

## A COMPARATIVE EXPOSITION OF CUSTOMARY LAW MARRIAGE IN NIGERIA AND SOUTH AFRICA\*

### Abstract

*There are two basic types of marriage in Nigeria, the Monogamous and the Polygamous types of marriage respectively noted for one man, one woman to the exclusion of others, and one man, one woman potentially admitting the intrusion of others. There are however three forms of marriage, two (Customary and Islamic) potentially Polygamous and the other, the Act Marriage which is Monogamous. In Nigeria, people sometimes go through at least two processes of Marriage. Whether the marriage is pure Act Marriage or Church Marriage, it almost in all cases, starts with the Customary Marriage, as marriage in Nigeria in whatever form, is seen as the coming together of not only the couple but also their families. The plurality of Laws governing and controlling the various forms of marriage in Nigeria has on one hand created a confusing intrusion of one form into another and also different levels of protection for the parties involved. This paper tries to look at Customary Marriage in Nigeria in terms of duties, rights and obligation and customary marriage in South Africa. A comparative exposition shall be made using the doctrinal methodology examining authorities, journal articles, case law and internet as Sources of Material.*

**Keywords:** Comparative Exposition, Customary Law Marriage, Nigeria, South Africa

### 1. Introduction

Both Nigeria and South Africa seem to have a mixed legal system comprising of transplanted European Laws (mostly the English Common Law) and indigenous laws referred to as Customary Law. This is evident in the marriage laws of both Countries. While in Nigeria Customary Law marriage has remained a distinct and unwavering form of marriage among the three forms of Marriage in the Country; development in the two categories of marriage in South Africa have been revolutionary. To deal with the challenges posed by the interaction of two seemingly equal legal systems in one legal sphere, the Courts have followed a variety of approaches including legal positivism, the application of common law principles, and more recently, the notion of transformative constitutionalism.<sup>1</sup> South Africa is a sister Indigenous Country to Nigeria, and this work seeks to examine and make a comparison of customary law marriage in the two jurisdictions. The finding is that while South Africa has tried to generate legal protection for parties in customary law marriage, the *status quo* has been maintained in Nigeria. It is recommended that since some people may not be able to involve themselves in more than one form of marriage; and since customary marriage seems to be compulsory to indigenous African settings because of the issue of bride price, effort should be made to accord the parties in customary law marriage more protection that the customs of the various communities can provide as witnessed in the case of South Africa.

### 2. Customary Law Marriage in Nigeria

The Advent of the Colonial Master ushered into Nigeria a triple system of Marriage Laws<sup>2</sup> superimposing the statutory marriage on the cultural fabric of the Nigeria Society. The effect is that many of the discriminatory features of customary law marriages are still observed and enforced within marriages purported to be governed by statutory law. Some aspects of customary law marriage in Nigeria shall be discussed below:

#### Age of Marriage

One of the problems associated with customary law is that it permits child marriage as it pegs the age of marriage at 'puberty' generally between 12, 13 to 14 years of age. Marriage at this age is fraught with attendant health hazards of RVF and/or VVF common in early childbirth<sup>3</sup>. The Child Rights Act which pegs the age of majority at 18 and which would have helped in this issue is not uniformly applicable to all children in Nigeria. The issue of children falls within the residuary list in the Constitution so only states that require it adopt it into their State laws, So far only about 21 out of the 36 States have made it their State Laws. It can therefore protect only children from these states.

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<sup>2</sup> These are Statutory, Customary and Islamic Marriage Laws.

<sup>3</sup> RVF is Recto Vaginal Fistula and VVF is Vesico Vaginal Fistula, a situation common in prolonged labour (associated with early childbirth) where the victim leaks urine, faeces or both)

### Celebration of the Marriage

Most customary Law Marriages in Nigeria go through a number of stages, and this varies from community to community. In all of them, there must be the Introduction state or declaration of intention by the intending groom. After this generally, a bride price is paid and provision of gifts and drinks for kinsmen and women made, as soon as confirmation has been done. After this, the ceremonial and public celebration is done. This involves the invitation of friends, extended families and well-wishers to eat, drink and make merry on account of the customary couple. Each stage in the customary marriage involves the presentation of drinks, cash, and gift items to the bride's people. A customary marriage celebration terminates here and goes no further. It is potentially polygamous and the man is allowed as marry wives as he desires by custom. Here, the rights, liabilities and obligations of the spouses are determined by customary law with the attendant subjugation of the female. In the African traditional setting the supremacy of the male is sacrosanct. He is therefore the head of his household, and deals with it as he deems fit. It is no wonder that domestic violence against the female is regarded as a minor issue in customary marriage. It is even coded in some places and given legal backing<sup>4</sup>. Incidences of patriarchy and male preference also abound. Any offspring from the marriage primarily belongs to the man and he it is, who mainly takes decisions concerning the upbringing of the children. The marriage is not registered in any form and is potentially polygamous with protection, rights and obligations provided for the parties only by customary law which is the legal regime under which it is celebrated.

The issue of property in a customary marriage is also dealt with according to customary law. Under custom a woman can neither hold nor inherit real property. This however differs from custom to custom. While the Yoruba woman does not inherit real property from her husband's family, she does so in her father's property in equal shares with her brothers. She can also become the family head at any point she becomes the oldest in her maiden family. For Islam the widow inherits  $\frac{1}{8}$  of her husband's real property if she has children and  $\frac{1}{4}$  if she has no children. It is only in Igboland that the female neither inherits from her maiden family nor from her husband's family. This was before the trending cases of *Mojekwu v Mojekwu*<sup>5</sup>, *Mojekwu v Ejikeme*<sup>6</sup>, *Ukeje v Ukeje*<sup>7</sup>, and *Anekwu v Nweke*<sup>8</sup> which all express the fact that women can and should inherit real property. All these cases were opposing the earlier decision in cases like *Nezianya v Okagbue*<sup>9</sup>, *Nzekwu v Nzekwu*<sup>10</sup> and *Idehen v Idehen*<sup>11</sup> to the effect that females cannot inherit landed property.

### 3. Customary Law Marriage in South Africa

The definition of a customary marriage in South Africa is one that is negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa<sup>12</sup>. What further qualifies it as customary marriage is that it must be entered into in terms of tradition and there must be no white wedding<sup>13</sup>.

### Celebration of the Marriage

A valid customary union must satisfy three requirements<sup>14</sup>

- The couple must consent to a customary marriage in accordance with customary law
- Couple must be older than 18 years or have parental consent
- The marriage must be negotiated and entered into or celebrated according to customary law<sup>15</sup>

The wedding celebration differ from community to community and could include song and dance, the slaughter of cattle, exchange of gifts and welcoming of the bride into her new family. This takes effect after the exchange of *labola* or *magadi* which is a presentation either in cash or cows by the grooms family to the bride's family as a token of friendship, and appreciation for bringing up the bride as a responsible person<sup>16</sup>. Often the celebrations

<sup>4</sup> S.55(1)(d) of the Penal Code

<sup>5</sup> . (1997) 7 NWLR Pt 283 CA

<sup>6</sup> . (2000) 5 NWLR (Pt 657) 402

<sup>7</sup> . (2014) 11 NWLR (Pt 1418) 384

<sup>8</sup> . (2014) 9 NWLR (Pt 1412) 293

<sup>9</sup> . (1963) ANLR 352

<sup>10</sup> . (1989) 2 NWLR (Pt 104) 373

<sup>11</sup> . (1991) 5 NWLR (Pt 198) 382

<sup>12</sup> . Hazel Phiri, 'Understanding Customary Marriage'

[https://www.news24.com/SouthAfrica/News/understanding\\_customary\\_marriages\\_20171017](https://www.news24.com/SouthAfrica/News/understanding_customary_marriages_20171017) accessed on 25/3/2020

<sup>13</sup> . *Ibid*

<sup>14</sup> . <https://www.fin>

24.com/Money/Wills\_and\_trusts/customary\_marriage\_amendments\_give\_women\_more\_financial\_clout\_20190817 accessed 23/3/2020

<sup>15</sup> . *Ibidi*

<sup>16</sup> . [https://www.lawforall.co.za/2019/02/customary\\_marriages\\_in\\_SouthAfrica](https://www.lawforall.co.za/2019/02/customary_marriages_in_SouthAfrica) accessed 25/3/2020

don't take place for a while after the *lobola* negotiations, and payment has been settled (in part or full). Normally families need time to save up enough money for the big day. While *Labola* is important, it is also vital that the necessary traditional rituals and celebrations take place as soon as possible<sup>17</sup>. Legally, this is very important because, should the couple break apart or one spouse passes away, it would be difficult to prove that they were legally married for the purpose of the issue of property. A Customary marriage in South Africa must also be registered with a Home Affairs Domestic Office within 3 months of the Marriage with a witness from each family<sup>18</sup>. A marriage certificate will serve as full proof of the couple's marital status. The following are required for registration of the Marriage

- Copies of IDs and a *Lobola* agreement letter, if available.
- One witness from bride's family
- One witness from groom's family; or
- A representative of each family<sup>19</sup>

It should be noted that while lack of registration does not invalidate the Marriage, it is important to get one, in the event that any dispute ends up in Court.

### **Issue of Property**

According to the Department of Justice and Constitutional Development, a customary marriage in South Africa is automatically considered to be in community of property. This is a situation where husband and wife have equal share in the assets, money and property, and also share the liabilities and debts. If parties want their marriage to be out of community property, they will have to enter into an ante-nuptial contract before getting married<sup>20</sup>. If they want a change after the marriage, they will have to apply to the High Court. The Recognition of Customary Marriage Act (RCMA) apparently recognized the customary marriage but a new Bill<sup>21</sup> approved by Cabinet has important financial implications for customary couples in South Africa. This also provides equality for women in monogamous or polygamous Customary Marriage in South Africa. According to Minister Jackson Mthembu<sup>22</sup> 'spouses will now have joint and equal proprietary rights over marital property. This means that husbands will no longer have exclusive proprietary rights over marital property to the detriment of their wives. Children also benefit as they will be able to inherit from the mother'. The bill gives women who entered into customary law marriage prior to 2000, equal rights to marital property, something which they did not have before since the RCMA did not operate retrospectively. With the amendment<sup>23</sup> came equal protection in terms of marital property for both women in monogamous and polygamous customary marriages. The amendment also means that those who contract valid customary marriage cannot subsequently contract a valid civil marriage with other persons. Even though customary marriage in South Africa could be polygamous, an order of Court regulating future matrimonial property system of a man's marriage is required should he desire to take more customary wives.

### **4. The Comparison**

From the celebration of customary marriage in the two jurisdictions, notable differences are observed. While the *Lobola* which could be likened to the bride price is agreed upon by the two families where in the intending groom makes known what he can afford, In Nigeria the bride price comes in a list and even though negotiations are made, it is not as voluntary as the *Lobola* or *Magadi*. At the termination of the marriage by divorce, the *Lobola* is not paid back, while the bride price in Nigeria is expected to be paid back to signify the end of the marriage and failure to do this in many communities, means the woman remains the man's wife, expected to sit in mourning when he dies, and any child she has with another man is deemed to belong to her ex-husband. Payment of *Lobola* does not validate the customary marriage in South Africa. Other celebrations must follow including the official handing over of the bride to her new family. In some communities in Nigeria, payment of the bride price validates the customary marriage. The taking of more wives customarily is regulated by Court in South Africa because of the issue of property while a man can take as many wives as he desires in some jurisdiction in Nigeria, without the intrusion of the Court. Customary Marriage in South Africa are under property regulations by Court, but in Nigeria Matrimonial Property System in Customary Marriage, is governed by custom which in most cases may be unjust to some or all the wives.

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<sup>17</sup> . Ibidi

<sup>18</sup> . Felicua Anyogu, Access to Justice in Nigeria: A gender perspective (2<sup>nd</sup> Ed) Ebenezer Productions Enugu 2013.P.268

<sup>19</sup> . [https://www.lawforall.co.za/2019/20/Customary\\_marriage\\_in\\_Southafrica](https://www.lawforall.co.za/2019/20/Customary_marriage_in_Southafrica) accessed 25/3/2020

<sup>20</sup> . Hazel Phiri op.cit

<sup>21</sup> . 2019 Amended to the Recognition of Customary Marriages Act in South Africa passed on 30<sup>th</sup> July 2019

<sup>22</sup> . [[https://www.timeslive.co.za/news/south\\_africa/2019-07-29\\_the\\_new\\_customary\\_marriage\\_law\\_what\\_you\\_need\\_to\\_know](https://www.timeslive.co.za/news/south_africa/2019-07-29_the_new_customary_marriage_law_what_you_need_to_know)]

<sup>23</sup> . 2019 Amendment to the Recognition of Customary Marriages Act South Africa

## 5. Conclusion

The tripartite legal control of marriage in Nigeria gives the situation a semblance of *'volenti non fit injuria'* making it an imperative that intending marriage parties should choose the form which will protect their interest better. In all this, Customary Marriage seems to be compulsory as it signifies the consent of the parents and community no matter how old the parties are. This has made marriage in many communities in Nigeria very expensive, as parties must go through at least two forms of celebration. This paper has explained what customary marriage is in the two jurisdictions and the features of customary marriage in both. The paper also made a comparison of the socio-legal protections of customary marriage in both jurisdictions. South Africa not only made the registration of their customary marriages for purposes of legal protection especially in the area of properties compulsory, it also recognized the fact that while Customary Marriage is potentially polygamous in Indigenous African communities, not all end up being polygamous. South Africa has legal protection by legislation<sup>24</sup> for customary marriage; despite that, an Amendment<sup>25</sup> to this Act was made to protect both polygamous and monogamous customary marriages equally. In Nigeria Customary Law controls, and there is no separate legislation controlling or protecting parties in customary law Marriage. When the need arises, the custom of the relevant community is then sought to be proved. It is recommended that Nigeria should do well to protect spouses in customary marriages as South Africa has done. Secondly, there are many laws in Nigeria which have not served their purpose completely, because of conflict of laws; a reconciliation or harmonization of the relevant laws is required.

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<sup>24</sup> . Recognition of Customary Marriage Act RCMA South Africa.

<sup>25</sup> . 2019 Amendments to the Recognition of Customary Act in South Africa