

COLOURFUL AND FASCINATING: ENGAGING THE THEORETICAL LEGAL FRAMEWORK OF AFRICAN CUSTOMARY MARRIAGE*

Abstract

In African communities and in particular, Nigeria, customary marriage means very much to many Africans. Local and international literature, case law and legislative attention on the legal implications of customary marriage usually focus on the potentially or actual polygamous nature of the marriage and thus, engage issues such as status, domicile of the parties and jurisdiction. This focal point misses a vital concern- the legal theoretical underpinning of customary law marriage and level of coherence with modern legal nuances. This article seeks to address this concern. The recent Ugandan case of *Mifumi (U) Ltd. & Others v Att Gen & Kenneth Kakuru* draws further attention to the subject and is very useful. The article concludes that the customary marriage can be fitted into modern threads of legal theory and should therefore be contained within it.

Keywords: Customary Marriage, African, Legal Framework, Colourful and Fascinating

1. Introduction

Marriage in want of specificity of nature and legal content has been variously characterised as a union, status, contract, or an institution. In the light of these concerns, it is not surprising that literature and case law on customary marriage abound. Some of these draw attention to its practical consequences, particularly with respect to its deleterious impact on women and children and the exclusion of women and daughters from property holding and inheritance.¹ Some literature focus on the incompatibility of customary marriage and monogamy,² others draw attention to local conflict inherent in legal pluralism as a consequence of colonial interaction and heritage.³ Yet others draw attention to conflict of law issues with migration prompted marriages and the judicial response from those jurisdictions.⁴ Some others focus on the question of domicile and its relevance to jurisdictional issues.⁵ A plausible explanation for the complexity of the subject may be attributable to human nature, human evolution, the interest of the society and the response of law. As an emotive subject, it is not surprising that an attempt to examine its exact legal nature and content has been divisive and elusive. Nevertheless, Western nations and possibly some others may have achieved considerably, an enabling theoretical and structural framework to drive policy on the marriage. It is now compelling that customary marriage is approached from the same perspective to position it for modern relevance. This is despite the fact that the incidence of colonialism and its consequent tension with customary law generally make this difficult. As Atsenuwa notes:

The post-colonial de-colonisation project with its focus on cultural identity reclamation and the restoration of pristine African values and customs remains on-going.... The project of cultural identity reclamation itself returns to essentialism in which all the peoples of Africa are 'essentialised' into Africans with a cultural identity differentiable from those of the other peoples

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¹*Akinnubi v Akinnubi* [1997] 2 NWLR (Part 486) 144; Kenneth Mwenda, Florence Mumba and Judith Mvula-Mwenda 'Property-Grabbing under African Customary Law: Repugnant to Natural Justice, Equity and Good Conscience, yet a Troubling Reality' (2005) 37 *Geo. Wash. Int'l L. Rev.* 949; Emmanuel Durojaye 'Woman but not Human' Widowhood Practices and Human Rights Violations in Nigeria' *International Journal of Law, Policy and the Family* 27(2) (2013) 176-196; Sope Williams 'Nigeria, Its Women and International Law: Beyond Rhetoric' (2004) 4 *Human Rights Law Review* 229; *Oghoyone v Oghoyone* [2010] 3 NWLR (Part 1182) 564. However see, *Anekwe & anor v. Nweke* [2014] 4 SC(Pt. III); Suit No. SC. 129/2013 (2014) LPELR – 22697 (SC) *electronic report*; *Salubi v Nwariaku* (2004) 11 NWLR (part 883) 196; N.N. Chinwuba 'Changing Perspectives of Law on Human Evolution: Attainment of National Peace and Development through a Socio-Legal Re-Construction of Patriarchy' *International and Comparative Journal of Peace and Environment* [2014] 1(1)170 – 197.

²N. N. Chinwuba Jurisprudence and legal education: an assessment of their link to Nigeria's developmental aspirations, [2014] 40(2) *Commonwealth Law Bulletin* 269-291 analysing in context the case of *James Egbuson v. Joseph Ikechukwu* (1977) 6 S.C. 7 a case in which the Supreme Court was called upon to interpret monogamy within a uniquely Nigerian experience. E.M. Baloyi 'Critical reflections on Polygamy in the African Context' [2013] 41(2) *Missionalia* 164-181; MA.O. Aluko & J.O. Aransiola 'Peoples' Perception of Polygyny in Contemporary Times in Nigeria' [2003] 5(3) 179-184.

³I.O. Agbede 'Recognition of Double Marriage in Nigerian Law' (1968) 17(3) *International and Comparative Law Quarterly* 735-743;

⁴*Ohochuku v Ohochuku* [1960] 1 ALL ER 253; *Ali v Ali* [1962] 2 WLR 620; J.M. Eekelaar 'The Dissolution of Initially Polygamous Marriages' J.M. Eekelaar, JLR Davis and PRH Webb (1966) 15(4) *The International and Comparative Law Quarterly* 1181-1189

⁵Chigozie Nwagbara 'Recognition of Polygamous Marriages under the English Law' (2014) 2(2) *Global Journal of Politics and Law Research* 52-62; *Agbaje v Agbaje* [2010] UKSC 13; *Omotunde v Omotunde* [2001] 9 NWLR (Part 718) 252; *Sunil Bhojwani v Nitu Sunil Bhojwani* [1996] 6 NWLR 662; *Nachimson v Nachimson* [1930] p. 217; *Hyde v Hyde* (1866) L.R.I.P & M 130,133

of the continents, in particular with the coloniser which is Western. Little dissent or deviation is brooked. Any dissent or deviation or support for dissent or deviation is rejected as un-African and inauthentic.....Another weakness of the post-colonial African cultural reclamation project is that values and standards of African culture including its customs are projected and celebrated as inherently superior and there is a tendency to closure against any discursive engagement seeking to probe claims of superiority⁶.

A discursive engagement is nevertheless, necessary as the role of law in society cannot, but be, underscored. Society cannot function efficiently and effectively without pure law.⁷ In addition, law is absent in a society where rules designed to be law have no identifiable theoretical structure. Viable laws for driving a society and cohesion in human interactions can only be designed and developed within a theoretical structure. The structure provides a design; foundation- a goal post while the theory shapes the design and does so continually, keeping the design in shape. If theory is absent or latent, then foundation and structure are faulty and all content and actions derived therefrom fail or at best wobbly. Context is also important and the design and structure have to be contextual. These statements while appearing elementary will find expression in the discourse on customary law. As, the Lord Chancellor noted in *M'Cartan v. Belfast Harbour Commissioners*⁸, the value of an earlier authority lies not in the view which a particular Court took of particular facts, but in the proposition of law involved in the decision. Context is also never to be forgotten for, as Niki Tobi JSC stated in *Muojekwu v Iwuchukwu*⁹ and noted in *Dyce v Lady Hays*¹⁰ – times change and so do humans who are in and relate by time, evolve with changing times and circumstances. This perspective has seen developments in Ghana and South Africa in the right direction.¹¹ In Nigeria, recent Supreme Court decisions demonstrate that there is now room for further discursive engagement of customary marriage and its incidents.¹² In *Toyin Arajulu v. James Monday*¹³ a Nigerian High Court stated: 'Moreover our native law and custom is dynamic and changes with modern concept as society becomes more civilised. Therefore, the influence of English legal jurisprudence on rules of customary law cannot be totally ignored. This explains why I would be guided by those rules and the legislative intention in those provisions.¹⁴ The Court granted proprietary and perpetual rights in a matrimonial home even though the marriage was customary.

2. Remarks on Conflict in Related Case Law

As a result of global integration and interaction, many cases of conflict have emerged in the area of marriage and its nature commencing with the celebrated case of *Hyde v Hyde*¹⁵ to *Ohochuku v. Ohochuku*¹⁶; *Ali v. Ali*¹⁷ to *Cheni v. Cheni*¹⁸. Nigeria also records local conflict and internal issues with marriage and its nature starting from *Savage v. Macfoy*¹⁹ to *Fonseca v. Passman*²⁰ and *Agbeja v. Agbeja*²¹ *James Egbuson v. Joseph Ikechukwu*²² to *Alero Jadesimi v Okotie-Eboh*.²³ This difficulty also reared its head in the now precedent-setting decision in *Agbaje v Akinnoye-Agbaje*.²⁴ An analysis of the discourse from case law and legal literature provide until date, insufficient guide. In *Ohochuku v Ohochuku*²⁵ an expert evidence by Elias (later CJN) was reported in these terms: 'His Lordship [referring to the court below] accepted the evidence of Dr. Elias, a member of the English Bar and a barrister of the Federal Supreme Court of Nigeria, that this ceremony, as described by the wife, constituted a valid

⁶ Ayodele Atsenuwa 'Can two walk together, except they be agreed?' Interrogating the co-existence of Customary and Human Rights Law in Nigeria' Being paper presented for the University of Lagos Law Faculty Seminar Series of Friday, 08/03/13)

⁷Purity of law means a State of affairs in which the law is recognized and embraced by all, in spite of a few deviant reactions.

⁸[1911] 2 I.R. 143.

⁹[2004] 11 NWLR (part 883) 19)

¹⁰1852) 1 Macq 305

¹¹In Ghana, *Gladys Mensah v Stephen Mensah*, Civil Appeal No. J4/20/2011 of 22ND February, 2012 and in South Africa, *Nonkululeko Letta Bhe & Ors. v. Magistrate, Khayelitsha & Ors.* [2005] 1 SA 58 (CCT 49/03)

¹²*Anekwe & anor v. Nweke* [2014] 4 SC(Pt. III); Suit No. SC. 129/2013 (2014) LPELR – 22697 (SC) electronic report; *Salubi v Nwariaku* (2004) 11 NWLR (part 883) 196.

¹³Suit No. 1/169/2015 of the High Court of Justice, Oyo State holden at the Ibadan Judicial Division, Ibadan, Oyo State.

¹⁴ *Ibid* at pg 26

¹⁵ (1866) L.R. 1 P & D. 130

¹⁶ [1960] 1 ALL ER 253

¹⁷ [1962] 2 WLR 620

¹⁸ [1963] 2 WLR 2

¹⁹ (1909) J. Renner's Gold Coast Reports 504

²⁰(1956) WRNLR 41. See further *Short v Morris* 3 WALR 339; *Nelson v Nelson* (1951) 13 WACA 248

²¹ (1985) 3 NWLR (Part 11) 11.

²²(1977) 6 S.C. 7

²³ (1996) 2 NWLR (Part 429) 128; see also *James Egbuson v. Joseph Ikechukwu*(1977) 6 S.C. 7.

²⁴ [2010] UKSC 13

²⁵ [1960] 1 ALL ER 253

marriage by Nigerian law, though it would be potentially a bigamous one, as both husband and wife could lawfully marry other persons whilst their marriage was in existence'²⁶.

Wrangham J. stated that it is established by authority that English Court did not have jurisdiction to dissolve a polygamous union although such unions had recognition for some limited purposes. This now includes the Matrimonial Proceedings (Polygamous Marriages) Act 1972.²⁷ His Lordship then proceeded to dissolve the marriage conducted in England and declined jurisdiction over the customary marriage which was conducted in Nigeria. Webb thought that the Court in *Ohochuku* proceeded on the conscious or unconscious understanding that only one marriage existed and that was the monogamous union.²⁸ Eekelaar commenting on *Ohochuku* thought the same of the approach of the Court but concludes that it was expedient that polygamous marriages ought to be given more recognition in view of the position of Britain in the Commonwealth.²⁹ Agbede, as many authors commented on the decision in *Ohochuku*.³⁰ In his view, the case could not hold water on the nature of the relationship created by double marriage, customary and Statutory. For him, they both complemented each other. This position was taken by the Nigerian Supreme Court in the case of *Jadesimi v Okoti-Eboh*. It is to be noted that Wrangham J. in *Ohochuku* acknowledged that he had been informed that it may be common practice that dissolving the monogamous marriage invariably led to a legal dissolution of the customary one. This appears to be the position taken impliedly by the Nigerian Supreme Court in the case of *Jadesimi v Okoti-Eboh* when the Uwais CJN stated 'The parties are of course aware that by applying the Marriage to their relationship, their marriage would become monogamous'.³¹ This position is however, quite far from the reality from the stand point of the legal theoretical nature of the two types of marriages. A customary marriage cannot be subsumed by a monogamous one, not just from the differences in formation but more importantly on the methods and principles informing potential and actual dissolution. Thus, contrary to the views expressed by most commentators on the decision of Wrangham J. in *Ohochuku v Ohochuku*, it must be stated that the approach of Wrangham J. is the accurate line to toe until the customary marriage is restructured and aligned with modernity and global inter-relations. Two dissolutions must be contemplated in any case where a Nigerian customary marriage and a monogamous one exist in one union as the High Court Judge correctly noted. Indeed, some customs in Nigeria do not contemplate the dissolution of a duly conducted customary marriage. The Ugandan case of *Mifumi (U) Ltd. & Others v. Att. Gen. & Kenneth Kakuru*³² only just ruled that return of bride price which is the main procedure for dissolving a customary marriage is a contravention of the bride's right to human dignity and therefore unconstitutional and remediable.

3. An Evaluation of the Formation and Celebration of Marriage

When people decide to marry in Nigeria the formation and celebration of the marriage are a troubling feat. An intending couple to be married would usually undergo processes that are emotionally, economically and physically taxing and agonising ranging from choice, to approval by parents, family and the events incidental to each. The simplest objection from tensions arising from tribal and religious affiliations to sundry objections from parents then the larger family may bring the intentions of the couple to an end at any of the various stages. The intrigue and complexity expand to the form and nature of the events incidental to the process-, the engagement, also sometimes referred to as introduction, the customary marriage, in many cases, the statutory marriage and finally the church or Islamic marriage. These apply to a typical marriage involving persons whose personal laws are neither customary nor Islamic and those whose personal law is.³³ These processes must ordinarily be in conflict with the provision of the African Charter on Human and People's Rights, ACHRPR. Article 16 of the ACHRPR enjoins State parties to guarantee the individual's mental health. Mental health is now generally accepted to include an enabling environment for a state of emotional well-being.

²⁶ [1960] 1 ALL ER 253, 254 paras C-D. At 255, Wrangham J states that 'Dr. Elias proved before me that, whether the parties were Christian or not, the Nigerian law would recognise a subsequent union between the husband and another woman as being a lawful marriage'. Para C. It would appear that this statement is more likely than the one reportedly attributed to Dr. Elias that either party could marry again.

²⁷ The Act enables the grant of matrimonial reliefs concerning the validity or otherwise of a marriage even when the marriage is celebrated under a law or jurisdiction that permits polygamy and notwithstanding that the marriage was celebrated while one of the spouses is domiciled in England, or the United Kingdom and the marriage may be polygamous although at its inception neither party has any spouse additional to the other.

²⁸ PRH Webb '*Ohochuku v Ohochuku*' A variation of *Thynne v Thynne*' (1960) 23(3) *The Modern Law Review* 327-331; for other views see note 15 above.

²⁹ J Eekelaar (above) note 15

³⁰ IO Agbede 'Recognition of Double Marriage in Nigerian Law' (1968) 17(3) *International and Comparative Law Quarterly* 735-743.

³¹ [1996] 2 NWLR (Part 429) 128, 147

³² [2015] UGSC 13 (15 August 2015); CONSTITUTIONAL PETITION NO. 12 OF 2007.

³³ This means a reasonable number of the populace not only from southern Nigeria but also many persons in the middle belt and some other parts of Northern Nigeria.

It is therefore compelling to examine whether the three to four tiered structure of marriage formation and celebration are targeted at the same objective or the objective in Nigeria is simply to ensure that the union takes on the features of a properly formed marriage. If this is the case, it is examined whether the trouble is well worth it, if the features envisaged can be achieved through better policy derivatives obviating the need for the many formalities targeted at security and stability of the marriage, usually on the part of the women. Can the same set of objectives be achieved for instance by the legislature tackling the rights of inheritance and succession within the current fundamental human rights provisions rather than leaving it to judicial activism? Could such legislative intervention as in the Ugandan Constitution stem women's distrust of the system to protect them in the marriage and in the event of a break up?³⁴The same applies to concerns for children. What is the objective of marriage in Nigeria and what should the objective actually be?³⁵ The following section assesses the vital features of monogamy as distilled from the Marriage Act, 2004.³⁶An assessment of the features of a typical customary marriage follows. The analysis reveals that the two are not alternatives and may point to why the conclusion by the Ugandan Constitutional Court in *Mifumi (U) Ltd. & Others v. Att. Gen. & Kenneth Kakuru*³⁷ may not sit quite well. The court stated that in so far as the parties have an option to marry in some other way, their freedom of choice cannot be said to have been eroded if they married under the customary norm.

Marriage under the Act

Marriage under the Marriage Act³⁸, (MA) is in the usual form it takes within the Commonwealth, except that the MA attempts to draw a contextual dichotomy and reconciliation of monogamous and customary marriages. The MA is a document and definition of monogamy not according to religion but law. This is significant because monogamy according to religion is strikingly different from the variant at law. This is so at least, in one respect- the parties in a religious monogamy are not equal partners and therefore age is not so relevant and consent of the parties may not be real.³⁹ Monogamy according to law is typically an equality arrangement and to ensure that this is so, there are rules on age of maturity and a clear objective of consent that is real. Thus, Section 11(d) of the Marriage Act (MA) provides that 'no certificate shall be issued by the Registrar unless it is ascertained that each of the parties to the intended marriage (not being) a widower or widow) is twenty-one years old, or that if he or she is under that age, the consent herein after made requisite has been obtained in writing and is annexed to such affidavit'. Section 18 provides further that '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 mind 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 afore said before a license can be granted or a certificate issued'. It is thus clear that age is of utmost importance for the purposes of consent of the parties to the marriage. Following very closely to age and consent is the question of notice. Every contract is perfected when in writing and in a specified form coupled with registration even where in some cases, consideration is absent. The rules on notice appear in section 9. Section 10 creates a register of notice. Section 12 provides that where marriage does not take place within 3 months, a fresh notice must be initiated and given. Section 13 provides for dispensing of notice in some specified circumstances. Section 21 provides for times of notice. Section 13 provides:

The Minister upon proof being made to him by affidavit that there is no lawful impediment to the proposed marriage, and that the necessary consent, if any, to such marriage has been obtained, may, if he shall think fit, dispense with the giving of notice, and with the issue of the certificate of the registrar, and may grant his licence, which shall be according to Form D in the First Schedule, authorising the celebration of a marriage between the parties named in such licence by a registrar, or by a recognised minister of some religious denomination or body.

Sections 11, 33, 35, 39 40, 46 and 47 attempt to secure the marriage conducted in accordance with the Act to discourage subsequent marriages under custom or customary marriage conducted with another person different from the person being married under the Act.⁴⁰Section 35 provides:

³⁴ The Constitution of the Republic of Uganda, 1995; *Mifumi (U) Ltd. & Others v. Att. Gen. & Kenneth Kakuru* [2015] UGSC 13 (15 August 2015); CONSTITUTIONAL PETITION NO. 12 OF 2007.

³⁵ It is to be noted that some scholars in Family law have stated categorically that marriage in Africa is primarily for the purpose of creation. Eunice Uzodike 'A Decade of the Matrimonial Causes Act 1970' (1990) *Nigerian Current Law Review* 55; see also, Andreas Rahmatian 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' (1996) *International Journal of Law, Policy and the Family* 10, 281 – 316.

³⁶ Cap M6, Laws of the Federation, 2004

³⁷ [2015] UGSC 13 (15 August 2015); CONSTITUTIONAL PETITION NO. 12 OF 2007

³⁸ *Ibid*

³⁹ *Cheni v Cheni* [1962] 3 All E.R. 873; [1963] 2 W.L.R. 2; *Shahanaz v Rizwan* [1965] 1 QB 390

⁴⁰ *Agbeja v Agbeja* (1985) 3 NWLR (Part 11) 11. Section 11(d): The Registrar may issue his Certificate in the prescribed Form C as in First Schedule to the Act, provided amongst other conditions: 'that neither of the parties to the intended marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted'. Section

Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner apply to marriages so contracted.

Section 39, 46 and 47 make it a criminal offence of bigamy to flout the above provisions.

All of the above provisions go to the root of the marriage to legitimise the freedom of the parties to choose, their consent to the marriage, and their capacity to enter a valid contract. The provisions further demonstrate that the modern law on marriage recognises its root in property but has been consciously re-constructed to fit into contract.

Security of the Marriage and Proprietary indices and incidents

Section 21 provides the recognised place where marriage can take place outside public offices, and more importantly stipulates the time when marriage can be celebrated as between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and in the presence of two or more witnesses besides the officiating minister. Section 24 provides for the authenticity and security of all certificates issued in respect of marriages. Section 25 reinforces 24 while section 26 reinforces the stated section by certification, signature and attestation by witnesses. Section 27 provides for conduct of marriages in public offices either in accordance with section 11 or section 13. This is stipulated to be in the office of the Registrar or Minister and with doors open between the hours of 10 o'clock in the forenoon or 4 o'clock in the afternoon. Section 28 as section 25, provides for signing of certificates by all parties and the filing of a duplicate for record and certification purposes. Section 30(2) makes all marriages conducted under the Act and the certificates issued a matter of public record and open to the public by allowing inspection and certification. It has been held in the case of *Obiekwe v Obiekwe*⁴¹ that the provisions of the Act ought to be fully complied with. This case which was in respect of the previous Marriage Act remains valid with respect to the Marriage Act. It is also clear from the provisions of section 11(1)(a), 30 and Order V of the Matrimonial Causes Rules coupled with Section 7(5) of the Constitution of the Federal Republic of Nigeria, that marriages conducted under the framework of the MA must be registered at the appropriate and relevant Local government authority. The reason for this goes to questions of identification, jurisdiction and domicile. Nevertheless, section 34 makes it clear that this provision does not go to validity but perfection. Thus, the section states: All marriages celebrated under this Act shall be good and valid in law to all intents and purposes.

An analysis of the MA immediately evinces the objective of the legislature to set boundaries and make such boundaries clear and permanent which is very akin to proprietary boundaries and its attendant incidents of openness, notice and security of right. Marriage under the Act can thus be fully described as having proprietary incidents but the emphasis on the contractual incidents of freedom and freedom of contract places the relationship as contractual rather than proprietary.

It remains now to consider the customary marriage, its nature and incidents.

Customary Marriage: its Nature and Incidents

Marriage under customary norms is very unique and colourful. It commences with an introduction between the families. Formalisation follows with a meeting of the families, negotiation and payment of bride price, presentation of demands from the bride's family to the family of the groom and ultimately the handing over of the bride to the groom's family usually to the eldest member of the groom's family. The following have been judicially noticed as the essential elements of a valid customary marriage.

- i. parties must possess the capacity;
- ii. payment of bride price by the prospective husband to the parents or guardians of the wife; and
- iii. there must be a ceremony of marriage and the formal handing-over of the woman to the man's family, usually, the head of the family.

In *Nickaf v. Nickaf*,⁴² Akpata J.C.A observed that the payment of bride price is an essential requirement of marriage under customary law of most communities in Nigeria. Bride price is also a feature of customary marriages in many African communities, South Africa, Uganda and countries in Sub-Saharan Africa. Of the essential elements of customary marriage, the bride price is the most contentious. In the Ugandan case of *Mifumi*

33(1): 'No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person with whom such marriage is had'. Section 34: 'All marriages celebrated under this Act shall be good and valid in law to all intents and purposes'.

⁴¹ (1963) 7 Eastern Nigeria Law Report 196

⁴² Suit No. CA/1E/79/84. (Unreported) Court of Appeal, Kaduna; See also ⁴² E.I. Nwogugu, *Family Law in Nigeria* (Heinemann, 1990) 56-58.

(U) *Ltd. & Others v. Att. Gen. & Kenneth Kakuru*⁴³ the Constitutional Court in assessing the petition for the case stated:

I wish to begin by acknowledging the significant rights and protections that the Constitution accords to women (See Article 31(1), (3) (rights to freely enter into marriage); Article 33 (rights of women to equality with men). Moreover, the Court is cognizant of the constitutional provisions intended to correct historical imbalances and an unequal playing field as between men and women (See Art. 33(6)). The Court, further, acknowledges the sentiment expressed by the petitioners that anytime a woman is equated with a sum of money or property, as occurs in any bride price agreement, such an agreement does, on its face, seem to undermine the status of the woman vis-à-vis the man. A potential bride price being discussed in terms of any quantity of money does, at first glance, seem to violate the constitutional prohibition against customs that undermine the status of a woman (See Art. 33(6)).

In *Jadesimi v Okotie-Eboh*⁴⁴ the Nigerian Supreme Court delivering in a unanimous judgment delivered by Uwais JSC stated:

It is a matter of common knowledge that most people in Nigeria, who contract marriages under the Marriage Act, undergo a form of customary marriage earlier as a matter of practice and adherence to the customs of their forefathers. Some refer to such practice as traditional engagement' while others simply refer to it as solemnisation of customary marriage. It is never intended by the practice that the marriage under the Marriage Act should nullify the customary marriage or engagement but rather that it would supplement the practice or custom. The parties are of course aware that by applying the Marriage to their relationship, their marriage would become monogamous. However, it is a matter of common knowledge that in spite of the punishment provided under section 47 of the Marriage Act against any of the parties entering another customary marriage, the male folk in particular observe the restriction more in breach than obedience with impunity.⁴⁵

This account of the state of affairs is to say the least, unacceptable for any society with the objectives of inclusivity, orderliness and a developmental aspiration. In the light of these, the expediency of determining the legal theoretical nature of actions and the customs driving them is underscored. Such an enterprise, if successful, helps to position customs and actions traceable to them properly for orderly recognition and regulation. Regulation would be arbitrary in the absence of recognition. Regrettably, there appears to have been no formal articulation of the theoretical legal nature of customary type marriage. One definition is given of the customary law in Nigeria in *Godwin Ogolo & Ors. v. Joseph Ogolo & Ors*⁴⁶:

Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is a mirror of the culture of the people. Under our law, customary law is a question of fact to be proved by evidence or judicial notice if it has been established as required by Sections 14(2) and 73 of the Evidence Act⁴⁷...Being a fact to be established by evidence, customary law must be specifically pleaded.⁴⁸

Later on, in the case of *Nwaigwe v Okere*⁴⁹, Niki Tobi JSC stated that the customs, rules, traditions, ethos and cultures which govern the relationship of members of a community are generally regarded as customary law of the people. Customary law is a mirror of accepted usage.⁵⁰ In *Okonkwo v Okagbue*⁵¹ however, the Supreme Court expresses the view that while customary law may be a question of fact, the decision whether it is repugnant to natural justice, equity and good conscience is a matter of law.⁵² These two positions demonstrate the problem with customs and customary law in Nigeria. What is the measurement for determining repugnancy? Until date, there appears to be no known custom that the judiciary has been able to abate its practice by declaring it repugnant. The very question in *Okonkwo v Okagbue*⁵³ which arose for determination and which the Supreme Court did declare was repugnant is still well and continues to wax strong.⁵⁴ The reason it has not abated was well identified in an

⁴³[2015] UGSC 13 (15 August 2015); CONSTITUTIONAL PETITION NO. 12 OF 2007.

⁴⁴ [1996] 2 NWLR (Part 429) 128

⁴⁵ [1996] 2 NWLR (Part 429) 128, 147

⁴⁶(2003) LPELR-2309 (SC);(2003) 18 NWLR (PT.852) 494; (2003) 12 S.C (PT.I) 56

⁴⁷*Oyewunmi v. Ogunesan* (1990) 3 NWLR (Pt. 137) 182,207; *Taiwo v. Dosunmu* (1966) NMLR 67; *Otogbolu v. Okeluwa* (1981) 6-7 S.C. 99.

⁴⁸*Per* Edozie, J.S.C. at P. 16, paras. A-C.

⁴⁹(2008) 13 NWLR (Part 1105) 445

⁵⁰(2008) 13 NWLR (Part 1105) 445, 481

⁵¹ (1994) 9 NWLR (Part 368) 301

⁵² (1994) 9 NWLR (Part 368) 301

⁵³ (1994) 9 NWLR (Part 368) 301

⁵⁴ E.N. Uzodike 'Nigeria: Defining the Ambit of Custom' [1989] University of Louisiana Journal of

earlier decision by the Supreme Court, in *Muojekwu v Iwuchukwu*⁵⁵. In *Muojekwu v Ejikeme*⁵⁶, the Court of Appeal correctly identified the panacea and called on the legislature to take action. The Legislature has been silent and perhaps for reasons stemming from the Constitution and its schedules of legislative competence.

The thoughts expressed by Niki Tobi JSC as he then was, suggest that customs are law once proved or when it acquires judicial recognition. Thus, we must treat customary marriage as governed by customary law. His views also suggest that such law is a living law. The case of customary marriage appears to be in contradistinction with this view as the customary marriage and its processes can be said to be fully rigid. A living thing or person undergoes changes but not so the customary law which can be fairly described as static.⁵⁷ As an example, generally, customary marriages require that the marriage should be conducted in the ancestral homes of the bride and groom. In a bid to fulfil this condition, many have perished and come under sundry dangers. Such a position is clearly alien to human condition to which change is a feature and a key indication of the compelling need to re-examine the relevance of the rigidity of customary marriages in modern day Nigeria. When a marriage is not fully conducted under customary marriage, it is not inchoate but usually non-existent. Failure to pay the bride price makes the marriage non-existent and the parties acquire no rights from the marriage.

4. Is there a Theoretical Difference between the two forms of Marriages?

A typical proprietary right draws its nature and attributes from law and law's drive for order and orderliness in human affairs. It has been attributed to social construct.⁵⁸ Orderliness in turn can only operate in an environment of certainty a key characteristic and legal incident of property. Law is driven to create appropriate boundaries particularly with respect to property. The objective of creating and establishing boundaries finds vent in another area of human engagement – family. Leaving the matter to individuals is rife with quarrels and contentions. The State exists to provide order and enforce boundaries. Nowhere is this need more evident than the incidents of property rights and family mechanics. Law has generally developed towards establishing bare or simple contractual rights. Their incidents are transient, negotiable and reconcilable with freedom of contract as the foundation of the legal relation.⁵⁹ These incidents do not always apply to proprietary relations which assume some superior status.⁶⁰ Proprietary relations have been fashioned towards permanence, certainty and openness. Thus, while contract is almost always a private matter, a proprietary right is always a public one conceived and applied in public for the avoidance of any surprises and consequently security of the relationship and the right thereby created. The contemplation of law with respect to the different paths of property and contract culminate in the remedies available on breach or interference with the boundaries set. With contract, remedies are said to attach to the person based on *privity* of contract or persons so closely related with the contract. Property is different, it transcends the parties and attaches *in rem* to the item of property in specie, transmuting into whatever the property transmutes into so, does the proprietary right follow the item until the right holder claims that which belongs to him or her in specie.⁶¹ For this reason, rules with regards to transfer of proprietary interests such as land have to be by deed. To be sure, a bare contract sometimes does bring about a proprietary interest as in a leasehold contract. In addition, proprietary interests equally arise by some other means such as devolution and in the case of lands, conquests and easements by grant. There are also proprietary interests arising by the action of *detinue* in tort (although this is now abolished in England, it remains available as a tortious remedy in Nigeria). The distinctive difference between a transaction by deed and bare contract is that the former must be in writing signed in a particular form and witnessed although no consideration need be made.

The nature of property and the law concerning and guiding it appears agreed; to be guided by law according to what is of utmost interest to society at each point in time. Universally, land and its use appear to be the utmost

Family Law 13, 399 – 405; 29 J. Fam. L. 399 [1990-1991]; Clement Akpamgbo 'A 'Woman to Woman' Marriage and the Repugnancy Clause' [1977] Africa Law Studies 14, 87 - 95

⁵⁵ [2004] 11 NWLR 196

⁵⁶ [2000] 5 NWLR 403

⁵⁷ Ayodele Atsenuwa 'Can two walk together, except they be agreed?' Interrogating the co-existence of Customary and Human Rights Law in Nigeria' Being paper presented for the University of Lagos Law Faculty Seminar Series of Friday, 08/03/13)

⁵⁸ Craig Rotherham 'The Metaphysics of Tracing: Substituted Title and Property Rhetoric' (1996) 34 *Osgoode Hall Law Journal* 321; Mzukisi Njotini 'Examining the 'Objects of Property rights' - lessons from the Roman, Germanic and Dutch legal history' [2017] De Jure 136-155.

⁵⁹ J. Russel Versteeg, 'From Status to Contract: A Contextual Analysis of Maine's Famous Dictum' [1989] *Whittier L. Rev* 669.

⁶⁰ Mzukisi Njotini *ibid*

⁶¹ A case exploring and providing a full account of the nature and incidents of proprietary right is *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102

point of property to human race.⁶² With land, at varying times in human evolution, have been slaves and wives. The distinctive features of property run through the formation of rights in property and severance.

The theoretical analysis thus far, demonstrates that the monogamous institution typified by the statutory marriage is typically a proprietary subject. The Blackstonian spousal unity reinforces this perspective, and so does the old concept of ownership from Roman concept of *mancipi* and *rec nec mancipi*.⁶³ Today ownership is differently articulated.⁶⁴ Thus, through time and human evolution and development of human institutions changes have continued to take place since the Married Women's Property Act 1882.⁶⁵ One significant incident of marriage that removes the monogamous union from a proprietary contract is the absence of consideration. The customary marriage has as its main feature- consideration; bride price. It has been suggested that consideration akin to bride price existed in Jewish customs, Chinese and perhaps Greece.⁶⁶ There is no evidence that the practice exists in any form in these jurisdictions in modern times. The customary marriage by reason of the payment of bride price, nominal or substantial, is in every sense a contract of sale; and sale of the bride. It is first not in writing and therefore enforcing it under modern laws requires clear consideration and that consideration is fully provided by the bride price which in many customary areas is negotiated or haggled. Consequent upon this sale, many customary areas therefore correctly observe that from the conclusion of the ceremonies, the woman and all that she owns belong to the husband.⁶⁷ In addition, children are perceived and seen as belonging to the husband rather than issues of the marriage. That at death, some customs, require that the remains of the woman be returned to the family does not change the position, since it is always a temporary return at any rate, aimed at ensuring a kind of autopsy to the effect that the woman was not beaten to death or maltreated prior to her passing. In property law, at any rate, this does not affect the proprietary right of the husband as the mortgagor's property right is indefeasible by the dynamics of the equity of redemption which itself is a property right alongside the mortgagee's property right. Regional and State governments have at several times attempted to regulate the bride price but regulation does not change the character of the theoretical legal underpinnings of the bride price.

In view of the above, the nature of customary marriage can be clearly said to be in legal terms a proprietary contract. It may be worse, sale of a chattel. *Mifumi (U) Ltd. & Others v. Att. Gen & Kenneth Kakuru*⁶⁸ was a Ugandan case on bride price. The contention of the petitioners was that:

- (i) Demand for bride price by parents of the bride from prospective sons-in-law as a condition precedent to a valid customary marriage is contrary to Art 31 (3) of the Constitution that provides that marriage shall be entered into with the free consent of the man and a woman intending to marry, because the demand for bride price makes the consent of the persons who intend to marry contingent upon the demands of a third party;
- (ii) Demand for bride price by parents of the bride from prospective sons-in-law in as much as it portrays the woman as an article in a market for sale amounts to degrading treatment, prohibited by the Constitution of Uganda in Art 24, which guarantees that every person shall be treated with dignity.
- (iii) Use of bride price leads to social ills such as fathers forcing daughters to get married simply to collect a bride price and young women being removed from schools and forced into early marriages. Uneducated women may even fetch a higher bride price, or dowry, due to the assumption that women in a school setting are less likely to be undefiled.
- (iv) Bride price can even lead to inhuman and degrading treatment of corpses. In her affidavit, Felicity Atuki Turner notes that she has come across several cases where a wife's corpse has been denied burial pending the refund of the applicable bride price to the husband.

The Ugandan Supreme Court ruled that where bride price is reached in a voluntary manner between the parties that is, the prospective couple- that such an agreement will then make the bride price a voluntary matter and with respect to the bride price paid to the parents of the woman, this should be taken as an appreciation for their

⁶² See for instance, Mzukisi Njotini 'Examining the 'Objects of Property rights'- lessons from the Roman, Germanic and Dutch Legal History' [2017] *De Jure* 136-155

⁶³ Leage, *Roman Private law* 3rd ed., by Prichard A. M. (Macmillan & Co. Ltd., 1961)

⁶⁴ A.M. Honoré 'Ownership' in A.G. Guest (ed.), *Oxford Essays in Jurisprudence*, (OUP, 1961) 107; CM Rose 'Possession as the Origin of Property' [1985] 52 U. Chi. L. Rev. 73; G. Samuel, 'The many dimensions of Property' in McLean, J. (ed.), *Property and the Constitution* (Hart Publishing Oxford Portland Oregon, 1999) 40

⁶⁵ For an interesting account of these changes and development, see M Rheinstein 'Trends in Marriage and Divorce Law of Western Countries' (1953) 18 *Law & Contemporary Problems* 3.

⁶⁶ W.G. Thalman, *The Swineheard and the Bow: Representatives of Class in the Odyssey* (Cornell University Press, 1998) 157f. See also Code of Hammurabi

⁶⁷ *Akinnubi v Akinnubi* [1997] 2 NWLR (Part 486) 144; *Asikia v Atuanya* (2008) 17 NWLR (part 1117) 484 – 524 *Nezianya v Okagbue* (1963) 1 All NLR 352; cited with approval in *Nzekwu v Nzekwu* (1989) 2 NWLR 373

⁶⁸ [2015] UGSC 13 (15 August 2015); CONSTITUTIONAL PETITION NO. 12 OF 2007.

parenting the bride. The Court further ruled that the petitioners had not established that payment of bride price was commonly practiced in Uganda and aligned itself with the case of the respondents that the custom and practice of payment of bride price or dowry was more an exchange of gifts from the families of a prospective couple unless proved. The Court stated further that couples had other options for forming a marriage as in Nigeria. This decision by the Court being novel on the subject is commendable. The question is whether these options are real since many African women do not find satisfaction from conducting other forms of marriage and African men do prefer the customary marriage for its fluidity. In the circumstances, it is for the State to take active role to bring about a resolution that meets the demands of wellness, conformity with international and global human rights indicators and standards. In the Ghanaian case of *Gladys Mensah v Stephen Mensah*⁶⁹ her Supreme Court stated unequivocally: 'The tendency to consider women (spouses) in particular as appendages to the marriage relationship, used and dumped at will by their male spouses must cease'.

5. Conclusion

The paper concludes that the current legal theoretical incidents of the customary marriage reflect the incidents of a proprietary contract. This may have been very appropriate for a modest society without modern government where it was necessary to hold a husband or groom and his family responsible for the wife. To the extent that the customary marriage requires for its validity, payment of bride price and for its dissolution, return of that bride price, some modification to meet modern legal realities have become imperative. The payment of bride price is not in line with modern understanding of law and the notions of contract as between persons but in respect of things. Reducing the terms of the marriage in exchange of gifts as is presently the norm in a few societies could suffice as symbols for customary marriages. Customary marriage should also be repositioned as a complete marriage celebration by making parties to it comply with the requirement of registration at the local government- (that it is potentially polygamous should not be an impediment). This would provide for notice and therefore confer a legal interest rather than an equitable interest as is presently the case that may be overreached by a legal statutory marriage. Secondly, it could also be positioned as an aspect of the process of marriage under the Marriage Act. It may thus, be a form of engagement process providing for identification and domicile in place of the requirement of the Marriage Act for registration of marriage in the local government area or registry which is inconsistent with the objectives of the Act. If the customary marriage is driven to evolve as a pre-nuptial or an engagement, it would fall into a legal framework and the concerns on status, jurisdiction and domicile will be fully addressed within the intendment and provisions of the Marriage Act and the Matrimonial Causes Act. In this respect, a couple conducting only the customary ceremonies will be regulated within its rules while a couple who conducts the customary ceremonies and proceeds to conduct the formalities of the Marriage Act would have elected within identifiable legal framework to have the marriage categorised as monogamous. Most importantly, with the absence of bride price as an incident of customary marriage, the theoretical legal thread that projects it seemingly as a contract of sale will be eliminated and the marriage itself with the children as issues of the marriage serving as the only consideration just as in monogamous unions. The colour, fascination and melodrama of a customary marriage thus remain and all is really well.

⁶⁹ Civil Appeal No. J4/20/2011 of 22ND February, 2012