

APPRAISING NUPTIAL AGREEMENTS IN THE PROTECTION OF WOMEN AGAINST OPPRESSIVE TREATMENTS IN MARRIAGES IN NIGERIA*

Abstract

Many Nigerian women face discriminations and oppressions in their marriages. There has been an age long concept of women being relegated to the background. This stems from the fact that Nigerian women are seen in marriages not as partners but as properties of their husbands. As a result, women's general rights and in particular, proprietary rights are not adequately catered for. The problems of women's rights in Nigeria include the absence of adequate legal framework geared towards the protection of women's rights especially their matrimonial rights. Another problem is lack of proper implementation of the legal provisions. Overtime, series of measures have been explored towards checkmating these oppressions and discriminations. However, while we hail their efforts at exploring so many options towards the protection of the matrimonial rights of women, an option remains unexplored: The Nuptial Agreement Option comprising of Prenuptial and Postnuptial Agreements. Using the doctrinal methodology, and the analytical approach adopted with reliance placed on statute books, constitutional provisions, research reports, journal, seminar papers and so on, this work explored the option of the Nuptial Agreement in the protection of Women's Matrimonial Rights in Nigeria. This work found that the nuptial agreement gives clarification and certainty as to the conduct of the financial affairs of parties during the subsistence of the marriage or in the event of divorce or separation and was found to be able to curb the oppression that comes with one partner (usually the woman) being the financially weaker party. This was also found to be capable of assisting the financially weaker party to feel financially secure within the marriage. It therefore advocated for the legislation of the nuptial agreement in Nigeria as this would go a long way in the protection of the matrimonial rights of women especially their proprietary rights in Nigeria. It is not the intention of the researcher nor the concept being advocated to create an enabling environment for insecurity and tension which may lead to the breakup of marriage. It is rather the hope of this research work that the nuptial agreement if implemented would help in the protection of the matrimonial rights of women in Nigeria especially as it bothers property rights.

Keywords: Nuptial Agreements, Matrimonial Rights, Legislation, Oppressive Treatments

1. Introduction

Nigeria is such that its patriarchal nature subjects its women to unfair practices including the denial and infringements of their rights. This stems from the fact that the husband is said to enjoy a '*partria potestas*'¹ over the wife. Women are often relegated to the background and as a result, their general rights and their matrimonial rights in particular are not adequately catered for. About the matrimonial rights of women, there has been series of movements, advocacies and legislative lobbying by various organizations like FIDA, some NGOs and even some private individuals towards the protection of these rights. While we hail them for their efforts at exploring so many options towards the protection of this right, The Nuptial Agreement option has so far remained unexplored. The focus of this work therefore is to make a case for the nuptial agreement as a tool for the protection of women's matrimonial rights in Nigeria. The content of a nuptial agreement or contract so to say vary widely, but commonly includes provisions for division of property and spousal support in the event of divorce or break up. They may also include provisions for the forfeiture of assets as a result of divorce on the grounds of adultery. Further conditions of guardianship may also be included as well. The idea behind this agreement is to state in clear terms what goes to who in any of these events. Though relatively unknown in the Nigerian Legal System, however, its benefits cannot be over emphasized. For a better appreciation of these benefits, recourse will be had on the unfair practices some women are subjected to in Nigeria.

2. Unfair and Oppressive Practices against Women in Marriages in Nigeria

Nigerian women have been marginalized in different spheres of existence. The rights of women have hardly been tested from a human rights perspective. As a result, there is a dearth of judicial decisions and strict legal women's right jurisprudence on the issue of the judicial system for the enforcement of women's right². Across the country, gender inequality remains the norm and women have continued to encounter discriminatory practices. In Nigeria, women are often treated as minors and sometimes as second-class citizens that are only to be seen and not to be heard. The situation is often compounded by the patriarchal tradition which undermines women's fundamental human rights. Cultural practices such as female genital mutilation/cutting, widow cleansing, son preference, and domestic violence among others are not only demeaning of women but also perpetuate gender inequality. Due to culture and religions, women are assigned different roles in society and are confined to the role of child bearing and home-making. Also, the continued observance of harmful cultural practices has remained threats to women's health and well-being. The Nigeria culture has thus given birth to series of discrimination against women. We can therefore define culture and discrimination against women as the practices against the female folk to the advantage of men. In Africa, many cultural practices are against women. Discrimination against women is a global issue which agitates the minds of many human rights scholars and activities³ Women are beaten by husbands, and are always blamed for not being able to produce children. Even when it's not confirmed that they are responsible for the marital problems, they suffer for those problems. Married women could be replaced at any time by their husbands because culture supports men to marry more than one wife. Most cultural practices are against female folks. As Africans, we cannot do without obeying the culture and tradition of our land because it is not only interesting, but it has become something passed on from one generation to another. However, some of these practices affect women adversely. These practices include:

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¹ *Patria Potestas*, (Latin: 'power of a father'), in Roman family law, power that the male head of a family exercised over his children and his more remote descendants in the male line, whatever their age.

² B N Okpalaobi & A Iguh, 'Nigerian Women and Rights Freedom from Discrimination', in M O Izunwa (ed) *Family in the Law: A Reader*, (Onitsha: Great-M Print and Publishers, 2013)p. 125

³ M Nwogu, Discrimination and Unequal Treatment in the Home- The Girl Child, in M. O Izunwa (ed), *Family in the Law: A Reader* (Onitsha: Great-M Print and Publishers, 2013) p. 263

Widowhood Practices

Widowhood practices are by no means peculiar to Nigeria as they are commonly practiced across Africa. In different parts of Africa, various forms of rites are performed when a woman loses her husband. In many parts of Africa, a bereaved spouse is expected to undergo certain rites upon becoming a widow. In some situations, the nature and forms of these rites vary depending on culture and beliefs. Widowhood rites, often by-products of institutionalized socio-cultural norms, are more or less social obligations for women. It is also a period when a widow is expected to grieve and mourn the loss of the husband/irrespective of whether the marriage resulted in children or not. Whatever form they may take, widowhood practices tend to include various forms of inhuman, demeaning and barbaric acts that may endanger the life of a woman. Some commentators have argued that widowhood practices are not only tools to perpetuate gender inequality but are also barbaric, atrocious, unethical and a gross violation of women's fundamental rights and freedom⁴. In her award-winning novel *'So Long a Letter'*, Ba⁵ vividly captures the oppressive nature of culture in a patriarchal environment. More importantly, the novel mirrors the sorrow, suffering and humiliation widows often experience as a result of burial rites in a patriarchal African setting. The experience of Ramatoulaye (the antagonist of the novel) after the death of her husband in the novel is that of a woman suffocating under the whims of culture. Rather than receiving comfort or succor from her late husband's family, she is faced with a cultural practice, which requires that she be married to her late husband's brother or be thrown out of her home. This underscores the difficult choices a woman is forced to make upon the death of her husband in a typical patriarchal African society. Interestingly, these burial rites are often performed when a woman loses her husband and not the other way round. This tends to raise concerns about the discriminatory nature and rationale for these practices. Proponents of widowhood practices tend to argue that they are observed in order to determine the innocence of a woman with regard to the death of her husband. The belief is that a man could not have died of a natural cause, therefore, the need to ascertain the cause of his death. Unfortunately, the wife of the deceased is often the prime suspect in this situation and will have to undergo these excruciating practices in order to prove her innocence. Moreover, they contend that these practices should not be viewed as a violation of women's rights but as fulfilling cultural expectations of the people. These arguments tend to bring to fore once more the tension that often exists between culture and human rights. Cultural relativists have argued that it is erroneous to use western notion of human rights as universal standards for all individuals regardless of their jurisdiction and belief. They have argued that since human rights principles and standards originate from the west, it is misleading to ascribe 'universalism to human rights guarantees as they do not necessarily reflect the cultures of developing countries, particularly African countries. Some commentators have also argued that scholars from the west are often quick at criticizing and condemning cultural practices of other people without a careful reflection on the origin and relevance of those practices.⁶ Tamale⁷ has noted also that there are positive and negative aspects of every culture and that it is misleading to assume that all African cultures interfere with the enjoyment of women's rights.

However, critics of cultural relativism argue that cultures are never static but change with time. Thus, it is of no value to retain obsolete and potentially harmful cultural practices, which may interfere with enjoyment of individuals' rights. For instance, Terry⁸ argues that cultural relativism fails to recognize power imbalances and relations that exist in most societies and how these limit women's choices and rights. Furthermore, she submits that if cultural relativism is taken to its logical conclusion, then it will mean that one should accept any behavior no matter how crude or inhuman. Donnelly,⁹ one of the leading proponents of universalism has summarized the contemporary doctrine of universalism in the following ways:

- (i) All humans have rights by virtue of their humanity;
- (ii) A person's right cannot be conditioned by gender, or national or ethnic origin;
- (iii) Human rights exist universally as the highest moral rights, so no right can be subordinated to another person, or to an institution.

It has been argued that the inherent dignity of human persons is not a matter for state consent, but a sacred predicate for an international moral order that transcends the boundaries of cultural and religious diversity.¹⁰

Domestic Violence

Violence against women continues to be a global epidemic that kills, tortures and maims physically, psychologically and sexually. It is one of the most pervasive of human rights violations, denying women equality, security, dignity, self-worth and their right to enjoy fundamental freedom. Violence against women is present everywhere, cutting across boundaries of culture, class, education, income, ethnicity and age. Even though most societies proscribe violence against women, the reality is that violations against women's human rights are often sanctioned under the garb of cultural practices and norms, or through misrepresentation of religious tenets. Moreover, when the violation takes place within the home, as is very often the case, the abuse is effectively concluded by the tacit silence and the passivity displayed by the state and the law-enforcing machinery. Domestic violence as defined by this work includes violence perpetrated by intimated partner and is manifested through:

- i. Physical abuse such as slapping, beating, arm twisting, stabbing, strangling, bumping, choking, kicking, threats with an object or weapon.

It should be noted that although the categories above are listed separately, they are not mutually exclusive. Indeed, they often work hand in hand.

⁴ M A Sossou. 'Widowhood practices in West Africa: The Silent Victim (2002) 51 IJL, 39-67

⁵ M Ba. *So Long a letter*, (Daker: Heinemann Publishers, 1981)p. 23

⁶H Lewis, 'Between 'Irua' and female genital mutilation; Feminist Human Rights Discourse and the Cultural Divide (1995) HHRJ, 281

⁷ S Tamale, 'The right to Culture and the Culture of Rights :A Critical Perspective on Women's Sexual Right in Africa (2008) 16 *Feminist Legal Studies* ,47-69

⁸ G Terry, *Women's Rights*, (London:Palgrave Macmillian, 2007)p. 38

⁹ J Donnelly , *Cultural Relativism and Universal Human Rights*;(1984) 6 HRQ, 400-419

¹⁰ L A. Obiora 'Feminism, Globalization and Culture After Beijing' (1997) 1 IJGLS, 355 -406

Gender Discrimination

Culturally, the female folks are known to be less important in making laws, training children, speaking their minds. Females are always very silent. Men are the ones who have the right to make laws which women must obey. Even in families, it is discovered that mothers in training children do not have a say over the children they gave birth to. In the same way, female folks traditionally are not recognized; they are seen as assets through which they can send the male children to school, while females are not always sent to school. James reports: 'Nnu ego and her husband, Nnaife, gave up everything so that their eldest son Oshia can have the benefit of an education. The leftover money if there had been any, would go to educate their second son, Adim. There was never any thought given to educating their daughters. Daughters were seen as investments.' Culture blames women who are not able to bear children especially male children. They are beaten and accused of witchcraft. This illustration goes a long way to show that women are treated as they are nothing irrespective of the fact that they are human beings. Women are seen as what can be traded for money with the bride price issue in African. The way many parents present bride price is like they are selling off the girl. For instance, many people are afraid of getting married from the Eastern part of Nigeria, not because those are no good girls but because of the huge amount of money demanded as bride price by the parents. Emecheta¹¹ says: 'the longer she stays in school, the higher the bride price that is expected on her. Furthermore, unlike a woman who marries under the Marriage Act, a woman who marries under Customary or Islamic Law in Nigeria does not enjoy adequate legal protection in the distribution of assets upon death or divorce¹². Where the marriage is dissolved, the Nigerian Matrimonial Causes Act provides that a judicial order shall divide the family assets between the parties. Here lies the problem. The Act in Section 72 pointed out that the Court divides the assets as it deems it just and equitable. Sadly, in the decided cases of *Nwanya v Nwanya*¹³ and *Shodipo v Shodipo*¹⁴, Nigerian Courts have shown the extent of discrimination which women have to contend with in handling the financial aspect of divorce. The financial awards given to the women upon divorce were just a token out of the estate of the marriage. Courts here did not take cognizance of the contributions of the women both financially or otherwise, in the family.

Also, under customary arrangement, the husband is regarded as having dominant legal power to dispose of family property. In some cases, the husband often exercises this power without taking cognizance of the wife's contributions to the assets as they are usually acquired in the husband's name.

In the Yoruba customary law, the deceased wife is regarded as part of the chattel or property to be inherited and as such, she has no inheritance rights in her husband's property¹⁵. Exclusion of the wife from inheriting from her husband's estate is based on the Customary Law notion that succession or devolution of his property follows blood. Not being a blood relation of the husband, a wife or widow has no claim to any share¹⁶. From these, one can deduce the fact that women in matrimony are greatly discriminated against with regards to distribution of the assets of the marriage in the event of divorce or even death. And sadly, the laws providing for how assets are to be shared when it comes to settlement of properties in the event of divorce did not give a clear-cut illustration as to how these assets are to be shared. Sadly too, Nigerian Courts have so far banked on this to distribute these assets with the women getting just a token from the assets of the marriage.

Polygamous Practices

When women are replaced by others, they are pushed aside and forgotten. Emecheta B. (1979)¹⁷ reports: '{She was not surprised when Amatokwu told her casually one evening that she would have to move to a nearby hut kept for older wives, because his people had found him a new wife. 'My father is desperate I am sorry Nnu Ego, but I cannot fail my people'. Because of the replacement, Nnu Ego cries to her chi to save her. 'O my chi, why do you have to bring me so low? Amatokwu insults and blames his wife Nnu Ego for her childlessness. 'I am a busy man. I have no time to waste my precious male seed on a woman who is infertile'. Polygamy breaks a woman. Polygamy breaks a home. It widens the gap between husbands and wives. It brings discrimination. The first woman is forgotten. The man begins to favor the new woman in many cases and when the man dies, there are always problems in sharing the property of the deceased which in most cases leads to unending court cases and even killing one another.

Marriage to Deceased Relatives

In most cultures sadly, a woman who loses her husband is married off to the brother of the deceased husband. This practice is totally unfair to the woman. These widows inherited are sometimes not regarded as legal wives by the family they go into. They are not respected nor are their position recognized in the family.

3. Remedies of Nuptial Agreements

Nuptial Agreements serve as a bedrock of so many important topics in Family Law example Contract and Family Law, public interest and private lives feminism to mention but a few. The agreements give unique insights into all of these areas bringing out issues and problems in a singularly clear way example, how we think about marriage and relational contracts and how the law should respond to issues pertaining marriage. Past discussions on nuptial agreement tend to be either unduly pessimistic or unduly sanguine regarding the enforcement of this agreement under traditional contract principles.¹⁸ The pessimists think that enforcement of the agreement will

¹¹ B Emecheta, *The Bride Price*, (London :Fontane Collins, 1976)p. 45

¹² The Married Woman Property Act 1883 accords some recognition and gives a surviving wife inheritance rights on certain portion of the husband's legacy. Married Women Property Act is a statute Of General Application in Nigeria.

¹³ (1987) 3 NWLR (pt 62) 239

¹⁴ (1990) WRN 98

¹⁵ This is made possible through levirate arrangement. Under this system, if a person dies leaving a young widow capable of bearing children, she would be expected to enter into a levirate union with one of the deceased male relatives

¹⁶ Following Customary Law, the Nigerian Court of Appeal, Lagos Division held that wives are regarded as chattels which are capable of being inherited by other members of the family of the deceased. See *Ogunkoya V Ogunkoya*, Suit No. CA/L/46/88, 56 (Unreported)

¹⁷ Emecheta, *The Joys of Motherhood* (London :Heinemann, 1979)p.43

¹⁸ Compare G F Brod, 'Premarital Agreements and Gender Justice', 6 ALE J.L8 FEMINISM 229, 279 (1994) 'Law makers should recognize pessimist agreements for what they are: Contracts that violate societal norms against gender discrimination) with Marjorie Maguire Schultz, Contractual Ordering

inevitably lead to grave injustice¹⁹ while the optimists think that enforcement of these types of agreements must always increase social welfare as this is the inevitable result of enforcing all voluntary choices.²⁰ This work challenges the views of the pessimists, arguing that the resources of current contract law can protect parties from most forms of unfairness that tend to result from these agreements, and still provide parties who have a good faith desire to order their own domestic lives with the necessary legal powers to do so. As will become clear, this concept is deceptively far-reaching. A proper consideration of the concept touches upon issues exceeding division of property only. In the light of this, in the protection of the property rights of women in marriage, nuptial agreements can protect other incidences of marriages. This is because there is nothing in the law that prohibits couples from entering into agreements whether or not the intended marriage is protected statutorily or not. Also in Nigeria, statutory marriage is not the only recognized type of marriage. The type and incidence of marriage determines the extent to which nuptial agreement play a role. For instance, the Administration of Estate Law²¹ takes care of properties acquired in the course of statutory marriage. So, while Prenuptial Agreement can come in handy in aiding the woman protect her properties acquired before the marriage, Postnuptial agreement can also come in handy just like the Administration of Estate Law to protect the rights of woman who are already in the marital institution. However, in customary marriage, Prenuptial and Postnuptial Agreements can come in generally in fortifying the protection of the woman's property both before and during marriage. It should be borne in mind and as explained in the scope and considering the nature of nuptial agreement, it is not all unfair practices that it guards against. Bearing this in mind, what follow are a series of remedies nuptial Agreement can offer:

Protection of Women's Property Right

This work is not unmindful of the fact that there are laws statutory²² and judicial²³, which protect women's property rights in marriages in Nigeria. That notwithstanding, most of these rights are endangered by the incidences of marriage. Also, the Matrimonial Causes Act did not give a clear-cut criteria as to how these assets are to be shared in the event of divorce. This is where Nuptial Agreement comes in. Through this Agreement, a woman can include terms which will ensure that properties she acquired both prior to the marriage and in the course of the marriage remain her private estate. Also in statutory marriages, in the event of divorce, the woman is protected too. This is because Nuptial Agreement defines how properties are to be shared in the event of divorce instead of leaving everything to the mind of the court. The woman in this case, do not need to prove her contribution to the jointly acquired properties since it is all spelt out in the agreement. Furthermore, through Nuptial Agreement as well, a woman can add the clause that whatever contribution made to a jointly acquired property can be severed. This has posed a problem for women in marriages in Nigeria in the event of divorce. Cases such as *Nwanya v Nwanya*²⁴ and *Shodipo v Shodipo*²⁵ have given a better appreciation to the extent of discrimination which women have to contend with in handling the financial aspect of divorce in Nigeria. This is a far cry from what is obtainable in foreign jurisdictions. For example, in *Wachtel v Wachtel*²⁶, the court ruled that the domestic contributions of the wife to the home in enough contribution and this ought to sphere in the income of the family²⁷. In Nigeria, most women are housewives who stay at home to take care of the home front while the husband goes out to make money. Thus, if there is an agreement which will set out the share of the woman over income realized by the husband, the property rights of the woman will be protected. Furthermore, in customary marriage, what is applicable most of the time is that when a man dies, his people devour his property to the exclusion of the wife. And because it is a customary marriage, it is not protected by the marriage Act and the Matrimonial causes Act. However, where there is an agreement, the woman can protect the marital property and can sue even against the estate of the deceased husband in the event of contention.

Nuptial Agreement as a Tool to Protection of Women against Domestic Violence

It is important to note that Nuptial Agreement in itself does not automatically guarantee the protection of women's rights against domestic violence.²⁸ It does not tie the hands of an aggressive man. The role this agreement plays is that sometimes women tend to endure this domestic violence and continue suffering same because they are scared of what the future holds for them financially, thus endangering their lives. By the agreement therefore, the woman guarantees her rights in the marriage such that in event where the violence becomes unbearable, she can comfortably go out of the marriage with the assurance that her property rights have been taken care of by agreement. The agreement can be invoked and all shares of marital property accruing to the woman will be given to her. Also, the agreement can place a caution on the man who domestically violates his wife because he knows what he stands to lose should the woman leave.

Nuptial Agreement as a Tool to Protecting Women against Polygamous Practices

When a man marries another wife, his love and attention shift to his new bride. In majority of cases, the new bride cajoles the man into making a will which will favour her most. However, where there is a Nuptial Agreement setting out the rights of the first wife, a will cannot revoke such agreement. Also, the man cannot transfer a property that is set out in an agreement to belong to his first wife to any other person.

of Marriage: A New Model for State Policy, 70 CALI. Rev, 204, 207-11, 216-23, 285-86, 288-91, 328-34 (1982) (viewing optimistically the private ordering of marriage, in particular premarital agreements relating to economic matters)

¹⁹ See example Brod, *ibid* note 2, at 294 (Premarital agreements have a disparate impact on women and thereby discriminate against them')

²⁰ See E Rasmusen & J E Stake, 'Lifting the Veil of Ignorance: Personalizing the Marriage Contract' (1998), 73 IND L.G, 453, 472 (Assuming that enforcing agreements about marriage creates net gains in trades away from the default positions ,though noting that there may be discrimination concerns about the division of those gains)

²¹ Cap 1 33 Laws of Western Nigeria 1959

²² Administration Estate Law Cap... ;The Nigerian Constitution

²³ *Ukeje v Ukeje*, *opcit*

²⁴ (1987) 3 NWLR (PT 62) 239

²⁵ (1990) WRN 98

²⁶ (1973) 1 ALL ER 119

²⁷ The book Contemporary Issues in Nigerian Family Law by S. C. Ifemeje comes in handy for a proper understanding of this sub-head. The book is highly recommended.

²⁸ There are laws that protect women against domestic violence in Nigeria. They include Criminal Code Act and The Violence Against Persons (Prohibition) Act. These laws have been discussed in previous chapters.

Nuptial Agreement as a Tool to Protection of Women against Subordination of Men

A woman is always regarded as inferior. One of the incidences of this is that she is prevented from acquiring property on her own or the man subdues her to acquire property in their joint names or even in the man's names (with the notion that women are property of the man and whatever they have automatically belongs to their husbands). Nuptial Agreement is a pointer that subordination cannot be tolerated in a marriage. As such a woman is protected from being subdued into buying properties in husband's name. Pal adventure the woman is subdued into buying properties in husband's name; the agreement defines what percentage she gets in the share of the property. Subordination also takes the place of the women being subdued to being a housewife and would at the end of the day be left with no personal acquisition. By the discussion under the protection of property rights, a woman can by Nuptial Agreement specify percentage of property she is entitled to from the husband's enterprise. It also guarantees her rights in the event of divorce.

Pre-nuptial Agreement as a Tool to Militate against Widowhood Practices

Widowhood practices as discussed earlier play out in a manner that women are subjected to various kinds of in human treatment, in the guise of mourning their husbands. In the case of statutory marriage, the woman is basically protected because the Administration of Estates Law guarantees her rights as the first person entitled to administer husband's estate. However, in customary marriages, the woman is obviously being harassed by the late husband's relative even to the point of attempting and ripping her of her husband's properties While the courts have always protected widows,²⁹ Pre-nuptial Agreement can go further to fortify the woman's rights in situations where the deceased husband's relatives become turbulent because the woman can even enforce the agreement against her husband's estates.

4. Conclusion

This research work is not intended to be and is not even a conclusive work on the protection of women against unfair practices in marriages in Nigeria. It has rather provoked an area of research that can be explored in the protection of the rights of women in marriages in Nigeria. In view of the foregoing, this research work recommends empowerment of women, literacy amongst women, and most importantly, legislation of nuptial agreements into the Nigerian Legal System as the way forward in achieving a reasonable protection of women's matrimonial rights in Nigeria.

²⁹ *Ejikeme V Asika opcit* is an illustration.