

Equalizing the Legal Status of Customary and Statutory Marriages in Nigeria: Lessons from Kenya and South Africa

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Abstract

The practice of customary marriage is diverse amongst African indigenous societies due to legal and cultural differences. While some countries conventionally recognize customary marriage as valid, others protect customary marriage with the additional requirement of registration and legal recognition as equal to any other form of statutory marriage. This article examined equalizing the legal status of customary and statutory marriages in Nigeria drawing lessons from Kenya and South Africa. Adopting the doctrinal research method, the article revealed that equalising customary marriage with statutory marriage appeared to lack statutory clarity in Nigeria; and therefore asserted the need for statutory recognition of marriage equality irrespective of form once the necessary rites are met.

Keywords: African Customary Law, African Customary Marriage, Marriage Practices and Family law

1. Introduction

Marriage is an institution intertwined with the cultural and legal dynamics of the society.¹ Marriage exists primarily in two forms; that is; statutory marriages, governed by statutes and customary marriages governed by the native law and custom of the various ethnic groups.² Others are Polyamory, Same-Sex Marriage, Open Marriage, Common Law Marriage,

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¹ RN Bellah and Others, *Habits of the Heart: Individualism and Commitment in American Life*, (New York: Harper & Row, 1985), 93, 102

² JH Rubio, *Family Ethics: Practices for Christians*, (Washington: Georgetown University Press, 2010), 31

Group Marriage, Boston Marriage, Levirate Marriage, Sororate Marriage, Endogamy, Exogamy, 'Mixed' Marriage, Arranged Marriage, Egalitarian Marriage, Covenant Marriage, After-death Marriage and so on.³ Despite the acceptance and practice of customary marriage, it lacks the same legal recognition and protection as statutory marriages. This difference often creates significant challenges, including issues related to inheritance rights, marital property and the status of children born in the union.⁴

The seeming superiority of statutory marriages undermines the cultural heritage of numerous Nigerian communities and leads to practical difficulties for individuals whose marriages are not protected by statute. This calls for a re-evaluation of the legal framework governing marriage in Nigeria to ensure that customary marriage is accorded the same legal status as statutory marriages.⁵

Kenya and South Africa offer valuable case studies in this regard. The Kenyan Marriage Act of 2014 and the South African Recognition of Customary Marriages Act of 1998 integrated various forms of marriage into a unified legal framework, providing equal recognition and protection for customary, statutory, religious, and civil marriages. This legislative reform has helped address many of the issues that arise from the coexistence of multiple marital systems.⁶ The paper has therefore examined the Kenyan and South African practices with the aim of extracting lessons and strategies that can be applied to the Nigerian context.

2.0 Conceptual Clarification

2.1 Customary Law and Customary Marriage

Customary law encompasses laws derived from the customs of a particular community. Although there is no universally accepted definition, efforts have been made to characterize its nature. Customary

³ A Libertine's Thoughts: 20 Types of Marriage' < <http://libertinethoughts.blogspot.com/2008/01/20-types-of-Marriage.html> > accessed on 27 July 2024

⁴ N Tijani, *Matrimonial Causes in Nigeria- Law and Practice* (Renaissance Law Publishers Limited, 2007) 13

⁵ SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publishers, 2004) 32

⁶ OJ Awolalu and DO Adelomo, *West African Traditional Religion* (Ibadan, Onibonjoje Press 1979)

law is often described as a body of customs that govern the various relationships among members of a community within a traditional context. Obaseki JSC described customary law in the case of *Oyewunmi v Ogunesan*,⁷ as the organic or living law of an indigenous group of people. There has also been constitutional recognition of custom. For example, Article 11(3) of the 1992 Constitution of Ghana defines Customary Law as rules of law which are by custom applicable to particular communities in Ghana.

These laws were allowed to exist even after the colonialists introduced their own system not however without insisting that the laws complied with their own scale of repugnancy and natural justice test;⁸ thereby subjecting customary laws to English principles of natural justice, equity and good conscience.⁹ It must also be mentioned that in Nigeria, where a person seeks to rely on a customary law in a law court, he has the burden of proving it,¹⁰ except the court has taken judicial notice of it.¹¹ African customary law derives from various sources such as proverbs, re-enactment ceremonies, traditional festivals, *Ifa* philosophy, individual and communal praise poems, traditional legislation and recently treatise by anthropologists and jurists;¹² thereby making is a task to establish.

Marriage under customary law often encompasses more complex and nuanced arrangements, including polygamous unions. There is no universally recognized customary law as various and divergent customary laws exist amongst indigenous communities across Africa.¹³ The legal and social implications of customary marriage systems vary

⁷ (1990) 3 NWLR (Pt. 137) 182 at 207

⁸ SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publishers, 2004) 32; W Abraham, 'Sources of African Identity' in Alwin Diemer, (ed), *Africa and the Problem of Its Identity*, (Frankfurt: Peter Lang 1987)

⁹ SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publishers, 2004) 32

¹⁰ Evidence Act 2011 (as amended), s 18

¹¹ *Ibid.*, s 16

¹² A Ibidapo-Obe, *A Synthesis of African Law*, (Concept Publications Limited, 2005) 36

¹³ IP Enemuo 'Dissolution of Marriage Under Customary Law: Need for Reform,' (2005) 5(1) *Unizik Law Journal* 105

between different cultural contexts and legal jurisdictions. While some countries recognize customary marriages as legally valid, others may require additional formalities or registration for legal recognition.¹⁴

Understanding the legal frameworks on customary marriages is essential for ensuring the protection of individuals' rights within these systems.¹⁵ It is against this backdrop that this paper explores equalizing the legal status of customary and statutory marriages in Nigeria, drawing lessons from Kenya and South Africa.

2.2 Statutory Marriage

Marriage represents the union between a man and a woman and can be traced back to the creation of humanity.¹⁶ Despite its global significance, there is no universally accepted definition of marriage. Various individuals, articles, and books have offered diverse interpretations of the term. According to Black's Law Dictionary, marriage is defined as 'the legal union between one man and one woman.' Lord Penzance¹⁷ while enunciating the legal definition of statutory marriage in the case of *Hyde v Hyde*¹⁸ described it as the voluntary union for life of one man and one woman to the exclusion of all others.¹⁹ According to section 3(1)(d) of the Matrimonial Causes Act:²⁰

Subject to the provisions of this section, a marriage that takes place after the commencement of this Decree is void in any of

¹⁴ K Mosley, 'The Legal Recognition of Customary Marriages in Africa: A Comparative Analysis' (2016) 18(2) *African Human Rights Law Journal* 435-436

¹⁵ JA Yakubu, Colonialism, Customary Law and Post Colonial State in Africa: The Case of Nigeria, Paper prepared for CODESRIA'S 10th General Assembly on "Africa in the New Millennium, Kampala, Uganda, 8th-12th December 2002

¹⁶ SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publishers, 2004) 32; W Abraham, 'Sources of African Identity' in Alwin Diemer (ed), *Africa and the Problem of Its Identity*, Frankfurt: Peter Lang, 1987)

¹⁷ (1866) LR P & D 130

¹⁸ *Ibid.*

¹⁹ *Ibid*

²⁰ Matrimonial Causes Act (MCA) Cap M7 Laws of the Federation of Nigeria 2004

the following cases but not otherwise, that is to say, where the consent of either of the parties is not a real consent because:

- i. it was obtained by duress or fraud;
- ii. the party is mistaken as to the identity of the other party or the nature of the ceremony performed;
- iii. the party is mentally incapable of understanding the nature of the marriage contract; ...

The Marriage Act²¹ is the primary legislation that governs the celebration of marriage in Nigeria. Under the Act, the only form of marriage recognized as statutory is monogamous marriage (marriage between one man and one woman). The essential requirements of a statutory marriage are provided under the Matrimonial Causes Act 1990 and summarized below:

2.2.1 Consent of the Parties

Marriage must be conducted between a man and a woman who have freely decided to marry. A marriage is invalid if consent was obtained by fraud, misrepresentation, threat, or mistake as to identity or the nature of the ceremony, or if a party is mentally incapacitated, as outlined in Section 3(d) of the MCA.²² Voluntary consent is a prerequisite for a valid marriage.

2.2.2 Parties to the Marriage

The parties must not be within the prohibited degrees of affinity (relationship through marriage) or consanguinity (blood relationship). Specific prohibited relationships include, for a man, marriage to his ancestress, wife's mother, wife's grandmother, wife's descendant, etc. For a woman, marriage is prohibited to her ancestor, descendant's brother, father's brother, mother's brother and so on. However, Section 4 of the Matrimonial Causes Act, 1970, allows two persons within the degree of affinity to marry with a judge's permission in special circumstances.

2.2.3 Marital Status of the Parties

²¹ Marriage Act (MA), CAP M6 Laws of the Federation of Nigeria 2004

²² *Ibid*

Neither party should be in a subsisting marriage. A person in an existing marriage must dissolve it conclusively before entering a new one. A Decree Nisi (a temporary dissolution) must become a Decree Absolute before a new marriage can be contracted. Violation of this provision nullifies the marriage and may result in criminal liability, with penalties including imprisonment. However, a couple married under customary law may convert same to a statutory marriage provided that the marriage is not polygamous.²³

2.2.4 Age of the Parties

The marriage is void if either party is below the marriageable age. Neither the Matrimonial Causes Act nor the Marriage Act specifies a marriageable age.²⁴ However, Section 21 of the Child's Right Act²⁵ stipulates eighteen years as the minimum age of marriage applicable to the Marriage Act.

2.2.5 Written Consent of the Father

Written consent of the father is required if either party to a statutory marriage, not being a widower or widow, is below 21 years old. If the father is deceased, mentally incapacitated, or absent from Nigeria, the mother's consent is required. If the mother is also unavailable, the guardian's consent will suffice.²⁶

A statutory marriage is a union of a man and woman as defined by the Marriage Act. Sections 3 and 5 of the MCA²⁷ also provide instances where a marriage could become void or voidable, such as when consent is obtained by duress or fraud, or when a party is mistaken as to the identity of the other party or the nature of the ceremony performed.

3. Marriage under African Customary Law Generally

²³ Section 47(1) of the Marriage Act Cap M6 Law of the Federation of Nigeria, 2004

²⁴ N Tijani *Matrimonial Causes in Nigeria- Law and Practice* (Renaissance Law Publishers Limited, 2007) 9

²⁵ Cap C50, Laws of the Federation of Nigeria, 2004

²⁶ E.I.Nwogugu, *Family Law in Nigeria*, (3rd edn., HEBN Publishers Plc, 2014) 41

²⁷ Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004

African customary marriage can be described as the union of one man to many women as his wives.²⁸ It is a form of union in which several wives are united to one man, each having the status of a legal consort.²⁹ The union with many women does not necessarily have to be from the onset, it just suffices that the formalities of the marriage make it a potentially polygamous venture.³⁰ The multiple nature of the African marriage is so sacrosanct and unmovable that the parliament of Kenya passed a Marriage Act recognising the existence of this system of marriage and elevating it to the status of a civil marriage.³¹

In South Africa, although customary marriages were previously governed by customary law, they were not afforded equal legal status as civil marriages until the Recognition of Customary Marriages Act of 1998, which implemented the constitutional recognition provided under Section 15(3) of the Constitution of the Republic of South Africa, 1996. By this law, nothing prevents legislation from recognizing, *inter alia*, marriages concluded under any tradition or a system of religious, personal or family law. Section 9 of the Constitution further regulates that everyone should have the right to equal protection of the law.³²

Under the African Customary Law, marriage is more for reproduction rather than mere companionship and it is seen as a compulsory venture. It is in this light that Mbiti³³ opined that failure to get married under normal circumstances means that the person has rejected society and society rejects him in return. Therefore, African marriage is a social family affair which involves the coming together of two individuals, two families and sometimes even two communities.

3. Essentials of African Customary Marriage

²⁸ SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publishers, 2004) 32

²⁹ IP Enemuo, 'Dissolution of Marriage under Customary Law: Need for Reform', (2005) (5) (1) *Unizik Law Journal* 105

³⁰ E Ayisi, *An Introduction to the Study of African Culture; Nairobi* (East African Educational Publishers, 1974)

³¹ Marriage Act 2014, No 4, Laws of Kenya 2014

³² Constitution of South Africa, 1996, s9

³³ JS Mbiti, *African Religions and Philosophy*, (Johannesburg Heineman, 1969) 133

Africa is quite diverse in terms of its peoples and cultures and since customary law derives from people's cultural practices, it would follow ordinarily that there would be almost as many essentials and validities of marriage as there are cultures in Africa. Even amongst a particular tribe, there may exist varying forms of customary marriage.³⁴ In a Ghanaian case, *Yaotey v Quaye*,³⁵ Ollennu J (as he then was), after reviewing earlier decision named the essentials of a valid traditional Ghanaian marriage as: agreement between the parties, consent of the families and consummation, which together constitutes the fundamental basis for a legally recognised union. K.Y Yeboa³⁶ upon a review of *McCabe v McCabe*³⁷ added more requirements to include publicity and capacity.

This paper will consider the germane ingredients of marriage that permeate almost all African countries. These ingredients have been identified and put succinctly by Emiola³⁸ in six categories as follows:

3.1 Capacity to marry

A betrothal is merely an agreement to marry. It follows therefore that the parties have to be able to contract a marriage for there to be a valid marriage. Capacity is discussed under three subheads:

3.1.a Age

There is no specific age for marriage under customary law. In Sudan minimum age of marriage is 10 years for boys and puberty for girls for Muslim marriages (which are the most prevalent) and 13 for girls and 15 for boys for non-Muslim marriages.³⁹ Similarly in some countries,

³⁴ SU Nweke-Eze, 'An Appraisal of Customary Law Marriages in Nigeria,' <file:///C:/Users/USER/Downloads/2082-2772-1-PB%20(1).pdf> accessed 25th October 2024

³⁵ (1961) GLR 573 at 576

³⁶ K.Y Yeboa, 'Formal and Essential Validity of Akan and Ghanaian Customary Marriages,' (1993-1995) (19) *University of Ghana Law Journal*, 133-144 at 137

³⁷ (1994) 1 FLR 410

³⁸ A Emiola, *The Principles of African Customary Law* (2nd edn., Emiola Publishers Ltd) 93

³⁹ V Odala, 'Why is it Important for Countries to Have a Minimum Legal Age of Marriage?' <<https://www.girlsnotbrides.org/documents/1196/ACPF-Importance-of-min-age-of-marriage-legislation-May-2013.pdf>> accessed 1st July 2024

marriageable age is determined by physical maturity or puberty, rather than a specific age. In Kenya, for instance, the age of marriage varies among ethnic groups with some communities considering initiation rites as a marker of readiness for marriage,⁴⁰ not until recently when the Marriage Act was enacted making the marriageable age 18 years.⁴¹

The majority of customary laws do not specify a minimum age for the solemnization of customary law marriages. The absence of a clear age requirement in customary law has contributed to a prevalent issue of child marriage, accompanied by its associated challenges. In certain regions, child betrothal is widespread, yet the actual marriage may be deferred until the individual reaches the age of puberty.⁴²

3.1.b Prohibited degree of marriage

In most parts of Africa, marriage is not encouraged between people who are considered too close in relationship. The relationship could be that of consanguinity or affinity.⁴³ Consanguinity is the most severe and it is to the effect that people who are related by blood should not be allowed to marry. It is a taboo in many societies. For affinity however, it means people who have become related due to marriage or other relationship not blood should not be allowed to marry. This differs from community to community with a degree of flexibility in some instances. In Kenya for example, the Luhya and Luo tribes allow a man to marry his wife's sister even when the wife is alive and a Teso man may take over his father's wife not being his mother.⁴⁴

In the Nigerian case of *Sapara v Sapara*⁴⁵ however, it was said that when such marriages are held in error, atonements could be offered to the gods for rectification. However, under Yoruba native law and

⁴⁰ J Kenyatta *Facing Mount Kenya: The Tribal Life of the Gikuyu* (London: Secker and Warburg, 1938)

⁴¹ Ace Litigator 'Marriage and Divorce under Customary Laws in Kenya' <<https://www.linkedin.com/pulse/marriage-divorce-under-customary-laws-kenya-ace-litigator>> accessed 2nd August 2024

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ Ace Litigator 'Marriage and Divorce under Customary Laws in Kenya' <<https://www.linkedin.com/pulse/marriage-divorce-under-customary-laws-kenya-ace-litigator>> accessed 2nd August 2024

⁴⁵ (1911) RGCR 605

custom, a man could inherit his brother or father's wife after their demise.

3.1.c Consent

Consent is very essential if there must be a valid marriage. Consent is in two forms; consent of the parties and consent of their parents. The two are very essential and one cannot be dispensed with for the other except the customary practice of a particular community relaxes the rule on it. In an area where child marriage is practiced, the girl is generally required to give her consent after she has reached the age of puberty.⁴⁶ Parental consent is next.

Initially, in Nigeria, customary law was not concerned with consent between the two marrying parties. Marriage was regarded as a union between two families rather than two individuals, but in recent times, there is an implicit recognition of the need for the consent of the parties.⁴⁷ The Supreme Court in the case of *Osanwonyi v Osanwonyi*⁴⁸ held that under Bini Native Law and Customs, the consent of the parties was necessary for a valid marriage. In *Okpanum v Okpanum*,⁴⁹ the High court of East Central State of Nigeria held that in order to constitute a valid customary marriage, there must be parental consent and mutual agreement between the parties.

According to Nwogugu,⁵⁰ parental consent is not only essential but mandatory for the celebration of a valid customary marriage. No marriage under the Nigerian traditional system can be recognized until the two parties come of age.⁵¹ Puberty, however, is the yardstick for determining the attainment of marriageable age and as such, it varies.⁵²

Age does not determine capacity in Kenya under customary law, and the number of years someone has lived on earth does not matter but

⁴⁶ A Emiola, *The Principles of African Customary Law* (2nd edn., Emiola Publishers Ltd) 93

⁴⁷ *Ibid*

⁴⁸ (1973) NMLR 26

⁴⁹ (1972) 2 ECSLR 561

⁵⁰ E L Nwogugu *Family Law in Nigeria*, (Heinemann Educational Books, 1974) 44

⁵¹ A Emiola, *The Principles of African Customary Law* (2nd ed., Emiola Publishers Ltd) 93

⁵² *Ibid*

whether or not someone has gone through a process of initiation.⁵³ The initiation process differs from community to community. While in some communities, one becomes capable upon circumcision, in others, it is not so. However, with the introduction of the new Marriage Act, it would seem that marriages cannot be conducted upon the completion of the initiation any longer but on attainment of age of eighteen years.⁵⁴

In South Africa, under customary law, puberty and initiation ceremonies are prerequisites to accept someone as an adult in the community. Puberty was regarded as the minimum requirement for marriage as the ultimate goal of a marriage was regarded as procreation.⁵⁵ Customary law does not have a specific age requirement but the Recognition Act includes an age requirement to allow the individuals to the marriage to take an informed decision with regard to the consequences of the marriage.⁵⁶ Section 3(1)(a)(i) of the Recognition Act⁵⁷ provides that both parties should be at least 18 years of age. The purpose of this section is to prevent forced marriages similar to those that occurred in the former Transkei and KwaZulu-Natal.⁵⁸ This is based on the requirement stated in the African Charter on Human and Peoples' Rights of 1981.⁵⁹

The Recognition Act⁶⁰ does not define what should be regarded as permission but only states that permission of the individual is needed as a minimum requirement. The Recognition Act therefore amends the traditional position in that the individuals now decide on the conclusion

⁵³ Ace Litigator 'Marriage and Divorce under Customary Laws in Kenya' <<https://www.linkedin.com/pulse/marriage-divorce-under-customary-laws-kenya-ace-litigator>> accessed 2 August 2024

⁵⁴ Marriage Act of Kenya 2014, s 4

⁵⁵ Marissa Herbst and Willemien du Plessis, 'Customary Law v Common Law Marriages: A Hybrid Approach in South Africa' (2008) *Electronic Journal of Comparative Law* 6

⁵⁶ NJJ Olivier and Others., *Indigenous Law*, (Durban, 1996) 11

⁵⁷ The Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)

⁵⁸ Marissa Herbst & Willemien du Plessis, (note 55)

⁵⁹ Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, of 13 September 2000 (entered into force 25 November 2005)

⁶⁰ The Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)

of the marriage and not the families.⁶¹ Formally, customary law was not concerned with consent between the two marrying parties. Marriage was regarded as a union between two families rather than two individuals.⁶² An essential requirement was that the family councils had to be in agreement as to the identity of the two parties.⁶³ Several judicial pronouncements have been made prohibiting forced marriages and that the two marrying parties should agree to the marriage at the time of the union.⁶⁴ In terms of some of the customary law systems, it is possible to abduct a girl to another family household in order to force the girl's family to

give permission for the marriage. This is known as *ukuthwala*.⁶⁵ More often than not, the girl agreed to the abduction, but Transkei and KwaZulu-Natal banned the practice as it was not always possible to ascertain if the girl indeed did agree to be abducted.⁶⁶

In Ghana, consent is not just an agreement between parties to marry but also of their families to accept the two parties as husband and wife, for the family of the husband to accept the woman as their son's wife and for the family of the wife to accept the man as their daughter's husband. This position has long been recognized by scholars⁶⁷ and judicial authority.⁶⁸ In the Ghanaian case of *McCabe v McCabe*,⁶⁹ it was held that parental consent is very germane and it is only when the parents do not exist that it can be dispensed with.

3.1.d Dowry/Bride Price/Bride Wealth

Marriage is a contract, no doubt, and for a contract to be valid there should be a consideration. The consideration for a valid African

⁶¹ TWA Bennett *Customary Law in South Africa* (Landsdown Publishers, 2004)

⁶² *Mabena v Letsoalo* 1998 2 SA 1068 (T)

⁶³ Marissa Herbst & Willemien du Plessis, (note 55)

⁶⁴ SC Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Nolix Educational Publishers, 2004)32; Abraham, William 'Sources of African Identity' in Alwin Diemer (ed), (1987) Africa and the Problem of Its Identity, Frankfurt, Peter Lang

⁶⁵ *Ibid*

⁶⁶ NJJ Olivier and Others. (note 56) at 11

⁶⁷ John Mensah Sarbah, *Fanti Customary Law* (3rd edn, London: Cass, 1968) 317

⁶⁸ *Djarbeng v Tagoe* (1989-90) 1 GLR 155

⁶⁹ (1994) 1 FLR 410

traditional marriage therefore is the bride price. In a jurisdiction like Nigeria, the bride price traditionally used to be in form of a labour service to the bride's father or a token of money⁷⁰. It must be categorically stated that the payment of bride price is important in African traditional marriages such that non-payment of it can vitiate the marriage.

The amount of dowry collected is not the same for all tribes in Kenya. Among the Tavetas for example, it is a fixed dowry of a cow, three female goats, two bulls and a home for the bride's father.⁷¹ The Kenyan Marriage Act does not seem to interfere much in regulating how much is due as dowry as it allows already laid down payment of a dowry by a custom to be valid, just a token is sufficient.

3.1.e Solemnisation/Celebration/Publicity

This is the actual marriage ceremony where the bride, upon every right being satisfied is handed over to the family of the groom and a form of feast is thrown in celebration or acknowledgement of this. The ceremony takes different form in different parts of Africa. It ranges from the lifting over threshold, offering water or fire to the bride, making the wife sit on her husband's laps of the Nigerian people⁷² to the solemn implied publicity of the husband and wife merely living together with the consent of their families.⁷³ After this event, the bride becomes the resident of her husband's house for life, even upon death of the husband.⁷⁴

In *Omoga v Badejo*⁷⁵ the court held that there must be a formal handing over of the bride to the groom in the presence of the two families and witnesses and the acceptance and taking away of the bride

⁷⁰ A Emiola, *The Principles of African Customary Law* (2nd ed., Emiola Publishers Ltd) 93

⁷¹ Ace Litigator 'Marriage and Divorce under Customary Laws in Kenya,' <<https://www.linkedin.com/pulse/marriage-divorce-under-customary-laws-kenya-ace-litigator>> accessed 2 August 2024

⁷² A Emiola, *The Principles of African Customary Law* (2nd ed., Emiola Publishers Ltd) 93

⁷³ *McCabe v McCabe* (1994) 1 FLR 410

⁷⁴ PA Talbot, *People of Southern Nigeria*, Vol 111 at 426

⁷⁵ (1985) NCNLR 1075

to her husband's house for marriage under Yoruba Native Law and Custom, to be valid.

Publicity is an essential of a valid marriage in Ghana. This was affirmed in the case of *McCabe v. McCabe*⁷⁶ where two expert witnesses were called and they both testified to the fact that publicity is a requirement in Ghanaian customary marriages.⁷⁷ They said publicity is another way of referring to the ceremonies. The publicity is not necessarily a large one, that it could be proved by overt acts like mere living together.

3.1.f Consummation

Inability to consummate the marriage is held a major ground for dissolution of a marriage. Consummation of marriage is a solemn seal or signature, in which sex is used in and as a sacrament signifying inward spiritual values.⁷⁸ In *Osanwonyi v Osanwonyi*⁷⁹, the Supreme Court held that unless there was cohabitation, payment of dowry alone does not constitute marriage under such native law and custom. In traditional societies, the very night of the marriage is eagerly awaited by the groom's family as he is expected to announce his exploits to his family and state if his wife was found intact or not.⁸⁰

3.2 Betrothal

Betrothal is the formal engagement of the parties.⁸¹ It is a mutual promise between the two families to support the marriage.⁸² It is the point at which match making negotiations between the parties themselves or guardians come to a head. This stage consists of a formal process of agreement between the prospective spouses, the giving of consents by their parents or guardians and the giving of gifts (in money

⁷⁶ (1994) 1 FLR 410

⁷⁷ K.Y Yeboa (note 36) at 137

⁷⁸ JS Mbiti, *African Religions and Philosophy*, (Johannesburg Heineman, 1969) 133

⁷⁹ (1972) ANLR 792 at p. 799

⁸⁰ The Lawyers Chronicle, 'Types of Marriages under Nigerian Law,' <<http://www.thelawyerschronicle.com/types-of-mARRIAGES-UNDER-NIGERIAN-LAW/#>> accessed 24th October 2024

⁸¹ *Ibid.*

⁸² Emiola, (note 72)

or in kind) by the man to the woman and her family.⁸³ After the betrothal, the actual marriage takes place. The betrothal style varies from society to society. In Nigeria, it is the parents who initiate the process of betrothal. Betrothal is a mere agreement to marry, thus, the consent of the marrying parties may not be relevant at this stage.⁸⁴ When the families concerned are convinced that there are no facts that could hinder the marriage, the betrothal may takes place.⁸⁵ Betrothal is arranged through intermediaries who conduct all the investigation. These intermediaries may be family or friends.⁸⁶ In Nigeria among the Yorubas', betrothal involves various traditional and cultural steps, one of which is the payment of the betrothal fee to the woman's family.⁸⁷

4. Status of Customary Marriage in Nigeria

The customary marriage system in Nigeria, despite its rich cultural significance and widespread practice, lacks formal recognition and legal security. This oversight leaves many individuals in customary marriages vulnerable and without adequate protection under the law, hence the need to amalgamate customary marriages with those conducted under statutes.⁸⁸ This vulnerability stems from a prevailing tendency among Nigerians to replace or supplement customary marriages with statutory marriage. Many Nigerians seem averse to solely engaging in customary marriages, often preferring to formalize their unions through civil marriages for various reasons. Consequently, Nigerian customary marriages face numerous challenges including:

- a. Superiority of the English system of laws to the customary system of laws: The British recognized the need to allow the natives to govern themselves by their own laws; such permissive expression was halted or at least, demarcated by the level of tolerance of the transplanted legal system, value and

⁸³ The Lawyers Chronicle, *ibid*

⁸⁴ S Johnson, *History of the Yorubas*, (CSS Bookshop, 1921) 13

⁸⁵ *Ibid*

⁸⁶ SNC Obi, *The Ibo Law of Property*, (Butterworths, 1963)

⁸⁷ T Elias, *Nigerian Family Law*(2nd edn Buttersworth, 1973)

⁸⁸ Elias, (note 87)

method of governance.⁸⁹ This is sadly a reflection of today's attitude of the Nigerian legal system for most of the laws, marriage laws inclusive still rates the English system of marriage above its African counterpart. To this end, Marriage Act 2004 section 33(1), 35, and 47 are apposite. For the avoidance of doubt, these sections provide as follows:

section 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 35 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.

- b. Non uniformity/lack of codification of the African system of marriage: While the Yorubas of Nigeria have a system of marriage different from that of the Igbos, the Hausa of Nigeria have a system different from that of the Ibibios of Nigeria. This lack of uniformity is a serious hindrance to the development of the customary laws into a singular guide. Every man tends to do what he likes in his own way.⁹⁰

⁸⁹ JA Yakubu, 'Colonialism, Customary Law and Post Colonial State in Africa: The Case of Nigeria,' Paper prepared for CODESRIA'S 10th General Assembly on "Africa in the New Millennium," Kampala, Uganda, 8th-12th December 2002

⁹⁰ O Bambose 'Customary Law Practices and Violence against Women: The Position Under the Nigerian Legal System' Paper presented at 8th International Interdisciplinary Congress on Women hosted by Department of Women and Gender Studies (2002), University of Makerere

- c. Flexibility of customary laws: Flexibility could lead to abuses of various types and this could make the system of marriage unattractive. For example, most customary law systems have lacunas in the area of due age for marriage. This makes for incidents of child marriage in many rural communities.
- d. Statutory marriages may lead to neglecting African customary law marriage under the Marriage Act otherwise known as statutory marriages affect customary marriages in Nigeria. this is as a result of recognition, superiority and certification accorded such marriages while, there is nothing of such in a customary marriage.
- e. Registration: In Nigeria, for instance, registration of customary marriages hardly pursued in states where registration is provided for. This is a major setback as registration is *prima facie* evidence of marriage especially to third parties.

5. Equalizing the Status of Statutory and Customary Marriage in Nigeria

The African Charter on Human and People's Rights emphasises the importance of recognising and respecting customary law.⁹¹ Granting equal legal status to statutory and customary marriage in Nigeria is an important step towards preserving cultural heritage, eliminating gender bias and protecting rights of individuals. This can be achieved by recognising marriages conducted in accordance with customary law as valid and enforceable, with the same rights and obligations as statutory

⁹¹ African Union, Preamble of the African Charter on Human and People's Rights, Banjul Charter, 1981

marriages.⁹² The advantages of establishing equal legal status for customary marriages are:⁹³

- a. Cultural preservation: Recognising customary marriages promotes cultural diversity and preserves traditional practices.
- b. Improved women's rights: Customary law can be reformed to address gender bias and protect women's rights.
- c. Reduced conflict: Harmonising customary and statutory marriages would minimise conflicts between different legal system
- d. Increased access to justice: Equal legal status expands access to legal remedies for parties in customary marriages.
- e. Enhanced legal certainty: Clear legal recognition of customary marriages provide certainty for parties involved.

Despite the benefits of establishing equal status, there are also potential drawbacks to consider.⁹⁴ They are:

- a. Complexity in merging legal systems: Integrating customary and statutory laws can be complex and requires significant resources.
- b. Potential for increased divorce rates: Equal legal status may lead to more divorces as parties in customary marriages may be more aware of their legal option.
- c. Challenges in reforming customary law: Changing entrenched cultural practices can be difficult.

⁹² ME Nwocha 'Customary Law, Social Development and Administration of Justice in Nigeria' (2016) (7) (4) *Beijing Law Review* 4

⁹³ R Atugha 'Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa' <<https://intergentes.com>> accessed on 29 July 2024

⁹⁴ E Osipitan 'Customary Law in Nigeria: Prospect, Challenges, and the Way Forward,' (2018) 61(2) *Journal of African Law* 147-162

- d. Inconsistent application: Customary laws flexibility may lead to inconsistent application and unequal treatment.
- e. Potential for cultural relativism: Recognising customary law may be seen as condoning practices that violate human rights.

While these disadvantages are equally notable, it is crucial to note that the advantages outweigh the disadvantages.

6. Conclusion

The paper compared customary practices in Africa in relation to marriages. Customary marriage systems vary from jurisdiction to jurisdiction in Africa based on their different cultural contexts and legal jurisdictions Africa. Some countries recognize customary marriages as legally valid, while others require additional formalities or registration for legal recognition. The Nigeria customary marriage is not contained in the same instrument with statutory marriage registration as in some countries like Kenyan and South Africa. In essence, the comparative analysis of African customary marriages serves as a source of guidance for Nigeria. By recognizing the shared values, addressing challenges, and promoting inclusivity, Nigeria can build on its cultural strengths to create a marriage environment that is both rooted in tradition and adaptable to the evolving dynamics of the modern world. The lessons learned from the countries compared provide a foundation for enriching and sustaining the institution of customary marriage in Nigeria.

7. Recommendations

The paper, therefore, recommends the following:

- a. For the problem of lack of uniformity and superiority of the English system, the Kenya style could be adopted in Nigeria. The law passed by the Kenya parliament allows all forms of marriages to be regulated by the Act and they all enjoy equality before the law in Kenya. This is an improvement as it makes customary practices permanent. They are not erased but are guided by a simple uniform set of rules.

- b. Nigeria should develop a unified framework for the registration of customary marriages. In some states in Nigeria, such as Rivers, Ogun, Lagos and Anambra; customary marriages can be registered, but the availability of such registries is not uniform across the country. This would ensure consistency and also abate the rigorous task of having to specially prove customary marriage. Nigeria should also take a step further to impose sanctions on people who would not register their marriages.
- c. Nigeria should have a universal minimum age for customary marriages and provide adequate sanctions for defaulters. This will put an end to child abuse and child marriage in Nigeria.