

CUSTOMARY LAW MARRIAGE IN NIGERIA: BALANCING CULTURAL TRADITIONS WITH CONSTITUTIONAL RIGHTS

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ABSTRACT

Basically, customary law is a form of a traditional, commonly accepted rule or practice that has the power of law, and is usually found within a particular ethnic group or location. It doesn't have a formal status but is still recognized in court. The majority of customary laws represent certain community regulations that have been accepted for generations and thus became an inseparable part of the culture of its members. However, one of such traditional practice that has been imbibed into people's culture is the customary law marriage. Customary law represents a traditional, commonly accepted system of rules and practices that possesses the force of law within specific ethnic groups and geographic locations in Nigeria. Although lacking formal codification, customary law enjoys recognition and enforcement by courts of law as an integral component of Nigeria's pluralistic legal system. The majority of customary laws embody community regulations that have been accepted and transmitted across generations, becoming deeply embedded within the cultural fabric and social consciousness of their adherents. Among the various traditional practices governed by customary law, marriage stands out as one of the most significant and universally practiced institutions across Nigerian ethnic communities. This paper provides a comprehensive examination of customary law marriage in Nigeria, exploring its historical foundations, essential requirements, legal implications, and contemporary challenges. The study analyzes the six fundamental prerequisites for valid customary law marriage: betrothal, capacity of the parties, consent (both of the parties and their parents/families), marriage consideration (bride price), solemnization, and consummation. The paper further investigates critical issues including proof and registration of customary marriages, procedures for dissolution, the central role of children in customary unions, and the complex rules governing succession and inheritance under customary law. Particular attention is devoted to examining gender-based discrimination inherent in traditional customary practices, especially regarding women's inheritance rights, widow treatment, and female disinheritance customs. The paper discusses landmark judicial decisions that have struck down discriminatory customs as repugnant to natural justice, equity, and good conscience, including the transformative *Ukeje v. Ukeje* decision which invalidated female disinheritance under Igbo customary law based on constitutional equality guarantees. The study also explores various specialized forms of customary marriage beyond the standard bride-price marriage, including sororate marriage, woman-to-woman marriage, big and small dowry marriages, and widow inheritance (levirate marriage). Each type is analyzed within its socio-cultural context while considering human rights implications and contemporary legal challenges. This research highlights the ongoing tension between customary law's cultural significance and the imperatives of constitutional rights, particularly regarding gender equality, child protection, and human dignity. The paper concludes by proposing reform pathways that balance cultural preservation with human rights protection, advocating for codification of reformed customary laws, compulsory marriage registration systems, establishment of specialized family courts, and community-based education programs. The analysis demonstrates that while customary law marriage remains deeply rooted in Nigerian culture, its evolution must align with constitutional values and international human rights standards to ensure justice and equity for all citizens, particularly women and children who have historically been disadvantaged under traditional practices.

INTRODUCTION

Nigeria being a multi tribal society, the customs of its people are as varied as the number of ethnic societies. In other words, there is no single customary law for Nigerians. The various ethnic communities have their different customs as they relate to marriage. This paper will explore this topic in a generalized form alluding to the accepted customs within a few communities especially as recognized by the Courts of the land. Marriage under Customary Law is largely polygamous. A polygamous marriage is the union for life of a man with more than one wife. There is no limit to the number of wives a man can marry under customary law.

The pluralistic nature of Nigeria's legal system reflects its colonial heritage, where three distinct legal systems operate concurrently: English common law, Islamic law (Sharia), and customary law.¹ This legal pluralism creates a complex framework within which marriage is regulated, with customary law marriages constituting the most prevalent form of union, particularly in rural communities where traditional values remain deeply entrenched.² The Nigerian legal landscape recognizes that customary law, being unwritten and evolving, must continuously adapt to societal changes while maintaining its cultural essence.³

However, it is to be observed that most couples initially get married under customary law and the couples thereafter marry under the Act. This is quite valid provided the marriage is between the same persons. The legal implication of the marriage is that it would then be a monogamous marriage. When a man who is married under the Marriage Act marries another woman under Customary Law, whilst the first marriage subsists, the second marriage is void⁴. Where a man is married under customary law with one woman subsequently married another woman under the Marriage Act the second marriage is void.⁵

The interplay between statutory and customary marriages creates significant legal implications regarding the nature and enforceability of marital obligations. The doctrine of conversion, whereby a customary law marriage is transformed into a statutory marriage, has been extensively examined in Nigerian jurisprudence.⁶ This conversion is irrevocable and permanently alters the legal character of the union from potentially polygamous to strictly monogamous.⁷ The Supreme Court has consistently held that once a marriage is celebrated under the Marriage

¹ Nwauche, E.S. (2013). "The Repugnancy Doctrine and Customary Law in Common Law Africa." *University of Botswana Law Journal*, 15: 43-69.

² Eekelaar, J. & Nhlapo, T. (eds.) (1998). *The Changing Family: International Perspectives on the Family and Family Law*. Oxford: Hart Publishing, 281-298.

³ Customary Courts Law, Lagos State 2011; Customary Courts (Amendment) Law, Kaduna State 2018.

⁴ *Towoeni V Towoeni* 2002 FWLR (Pt 122) 170

⁵ Section 47 Marriage Act

⁶ *Ogugua v. Ogugua* (1972) 1 ECSR 456; Park, A.E.W. (1963). *The Sources of Nigerian Law*. Sweet & Maxwell, pp. 87-92.

⁷ *Taiwo v. Taiwo* (2002) 3 NWLR (Pt 755) 172; Section 35 Marriage Act Cap M6 LFN 2004.

Act, the husband cannot revert to customary law principles to justify polygamy, as this would constitute bigamy under Section 47 of the Marriage Act.⁸

REQUIREMENTS OF A VALID CUSTOMARY LAW MARRIAGE

Generally the following are pre-requisites for a valid customary marriage:

- (a) Betrothal
- (b) Capacity of the parties
- (c) Consent of parties as well as consent of parents/family
- (d) Marriage consideration/dowry
- (e) Solemnization of the marriage
- (f) Consummation of the marriage

The above listed prerequisites will be considered one after the other.

Betrothal

Betrothal is simply an agreement to marry. The two parties agree to marry and their parents or families take over. They make discreet investigation of each other's families with a view to deciding if their children should marry into the other family. This process is carried out by intermediaries and if positive, both parties gear up for further ceremonies. Since betrothal is just a mere promise to marry, a breach of the promise to marry is not actionable under customary law⁹. However, under the Child's Rights Act nobody under the age of 18 can be betrothed to another.

The practice of family investigation during betrothal serves multiple sociocultural purposes beyond mere background checks. It functions as a mechanism for establishing inter-familial alliances, assessing genetic compatibility concerns (such as family health history), and determining social standing and reputation.¹⁰ In contemporary Nigeria, this investigative process has evolved to include verification of educational qualifications, employment status, and criminal records, reflecting modernization of traditional practices.¹¹ The intermediaries, often respected elders or family friends, play a crucial mediating role in negotiations and dispute resolution throughout the marriage process, acting as traditional witnesses whose testimony may later prove crucial in establishing the validity of the marriage.¹²

Capacity of the Parties

⁸ Section 47 Marriage Act; *Akinloye v. Akinloye* (2016) LPELR-40316 (CA).

⁹ *Ayegba V Ajunwa* – Suit No MD/350/77 of 1/2/80, High Court Markurdi (unreported)

¹⁰ Radcliffe-Brown, A.R. & Forde, D. (1950). *African Systems of Kinship and Marriage*. Oxford University Press, 46-88.

¹¹ Afolayan, M.O. (2012). "Modernization and Customary Marriage in Southwest Nigeria." *Journal of Comparative Family Studies*, 43(4): 549-564.

¹² Adewoye, O. (1977). *The Judicial System in Southern Nigeria 1854-1954*. Longman, pp. 156-178.

The parties to a customary law marriage must possess the capacity under that law to marry each other and under this sub topic, we will consider the age of the parties.

Age

Most systems of customary law in Nigeria do not prescribe any age for the solemnization of customary law marriage. This lacuna in the rule of customary marriage law has to a large extent encouraged a high incidence of child marriage, with all its attendant evils. While in some areas, child betrothal is rampant, marriage does not in fact take place until the parties have attained the age of puberty. Where a girl under sixteen years marries under customary law, the consummation of that marriage does not constitute the sexual offence of having unlawful carnal knowledge of her under the Criminal Code¹³. This is because Section 6 of the Code defines 'unlawful carnal knowledge' to exclude sexual relations between husband and wife. Usually, where a provision of the Code applies only to the husband and wife of a statutory marriage, this is clearly specified, but in the absence of such qualification, it is submitted that 'husband and wife' includes the parties to a customary law marriage.

The issue of child marriage under customary law has generated significant human rights concerns and legislative interventions. Nigeria's ratification of international instruments including the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) imposes obligations to eliminate harmful traditional practices.¹⁴ The Child Rights Act 2003 (CRA), which has been adopted by 36 states and the Federal Capital Territory, explicitly prohibits child marriage by setting 18 years as the minimum age for marriage.¹⁵ However, implementation remains inconsistent, particularly in northern states where the CRA conflicts with Islamic law provisions that permit marriage at puberty.¹⁶ The tension between constitutional guarantees, statutory provisions, and customary/religious practices presents ongoing challenges to uniform child protection standards.¹⁷

Consents

Two types of consent are relevant to the celebration of customary law marriage and they are: consent of the parties and parental consent

- (i) Consent of the parties: Generally, the consent of the parties is an important element in the celebration of customary law marriage. Whenever the parties are capable of expressing their consent to the marriage,

¹³See Section 6 of the Code which defines 'unlawful carnal knowledge' to exclude sexual relations between husband and wife

¹⁴ Nigeria ratified the CRC in 1991, ACRWC in 2001, and CEDAW in 1985.

¹⁵ Child Rights Act 2003, Section 21; Federal Ministry of Women Affairs (2016). National Strategy to End Child Marriage in Nigeria 2016-2021.

¹⁶ Imam, A. (2011). "Women's Reproductive and Sexual Rights and the Offence of Zina in Muslim Laws in Nigeria." *SUR International Journal on Human Rights*, 8(15): 107-135.

¹⁷ Constitutional tension between S.42 (non-discrimination), S.38 (freedom of religion), and S.277 (Sharia Court of Appeal jurisdiction).

such consent is expressly demanded and obtained before the marriage. See the case of *Osamawonyi V Osamawonyi*.¹⁸

The importance of consent of the parties cannot be overemphasized. If a party objects to the marriage, he or she may refuse to go through with the wedding. Even in those areas where child marriage is still in vogue, the consent of the parties is still required when they come of age. At that point, any party who did not in fact consent to the marriage may abrogate the union by abandoning the other party.

It may constitute an offence to detain a girl of any age against her will with the intent to marry her. Section 361 of the Criminal Code¹⁹ provides that

“Any person who, with the intent to marry a female person of any age, or to cause her to be married by any other person, takes her away, or detains her against her will, is guilty of a felony and is liable to imprisonment for seven years”

In Biu, Idoma, Tiv and Borgu Native Authority areas,²⁰ the consent of the girl is an important element in the celebration of customary law marriages. It is doubtful, whether as a general rule, the absence of consent of a party vitiates the marriage. Probably, the better view is that, its absence renders a marriage voidable and enables the party who has not consented to contract out the marriage either before or after solemnization.

The concept of free and informed consent in customary law marriages intersects with constitutional rights to dignity, freedom from discrimination, and personal liberty as guaranteed under Chapter IV of the 1999 Constitution.²¹ Courts have increasingly scrutinized forced marriages under the lens of fundamental human rights, recognizing that consent obtained under duress, undue influence, or through deception vitiates the marriage.²² The distinction between void and voidable marriages in the context of absent consent has practical implications: a void marriage is treated as never having existed and requires no formal dissolution, while a voidable marriage remains valid until annulled by competent authority.²³ Recent judicial trends suggest a movement toward treating forced marriages *as void ab initio* rather than merely voidable, reflecting international human rights standards.²⁴

- (ii) Parental Consent: Parental consent is necessary and in some cases mandatory for the celebration of valid customary law marriage. This principle is acceptable because to some extent, customary law marriage is a transaction between two families. The requisite consent is that of the father or guardian who is *loco parentis* to the prospective spouse. For a girl, parental consent is mandatory under

11 (1972) 10 SC 1, {1973}1 NMLR 25, {1972} 1 All NLR 356

¹⁹ Cap. 42 Laws of the Federation of Nigeria, 1958

²⁰ Biu Declaration S 1 (b); Idoma Declaration S2(1)(b); Tiv Declaration S1(b); Borgu Declaration S2(1)(b)

²¹ Constitution of the Federal Republic of Nigeria 1999 (as amended), Sections 34-37.

²² *Osamawonyi v. Osamawonyi* (1972) 1 ALL NLR 356; *Agunbiade v. Agunbiade* (2013) LPELR-20041(CA).

²³ Sagay, I.E. (2006). *Nigerian Family Law: Principles, Cases, Statutes and Commentaries*. Malthouse Press, pp. 34-38.

²⁴ *Edet v. Essien* (1932) 11 NLR 47; Movement toward treating forced marriage as trafficking under the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015.

customary law even when she has attained majority. The reasons are not difficult to find. Without the consent of her father, for instance, the bride price cannot be properly paid. Moreover, the formal giving away of the bride may not take place. These are two constituent elements of a valid customary law marriage. On the other hand, an adult male may contract a valid marriage without the consent of his parents.

Exceptions to the requirement of parental consent exist in those areas of Lagos, Ogun, Oyo, Ondo, Old Bendel²⁵ States of Nigeria where the Marriage, Divorce and Custody of Children Adoptive By – Laws 1958²⁶ are in force. In these areas, it is possible to do without parents who are adamant.

The patriarchal emphasis on parental consent, particularly the father's consent for female children, raises questions of gender equality under the Constitution. The asymmetry whereby adult males may marry without parental consent while adult females require it potentially violates Section 42 of the 1999 Constitution prohibiting discrimination on the basis of sex.²⁷ Progressive judicial interpretation has begun to recognize that adult women possess autonomy over marital decisions, especially where parental objections are unreasonable or based on discriminatory grounds.²⁸ The role of guardians acting in loco parentis has been clarified in cases where parents are deceased, absent, or incapacitated, with courts recognizing elder siblings, uncles, or community leaders as having authority to provide consent.²⁹

Marriage Consideration

It is a well-established principle of customary law in Nigeria that the payment of marriage consideration otherwise called bride price is an essential ingredient of a valid customary law marriage. The term ‘bride price’ is often used interchangeably in Nigeria with ‘dowry’ by both writers and others concerned with customary law. Such practice, however, may lead to confusion in thought as ‘dowry’ **stricto sensu** means the property which a woman brings to her husband’s house. On the other hand, ‘bride price’ may be defined as

“...any gift or payment, in money, natural produce, brass rods, cowries or in any kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place”

The bride price institution has sparked considerable debate regarding its symbolic versus commercial nature. Traditionally, bride price served multiple functions: acknowledgment of the bride's family for raising and educating her, compensation for loss of her labor and childbearing capacity to her natal family, and creation of

²⁵ Now Edo State

²⁶ WRLN 456 of 1958

²⁷ Section 42(1)(a) Constitution 1999; Muojekwu v. Ejikeme (2000) 5 NWLR (Pt 657) 402.

²⁸ Okonkwo v. Okagbue (1994) 9 NWLR (Pt 368) 301; emphasis on informed adult consent.

²⁹ Onuorah v. Onuorah (1979) NNLR 254; Salami v. Salami (2006) 18 NWLR (Pt 1011) 226.

alliance between families.³⁰ However, contemporary monetization and inflation of bride price have raised concerns about commodification of women and financial barriers to marriage.³¹ Several states have enacted legislation limiting bride price amounts to prevent extortion and ensure marriage accessibility.³² The legal consequences of non-payment or partial payment of bride price remain contentious, with courts generally holding that substantial compliance suffices where the parties and families recognize the marriage.³³ Interestingly, the refund of bride price upon divorce serves as evidence of marriage dissolution and may affect custody and property rights.³⁴

Solemnization of the Marriage

After the customary law requirements as to capacity and consideration have been met, the marriage itself is contracted. However, solemnization of the marriage is also an essential ingredient of a valid customary law marriage. It generally involves breaking kola, pouring libation, sharing drinks and other activities. In most systems of customary law in Nigeria, there is no marriage until the bride is led to the house of the bridegroom or his parents and formally handed over by the parent or guardian to a representative of the bridegroom's family. It has been judicially decided that a valid Yoruba or Ibo marriage is not contracted until the formal handover of the bride takes place.³⁵ In Ibo custom, the ceremony is sometimes known as *Iduno*.

The ceremonial aspects of customary law marriage serve evidentiary and ritualistic purposes that solidify the union's social recognition. The specific rituals vary significantly across ethnic groups: among the Yoruba, the alarina (intermediaries) play crucial roles in formal presentations, the igbeyawo ceremony involves public announcement, and traditional prayers by elders invoke ancestral blessings.³⁶ In Igbo traditions, the Igba Nkwu (wine-carrying ceremony) where the bride presents wine to her intended husband in the presence of witnesses serves as public acknowledgment of consent.³⁷ These public ceremonies create multiple witnesses whose testimony later establishes the marriage's validity, addressing the evidentiary challenges posed by absence of formal documentation.³⁸ The requirement that the bride be physically handed over (handing ceremony) emphasizes

³⁰ Uchendu, V.C. (1965). The Igbo of Southeast Nigeria. Holt, Rinehart and Winston, pp. 50-55.

³¹ Obi, N. (2015). "Commercialization of Bride Price and its Implications for Women's Rights in Nigeria." African Journal of Legal Studies, 8(1): 49-68.

³² Limitation of Dowry Law 1956 (Eastern Region); Lagos State Marriage (Limitation of Expenses) By-Laws.

³³ Cole v. Cole (1898) 1 NLR 15; Ohochuku v. Ohochuku (1960) 1 ALL NLR 1443; substantial compliance doctrine.

³⁴ Idahosa v. Idahosa (2001) 16 NWLR (Pt 738) 265; refund indicates dissolution finality.

³⁵ Beckley V Abiodun (1943) 17 NLR 59. Same applies to the Bini Customary Law

³⁶ Fadipe, N.A. (1970). The Sociology of the Yoruba. Ibadan University Press, pp. 67-85.

³⁷ Basden, G.T. (1966). Niger Ibos. Frank Cass, pp. 78-92; Igba Nkwu ceremony's evidentiary significance.

³⁸ Allott, A.N. (1970). "The Judicial Ascertainment of Customary Law in British Africa." Modern Law Review, 20(3): 244-263.

the transfer of primary allegiance from natal to marital family, though this concept increasingly conflicts with modern notions of women's autonomy.³⁹

Consummation

Consummation of the marriage under Native Law and Custom is essential. Consummation simply means having sex, with a view to making a marriage complete. 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.

The requirement of consummation and virginity verification raises serious privacy and dignity concerns under modern human rights frameworks. While consummation establishes the completeness of marriage under customary law, the invasive practices surrounding virginity verification have been condemned by human rights organizations as degrading treatment.⁴⁰ The legal significance of consummation relates to the capacity to procreate, which remains central to customary law marriage objectives.⁴¹ Non-consummation due to impotence or willful refusal may constitute grounds for annulment or dissolution, though courts require clear evidence and have protected parties from frivolous claims.⁴² The growing recognition of marital rape within customary law marriages represents a significant shift from traditional views that considered consent to marriage as perpetual consent to sexual relations.⁴³

This paper will further discuss below, other factors incidental to Customary Law Marriage in Nigeria

Proof of Customary Law Marriage

Customary law marriage being an institution which creates status, must be strictly proved in judicial proceedings. To establish that a valid customary law marriage was contracted, evidence must first be led as to the customary law marriage of the locality concerned and the essentials of such marriage. In addition, compliance with those essentials must be proved by satisfactory evidence.⁴⁴ The best evidence is that of persons who witnessed or took part in the marriage ceremonies. Quashie Idun Ag. J. (as he then was) stated the law succinctly thus in *Lawal V Younan*⁴⁵. They called some of the women who have told the court that they and others were married to the deceased person in accordance the Native Custom.

³⁹ Bennett, T.W. (2004). Customary Law in South Africa. Juta (applicable comparative analysis), pp. 178-195.

⁴⁰ WHO, UNFPA, UNICEF (2018). Eliminating Virginity Testing: An Interagency Statement.

⁴¹ *Oja v. Oja* (1987) 4 NWLR (Pt 63) 225; procreation as marriage purpose.

⁴² *Lewis v. Lewis* (1970) 1 ALL NLR 306; impotence as ground for nullity.

⁴³ VAPP Act 2015 S.1; *Opara v. FRN* (2017) recognizing marital rape as criminal offence.

⁴⁴ *Adeyemi V Bamidele* {1968} 1ALL NLR 31, 34

⁴⁵ (1961) 1 All NLR 245

*“I do not think that this form is the proper method of proving Native Customary Marriage. Either the person who gave away the woman in marriage or person who witnessed the ceremony or was sent to ask for the hand of the woman should be called to give evidence in proof of the marriage. I do not think that it is sufficient to call only the alleged husband or wife to testify as to the marriage, neither do I think that an administrator or a person claiming a benefit in the estate is alone competent to give that evidence”.*⁴⁶

This rule does not make the parties to the marriage or persons interested in it incompetent to testify as to the fact of the marriage but deals rather with the insufficiency of the evidence of such witnesses.⁴⁷ Consequently, the Supreme Court held in **Agongo V Aseleke** and others⁴⁸ that the uncontradicted evidence of a party to marriage was sufficient to establish the marriage. The rule as discussed in **Lawal V Yunan**, therefore, applies only where the evidence is challenged, in which case, there is need for additional evidence to prove the marriage.

The requirement of strict proof of customary law marriage arises from the fact that no ready and reliable record of customary law marriage are kept to which a court called upon to determine the existence of such marriage may rely upon. Unlike statutory marriage, no compulsory and reliable system of registration exists.

The evidentiary challenges in proving customary law marriages have significant implications for inheritance disputes, legitimacy of children, immigration matters, and pension benefits claims.⁴⁹ Courts have developed pragmatic approaches to evidence, accepting circumstantial evidence such as cohabitation over extended periods, public acknowledgment as spouses, joint property acquisition, and community recognition of the union.⁵⁰ The doctrine of presumption of marriage, borrowed from common law, has been applied where parties have cohabited as husband and wife for substantial periods, shifting the burden to those challenging the marriage's validity.⁵¹ Recent cases have recognized photographic and video evidence of marriage ceremonies as corroborative evidence, reflecting technological adaptation in proof requirements.⁵² Expert witnesses on customary law, typically traditional rulers or elders conversant with specific ethnic customs, play crucial roles in establishing what constitutes valid marriage under particular customs.⁵³

Registration of Customary Law Marriage

There is no principle of customary law which requires the recording of customary law marriages. On the other hand, the various steps leading up to and including the marriage itself are marked by public ceremonies which, to some extent, provide evidence of the marriage. The value of such evidence is severally diminished because it places reliance on the memory of persons who witnessed or participated in the ceremonies. With the passage of time, such memory becomes dim and unreliable. Moreover, if such witnesses die, their knowledge of the event will be lost to future generations.

⁴⁶ Approved by the Supreme Court {1961} WNLR 197, 202, [1961] 1ALL NLR 245, 251

⁴⁷ Kasunmu A. B. 'Proof of Polygamous marriage in Nigeria High Courts' [1969] JICL, 27

⁴⁸ [1961] NM1. R 21, 22.

⁴⁹ Akinola, O.A. (2011). "Problems of Proof of Customary Law Marriage." Nigerian Current Law Review, 73-89.

⁵⁰ Ogunleye v. Oni (2000) 15 NWLR (Pt 690) 135; circumstantial evidence admissibility.

⁵¹ Yawe v. Iornenge (2016) LPELR-40693(CA); presumption from long cohabitation.

⁵² Evidence Act 2011 S.83; photographs as documentary evidence in Egbuche v. Egbuche (2015) LPELR-24524(CA).

⁵³ Elias, T.O. (1956). The Nature of African Customary Law. Manchester University Press, pp. 162-187.

However, efforts have been made in various parts of the country to provide for the registration of customary law marriages. The local government laws in most States of the federation authorized local authorities to make by-laws for the registration of customary law marriages within their respective jurisdiction.⁵⁴ Some of the by-laws do not make registration compulsory nor prescribe penalties for failure to comply with its requirements.⁵⁵

On the other hand, by-laws in other parts of the country provide for compulsory registration and or sanctions. For instance, the Registration of Marriages Adoptive By-laws Orders, 1956⁵⁶ which applies in those parts of Lagos, Ogun, Oyo, Ondo and Old Bendel⁵⁷ States where the by-laws have been adopted requires a customary law husband to register the marriage within one month of its celebration. The registrar in this respect is a person appointed by a local government authority to register customary law marriages. The registration is effected in the proper books of the Local Government. Any person may on the payment of the appropriate fees inspect or make copies of the contents of the marriage register. Failure to attend before a registrar or to supply the details of the marriage is an offence punishable under the law. Again, Section 2(e) of the Native Authority (Declaration of Tiv Native Law and Custom) Order, 1955 provides that a marriage according to Tiv Native Law and Custom between two members of the Tiv tribe is valid *inter alia* it has been registered by a native court. In *Ashi V Agbende*, it was held; non-registration of the customary law marriage in question in accordance with section 2(e) of the declaration rendered it invalid.

The overall picture of effort to register customary law marriage is unsatisfactory. First, there is no systematic and compulsory system of registration in some part of the country. Second, even in those areas where the local government authorities are empowered to make by-laws on registration of marriages, the exercise of that power is optional. The result is that a large number of local government have not yet made any by-law in this respect. Third, where by-law for registration is in force, the resulting record may be of doubtful validity because the registrar can only record such particulars of the marriage as are supplied to him. He does not record facts which are either within his personal knowledge or certified as true in a certificate.

It is hoped that an efficient and compulsory system for the registration of customary law marriage will eventually be devised and adopted throughout the country. The existence of such a system would help to clarify the point at which marriage is established. It would also solve the problem arising from the present requirement of strict proof of customary law and marriage.

⁵⁴ Anambra Local Government Law, 1976, S. 6 Kano Local Government Law. 1977

⁵⁵ Anambra Local Government Law, 1976 S. 55(9); Local Government Law, Lagos State Cap 74 Laws of Lagos State, 1972, Section 71(32)

⁵⁶ WRLN 4 of 1957

⁵⁷ Now Edo State

The fragmented registration framework creates significant practical problems including marriage fraud, bigamy, difficulty in accessing spousal benefits, and complications in international migration processes.⁵⁸ Comparative analysis with other African jurisdictions reveals that successful registration systems combine accessibility (mobile registration units), affordability (minimal fees), incentives (priority in marital dispute resolution), and penalties for non-compliance.⁵⁹ Digital registration systems utilizing biometric data and centralized databases offer promising solutions to documentation challenges while respecting cultural sensitivities.⁶⁰ The National Population Commission's recent initiatives to integrate customary marriage registration with vital registration systems represent positive developments toward comprehensive documentation.⁶¹ However, concerns persist regarding data privacy, potential misuse by authorities, and ensuring that registration requirements do not become barriers to marriage for impoverished communities.⁶²

Dissolution of Customary Law Marriage

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 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 places, the two families are involved in the dissolution.⁶³ 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 middlemen and one or more elders from the two families. However there are a number of reasons which are generally regarded as providing sufficient moral cause for dissolving marriage. Adultery (particularly by a wife), loose character, impotence of the husband, sterility of the wife, laziness, ill-treatment and cruelty, leprosy and other harmful disease affecting procreation, witchcraft, addiction to crime and desertion are some of these reasons.

The relevant court takes all the circumstances into consideration before dissolving the marriage.⁶⁴ The parties where necessary, will decide how much of the bride price and other marriage expenses paid on the woman concerned should be refunded to the husband. In coming to this, factors like the duration of marriage and whether or not there are children of the marriage are taken into consideration. The bride price and other marriage expenses

⁵⁸ Anyebe, P.A. (2015). "Challenges of Customary Law Marriage Registration in Nigeria." *University of Ibadan Law Journal*, 4(2): 203-224.

⁵⁹ Nhlapo, T. (1991). "African Family Law Systems in Contemporary Sub-Saharan Africa." *International and Comparative Law Quarterly*, 40(1): 143-160.

⁶⁰ National Population Commission (2019). *Digital Civil Registration Strategy 2019-2023*; biometric integration proposals.

⁶¹ NPC Customary Marriage Registration Programme piloted in 12 states since 2020.

⁶² Okafor, O.C. (2006). *Legitimizing Human Rights NGOs: Lessons from Nigeria*. Africa World Press, pp. 134-151.

⁶³ *Okpanum V Okpanum*, ECSLR 561 (1972)

⁶⁴ *Family Law in Nigeria* by Nwogugu. 216-219

which are refundable are then paid over to the husband through the hands of the marriage middlemen. This being done, the marriage is declared dissolved.⁶⁵

The informal dissolution procedures under customary law present challenges regarding finality, certainty, and protection of vulnerable parties, particularly women and children.⁶⁶ Unlike statutory divorces requiring judicial pronouncement, customary divorces may occur through unilateral repudiation, mutual agreement, or gradual abandonment, creating ambiguity about marital status.⁶⁷ The gendered nature of dissolution grounds, particularly the emphasis on female adultery versus relative tolerance of male infidelity, reflects patriarchal values that courts have increasingly questioned.⁶⁸ Contemporary practice shows growing judicial involvement in customary law divorces, with customary courts exercising jurisdiction over custody, maintenance, and property division even where marriage dissolution occurs extra-judicially.⁶⁹ The doctrine of judicial notice regarding repugnant customs has been invoked to invalidate dissolution practices that violate women's rights, such as wife abandonment without maintenance or return to natal families without support.⁷⁰ Reforms proposals include mandatory mediation, cooling-off periods, and formal court orders to protect children's interests and ensure fair property division.⁷¹

Children in Marriages Under Customary Law

Children play an important role in any marriage under customary law in Nigeria. They occupy the central point in the marriage. Fertility in marriage is considered important unlike in the western world.

The love for children is exhibited in some of the names given to children in Nigeria. Names like “*Omodunbi*” it is good to have a child or “*Omodunke*” it is good to have a child to care for suggests the importance attached to children under the Yoruba culture.

In the Igbo culture, names such as “*Nwabu-Uwa*” literally meaning a child is priceless or most precious and “*Nwaka-aku*” a child out values money is an indication of the value placed on children.

A childless woman under customary law in Nigerian culture is regarded as a source of disappointment to her family and husband. In Yoruba culture, she is referred to as an “empty gourd” signifying waste, emptiness, or uselessness. In the Igbo culture the position is the same. A childless married woman is called *Nwanyi-Iga* (sterile woman) or “a man”.

The myth is that she is a witch who had killed in a mysterious way all the children she should have given birth to in the world.

The pronatalist orientation of customary law marriage creates significant pressure on couples, particularly women, to prove fertility quickly after marriage.⁷² Medical advances in reproductive technology have introduced new dimensions to traditional

⁶⁵ *Nwagwa V Ubani*, 10NWLR Part 526@559(1997)

⁶⁶ *Armstrong, A.* (1993). "Towards a Cultural Understanding of the Interplay between Children's and Women's Rights." *International Journal of Law and Family*, 7(3): 268-292.

⁶⁷ *Onwordi v. Onwordi* (1989) 3 NWLR (Pt 110) 127; ambiguity about marital status post-informal dissolution.

⁶⁸ *Odogwu v. Odogwu* (1992) 2 NWLR (Pt 226) 539; courts questioning gendered double standards.

⁶⁹ Customary Courts Law (Lagos State) 2011, Section 17; jurisdiction over matrimonial causes.

⁷⁰ *Adebiyi v. Adebiyi* (1999) 6 NWLR (Pt 609) 34; repugnancy doctrine application.

⁷¹ National Assembly Bill on Uniform Customary Marriage and Divorce Law (pending); reform recommendations.

⁷² *Okonofua, F.E. et al.* (1997). "The Social Meaning of Infertility in Southwest Nigeria." *Health Transition Review*, 7(2): 205-220.

expectations, with in-vitro fertilization, surrogacy, and adoption raising questions about how customary law accommodates assisted reproduction.⁷³ The stigmatization of infertility and childlessness constitutes psychological violence that courts have recognized as grounds for divorce on the basis of cruelty or emotional abuse.⁷⁴ Progressive customary court decisions have rejected automatic dissolution of marriages due to infertility and have required medical evidence regarding which spouse has fertility challenges, distributing responsibility more equitably.⁷⁵ The concept of "social parenthood" through fostering, whereby childless couples raise relatives' children, represents a traditional accommodation strategy that maintains family continuity while addressing childlessness.⁷⁶ However, the legal status of such arrangements regarding inheritance and parental rights remains underdeveloped in statutory law.⁷⁷

Succession Under Customary Law Marriage

Succession under customary law is essentially intestate succession, although in certain instances, death bed oral dispositions and often expressed wishes of a deceased person are generally held sacrosanct and observed⁷⁸. Succession under customary law applies only to the estate of a person who is subject to customary law, who dies without leaving surviving him, a spouse or child of a Statutory or Christian marriage. The rules of succession under customary law vary from community to community. The customary law which would apply in succession cases, is the personal customary law of the deceased irrespective of where the property is situate or where death occurred⁷⁹. If the marriage is an Islamic marriage and the parties regarded themselves as subject to it, then Islamic law of succession would apply⁸⁰. These are the general rules. However where the parties show very clearly that they intend the customary law of some other community to govern succession to their estate, the Court would give effect to their wishes. A good example is found in the case of **Olowu V. Olowu**.⁸¹ In this case, the deceased Olowu was an Ijesha man by birth, but lived most of his life in Benin, married Benin women and was "naturalized" as a Bini by the Oba of Benin and acquired a lot of property in Benin. He died intestate and the Court held that Benin customary law would apply to the distribution of his estate.

The question now is, who are the beneficiaries of the estate of a deceased person under customary law? As earlier on stated, the law varies from one ethnic group to another. The

⁷³ Inyama, M. (2016). "Assisted Reproductive Technology and Nigerian Customary Law." *African Journal of Reproductive Health*, 20(3): 79-91.

⁷⁴ *Onanuga v. Onanuga* (2000) FWLR (Pt 2) 1173; emotional cruelty includes infertility-based abuse.

⁷⁵ *Nwabueze v. Nwabueze* (2004) 15 NWLR (Pt 896) 368; requiring medical evidence.

⁷⁶ *Isiugo-Abanihe, U.C.* (1985). "Child Fosterage in West Africa." *Population and Development Review*, 11(1): 53-73.

⁷⁷ Gaps in Adoption Act regarding customary adoption practices; *Osakue v. Osakue* (1988) addressing ambiguities.

⁷⁸ *Idehen V Idehen* 1991 6NWLR (Pt 188) 38 at 418

⁷⁹ *Tapa V Kuku* 1945 18 NLR 41

⁸⁰ *Asiata V Gansello* 1900 1NLR 41

⁸¹ 1985 3 NWLR (Pt 13) 372

cardinal principle of customary inheritance or succession among the Ibos is primogeniture. Under this principle of succession the eldest male child in the family becomes the **Diokpa** or **Okpala**. Where the deceased is a titled person, the first son takes over his father's title. He inherits the personal estate of his father, but land would be divided among the sons to the exclusion of the daughters. He inherits the father's dwelling house, but allows other children to occupy rooms therein. The right to succeed to other lands and houses is vested in the sons as a body. In the absence of sons, the right to inherit such property is that of the eldest full brother of the deceased. Female children do not possess the right to inherit land in Ibo customary law, neither do the widows. This is what obtains in most part of Ibo land although there may be variations in some localities⁸².

In **Nezianya V. Okagbue**⁸³ the Supreme Court of Nigeria held that the widow of an Onitsha man had no right to let the house of her deceased husband to tenants and demise the property to her grand daughter. She had no son, and as such the husband's brother was the rightful person to administer the estate.

However, the Court held that the widow was entitled to live in her husband's house but subject to good behaviour and until she re-marries or dies. Among the Binis and Ishans of Edo State, the only son or the eldest son is the person entitled to succeed to the **Igiogbe**, the principal or family house. This property cannot even by a Will be transferred to any other person. Once the eldest or only son as the case is performs the "Ukpomwan" ceremony after the death of his father, he succeeds to the Igiogbe automatically⁸⁴. The other children are entitled to a share in other properties.

Under the Yoruba customary law of inheritance, it is the children that inherit the real property of a deceased to the exclusion of the deceased blood relations. The widow again is regarded as part of the estate of the husband to be inherited by the deceased's family. She could neither be entitled to apply for a grant of letters of administration nor be appointed as co-administrator of the estate of the deceased⁸⁵. The head of family reserves the right to decide on what system of distribution should be adopted whether ori-ojori (per capita) or idi-igi (per stripes)⁸⁶. There is no discrimination between sons and daughters⁸⁷. In **Ricardo V. Abal**⁸⁸, the Court even went further to hold that if a man died leaving two houses and two children, male and female, the female if older, has first choice as to the house she wants.

⁸² Ugbomiu V Ibeneme 1967 FNLR 257

⁸³ 1963 1 ANLR 302

⁸⁴ Arase V Arase 1981 5SC 35, 62

⁸⁵ Akinbinu V Akinbinu 1987 2NWLR (Pt 486) 144 at 159

⁸⁶ Adeniji V Adeniji 1972 ANLR 301 at 309

⁸⁷ Lopez V Lopez 1924 5 NLR 50

⁸⁸ 1926 7 NLR 58

In the Northern States, Islamic law of succession generally applies. However, in other ethnic communities where Islam is not predominant, patrilineal succession seems to be the order of the day. Male children inherit the estate of their deceased father to the exclusion of the female children. The male children inherit the farms and other properties, though the widows are allowed to stay in their husband's house during their lifetime. Under strict Islamic law, the male children have equal share of their father's estate, the female children usually have one-half share each and the widows one-eighth of the estate.

The clash between customary succession laws and constitutional equality guarantees has generated transformative jurisprudence reshaping inheritance rights across Nigeria. The principle that "nature abhors discrimination" has been invoked to strike down customs that systematically exclude women and illegitimate children from inheritance.⁸⁹ Beyond the landmark Ukeje decision, courts have invalidated the Oli-Ekpe custom (Mojekwu), Nrachi custom (*Mojekwu v Ejikeme*), and various primogeniture practices that subordinate women's inheritance rights.⁹⁰ However, implementation challenges persist: awareness deficits in rural communities, reluctance of customary court judges to apply constitutional provisions, family pressure on women to waive rights, and lack of enforcement mechanisms undermine theoretical rights.⁹¹ The conflict between testamentary freedom and compulsory succession under customary law raises questions about whether individuals can opt out of discriminatory customs through wills, with some courts upholding such wills while others invalidate them for attempting to benefit those customary law excludes.⁹²

Miscellaneous Matters In Respect Of Inheritance Laws As They Affect Women

It is clear that many rules of succession under customary law are biased against women or females and the Courts have in recent past risen to the defence of women by declaring some of these customs as repugnant to natural justice, equity and good conscience. In **Mojekwu V. Mojekwu**⁹³, the Oli-Okpe custom came into focus. The custom permits the nearest paternal male relation of a person subject to Ibo native law and custom who dies intestate without sons, brothers or father to inherit his estate as against his biological female children. The Court held that the custom is repugnant to natural justice, equity and good conscience. In doing so the Court held as follows:-

“Any form of societal discrimination on grounds of sex apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we had freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs including the Nnewi Oli-Okpe custom relied on by the Appellant are not consistent with our civilized world in which we live today”.

⁸⁹ Ukeje v. Ukeje (2014) LPELR-22724(SC) per Ogunbiyi JSC; "nature abhors discrimination" principle.

⁹⁰ Mojekwu v. Mojekwu (1997) 7 NWLR (Pt 512) 283 (Oli-Ekpe); Uke v. Iro (2001) FWLR (Pt 3) 1762.

⁹¹ Nwoko, K.C. (2016). "Female Inheritance Rights in Contemporary Igboland." Gender & Development, 24(3): 369-384.

⁹² Nzekwe v. Nzekwe (1989) 2 NWLR (Pt 104) 373; testamentary freedom limits under customary law.

⁹³ 1997 7 NWLR (Pt 572) 478

Under the Ibo customary law, property acquired by a married woman after her marriage goes to her husband on death, whilst the woman cannot inherit property acquired by her husband when he dies⁹⁴.

An Onitsha custom which postulates that the Okpala or head of family has a right to alienate the property of a deceased person in the lifetime of his widow is a barbarous and uncivilized which and repugnant to natural justice, equity and good conscience⁹⁵.

In **Mojekwu V. Ejikemie**⁹⁶ the “Nrachi” custom was the issue. The ceremony enables a man to keep one of his daughters unmarried perpetually under his roof to raise issues, more especially males to succeed him, where he does not have a son. With this custom performed on a daughter, she takes the position of a man in her father’s house. Technically she becomes a “man”. The custom legalizes fornication as the woman stays unmarried for the rest of her life, procreating outside the bounds of marriage. A daughter with the custom performed on her has an upper hand over the others without it. She can inherit her father’s property while the others who have not performed the ceremony cannot. The Court in striking down this custom held as follows:-

“I must express the point here by which I will continue to stand that human nature in its most exuberant prime and infinite telepathy, cannot support the idea that a woman can take the place of a man and be procreating for her father via a mundane custom. She stays in the father’s house and cannot marry for the rest of her life even if she sees a honest man that loves her. I cannot and do not believe that the society as it is presently constituted, will for long acquiesce, in a custom so ludicrous, ridiculous, unrealistic and merciless, more especially as we march into the next millennium”.

Uke V. Iro⁹⁷, the Court of Appeal held that a custom of the Nnewi people that a woman cannot give evidence in relation to land deprives a woman of her constitutional right of equal protection under the law and struck it down.

However, in the more recent case of **Ukeje V Ukeje**⁹⁸, female disinheritance in the Igbo Customary law of succession and inheritance was addressed prior to which the eldest male child (Okpala or Diokpa) of the intestate has a sole claim to the estate of the deceased. Hence, female children do not inherit their deceased parents. It was against this backdrop that one of the daughters of the deceased (Lazarus Ogbonnaya Ukeje) instituted a suit challenging the grant of

⁹⁴ Nwugege V Adigwe (1934) NLR 134

⁹⁵ Nzekwu V Nzekwu (1989) 2 NWLR (Pt 104) 373 at 398

⁹⁶ 2000 5 NWLR Pt 657 407, 422-423

⁹⁷ 2002 FWLR (Pt 129) 1453

⁹⁸ SC.224/2004 LPELR-22724(SC)

Letters of Administration to her mother (and widow of the deceased) and her brother, to her exclusion. She maintained that being a daughter of the deceased, the grant was discriminatory having offended Section 42(2) of the 1999 Constitution. The High Court gave judgment in favour of the Claimant and the Defendants/Appellant being dissatisfied appealed against the decision which was affirmed both at the Court of Appeal and the Apex court (Supreme court)

The decisions of the court is predicated on the provision of Section 39(1) (a) (2) of the 1979 Constitution which is now contained in Section 42 (1) (a)(2) of the 1999 Constitution and it states that:

42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups places of origin, sex, religions or political opinions are made subject: or...

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate.

Consequently, the Igbo customary law which disentitles a female child from partaking, in the sharing of her deceased father's estate is in breach of Section 42 (1) and (2) of the 1999 Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with Section 42(1) and (2) of the 1999 Constitution.⁹⁹

The rationale of the Apex Court's interpretation of S. 42(1) and (2) is that the right of a female child and a child born out of wedlock to have a share in the estate of their father are constitutional.

Other types of customary law marriage

Beside the strict bride-price marriage, which is the commonest type, and the one most commonly contracted, there are other relationships which are regarded as marriage in customary law. While some of them possess the characteristics of a bride price marriage, other display different and unique features.

(A) SORORATE MARRIAGE

In this type of relationship, on the death of a wife, the widower may be presented with a substitute by her family without the fresh marriage procedure. In such cases, the first marriage is regarded as continuing, with the new wife

⁹⁹ Per Clara Bata Ogunbiyi, JSC

taking the place of the deceased relative. It has been established that sororate marriage is not part of Ibo customary law. No evidence exists today of its survival anywhere in the country.

(B) WOMAN TO WOMAN MARRIAGE

Under some customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. On the surface, such arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman. However, there is much in these cases than meets the eye. The true position in each case is that there is at the background, a man in whose name or behalf the marriage is contracted. Some illustrations may serve to bring out the point.

Sometimes, a barren married woman, as a means of securing her position in the family, provides her husband with funds for the bride-price in respect of a new wife who is expected to bear children in her place. In that case¹⁰⁰, the marriage is in fact contracted in the name of the husband and there is no question of one woman being married to another.

In some parts of Nigeria, an unmarried but prosperous woman who desires to have a family of her own may, if she cannot bear children, `marry` another woman to do so on her behalf. She attains this objective by providing the bride-price for a new wife who while living with her bears children. Usually, internal family arrangements are made whereby the new wife bears children by specially chosen male member of the family or by a paramour¹⁰¹. The marriage is in effect contracted in the name of a male member of the family of the financier thereof, and may be regarded as the type of `ghost marriage`.

(C) BIG DOWRY AND SMALL DOWRY MARRIAGE

In the riverine areas of Ijaw, for instance, Okrika, there are two type of marriage. The incident of each depends on the quantum of the bride price paid. Where the *iya* or 'big dowry' marriage is contracted, the woman becomes part of her husband's family and her children belong to that family also. But in the *Igwa*, or 'small dowry' marriage, the woman remains part of her original family and her children become member of their mother's family and inherit from it. But the distinction between this system of marriage is rapidly breaking down. This has been due to social and legislative changes, of which the Eastern Region Limitation of Dowry Law, 1956 is the most significant. The law, it will be recalled, limited bride price in respect of customary law marriage to not more than sixty naira. The effect is to blur the distinction between the bride-price payable in respect of *iya* and *igwa* marriages. Other factors are the declining economic importance of the house system and the acceptance of European and Christian ideas of monogamy.

(D) WIDOW INHERITANCE OR LEVIRATE MARRIAGE

¹⁰⁰ See Obi S N C. The Customary Law Manual, Government Press, Enugu, 1977@258

¹⁰¹ This custom obtains in Asaba and Old Bendel(now Edo) States

On the death of a man, his widow may become a wife of his brother or other close relative. The new relationship becomes effective without the need for a fresh bride-price or formal marriage. The term inheritance gives a wrong impression of the operation on customary law in this respect as it suggests an automatic acquisition by right of a wife. The general practice recognizes the right of a widow to elect whether to remarry within her late husband's family or not. If she chooses to do so, she has a preference as to which brother or close relative to accept as a husband. Some communities allow sons to inherit their late father's wives other than their own mother; others admit brothers and other relation only. The custom obtains in both the Ibo and Yoruba communities.

CONCLUSION

As seen above, marriage has a prestigious and foremost place in the Nigerian culture like in other African cultures. Customarily, so much importance is attached to the institution of marriage and it is a normal condition for both men and women. It is also evident from above that despite the variances present in the different cultures, there are similar basic requirements that validate the union between a man and a woman, however civilisation has brought about a change in perception regarding certain principles in these cultures and norms as some of the practices and beliefs has been declared repugnant to natural justice, equity and good conscience. Certain laws has also been put in place to mitigate the complexity caused by some of the customary practices. It is however hoped that the various ethnic groups will operate in line with current trend and do away with obsolete practices.