



LEGAL PRESCRIPTIONS OF MARRIAGE: THE LOOPHOLES FOR THE SUBJUGATION OF WOMEN

Felicia Anyogu

Faculty of Law

Nnamdi Azikiwe University

Awka, Nigeria

ABSTRACT: *What is known as marriage varies according to different cultures, legal regimes and religious institutions? Marriage seen under any of these is the basis for family creations and ties and the family in turn is the unit of the society. Every regime under which a marriage is celebrated defines the marriage, the duties and obligations accruing there from. The subjugation of women and disrespect for their human rights over the years has been a global issue for many decades now, and as long as the aberration persists, it shall continue to be an issue to contend with. This paper explores the regimes under which marriages are celebrated in Nigeria, their rights and obligations and the available loopholes in them for the subjugation of women. The paper uses the doctrinal method relying on authorities on the issue, and proffers recommendations for the way forward.*

KEYWORD: *Legal Prescriptions, Marriage, Loopholes, Subjugation, Women, Nigeria.*

1. INTRODUCTION

Marriage is a socially or ritually recognized union or legal contract between spouses that establishes rights and obligations between them, between them and their children and between them and their in-laws [1]. The definition of marriage varies according to the context in view, but is principally an institution in which interpersonal relationships, usually sexual are acknowledged.

There are two distinct systems of marriage in Nigeria, namely Marriage under the Act, and customary marriage. The Islamic form of marriage is subsumed into customary marriage even though it is guided basically by the Islamic religion. One can therefore safely say that there are three forms of marriages recognized and held valid in Nigeria, namely Act Marriage, Customary Marriage and Islamic marriage. The advent of the colonial master ushered into Nigeria a triple system of marriage laws. The three forms of marriage are controlled and regulated by the legal regimes under which they are celebrated. Consequently, the rights and obligations following from these marriages are embedded in the laws regulating them *vis-à-vis* the Marriage/Matrimonial Causes Act, Customary Law and Islamic/ Sharia law. There are some other laws in Nigeria which even though do not exclusively provide for rights and obligations in marriage, have provision that touch on marriage. The statutory and the laws guiding it were super imposed on the cultural fabric of the Nigerian society without their being absorbed. The effect is that many of the discriminating features of customary law marriages are still observed and enforced within marriages purported to be governed by Statutory Law. For example, even though the Matrimonial Causes Act in respect of custody matters provides in the best interest of the child, some Courts still dwell on the customary notion that the child primarily belongs to the father and his people, to automatically award custody to the father whether it is in the best interest of the child or not. This paper seeks to explore the legal prescriptions (Act, Customary, Islamic) of marriage in the Nigerian Jurisprudence, ultimately to expose the loopholes for the subjugation of women.

II THE FORMS OF MARRIAGES AND LAWS GOVERNING THEM

Every regime under which a marriage is celebrated defines marriage to suit their own context. Since the late 20th century major changes especially in the Western countries have led to variations in the demographics of marriage, while a growing number of other jurisdictions have established legal recognition for interracial, interfaith and in recent times same sex marriage [2]. This has also necessitated 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 purpose. Nigeria has not legalized same-sex marriage and does not have the need to change the definition of marriage under the forms of marriages in Nigeria discussed hereunder.

ACT MARRIAGE

The Act Marriage in Nigeria is Monogamous. It is the state marriage. However, marriages celebrated by the churches that are registered for the celebration of marriage are also regarded as Act marriages. For the Statutory or state Marriage, the definition is the 'Union between one man and one woman to the exclusion of all others during the continuance of the marriage [3]. This was the definition by Lord Penzance in *Hyde vs. Hyde* [4]. In religious circles especially the Catholic church (usually also regarded as Act Marriage), marriage 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 the Matrimonial Causes Acts [5]. The two Acts provide the definition, capacity, mode of celebration, duties and liabilities 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. For the purely statutory state marriage without a church blessing, there are grounds for divorce prescribed in the Matrimonial Causes Act. The Church marriage holds husband and wife together till death does them part and admonishes that "what God has put together let no human being separate [6]. It is also by the dispensation of the Pope especially in the Catholic Church that such marriages are annulled (not divorced). It is to be noted that even with the pure Act Marriage, where grounds are listed for divorce, that the Court does not break marriages as the marriage would have broken down irretrievably. What the Court does is to give it a decent burial. The definition of marriage under the customary law (Islamic Marriage inclusive) can be deduced to be the union of a man and a woman; the exclusiveness is not guaranteed. Customary marriage and Islamic marriage are potentially polygamous. The difference is that while the Moslem is restricted to four wives, a non Moslem in a customary marriage can take any number of wives he likes. Valid customary marriages cannot be contracted without parental consent regardless of the bride's age, since the bride price has to be paid and acceptance of it signifies consent on the part of the bride's parents and if they refuse the bride price, then the customary marriage did not take place. The payment of bride price served several functions in traditional society. It is said to have served as a mark of formal validation of the marriage, evidence of consent of the two families to the marriage, and also as a mark of appreciation to the bride's family for bringing the bride into the world and training her in all the wifely virtues [7].

In Nigeria, people sometimes go through at least two processes of marriage. Whether the marriage is pure Act marriage or church marriage, it in almost all the cases starts with the customary marriage. This is because, marriage in Nigeria (whether customary, church or Act) is seen as the coming together of not only the couple but also their families. No one marries a woman in Nigeria without doing the requisite cultural performances, which are the hall mark of a customary marriage. Some people in a church marriage found themselves first doing the cultural marriage, then the pure Act Marriage followed by the church marriage because they are Christians. Because communities in Nigeria still operate the communal system, getting married without the customary rites of marriage, will invoke the wrath of the kinsmen, who will never recognize the marriage. Some people also stay 'married' for a longtime only to realize that they were never married at all because of the plurality and confusion of the marriage laws. Where a man is married to more than one wife for example, and now decides to jettison polygamy for a Christian/Act marriage and takes one of the wives to the altar, confusion exists as to the marital status of the other wives.

By the Provisions of the Marriage Act, [8] a person married under the Act cannot contract another marriage with a third party either under the Act or under customary law else, he commits the offence of bigamy [9]. In the same manner, a person married under customary law may not contract a marriage with a third party under the Marriage Act [10]. People married under customary law may however go into a valid marriage under the Act with each other. The import is that such a man can only go into Act marriage with the first woman he married under custom [11]. This has the effect of transforming a potentially polygamous marriage into a monogamous marriage. Despite these provisions, Nigerian men still sometimes enter into different forms of marriage simultaneously with different women. Yet there is hardly any prosecution for bigamy in Nigeria. In fact only one instance is known to the writer [12].

Islamic marriage is usually controlled by the Moslem law or Sharia Law. The claims, rights and responsibilities are all prescribed by the Sharia law. A Moslem is allowed to take a maximum of four wives with the injunction that he must love them equally. Three essential features stand out in the three forms of marriage recognized and held valid in Nigeria thus:

- a) Parties must be legally capable of contracting to marry.
- b) Mutual consent or agreement must be present and
- c) An actual Contracting in the form prescribed by the relevant governing laws [13].

III THE LOOPHOLES FOR THE SUBJUGATION OF WOMEN

The Provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) enjoins State Parties to ensure that women and men enjoy on equal basis, the right to choice of spouse and the same rights and responsibilities during marriages. None of the three forms of marriage recognized and held valid in Nigeria is without loopholes for the subjugation.

STATUTORY MARRIAGE

This form of marriage is regulated by the Marriage/Matrimonial Causes Act. The Marriage Act does not make express provision for a marriageable age but only prescribes the age below which parental consent is required for a marriage to be validly celebrated and in the absence of that consent, the marriage is void *ab initio*. The relevant section for the Act [14] states;

If either party to an intended marriage, not being a widower or widow is under twenty-one years of age, the written consent of the father or if he be dead or of unsound or absent from Nigeria, of the mother or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party must be produced annexed to such affidavit as aforesaid before a license can be granted in a certificate issued.

The age of majority for the purposes of marriage can be construed to be twenty one years of age under the Marriage Act, but it does not provide any age under which consent should be denied. It therefore tacitly encourages child marriage and women are disproportionately affected in this area. This provision means that as long as parental consent is obtained, the marriage will be celebrated even for minors. It also means that a widowed child can also be given out in marriage with a statutory backing, but this time to another man. The Child's Right Act stipulates eighteen years as the age of marriage but this Act does not apply to every child in Nigeria. The issue of children falls within the residual list of the Constitution and so States that deserve it, are to adopt it into their state laws. For now, many States have not adopted it.

When it comes to the issue of property rights of women, the type of marriage the couple embarked upon will affect the property right of the woman and even her children. Property is defined as.

Everything which is or may be the subject of ownership; everything that has an exchangeable value or which goes to make up wealth or estate [15].

The import of this definition is that ownership of property determines one's wealth and wealth guarantees one's ability to take care of oneself. Logically property ownership will undoubtedly afford one the means to satisfy the basic needs of food, health and shelter. The Constitution of the Federal Republic of Nigeria guarantees every citizen the right to own property anywhere in Nigeria. The property in view here is real property (dealing with land). There are three principal modes of acquiring property).

- a) Self acquired property.
- b) By gift *intervolves*

c) By succession or inheritance.

The problem is never with self-acquisition, as anybody can do that anywhere as long as they have the financial means. The presence of a valid 'Will' also leaves no room for controversy and uncertainty. The problem area seems to be that of inheritance, where the deceased died interstate. The disabilities of women to own and control property in Nigeria, stems from custom and tradition's conception of a woman as unable to care of herself, let alone contribute to society. The English system of succession since after the Women's Property Act 1882 has been, and is still devoid of discrimination against any of the sexes, for it recognizes the right of each to succeed to part of the others property whether real or personally. This was manifested in the historic decision in Lambert vs. Lambert [16] where Lord Justice Thorpe gave a 50-50% to each spouse on divorce condemning the decision of the trial Court thus;

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.

For him, it is unacceptable to place greater value on the contribution of the breadwinner than that of the home maker as a justification for dividing the product of the breadwinner's efforts unequally between them. The English system also upholds the rights of the legitimate children (male and female) to equal succession to their father's real and personal properties. This was purported to be enacted in Nigeria in the various succession laws [17]. By this provision, a wife under the Act is entitled to $\frac{1}{3}$ of the husband's estate while $\frac{2}{3}$ is shared equally among the children (male and female). Nigeria did not however incorporate to the letter, the provision of the English laws. Nigerian statutes introduced something different in a way showing Nigeria's inculcation of cultural practices. Where there are no children to 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 when there are no issues, the man (the widower) inherits everything if it was the wife that died. These provisions are discriminatory and subjugate the woman to the position of the disrespected and half human yet they are contained in various State Laws [18]. It agitates the objective mind that any relative could be described as being of equal rank with a person's spouse under the Act since legally a husband and wife are supposed to be one. Is it then possible to construe any relative who could balance the legal (also biblical [19] equation of $1+1 = 1$ with any of the spouses?

ISLAMIC MARRIAGE

Islam controls the total way of life of its adherents, therefore an Islamic marriage is entirely controlled by the dictates of the Islamic faith and the Qur'an. In a Moslem marriage, the man is entitled to four wives but he has to love them equally if that is possible. Some of the wives are therefore bound to feel less loved and cheated. The wives also have to cope with the attendant evils of polygamy such as trying to undo each other to win his approval, with risk to their reproductive rights and health. The women are also subjugated to the level of competing for their husband's love while he plays the manor of all he surveys. In terms of inheritance, at the death of the man, the Moslem widow's portion is one-eighth of the deceased's estate if there are children. If there is more than one wife, one eighth of the deceased's estate is shared equally among them. A Moslem widow without a child inherits one quarter of the deceased husband's estate while the 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.

CUSTOMARY MARRIAGE

In Nigeria a customary marriage is one that is 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, gifts and cash to the bride's parents. A customary marriage celebration terminates here and goes no further. This form of marriage 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 evils inherent in polygamy. The view has been expressed that the payment of bride price represents a 'sale'

transaction by the bride's family to the bridegroom. The import is that it is the price paid for the purchase of a wife. This used to be in the form of labour but gradually it got monetized and gradually again greedy in-laws hid behind it to extort money from in-laws. In recent times, some areas and communities have been known to demand huge sums of money in the name of bride price. The un-dignifying thing about the issue of bride price is the fact that unlike the familiar rules of sale of goods which place limitations on the right of the purchaser for a refund of his money paid on goods, customary law requires the refund of the bride price to the husband on the dissolution of the marriage [20]. As a matter of fact, the return of the bride price signifies the dissolution, else the marriage subsists. The return of bride price on dissolution of customary marriage gives the transaction the semblance of a defective good being returned, subjugating the woman to the position of a commodity. This situation subsists notwithstanding the duration of the marriage, the number of child births the woman may have gone through, years of service and companionship. The return to the groom and his family of the bride price served as evidence of dissolution in olden times but in recent times dissolution can be achieved through the Magistrate Court. In many communities in Nigeria, especially the South-East, Customary law puts the age of maturity at puberty. This means twelve years for girls and fourteen years for boys and this encourages child marriage with its attendant reproductive health risks for the girls. The property right of women under customary law marriage is quite different from the other two forms of marriages [21] in Nigeria. This differs from culture to culture especially in Nigeria, which lends itself as a groove for multifarious ethnic existence. In Yoruba custom, a wife cannot inherit (realty) from her husband and *vice versa*. If she dies without a child, her property (ies) goes to her sibling's, whether she acquired them before, during or after marriage. Daughters in Yoruba land inherit their father's property whether Realty or Personality, in equal shares with their brothers to the exclusion of all other relatives [22]. The daughters also have the opportunity of becoming the Head of the family or the Dawodu [23] if at any point in time; she becomes the oldest in the family. It would seem that the Yoruba woman has a better package than other women in Nigeria, except for the fact that she has no share in the property she may have toiled with her husband to acquire. By cultural acceptance, and stereotype roles, the man has more opportunities of acquiring properties (especially realty) in marriage. While he is doing this, the woman takes care of his needs, keeps the home, bears and nurtures the children. One would expect that this position would earn her a beneficial interest in any property acquired during the marriage especially if they lived in the property. Of course all this is in the absence of a well-executed and valid 'Will'.

The Igbo customary law does not allow a woman to dispose of any property she acquired during the marriage without the consent of her husband, but the husband is not obliged to do the same with his own property. The general rule of customary law as enunciated in *Suberu vs. Suberu* [24] is that where a property owner dies intestate, his self-acquired property devolves on his children as family property. The oldest son becomes the head of the family, occupies the family house [25] and holds the deceased's property (ies) as a trustee for himself and the other sons. Disinheritance of females has been given effect in cases like *Nezianya vs. Okagbue* [26] and *Nzekwu vs. Nzekwu* [27]. The unfair practice exists by virtue of intestacy, for under native law and custom, the devolution of property follows the blood. A wife or a widow consequently not being of the blood has no claim to any share [28]. It is strange then that the female children are excluded from inheritance in many parts of Nigeria. It would seem that the Igbo female whether single, married, divorced or widowed has no inheritance rights to real property. A changing tide in the fortune of the Igbo daughters with respect to property was witnessed in the decisions of *Mojekwu vs. Mojekwu* [29] and *Mojekwu vs. Ejikeme* [30] where the Court of Appeal pronounced that female children have the right to inherit their father's estate. He also declared the *nrachi* and *oliekpe* custom of *Nnewi* in *Igboland* repugnant. *Oliekpe* means a female cannot inherit her father's property instead even distant male relative would do so if the dead intestate has no son.

The *nrachi* is a ceremony that would be performed on a female who wishes to inherit her father's property. This ceremony enables her stay in her father's compound, and raise children in his name with the hope of producing an heir (a male child). The judge *NikiTobe* (JCA as he then was) declared that 'we need not travel all the way to Beijing to know that the *Nnewioliekpe* custom is repugnant to natural justice, equity and good conscience'. The repugnancy pronouncement was rejected by the Supreme Court but the Court declared in *Mojekwu vs. Iwuchukwu* [30] that female children have the right to

inherit realty from their father's estate. In the more recent case of *Anekwe vs. Nweke* [31] the Court affirmed, the fact that women could inherit their husband's property, contrary to the dictates of customary law. Per *Ngwuta JSC*

The custom.... Where in a widow is reduced to a chattel and part of the husband's estate, constitutes the height of man's in humanity to woman, his own mother, the mother of nations, the hand that rocks the cradleChildren male of female are gifts from the creator for which the parents should be grateful.

The same position was taken specifically with respect to female children in *Ukeje vs. Ukeje* [32]. It should be noted that while a woman is not expected to inherit her husband's property, this does not apply in a man's case as it was emphatically stated in *Idehen vs. idehen* [33] that a wife cannot even by the exercise of testamentary disposition deprive her husband of his succession right in her estate. It is submitted that this practice, where it still subsists subjugates, and marginalizes women to a state of chattels. This is an infringement of the fundamental rights and freedoms promised all human family members by the Universal Declaration of Human Rights which the Constitution of the Federal Republic of Nigeria has replicated in its Chapters two and four.

IV. CONCLUSION

These loopholes for subjugation of women exist because of the plurality in our marriage laws. It's all as if one should weigh which type of marriage will protect her more and go into it. It is in effect a question of *voluntis non fit injuria*. Marriage ceremonies in Nigeria are expensive and the customary marriage is usually the starting point. Because of the customary definitions of marriage, many people may not be able to go through more than one celebration. It is therefore necessary that our marriage laws be harmonized so that people can get the protection they need from only one celebration.

Most of the dehumanizing treatments women are subjugated to are nearly always perpetrated against poor, uneducated and empowered women. The need to empower women can therefore never be an overstatement. It is also true that most of the marginalization of women stems from cultural and traditional practices. It is therefore also humbly submitted that all such cultural practices that marginalize women and undermine their dignity should also be jettisoned. It is hoped that when these recommendations are adhered to, marriage which is supposed to be a thing of joy while it lasts, would cease to be a nightmare for many women in Nigeria.

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