



## Customary Law Marriage Practice in Nigeria: Women and Human Rights

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### Abstract

Marriage has been defined as a voluntary union between a man and a woman or women (in the case of customary marriage) for life to the exclusion of any other. In other words, it is a legal union which exists between a man and a wife(s). The practice is acceptable world over and it is usually legally recognized. In Nigeria, though there exist a statutory marriage which is monogamous in nature but most prevalent is the customary marriage. This marriage is practiced among all the tribes in Nigeria despite the fact that there exist statutory marriages. One thing that is pertinent here is that the practice of customary marriage in Nigeria has violated the human rights of the couple especially the women. The women in Nigeria have not enjoyed their human rights in their customary marriage. This is due to certain customs and traditions that do not allow for such. Among the few are undue reliance on consent of their parents. Before a marriage can be contracted female genital mutilation, the corresponding rights to bring an action for dissolution of marriage if the other party commits adultery, etc. As a result of the above (and many others) Nigerian woman is deprived of her rights. This work seeks to examine these practices which stand as hindrances to the rights of a married woman in Nigeria and therefore suggests that Nigerian women should be allowed to enjoy her basic human rights (even as a married woman) just like her husband, also that the practices in other climes where women enjoy their human rights should be imbibed in Nigeria.

**Keywords:** Customary law marriage; Opposite Sex; Union; Rights of women; Equality; Genital mutilation.



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### 1. Introduction

Marriage is recognized as the union between man and woman (or women in appropriate cases). This presupposes a union between persons of the opposite sex<sup>1</sup>. This means that there cannot be a legal marriage between man and man or woman or woman. Thus, in the old popular English case of *Corbett v. Corbett*<sup>2</sup> the petitioner and respondent went through a ceremony of marriage in September, 1963. The petitioner knew that the respondent had been registered at birth as a male and had in 1960 undergone an operation for the removal of the testicles, most of the scrotum and the construction of an artificial vagina. Since the operation, the respondent had lived as a woman. In December, 1963, the petitioner filed a petition for a declaration that the marriage was null and void because the respondent was a person of the male sex or alternatively for a decree of nullity on the ground of either incapacity or willful refusal to consummate. It was held per Ormrod J. that the respondent had remained at all times a biological male and that accordingly, the so called marriage was void.

In Nigeria, just like any other jurisdictions there are basically two types of marriages: Customary (Islamic and non-Islamic) and Statutory Marriages. The latter which is monogamous in nature has been defined by Lord Penzance in *Hyde v. Hyde*<sup>3</sup> to be a voluntary union for life of one man and one woman to the exclusion of all others. The former which is customary can be defined as a voluntary union for life of one man and one woman (or many women) as the case may be to the exclusion of all others.<sup>4</sup> Although the two types of marriages are practiced in Nigeria. This work seeks basically to examine the practice of customary law marriage vis-à-vis the human rights of women in such a marriage and juxta position it with other jurisdictions

### 2. The Human Rights of Women

- a) The United Nations Charter: the charter extols the noble attributes on the promotion of respect for human rights and for fundamental freedom for all, without distinction, as one of its central purpose.<sup>5</sup> Article 52 of the Charter contains a pledge by all member states to promote respect for human rights and fundamental freedoms for all, regardless of race, sex, language or religion.
- b) Universal Declaration of Human Rights (UDHR) Article 1 provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one

<sup>1</sup>This oppose the practices of same sex marriage that is prevalent in most places in the world today.

<sup>2</sup> (1971) p. 83

<sup>3</sup>(186) LR 1 PRD 130. See also Section 1 of the Interpretation Act.

<sup>4</sup> The Islamic customary marriage allows a man to marry four wives at a time if he desires.

<sup>5</sup>Article 1 UN Charter 1945.

another in a spirit of brotherhood. Article 2 further states that everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

- c) African Charter on Human and Peoples; Right: This also enshrines the principles of rights, equality and non-discrimination, Article 2 provides:  
Every person shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter and without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or any other status.<sup>6</sup>
- d) Convention on the Elimination of all forms of Discrimination against Women (CEDAW). This is the legal instruments that call for the abolition of all forms of inequalities and discrimination against women. Its Articles 1 to 29 discuss fully what discrimination against women mean, how states parties should do all it can to eliminate it, the right of women, etc.
- e) The 1999 Constitution of the Federal Republic of Nigeria – The Nigerian Constitution equally guarantees the fundamental rights to equality and non-discrimination.<sup>7</sup> Section 17(1) under the fundamental objectives and Directive Principles of State Policy states that the state social order is founded on ideals of freedom, equality and justice while Section 17(2)(b) provides that every citizen shall have equality of rights obligations and opportunities before the law. Section 42(2) provides for the right against discrimination, and it states, “no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.”

### 3. The Problem of Rights of Women in Nigeria

Despite the above international and municipal instruments bestowing human rights on women in Nigeria, there are situations where a Nigerian woman has to complain about her rights especially under the customary law marriage.

- (a) **Consent before marriage** – One of the basic requirements for customary marriage in Nigeria is that of the consent of the parties to the marriage as well as that of the parents especially that of the woman. In Nigeria, no matter how old a lady may be, she needs the consent of her parents or guardian before a customary marriage will take place. The absence of which will render the marriage void. What the above means is that her right of choice of a spouse is limited by her parents’ consent. If and when they refuse consent, she cannot exercise the rights, meaning that her own consents which is an expression of her rights with that of her person is immaterial.
- (b) **Age of marriage** – Today, it is internationally recognized that one must attain the age of marriage before he / she marries. Infact, the Child Rights Act has put it for Eighteen (18) years which if not complied with may make a marriage invalid. Unfortunately, under most Nigerian customary laws of marriage, it is not the case. Most Nigerian customary laws allows for 12 years, 13 years and 14 years for the girl child to get married.<sup>8</sup> This age which is below the acceptable one does not accord the freedom of choice for the lady because at this age she does not know much to have the right choice.
- (c) **Inheritance** – In most customary laws in Nigeria men may have the right to inherit their wives, but the corresponding right on that part of the women to do so is not there. Among the Igede people<sup>9</sup> the husband in conjunction with his children (male especially may inherit some of the property of his deceased wife, but that right is not available to the woman in the property of her deceased husband. This ‘no right of a woman to inherit her deceased husband’s property’ practice is also among the Ibos and other ethnic groups in Nigeria. The question is this, if there is a right or a little one to inherit, why discriminate against the wife?
- (d) **Genital Mutilation**- Despite the worldwide campaign against women genital mutilation, the practice is prevalent in some parts of Nigeria. Among the Urhobos<sup>10</sup> before a lady gets married or when she is about to give birth she is circumcised. This does not necessarily demands her consent but for the purpose of traditions. In Igedeland a girl child who is attaining the age of puberty is circumcised. Also this is not necessarily because she consents but to fulfill the traditional rights. The above scenario has completely deprived the human rights of the individual to say no to such obnoxious practice
- (e) Others are: one, the rights of a woman under the customary law marriage to bring an action for dissolution of marriage in a case where her husband commits adultery. She has no corresponding rights unlike her husband. Another one is that of sexual intercourse. Under the customary law, the husband has the rights to demand for sexual intercourse with his wife or wives but the wife has no such right. In fact in a polygamous home, such wife has to wait for her turn no matter how long.

<sup>6</sup> The inclusion of ‘other status’ in this provisions expressly or impliedly provides the rights of all categories of people, regardless of states or disability.

<sup>7</sup>See Sections 17(a) & (2) and Section 42 of the 1999, Nigerian Constitution.

<sup>8</sup> See Idomas, Borgus and Bius respectively.

<sup>9</sup>Igedes are a minority ethnic group found in Benue and Cross River States of Nigeria. In Benue they are found in Oju and Obi Local Government Areas while in Cross River State, they are found in Yala Local Government Area

<sup>10</sup>Urhobos are a people in Delta State of Nigeria.

## 4. The Practice in other Jurisdictions

Customary law, as the living law of every land and of the people is not static. It changes with times. This means that some rules which have failed and cannot survive the test of time have to be discarded and possibly replaced.<sup>11</sup>

Because of the adoption of the provisions of international and domestic human rights instruments, many countries have adjusted their human rights practices. Even customary law and traditional practices in some of these countries have started to adjust to the changing times and modern day realities.

In South Africa for example, recent case law reviews indicate an evolving new order and judicial thinking. In the South Africa case of *Mabuza v. Mbatha*<sup>12</sup> the Si Siwati-custom of Ukumezoka has now evolved and is practiced differently. The custom involved the process of formal integration of the bride into the family of the bridegroom, as one of the those requirements for a valid customary law marriage. The court held that the former approach, which recognized African law only to the extent that it is not repugnant to the principles of natural justice and public policy is flawed and unconstitutional. The court said that;... Evolution of African customary law has evolved and is always flexible. It is inconceivable that Ukumekeza has not evolved and that it cannot be waived by the agreement of the parties or families'

Again in South Africa case of *Mabena v. Letsaalo*<sup>13</sup> the long standing custom that an adult male should require the consents of his parents to marry was challenged. The court held that there is no reason why an independent adult male should require the consent of his parents in order to marry or should not he negotiate for payments of the lobola. Accordingly, if the father of the male is not involved in jobola agreements, consent of the male himself and the female's guardian are enough requirements. The court further held that it may traditionally not be possible for the mother of bride to be her daughter's guardian. However, in practice it is not repugnant to customary law of the marriage for a mother, who is the head of the family to negotiate for and receive Lobola. The court said such principle is recognized as valid.

**The New Social Order and Legal Thinking** – On account of the historical background already established in terms of guaranteeing to everybody fundamental rights including the right to equality and non-discrimination, regardless of race, social origin, status, disability, ethnicity, etc, a new wave of social order and legal thinking has emerged with irreversible precedents already set with regards to the protection, fulfillment and enforcement of the fundamental rights of various vulnerable group, including women and children.

Starting from the UN Charter of 1945, followed by the Universal Declaration of Human Rights 1948, and the International Covenant on Civil and Political Rights (ICCPR) 1960 and the International Covenant on Social, Economic and Cultural Rights (ICESCR) 1966 and other international human rights instrument one thread and trend of thought that emphasizes equality and non-discrimination regardless of any condition or disability runs through. The same thread and trend of thought ran through the thinking of natural rights theorists, like Montesquieu, Immanuel Kant, John Locke and others who argued that individuals are endowed by nature with certain claims and rights, among which include the rights to life, liberty, freedom and equality. It is the same thread and trend of thought that ran through the 18<sup>th</sup> century and early 19<sup>th</sup> century struggle against political absolutism that culminated in the enactment of the Magna Carta of 1215 and the Bill of Rights 1688. That same thread and trend of thought was embedded within the wave of revolutionary activities that swift through America and France, resulting in the American Declaration of Independence in 1776 and the French Declaration of the Rights of a man and citizen of 1789.

The same thread and trend of thought energized women's demand for rights for equality and non-discrimination, and of which children have also become generous beneficiaries of rights.

## 5. Conclusion

One cannot outrightly conclude that in Nigeria, there is no human rights of women under the customary law marriage, this is going by the fact that there are situations where women also have the rights such as divorce (a woman can divorce). Also among the Efiks<sup>14</sup> a woman has a right to inherit her parent's property whether landed or otherwise, etc.

But while not much appears to have been done to reduce gender inequalities in the area of customary marriage, the South African experience is different. Though it remains to be seen if the impact of legislations and policies that protect women and the most vulnerable in the society have actually yielded fruitful dividends. South Africa must be commended for actually affecting and putting certain legislations in place to address matters of gender imbalance. In doing so, cognizance have been taken of the forceful and persuasive effects of international and domestic human rights instruments. The Recognition of the Customary Marriages Act No. 120 of 1988, the Domestic Violence Act No 116 of 1998, and the Prevention of Family Violence Act No. 133 of 1993 have some noble legislative hallmarks that are designed to address the rights of women, protect them and other vulnerable victims in the society and resolve issues of gender inequality and discrimination.

In Nigeria, there are moves to bring this type of situation home. This is possible seeing the Cross River State Age of Customary Marriage Law 1981 which says: "A marriage or promise or offer of marriage between or in respect of persons either of whom is under the age of sixteen shall be void". This means that instead of women

<sup>11</sup>The barbaric customary act of killing of twins and their mothers in the olden days.

<sup>12</sup> 2003(4) SA 218(c)

<sup>13</sup> 1998 (2) S.A 1068 (T)

<sup>14</sup>The Efiksare tribe in Cross River State, Nigeria.

marrying, early as it is practiced in some places in Nigeria at least the sixteen years as put by the Cross River State government has come to save the situation of one not attaining the age of marriage for the women. Nigeria practicing this and imbibe the practice in South Africa can help assuaging the rights of women under the customary law marriage.

## References

- (Anonymous, 1971; (2) S.A 1068 (T), 1998; (4) SA 218(c), 2003; Act; Article 1 UN Charter 1945; Igedes are a minority ethnic group found in Benue and Cross River States of Nigeria; See Sections 17(a) & (2) and Section 42 of the 1999; See Idomas; The barbaric customary act of killing of twins and their mothers in the olden days; The Efiksare tribe in Cross River State Nigeria; The inclusion of 'other status' in this provisions expressly on impliedly provides the rights of all categories of people; The Islamic customary marriage allows a man to marry four wives at a time if he desires; Urhobos are a people in Delta State of Nigeria).
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- (4) SA 218(c) (2003).
- Act, L. P. S. a. S. o. t. I.: 186.
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- See Idomas, B. a. B. r.
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