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Customary Practices and the Conflict with Law: Case Study of Marriage under Selected Native Laws and Customs in Nigeria

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Abstract

Customary law is recognized as an integral part of the Nigerian legal system. Consequently, several enactments, such as the Marriage Act, Matrimonial Causes Act and Evidence Act, *inter alia*, identify the existence of customary law marriage in Nigeria. Even though the features of customary law marriage differ from one community to another, it is characterised by basic features which share peculiar similarities across various communities. Similarly, there are several practices and procedures peculiar to customary law marriage in Nigeria; these practices and procedures differ from one place to another. Even though customary law is described as a law which is generally accepted by a community as binding on them, it is noteworthy that such law is sometimes irrational, and may not always serve the best interest of society as a whole. Often times, it may be of interest to a particular group in the society at the expense of subordinating another group. This article explores some of the customary laws and practices of marriage in Nigeria. In so doing, it identifies those areas where the interests of one societal group are promoted at the expense or detriment of those of another group thereby, conflicting with major statutory provisions in Nigeria, as well as provisions of international Conventions to which Nigeria is a signatory.

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INTRODUCTION

The term ‘custom’ refers to “*a rule of conduct, obligatory on those within its scope, established by long usage*”.¹ Similarly, it is described as “*a rule which in a particular district, has from long usage obtained the force of law*”.² Since the customary law of a community derives from the custom of that community, customary law is defined as laws that emerged from the traditional usage and practice of a people which by common adoption and acquiescence as well as from long usage has acquired some elements of compulsion and force of law acceptable to the people.³ It is also referred to as “*a body of customs, practices and mores which are largely unwritten, and handed down from generation to generation by oral tradition*”.⁴ Just as defined severally by various authors, customary law is interpreted in diverse ways by the Courts. For instance, it is described as “*a mirror of accepted usage, among a given people*”.⁵ It is also interpreted as “*...the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions...*”⁶ According to the Supreme Court in *Zaidan v. Mohssen*,⁷ customary law within the Nigerian context refers to “*any system of law, not being common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding in Nigeria between the parties who are subject to its sway*”.

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¹ Osborn’s Concise Law Dictionary (9th edn, London: Sweet & Maxwell 2001) 121.

² The Evidence Act 2011, s 258(1). See also the Supreme Court in *Agbai v Okagbue* [1991] 7 NWLR (Part 204) 391.

³ A T Oyewo and O B Olaoba, *A Survey of African Law and Custom* (Ibadan: Jator Publishing Company 1999) 30.

⁴ Derek Asiedu-Akrofi, ‘Judicial Recognition and Adoption of Customary Law in Nigeria’ vol. 37 issue 3 *The American Journal of Comparative Law* (1989) 571, 572.

⁵ See the case of *Owoniye v Omotosho* [1961] 1 All NLR 304 per Bairamian FJ.

⁶ See the case of *Oyewunmi v Ogunesan* [1990] 3 NWLR (part 137) 182 at 207 per Obaseki JSC.

⁷ (1973) 11 S.C. 1.

Historically, customary law was the only legal system that existed among indigenous peoples and communities in Nigeria prior to the advent of colonialism.⁸ It found expression in the cultural practices and traditions of such communities.⁹ As a result of the consistent usage, it acquired the element of compulsion and attracted sanctions of different kinds making it enforceable.¹⁰ Thus, customary law was traditionally intrinsic to the life of the indigenous people and local communities in Nigeria. It has over the years regulated various issues affecting the indigenous people such as land, inheritance, marriage, among others. Hence, customary law forms part of the Nigerian legal system in addition to the received English law.¹¹ It derives its validity from the provision of the Nigerian Constitution which is the ground norm of the federation. The Constitution provides that “... *an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution...*”¹² As already stated, customary law has been in existence in Nigeria prior to the enactment of the Nigerian Constitution. Pursuant to the above provision however, customary law have effect in Nigeria particularly; with respect to matters of customs, norms and the general way of life of a particular people to which it relates.

The term ‘marriage’ on the other hand lacks any specific definition; neither the Marriage Act nor the Matrimonial Causes Act nor any other enactment in Nigeria, has given any specific definition of marriage. Traditionally however, marriage could be said to refer to the union of a man and woman as husband and wife with its legal effects such as consortium, among others. According to the Osborn’s law dictionary, marriage refers to “*the voluntary union for*

⁸ Richard Mordi, ‘An Appraisal of Inheritance Rights of Women in Nigeria’ <https://www.academia.edu/7187814/AN_APPRAISAL_OF_INHERITANCE_RIGHTS_OF_WOMEN_IN_NIGERIA>6 [accessed August 15, 2017].

⁹ *Ibid*, 7.

¹⁰ Niki Tobi, *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Ltd. 1996) 103-104.

¹¹ J O Anifalaje ‘Judicial Development of Customary Law in Nigeria’ vol. 9 issue 1 *The Journal of Legal History* (1988) 40.

¹² Constitution of the Federal Republic of Nigeria 1999, sec 315(1).

life of one man and one woman to the exclusion of all others subject to the formalities required by the place where the marriage takes place".¹³ Customary law marriage has been described as marriage contracted in accordance with native law and custom.¹⁴ It is however noteworthy that there is no universally accepted form of customary law marriage in Nigeria; the practices and procedures for such marriage vary from one place to another.¹⁵ Notwithstanding, the basic characteristics of customary law marriage are similar across the various cultures in Nigeria.¹⁶ According to the Court of Appeal, "*there are essential and formal requirements for the celebration of valid customary law marriages and although the details of such requirements vary from one locality to another, the broad principles are sometimes similar*".¹⁷ The requirements for a valid customary law marriage range from parental and spousal consent; marriageable age; bride price; to dissolution of marriage, among others. Some of these customary law marriage requirements as practiced by indigenous communities however conflict with major statutory provisions, as well as international instruments relevant within the Nigerian jurisdiction. This article will proceed to explore such areas of conflict between customary law marriage practices and the provisions of some statutes in force in Nigeria, as well as those of international Conventions.

I. Capacity to marry

Although there is no generally accepted minimum age for the celebration of customary law marriage in Nigeria, some parts of the country have legislated specific minimum age for contracting a valid customary law marriage.¹⁸ According to the Age of Marriage

¹³ Osborn's Concise Law Dictionary, *op cit.*, 246.

¹⁴ Ajuzie C Osondu, *Modern Nigerian Family Law & Practice* (Lagos: Printable Publishing Company 2012) 78.

¹⁵ *Ibid*; M O Izunwa, 'Divorce in Nigerian Statutory and Customary Marriages: A Comparative Critique of Grounds, Procedures and Reliefs Attaching Thereto' vol. 3 issue 6 *Peak Journal of Social Sciences and Humanities* (2015) 77, 78.

¹⁶ *Ibid*.

¹⁷ Per Niki Tobi JCA in *Muojekwu v Ejikeme* [2000] 5 NWLR (Part 657) 402.

¹⁸ For instance, the Age of Marriage Law of the old Eastern Region of Nigeria; the Native Authority (Declaration of Borgu Native Marriage Law and Custom)

Law of the old Eastern Region, a marriage between, or in respect of, persons either of whom is under the age of sixteen shall be void.¹⁹ The Borgu Native Marriage Law and Custom Order prescribes the minimum age for marriage as thirteen years.²⁰ Likewise, the Idoma Native Marriage Law and Custom Order prescribes the minimum age for marriage as twelve years.²¹ In Tiv native communities, customary law marriage between two persons is valid if, *inter alia*, the bride has reached the age of puberty.²² Similar to the provision in the Tiv native law order, the vast majority of native communities in Nigeria deem the minimum age for marriage to be the age of puberty.²³ It is noteworthy however that there is no specific age that may be regarded as the age of puberty. Puberty has been described as “*the period of a person’s life during which the sexual organs develop and the person becomes capable of having children*”.²⁴ It is noteworthy that in contemporary times, young persons, especially girls, attain puberty at a very early age usually between the age of eight and fourteen. Therefore, such provisions on the marriageable age under native laws and customs has given rise to a high incidence of child marriage in Nigeria which is contrary to domestic statutory provisions on protection of the child. According to the Child Rights Act, “*no person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and is of no effect whatsoever*”.²⁵

Order; the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order; the Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order.

¹⁹The Age of Marriage Law 1956, s 3(1).

²⁰The Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order 1961, s 2(1).

²¹The Native Authority (Declaration of Idoma Naïve Marriage Law and Custom) Order 1959, s 2(1).

²²The Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order 1955, s 2.

²³Olugbemi A Fatula, *Feminism, Women, Family & Children’s Law* (Nigeria 2014) 229

²⁴ Oxford Advanced Learner’s Dictionary (7th edn, Oxford: Oxford University Press 2005) 1172.

²⁵ Nigeria: Child’s Right Act 2003, s 21 which conforms to the provision of several international instruments on the protection of the child which have

Similar to the issue of child marriage is that of forced marriage which is particularly prevalent in the northern part of Nigeria where it is perceived as a part of the northern culture and religion. According to an administrative report, young girls regardless of their age, are forced to marry when they reach puberty to prevent sexual indecency, and for other cultural and religious reasons.²⁶ According to a media report, the practice of forcing young girls to marry is increasing yearly in Nigeria.²⁷ So also is the issue of child betrothal whereby the parents of a girl promise her hand in marriage to the family of a man. This practice is notable among the Ibibio of the South-Eastern part of Nigeria.²⁸ Such systems of forced marriage and child betrothal deprives a girl of the right to choose her husband, and infringe on her right to consent to a marriage proposal.²⁹ This also runs contrary to specific statutory provisions. According to the Child's Right Act, "*no parent, guardian or any other person shall betroth a child to any person as such betrothal is null and void*".³⁰ Moreover, the law provides that "*in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of*

defined a child to mean any person below the age of eighteen; see for instance, the African Charter on the Rights and Welfare of the child, article 2; the United Nations Convention on the Right of the Child, article 1.

²⁶ Nigerian Federal Ministry of Justice, *Nigeria's 4th Periodic Country Report-2008 -2010 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria* (Nigeria 2011).

²⁷ Maryam Ahmadu-Suka, 'Forced Marriage and the Right to Choose' Daily Trust (Abuja, 12 October 2012).

²⁸ Olugbemi Fatula, *op cit.*, 233.

²⁹ Note the Constitution of Nigeria entitles every person to personal liberty and no person shall be deprived of such liberty unlawfully; Constitution of the Federal Republic of Nigeria 1999, s 35(1). Marriage does not constitute one of the lawful exceptions recognized by that provision. Note also in this regard the United Nations Convention on the Right of the Child which vests on a child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child, article 12(1); and the African Charter on the Rights and Welfare of the Child, article 7. Similarly, the United Nations Declaration of Human Rights provides that marriage shall be entered into only with the free and full consent of the intending spouses, article 16(2).

³⁰ The Child's Right Act, s 22.

the child shall be the primary consideration".³¹ Arguably, neither child marriage/betrothal nor forced marriage is in the best interest of a child. For instance, such early or forced marriage may cause a child to suffer both physical and psychological trauma as a result of early pregnancy and child birth which is contrary to the protection offered by the law.³² Moreover, such marriage may hinder the proper education of the girl child contrary to the right to education guaranteed by the law.³³ This is because a girl child who is forced into an early marriage is deprived the opportunity of proceeding with and concluding her education as a result of the incidents of marriage such as pregnancy, child care, among others.

In addition, the customary law practice of early marriage, child betrothal and forced marriage is discriminatory in nature as it is usually the girl child that is subject to the constraints of the practice while male counterparts do not suffer the same

³¹ The Child's Right Act, s 1 which is in conformity with the provisions of the African Charter on the Rights and Welfare of the child, OAU Doc. CAB/LEG/24.9/49 (1990) articles 4(1) & 20(1)(a); and that of the United Nations Convention on the Right of the Child, UNGA Res 44/25 1989, article 3.

³² According to the Child's Right Act, "*a child shall be given such protection and care as is necessary for the well-being of the child*", ss 2(1)&13(1) of the Act. This provision conforms to article 14(1) of the African Charter on the Rights and Welfare of the Child, and article 24(1) of the United Nations Convention on the Right of the Child which provide that "*every child is entitled to enjoy the best attainable state of physical, mental and spiritual health*". In addition, s 14(1) of the Child's Right Act provides that "*every child has a right to parental care and protection, and accordingly, no child shall be separated from his parents against the wish of the child*". It should be noted that marriage is not one of the exceptions recognized by this provision thus, a child is not permitted to be separated from her parents against her wish in the guise of a forced or an early marriage; see also the United Nations Convention on the Right of the Child for a similar provision, article 9(1); the African Charter on the Rights and Welfare of the Child, article 19(1).

³³ The Child's Right Act, s 15 which provides that "*every child has the right to free, compulsory and universal basic education... and to this end, every parent or guardian shall ensure that his child or ward attends and completes primary school education and junior secondary education*". See also on the right of a child to education, the African Charter on the Rights and Welfare of the Child, article 11(1); the United Nations Convention on the Right of the Child, article 28(1).

constraints.³⁴ Moreover, according to the United Nations Sustainable Development Goals, member-States are expected “*to eliminate all harmful practices such as child early and forced marriage*”.³⁵

Another instance of the breach of the right of a child by customary law is the customary practice in the Eastern part and Ishan native community in the Southern part of Nigeria whereby, a woman marries another woman for the purpose of raising children by her. According to this custom, a woman who does not have any children of her own marries another woman so that the latter can give the former children by a man of the latter’s choice. Often times, the woman without a child marries a young girl whom she can maintain and control. For instance, in *Helena Odigie v Iyere Auika*,³⁶ an Ishan woman married a girl of nine years for the purpose of producing children for her by a man of the girl’s choice. The girl lived with the woman for some years and had a son by a young teacher who worked in the same town. The teacher was later transferred to another town and the girl, having fallen in love with him, followed him with her son. The woman brought an action in the customary court demanding the return of the child which she claimed belongs to her by Ishan native law and custom.

This customary practice runs contrary to the protection offered a child by the Child’s Right Act. According to the Act, “*every child is entitled to respect for the dignity of his person, and accordingly, no child shall be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse*”.³⁷ The Act further provides that “*a child shall not be used for any purpose that deprives the child of the opportunity to attend and remain in school as provided for under the Compulsory, Free Universal Basic Education Act*”.³⁸ In addition, the Act provides that “*a person who exploits a child in any other form or way not mentioned in the Act*

³⁴ This is contrary to the provision of the fundamental human rights enshrined in chapter four of the 1999 constitution and affirmed in s 3 of the Child’s Right Act. See the Constitution of the Federal Republic of Nigeria 1999, s 42(1).

³⁵ United Nations Sustainable Development Goals (2015) goal 5.

³⁶ Unreported Suit No. U/24A/79 delivered on 23rd March 1982.

³⁷ Nigeria: Child’s Right Act 2003, sec 11(a).

³⁸ *Ibid.*, sec 30(2)(d).

which is prejudicial to the welfare of the child commits an offence".³⁹ Arguably, this customary law practice is an abuse of the dignity of a child as it subjects her to sexual abuse having to sleep with men to whom she is not married for the sole purpose of raising children by them for the woman who married her. Similarly, such customary law practice deprives the child of the right to education as she has to remain with the woman who married her and cope with pregnancy and child care issues. Hence, this customary law practice is apparently prejudicial to the welfare of a girl child who is subjected to such a marriage.

Moreover, the practice is contradictory with the provision of the Same Sex Marriage Prohibition Act. According to the Act, a marriage contract or civil union entered into by persons of the same sex is prohibited in Nigeria.⁴⁰ The Act further affirms that only a marriage contract between a man and a woman shall be recognized as valid in Nigeria.⁴¹ Therefore, such marriage contract between a woman and another woman for the sole purpose of raising children by a man who is not privy to the marriage contract is invalid by virtue of the provisions of the Same Sex Marriage Prohibition Act.

II. Patriarchal Nature of Marriage Under the Nigerian Customary Legal System

Many Nigerian native communities are patriarchal in nature; this connotes that majority of the Nigerian cultures emphasise male superiority, and reflect preferences for men.⁴² Thus, customary law is used to legalize denial to a group in the society equal rights as those enjoyed by another group.⁴³ In other words, customary law has become an instrument for the legalization of discrimination or unequal treatment between men and women in the

³⁹*Ibid.*, sec 33(1).

⁴⁰ Nigeria: Same Sex Marriage (Prohibition) Act 2013, sec 1(1).

⁴¹*Ibid.*, sec 3.

⁴²Olugbemi Fatula, *op cit.*, 130.

⁴³*Ibid.*

society. According to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),⁴⁴

Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴⁵

Arguably therefore, customary law, discriminates against women on the basis of their gender contrary to the provisions of the Nigerian Constitution and those of major international Conventions on human rights protection. For instance, customary marriage which is referred to as polygamous in nature allows a man to marry several wives but prevents a wife from practicing same.⁴⁶ Therefore, while a husband is allowed to divorce his wife on the ground of adultery, there is no similar consequence for an adulterous husband.⁴⁷ Thus, a customary law wife is forced to cohabit with an adulterous husband thereby exposing the wife to the danger of sexually transmitted diseases and such other incidents of sexual impurity.

Secondly, under many native laws and customs, the father is usually regarded as the absolute owner of the children of a marriage.⁴⁸ This is perhaps the area where women are most deprived under

⁴⁴ CEDAW is an international document that establishes standards of equality between women and men.

⁴⁵ The United Nation Convention on the Elimination of all forms of Discrimination against Women UNGA Res 34/180 1979, article 1.

⁴⁶ Where a woman practices polyandry under customary law, she is referred to as adulterous or promiscuous, and it constitutes one of the major grounds for a husband to call for the dissolution of a customary law marriage.

⁴⁷ See for instance, s 6(1) of the Idoma Native Marriage Law and Custom Order which provides that there shall be no limit to the number of wives a man may have at one time but it shall be an offence for a woman to have more than one husband at one time. See also s 6(1) of the Borgu Native Law and Custom Order for a similar provision; *Aoko v Fagbemi* [1961] 1 All NLR 400, where the appellant was charged, convicted and sentenced for an alleged offence of committing adultery by living with another man without judicial separation.

⁴⁸ Ajuzie C Osondu, *op cit.*, 100.

customary law. The general principle of customary law is that a mother's lineage gives her no right to the child.⁴⁹ Hence, the father is deemed to have the absolute right to the custody of the children of a subsisting marriage and this right subsists after the marriage has been dissolved except in the case of a suckling child who may be allowed to stay with the mother for the purpose of weaning.⁵⁰ Under the Igbo native law and custom, the absolute right to custody of the children may be transmitted to members of the husband's family upon the death of the husband. In *Virginia Abakam & another v Paul Anyanwu*,⁵¹ the plaintiff, being the next of kin of a deceased father, obtained judgment against the defendant-mother in a claim for the ownership and custody of two boys. On appeal, it was held that under Igbo customary law, the father of a child was *ipso facto* entitled to the ownership and custody of a child and that right was transmissible to the members of his family. It was further held that once a woman is married under Igbo customary law, all the children born by her during the subsistence of the marriage are children of her husband and if the husband dies, all the children belong to the family of the deceased husband.

Thirdly, dissolution of customary law marriage may be reached by the mutual agreement of spouses, such as where they have fallen out of love and an attempt at reconciliation has failed. Dissolution may also be reached by a unilateral act of a spouse with the intention of ending the marriage.⁵² In some native communities in Nigeria, only a husband has the right to a unilateral dissolution of marriage.⁵³ In

⁴⁹Olugbemi Fatula, *op cit.*, 309.

⁵⁰The Idoma Native Marriage Law and Custom Order, ss 8(1)(c) & 15; the Borgu Native Marriage Law and Custom Order, ss 8(1)(c) & 15. According to these provisions, a husband has the right to demand from his wife the children conceived by her during the marriage and upon dissolution of the marriage, custody of all the children born by the wife during the period of the marriage shall be given to the husband.

⁵¹[1975] 5 ECCLR 305.

⁵²E I Nwogugu, *Family Law in Nigeria* (Enugu: Heineman Educational Books 2006) 155.

⁵³For instance, the Biu native communities. See the Biu Native Authority (Declaration of Biu Native Marriage Law and Custom) Order 1964, s 8.

such communities for instance, a husband may send his wife out of their matrimonial home with the intention of ending their marriage on the basis of allegations such as adultery, witchcraft, among others. A wife on the other hand is not allowed to leave her matrimonial home with the intention of ending her marriage even when she is being maltreated by her husband.

These practices are contrary to the provisions of the Nigerian Constitution and those of international conventions on the protection of human rights which guarantee the equality of men and women, and forbid any form of gender discrimination.⁵⁴ According to the Nigerian Constitution, “*a Nigerian citizen of a particular sex shall not by reason only of such sex be subjected either expressly by, or in the practical application of, any law in force in Nigeria to disabilities or restrictions to which Nigerian citizens of other sex are not made subject*”.⁵⁵ Similarly, “*a Nigerian citizen of a particular sex shall not by reason only of such sex be accorded either expressly by, or in the practical application of, any law in force in Nigeria, any privilege or advantage that is not accorded to Nigerian citizens of other sex*”.⁵⁶ Furthermore, “*all peoples shall be equal; they shall enjoy the same respect and shall have the same rights; nothing shall justify the domination of a people by another*”.⁵⁷ According to the Universal Declaration of Human Rights, “*everyone is entitled to the fundamental human rights without distinction of any kind such as sex*”.⁵⁸ The Declaration further provides that “*men and women of full age, without any limitation due to race, nationality or religion, have the right to*

⁵⁴ See the Constitution of the Federal Republic of Nigeria 1999, which is in conformity with the provision of the United Nations Declaration of Human Rights, UNGA Res 217 A (111) 1948; the African Charter on Human and Peoples’ Rights; and the Convention on the Elimination of all Forms of Discrimination against Women, UNGA Res 34/180 1979.

⁵⁵ The Constitution of the Federal Republic of Nigeria 1999, sec 42(1)(a).

⁵⁶*Ibid*, sec 42(1)(b).

⁵⁷Nigeria: The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1983, article 19.

⁵⁸ The United Nation Declaration of Human Rights UNGA Res 217 A(111) 1948, article 2.

marry and to build a family, and are entitled to equal rights as to marriage, during marriage and at its dissolution".⁵⁹ According to the United Nations Sustainable Development Goals, all United Nations member-States are expected to achieve gender equality and empower all women and girls by the year 2030. In so doing, member-States are expected to end all forms of discrimination against all women and girls everywhere.⁶⁰ **Dissolution of Customary Law Marriage**

There are no generally accepted rules regarding the dissolution of customary law marriage in Nigeria unlike that of statutory marriage. The custom, values and norms of each community determines the accepted basis for the dissolution of marriage celebrated under the native law and custom of the community.⁶¹ A customary law marriage is however deemed dissolved only when the bride price has been returned to the husband; until this is done, the marriage is deemed to subsist.⁶² Even where a customary court has issued an order for the dissolution of a customary law marriage, it is the refund of the bride price or dowry that puts an end to all the incidents of the marriage and not the order of court. According to the court in *Eze v Omeke*,⁶³ an order dissolving a customary law marriage without a consequent order for the refund of the bride price or dowry is devoid of any meaning.

According to the Nigerian Constitution, "*the judicial powers vested in a customary court shall extend to all the inherent powers and sanctions of a court of law*".⁶⁴ Arguably, this extra-judicial act of refunding the bride price or dowry appears to limit the effectiveness

⁵⁹*Ibid*, article 16(1).

⁶⁰United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development* UN Doc A/RES/70/1 (2015) Goal 5, para 5.1, available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> [accessed December 28, 2017].

⁶¹ E I Nwogugu, *op cit*.

⁶²*Registrar of Marriages v Igbinomwanhia* [Unreported Suit No. B/16M/72 High Court Benin 5th August 1972].

⁶³[1977] 1 ANSLR 136.

⁶⁴ See the Constitution of the Federal Republic of Nigeria 1999, s 6(4)(a) & (6)(a).

or the absolute power of a customary court to dissolve a customary marriage.

III. Widowhood

In some native communities in Nigeria,⁶⁵ the widow of a deceased man is often oppressed and afflicted on the basis of various traditional rituals required to be performed by widows. Such rituals do not have any positive impacts; but merely subject widows to psychological and physical trauma.⁶⁶ On the other hand, where a woman dies, her husband is not subjected to such rituals. Instead, he is pitied and consoled, and a new wife is arranged for him as soon as possible so as to encourage him out of his predicament.⁶⁷ This is illustrated by a Yoruba adage '*opo 'kunrinkii da sun nitoriiyawoorun*' which means, 'a widower does not sleep alone because of the spirit of the dead wife'.⁶⁸

According to a media report on widowhood practice in the eastern part of Nigeria,⁶⁹ widowhood is a dreadful experience in Igbo communities because of the pain, sorrow and suffering that trails the traditional rituals. In indigenous Igbo communities, the widow of a deceased man is in most cases suspected to be responsible for the death of the deceased. Hence, the widow and her children are made to observe compulsory traditions that are customary to her husband's people, such as having their hair shaven, wearing of mourning robes, and getting barred from going out or associating with people, among other such practices.⁷⁰

As noted earlier, men are not subjected to such mental torture and degrading treatment at the death of their wives. Thus, such widowhood practices are discriminatory in nature as they differentiate between the treatment meted out to a man and woman while bereaved. This contradicts statutory provisions to the effect

⁶⁵For instance, the Igbo and Yorba native communities.

⁶⁶Olugbemi Fatula, *op cit.*, 343.

⁶⁷*Ibid.*, 344.

⁶⁸*Ibid.*

⁶⁹Isioma Madike 'Widowhood: The Story of Invisible Women (2) (Nigeria: Saturday Telegraph 31 January 2015) 24-25.

⁷⁰*Ibid.*

that no person in Nigeria of a particular sex shall be subjected to any law or restrictions to which persons of another sex are not made subject.⁷¹ Moreover, such cruel and inhuman treatment violates the right of widows to dignity. According to the Nigerian Constitution, “*everyone is entitled to respect for the dignity of his person, and accordingly, no person shall be subjected to torture, inhuman or degrading treatment ...*”⁷² Furthermore, Nigeria, being a signatory to the United Nations Sustainable Development Goals is expected to eliminate all forms of violence against all women and girls in the public and private spheres.⁷³

IV. Human Right

In many native communities in Nigeria, when a potential bride has been found by a man, his family proceeds to investigate the family background of the girl. The investigation may focus on the family’s social and health background, and the character of the girl. This may arouse the issue of the human rights of the potential bride as facts relating to the social and health status of the girl’s family will include facts such as whether any member of her family suffers from diseases such as mental illness, epilepsy, inter alia. Such inquiry will also include investigation into the social status of the girl’s family such as whether the family belongs a system of outcasts known as ‘Osu’. These facts in most cases constitute a bar to the proposed marriage. This is contrary to the fundamental human rights of a proposed bride as guaranteed by the Nigerian Constitution. According to the Constitution, “*no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason*

⁷¹Nigerian Constitution, s 42(1). This is in consonance with the United Nation Declaration of Human Rights which provides that “*all human beings are born free and equal in dignity and rights*”, article 1; and “*everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as sex*”, article 2.

⁷² Nigerian Constitution, s 34(1)(a). This is in consonance with the United Declaration of Human Rights which provides that “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”, article 5; and the Nigerian African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1983, article 5.

⁷³United Nations Sustainable Development Goals (2015) goal 5.

of the circumstances of his birth".⁷⁴ Such customary law practice discriminates against a potential bride on the basis of the circumstances of her birth such as, having a mother who suffers from mental disorderliness, or a relative who suffers from epilepsy, among other such circumstances.

V. Privity of Contract

According to the definition of marriage given above and the provisions on statutory marriage, marriage is deemed a lifetime union of a man and a woman. However, under several native laws and customs, marriage extends beyond the lifetime of a man but not that of a woman. Under such native laws, in the event of a man's death, a widow who is presumed as one of the deceased husband's properties may be inherited by one of the deceased husband's kinsmen.⁷⁵ It is noteworthy that such does not give rise to a new marriage contract between the widow and the deceased husband's kinsman but the latter only steps into the marriage as a substitute of the deceased husband.⁷⁶ For instance, in the Idoma and Borgu native communities, if the widow of a deceased man elects to remain with the heirs of her deceased husband, she shall be deemed to be the wife of whichever of the deceased husband's relatives is eligible by native law and custom subject to mutual consent.⁷⁷ Such a marriage is not deemed to be a remarriage, but a continuation of the original marriage bond contracted between the woman and her deceased husband.⁷⁸ Thus, such customary laws recognize third parties who are not privy to the marriage contract between a husband and wife as capable of entering into the contract and benefitting from the contract.⁷⁹ This runs contrary to the principle of privity of contract

⁷⁴The Constitution of the Federal Republic of Nigeria 1999, sec 42(2).

⁷⁵Olugbemi Fatula, *op cit.*, 224.

⁷⁶Oyewo and Olaoba, *op cit.*, 158.

⁷⁷ The Idoma Native Marriage Law and Custom Order, *op cit.*, sec 20(1); the Borgu Native Marriage Law and Custom Order, *op cit.*, sec 20(1).

⁷⁸*Ibid.*, sec 20(2).

⁷⁹ The kinsman of the deceased husband who steps in to inherit the widow will benefit from the consortium of the wife such as cohabiting with the wife, having

which emphasizes that only the parties to a contract can sue as well as benefit from the contract.⁸⁰

Moreover, this customary law practice of wife-inheritance is anti-human rights. A widow may be under so much pressure and undue influence so as to give her consent to marry her deceased husband's kinsman. This is because in several native communities in Nigeria, where a widow decides to marry outside her deceased husband's family, she loses custody of her children to her husband's family.⁸¹ For instance, in Tiv native communities, if a man dies and his wife elects to return to her guardian, the surviving children of the union will be retained by the heirs of the deceased husband.⁸² Thus, in order for a widow to retain the custody of her children, she may be forced to consent to be inherited by a kinsman of her deceased husband. Such a marriage may therefore be likened to that of a forced marriage since consent was not given out of a freewill.

Likewise, this customary practice of a deceased husband's family retaining custody of the children of the deceased while the mother is still alive may be anti-child rights. According to the Child's Right Act, "*every child has a right to parental care and protection and accordingly, no child shall be separated from his parents against the wish of the child except for the purpose of his education and welfare; or in the exercise of a judicial determination in accordance with the provisions of the Act in the best interest of the child*".⁸³ Furthermore, "*a child shall be given such protection and care as is necessary for the well-being of the child*".⁸⁴ According to the African Charter on the Rights and Welfare of the Child,

sexual intercourse with the wife, *inter alia*, thereby benefitting from the contract to which he was not a party.

⁸⁰ I E Sagay, *Nigerian Law of Contract* (2nd edn, Ibadan: Spectrum Law Publishing 2000) 489.

⁸¹ See *Virginia Abakam & anor v Paul Anyanwu*, *supra*.

⁸² Declaration of Tiv Native Marriage Law and Custom Order, *op cit.*, sec 7(3).

⁸³ Nigeria: Child's Right Act 2003, sec 14(1).

⁸⁴ *Ibid.*, sec 2(1).

Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his/her parents against his/her will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.⁸⁵

Similarly, the United Nations Convention on the Right of the Child provides, States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.⁸⁶

Arguably, such customary law practice that deprives a child from the care and protection of the biological mother may not be in the best interest of a child. This is because, all things being equal, none may be able to take better care, or protect a child as well as the biological parents of the child.

CONCLUSION

Apparently, some customary laws and customs relating to marriage even though are considered valid because they have not been held repugnant to natural justice, equity and good conscience, they are however practiced in conflict with some laws validly in force Nigeria. Various International Conventions have offered recommendations with regard to such conflict of laws. For instance, it has been provided that “*any custom, tradition, cultural or religious practice that is inconsistent with the rights of a child shall, to the extent of such inconsistency, be discouraged*”.⁸⁷ According to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),

States Parties are encouraged to take all appropriate measures to eliminate discrimination against women in all matters relating to

⁸⁵ The African Charter on the Rights and Welfare of the Child, article 19(1).

⁸⁶ The United Nations Convention on the Right of the Child, article 9(1).

⁸⁷ The African Charter on the Rights and Welfare of the Child, article 1(3).

marriage and family relations and in particular to ensure, on a basis of equality of men and women, the same right to enter into marriage; the same right to freely choose a spouse and to enter into marriage only with their free and full consent; the same rights and responsibilities during marriage and at its dissolution.⁸⁸

CEDAW further encourages that, States Parties take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁸⁹

In addition, CEDAW encourages State Parties “*to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*”.⁹⁰

According to the United Nations Sustainable Development Goals, States are expected to “*adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels*”.⁹¹ In addition, States are expected to “*ensure equal opportunity and reduce inequalities of outcome including by eliminating discriminatory laws, policies and practices, and promoting appropriate legislation, policies and action in this regard*”.⁹²

Therefore, being a member State of the United Nations, Nigeria needs to address these issues in order to meet up with her international obligation. Nigeria, through the national legislature, has domesticated the rights of the child as recognized by the international community.⁹³ Although, many States in the country

⁸⁸ The United Nations Declaration on the Elimination of all forms of Discrimination against Women, article 16(1).

⁸⁹ *Ibid.*, article 5(a).

⁹⁰ *Ibid.*, article 2(f).

⁹¹ The United Nations Agenda for Sustainable Development, *op cit.*

⁹² *Ibid.*

⁹³ See the Child’s Right Act, 2003.

have enacted a similar law at the level of their respective State legislature, there is a need to encourage the States that are yet to domesticate the Act⁹⁴ to do so in order that the incidence of child marriage can be drastically curtailed. This will promote the codification and unification of the capacity to marry under the various customary laws thereby establishing eighteen as the minimum legal age for marriage under such customary laws. Similarly, Nigeria has domesticated some of the provisions of the United Nations Convention on the protection of women, particularly, those that relates to gender discrimination and the right to dignity.⁹⁵ Also, Nigeria has ratified the African Charter on Peoples' Rights, which also gives recognition to the right against gender discrimination and inequality.⁹⁶ However, there is need to take a further step to enforce such rights at the level of customary law. To this end, it is recommended that customary law provisions and practices should be subjected to the test of legality in addition to those of repugnancy to natural justice, equity and good conscience. Hence, those customary laws and practices that are arbitrary or contrary to statutory provisions should be regarded as invalid, and null and void to the extent of their illegality.

Furthermore, in order to ensure the recognition and protection of the right of women, especially those subject to customary law, there is a need for the Federal Legislature to domesticate the provisions of CEDAW in Nigeria. In so doing, the Federal Legislature will incorporate specific women's rights provisions as recognized by CEDAW in the fundamental human rights provisions of the Constitution. In addition, State legislative houses will take necessary steps to modify the Native Marriage Laws and Customs Orders in force within their jurisdictions so as to eliminate all forms of gender inequality and discrimination, as well as illegality against women on the basis of such laws and customs.

⁹⁴Especially those in the northern part of the country.

⁹⁵ See the Constitution of the Federal Republic of Nigeria 1999, ss 42(1)& 34(1) respectively.

⁹⁶Nigeria: The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

Moreover, the Constitution provides that “*the appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of the Constitution*”.⁹⁷ The Constitution defines ‘an appropriate authority’ to include the President, in relation to the provisions of any existing federal law; a State Governor, in relation to any existing State law; or any person appointed by any law to revise or rewrite the laws of the Federation or of a State.⁹⁸ It further provides that “*nothing in the Constitution shall be construed as affecting the power of a court of law or tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law...*”⁹⁹ Thus, the Constitution empowers the executive and legislature to modify any customary law which is in conflict with statutory provisions in order to bring the customary law in conformity with statutory provisions. Therefore, the Governors of the States where these customary laws are practiced should be encouraged to issue directives or present bills to their respective legislative houses with the intention of modifying such contradictory customary laws. Likewise, the respective State legislative houses should take steps to modify or repeal, as it may deem necessary, such contradictory customary laws. Similarly, the judiciary is empowered to declare a customary law, which is inconsistent with statutory provisions, invalid. Thus, the various State High Courts are encouraged to review the customary laws that are practiced within their jurisdictions so as to identify those that are contrary to statutory provisions and consequently, establish their invalidity.

⁹⁷Constitution of the Federal Republic of Nigeria, sec 315(2).

⁹⁸*Ibid.*, sec 315(4).

⁹⁹*Ibid.*, sec 315(3).