VOLUNTARIETY IN THE CONTRACT OF MARRIAGE AND THE CHALLENGE OF DURESS*

Abstract
For any human project including marriage, to be of value, it ought to proceed from the voluntary dispositions of the free subject. This means that for any act to be properly a human undertaking, it must have been done with concrete awareness, willingness and deliberate consent of those involved. Predicated on this proposition, the Christian-Canonical Jurisprudence which informed the dictum of Lord Penzance in the celebrated case of Hyde v Hyde, made voluntariness of the parties to marriage a sine qua non to any valid celebration. But in the ancient and modern times, the issue of 'duress' has always operated to destroy the element of voluntariety in marriage. Whenever this happens, the consequence by law and policy is nullity. Using the doctrinal method of inquiry, this paper is structured to examine the concepts of voluntariety and 'duress' as they affect the marriage contract. It finds that despite the trite positions of the laws on this, people in their increasing numbers still enter into marriage under duress activated by different persons and under various situations. The instant paper recommends more than else a Christian pastoral engagement of the problem, through value driven pastoral orientations, and robust enforcement of available legal provisions against the operation of duress for marriages across all jurisdictions.

Keywords: Voluntareity, Duress, Contract of Marriage, Consent

1. Introduction

Marriage is a universal institution which is recognized and respected all over the world. It is usually governed by the social and religious norms of the society. Essentially, 'marriage, as it were, is about the union of a man and a woman for the purposes of living together in a community of love and having and rearing children.[1] According to Osborn's Concise Law Dictionary, the fundamental ethical component of the contract of marriage lies in its voluntariety. Hence, it is a 'voluntary union for life of one man and one woman to the exclusion of all others...'[2] it is this voluntariness which forms the bedrock of the contract of marriage, precisely as its formal cause, that is the victim of duress among other vitiating elements. Duress involves a coercion of the will or a situation in which one party has no realistic alternative but to submit to pressure. It invokes a sense of intimidation or illegitimate pressure against a party to the marriage.[3] In its operation, it compromises the entire idea of voluntariety, thus exposing the vulnerable party to exploitation during the life of 'the marriage'. It often comes by way of external pressures or emotional coercion activated and sustained by either of the parties against the other, parental/family pressures, socio-cultural norms and expectations as well as economic susceptibilities. Note that of all the elements of the marriage contract outlined by Lord Penzance in his definition of marriage namely; voluntariety, monogamity, heterosexuality, indissolubility and exclusively,[4]only the element of voluntariety is universally accepted and defended. No known modern state, religion or culture espouses force/duress in the institution of marriage. It is one of the areas in which the principles of autonomy and self determination are critically needed so as to make the common life of two persons possible. For 'if both or all partners get to be in charge of their own lives, then you have a greater foundation for making room for each other and growing together'[5] In the progress of this paper, the relevance of voluntariness in human actions will be examined with particular emphasis on its consequences for the marriage contract. Furthermore, the vitiating element of duress and how it destroys voluntariety will be considered alongside some contentious issues surrounding the concept itself in global jurisdictions. The paper will end with few recommendations that will strengthen the institution of marriage against the vitiating 'assault' of duress and kindred forces.

2. The Question and Relevance of Voluntariness in Human Actions

Without doubt, human beings are not automatons; they are moral entities free from all forms of psychological determinations. Precisely as free moral agents, all human acts, *actus humanus*,[6] properly so called are voluntary acts, arising from an intellectual election of object and oriented towards an *entelechy* – end or purpose. This requires knowledge, awareness, willingness, considered decision and deliberated accent of the will. According to Dario Composta, what appears as moral in human acts is only that which is guided by intelligence and will, or, in other terms, by understanding and willing, or also by awareness and consent. Their flux constitutes the voluntary.[7] Inferentially, voluntary acts require the concomitant presence by B: knowledge (awareness of the goal) and A: interior

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[1] M. O. Izunwa, 'Statutory Marriage and Contemporally Challenges: A Contextual Re-reading of some Modern Options' [2010](1)(2) *Confluence Journal of Private and Property Law*, 75.

[2] S Bone (ed.), *Osborn's Concise Law Dictionary* (9th edn, London: Sweet and Maxwell, 2001) p. 246.

[3] Cf. *Ludmer v. Ludmer*, 2013 ONSC 784, [2013] O. J. No. 699.

[4] *Hyde v Hyde* (1861-1873) ALL ER 175.

[5] 'Its' Your Choice: Personal Autonomy in a Relationship' <https://genderminorities.com2021/03/11/autonomy-in-a-relationship/>accessed on 17/07/2023.

[6] Human act(s), are completely different from *Acts of Man,* which are – those gestures and actions performed by a person, but not in a specifically human way. Examples include crying in a dream or acting under the effect of drugs or hypnosis.

[7] D Composta, *Moral Philosophy and Social Ethics* (India: Bangalore Theological Publications, 1988) p.14.

or exterior action performed by a person. From the combination of 'A' and 'B' is obtained (+A) + (+B) = 'V', where 'V' represents a voluntary act.[8] As it were, 'in man the voluntary act is structured, therefore, into different moments which range from the original perception of the good to the enjoyment of the achieved end'.[9] It was left for Billuart, in the seventeenth century to sketch the various moments of the movement as follows:

1. Original apprehension of the good.	2. Simple inefficacious volition of the good.
3. Judgment on the possibility of the good.	4. Efficacious intention
5. Deliberation (*consilium*)	6. Consensus (consensus)
7. Election of the means through a judgment.	8. Practical election (*electio*)
9. Command of reason (*imperium*).	11. Fruition of the good.

This principle of voluntariety in the proper human actions is the centre of criminal jurisprudence in almost all jurisdictions. It requires that to be guilty and convicted as such, it must be demonstrated beyond reasonable doubt that the accused over and above doing the act or omitting to do the act (*actus reus*) constituting the offence so charged, must also have the intention/intent to commit the offence. The doctrine of *mense rea* in criminal law is the legal equivalent of voluntariety in ethics. Hence, 'in order to be guilty, the criminal must have committed the act in a culpable mental state'.[10] Culpability, in this sense, reflects voluntariety. Accordingly, all things being equal, it is morally wrong to punish a person for an act done to society innocently and unwittingly.[11]

Yet another area of law where voluntary assent of a person remains a sine-qua-non is in contractual transactions. It is for this reason that contracts are treated as forms of voluntary arrangements which need to be protected by law.[12] And for any contractual relation to be enforceable, the parties' intention to be bound must be ascertained and established.[13] In this understanding, for a contract to exist parties must voluntarily enter into it, they must agree to the same thing, in the sense that, there must be a meeting of their minds to the same thing. This meeting of minds is what is called *Consensus ad idem* and that is precisely the basis of contractual obligation.[14] It involves the apparent meeting of minds of the parties, and an apparent union of their wills. Thus, there must be two (or more) assenting minds, and the parties agreeing in opinion.[15] Even in religious categories and meanings, nobody is reckoned as having committed sin except when the person has voluntarily acted or omitted to act in respect of the object or the matter constituting the sin. As a matter of fact, for any sin to crystallize there must be knowledge and freedom of action. This knowledge and freedom taken together comprises voluntariety. More or less, voluntariety is directly proportional to the degree of personal involvement in the sin. Hence:

> It is not the gravity of the matter that makes a sin mortal, but rather the degree of personal involvement in the decision to act. And it is not the lightness of the matter that makes a sin venial, but rather the absence of such involvement. One is either involved in the decision in fact, or one is not.[16]

The clear implication of the above position is that to constitute sin, one should have full awareness regarding the seriousness of the law. This requires that the mind shall know what the will does.[17] Hence, the element of full understanding remains a necessary concomitant to achieve voluntariety.
For an act to be adjudged voluntary, the subject acting or omitting to act must do so in complete freedom of the will. Thus 'an essential condition of moral action is freedom of will. Without, at least, a minimum of freedom of decision, no moral act is possible'.[18] Alexander Willwoll, emphasizing the jurisprudence of free will and its relationship to responsible actions observes as follows:

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[8] Other possible outcomes of some combination are: (-A) + (-B) = Violent Act; (+A) + (-B) = Spontaneous Action and (-A) + (+B) = Speculative thought (outside the moral order).
[9] D Composta, *op cit*, p.19.
[10] IKE Oraegbunam & RO Onunkwo, '*Mens Rea* Principle and Criminal Jurisprudence in Nigeria' (2011) Vol 2 *Journal of International Law and Jurisprudence*, p.251
[11] '*Mens Rea'* <http://www.mojolaw.com/info/clo45> accessed on 27th September 2012; see also C Elliot, and F Quinn, *Criminal Law (3rd* edn, Harlow: Pearson Education Limited, 2000) pp.12-27.
[12] H J Berman and WR Greiner, *The Nature and Functions of Law* (3rd edn, New York: The Foundation Press INC, 1972) p.548.
[13] *Balfour v Balfour* (1919) 2 KB 571.
[14] BA Garner (eds.) *Black's Law Dictionary* (9th edn,Minessota, West Publishing Co., 2009) p.346
[15] *Tinn v Hofmann* (1873) LT 271; *Green Fingers Agro-Industrial Enterprises Ltd v Yusufu* (2003) 25 WRN 67; see also IE Sagay, *Nigerian Law of Contract* (2nd edn, Ibadan: Spectrum Law Publishing, 1993) p.36
[16] TE O'Connell, *Principles for a Catholic Morality,* (Revised edn, New York: HarperCollins Publishers, 1990) p.100.
[17] The kind of knowledge required to constitute sin is called evaluative knowledge which involves a critical reflective judgment about the values involved in a thing. It is concrete knowledge. To know evaluatively, one stands before a particular thing, a particular experience and interacts with it, finds it to be good or bad, beautiful or ugly and appreciates it, understand it. Evaluative knowledge is deeply personal.
[18] KH Peschke, *Christian Ethics: Moral Theology in the Light of Vatican II,* (Bangalore: Theological Publications, 1999) p. 232.

> The fact of free will becomes clearer when it is considered in relation to the ethical activities of persons. Without free will and therefore without the possibility to will this or that, clearly a man cannot be held any more responsible for his willed actions, he is no more worthy of praise or blame than a sick man is for his sickness. Consequently, the moral goodness or wickedness of an act of the will could not meaningfully be separated from sheer utility…if free will is abandoned then the moral dignity of the person must also be renounced; this would be equivalent to saying that there is no sense whatsoever to human existence.[19]

Hence, voluntariety evokes responsibility. No one is responsible for an act or omission which is not voluntary.[20]This is because voluntary actions or inactions are innate marks of man's unique sense of self, of truth, of achievement and responsibility.[21] The concept of responsibility for actions performed or not performed 'is fundamental to any system of ethics, because claiming that people ought to take certain actions presupposes a choice which determines the action taken and for which the individual is responsible'[22] What is more, is that the possibility of choice, freedom to act otherwise, is a specie of voluntary actions and an integral part of moral responsibility, since it involves the distinctive human capacity to deliberate. The substance of the argument is that:

> …moral responsibility would arise from the necessity of deliberation in order to achieve happiness (which is the end of all humans), and so praise of blame would primarily be bestowed upon the act of proper deliberation or careless deliberation (or no deliberation at all). Because this deliberation gives rise to choice, and because choice over the long run forms states of character, humans are morally responsible for both their choices and their states of character.[23]

But it is generally agreed 'that a person who has been coerced to do something did not do it freely and is not morally responsible for having done it'.[24] The phrase 'the agent is responsible for an action' is actually the translation of the Greek expression 'the agent is the cause of an action'. Impliedly, if it can be demonstrated that a person – the agent – is in some sense the cause of an action, by the principle of logical equivalence, we can equally hold without error that such an agent is in some sense responsible for the action he is said to have caused. In a summary, Aristotle offers some guidelines as the conditions for moral responsibility viz: (i) the agent must act in full awareness of what he is doing. (ii) He must will his actions, and will it for its own sake. (iii) The act must proceed from a fixed and unchangeable disposition.[25]

It suffices to underscore in agreement with Aristotle that a person is the originating cause of his or her moral actions. The word 'moral' as used in this context implies 'voluntary and free action'. Thus, concerning all actions of which a man is the first principle, which depends on him to happen or not to happen, the praiseworthiness and blameworthiness of all such actions also depend on him. Hence, he is responsible.[26] According to Aristotle, 'we ascribe responsibility to an agent when his action is performed voluntarily'[27] Without responsibility by the agent, all judgment, as to the rightness or wrongness of an act or omission loses meaning since there is no conscious and deliberate relationship between the subject of the act or omission and the object. Indeed, without responsibility there cannot be any form of value judgment. A person who acted based upon his previous decision is responsible not only for having performed the action, but also for having performed the kind of action performed. This is because the person made the decision to perform based on his existing disposition of which he is also responsible for.[28]

3. Marriage as a Voluntary Union: Legal Emphasis and Constraints

Voluntariety implies and involves free consent. And in Scholastic categories 'consent results from the combined actions of the cognitive, deliberative or critical, and volitional faculties.'[29] Yet, these faculties cannot act in isolation

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[19] A Willwoll 'Free will' in K Baker (ed.), *Philosophical Dictionary* (Washington: Gonzaga University Press, 1972) p.149

[20]Actions are not considered voluntary, then, if (1) they are done in ignorance; (2) or they are not done in ignorance, but they are not free to the agent; (3) or they are done by force. For we also do or undergo many of our natural actions and processes such as growing old and dying, in knowledge, but none of them is either voluntary or involuntary. See Aristotle, *Nichomachean Ethics*, N. E., 1135a31-b2.

[21] MP Cosgrove, *The Essence of Human Nature* (Grand Rapids: Zondervan, 1977) p.38.

[22]DM Hsieh 'Aristotle on Moral Responsibility' <http://www.enlightenment.supersaturated.com/essays/text/dianamertzhsieh/aristotleresponsibility.html >accessed on 1st October 2012.

[23] *Ibid*

[24]H Frankfurt, 'Alternate Possibilities and Moral Responsibility' in J Feinberg and R Shafer-landu (eds.), *Reason and Responsibility: Readings in Some Basic Problems of Philosophy* (Belmont: Wadsworth Publishing Company, 1999) p.460

[25] Aristotle, *The Nichomachean Ethics*, Bk 2, ch 4.

[26] Aristotle, *The Eudemonian Ethics*, Bk. 2. Ch 6:9-10.

[27]LLG Espindola, 'Voluntary Action and Responsibility in Aristotle <http://www.philosophy.ox.ac.uk/__data/assets/pdf_file/0017/1907/Gomez_-_Aristotle.pdf >accessed on 17th of September 2014

[28] *Ibid*

[29] JA Coriden et el. (eds.), *The Code of Canon Law: A Text and Commentary* (London: Geoffrey Chapman, 1999)p.774

of one another. If they do, the act of matrimonial consent is not simply an act of the person. Since in the nature of man, an action or inaction has value or dignity to the extent it is voluntary, all serious human engagements ought therefore to be done voluntarily to be relevant. And one seldom finds a human commitment which is more serious in fact than the whole issue of marriage contract. Little wonder Fearon observed that:

> Marriage is more than a personal relation between a man and a woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state. Marriage, as creating the most important relation in life, [has] more to do with the morals and civilization of a people than any other institution….[30]

Marriage is much more than a contract, in the words of Brodie 'the contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society'.[31] Therefore, it goes without saying that marriage commitment must be made with the fullest sense of consciousness, awareness, understanding, reason, deliberation, and free consent. Under the Common law and in line with the Nigeria Marriage Act, 'Marriage is a contract[32] which must be entered into freely. Both intending spouses must be capable of making the decision to get married. A marriage can be annulled or be void if consent is not given by the two individuals who entered into marriage.'[33] As a matter of fact:

> Marriage is a public act which must be between two consenting adults. It is an act that should not be entered into lightly as the duties and rights of marriage have consequences not only for the marrying couple but their families, friends and the society at large.

The laws are mindful of the fact that marriage enjoys the loftiest engagement of man and society for which it must be engaged with the greatest sobriety. *In Loving v Virginia*[34], the Supreme Court of the United States rightly held that 'Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.'

Perhaps in consideration of the importance of Marriage to human life and society, Lord Penzance in his definition of marriage in the case of *Hyde v Hyde*[35], made consent or voluntariety the first and quintessential element for any valid celebration of marriage**.** Thus, between any two parties intending or desirous to marry, the formal cause must be a voluntary desire of each other. In essence, the consent to marry as it applies to each and every one of the parties must be free from all forms of coercion internal or external. It was left for the Nigeria Matrimonial Causes Act[36]of 1970, to provide for the various factors that are capable of destroying and/or affecting free and voluntary consent to marry.[37] These include that the marriage was obtained by duress or by fraud; or that one party to the marriage is mistaken as to the identity of the other or as to the nature of the ceremony performed; or that any of the parties is mentally incapable of understanding the nature of the marriage contract. It is the position of the law that where any of the above mentioned factors exist and/or prevail, the consent given to such marriage is not real and therefore cannot sustain or support a valid marriage contract. In other words, the marriage is *ipso facto* void.[38]

However, The Matrimonial Causes Act in Section 5 (1) (b) (i) – (iii) provides for other factors which affect real consent and which shall have the effect of rendering a validly celebrated marriage voidable. The factors so provided include the situations where either of the parties to the marriage is of unsound mind or is mentally defective or is subject to recurrent attacks of insanity or epilepsy. And for avoidance of doubt the Act provides that:

> 'mentally defective', means a person who, owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight, care

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[30] *Maynard v Hill* 125 US 190,

[31]JF Brodie 'Actions for Breach of Promise to Marry' (1852-1891) Vol 20 No 2 The American Law Register 65 <http://www.jstor.org/stable/pdfplus/3303899.pdf?acceptTC=true&jpdConfirm=true> accessed on 14th September 2014

[32]Marriage is considered a civil contract, but of a peculiar character and subject to peculiar principles. It certainly does differ from ordinary common law contracts, by reason of its subjet-matter and of the supervision which the state exercises over the marriage relation which the contract institutes'. See <http//www.duhaime.org/Legal Dictionary/M/Marriage.aspx> accessed on 1st October 2012.

[33]TO Glasgow, 'the importance of consent' <http://www.thevoiceslu.com/features/2009/april/11_04_09/The_importance_of_consent.htm> accessed on 17th September 2014

[34] 338 US 1 (1967)

[35] (1866) LR1P&D 130

[36] Section 3(1) (d) (i) – (iii)]

[37]The Marriage Act was completely silent on the issue of the consent of the parties. This gap was filled by the Matrimonial Causes Act of 1970 which provides for the real consent of the parties, that is, consent obtained without duress or fraud cf. MCA (1970) S.3(i) (d) (i)

[38]A void marriage is one which has no legal effects. Everything done to establish such a marriage relation is as it were a nullity. This is quite different from a voidable marriage which remains valid until annulled, that is, a valid act that can be voided. cf. S Bone (ed.), *Osborn's Concise Law Dictionary*, (9th edn, London: Sweet and Maxwell, 2001) p.402; Garner, *ibid*, 1709.

> or control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage.[39]

Nwogugu observes, with great approval, that it is a cardinal principle of our law that the parties to a marriage must have freely consented to the union. Incisively, he noted that complete absence of consent will invalidate the marriage and therefore does not raise many difficulties to the Courts. But in those common cases where there exists an apparent consent, that is, where a party, under some prevailing circumstances does not give his true or real consent or have his consent negatived by some factors the courts have been called to more critical commitment.[40] The courts have indeed held in a plethora of cases that the absence of a genuine consent will vitiate marriage[41]. All such decisions are on all fours with the vision of the Universal Declaration of Human Rights, where it states that 'marriage shall be entered into with the free and full consent of the intending spouses'.[42] Interestingly, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, has a more serious but similar provision to the effect that:

> No marriage shall be legally entered into without the full and real consent of both parties, such consent to be expressed by the person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.[43]

In what follows, the element of duress as an impediment to voluntariety is taken up and discussed.

4. The Operation of Duress and Its Consequences for Marriage Contract

In the will lies the power to determine actions according to the voluntary options of the free subject. Duress occasions when the will, precisely as the elective and executory chamber of the rational subject is overpowered. Actual beating, threat and perhaps imprisonment of a would be spouse in order to achieve consent constitutes duress.[44] Put a little differently, duress means fear which is so over bearing that the element of free consent is absent. Of great relevance is the English Case of *Szechter v Szechter*,[45]where Sir Jocelyn Simon summarized the law on duress in a statement unanimously approved in *Singh v Singh*[46], as follows: **'**It must…be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party himself is not responsible), to life, limb, or liberty, so that the constraint destroys the reality of consent'.

In the case of *Parojcic v Parojcic*[47] a daughter who had just contrived to leave Yugoslavia and reach England was threatened by her father on arrival that unless she married the man who accompanied him, whom she had never met before, she would be sent back to Yugoslavia**.** In the instant case, the court found the prevalence of the element of duress and granted decree of nullity.

Note that what constitutes duress varies according to circumstances of each case but depends to a large extent on how far the volitional capacity and freedom has been overpowered. Thus, marriage contrived to escape from totalitarian regime amount to duress[48]; that celebrated under threat of being killed is also void on account of duress.[49] What is more, marriage which is entered into under threat of being made bankrupt and being shot was voided for duress.[50] It is therefore trite that for a plea of duress to succeed, there has to be an evidence of fear otherwise the action fails. Hence in *Singh v Singh*[51], a marriage arranged by the parents of two Sikhs was held to be voluntary. The court found that though the petitioner had never for once cast his sight on the would be husband prior to the marriage day, and as a matter of fact, went through the marriage for respect of the tradition of her people, fear was not implied. In effect the court reasoned that mere respect for parents is positive and normal and does not translate into duress for the purpose of nullity.[52] Contrast the above with the fact of *Hirani v Hirani*[53], where the parents of a Hindu girl, opposed her relationship with a Hindu boy and went further to arrange a marriage with a Hindu man. When the girl resisted, the

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[39] Matrimonial Causes Act (MCA) See.5(2)

[40] EI Nwogugu, *Family Law in Nigeria* (Revised edn, Ibadan: Heinemann Educational Books, 1974) p.136

[41] *Osamawonyi v Osamawonyi* (1972) 10 Sc 1

[42] Article 16 (1)

[43]1994, Article 1 (1); See also, Protocol to The African Charter on Human And Peoples' Right On the Rights of Women in Africa, Article 6 (a) and the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1905), Principle 1 (a).

[44] *Buckland v Buckland* (1967) 3 All ER. 300.

[45] (1971) 2 WLR 170; (1970) 3 ALL ER 905

[46] (1971) 2 WLR 963; (1971) 2 ALL ER 828

[47] (1958)1 WLR 1280; (1959) 1 ALL ER 1

[48] *H v H* (1953) 2 ALL ER 1229.

[49] *Hussein v Hussein* (1938) 2 ALL ER 344.

[50] *Scott v Sebright* (1886) 12 PD 21

[51] *Supra*

[52]Similarly, in the absence of fear or coercion, a mere ulterior motive is not enough. In the case of *Silver v Silver* (1955) 2 ALL ER 614, a German girl married an Englishman in order to come to England to live with another Englishman, no duress was implicated, but fraud may crystallize.

[53] (1982) 4 FLR 232.

parents threatened to withdraw all support from her and to oust her from the family. The girl was only 19years old then and cannot support herself nor sustain a house rent. The court found duress and held that it was not necessary, literally, to find a threat to life, limb or liberty in order to occasion duress capable of grounding nullity. It is enough that the threat was substantial to the extent that the victim acted by it. This is a better reasoning. Indeed, concerning the measure or degree of threat sufficient to ground nullity, Dodss citing Ormrod LJ observed that 'the crucial question…is whether the threat, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual.[54]

The elements of responsibility for and/or instrumentality to the situation giving rise to the use of threat; on the one hand, and the element of fear reasonably entertained by one of the parties perhaps the petitioner on the other hand, have been hotly contested in respect of the grant of the decree of nullity. Indeed, legal pundits have bordered themselves with the question of party's responsibility for the threat given, which affected consent. Hence in Buckland's Case,[55] the court reasoned that the decree would not have been granted had the petitioner been found guilty of offence alleged. Similarly, in *Griffith v Griffith*[56] where a man was forced to marry a girl under the false threat of prosecution for unlawful sexual intercourse with the said girl who is under 17-years of age, the court suggested 'that the approach should be whether the fear was justly imposed.' As it were, if the fear is justly imposed the marriage is valid and binding otherwise it is not. Fear could not be justly imposed if the party was not responsible for it.[57] In the instant case, the court declared the marriage void.

5. A Moral Response to the 'Reasonings' in 'Buckland's and Griffith's' Case

But with due respect, this paper argues that it is a bad law, proceeding from an improper jurisprudence to hold a marriage valid which was entered into in fear, just for the reason that the party is responsible for the fear. Granted that a person cannot be allowed to benefit from his fraud or crime, the institution of marriage affecting not only the 'responsible' party but also the other innocent party as well as the state should be secured from the inconvenience of this rule. To hold such a marriage valid is a mere technical extension of the rule of criminal law that one cannot allege compulsion when he/or she is responsible for or instrumental to the same. This paper considers such an extension of criminal law principle to the field of marriage as the most unconsidered extrapolation ever conceived in law. Fear or duress, irrespective of whether the petitioner or any of the parties to the marriage is responsible for it or not, vitiates voluntary action of a free moral agent, a quality of action quintessential to human act and more so, to marriage. The proper question to be asked at all times and without more is whether the parties to a marriage freely desires and consented to marry each other. To raise the question of 'responsibility for the threat' occasioning the diriment fear is a hermeneutical challenge to and /or outright summersault of the spirit of the definition of marriage by Lord Penzance. It is also a moral absurdity.

Another contentious issue in duress is as to whether the fear, occasioning duress and overpowering the will must have been reasonably entertained or not. On this, there has been conflicting dicta: *Scott v Sebright*[58] supports a subjective approach which considers the fear entertained from the perspective of the person involved as opposed to the standpoint of a reasonable man in the circumstances. On the other hand, Buckland's case[59] and Szechter's[60] case favor an objective approach which considers the fear entertained from the view point of a reasonable man. The latter position, with due respect is wrong in the opinion of this work. Although the objective approach of reasonableness has been made applicable and exalted to the point of being a rule in all legal transactions and issues, marriage for all intents and purposes transcends the considerations of logic and the technicalities of formal standards precisely because it deals with life partnership in love. Law must not pretend insensitivity when a love relationship meant for life is in issue. The language and grammar of love is fraught and understood in the intersubjectivity of persons than in the hard categories of contract *simpliciter*. It is a mark of a good jurisprudence to take 'judicial' notice of this fact of life. Here Natural Law School of jurisprudence will operate to direct all decisions or legislations. In effect, once a party to a marriage is caused to enter into that marriage by reason of fear occasioned by duress, it is immaterial that a man of ordinary courage could not be so moved or fettered.[61] The proper question to ask is whether the party was in fact actually caused to move into the said marriage by fear. If the answer is in the affirmative, the marriage is a subject matter for the declaration of nullity. Robert Brown in his renowned article 'Duress and Fraud as Grounds for the Annulment of Marriage,' observes as follows:

> … the weight of modern authority is probably to the contrary, holding that if there were coercion in fact the marriage should be dissolved, even though a more determined person would have been able to resist such pressure…the marriage resulting from undoubted coercion is just as intolerable to the

[54] M Dodds, *Family Law* (4th edn, London: Old Bailey Press, 2003) p. 26.
[55] *Supra*
[56] (1944) IR 35
[57] Dodds, *op cit*, p26
[58] *Supra*
[59] *Supra*
[60] *Supra*
[61] *Marre v Marre*, 184 Mo. App.198, 168 s. W. 636 (1914); See also *Doscher v Schroder*, 105 NJ. eq. 315, 147 Atl.781 (1929)

> victim as one resulting from sufficient duress to overcome a person of ordinary firmness would be to that kind of a victim. Furthermore, duress is a voluntary act, and it may reasonably be supposed that the person exerting it knows about and relies on the lack of firmness of his victim. An objective standard of duress unjustifiably permits such advantage to be taken.[62]

Butt J, stated the principle clearer in *Scott v Sebright*[63] when he observed that:

> whenever from natural weakness of intellect or from fear whether reasonably entertained or not – either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.

In *Ayiegbusi v Ayiegbusi,* a Nigerian Case[64], the father of the petitioner threatened to curse her if she refused to marry the respondent. While the promise of a curse may not mean much for some persons, in the African Igbo setting, it is of very high consequence, particularly, for a girl who is looking toward bearing children. Even where some African-Igbo girls will be undaunted by threat of curse, this particular girl was emasculated with fear and that subjective fear was sufficient for the petition to succeed.

6. Addressing the Prevalence of Duress in Contemporary Marriage Contracts

Addressing the prevalence of duress in contemporary marriages is of utmost importance and critical for ensuring liberty of contract with such extent of freedom characteristic of moral subjects. Considering the enormity of harm arising from marriages induced by duress, and further recognizing the pervasiveness of such cases, it is of high-priority that laws, policies and practices across jurisdictions rise to the occasion. In this way, individuals will be enabled to make personal marriage decisions devoid of undue pressure. According to Hannah Wu of the United Nations Human Rights Commission:

> Ending forced marriage requires strengthened and concerted efforts in all contexts, following a collaborative approach, as we can only make a difference together. We must address this issue in partnership involving all stakeholders at community, national, regional and global levels, in both peace and conflict situations. Above all, we need to work with girls and women.[65]

In line with the above reasoning, it is recommended that states should take the following into account as fitting responses to the challenging situation: Targeted awareness education campaigns; legislating, strengthening and enforcing uniform consent age in respect of marriage; Introduction of sufficient waiting periods before celebration of marriage; Integral pre-marital marriage counseling and classes; Criminalization of forced marriages and prosecution of offenders; Compulsory pre-nuptial agreements; Mandatory reporting of incidences of forced marriages; Strengthening legal protection of vulnerable persons; Sensitivity to differential cultural norms; Activating channels of International Cooperation; Mobilization of NGO's and CSO's; and Partnering with the Churches.

According to Nelson Mandela, education remains 'the most powerful weapon which can be used to incident change' and for Epictetus, the philosopher 'only the educated are free.[66] In the light of the above, it is a 'moral imperative' that states should embark on purposive educational campaigns that will facilitate people's awareness of the presence and consequences of duress in marriages, that fall victim, as well as steps to take to avert such difficult situations. Such campaigns should be, especially, targeted at places and 'spaces' where young persons are commonly reached namely; schools, community and commercial centres, mass media channels and social media halls/platforms, to mention a few. Of note is that there is no minimum acceptable age of marriage applicable to all the countries of the world. The age of consent ranges from as low as 11 to as high as 20 years old as is applicable in Nepal.[67] Some Countries have laws that allow marriage below the age of 18 often with parental or judicial consent, while others have lower age limits or no specific minimum age at all.[68] In Nigeria for instance, the laws are not settled as to what constitutes the marriageable age.[69] It is recommended that the minimum of 18 years prescribed by the United Nations Convention on the Rights of

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[62]RC Brown, 'Duress and Fraud as Grounds for Annulment of Marriage' (1935) Vol 10 Issue 9 Article 1 Indiana Law Journal 475 <htpp://www.Repository.Law.Indiana.edu/ilj/Vol10/Iss9/1> accessed on 17th of September 2014

[63] *Supra.*

[64] Unreported decision with Suit No.//238171 delivered on 29th April 1974 High Court of Western States, Ibadan Judicial Division, *per* Odulami

[65] Hannah Wu 'Forced Marriage a Violation of Human Rights' <https://www.ohehr.org/en/stories/2023/01/forced-marriage-violation-human-rights> accessed on 28/7/2023.

[66] Cf. '50 Powerful Education Quotes for Kids' <https://www.splashlearn.com/blog/powerful-education-quotes-for-kids-to-realise-the-importance-of-learning/> accessed on 28/7/2023.

[67] Nigeria Age of Consent and Statutory Rape Laws <https://www.ageofconsent.net/world/nigeria> accessed on 7/7/2023.

[68] Angola allows with parental consent while Central African Republic allows with judicial consent but a place like Gambia has no minimum age of marriage.

[69] There exists a disparity among the Matrimonial Causes Act (1970), the applicable common law and the Marriage Act (1914).

the Child[70]be adopted across all jurisdictions. States should endeavour to ensure that the provision is strengthened by applicable policies, so that, parties to marriages can have the capacity to make informed decisions about marriage by reason of maturity of age. In that vein, States should require marriage registrars and officials in licensed places of marriage to verify and ascertain that all claimed consents are freely given before the celebration of any marriage.
Also, given that there are countries or states that do not have elaborate process for pre-marriage bans and publications, it is recommended that a mandatory waiting period be introduced between the application for marriage and the actual celebration of same. This avails the couples some time to think issues out and ensure that they are not under any pressure at all. For instance, in the United States of America, places like Alaska, Florida and Iowa, etc, have mandatory three-day waiting period.[71] Such time permits them to reflect on their decision and seek appropriate advice if need be.

It is also necessary that the laws of nations should provide for compulsory (mandatory) pre-marriage course/counseling and develop an integral and intensive content which is to be taught by experienced professionals. This is an area where the church and state can form a synergy since the churches are conversant with a similar practice. Such themes as psychology of relationships/marriage, communication skills, conflict resolution strategies and rights and obligations of parties within marriage are to be taught. The said course ought to highlight 'the core elements of relationships and concentrates on exploring these elements in the company of other couples preparing for marriage.'[72] It is to be designed in such a way as to assist couples invest in their relationship and 'build a strong marriage.'[73] The provisions of the Canon law of the Catholic Church on this issue and the pastoral practice in respect of same, remain exemplary.

Another step that could be useful is to have a legal but optional pre-nuptial agreement[74]entered into by parties before the ratification of their marriage. Copies of such agreements should be deposited with the marriage registry and/or with the Court. Promoting and enforcing the use of such pre-nuptial agreement, where it applies, will go a long way in ensuring that marriage decisions are made with full awareness and without duress or constraints arising from any quarters.

Criminalizing duress in the contract of marriage could be a good legislative approach. Stringent penalties should be provided by the legislature for act(s) of compelling another person(s) to marry particular person(s). This could serve as deterrence.[75] Already, forcing someone to enter into a marriage against that person's will is a criminal offence in Dutch law and in 2011 European Council Convention required all states parties to turn forced marriage into a criminal offense.[76] Under the International law, the Rome Statute[77]in its Article 7, has provided a prop for state parties to make specific laws criminalizing forced marriages.[78] A case is hereby made for the globalization of this legislative initiative. Undoubtedly, marriage entered into by duress is a human right violation and calls for activating the laws that protect persons against the violation of a cluster of rights; to dignity, life, health, liberty and discrimination. It further calls for context specific policies and stringent legal measures in the form of civil protection orders.[79] Hence, there is an urgent need to review and strengthen laws that protect persons from all forms of duress within marriage whether in the forms of emotional, financial or physical pressure. Closely connected with this recommendation is the need to make laws in respect of mandatory reporting of incidents of use of force to compel persons into unconsented marriages. Indeed, if

[70] This was adopted by the General Assembly of the United Nations in its resolution 44/25 of 20 November, 1989.
[71] Cf. Lyle Therese et al 'Marriage License Requirements' <https://www.findlaw.come/family/marriage/marriage-license-requirements.html#> accessed on 23/7/2023.
[72]'Catholic Marriage Courses: What to Expect' <https://www.accord.ie/news/marriage-preparation-courses-what-to-expect#> accessed on 20/7/2023.
[73] 'Try Marriage Course' <https://themarriagecourse.org/try/the-marriage.course#> accessed on 7/7/2023.
[74] A pre-nuptial agreement is a written contract created by two people before they get married. It lists all the property each person owns and debts too and spells out each person's property rights during the marriage and in the event of eventual divorce. Note that the Catholic Church holds prenuptial agreements unacceptable because it creates conditions that undermine legitimacy and indissolubility of the marriage before it even starts. Indeed, the use of prenuptial agreements do not fit into the Christian version of marriage but it does serve the Islamic understanding of marriage at least.
[75] Cf. Francis Nguyen 'Untangling Sex, Marriage, and other Criminalities in Forced Marriage' [2014] (6) *Goettingen Journal of International Law*, 1-45.
[76] 'The Criminalization of Forced Marriage under Dutch law and in Rome Statute' <https://www.cambridge.org/core/books/abs/force-marriage/criminalization-of-forced-marriage-under-dutch-law-and-in-the-rome-statute/> accessed on 25/07/2023.
[77] Rome Statute of International Criminal Court, Opened for signature, July 17, 1998. 2187 U. N T. S. 90-Entered into force, July 1, 2002.
[78] The Rome Statute does not criminalize forced marriage as a separate crime but bundles it together with what it calls 'other inhuman acts.'
[79] Cf. Lisa. V. Martin 'Restraining Forced Marriage' [2018] (18) *Nevada Law Journal*, 919-984.

by law, professionals as doctors, teachers, social workers and even the common citizens, are mandated to report suspected cases of use of force to induce marriage, then, appropriate authorities can intervene to provide assistance.[80]
It is also important that the legislature, the courts and the law enforcement agencies are prepared to have a kind of Cultural and Cross cultural competence. This will help them to develop such cultural awareness or sensitivity that makes them understand and accept other people's cultural identities.[81] In this way, they can penetrate, decode and so respond appropriately to cultural nuances and challenges relating to duress in specific communities.

Efforts need also to extend to the international frontiers for handling cross-border cases of forced marriages. For this reason, there is the need to set in motion some kind of international cooperation in the fight against duress in the contract of marriage. After all 'international law supports order… and the attainment of humanities' fundamental goals' of advancing peace, prosperity, human rights and dignity, both in marriages and other sectors of human endeavours.[82]

More still, Civil Society Organizations (CSO's) and Non Governmental Organizations (NGO's) contribute greatly to society's safety and progress. They both 'advocate for individual's human rights protection and safety.'[83] Yet the Church being the greatest expert in humanity, the moderator of the consciences of peoples', women and society at large, and having all that it takes to teach, convince, persuade and convert, will be kept at the centre of the struggle to recover the essence of marriage.[84]

7. Conclusion

This paper has argued that at the core of all contractual relations, marriage inclusive, the freedom of the parties involved is paramount**.** Once this freedom is choked, the nature of the transaction changes substantially not withstanding that the form of the contract, on the face of it, may appear regular. Marriage as it were is, *stricto sensu*, a contract subject to the common conditions of contracts in general. To remain an act of a free moral subject, it has to be a voluntary endeavour. Its voluntariety is disclosed in an unconditional and unfettered consent of parties to marry. Once this liberty of consent is compromised, no matter the degree, the essence of marriage in all its ramifications stand betrayed, and so, the conjugal union becomes dead on arrival. From the discourse pursued in the instant paper, it is shown that duress is a major challenge to matrimonial voluntariety. In whichever form it manifests, whether by reason of over bearing pressure by a party or through substitution of a party's consent with parental consent or by way of outright supervention of family preferences, duress[85] is detrimental to 'matrimonial intentionality' and contrary to international best practices relating to marriage.

Marriage *in fieri* (wedding) being the act giving life to the conjugal union is the contract per se from which arises marriage in *facto esse* (family). Hence, without a free contract, the family arising from there will suffer the problem of validity. To be saved, the family has to be a community established and sustained in the dialogue of free choice of parties to a marriage in which love is specific.[86] Without doubt, the specificity of love excludes coercion and encapsulates concordance, consent in self-giving and self donation in a total and free way. Marriage is therefore a contract sui-generis requiring the highest degree of freedom and voluntariety of parties. Duress and its kindred weapons are therefore fundamentally opposed to marriage's ethical, moral, religious and legal configurations.
It is sustained in this paper that the establishment of marriage or rather the starting point of the family must be entirely set in a voluntary context. The said voluntariety remains its inexorable constitutive juridical element such that any form of compulsion is considered in law and morals as destructive, or at best dimunitive and reductive of marriage properly so called. The substance of the argument is that conjugal love consists in a free and unrestrained manifestation of the will and by that, is the efficient cause of marriage, which is responsible for bringing about the

[80] Cf. Rechard Thomas and Monique Reeves, 'Mandatory Reporting Laws' <https://www.ncbc.nlm.gov/books/NBK 56069> accessed on 21/7/2023.
[81] 'Cultural Sensitivity – Wikipedia' <https://en.m.wikipedia.org/wiki/culturalsensitivity#> accessed on 20/7/2023.
[82] O' Connel et al 'The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement' <https://www.corteidh.or.cr> accessed on 01/07/2023.
[83] 'Civil Society and NGO's' <https://vakilsearch.com/blog/civil-society-and-ngos#> accessed on 17/07/2023.
[84] Marriage is the basic unit of the family, and so, of the society. If it fails, the society fails to the detriment of all. The society rises and falls with the marriages contracted within it.
[85] Under the customary laws, parental consent is mandatory in the case of a bride-to be, irrespective of her age. No matter the rationale behind this rule of custom, the 'mandatoriness' of a consent other than that of the parties to the marriage sounds deterministic of marriage and is *Ipso facto* ruinous of the requisite quality of voluntariness. The implication of making parental consent mandatory before marriage is that where the parents or family do not support a particular marriage preference of their ward(s), they can foreclose such transaction(s) notwithstanding the intensity of their ward(s) option. (Cf. E. I. Nwogugu, op.cit, p. 20). Also, in Royal Marriages worldover, one finds another instance of the superposition of family preferences over the liberty of their ward(s) intention to marry. For instance, the *Royal Marriages Act* of 1772 which was repealed on the 26th March, 2015 provided that no descendant of George II, male or female, could marry without the consent of the reigning monarch. The regal consent was to be set out in the license and in the register of marriages, (Cf. Royal Marriages Act, 1772 <en.wikipedia.org/wiki/Royal-Marriages-Act-1772/> accessed on 12/07/2023).
[86] Cf. D. Composta, Moral Philosophy and Social Ethics (Bangalore: Theological Publications in India, 1988) pp 132-133.

union in the first place. By reason of this, voluntariety becomes the single, indivisible, irrevocable, unsubstituted act of the will, manifested by the contracting parties, and which is effective for their union, rights and obligations.[87] It is this matrimonial consensus that completes the exterior juridical element of marriage and drives the reciprocal donations preceding, accompanying and following the actual celebration of marriage.[88]

All in all, the notion of voluntariety in the contract of marriage and the challenge of duress thereof presents intricate and multifaceted issues that call for careful consideration. Marriage, precisely as a union in which parties must contract willingly, with full understanding of their rights and responsibilities must be devoid of all shadows of constraints. That way, parties will contract with genuine consent without any undue influence. Only in this way can the sacred institution be safeguarded against potential manipulations which make it difficult for parties to benefit maximally from it. While it is the case that modern states/legislatures have made significant strides in addressing issues of forced marriages and coercive practices connected thereto, this work recommends that the church, and other religious bodies, precisely as experts in humanity, should intervene with stronger moral orientations in marriage preparatory classes. Doing this, they will aid in diffusing lingering incentives to involuntary marriages. Particularly, homilies, preachings, workshops, conferences and pastoral letters are *apropos*.

[87] Cf. G. Groppo, 'Orientations in the Study of the Natural Origin of the Society' in Thomas Solasianum, XI, 1949, pp575ff.
[88] D. Composta, Op.cit, p. 134.