APPRAISAL OF THE PUNISHMENT FOR THE OFFENCE OF BIGAMY UNDER THE AUSTRALIAN LAW, NIGERIAN LAW AND UNITED KINGDOM LAW

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Abstract

Marriage is a social and legal relationship between two consenting adults. There are legal regulations to maintain the sanctity of marriage and to prevent actions deemed offensive to public morals. Every legal system, therefore, presents a conception of marriage, which states what can validly constitute a marriage, stipulates actions that are wrong, and provides ground for its dissolution. One of these vices is bigamy. This paper through a textual review, focuses on bigamy and the legal implications of adultery. It examines bigamy as a subset of polygamy, which can either be polygamy (where a man marries more than one woman) or polyandry (where a woman marries more than one man). The paper finds that, in whatever form it occurs, bigamy is the direct opposite of monogamy, which is marriage to one person. Bigamy is generally a criminal offense, and it is governed by the Criminal Code of various southern States excluding Lagos State in Nigeria and the Penal Code of various northern states in Nigeria. Bigamy is distinct from adultery. It is a criminal offence if it is committed knowingly. The offence of bigamy places prohibitions on situations where a married person purports to marry again. It has a long history within the Western legal tradition. Nigeria is a polygamous society and in that light the offence of bigamy was not known. The research revealed that the offence was imported into Nigeria as a

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received English Law. The research recommends and identify how court interpret and apply the Laws on bigamy. It further looks at the cultural, social and historical contexts that shape the laws and attitude toward bigamy in each country of focus, this include exploring how religious or traditional practices influence the legal framework and enforcement of bigamy laws.

Keywords: Punishment, Offence, Bigamy, Australian Law, Nigerian Criminal Law, United Kingdom Law.

1. Introduction

The offence of bigamy places prohibitions on situations where a married person purports to marry again. It has a long history within the Western legal tradition.[1] The offence existed first within 'the ecclesiastical courts' before being enshrined as a 'felony' within English statute law by the passage of the *Bigamy Act 1603*.[2] Bigamy was initially treated as a capital crime.[3] The offence has persisted over the intervening years even though aspects of it, such as the applicable penalty, have changed. Australian judges in the mid-20th century continued to regard the bigamy offence as being of 'vast importance' [4] and as dealing with a 'serious matter from the point of view of society'[5] Australia's current formulation of the bigamy offence was found in s 94 of the *Marriage Act 1961* where it carries a maximum penalty of imprisonment for five years.[6] This level of penalty means that although

[1] *Crimes Act 1914*(Cth) s 4G.
[2] 1 Jac 1, c 11; Bartholomew, 'The Origin and Development of the Law of Bigamy' (n 1) 260.
[3] Cox identifies that although bigamy in England had historically been 'designated as a Class One (Offences Against the Person) indictable felony' and 'was therefore theoretically punishable by death by hanging', the penalty was often reduced 'in practice': David J Cox, '"Trying To Get A Good One": Bigamy Offences in England and Wales, 1850–1950' (2012) 4 *Plymouth Law and Criminal Justice Review* 1, 2. Though executions for bigamy certainly did still occur: Capp (n 1) 554–5.
[4] *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279, 316 (Evatt J).
[5] *R v Bonnor* [1957] VicRp 33; [1957] VR 227, 240 (O'Bryan J).
[6] *Marriage Act* ss 94(1), (4).

bigamy is an indictable offence,[7] it falls within the lower-tier category of indictable offences that can be dealt with summarily.[8]

Bigamy is usually classified as an offence against public morals. Judging from the punishment prescribed for it - imprisonment for seven years - bigamy is among the more serious offences in the Nigerian Criminal Code. Yet it is very rarely prosecuted.[9] Traditionally, Nigeria is a polygamous society; it is lawful for a man to have several wives at the same time provided he marries under customary law but in the eyes of the law there is nothing immoral or anti-social about this. Indeed a good majority of Nigerian marriages are either actually or potentially polygamous. However, because of the dual system of marriages co-existing in Nigeria, viz, customary (polygamous), Islamic Law and statutory (monogamous), bigamy and allied offences may be committed in certain circumstances by the mere fact of having two wives at the same time. That this situation should exist in a polygamous society raises the question what is the purpose of creating these offences and prescribing severe punishments for them. In Nigeria, it is not antisocial for a man to have several wives. A man wishing to marry more than one wife may lawfully do so under native laws and customs which recognises polygamous marriage. Similarly, this polygamous practice is lawful in the northern part of Nigeria. However, it is an offence in certain circumstances to take more than one wife.[10]Accordingly, section 370 of the Criminal Code provides that any person who having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband and wife is guilty of a felony and is liable to imprisonment for seven years. The question that may arise is what is the purpose of this branch of law? If a man may lawfully take two wives under one form of marriage what is the punishment for doing the same thing under another form of marriage?

[7]*Crimes Act 1914*(Cth) s 4G.
[8]Ibid s 4J, if this is agreed to by both the prosecutor and defendant: s 4J(1). If a bigamy offence is dealt with summarily the maximum sentence of imprisonment that can be imposed is 12 months: s 4J(3)(a).
[9] Okonkwo C.O : Bigamy in a polygamous society :*The Nigeria Juridical Review* Vol 1976 p 76.
[10]Okonkwo C.O. *Criminal Law In Nigeria*, (2nd ed) Ibadan, Specrum Books , 2010 p.284.

2. The Ingredients of Bigamy

It is axiomatic that Nigeria operates a dual legal system. This duality creates a disparity in the application of the law, as the court often has to determine whether to apply the adopted English Common Law or to apply customary law with the Islamic Legal System often fallaciously classified as a genre of customary law. This is despite the obvious dichotomy in both features and application. In particular reference to marriage, the law that applies is determined by the form of marriage; whether it is statutory (made under the Marriage Act), or customary and the Islamic law.

Any marriage under the Marriage Act is monogamous, as provided by the Act, and proceeding to get married to any person other than the recognized spouse shall render him liable for bigamy. This is based on the locus classicus case of *Hyde v. Hyde* where Lord Penzance gave the most widely accepted definition of Marriage under English Law as '*the union of one man and one woman, voluntarily entered into for life, to the exclusion of all others'.*

The implication of the above definition is that, the Marriage Act, prohibits bigamy and penalizes it. Specifically, Section 35 of the Marriage Act prohibits a person who is married under the Act to pursue any other marriage with anyone else save for the same person previously married under Act.

A legal exposition of the application of this law was made in the case of *R v. Princewill,* where one Bartholomew Princewill got married to a woman in 1950 at a church. During the celebration of his marriage, evidence was led to the fact that he was a Christian. He converted to Islam and celebrated another wedding with one Fatima in July 1960. Per Reed J. as he then was, while examining the case stipulated the requirement of a previously existing, but yet-to-be-terminated marriage stated that 'there must be two 'marriages' to create the offense and the first question is whether both marriages must be monogamous'.

His lordship further stated thus:

> 'There must be a husband and wife living and one of them must 'marry' so that this second 'marriage' is 'void by

> reason of its taking place during the life of such husband and wife.

Similar stance was made by the court in *Momoh v. Momoh* where Aboki J.C.A ruled thus:

> 'Section 34 of the Marriage Ordinance stipulates that all marriages celebrated under the Act shall be good and valid in law to all intent and purposes. However, the Ordinance provides that any person who contracted a marriage under the Ordinance shall be incapable of contracting a valid marriage under any native law or custom.'

Adultery or cohabitation is insufficient to prove bigamy in the absence of a marriage ceremony. Ochem and Emejuru in their paper on Bigamy made a factual assertion that

> 'the offence of bigamy is not committed by undergoing any marriage ceremony but a ceremony which is capable of producing a valid marriage, save, for the subsistence of the first marriage.'

Anyone who contravenes the law prohibiting bigamy is liable to be punished accordingly. Case law, however, reveals that rather than the 7 years imprisonment stipulated in Section 370 of the Criminal Code, lesser punishments have been meted out. In *R v. Princewill,*[11] the punishment was for one month. In *State v. Ezeagbo Nweke*,[12] the court sentenced the accused to two months imprisonment or a fine of $15. The judges in these cases explained the rationale behind their decision, recognizing that Nigeria is a naturally polygamous society, unlike the United Kingdom, most cases are devoid of deception. Some people who take a second marital partner inform the new partner of the former, mitigating the punishment as the intent to deceive is absent. English laws are strict against bigamy as the new partner often acts under the representation that their partner is single. Many are ignorant of the rule of bigamy and enter new marriages without legally terminating the previous one, even if it has been constructively terminated.

[11] (1963) ALL NLR 478.
[12] Charge No. O/HC/1971 (High Court Onitsha unreported)

2. Position of Law on Adultery

Adultery or infidelity was defined by the court of law in *Ibeabuchi V. Ibeabuchi*[13] as 'consensual intercourse between two persons of opposite sexes, at least one of whom is married to a person other than the one with whom the intercourse is hard, and since the celebration of the marriage'.

2.1 Damages for Adultery

Adultery is a criminal offence under the Penal Code of Northern Nigeria. Section 387 and 388 stipulate imprisonment for two years, and/or with a fine for adultery. It is not prosecuted under the Criminal Code of the Lagos State of Nigeria. However, it provides for redress if a spouse can prove that adultery occurred. For instance, section 15(2)(b) of the Matrimonial Causes Act states that:

> "The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent"[14]

Adultery will only be a ground for divorce if the spouse finds it intolerable. Where the spouse condones the act, the court will not terminate the marriage, as held in *Alabi v. Alabi.*[15] Section 31 of the Matrimonial Causes Act further provides that a party to a marriage can claim damages for adultery if such an act is not condoned and was not perpetrated for up to three years before such a claim is made. Damages for adultery are compensatory. In awarding damages for adultery, the court considers the following:

i. The loss suffered by the petitioner

ii. Injury to petitioner's honor and feelings.

iii. Hurt to family life.

[13] (2016) LPELR-41268.
[14] section 15(2)(b) of the Matrimonial Causes Act
[15] (2007) LLJR-CA.

iv. Value of the adulterous spouse to the claimant

2.2 Adultery and fornication

Adultery and fornication have been considered and seen as evil from time immemorial. There is a universal condemnation and unanimity of laws against adultery and fornication in Rome, India, Australia, Greek, Jewish and the Nigerian laws. The worldwide condemnation of the act is justified by the fact that*: 'Adultery and Fornication are religiously sinful; they are morally wicked and socially evil.'*[16]

> 'It is therefore unfair for a man to require a wife the chastity he doesn't have or practice himself.'[17]

Adultery is defined as:

> sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another, without the consent or convenience of that man, such intercourse not amounting to the offense of rape is guilty hence of offence of adultery, and shall be punished……[18]

Fornication on the other hand is generally Consensual Sexual Intercourse between two people not married to each other.[19]

From the above discourse and by implication, the offence of adultery and fornication attract a grave punishment for all circles of life and social pedigree. The study of this nature is borne out of the fact that the sin of adultery/fornication are twin evil that serves to pervade the moral standards of a sane society and are almost legalized in advanced countries. They are no longer seen as sins or moral perversion.[20] To

[16] P. N. Murkey, B. H. Tirpude and others, *Adultery was viewed by Future Generation. A Study and Discussion*; J Indian Acad Forensic Med. 31 (4).
[17]S.497 IPC available at http://www.hyderabadpolice.gov.In/acts/Indianpenalcode 1860. accessed on the 12th April, 2024.
[18] T. Ranchan and K. R. Nagesh 'Adultery and Indian laws Int.' in J Med Toxicol legal Med 2008; 10 (2) 22-27.
[19] P. N. Murkey, B. H. Tirpude and others (n 1).
[20] Ibid (n 1).

therefore examine the offence of adultery/fornication under three laws and the capability or otherwise and to as well recommend strategies which will help curb these excesses and moral perversion. The paper will address the above topic through the following objectives:

2.3 The Ingredients of Adultery and Fornication

For the purpose of clarity, under this heading, some phrases are taken as the same for Adultery and Fornication.

The following are considered to be the ingredients of offence of adultery:

a. To examine the existing provisions of adultery and fornication under the three laws;
b. To find out the percentage of the dominant population which are prone to adultery/fornication;
c. To find out the reason (if any) for immunity of women from the charge of adultery/fornication;
d. To address the controversial issue of exception from the legal point of view under the present 21st Century; , and
e. To analyze the problems associated with the identification of the offence and the way forward. This paper gives a brief analysis on the offence of adultery and fornication as a foundation for bigamy.

3. **Bigamy under the Islamic Family Law**

It is important to note that under the Islamic Family Law, it is allowed for a man to marry more than one wife under his care and/or control so far he complies with the Islamic modes of marriage and that the husband does not need to have any secret marriage with another woman and the wife already married should not allow jealousy and envy to override her religious understanding.[21]

Offence under section 384 of the Penal Code Act (which is referred to as 'bigamy' under section 370 of the Criminal Code Act, 2004 is not applicable to the Islamic Family or the Islamic Law on Marriage. This

[21] https://thenigerialawyer.com/bigamy-and-its-non-applicability-to-marriage-under-the-islamic-family-law-a-legal-opinion-for-muslim-married-couples-in-nigeria/ Assessed on 12th April, 2024

is because, marriage under the Islamic Law is a legal contract as stated in the Holy Quran as thus:

> "Then marry (other) women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one or (slaves) what your hands possess".[22]

It should be noted that, the above provision of the Holy Quran overrides the provisions of Section 384 of the Penal Code Act, from being applicable to Islamic Marriage. The superior authority of the Quran in Nigerian Islamic Personal Law has been upheld by the Supreme Court of Nigeria. Kindly see the cases of: *Alhaji Ila Alkamawa v. Alhaji Hassan Bello & Anor*[23]

3. Bigamy under the Australian Law

The bigamy offence has not, however, fallen entirely into disuse. Although 'it appears' that 'bigamy is not regularly prosecuted in Australia',[24] but prosecutions do still take place.[25] Over the last decade, however, bigamy has taken on particular importance within the Australian family court system. As will be discussed below, in a growing number of nullity of marriage cases family court judges have referred the papers before them to other legal authorities for consideration for prosecution of bigamy.

In making these referrals, some judges have described the contemporary bigamy offence as being a 'serious crime'.[26] Thus,

[22] Quran 4:3
[23] *(1998) LPELR-424(SC); Usman v. Umaru (1992) 7 NWLR (Pt. 254) 377; (1992) 7 SCNJ (Pt.11) 388 P.400.*
[24] Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, 2013) 72 ('*Sister Wives*').
[25] See, eg, Elizabeth Byrne, 'Marriage Celebrant Escapes Jail Sentence for Bigamy after Failing to Divorce First Wife', *ABC News* (online), 5 August 2014 <https://www.abc.net.au/news/2014-08-05/marriage-celebrant-escapes-jail-sentence-for-bigamy/5650000>; Commonwealth Director of Public Prosecutions, *Annual Report 2009–2010* (2010) <https://www.cdpp.gov.au/publications/
[26] *Hiu v Ling* [2010] FamCA 743, [31].

despite bigamy's relative rarity, it still retains a position of contemporary practical significance.[27]

But what, exactly, is the nature of the wrong that justifies the continued existence of the bigamy offence in contemporary Australia? This paper demonstrates that this question cannot be satisfactorily answered and argues that the bigamy offence not only lacks a compelling rationale, but is also both practically and symbolically problematic. Accordingly, it proposes that bigamy should no longer be recognised as a specific offence in Australian law, that the existing bigamy offence provisions be repealed and that factual situations involving bigamous marriages be regulated through other parts of the existing legal framework. It further demonstrated that the bigamy offence lacks a compelling rationale because the various justifications that have been put forward for it are outdated, do not properly explain the scope of the bigamy offence and are already addressed by other laws. That Part ends by showing how the current operation of the bigamy offence which makes it problematic in a number of ways, namely that it generates tensions in the law around personal relationships, is practically unenforceable and is culturally insensitive. However, what this paper proposal for repealing the bigamy offence does and does not entail in terms of Australian law, the highlights of the key role that giving defective notice could play in the future regulation of situations involving bigamous marriages.

Before continuing, an important qualification needs to be made about the scope of the argument that this paper is concerned with bigamy and not with polygamy. Under Australian law, a person can only be validly married to one person at a time and any second or subsequent concurrent marriages are legally void.[28] However, for certain limited purposes, Australian law does recognise foreign polygamous marriages and does allow a person to be both married and in one or more de facto relationships simultaneously. Whether polygamous marriages should be granted full legal recognition as valid marriages is nevertheless a distinctly different issue from whether they should be criminalised through the bigamy offence. If Australian law were to allow for polygamy, this would necessarily require repealing the offence of

[27]*Chhibber v Kudva* [2014] FamCA 499, [11]; *Kailash v Manjalkar (No 2)* [2013] FamCA 592, [20].
[28]*Marriage Act* (n 6)s 23B(1)(a).

bigamy. However, the reverse is not true. It would be logically coherent for Australian law to refuse to recognise polygamous marriages as valid and also to simultaneously refuse to condemn them through the specific criminal offence of bigamy.[29] Thus, this paper only focus on the bigamy offence and, in doing so, will not engage directly with polygamy.[30]

Prior to the introduction of the Marriage Act by the Australian Parliament in 1961, bigamy was a matter for state and territory criminal legislation. Thus, in addition to providing a nationally uniform system of marriage law, the Marriage Act also provided a nationally uniform 'regulatory' approach to bigamy.[31] The bigamy offence contained within the Marriage Act was designed to operate 'to the exclusion of any law of a State or Territory' once it came into effect.[32] The commencement date for the offence was 1 September 1963[33] and, given the passage of time, it seems quite unlikely that any historical state or territory-based bigamy prosecutions would now commenced. Accordingly, a number of jurisdictions have repealed their bigamy offences, such as Western Australia, Tasmania and the Australia Capital Territory,[34]though some jurisdictions have chosen to retain theirs, such as New South Wales, Victoria, Queensland and South Australia.[35]

When the Marriage Act was enacted, it was the subject of immediate constitutional challenge and section 94 was caught up in the process of

[29] Indeed, it is entirely possible to 'sugges[t] decriminalization while remaining skeptical about and resistant to the legal recognition of polygamous spousal relationships': Campbell, *Sister Wives* (n 11) 73.
[30] For a detailed discussion of the legal and policy issues around polygamy in the Australian context, see Theodore Bennett, 'The Inclusion of Others? Polygamy and Australian Law' (2019) 32(3) Australian Journal of Family Law 263.
[31] Campbell, *Sister Wives* (n 11) 72.
[32]*Marriage Act* (n 6)s 94(8).
[33] Ibids 2(2); Commonwealth, *Gazette*, No 48, 30 May 1963, 1977.
[34] Western Australia repealed s 339 of the *Criminal Code* (WA) in 2004: *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 24. Tasmania repealed s 193 of the *Criminal Code* (Tas) in 1989: *Criminal Code Amendment Act 1989* (Tas) s 4. The Australian Capital Territory repealed s 93 of the Crimes Act 1900(ACT) in 1971: *Crimes Act 1971* (ACT) s 4.
[35]Crimes Act 1900(NSW) s 92; Crimes Act 1958(Vic) s 64; *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 360; Criminal Law Consolidation Act 1935(SA) s 78.

judicial review. While the Australian Parliament is given clear power under the *Australian* Constitution to legislate for 'marriage',[36] the State of Victoria argued that a number of the provisions of the Marriage Act exceeded the scope of its power.[37] The provisions called into question were those within part V of the Marriage Act dealing with the legitimation of children of marriages as well as the bigamy offence under s 94. The State of Victoria contended that these particular provisions were not laws with respect to marriage per se, but were instead laws that dealt with issues that were ancillary to marriage: namely, parentage, public order and morals. The 1962 decision saw a split in the High Court of Australia, with each of the seven justices in *Attorney-General (Victoria) v Commonwealth* writing their own separate decision and reaching multiple different conclusions about the validity of the legitimation provisions.[38] The particular issue of s 94, however, 'caused the Court no difficulty',[39]and all justices found that this section fell within the scope of the 'marriage' power and was thus valid.[40] As Menzies J noted, for example, the bigamy offence is 'a law which clearly upon its face is for the protection of marriage' and is thus also clearly a law to do with marriage.[41]With the validity of s 94 clearly confirmed by the High Court, it could be determined how exactly this section operates. Section 94 sets out two different ways that bigamy can be committed. The twin forms of this offence are:

> (1) A person who is married shall not go through a form or ceremony of marriage with any person.……
>
> (2) A person shall not go through a form or ceremony of marriage with a person who is married, knowing, or having reasonable grounds to believe, that the latter person is married.

[36]*Australian* Constitutions 51(xxi).
[37]*A-G (Vic) v Commonwealth* [1962] HCA 37; (1962) 107 CLR 529. For a useful synopsis of this case, see Zelman Cowen, 'Legitimacy, Legitimation and Bigamy: A Commentary on *Attorney-General for Victoria v Commonwealth of Australia*' (1963) 36(9) Australian Law Journal 239.
[38]*A-G (Vic) v Commonwealth* (n 24).
[39] Cowen (n 24) 248.
[40]*A-G (Vic) v Commonwealth* (n 24) 547 (Dixon CJ); 551 (McTiernan J); 557–8 (Kitto J); 559–60 (Taylor J); 575 (Menzies J); 600 (Windeyer J); 601 (Owen J).
[41] Ibid 575

Both forms carry the same penalty of imprisonment for five years.[42]The phrase 'form or ceremony of marriage' appears within both forms of the bigamy offence and requires further elaboration. This phrase is shared with some, but not all, earlier bigamy offences.[43] Alternative possible phrasing includes those found in New South Wales law: 'Whosoever, being married, marries another person during the life of the former spouse (including husband or wife), shall be liable to imprisonment for seven years'.[44] See also the phrasing found in English law: 'Whosoever, being married, shall marry any other person during the life of the former husband or wife ... shall be guilty of felony'.[45] These alternative phrasings are awkward because when they are given their natural meaning, they make it impossible for bigamy to be committed due to the longstanding legal position that if a person is already validly married, then it cannot legally marry again. This prima facie impossibility has historically been circumvented via statutory interpretation, with courts having held that 'marriage' is being used in two different senses within these types of alternative phrasing: the first-mentioned marriages are marriages that are 'perfect and binding' and the second-mentioned marriages are marriages that 'would be good but for the existence of the first'.[46] The chosen wording of s 94 obviates the need for this kind of interpretative intervention by making a more explicit distinction between: marriages that are legally-recognised as valid, as indicated by 'a person who is married'; and bigamous purported 'marriages' that are not legally-recognised as valid, which are merely 'a form or ceremony of marriage'.[47]

However, the Australian Law Reform Commission has considered and dismissed this kind of concern. In a 1986 report, the Commission observed that 'the "form or ceremony of marriage" to which s 94 refers

[42]*Marriage Act* (n 6)ss 94(1), (4).
[43] Such as those in Crimes Act 1958(Vic) s 64 and Criminal Law Consolidation Act 1935(SA) s 78.
[44]Crimes Act 1900(NSW) s 92.
[45]*Offences Against the Person Act 1861* (UK) 24 & 25 Vict, c 100, s 57.
[46]*R v Allen* (1872) LR 1 CCR 367, 373–4.
[47] Indeed, the *Marriage Act* consistently uses the phrase 'form or ceremony of marriage' in relation to purported marriages that could not be legal marriages, such as underage marriages: *Marriage Act* (n 6)s 95(1). Drummond draws a similar distinction in relation to the Canadian offence of bigamy: Susan G Drummond, 'Polygamy's Inscrutable Criminal Mischief' (2009) 47(2) Osgoode Hall Law Journal 317, 339.

is a form or ceremony of marriage under the Act' and thus concluded that certain kinds of polygamous 'traditional Aboriginal marriage[s] would not infringe the prohibition'.[48] In a 1992 report, the Commission reiterated that the bigamy offence involves 'going through a form or ceremony of marriage which purport[s] to be a ceremony of marriage under Australian law'.[49] While there is no Australian case authority on this exact point, the Commission's 1992 report cited the English case of *R v Bham*,[50] which concerned the appeal against conviction of a man charged under the *Marriage Act 1949* (UK)[51] with solemnising a marriage in a place other than a church or other specific building. The 'marriage' in question was a purely religious marriage ceremony that was not intended to give rise to a legally-recognised marriage and that was not conducted in a way that could give rise to a legally-recognised marriage. The English Court of Criminal Appeal held that the *Marriage Act 1949* (UK), 'and its predecessors in dealing with marriage and its solemnisation', only applied to ceremonies of marriage that were 'in a form ... capable of producing, because a purely religious marriage ceremony is not a ceremony that 'will prima facie confer the status of husband and wife on the two persons',[52] the man had not solemnised a 'marriage' in the relevant sense and so the Court allowed the appeal and quashed his conviction.[53] Campbell has suggested that there is a similar state of affairs in Australia in relation to bigamy, in that 'the crime of bigamy' here is also 'limited to circumstances involving multiple state-sanctioned marriages'.[54] Indeed, such a limitation to the scope of the bigamy offence does seem practically necessary to avoid inappropriately criminalising not only purely religious or customary marriages, but also a whole range of forms or ceremonies of marriage that may take place for a variety of reasons, including those that are

[48] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) [317].
[49]Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [5.11].
[50][1966] 1 QB 159, 163.
[51] 12 13 & 14 Geo 6, c 76.
[52] Ibid.
[53] Although Bartholomew concluded from his earlier analysis of English law that 'any ceremony, whether defective as a ceremony to create the status of marriage or not, is a sufficient second marriage for the purposes of the law of bigamy': G W Bartholomew, 'Polygamous Marriages and English Criminal Law' (1954) 17(4) Modern Law Review 344, 357.
[54] Campbell, *Sister Wives* (n 11) 72.

'part of a charade' for the purpose of 'advertising, the theatre, child's play'.[55]

4. Bigamy under the Nigerian Criminal Law

Nigeria is a polygamous society; it is lawful for a man to have several wives at the same time provided he marries under customary law. In the eyes of the law there is nothing immoral or anti-social about this. Indeed a good majority of Nigerian marriages are either actually or potentially polygamous. However, because of the dual system of marriages co-existing in Nigeria, viz, customary (polygamous) and statutory (monogamous), bigamy and allied offences may be committed in certain circumstances by the mere fact of having two wives at the same time. That this situation should exist in a polygamous society raises the question what is the purpose of creating these offences and prescribing severe punishments for them? In Nigeria, it is not antisocial for a man to have several wives. A man wishing to marry more than one wife may lawfully do so under native laws and customs which recognises polygamous marriage. But because we Nigeria does not live solely by the laws and customs of our forefathers, it is an offence in certain circumstances to take more than one wife[56]. Accordingly, section 370 of the Criminal Code[57] provides that any person who having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband and wife is guilty of a felony and is liable to imprisonment for seven years.

The Marriage Act contains two other offences which are similar to bigamy. Section 47 of the Act provides that any person who while married under customary law, marries another person under the Act is guilty of an offence punishable with imprisonment for five years. Section 48 covers the reverse situation. It prescribes the same punishment for any person who having contracted a marriage under the Act, marries another person under customary law during the

[55] *In the Marriage of V K and V Kapadia* [1991] FamCA 121; (1991) 14 Fam LR 883, 886,though this case was discussing the meaning of 'marriage' for the purposes of s 113 of the Family Law Act 1975(Cth) ('*FLA*').

[56] Okonkwo C.O. *Criminal Law In Nigeria*, (2nd ed) Ibadan, Spectrum Books , 2010 p.284.

[57] Cap c 38 laws of the federation of Nigeria 2004 hereinafter

continuance of the first marriage. "Section 35 of the Marriage Act provides that no person whose marriage is solemnized under it is capable of contracting a marriage under native law or custom. A person who did so would be liable to conviction under section 48 of the Act whether the other party to the marriage was alive or not at the time of the subsequent marriage by native law or custom but, if that party was alive he would not be liable under section 48 because the celebration of the marriage under native law or custom would not be capable of conferring the status of husband and wife on the parties.

The Act imposes the obligation of monogamy on those who marry under it. This interpretation of the joint effect of sections 35 and 48 of the Marriage Act is obviously wrong. Section 35 provides that a person who marries under the Act "shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law." It does not impose a perpetual obligation of monogamy on such a person. The obligation lasts only as long as the marriage lasts. Death dissolves a statutory marriage and thereafter the surviving spouse is free to revert to polygamy according to his personal law. In addition, section 48 specifically requires that the customary marriage must take place "during the continuance of" the statutory marriage. Therefore, no offence is committed if that marriage was not subsisting at the time of the customary marriage. It follows from this, contrary to Gledhill's view, that if the other party to the statutory marriage was alive at the time of the customary marriage i.e. the marriage was subsisting, an offence is committed under the section. The fact that the second marriage could not confer the status of husband and wife on the parties is irrelevant.

A question that arises is whether sections 47 and 48 of the Marriage Act also create the offence of bigamy. If so why do the punishments provided in them differ from the punishment stipulated in s. 370 of the Criminal Code? The first question arose from decision in *State v. Ezeagbo Nweke*.[58] The accused was married to A under customary law when she (the accused) was a young girl. She later married B under customary law without the first marriage being dissolved. While the two marriages were subsisting she married C under the Marriage Act in 1950 and had lived with him for twenty years when the charge of

[58]Charge No. O/IIC/1971 (High Court, Onitsha—unreported). See also, Okonkwo C.O :Bigamy in a polygamous society :*The Nigeria Juridical Review* Vol 1976 p 76.

bigamy was brought against her. There were four counts in all. The first count alleged bigamy under s. 370 Criminal code, the second count was under s. 47 of the Marriage Act, the third count was for making a false declaration in an affidavit of marriage contrary to s. 41 of the Marriage Act; and the fourth count charged her with going through a ceremony of marriage with C knowing it to be void on the ground of its taking place during the lifetime of A contrary to s. 46 of the Marriage Act. When the prosecution closed its case, defence counsel submitted that there was no case to answer on all the counts.

On the first count he submitted that for a charge of bigamy to succeed all the alleged marriages must be marriages under the Marriage Act. The prosecutor on the other hand contended that s. 370 Criminal Code has nothing to do with the Marriage Act at all and that once a person is validly married and goes through a second marriage which is void (by reason of its taking place during the subsistence of the first marriage) the offence is committed. The trial judge ruled that no case had been made out for the accused to answer on count one. He said:

> I am inclined to agree with [defence counsel] that in order to be offence under section 370 CC the marriages must be those under the Marriage Act and not under native law and custom; for there are provisions in the Marriage Act making it an offence for anyone contracting marriage by native law when already married by the Act, see section 48 and anyone contracting marriage under the Act when already married by native law, see section 47. 1 do not think that this is a case of bigamy.[59]

5. Bigamy under the United Kingdom Law:

In early times in England, bigamy was merely an ecclesiastical offence. Through the influence of the clergy it became a statutory offence.[60] It was first made a felony by an Act of 1603.[61] The preamble of this Act states that: *For as much as divers evil disposed persons being married, run out of one county into another, or into places where they are not*

[59] The prosecution conceded that no case was made out in respect of count 3 and the trial therefore proceeded in respect of counts 2 and 4.
[60] See Bartholomew: "The Origins and Development of the Law of Bigamy" (1958) 74 L.Q.R. 259.
[61] Jac. 1 C. 12.

known, and there become to be married, having another husband or wife living, to the great dishonour of God, and the utter undoing of divers honest men's children and others.

These surely are not convincing reasons for punishing bigamy. Glanville Williams describes the second reason as a "make-weight" for "it is difficult to see how the mere celebration of a void ceremony can „undo" children.[62] As to the first reason, if bigamy merely involved a "dishonour of God" it would seem that there was no need for statutory intervention. Because the offence is not confined to cases which involve anti-social consequences, e.g. where deception is practiced on the woman, it is difficult to find a justifiable reason for creating the offence and punishing it so heavily. If H and W find life with each other intolerable and decide to live apart, then if W finds peace with whom she cohabits and who decides to accord respectability to their relationship by undergoing a ceremony of marriage with her, she commits bigamy though society is in no way injured. On the other hand, if they lived together without undergoing any ceremony of marriage no offence is committed though from a Christian point of view the cohabitation is immoral. Therefore, what in effect seems to be forbidden and punished by the law of bigamy is not, for example, the fact of a married man putting away his wife and cohabiting with another woman but the mere undergoing of a ceremony of marriage by both of them. This conclusion finds some support in a dictum of Cockburn C.J., in ***R v. Allen***,[63] that bigamy "involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows to be applied only to a legitimate union, to a marriage at best but colourable and fictitious, and which may be made and too often is made, the means of the most cruel and wicked deception." Kenny also states that the reason for punishing bigamy is "the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony".[64] Bigamy cannot constitute an "outrage on public decency and morals" in a society in which polygamy is lawful. Neither can there be "prostitution of a solemn ceremony" where the second marriage is a customary marriage.

[62] "Language and the Law" (1945) 61 L.Q.R. 71 p. 76 fn. 14.
[63] (1872) L.R. 1 CCR 367 pp. 374-5.
[64] Outlines of Criminal Law, 15 ed. p. 361.

The marriage ceremony in a particular case may;

I) entirely secular, and it is especially difficult to see why a secular ceremony should be protected by a law analogous to blasphemy.

What confuses any discussion of the law of bigamy is that bigamy frequently involves conduct upon which society cannot look with approval. Bigamy frequently involves desertion of the lawful spouse, failure to maintain the lawful wife, deception of the registrar and minister of religion, and adultery; where it is committed with a woman who is deceived as to the facts it involves something nearly approaching rape. All these factors are, however, logical irrelevant to the offence. The bigamist may have separated from his spouse amicably, and anyway desertion is not a crime. He may maintain his spouse, and anyway failure to maintain is not a crime. Although bigamy is in practice followed by adultery, there is no logical necessity about this, and anyway adultery is not a crime. If desertion, failure to maintain and adultery were crimes, it might be proper to punish bigamy also, since bigamy is perhaps conduct conducive to these other acts which on this hypothesis would be crimes. But when (for good and sufficient reasons) the society do not treat as crimes the acts that constitute the real social mischief, it is surely wrong to punish bigamy merely because it is thought to conduce to them. Bigamy involving the deceit of an innocent woman, and amounting in fact to quasi-rape, certainly qualifies for a penal sanction; but the present law is not confined to this case. The only social mischief that is necessarily involved in every case of bigamy is the deceit practised upon those who officiate at or before the bigamous ceremony, and the consequential falsification of the marriage register. It could be noticed that this deceit, taking it by itself, would be adequately redressed by a. fine; certainly the maximum of seven years' imprisonment now fixed by the law is wildly out of proportion to the harm done in this particular respect. Although this maximum is certainly needed for statute does not distinguish between this case and the comparatively venial offence of trying to give respectability to an illicit association and 'giving the child a name'. In failing to discriminate between the serious and trivial forms it does not give the courts a lead as to the scale of punishment. This point may be illustrated by reference to a case of 1945." What it needed is a reconstruction of the law of bigamy, *so* that it becomes separated into two offences: a serious offence of quasi-rape, and a minor offence of falsification of the public records. These offences

already exist on the statute-book quite independently of the law of bigamy.

(1) By the Criminal Law Amendment Act, 1885, s. 3 (2), it is a misdemeanor to procure by false pretences unlawful carnal connection with any woman who is not a common prostitute or of known immoral character. This provision is at present little used because the typical case of it is bigamy, which is already provided for in the law under that name. If the offence of bigamy as such were abolished, cases of quasi-rape could still be prosecuted under the Criminal Law Amendment Act, for whenever a man goes through a ceremony of marriage he impliedly represents to the other party (unless he states the contrary) that he is a bachelor.[65] (2) If the bigamous wife realizes that the marriage is invalid, or if the offender is a woman, the offence now known as bigamy should be the lesser one of falsifying the marriage register.

The present law of bigamy is, in view of the foregoing provisions, unnecessary ; it is also objectionable because it regards as a single offence, with a common maximum punishment, two types of act that belong to different moral planes.

Finally, the rising offences of bigamy could be greatly reduced by a system of registration of marriages similar to those that have long been in force on the Continent.[66'] In England this would require the registers of births and marriages to be linked, possibly, though not necessarily, in conjunction with the system of national registration. If every marriage were recorded on the register of births or the national register, and if everyone on marriage were required to produce a recent extract from this register, bigamy would no longer be one of the easiest of all crimes to commit.

The act of bigamy is a criminal offence in the UK under section 57 of the Offences Against Person Act 1861. If a marriage takes place in the UK and one of the parties is already legally married to another person then such a person is committing bigamy and the marriage will be considered void. If a person is caught committing bigamy, he can be convicted of indictment and could face a jail sentence of up to 7 years.

[65]The Machinery of *Juslicr* in England, 128.
[66]See H. Mannheim, Criminal Justice and Social Reconstruction, 75-6 and sources there quoted, including H.L. Deb., Mar. a8, 1944, cols. 306 ff.

The only exceptions occur when a husband or wife has remained continually absent for seven years before the second marriage without knowledge of either of the partner's wellbeing or whereabouts.

6. Effect of a Child Born Out of Bigamy

Bigamy does not have any effect on a child in Nigeria by reason of the provision of Section 42 (2) of the 1999 Constitution as amended.[67] The Section provides thus: "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth". On the issue of presumption of legitimacy under Section 147 of the Evidence Act, the Court of Appeal established in ***Ogbole v. Onah*** that: *"Under Section 147 of the Evidence Act, as long as marriage between a husband and a wife lasted, there is a presumption that a child conceived and born during its continuance is legitimate".* [68] The Evidence Act did not use the word valid marriage. So a child born during the subsistence of a marriage remains a legitimate child and indeed with the right to inherit property. The court went further to held that, in law, where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary is proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. One issue germane to the implication of child born before the declaration of nullity of marriage by reason of bigamy is that he or she is considered to be legitimate by virtue of Section 147 of our Evidence Act and Section 42 (2) of the 1999 Constitution.

7. Conclusion

This research has examined the definition, nature and scope of bigamy under the Australian law, the Nigerian Criminal Law and the United Kingdom law with a comparative analysis of what is obtainable under those Laws in line with the punishment across jurisdictional boundaries. Bigamy is 'the act of marrying one person while still legally married to another'. The genesis of bigamy emanated through the act of continuous or persistence involvement in adultery and fornication. The position under the southern Nigeria Criminal Law is that bigamy is a criminal offence in the country excluding Lagos State

[67]Section 42 (2) of the 1999 Constitution as amended
[68]Section 147 of the Evidence Act,2011

which has expunged that section of the criminal code completely. An allegation that a man got married to a woman under the Marriage Act when his marriage to another woman under native law and custom was still subsisting is an allegation of commission of a criminal offence of bigamy which has to be proved beyond reasonable doubt. The implication is that a person who contracts a statutory marriage is bound by law to practice monogamy. However, there is no far-reaching consequence on the children born during the pendency of the marriage prior to its declaration by court as bigamy. This point has been adumbrated in the body of this work with the provision of the Constitution offering succor for child born out of wedlock against discrimination. Also, In Australia, it could be realised that the bigamy offence not only lacks a compelling rationale, but is practically and symbolically problematic. Accordingly, it proposes that bigamy may no longer be recognised as a specific offence in Australian law but stipulates punishment of 7 years imprisonment for offenders. In the United Kingdom, bigamy was merely an ecclesiastical offence through the influence of the clergy as it became a statutory offence. This paper concludes that Bigamy cannot constitute an "outrage on public decency and morals" in a society in which polygamy is lawful. Neither can there be "prostitution of a solemn ceremony" where the second marriage is a customary marriage or Islamic Marriage.

7. Recommendations:

1. The need for harmonization of punishments across jurisdictions
2. Increases public awareness campaigns to deter bigamy except those governed by Islamic law.
3. Review of cultural and social factors influencing bigamy