

DIVORCE PROCEEDINGS UNDER CUSTOMARYLAW

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INTRODUCTION

The native law and customs, nowadays referred to simply as Customary Law, pervaded the entire Nigerian Society even in the areas where Islamic law exists. The law which can hardly be defined in respect of various subjects such as inheritance, family law and succession, contract etc, vary from place to place. In fact, there is no ethnic group that can claim that all its customary laws and customs are the same and there are largely still unwritten. Up till now, the customary laws relating to dissolution of marriages are not as developed as the statutory law alternative. This is due to the reality of the existence of parallel local customs each with unique divorce provisions.

Moreover, divorce does great violence to customary law marriage and by extension to the family and society. The provisions and practices of divorce under the various customary laws are sometimes so devastating to the quintessential stability of marriage. The grounds enabling divorce are so elastic and plural to encompass anything whatsoever and the procedure for initiating and securing divorce are so overly discriminatory against women and the reliefs attaching thereto are not entirely satisfactory.

The topic of this paper straddles three important areas of customary law, to wit; customary law marriage; divorce

proceedings under customary law and the reliefs predicated upon customary divorce. It is therefore natural to start by saying a few words about what is customary law?

CUSTOMARY LAW DEFINED

As expected, many academic writers and jurists have proffered various definitions for "Customary Law". Kolajo said¹ "Customary law may conveniently be defined as those rules of conduct which the persons living in a particular locality have come to recognize as governing them in their relationships between one another and between themselves and things" Okany² defined it "as a body of customs and traditions which regulate the various kinds of relationships between members of a given community" while Dr. T. O. Elias³ posited that for any particular community, it is "the body of rules which are recognized as obligatory by its members". Nwabueze further defined customary law as "those customs generally accepted by a particular community as binding, the breach of which is supported by customary sanction"⁴.

Two illuminating definitions have been given by the Supreme Court of Nigeria. Elias, CJN (as he then was) said in **Zaidan Vs. Mohssen**⁵ that:-

"... Customary Law is 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 within Nigeria as between the parties subject to its sway".

In **OYEWUMI VS. OGUNESAN⁶ OBASEKI** JSC of blessed memory in his often quoted definitive statement on customary law said:

"Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that, it is not static. It is regulatory In that, it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say customary law goes further and Imports justice to the lives of all subject to it".

Customary law is also defined as ancient rules of law binding on a particular community and which rules do change with the times and rapid development of social and economic conditions. Though customary law consists of ancient rules of law, such rules of law must still be existing and binding on that particular community to which they apply.

Customary law can also be described as a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of law with respect to the place or the subject matters to which it relates.

The matters with which customary law is principally concerned are simple cases of contract (mainly debt), torts, land, family law and succession. These are matters which the rural population, who are in the majority in Nigeria are primarily concerned with. As A. E. W. Park⁷ rightly observed

“... the vast majority of the inhabitants of Nigeria conduct most of their activities in accordance with and subject to customary law and if all courts of whatever status are considered, far more cases are decided under customary law than under any other law in force in Nigeria”.

THE CONCEPT OF MARRIAGE

Marriage is universally accepted to be an institution governed by the social and religious norms of the society. It is a union between a man and a woman⁸. It is apt to state that marriage as an institution has been in existence from time immemorial. This can be traced back to the creation of man and is considered to have spiritual, moral and social significance in the society. It is therefore revered as sacred and thus heavily guarded by various religions, traditions, social norms and laws alike⁹.

Basically, there are two types of marriage recognizable under Nigerian law. The first is marriage conducted under the Marriage Act which is monogamous in nature. The

second is marriage contracted under Native Law and Custom which does not exclude marriage under Islamic Law which is polygamous in nature. For the purpose of this discussion, our focus will be on marriage under customary law.

Umoru Eri¹⁰ defined customary law marriage

“as the contract between a man and a woman to live as husband and wife after fulfilling and performing the ceremonies of payment of dowry”.

Customary Law Marriage is not just a union of husband and wife to the exclusion of all others. It is in fact a union of the two families to the marriage. The family of the wife is loosely speaking, married to the family of the husband and vice versa¹¹.

Marriages contracted under customary law are valid in the eyes of the law provided that such marriages comply strictly with native law and custom governing marriage in the locality where the marriage was contracted. Customary law marriages are said to be potentially polygamous in that they permit a man to marry more than one wife. However, where a person married under customary law maintains one man one woman relationship with his only wife, then his marriage is only potentially polygamous and does not actually become polygamous until he marries other wives¹².

REQUIREMENTS OF A VALID CUSTOMARY MARRIAGE

There are however essential and formal requirements for the celebration of valid customary law marriage, although details of such requirements vary from one locality to another but the broad principles are sometimes similar, namely;

- a. The parties to a customary law marriage must possess capacity under native law and custom the parties are contracting the marriage.
- b. There must be consent of the bride and her parents or guardians.
- c. There must be payment of dowry, or bride price which is both a gift and payment. It may be one of money, natural produce or any other kind of property. This must be paid to the parent or guardian of the bride. It must be paid on account of a marriage of a female person and must be for a marriage which is intended or has taken place; and
- d. There must be a formal giving away of the bride to the man's family¹³.

Family consent is the most fundamental of all requirements. Without it, bride price cannot be paid, since any such payment must be made to the family and not the bride herself. Also, the formal giving away of the bride can only be properly done by or with the approval of the

family. At customary law, a person lacks the capacity to marry either because he is under age or because there is a "Christian" marriage subsisting between him and a third party.

A person may also lack capacity to inter-marry on the grounds of prohibited degrees of relationship, status bar and the position of strangers.

The third essential requirement of a valid customary marriage is payment of bride price or dowry. Dowry is not necessarily a gift as its payment is enforceable in a court of law. On the dissolution of the marriage, dowry is recoverable but items of gift are not recoverable. The parents of the bride may however waive the payment of bride price or dowry and where it is not waived the quantum varies from place to place.

The payment is made to the family or the parents of the bride. Customary law marriage is incomplete without the formal handing over of the bride by her parents or guardian to the bridegroom or his representatives¹⁴.

DIVORCE PROCEEDINGS UNDER CUSTOMARY LAW

Marriage is acclaimed to be an institution ordained by God. And since the injunction in Christendom is that what God has joined together, no man may put asunder, people, including non-Christians, are loath to dissolve marriages.

Often times however, it becomes more in the interest of peace and harmonious co-existence to dissolve some marriages than to sustain them and in such situations, the courts have done so in compliance with the law regulating the particular marriage.

Marriage under most customary laws in Nigeria is meant to be a lifelong relationship between a man and a woman. It is considered a most unfortunate situation for a woman to have cause to return to her parent's home after she has been married out as it creates scar in the community concerned in ancient Nigerian Societies because of deep involvement of both families in stabilizing the marriage. This assertion is supported by Obi¹⁵ when he remarked as follows:

“Everywhere in the past and in the less sophisticated societies today, divorce could be obtained either In court or extra judicial proceedings being formerly only resorted to where a husband refused to accept a refund of the bride price (marriage consideration) which he paid on the wife or where a wife refused to leave the matrimonial home on being asked to do so by the husband or, having left it-she (more usually her maiden family) refused to refund the bride price on request”.

Divorce under customary law consists in the dissolution of the marriage bond, with the consequent release of the spouse and their respective families from all marital

obligations towards each other. Customary marriage is not dissolved by mere fact of desertion or voluntary separation. The Bride Price must be refunded. **In LAWAL OSULA VS. LAWAL OSULA**¹⁶. The Supreme Court held inter alia that living with a man and having children for him alone does not necessarily make a woman the wife of the man under customary law. In the same way, a woman who is the wife of a man under customary law does not divorce the man merely by leaving and staying with another and having children for that other.

The dissolution of a customary law marriage is not as stringent as that under the Marriage Act. A customary law marriage can be dissolved without any judicial pronouncement or intervention. The spouses may decide to break the union and the usual defences of collusion or condonation under statutory marriage is not available. But there must be a formal act on the part of the party who is tired and not willing to continue with the union or association. In most cases, the two families are involved in the dissolution¹⁷.

In Nigeria, a customary marriage may be dissolved either by Non-Judicial and Judicial divorce

i. NON-JUDICIAL DIVORCE

This arises in those situations where the customary law marriages are dissolved without recourse being to the Customary Court or any other court

having jurisdiction. Nwogugu¹⁸ argues that “*non-judicial divorce is still an important institution of customary law matrimonial causes*”.

There are two possible ways of achieving non-judicial divorce namely:-

a. By mutual Agreement

b. By unilateral action of any of the spouses.

a. By mutual Agreement: Customary marriage may be dissolved by mutual agreement between the husband (or his parents where he is young) and the parents of the wife in the presence of the marriage mediator and one or more elders from each of the two families. The parties in such circumstances and where necessary, decide how much of the bride price and other marriage expenses paid on the woman concerned should be returned to the husband. In this case, factors like the demotion of the marriage and whether or not there are children of the marriage are taken into consideration. The bride price and other marriage expenses which are refundable are then paid over to the husband through the hands of the marriage mediator. This being done, the marriage is declared dissolved¹⁹.

b. By Unilateral Action: Dissolution by a unilateral action of any of the parties with the intention to end the marriage arises when the husband drives the wife out and demand the return of the bride price or the wife

who is maltreated might run back to her parents with intention to end the marriage in whichever way it happens, dissolution is achieved by refund of bride price.

It should be noted that customary marriage is not dissolved by the mere fact that one spouse has left or been sent away by the other with the express intention of never again living together with him or her as husband and wife. Where this happens, there is no more than desertion or voluntary separation as the case may be. According to Obi²⁰, *"the parties remain husband and wife in the eyes of the customary law nonetheless"*. As Nwogugu²¹ has rightly observed "one major defect of Non-Judicial divorce is the absence of the time at which, and circumstance in which the divorce was obtained.

ii. JUDICIAL DIVORCE PROCEDURE

One of the areas where an Area or Customary Court exercises jurisdiction is in matters relating to marriages contracted under Native Law and custom. Hence, there is the establishment of respective statutes in the respective states of the federation and Abuja. Each of such statutes also defines the respective courts. For instance in Kogi State, Section 17 of the Area Courts Law 1991 provides for three grades of Area Court namely: An Upper Area Court, an Area Court Grade I and an Area Court Grade II with jurisdiction and powers as prescribed in the first schedule to the law.

Part II of the first schedule of the Area Courts Law 1991 of Kogi State relates to civil cause with jurisdiction of an Upper Area Court, an Area Court Grade I and an Area Court Grade 11 being unlimited in respect of matrimonial causes and matters between person married under native law and custom or arising or connected therewith other than those arising from Christian marriages.

Therefore, once a marriage is properly celebrated under applicable customary law rules of any particular ethnic group in Nigeria, matrimonial causes arising there from are recognized and given effect in the courts.

As stated above, all Customary Courts in Nigeria have unlimited jurisdiction to try matrimonial causes in respect of marriages under customary law. This includes questions of divorce and declaratory actions on validity of customary marriage with respect to any such matters arising from or in connection with a marital relationship under customary law²².

Having looked at the jurisdiction of courts with regard to customary marriage, it may be pertinent to note that the applicable law ought to be the native law and custom prevailing in the area of jurisdiction of the Customary Court. Alternatively, the applicable law will be the customary law chosen as binding the parties. The applicable law is however, "subject to the repugnancy test.

The custom to be valid and applicable must not be repugnant to natural justice, equity and good conscience or be incompatible either directly or by necessary implication with any written law for the time being in force²³.

Hitherto, judicial dissolution of customary law marriages has been in practice, reserved as a second order procedure. This is because, it is almost always resorted to only when the non-judicial procedure has failed in either two principal modes of application.

- i. In the case of mutual agreement by the families where disagreement arises in relation to the amount of bride price to be refunded or
- ii. In the case of unilateral dissolution by husband or wife. For instance in the case of UKE VS. Lru²⁴, where the husband refuses to take back the bride price or where the family of the woman refuses to pay back the bride price.

Nowadays, judicial customary divorce is fast gaining prominence for the reason that it guarantees recorded evidence of divorce which the extra judicial type could not provide. It appears that more people are using these courts rather than the more informal non-judicial means in order to make their divorces "official" so as to be protected against any future claim that the marriage was never dissolved. Some states have adopted local

legislations and now register customary divorces through the issuance of divorce certificates.

GROUND FOR DIVORCE UNDER CUSTOMARY LAW

Although, there are no laid down grounds for divorce, any unwholesome act by either party which a Customary Court hearing the divorce petition considers repugnant to decency and decorum will constitute a ground for the dissolution of the marriage. Obi²⁵ categorizes a number of reasons and circumstances which are generally accepted as affording a party sufficient moral justification to seek to have his or her marriage under native law and custom dissolved as follows:

- a. Impotence or sterility on the part of the husband or sterility on the part of the wife, since the main object of marriage is the procreation of children;
- b. Cruelty on the part of either spouse especially where this is accompanied by repeated acts of violence;
- c. Excessive meanness by the husband towards his wife or her maiden family;
- d. Indolence of either spouse, since this would not conduce to proper care and maintenance of any children that may be born of the marriage;

- e. Adultery by the wife, especially if repeated, as this is an indication of moral bankruptcy;
- f. Incest by either spouse, especially where this is committed with a member of the innocent spouse's family-the offending spouse is then considered far too defiled to continue cohabiting with the other spouse without incurring the wrath of the ancestral spirits;
- g. Addiction to crime (eg. Theft, poisoning or gangsterism] since criminal proclivity is believed to run in families. No spouse would be keen in sustaining a marriage that would breed criminals and social misfits.

It is to be emphasized that unlike in the case of the woman, adultery by a man would not per se constitute a ground for divorce in customary law unless accompanied by some other matrimonial wrong such as neglect of duties to his children or wife. Veneral disease contracted by either from the other or a contagious disease affecting one but kept away from the other before marriage will also constitute a ground for divorce²⁶.

Nwogugu²⁷ identified other factors as moral causes for dissolving customary marriages, leprosy or other harmful diseases which may affect procreation of children, witchcraft and desertion.

This list is however not exhaustive and cannot be exhausted. In practice, the list is open to accommodate more grounds.

However, in order to escape from the inconvenience of non-codified grounds, which makes customary law marriage very much vulnerable to instability, some attempts at statutory codification were made with limited success under the Marriage, Divorce and Custody of Children Adoptive By Law Order Aduba, 1958 which applies to parts of Ogun, Oyo, Ondo, Edo and Delta States. The statutory grounds codified are²⁸:

- a. Betrothal under marriage age;
- b. Refusal to consummate the marriage;
- c. Harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man;
- d. Impotency of the husband or sterility of the Wife;
- e. Conviction of either party for a crime involving a sentence of imprisonment of five years or more;
- f. Ill treatment;
- g. Cruelty or rejection of either party for three years or more;
- h. Adultery
- i. Leprosy contracted by either party
- j. Desertion for a period of two years or more and
- k. Lunacy of either party for three years or more.

As remarked by Onokah²⁹ the legislative provisions in most of the western states leave no room for any other indigenous reason for the dissolution of a customary law marriage. The arbitrary freedom of alleging just anything as ground is constrained and not opened to individual or community definitions.

In all, the return of the bride price is the critical threshold in the customary divorce proceedings. Once the bride price is returned by the father of the bride or whoever stands in his place with valid authority ("locus standi") all incidents of customary marriage fall apart irretrievably.

RELIEFS PREDICATED UPON DIVORCE PROCEEDINGS UNDER CUSTOMARY LAW

Once the party seeking the divorce satisfies the elders of the two families in case of non-judicial divorce as to the reason for dissolution, and attempts to reconcile him or her with the other spouse has failed, defacto divorce is pronounced by the elders or dejure divorce by the court in judicial divorce. Subsequently, matters incidental to such defacto or dejure divorce arise. They include the quantum of the marriage symbol refundable to husband, the custody of their children (where there are some) and the distribution, if any of any properties owned by the parties. These question and/or issues relate to possible reliefs

upon divorce proceedings under customary law, it is important to emphasise that in its approach; the court unlike non-judicial procedure, will among other matters have regards to the duration of the marriage; the Conduct of the parties and the number and sexes of the children born of the marriage. Such reliefs come in the form of court orders, disobedience of which materializes into committal proceeding in Contempt. However, in cases of non-judicial or unilateral divorce, the above considerations are most unlikely to apply, at least, as a rule binding on parties³⁰.

i. THE RETURN OF BRIDE PRICE AND AMOUNT REFUNDABLE

Customary Law Marriage is considered dissolved in the case of non-judicial divorce when the bride price is returned or refunded to the husband. Before this is done, a defacto dissolved marriage is considered to have continued, though in an inchoate state. An unfortunate consequence of this custom is that any child born to the woman before the bride price is returned is considered the child of the husband. However, this custom has been declared repugnant to natural justice in EDET VS. ESSIEN (1972) II NLR 47.

On the amount of dowry or bride price to be refunded to the husband when a customary law marriage is dissolved diminishes in proportion to the number of years that the

woman has lived with the man, while other expenses are generally not recoverable. Under the Marriage Divorce and Custody of Children Adoptive By Laws 1976 of the former Bendel State (applicable in Edo and Delta States) the proportion of dowry to be refunded is specified for some Local Government Council Areas. In *OSSAI OKALUDO VS JOHN OMAMA*³¹, the appellant brought a suit in a Customary Court against the respondent claiming:

- a. The refund of £22 being dowry paid on his wife whom he had divorced;
- b. The refund of £22 being money he had spent on clothing for the woman
- c. £16 for other expenses, evidence of which was vague. The Customary Court ordered the respondent to refund £10 (Ten pounds) out of the dowry to the appellant but dismissed the other claims. On appeal, it was held:
 1. That expenses for clothing do not form part of the down; and are not refundable.
 2. That dowry refundable diminishes according to the duration of the marriage and that the £10 ordered to be paid by the respondent was not unreasonable.

Therefore, customary marriage is not dissolved unless the bride price or dowry is refunded. In ***ISSAC EZE VS. AUGUSTINE OMEKE***³², it was held:

“That a specific order dissolving any marriage under customary law was unnecessary as it was the refund of the bride price or dowry that puts to an end all incidents of the marriage and not order of any court dissolving such marriage”.

But in the earlier case of **EDEBIRI VS. OSAGIE**³³, it was pointed out that a unilateral refund of the bride price by a woman in court was not sufficient under Bini customary law. To constitute legal divorce, one has to take an action in native court or call members of both families together at a meeting in which the dowry will be refunded to the husband.

Despite what was said in **EZE VS. OMEKE** (supra) suits for divorce are often brought to Customary Courts. Where both parties appear, the court usually attempt reconciliation but divorce is granted when all attempts at reconciliation have proved abortive and adjudication on the bride price to be refunded follows. In **AGBEIA VS. AGBEIA**³⁴, it was held inter alia by the Court of Appeal that the proper place for dissolving a customary marriage is a court of law.

However, there are cases where the refund of the bride price loses the force of being the material determinant of dissolution of marriage. Such cases include:

1. Where the husband renounces his right to claim a refund here the marriage is automatically dissolved by renunciation.

2. Where the husband especially among the Igbo divorces his wife, the refund shall not take effect until the wife remarries.

3. Where the husband refuses to accept the refund of the bride price. In such a case the wife may petition the court that the marriage be dissolved and bride price paid into the court.

4. Under the Maliki law in Northern Nigeria for instance, a Customary Court may dissolve a marriage without ordering a refund of bride price where the husband is guilty of wilful refusal to maintain the wife, physical ill treatment of the wife or deliberate sexual desertion.

5. Also in Biu area (Borno State) a husband who institutes divorce proceedings or repudiates his wife orally is deprived of the right to the refund of bride price³⁵.

On the question of who repays and when; it is the responsibility of the father of the bride or any other

person who under the particular customary law is entitled to receive it. What is more both in judicial and non-judicial divorce, there is no strict rule as to the timing of the refund. The general principle is that if the husband is responsible for the termination, he will be refunded only upon re-marriage of the wife but if the wife is responsible, the husband is entitled to immediate refund. And concerning the right to remarry, customary law confers on each spouse a right to remarry after dissolution of a marriage with the exception in few cases seen in Islamic and others.

ii. OWNERSHIP OF PROPERTY AFTER DISSOLUTION OF CUSTOMARY The Area or Customary Court by which a customary marriage is dissolved may also determine the ownership of any property claimed by either of the parties. For instance, In Benue State, paragraph 14 of the Declaration of Idoma Native Marriage law and Custom Order 1985 provides as follows:

“The court shall determine the ownership of any property claimed by both parties in accordance with local custom”.

For those items of property acquired by the woman before the marriage and brought into the matrimonial home there may not be any problem. For those acquired while in her matrimonial home however, some controversy may arise as in most Africa traditional settings, the average man would not understand why a woman he also sees as

part of his personal estate should be entitled to any property at all of her own.

It must be noted that any custom that encourages servitude or turns a wife into a chattel in contemporary Nigeria will not only look askance but will fail to meet the standard of justice or the repugnancy test. In this country everybody's right to property is guaranteed under section 43 of the constitution of the Federal Republic of Nigeria 1999 as amended against which the efficacy of every law, including rules of customs must be tested. The court should at all times make orders as to ensure the security of a woman's personal property acquired or money earned before marriage and the fair distribution of property acquired by joint efforts of herself and her husband during the subsistence of the marriage. This should also include absolute gifts made to her even by her husband before or during the life of the marriage, so that the under privileged spouse may not be rendered empty handed from a home she has contributed immeasurably to build³⁶.

iii. CUSTODY OF THE CHILDREN

Under customary law, a father has exclusive custodial right over the Children of his marriage. This right extends beyond custody to the ownership of the children. During separation or on dissolution of a marriage under customary law, the father has the custody of the children

of the marriage. This rule of customary law is hinged on the fact that most Nigerian communities are patrilineal (a few being matrilineal) by reason of which children belong to their father's lineage.

Another main consideration is the dominant position of Nigerian men in both domestic and economic spheres even up to the present time. This ensures that the husband enjoys custodial rights over the children of the marriage³⁷.

Where there are children of a marriage that has been dissolved by a Customary Court the question of custody invariably arises. In **OMODION VS. FABORO & ORS**³⁸. It was held that only a Customary Court can decide the custody of a customary marriage and whoever has the custody of the child must allow the other spouse access to the child unless the court directs otherwise in an exceptional case. In all cases, the court must take into consideration the best interest of the child.

In **OKWUEZE VS. OKWUEZE**³⁹, the Supreme Court reiterated that by virtue of the provisions of section 22 (1), Customary Courts Law, Ondo State 1978, when a Customary Court is determining the custody of children born under customary marriage, the interest and welfare of the children must be paramount. In determining what is

the best interest and welfare of the child, the general practice under Yoruba Customary Law was stated by R. O. Ekundare in his booklet titled: Marriage & Divorce under Customary Law.

In **ODOGWU VS. ODOGWU**⁴⁰, Beljore JSC however cautioned as follows:-

“Welfare of a child is not the material provisions in the house-good cloth, food, air conditioners, television, all gadgets normally associated with middle class. It is more of the happiness of the child and his psychological development...”

CONCLUSION:

From the above treatment of the topic: "Divorce Proceedings under Customary Law" it is clear that statutory law has made substantial inroads into our customary law. Some of the statutes have contributed to the ascertainment, clarification and exposition of important aspects of our customary law. The various Rules of Court now embodied in the statutes have also made for orderliness in what would have otherwise been a chaotic situation. The same can be said of the Marriage, Divorce and Custody of Children Adoptive By Laws of the various states of the Federation. These rather than stultifying customary law and inhibiting its growth, these statutes

have rescued our customary law from the uncertainties and inferior status to which they had hitherto been subject vis-a-vis the received English Law.

This development supports the view that customary marriage law has developed into two types (a). The indigenous customary law as practised by the people in non-judicial or unilateral divorce (b). The judicial customary law as applied by court to adjudicating family matters ⁴¹.

With the introduction of statutes, there has now emerged our own species of common law described by T. A. Aguda in "Towards Nigerian Common Law" in Fundamentals of Nigerian Law ⁴², thus:

"... we have witnessed the emergence of a new species of common law, a specifically African Common Law, defined, fortified and elaborated by local legislation and the decisions of African Courts".

Thank you all and God bless.