AN EXAMINATION OF MARRIAGE AND THE CONSTITUTIONAL RIGHTS OF WOMEN IN NIGERIA

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Abstract

Ordinarily, marriage is a union of spouses in a consensual and contractual relationship recognized by law. It is an intimate union and equal partnership of a man and a woman which comes to us from God. What is known as marriage differs appreciably in tune with different religious institutions, cultures and legal regimes. Under any of these, marriage is the basis for family creations and ties, while the family forms the unit of the society. The quest for the respect of human rights of women has occupied world agenda for many decades now and the aberrations even though gradually ending, still persist in some cultures, Nigeria inclusive. The Constitution is a baseline for human rights protection and these rights are outlined in Chapter IV and II of the 1999 Constitution of the Federal Republic of Nigeria. This paper seeks to examine the various forms of marriages in Nigeria and how far they have eroded or protected, the human rights of women in Nigeria using the doctrinal methodology and comparative analysis as tools with case law, authorities from experts and internet materials as sources.

Index Terms: Marriage, Constitutional Rights, Women, Nigeria.

1. Introduction

Marriage is a legally and socially, sanctioned union, usually between a man and a woman that is regulated by laws, rules, customs, beliefs and attitude that prescribe the rights and duties of the partners, and accords status to their offspring (if any).[1] The many basic social and personal functions for which marriage provides structure, have informed the universality of marriage within different societies and cultures. Such functions include structures of sexual gratification and regulation, division of labour between the sexes, economic production and consumption, and satisfaction of personal needs.[2] Generally, marriage is understood to mean when two people make a public pledge or commitment to live together and share their lives in a way that is recognized legally, socially and sometimes religiously[3]. The purpose of marriage is not procreation; in other words, marriage is to be structured around having sex in order to procreate, whether you can actually procreate or not which legitimizes sex within the marriage.[4] Every regime under which a marriage is celebrated defines marriage to suit its own context. Thus, for the statutory or state marriage, marriage is union between one man and one woman to the exclusion of all others during the continuance of the marriage.[5] This was the definition by Lord Penzance in *Hyde vs. Hyde*[6]. Under the customary law, marriage is usually defined as a union of a man and a woman; the exclusiveness is not guaranteed. In religious circle marriage is seen as

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[1] Encyclopaedia Britannica 'Marriage' https://www.britannika.com/topic/mareriage accessed on 20/2/2020.
[2] *Ibid.*
[3] https://www.google.com/search?of +marriage &of marriage & ags+chroonce ..69l57jo16j69160.2024 accessed on 26/2/20202.
[4] *Ibid.*
[5] S.18 Interpretation Act.
[6] (1886) LRi P & D 130 at 133.

the union between a man and a woman to the exclusion of all others, till death do them part. By the 21st century, the conception of marriage had begun to change especially with relevance of procreation and ease of divorce. This was notably in the Western world and a growing population also established legal recognition of inter-racial, inter-faith and more recently same-sex marriages.[7]

This has given rise to a change in the definition of marriage in line with the content of various circumstances, for example, jurisdictions that have legalized same sex marriage would view marriage as a civil union of two persons to suit their own purpose. Whichever form of marriage one contracts, one phenomenon is regarded as dividend from God and that is procreation which ultimately produces a family which in turn is the unit of the society. The respect for fundamental human rights is sacrosanct to the very existence of the individual. It is therefore an aberration for any institution whether legal, social or cultural to be seen to be contra-indication to this fact. This paper still looks at the forms of marriages trying to glean at them with respect to the human right of the contracting parties.

1.1 A brief overview of marriages in Nigeria:

Colonization ushered into Nigeria a three-tier system of marriage with corresponding, controlling set of laws.[8] The statutory marriage and the laws guiding it were superimposed on the cultural fabric of the Nigerian society without being completely absorbed.[9]

a. Act marriage: This is the state marriage and is monogamous. Marriages celebrated by churches that are registered for the celebration of marriage are also regarded as Act Marriages. For this form of marriage, the definition of marriage postulated by Lord Penzance in *Hyde vs. Hyde*[10] as the 'union between one man and one woman to the exclusion of all others during the continuance of the marriage is adopted. For the churches, especially the Catholic Church, it is seen as the union between a man and a woman to the exclusion of all others till death do them part or for life unless circumstances qualify a marriage for annulment (not divorce) by the church. The *Act Marriage* is governed by the *Marriage and Matrimonial Causes Acts*.[11] The two Acts provide the definition, capacity, mode of celebration, duties, liabilities and obligations accruing to parties to the marriage. The church marriages, if the church in question is registered for the celebration of marriages, is deemed to be a statutory marriage and they both enjoy the same rights, claims and responsibilities.

b. Customary marriage: This is marriage celebrated only by custom. In many places, such a marriage will start with the introductory rites, the confirmation stage, the payment of the bride price and then the public and ceremonial outing (*Igbankwu*). All of these stages require the carrying of drinks, gift items, and cash to the bride's parents. A customary marriage celebration terminates here and goes no further. It is potentially polygamous and the man is allowed as many wives as he desires. When this happens, the woman is expected to condone all the emotional, psychological and health hazards inherent in polygamy. Customary marriage is

[7] Map: In Legalizing Gay marriage England joins growing international community; http://blongs. Kg ed.org/
[8] Act Marriage by Marriage Act and the Matrimonial Causes Act; Sharia Marriage by Sharia Law and customary Marriage controlled by customary law.
[9] F Anyogu, Access to Justice in Nigeria: A Gender Perspective (2nd Ed, Enugu Ebenezer Productions, 2013) p 367.
[10] *Supra*.
[11] Cap M_6 and M_7 Laws of the Federation 2004.

controlled entirely by custom. The rights, liabilities and obligations for the parties are determined by customary law.

a. Islamic marriage:

Islam controls the total way of life of its people. An Islamic marriage is therefore entirely controlled by the dictates of the Islamic faith and the Qur'an. In a Muslim marriage, the man is entitled to four wives but he must love them equally. The wives also have to cope with attendant evils of polygamy such as trying to undo each other to win his approval, and are subjugated to the level of competing for their husband's love while he plays the manor of all he surveys.

2. The effect of marriage on the constitutional rights of women

The Constitution of any nation is the baseline for rights protection for the citizens. It is the ground norm and any law that is inconsistent with it, is invalid to the tune of the inconsistency. The Commission on the Status of Women was formed in 1946, consequent upon which the 'The Universal Declaration of Human Rights' was drafted and adopted in 1948. The Declaration guaranteed fundamental human rights to all. These rights were considered inherent in man hence the preamble:

> Recognition of the inherent dignity and of the equality and inalienable rights of all members of the human family is the foundation of freedom, justice and peace of the world.[12]

Even though the Declaration was not legally binding, it gave rise to other instruments on human rights that were binding on State, Parties. It also informed the enshrining of human rights provisions in the *Independence Constitution* in 1960. Subsequently constitutions in Nigeria up to the present 1999 Constitution (as amended), have contained chapters on human rights. These are the civil and political rights which form the bedrock of all the rights contained in chapter IV of the *Constitution* and the *Fundamental objectives* and *Directive principles* of State Policy contained in Chapter II. This work proceeds to examine the effect of marriage on each of the relevant provisions of the constitution on human rights of women, and for the purpose of this work, women will include females of eighteen years and above and those involved in child marriages.

Right to life[13]

The constitution guarantees everybody the right to life, save under certain conditions. Outside the exceptions recognized by the constitution, it is illegal to take another life. The debate on when human life begins, calls for the question whether anybody has the right to abort, and this basically concern women and men especially within the family circle. The following practices within the family can affect one's right to life.

Child marriage

Statutory marriage does not expressly permit child marriage. However, both *Customary* and *Islamic Laws* do, with the attendant health hazards capable of violating the right to life of the

[12] Preamble to the United Nation Declaration on Human Rights. G A Res. 217 (III) adopted on 10th December 1948 by United Nations General Assembly (UNGA)

[13] S. 33 1999 Constitution of the Federal Republic of Nigeria.

party concerned. The *Marriage Act* which stipulates the age where consent of parents is not required, but does not provide an age for marriage, tacitly also condones child marriage. The *Child Rights Act 2003*[14] has however expressly put the age of majority for purposes of marriage at 18, even though the Act has the challenge of not protecting all children uniformly. When a child has prolonged labour which is common in early childbirth, she stands the chance of contracting *Vesico Vaginal Fistula (VVF)* and *Recto Vaginal Fistula (RVF).*[15] Any health hazard is a potential threat to life and any event or situation that causes health hazard is a potential violation of the right to life.

Female Genital Mutilation: Among the Ibibios, it is a practice for women to undergo female genital mutilation just before they join their husbands in marriage. At adult age, the human skin is toughened and any form of genital operation poses much more health hazard than with infancy. All the forms of marriages are involved in this.

Frequent/many child births in quest for a particular sex.

Given the cultural domination of men in decision making and their ability to impose sexual relations on their wives backed by *Nigerian Law*, they usually have the last say on family size.[16] The result is that some women are made to go through many pregnancies and child birth most of the time, in quest of a male child. This happens in all the forms of marriages recognized and held valid in Nigeria, but women in customary marriages are more likely to go through this in apprehension of the husband taking another wife.

Right to family life[17]

The essence of this right is that the family is entitled to protection by society and state. Where women are at risk of maternal death, for lack of reproductive and maternal care the right of family life is jeopardized not just for the woman but also for children and their fathers who are prejudiced by harmful impact of mother's death. Preservation of maternal health and prevention of maternal death are central to the enjoyment of family life and therefore part of the human rights entitlement not only of women but also of children and husbands. The right to family life also includes right of choice of spouse, so forced and child marriages are violations of the constitutional right to family life and this exists in all forms of marriages.

Right to freedom from discrimination[18]

S. 42 of the *Constitution* states *inter alia;*

> 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, be subjected either expressly by, or in the practical application of any law enforced in Nigeria or any executive or administrative action of government, for disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject to.

[14] Interpretation section.
[15] A situation where the victim leaks urine or feces or both and is a serious life-threatening condition.
[16] I Okagbue Human Rights and Legal Status of Women in Nigeria (Institute of Advanced Legal Studies Lagos) p 9.
[17] S. 37 of the Constitution.
[18] S.42 of the Constitution.

This is the right to freedom from discrimination. It is unfortunate that some traditional and cultural acceptances, many of which are endemic in Nigerian marriages, whether statutory, customary or Islamic are inhibitions in this area. This is notably observed in *Citizenship By Registration*.[19]While a Nigerian male can confer citizenship by Registration on his foreign wife, a Nigerian female cannot do the same for her foreign husband. He has to go through the more stringent method of Naturalization.

Widowhood rights

When a man dies, certain responses are expected from the wife to show respect for the dead husband. The responses differ from community to community. Some communities demand that the widow sits secluded on a mat, wail at intervals, shave her hair and other nerve wrecking observances. Unfortunately, a man is not expected to do any of these as a demand. It would seem that those expectations are exclusive to women, while the accordance of respect is exclusive to men. These are all violations of the woman's human right under S. 42 and in marriage. This also happens in both the statutory and customary marriage.

Right to dignity of the human person[20]

The following acts which happen to women in marriage are in contradiction to their right to dignity of the human person.

- Women in Islamic regions or countries caught in adultery are stoned to death. This is tortuous. While it may be true that an adulterous man is also stoned to death, the mode of proof of adultery makes it difficult to rope a man in. While it requires four unimpeachable witnesses to testify seeing his manhood in the womanhood of the partner, the woman is roped in just by the fact of pregnancy while the man goes scot free.
- In Islam, a man is allowed by law[21] to chastise his wife using cane. This is both tortuous and degrading.
- Some cultures also allow husbands to correct their wives by mild beating not amounting to grievous bodily harm. This is degrading against the dictates of S. 34 of the constitution. The issue of bride price which ordinarily should be nominal and symbolic is also to be noted in the dignity of the human person of a woman. In recent times some cultures have been known to demand huge sums of money from prospective in-laws in the name of bride price. The undignified aspect is that a refund is demanded on the dissolution of the marriage and this gives the transaction the semblance of a defective good being returned no matter how long she has been in the marriage, or number of child births. This sort of subjugates the woman to the position of a commodity. Today however the dissolution of a customary marriage can be achieved through the *Magistrate Court.*

Freedom of movement[22]

Muslim religion tramples upon women's right for freedom of movement. Muslim women in '*Purdah*' are not supposed to be seen in public. They have their faces covered with the veil and

[19] S. 26 of the Constitution.
[20] S. 34 of the Constitution. This forbids that any person be subjected to torture or to inhuman and degrading treatment.
[21] S 55 (d) of the Penal Code.
[22] S.39 of the Constitution.

during that period, their movements are impeded as much as possible and desirable by the religion. This affects mostly women in marriage.

Right to inherit landed property[23]

Some cultural practices inhibit inheritance of immovable property by women and this has found itself one way or the other in all the three forms of marriages. Property ownership is either by:

- Self-acquisition
- Gift intervivous
- Succession or inheritance.

With self-acquisition, there is no problem as anybody can do that anywhere if they have the financial means. As manifested in the historic decision in *Lambert vs. Lambert*[24] the English system of succession since after women's *Property Act 1882* has been, and is still devoid of discrimination against any of the sexes, for it recognized the right of each to succeeds to part of the other's property whether real or personality.

Lord Justice Thorpe giving a 50-50% to each spouse on divorce condemning the decision of the *trial Court* opined:

> If all that is regarded in the scale is the breadwinner's success then discrimination is almost bound to follow since there is no equal opportunity for the home maker to demonstrate the scale of her comparable success.

The English system which grants equal shares to children whether male or female was purported to be enacted in Nigeria in the various succession laws.[25] By this provision, a wife under the act is entitled to 1/3 of the husband's estate while 2/3 is shared equally among the children (male and female). The cultural twist still found its way in this *via* the succession laws.[26] Where there are no children in the marriage, the wife takes half the estate, while the man's next of kin of equal rank takes the other half. While the wife takes half of the estate where there are no issues, the man (the widower) inherits everything if the wife dies. It agitates the objective mind that any relative could be defined as a next of kin of equal rank to the wife of the deceased.

In Islamic marriage at the death of a Muslim man the Muslim widow's portion is one eight of the deceased's estate if there are children. If there are more than one wife, one eight of the deceased's estate is shared equally among them. A Moslem widow without a child inherits one quarter of the estate while daughters are given half the share of what is due to the sons. In other words, the girls are not thought worthy to get the same share as the boys. In the case of customary marriage, what happens in relation to S. 43 of the constitution differs from culture to culture. In Yoruba custom a wife cannot inherit (realty) from her husband and vice versa. If she dies without a child, her property or properties go to her siblings whether she acquired them before, during or after marriage. Daughters in *Yoruba land* inherit their father's property, whether realty or personality with their brothers in equal shares.

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[23]. (2002) EWCA At 1685.
[24]. *ibid*
[25]. 1963 ANLR 352
[26]. 1989 2 NWLR pt 104 p 373

The Igbo custom does not permit a woman to dispose of any property she acquired during the marriage without the consent of her husband. When a man dies the eldest son becomes the head of the family, occupies the family house and holds the deceased father's property (ies) as a trustee for himself and the other sons. The disinheritance of females has been given effect in cases like *Nezianya vs. Okagbue*[27], *Nzekwu vs. Nzekwu*[28], and *Idehem vs. Idehen*. This unfair practice subsists by virtue of intestacy which maintained a position where for Igbo females, whether single, married, divorced or widowed have no inheritance rights to real property. A paradigms shift in this situation was witnessed in the decisions of *Mojekwu vs. Mojekwu*[29] *Mojekwu vs. Ejikeme*[30] where it was now expressly stated that females (daughters and wives) can inherit, hold and deal with real property and in the more recent case of *Anekwe vs. Nweke.*[31] Also very recent is the case of *Ukeje vs. Ukeje*[32] specially affirming that female children even if born out of wedlock have the right to inherit their father's property whether real or personally.

Conclusion

The bill of rights in the constitution of the *Federal Republic of Nigeria 1999* (as amended), are meant to be enjoyed by all irrespective of sex, ethnicity, political opinion and so on. Cultural acceptances have always put a stricture on this for women in all spheres of life; the condition of marriage is not left out on this. No one marries a woman in Nigeria without doing the requisite cultural performances, which are the hallmark of a customary marriage and because communities in Nigeria still operate the communal system getting married without the customary marriage rites will invoke the wrath of the kinsmen, who will never recognize the marriage. Because of the tripartite marriage laws and the endemic cultural and traditional observations purely act marriages still have vestiges of customary intrusion as if they were customary marriages. For the intrusion not to amount to a negation of the true nature of an act marriage, it is recommended that:

1. All discriminatory law against women be abrogated.
2. Cultures and traditions that are inimical to the dignity of women should be made away.
3. The *Marriage Laws* in Nigeria should be harmonized so that none protects any group better than the other and the *Matrimonial Causes Act* under *Review* should be made to address all the nagging issues.

[27] (1991) 5 NWLR pt 198 p 382
[28] (1997) 7 NWLR Pt 283 CA
[29] (2000) 5 NWLR (Pt 657) 402.
[30] (2014 9 NWLR pt 1412 293.
[31] (2014) 11 N?WLR (Pt 1418) 384
[32] (2014) JELR 54676 (SC).