda-politics-research%20notes-Dec%2005.pdf>, (visited on 30th August, 2015 at 11.19 pm).

² B. O. Nwabueze, above n 5.

³ See J. O. Ezeanokwasa, *The Legal Inequality of Muslim and Christian Marriage in Nigeria: A Constitutionally Established Judicial Discrimination*, (New York: Edwin Mellen Press, 2011) p. 22.

⁴ T. F. O’Dea, “Sociology of Religion” in *New Catholic Encyclopaedia*, (Michigan- U.S.A.: Thomson Gale, 2nd ed., Vol. 12, 2003) p. 75

⁵ *Ibid.*, p. 76.

⁶ See F. Cardinal Arinze, *Religions for Peace: A Call for Solidarity to the Religions of the World*, (New York: Doubleday, 2002) p. 35.

⁷ *Ibid.*

⁸ K. D. Wald, *Religion and Politics in the United States*, (Washington, D.C., 2nd ed., Congressional Quarterly Inc., 1992) pp. 8-9.

officials who are also members of the Church. ... And many, many young Chinese, who have been raised up without religion, are thirsty for something like religion.¹

This means that religion is as important for human life as the necessities of life such as food, water, and shelter. This is amongst the reasons why the international community prohibits not only inequality of citizens under the law but also discrimination on the basis of religion. Article 7 of the Universal Declaration of Human Rights (UDHR) provides that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

And article 2 of the African (Banjul) Charter on Human and Peoples' Rights provides:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Also article 3 of the African (Banjul) Charter on Human and Peoples' Rights states that:

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law.

3. Stable Democracy and Religious Equality in Nigeria

Religious equality is recognized and guaranteed in Nigeria as right to freedom from discrimination, and it is contained in section 42 of the 1999 Constitution of Nigeria, as amended, (hereafter referred to as the 1999 Constitution or the Constitution). The high premium placed on religious equality in Nigeria is manifested in two ways. First, it is recognized by the Constitution, and second, it is contained in chapter IV of the Constitution which runs from section 33 through 46. Chapter IV is titled *fundamental rights*.

Fundamental rights are rights recognized as being inherent in human beings and not given to them by the government or society.² Democracy would be healthy and stable only if the rights inherent in the people as *demos* are recognized and guaranteed. The sanctity of chapter IV provisions comes out eloquently in the fact that they are amongst the few provisions of the Constitution that require stricter amendment process. While the proposal for the alteration of other sections of the constitution require the support of the votes of two-thirds majority of the votes of the Houses of National Assembly and the approval by resolution of the Houses of Assembly of two-thirds of the states,³ the proposal for the alteration of a provision of chapter IV requires the votes of four-fifths majority of all the members of each of the Houses of the National Assembly, and also approved by resolution of the Houses of Assembly of two-thirds of all the states.⁴ Earlier Constitutions of Nigeria contained the right to freedom from discrimination.⁵

3.1 Right to Freedom from Religious Discrimination- Section 42 of the 1999 Constitution

Section 42 of the 1999 Constitution states:

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-
 - (a) be subjected either expressly by, or in the practical application of, any

¹ J. Cardinal Onaiyekan, "It's Difficult to Say There Is Government in Power" in *Sunday Sun* (Lagos), 15 Nov. 2015.

² M. O. Udugbor, *Introduzione allo Studio del Diritto degli Stati Africani*, (Parte General), (Roma: Pontificia Università Lateranense, 2001) p. 86; *Compendio Della Dottrina Social Della Chiesa*, (Vaticana: 3^o edizion, Libreria Editrice, 2004) p. 82.

³ 1999 Constitution, s. 9(2).

⁴ 1999 Constitution, s. 9(3).

⁵ 1979 Constitution, s. 39.

law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria.

By the express words of the Constitution the subjects of this right are only citizens of Nigeria. This is quite unique because most of the rights recognized and guaranteed in chapter IV are guaranteed to individuals as persons and not as citizens. Only three rights, namely, the right to private and family life (s. 37), the right to freedom of movement (s. 41), and the right to freedom from discrimination (s. 42) are guaranteed to individuals as citizens. Rights such as the right to life (s. 33) and right to freedom of thought, conscience and religion (s. 38) are guaranteed to individuals as persons. The idea of citizenship is narrower than that of personhood. The *Oxford Advanced Learner's Dictionary* defines a citizen as “a person who has the legal right to belong to a particular country.”¹ The same dictionary defines a person as “a human as an individual.”² By having a legal right to belong to a particular country a citizen is a party to the social contract on which the country is established. In the context of democracy, he is part of the *demos* by whom, of whom, and for whom the country is established. He is an integral part of the country. On the other hand, rights guaranteed to individuals as persons are guaranteed to them not in relation to their political connection with the existence of the country but in their nature as human beings, which nature is legally recognized by the country. Thus discriminating against a citizen is like undermining a pillar on which a structure is resting. In the context of a democracy, it is undermining a human pillar on which the state is built. This is a recipe for instability.

Section 42(1) prohibits discrimination on the basis of *inter alia* religious affiliation. From a joint reading of paragraphs (a) and (b) of subsections 1 the discrimination prohibited can come from any of three material causes:

- from the express provision of any law in force in Nigeria;
- from the application of any law in force in Nigeria; and
- from any executive or administrative.

Also from a joint reading of paragraphs (a) and (b) of subsections 1 the discrimination could come from any of these two formal causes:

- by subjecting a citizen of Nigeria of a particular religion to disabilities or restrictions to which citizens of Nigeria of another or other religions are not subjected; or
- by according a citizen of Nigeria of a particular religion any privilege or advantage that is not accorded to citizens of Nigeria of another or other religions.

For better precision in communication, discrimination in the form of subjecting a citizen of a particular community to disabilities or restrictions not meted to citizens of other communities can be referred to as negative discrimination while discrimination in the form of according preferential privileges and advantages can be referred to as positive discrimination. However, section 42 of the Constitution prohibits both. That notwithstanding, it is not usual that people complain of positive discrimination when it is in their favour.

Section 42(2) is a particular application of the general prohibition of discrimination to circumstances of birth. It states that “no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. What circumstance of birth means is not evident. “Circumstance”, from the Latin words ‘*circum*’ (around) and ‘*stans*’ (standing) is defined as “the logical surrounding of an action; an attendant fact”.³ The circumstance of birth in this context refers to the logical facts surrounding the birth of a Nigerian citizen. Things that could be found within the circumstance of the birth of a citizen are many. They include one’s

¹ *Oxford Advanced Learner's Dictionary*, (Oxford-New York: Oxford University Press, 2010) p. 253.

² *Ibid.*, p. 1092.

³ *Chambers Twentieth Century Dictionary*, (Edinburgh: W & R Chambers Ltd, 1981) p. 237.

religion, ethnicity, tribe, sex, whether a citizen is born within wedlock or outside of it. So section 42(2) prohibits also discrimination on the basis of religion.

Section 42(3) gives a general exception to the right to freedom from discrimination. Applying it to religion it means that it would not amount to religious discrimination if some employments restrict a citizen's right to practice his religion. The employments include working for the state, being a member of the armed forces of the Federation or a member of the Nigeria Police Force or being in the service of a body corporate. It is not clear whether the 'State' in this context refers to the federal or state government. Being aware that the job of both federal and state governments could entail limitations to the opportunities of employees to practice their religions, it could be assumed that 'State' refers to both federal and state government offices. All the same, there would be discrimination on religious basis if people of a particular religion are always given assignments that impede the opportunity of practicing their religion.

The necessity of guaranteeing the right to freedom from discrimination in religious matters underpins section 10 of the Constitution which prohibits the government of the federation and the states individually and collectively from establishing a state religion.¹ To establish a state religion necessarily implies discriminating against citizens who do not belong to the privileged religion. Other provisions of the 1999 Constitution, which though not up to the rank of fundamental rights as is section 42, also espouse the idea of the equality of the religions of Nigerian citizens.

3.2 Other Constitutional Provisions against Discrimination on Religious Basis

Chapter II of the Constitution (from section 13 through 24) deals with the *Fundamental Objectives and Directive Principles of State Policy*. It sets out the socio-political ideology of the state and the channels for reaching the set goals. Though the provisions of this chapter are not directly justiciable,² they represent the aims of the Nigerian state. They inform the jurisprudence of the written laws and their interpretations.³

Section 14 deals with the *Directive Principle on the Government and the People*. In subsection 1 it declares that the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice. No other principle is more native to democracy and social justice than that of equality of the citizens, which covers the equality of their religions. Section 15 which deals with the political objective of the country sets out in subsection 1 the motto of the federation as "Unity and Faith, Peace and Progress". To realize the motto, subsection 2 directs that "national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited." This subsection recognizes that discrimination on the basis of religion is antithetical to national integration which is the base on which unity, faith, peace, and progress can be built. It is aware that religious discrimination undermines national harmony and stability. The social objectives of the country are presented in section 17. Subsection 1 states that "the State social order is founded on ideals of Freedom, Equality and Justice." To achieve this, the constitution directs that "every citizen shall have equality of rights, obligations and opportunities before the law..."⁴ The Constitution also calls on the state to direct its policy towards ensuring that "conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life..." Section 21 that deals with Nigerian cultures has implications for equality of citizens. It provides that:

The State shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter; and encourage development of technological and scientific studies which enhance cultural values.

Ordinarily a constitution does not go into defining terms that it used. So it has no definition for Nigerian cultures. The *Webster's Third New International Dictionary* defines culture as the ideas, customs, and art of a particular society.⁵ Understood in this way, it is the whole way of life of a people, which embraces the beliefs, values, moods, language, artefacts and skills of a people.⁶ Thus, religion as a system of belief, is part of culture.

¹ Section 10, 1999 Constitution provides that: "The Government of the Federation or of a State shall not adopt any religion as State Religion."

² 1999 Constitution, s. 6(6)(c). All the same the court can indirectly rely on the provisions of Chapter II of the Constitution in deciding a case. In *INEC & Anor. V. Balarabe Musa & 4 Ors.*, (2003) NWLR (pt. 806) 72 at 150 where the Supreme Court relied on the jurisprudence of section 14(1) of the 1999 Constitution in interpreting section 222 of the same Constitution; and on the authority of the jurisprudence of section 14(1) it declared unconstitutional INEC's (Independent National Electoral Commission) guidelines for the registration of political parties. Section 14(1) comes under chapter II of the 1999 Constitution.

³ See *INEC & Anor. V. Balarabe Musa & 4 Ors.*, (2003) NWLR (pt. 806) 72 at 150.

⁴ 1999 Constitution, s. 17(2)(a).

⁵ *Webster's Third New International Dictionary*, Unabridged, (Cologne :Konemann, 1993) p. 552.

⁶ See "Culture" in *Encyclopedia Britannica*, 15th ed., vol. 3, 784; J. O. Ezeanokwasa, *Towards Understanding the Bible*, (Nimo-Anambra Nigeria :Rex Charles & Patrick Ltd., 2002) p. 7.

That the 1999 Constitution talks of ‘Nigerian cultures’ rather than ‘Nigeria culture’ as in the 1979 Constitution¹ points to the awareness of the drafters of the Constitution of the fact that the country is multi-religious and these many religions deserve to be treated equally. Section 21 circumscribes the cultures to be protected and promoted as those “Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter.” Religion, certainly, enhances human dignity by giving meaning to it.² Section 23 is the directive principle on National Ethics. The National Ethics is “Discipline, Integrity, Dignity of Labour, Social Justice, Religious Tolerance, Self –reliance and Patriotism.” Ethics refers to the moral principle or code of behavior.³ Again, the principle of social justice occurs. This time it is stated as a principle of behavior for every citizen. Religious tolerance is another element of the National Ethics. The infinitive, *to tolerate* means ‘to allow somebody to do something that you do not agree with or like.’⁴ It means accommodating what one ordinarily does not like. The reasons for such accommodation vary. It could be altruism, philanthropy, piety or law. The religious tolerance called for by this section cannot be based on altruism, philanthropy or piety. It is based on the legally enforceable right of every citizen to practice his religion to the extent allowed by law. And this extent is generally determined by the principle that one’s right begins from where the rights of others stop. So when one person is within his legally recognized right, the other person has only to tolerate his action if it does not please him.

Sincere concern for the stability of Nigerian democracy must issue from adhering to these constitutional provisions. It is from this background that the marriage-regulation scheme put out by the 1999 Constitution is considered discriminatory, and so contradictory to its own non-discrimination provisions, particularly sections 42(1) and (2).

4. Marriage Regulation in Nigeria

The template for marriage regulation in Nigeria is laid out by item 61 of the Exclusive Legislative List of the 1999 Constitution, which while giving the legislative competence over marriage to the National Assembly, limits the competence to: “The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto.” The import of this mandate is that three forms of marriage are recognized by the constitution, to wit:

- Statutory marriage: this refers to marriages formed, annulled, dissolved, and their matrimonial causes determined according to the statutes passed by the National Assembly;
- Islamic law marriage: marriages formed, annulled, dissolved, and their matrimonial causes determined according to Islamic law, Sharia; and
- Customary law marriage: marriages formed, annulled, dissolved and their matrimonial causes determined according to customary law.

Though they are all recognized, Islamic and customary law marriages are exempt from the regulation of the National Assembly. That notwithstanding, customary law marriage is indirectly regulated by the National Assembly via the validity and incompatibility tests, and public policy rule. A rule of customary law cannot be enforced in court if it is repugnant to natural justice, equity and good conscience. It cannot also be enforced if it is either incompatible with any law in force in the country or contrary to public policy, or both. Islamic law marriage stands free of any statutory check. Statutory marriage is monogamous in nature. It is also a secular form of marriage. ‘Secular’ is not used in the sense of being opposed to religion or being religion-less, but in the sense that its rules and conditions are not dictated by the dogmas of any religion. Islamic law marriage is a religious marriage being that its rules and regulations are dictated by Sharia, the Islamic legal system. Customary law marriage is equally a religious system of marriage under ethnic traditional religion. However, the traditional religious character of customary law is not as pronounced as that of Islamic law. The subdued nature of the religious character of customary law marriage system derives from the overall nature of ethnic traditional religion as a non-theistic model of religion whereas Islam is theistic. Both Islamic and customary law marriages are polygamous; they allow polygyny.

Taking into consideration the similarities and differences between these three systems of marriage, the marriage systems recognized by the Nigerian law can be reduced to two models: secular-monogamous and religious-polygamous. But there is the third model of marriage in Nigeria, the religious-monogamous model, represented by Christian marriage. Unfortunately this is not recognized by the Constitution. Christianity and Islam are generally taken to be numerically at par. Ethnic traditional religion takes a distant third position. There is no official statistic on religion in the country.

¹ 1979 Constitution of Nigeria, s. 20.

² See T. F. O’Dea, “Sociology of Religion” in *New Catholic Encyclopaedia*, (Michigan- U.S.A.: Thomson Gale, 2nd ed., Vol. 12, 2003) p. 75

³ See *Webster’s Third New International Dictionary*, above n 2, p. 780.

⁴ *Oxford Advanced Learner’s Dictionary*, (Oxford-New York: Oxford University Press, 2010) p. 1572.

A common feature of all these models of marriage is heterosexuality, they exist between persons of opposite sex.

4.1 Secular-Monogamous Model of Marriage

This refers to statutory marriage. The Marriage Act¹ (MA) and the Matrimonial Causes Act² (MCA) are the two statutes regulating marriage in Nigeria. The MA was originally an English Ordinance introduced into Nigeria by the colonialists and is deemed today to have been enacted by the National Assembly given the exclusive legislative competence the National Assembly enjoys on the subject-matter of marriage. It regulates the formation of marriage. A marriage can be validly entered into if the parties satisfy individually the essential requirements: marriageable age, single status, freedom from the prohibited degrees of affinity and consanguinity. They have also to satisfy the formal requirements which include obtaining the registrar's certificate of notice. The essential requirement of 'single status' implies that it is a monogamous form of marriage. A person cannot validly enter into statutory marriage if he is validly married to another person. This constitutes the offence of bigamy which is punished with imprisonment for five years.³ A particular feature of this form of marriage is that it can be celebrated at government marriage registry with a civil servant (marriage registrar) officiating. It is immaterial whether or not the civil servant belongs to any religion or not. Even an atheist can be a marriage registrar. Thus, even though Muslims and followers of traditional religion are exempt from marrying under the statutes, they can work in a marriage registry and even officiate at marriages as marriage registrars. One may ask, is this proper since they do not marry under the marriage statutes? There is the option for an intending couple to have its marriage celebrated in a licensed place of worship⁴ which however, does not include Muslim and traditional religionists' places of worship. The MA specifies the conditions for this form of celebration and they include the time, physical condition of the licensed place of worship, the religious minister that will officiate, and the paper work to be done by the parties and the minister after the celebration. The MCA is a local legislation promulgated as a decree in 1970 but with ideas drawn from the Australian Matrimonial Causes Act 1958 and to a minor degree from the English Divorce Reform Act 1969.⁵ The MCA, as the name indicates, regulates the matrimonial causes for marriages entered into under the MA. The matrimonial causes include nullity of marriage, dissolution of marriage (divorce), judicial separation, restitution of conjugal rights and jactitation of marriage.

Being that the religious-monogamous model of marriage is not recognized by the constitution, followers of this model of marriage such as Christians are compelled to marry under the secular-monogamous model of marriage.

4.2 Religious-Polygamous Model of Marriage

As seen above, this model of marriage covers Islamic law and customary law marriages. We look at these forms of marriage individually.

4.2.1 Islamic Law Marriage

Islamic law marriage is also known as marriage according to Sharia, that is, the legal systems regulating the life of Muslims. Doi defines sharia as "... the path not only leading to Allah, the Most High, but the path believed by all Muslims to be the path shown by Allah, the creator Himself through His Messenger, Prophet Muhammad."⁶ Following this definition Islamic law marriage is a path leading to Allah. As is a path believed to have been shown by Allah, Islamic marriage therefore becomes religiously normative. Marriage becomes a religious norm that has to be complied with. Thus Marriage is held as a religious duty which must be fulfilled by all those who are capable of meeting the responsibilities involved.⁷ The Islamic Development Bank (IDB) gives a definition of Sharia that complements that of Doi by giving the sources of the Sharia. It defines Sharia as "the set of rules derived from both the Holy Quran and the authentic traditions (Sunnah) of the Prophet (peace be upon him) and the scholarly opinions (Ijtihad) based on Quran and Sunnah."⁸ In the end the sharia, as a legal system, is a product of the Muslim community based on the Koran and the Sunnah.

Scholars have divergent opinions concerning the nature of Islamic marriage. While some jurists think

¹ Cap M6, *Laws of the Federation of Nigeria*, 2004.

² Cap. M7, *Laws of the Federation of Nigeria*, 2004.

³ Marriage Act, Cap M6, *Laws of the Federation of Nigeria*, 2004, s. 39.

⁴ Marriage Act, Cap M6, *Laws of the Federation of Nigeria*, 2004, s. 21.

⁵ E. I. Nwogugu, *Family Law in Nigeria*, (Ibadan-Nigeria: Heinemann Educational Books (Nigeria) plc., 1990) p. 107.

⁶ A.R. I. Doi, *Sharia: The Islamic Law*, (London: Ta Ha Publishers, 1984) p. 2.

⁷ H. Ali Al Abd, *The Family Structure in Islam*, (Lagos-Nigeria: American Trust Publications, 1982) p.52; R. J. A. De Seife, *The Shar'ia: An Introduction to the Law of Islam*, (San Francisco: Austin & Winfield, 1994), p. 57.

⁸ http://www.isdb.org/english_docs/idb_home/faq/Q_ISM.htm in Mohammad Omar Farooq, "What is Sharia? - Definition/Description potpourri", http://globalwebpost.com/farooqm/study_res/islam/fiqh/farooq_sharia.html, (visited Sept. 12, 2015, 7.08 PM).

that Islamic marriage is purely a civil contract, some others are of the opinion that it is not merely a contract but also a religious sacrament.¹ Those on the side of it being purely a civil contract argue from its contractual characteristics.² Just as Islamic marriage requires proposal (Ijab) from one party and acceptance (Qubul) from the other, so is a contract. Free consent is as a determining factor in a contract as it is in Islamic marriage.³ Thus a marriage entered into under duress, force or undue influence is not valid. This is the import of the decision in the Indian case, *Adam v. Mammad*.⁴ In this case Pareed Pillay, J. of the Kerala High Court held that where the girl's father had given his consent, and the daughter had withheld hers, no valid marriage had taken place. In other words, Islamic law marriage was based on the contractual consent of the daughter, the party to the marriage, and not on the religious role of the father.⁵ Other points of similarity between Islamic law marriage and contract include the fact that parties to Islamic marriage could enter into an ante-nuptial or a post-nuptial agreement which is enforceable by law provided it is reasonable and not contrary to the policy of Islam.⁶ Another is that the terms of a marriage contract could be altered within legal limits to suit individual cases.⁷ Even though, it is dissuaded both by the holy Quran and Hadith, there is the provision for the breach of marriage contract just like in another contract.⁸

Jurists that hold that Islamic law marriage is not merely a contract, but also a sacrament argue that unlike civil contract, it cannot be made contingent on future event.⁹ In other words, it could be entered into based on only past or present conditions. Also unlike civil contracts, it cannot be entered into for a limited time (*muta* marriage - temporary marriage-, is an exception).¹⁰ It is entered into with the mind of it lasting till the end of the life of a party. Another difference is that unlike civil contract, the analogy of lien cannot be applied to a marriage contract.¹¹ Yet another difference is that the contract of sale of goods may be cancelled by unpaid seller; he may resell the goods by rescinding the contract, but in a contract of marriage, the wife is not entitled to divorce her husband or to remain with a third person if a part of his dower has not been paid.¹² That Islamic law marriage is a sacrament is considered by Variyar as an orthodox view that also has judicial support.¹³ In *Anis Begum v. Mohammad Istafa*,¹⁴ another Indian case, it was held that Muslim marriage is both a civil contract and a religious sacrament.¹⁵ Koranic passages allude to its religious nature. The Koran provides in 30:21:

“And among His signs is this, that He created for you mates from among yourselves, that you may dwell (live) in tranquility with them, and he has put love and mercy between your hearts. Undoubtedly in there are signs for those who reflect.”

The Koran goes further in 16:72 to say:

“And Allah has made for you your mates of your own nature and made for you, out of them sons and daughters, and grandchildren, and provide for you sustenance of the best.”

It is not only rooted in the Holy Koran, but also sustained by the traditions of the Holy Prophet.¹⁶ Thus scholars like Doi consider it as a form of *Ibadah*, that is, worship of Allah and obedience to His Messenger.¹⁷ Also it is an act of piety (*Taqwah*).¹⁸ Marriage in Islamic traditions, thus is described as a solemn covenant between Allah

¹ Nikhil Variyar, “Marriage Under Muslim Law”, <http://www.lawctopus.com/academike/marriage-under-muslim-law/>, visited 4 Dec. 2015, 10.46PM).

² Ibid.

³ Ibid.

⁴ 1990 (1) KLT 172.

⁵ See Nikhil Variyar, “Marriage Under Muslim Law”, <http://www.lawctopus.com/academike/marriage-under-muslim-law/>, visited 4 Dec. 2015, 10.46PM).

⁶ Ibid

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid

¹⁴ (1933) 55 AP 743.

¹⁵ Nikhil Variyar, above n 9.

¹⁶ See A.R. I. Doi, *Sharia: The Islamic Law*, (London :Ta Ha Publishers, 1984) p. 115.

¹⁷ Ibid., at pp. 116, 117. To explain the concept of *Ibadah*, Doi stated: “By worship it is not only meant the performance of rituals (or) merely having sex with your wife, but it essentially implies righteousness in all transactional behaviour. The concept of *Ibadah* is very wide. Every good deed, every service to humanity, every usual productive effort, and even every good word is a part of a true Muslim's worship of his creator.”

¹⁸ A.R. I. Doi, *Sharia: The Islamic Law*, (London :Ta Ha Publishers, 1984) p. 117.

and the human parties, and also as a covenant entered into between the human parties themselves.¹

Summarizing and moderating the two positions, Variyar wrote:

“On the basis of Juristic opinion we can easily conclude, that marriage is simply a civil contract under Muslim Law. It fulfills all the conditions of a contract-proposal and acceptance, free consent and consideration.

But from the religious angle, Muslim marriage is a devotional act. Marriage is not devoid of all religious and spiritual values. Along with its secular aspect it also partakes the elements of a sacred union of two souls means for spiritual ends.”²

Being that Islamic marriage is a civil contract under Muslim law as pointed out above by Variyar, it follows that in the overall, it is a religious marriage taking into consideration that Islamic law or Sharia derives from the Koran. Islamic law as a whole is a religious law and whatever subsystem of law inside it, whether civil or otherwise, remains a religious law. This logic finds support in the decision of the Privy Council in *Shoharat Singh v. Jafri Begum*,³ where it held that *nikah* (marriage) under the Muslim law is a religious ceremony,⁴ and confers on the woman the full status as wife, and children born after it are legitimate.⁵ In other words, Islamic law marriage is a religious marriage. In Nigeria the decision of the Supreme Court in *Alkamawa v. Bello & anor*⁶ goes along the line of the decision of the Privy Council in *Shoharat Singh* in implying that Islamic law marriage is a religious marriage. In *Alkamawa* the apex court held that “Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law.”⁷ By Islamic law not belonging to any tribe, it means that, as a religious law, it transcends geographical or tribal boundaries.

To be validly married according to Sharia, among other things, the norms on consanguinity, affinity, fosterage, the state of woman, and religious affiliation have to be observed. While a Muslim woman is allowed to marry only with a Muslim man, a Muslim man could marry a non-Muslim who is a Christian or a Jew, but no other.⁸ Polygynous polygamy where a Muslim is allowed to marry up to four wives at a time is allowed under Sharia.⁹ Concubines are also allowed.¹⁰

4.2.2 Customary Law Marriage

Customary law has always been considered in the abstract without connecting it to a religion. But this is not correct. The truth of the matter is that the customary legal order is religious. But it is not perceived as such because traditional religion belongs to a conceptual framework different from the conceptual framework of Christianity and Islam, which dominates the academic world in the Western hemisphere. While Islam and Christianity are theistic religions, traditional religion is not purely theistic. The conceptual differences in understanding religion were identified by scholars like Goetz¹¹ and King¹² as the fundamental difficulty in having a universal definition of religion. There is the Western conception of religion which is theistic in nature and is influenced greatly by the Western speculative, intellectualistic and scientific disposition on the one hand,¹³

¹ H. Ali Al Abd, *The family Structure in Islam*, (Lagos-Nigeria: Islamic Publications Bureau, 1982) p. 66; P. E. O. Okpaloka, *Legal protection of Marriage and the Family Institutions*, (Onitsha-Nigeria: Trinitas Publications, 2002) p. 173.

² Nikhil Variyar, “Marriage Under Muslim Law”, <http://www.lawctopus.com/academike/marriage-under-muslim-law/>, visited 4 Dec. 2015, 10.46PM

³ Law (PVC)-1914-5-26.

⁴ Ibid. See M. A. Qureshi · *Marriage and matrimonial remedies : A Uniform Civil Code for India*, (New Delhi: Concept Publishing Company, 1978) p. 43.

⁵ *Shoharat Singh v. Jafri Begum*, Law (PVC)-1914-5-26.

⁶ (1998) 6 SCNJ 127.

⁷ Ibid. at 136. Before this judicial declaration, Niki Tobi had written: “Writers and commentators have surprisingly not dealt with Islamic law as a source of Nigerian law. The reason is not far-fetched. It is this. There is the wrong notion that Islamic law is customary law and therefore a discussion of customary law includes Islamic law. This is a wrong notion. It is not correct. Niki Tobi, *The Nigerian Judge*, (Enugu: Forward Press & Bookshop, 1992) p. 134.

⁸ S. M. S. Al-Munajjid, “Islam Question and Answer”, <http://islamqa.info/en/21380>, (visited 9 Dec. 2015, 10.07 PM).

⁹ “Why are Muslims allowed to marry up to four women?”, <http://islam.stackexchange.com/questions/76/why-are-muslims-allowed-to-marry-up-to-four-women>, (visited 9 Dec. 2015, 10.33 PM).

¹⁰ M. H. Katz, “Concubinage, in Islamic law” in *Encyclopaedia of Islam*, http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/concubinage-in-islamic-law-COM_25564, (visited 9 December 2015, 11.07 PM).

¹¹ J. Goetz., “Religion” in *New Catholic Encyclopedia*, 2nd ed., (ed. by B. L. Marthaler), vol. 12, Thomson Gale, Detroit, Michigan, 56.

¹² W. L. King, “Religion” in *Encyclopedia of Religion*, (ed. by M. Eliade), (New York: Macmillan Publishing Company, vol. 12, 1987) p. 282.

¹³ J. O. Ezeanokwasa, *The Legal Inequality of Muslim and Christian Marriages in Nigeria*, (New York: Edwin Mellen Press, 2011) p. 13.

and on the other is the concept of religion amongst the so-called primitive societies, where ethnic or traditional religions were classified.¹ Religions that characterize the Western theistic conception of religion include Christianity, Judaism, and Islam.² Theism is a system of religious belief which involves belief in a transcendent deity that is distinct from all else.³ It embraces a distinction between the creator and the creatures, between God and man.⁴ Thus theistic concept of religion involves two worlds: that of the deity and that of all others.⁵ In the so-called primitive societies this dualistic perception of the world does not exist. The deity is not conceived to be anywhere outside of the world. It is immanent in it. Thus there is no distinction between the religious and the profane.⁶ Hence King observed:

In primitive societies, for instance, what the West calls religious is such an integral part of the total ongoing way of life that it is never experienced or thought of as something separable or narrowly distinguishable from the rest of the pattern. . . . Indeed, in a real sense everything that is, is divine; existence *per se* appears to be sacred The religious life here is one of harmony with both the natural and human orders, a submersion of individuality in an organic relationship and in an inwardly experienced oneness with them.⁷

A strong point made by King is that members of the so-called primitive societies enmesh themselves in an organic relationship with their environment, and experience interior oneness with them. An instance of non-theistic religion is Hinduism.⁸ African traditional religion or ethnic traditional religion according to Shorter does not have a purely theistic view of life.⁹ All the same it shares traits with non-theistic societies as it relates to the divine being somehow immanent in man's world and man's activities. The universe is one organic whole with man. The physical environment furnishes African traditional religion with not only religious symbols but also a 'sacramental' channel of communion with the spiritual realities the symbols represent. Thus for Shorter, the entire world is not so much a cosmology as a 'cosmobiology'.¹⁰ This means that the entire world is seen from an organic or biological perspective. Man is in spiritual relationship with it.

What this means in terms of the religiosity of the customary law order is that the customary law system is part and parcel of the traditional religion. The ethnic customary order is not a secular order.¹¹ Thus, Ezeanokwasa wrote: "Ethnic customary law, strictly speaking, is religious. It is bound up within the integrated traditional African worldview in which man and his world constitute one undivided sacred reality."¹² Accordingly, customary law marriage is part and parcel of traditional religion. The religious integrity of the customary order exists in spite of the unique way the customary order relates with religions that are not customary in origin. Aspects of the customary order are adopted by other religions. For instance, Islamic law¹³ and canon law¹⁴ see customary law as a source of law to the extent that they accept certain customary practices that do not go contrary to their belief. In this way and to this extent customary law becomes both Christianized and Islamised while at the same time retaining its 'customaryness'.

The specific requirements for customary law marriage are not uniform; they vary from place to place. All the same, it is essentially polygynously polygamous, a man can marry more wives than one woman.

4.2.3 Religious-Monogamous Model of Marriage

Christian marriage is a major follower of this model of marriage in Nigeria. Other religions that practice monogamy include Sikhism.¹⁵ Christian marriage is used in a generic sense to represent that marriage formed,

¹ Ibid., at p. 14.

² Ibid., at p. 13.

³ Ibid.

⁴ Ibid., at p. 14; W. L. King, n.2 above.

⁵ J. O. Ezeanokwasa, above n 3.

⁶ Ibid.

⁷ W. L. King, above n 2, pp. 282-83.

⁸ "Religion", <http://www.conservapedia.com/Religion>, (visited 9 Dec, 2015, 9:47 PM).

⁹ A. Shorter, *African Culture, An Overview: Socio-cultural Anthropology*, (Kenya: Paulines Publication Africa, 1998) pp. 48-50.

¹⁰ Ibid., pp. 46-47.

¹¹ J. O. Ezeanokwasa, *The Legal Inequality of Muslim and Christian Marriages in Nigeria*, (New York: Edwin Mellen Press, 2011) p. 234.

¹² Ibid., p. 234.

¹³ On custom being a source of Islamic law, see A.R. I. Doi, *Sharia: The Islamic Law*, (London: Ta Ha Publishers, 1984) p. 84.

¹⁴ On custom being a source of Canon law, canon 5§2 states: "Customs apart from the law, whether universal or particular, which have been in effect hitherto, are retained."

¹⁵ See W. O. Cole and P. S. Sambhi, *The Sikhs: Their Religious Beliefs and Practices*, (New Delhi: Vikas Publishing House PVT Ltd, 1978) p. 142.

lived, and possibly annulled or dissolved according to the teachings of Jesus Christ as understood by different denomination.¹ It is not tied to the doctrinal teachings of any denomination. The different denominations in Christianity have their particular marriage doctrines. From the civil-judicial point of view that this paper is looking at religion, none is more or less Christian than the other. The Catholic teaching on marriage is as Christian as the Anglican, Deeper Life, Evangelical or Pentecostal teaching on it. The idea of Christian marriage is like those of Islamic law and customary law marriage which are umbrella concepts representing the various sects in Islam and the diverse ethnic customary law systems that respectively exist in Nigeria.

The religiousness of Christian marriage is anchored on the person of Jesus Christ, God-made-man, the founder of the religion, whose life and teaching guide and inspire the doctrinal teachings of the different denominations. Two main blocs exist on Christian marriage theology. These are the sacrament and non-sacrament theologies. The Catholic Church represents Churches that understand marriage as a sacrament.² On the other hand, the Church of Nigeria (Anglican Communion) [CNAC], following the European reformation Churches, does not take marriage as a sacrament even though it understands it as a divine institution. In the context of Christian marriage, sacrament is used technically to refer to a definite channel of grace instituted by Jesus Christ. Otherwise it is used generally to refer to any means of relating with the divine. Generally, the other Christian denominations such as the Pentecostals and Evangelicals are closer to the CNAC than to the Catholic Church on marriage theology.³ *The Catechism of the Catholic Church* defines a sacrament as

“an efficacious sign of grace, instituted by Christ and entrusted to the Church, by which divine life is dispensed to us. The visible rites by which the sacraments are celebrated signify and make present the graces proper to each sacrament. They bear fruit in those who receive them with the required dispositions.”⁴

In defining marriage juridically, the Code of Canon law of the Catholic Church states in canon 1055 §1 that:

The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.

The same canon goes on in subsection 2 to state that a valid marriage contract cannot exist between baptised persons without it being by that very fact a sacrament. According to the Canons of the Church of Nigeria (Anglican Communion) [CCNAC], the regulatory code of the Church, Anglicans believe that: “. . . Marriage, by Divine institution is a lifelong and exclusive union and partnership between one man and one woman. Its law and regulations are based upon this belief.”⁵ The CNAC recognizes marriage as a divine institution but not established by Christ as a sacrament as Catholics believe it.

Besides the sacrament/non-sacrament dichotomy, both Catholics and Anglicans understand marriage to be of divine institution. *The Catechism of the Catholic Church* defines marriage as “an efficacious sign of grace, instituted by Christ...” and the CCNAC says “. . . marriage, by Divine institution is a lifelong and exclusive union....”. Both churches consider baptism as a precondition for marriage. For Anglicans, the CCNAC provides:

Solemnization of Holy Matrimony by the Rites of the Church is reserved to those who are baptized unless in the case of a marriage proposed between a baptized person and an unbaptized person, a dispensation be granted by the Bishop.⁶

For Catholics, canon 842 §1 enacts that “A person who has not received baptism cannot validly be admitted to the other sacraments”⁷ which include marriage. Apart from these doctrinal provisions on marriage, the Holy Bible, in many places, has injunctions on marriage. For instance, the book of Genesis tells of how God created man and woman and commanded them to increase and multiply.⁸ Corroborating the Genesis account of divine institution of marriage, Jesus stated:

Have you not read that the creator from the beginning made them male and female and that he said: This is why a man must leave father and mother, and

¹ See J. O. Ezeanokwasa, *The Legal Inequality of Muslim and Christian Marriages in Nigeria*, (New York: Edwin Mellen Press, 2011) pp. 279-80.

² See “Gaudium et Spes” in *Vatican Council II*, par. 48, 1.; *Catechism of the Catholic Church*, No. 1601; 1983 *Code of Canon Law*, can. 1055 § 1.

³ E. Iwuji, *Marriage Forms in Nigeria*, (Rome: Tipolithografia Bella, 1983) p. 36.

⁴ *Catechism of the Catholic Church*, no. 1131.

⁵ CCNAC, can. XVII(1).

⁶ CCNAC, canon XVII(2)(1).

⁷ See also 1983 Code of Canon Law, cann. 96, 849.

⁸ Holy Bible, Genesis 1:27-28.

cling to his wife, and the two become one body? They are no longer two, therefore, but one body. So then, what God united, man must not divide.¹

In the book of Ephesians, the bible instructs on the morals of the home. It particularly instructs husbands and wives on their different but complementary duties by telling husbands to love their wives as Christ loves his body, and wives, to obey their husbands as the church obeys Christ, her bride.²

Despite its religious nature, Christian marriage is also a contract. It involves offer and acceptance on the part of the man and woman entering into it and who are legally capable of entering into it. Like in every other contract, it is the consent of the parties that is the efficient cause of marriage.³ To this end factors like force or duress, fear and deceit which impede free consent invalidate Christian marriage.⁴ It cannot be entered on a future condition just like Islamic law marriage. Canon 1102 §1 of the Code of Canon law of the Catholic Church states that ‘Marriage cannot be validly contracted subject to a condition concerning the future.’ Being that it is an exclusive contract between one man and one woman till the end of the life of either party, it is monogamous and permanent. Like Islamic law it is not entered for a determinate period of time. Rather it is meant to last till death does any party part.

The Catholic canon law prescribes the form for celebrating its marriages which must be followed for the validity of the marriage. The Anglican Church also has its form for the celebration of marriage, but it is not explicit on the standing of a marriage celebrated according to the civil form of marriage. Based on the doctrinal nexus between CNAC with the Church of England, the mother church of Anglicanism, the presumption is that the CNAC accepts as valid a marriage entered into in a civil registry. This is the practice in Church of England.⁵ The problem with this arrangement is that the Anglican Church and the Marriage Act do not have the same requirements for marriage. Baptism, for instance, is a precondition for Anglican marriage but it is not at all a condition for statutory marriage. Recognizing marriages celebrated the marriage registry would be short-changing its own doctrine since this arrangement forces it to consider as validly married an Anglican who is not baptized.

All this shows that Christian marriage is religious even though it shares features with contract. Its religious nature becomes a ground for it to be treated equally with the Islamic law and customary law marriages by the Constitution.

5. Conclusion: Stabilizing Democracy in Nigeria through Redressing the Inequities in Marriage Regulation

The foregoing discourse reveals that stable democracy is an end to be realized through the equality of citizens in whom the sovereignty of the state lies. The state cannot be stable when a group of citizens are treated with favours and privileges whereas others are denied such privileges and favours. Such discriminations, if they come from the state, are veritable recipes for state instability.

The particular nature of Nigeria as a heterogeneous state heightens the sensitivity for discrimination. It is a country with different ethnicities, tribes, and more importantly different religions. Religion is regarded as one of the fault-lines of Nigeria, meaning that it is explosive. The other is ethnicity. Religious difference is more important because it is one factor that has been identified as militating principally against the harmonious existence of Nigeria. Nigeria has had a long history of religious tensions, which have cost the country innumerable number of lives and unquantifiable amount of properties. Falola wrote: “The links between religious violence and the Nigerian economy and state are so firmly established that many answers have to be sought in those connections. That religious violence and aggression will slow down the pace of economic progress is already clear”⁶ Religious violence undermines the stability of the state and if the state is not stable, certainly its economy cannot be strong. The explosiveness of religion in the country should make, in particular, legislators, policy makers and politicians to be sensitive and careful in matters pertaining to it. The *Boko Haram*’s expressed intention of Islamizing the country is an emblem of the magnitude of challenge facing Nigeria’s democracy.

A strong force for the secularity of the state and for the stability of democracy should be the Constitution in its resolve to ensure the equality of all citizens and their right to freedom of religion and their right to freedom from religious discrimination. Unfortunately the 1999 Constitution cannot be said to stand for these rights with its religiously discriminatory marriage regulation regime. The marriage regulation scheme put

¹ Ibid., Matthew 19:4-6.

² Ibid, Ephesians 5:21.

³ See 1983 Code of Canon Law, can. 1057 §1.

⁴ See Ibid., cann. 1095 – 1107; CCNAC, can. XVII(6).

⁵ Canons of the Church of England, can. B 36.

⁶ T. Falola, *Violence in Nigeria: The Crisis of Religious Politics and Secular Ideologies*, (New York: University of Rochester Press, 1998) p. 298.

out by item 61 of the Exclusive Legislative List amounts to religious discrimination in favour of the religious-polygamous model of marriage followed by Muslims and traditional religionists and against the religious-monogamous model of marriage followed by Christians and others. By the strength of the item 61, Nigerian citizens of Islamic faith and those of the traditional religion can marry and live their marriage in accordance with their faith without being compelled to satisfy any conditions imposed by the state through the marriage statutes whereas Nigerian citizens of other faiths and particularly Christians do not marry under the same condition. Instead their marriages are subjected to conditions and requirements imposed by the state through the marriage statutes. These requirements include getting licences for their places of worship and getting personal license before they can marry. A marriage celebrated without complying with these requirements is not considered to be a marriage and the parties do not have the status of husband and wife.¹ The above situation amounts to the Constitution contradicting itself. Section 42(1) prohibits any law in force in Nigeria from expressly conferring a privilege or advantage on a citizen of Nigeria of any religion which privilege or advantage is not conferred on another citizen of Nigeria of another religion. The same section 42(1) prohibits also a law in force in Nigeria from subjecting a citizen of Nigeria of any religion to disabilities or restrictions which another citizen of Nigeria of another religion is not subjected to. The Constitution is the number one law in the country. A constitution that contradicts itself loses credibility and cannot be the cornerstone of the stability of the country that it should be. This is more so when the contradiction is on the right to freedom from discrimination on religious basis. In the context of the Nigerian democracy such a contradiction undermines democratic stability as the citizens, of whom, by whom, and for whom the government exists, are treated unequally. Thus, reforming the law on marriage with a view to treating all the operating models equally is recommended as a way of enhancing the stability of the Nigerian democracy. This will also enhance the right to freedom of religion and boost genuine patriotism in the country.

¹ See *Obiekwe v. Obiekwe*, (1963) 7 ENLR 196.