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**A Critique of Certain Aspects of the Grounds,
Procedure and Reliefs Attaching to
Customary Law Divorce in Southern Nigeria**

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Abstract

The family is at the basis of the society and marriage is fundamental in the establishment of the family institution. Divorce, without doubt does great violence to marriage and by extension, to family and society. Although the provisions for divorce under the Act frustrates the ideal of a lifelong union suggested by the natural law jurisprudence, the provisions and practices of divorce under the various customary laws are arguably much more devastating to the sanctity of marriage. Indeed much of the corpus of customary laws on divorce in the Southern part of Nigeria as in others, suffer the shortcoming of being contrary to natural justice, equity and good conscience. Often, they contradict existing statutory laws and depart from acceptable public policy formulations. It is either that the grounds enabling divorce are so elastic and plural to encompass anything whatsoever, or that the procedure for initiating and securing divorce is overly discriminatory and human-rights insensitive, or that the reliefs attaching thereto are not satisfactory or sufficient. This work finds that the existing customary laws on divorce are in need of a critical appraisal for necessary statutory revision. The methods employed in this work are analysis and hermeneutics of customs on the one hand and statutory and case constructions on the other hand.

Introduction

In Nigeria, two strands of customary laws are recognized: the Islamic (Muslim) and the non-Islamic (non-Muslim) variants. While the Islamic customary law applies to the Northern jurisdiction of Nigeria and particularly

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to the adherents of Muslim faith; the non-Islamic counterpart applies with equal force to the Southern part of the country. It is worthy of note that the Islamic customary law, which as it were, is co-extensive with the doctrines of the Islamic faith is codified in the corpus of the Sharia law. However, the non-Islamic customary law(s) are not codified anywhere, precisely because each community introduces a new version of customs to which it conforms, to the exclusion of other communities. For the above reason and for the speed with which customs change under the circumstances of the modern times, a codification of the customary laws in the South meets with a formidable obstacle.

Yet what is most problematic about most customs is that they constitute great moral affront to human rights and freedom and are often discriminatory against women. A ready remedy to this is that the legislature can override customary laws by statutory enactments and the courts can strike down otiose customs for the reason that they fail the established validity tests.¹

Up until now, the customary law rules relating to the dissolution of marriages are not as developed as the statutory law alternative. A major problem burgeoning the standardization of divorce laws under the customary law is the reality of the existence of parallel local customs each with unique divorce provisions. But there are some common features discernible in the various provisions by reason of which one can talk of customary law divorce.

In what follows, this paper will critically consider the common grounds, procedure and incidental reliefs attaching to divorce under customary laws where applicable. Particularly the grounds, procedure and reliefs appertaining to non-Islamic customary laws in Nigeria shall be prominent in the discourse. The end of it all is to recommend necessary legislative and judicial *aggiornamento* in law and practice of divorce under the customary law.

Grounds of Customary Law Divorce within Nigerian Legal System

While it is trite that much of the corpus of customary law in Nigeria lacks what can be strictly and technically designated as grounds for dissolution of

¹ From the statutory provisions, three criteria have been established for determining the validity of customary law. These are :(1) repugnancy criterion, (2) the incompatibility criterion, and (3) the public policy criterion etc. A. S. Beregudo, *Nigerian Legal System: An Introductory Text*, Third Edition, Lagos, Malthouse Press Limited, 2009, pp. 62-66.

marriage, it is not contested that each local custom, reserves reasons loosely accepted as grounds upon which marriage contract may be terminated. Some jurisdictions have codified these reasons for customary divorce without however curing the problem of non standardization of the grounds.

Generally, there is so much liberty in stepping out of a customary law marriage. Divorce crystallizes once a marriage has failed. And when does customary law marriage fail? The answer is simple – when any of the parties to the marriage, especially the husband is fed up with the relationship for whatever reason unimaginable. Hence, a plethora of factors can be identified as moral causes for dissolving marriages. These include but not limited to: adultery (particularly by the wife), loose character, impotency of the husband, sterility of the wife, laziness, ill treatment and cruelty, leprosy or other harmful diseases which may affect procreation of children, witchcraft, addiction to crime and desertion.² This list is however not exhaustive and cannot be exhausted. In practice, the list is permissive.

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 codifications were made with limited success. For instance, under the *Marriage, Divorce and Custody of Children Adopted by Law Order, 1958*³ which applies to parts of Ogun, Oyo, Ondo and Bendel States, the following can ground a divorce: Betrothal under marriageable age; refusal to consummate the marriage; harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man; impotency of the husband or sterility of the wife; conviction of either party for a crime involving a sentence of imprisonment of five years or more; ill treatment; cruelty or rejection of either party for three years or more; adultery; leprosy contracted by either party; desertion for a period of two years or more.

Similarly, under the Local Government (Declaration of Marriage Law) Order, 1985,⁴ it is provided that “without prejudice to the generality of this paragraph,

² E. I. Nwogugu, *Family Law in Nigeria*, Enugu: Heineman Educational Books, 2006, p. 217

³ Sec. 7; see also, J. N. Aduba “A Critique of Some Aspects of the Law Relating to the Dissolution of Marriage Under Customary Law in Nigeria”. Available at [http://dspace.unijos.edu. Ng/bitstream/10485/154/1/A% 20 Critique% 20 the of% 20 some% 20 Aspect% 20 of% 20 the% 20 Law% 20 Relating% 20 to% 20 the% 20 Dissol. Pdf](http://dspace.unijos.edu. Ng/bitstream/10485/154/1/A%20Critique%20the%20of%20some%20Aspect%20of%20the%20Law%20Relating%20to%20the%20Dissol. Pdf) accessed on 5/01/2013 at 3.00 am

⁴ Sec. 14.

a party asking for divorce may petition the court on any of the following grounds:

(a) ill treatment; (b) impotence of husband; (c) insanity; (d) contagious leprosy disease; (e) adultery such that the petitioner has neither condoned nor forgiven; (g) separation of parties or desertion by any of them for a period of not less than one year; and (f) for reasons other than above and such that the parties can no longer be reasonably expected to live together as husband and wife.⁵

The legal importance of these statutory provisions is that having expressly provided for grounds of customary divorce, the arbitrary freedom of alleging anything as ground is constrained. It does appear that with the statutory limitations, the grounds of divorce in those affected areas, where the limitation laws are in force, are no longer *omnibus*. Ipso facto, “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.”⁶

Common Procedures for Availing Customary Law Marriage Divorce in Nigeria

As will be expected, customary law rules appertaining to the dissolution of marriage are yet to be tacitly systematized as their statutory law alternatives. In most of the sub-African jurisdictions with systems of customary law like Kenya, Ghana, Congo and Nigeria, a customary law marriage may be dissolved either by non-judicial (extra-judicial) or judicial procedure.⁷ The discourse on these two systems of procedure will be exclusive to the obtainable practice in the Nigerian legal system, particularly in the southern area of the country.

Non Judicial Divorce

This arises in those situations where the customary law marriages are dissolved without recourse being had to the customary court or any other court having jurisdiction. Whatever be the development in the corpus of Nigerian

⁵ A. A. Shima; “Marriage and Divorce under Tiv Law and Customs” as cited in J. N. Aduba, *op.cit.*

⁶ M. C. Onokah, *Family Law*, Ibadan, Spectrum Books, 2003, p. 174.

⁷ cf. C. Mwalimu, “The Nigerian Legal System: Public Law”, vol, 1, NY, Peterlang, 2005, p.506.

Legal system, Nwogugu argues that “non- judicial divorce is still an important institution of customary law matrimonial causes.”⁸

There are two possible ways of achieving non- judicial divorce: by mutual agreement or by unilateral action of the spouses. Dissolution by *mutual agreement* arises where after the spouses have fallen out and where attempts to reconcile them by their families have failed, a mutual agreement to bring the marriage to an end and an agreement on the quantum of bride price to be returned may be reached. In such a case the repayment of the bride price is also agreed upon or determined by the customary court where such agreement could not be mutually reached by the parties and their families. Secondly, dissolution of customary marriage can also be achieved by a *unilateral action* of any of the parties. Thus, with the intention to end the marriage, the husband may drive the wife out and demand the return of 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. Hence, contrary to popular opinion, and by an extra judicial procedure:

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. The parties remain husband and wife in the eyes of the law nonetheless.⁹

The event of return of bride price is substantial and determinant of dissolution. In some areas, however, only the husband has the right to a unilateral dissolution of marriage. A clear example is the case of section 8 of the *BIU Native Authority (Declaration of BIU Native Marriage Law and Custom) Order 1964*¹⁰. Notice that one major defect of Non- Judicial divorce is the absence of record of the time at which, and circumstance in which, the divorce was obtained.¹¹

⁸ E.I. Nwogugu *op.cit.*, p. 214.

⁹ S.N. Chinwuba Obi, *Modern Family Law in Southern Nigeria*, 1966, p.365 Available at [www. Justice. Gov/eoir/vll/intdec/vol 16/2542. Pdf](http://www.Justice.Gov/eoir/vll/intdec/vol 16/2542.Pdf), accessed on 7/01/2013.

¹⁰ A muslim customary law parallel to the BIU Native Authority Declaration is the Maliki School of Islamic Law which dissolves marriage either by means of Talaq by the sole impetus and/ or discretion of the husband.

¹¹ E.I. Nwogugu, *op.cit.*, p. 215.

Judicial Divorce Procedure

Once a marriage is properly celebrated under applicable customary law/rules of any particular tribal group in Nigeria, matrimonial causes arising there from are recognized and given effect in the courts. As it were:

All customary courts in Nigeria are vested with unlimited jurisdiction on all matrimonial causes and matters that involve anyone married under customary law or with respect to any such matters arising from or in connection with a marital relationship under customary law.¹²

Also, Magistrates' Courts, since 1971 can also hear and determine divorce cases under the customary law. This is however obtainable mostly in those states where customary courts are non-existent or yet to be established. In such places, Magistrates' Courts exercise the same jurisdiction in the administration of customary law.¹³

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."¹⁴ This application is however "subject to the repugnancy test. It cannot 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 force."¹⁵ Hitherto, judicial dissolution of customary law marriage 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: in the case of mutual agreement by the families where disagreement arises in relation to the amount of bride price to be refunded; or in the case of unilateral dissolution by

¹² C. Mwalimu, *op. cit.*, p. 518; see also 1999 Constitution of Federal Republic of Nigeria (as amended) Cap 23 *Laws of the Federation of Nigeria (LFN)* 2004, pp. 280-284.

¹³ *Okpakap Vokor v. Anon*, Suit No. LD/634, 1969 (unreported, High Court, Lagos, 22nd May 1970); see also E. C. S. N., Magistrate's Courts Law (Amendment) Edict, No.23, 1971, S.5 & 17 (i)(h).

¹⁴ C. Mwalimu, *op. cit.*, p.518.

¹⁵ See *Uke v. Iru* (2001) II N.W.L.R. 197.

husband or “by wife”¹⁶, where the husband refuses to take back the bride price or where the family of the woman refuses to pay back the bride price.

Today, 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. For instance, under the aegis of such laws as the Bendel State of Nigeria Customary Law of 1984, Bendel State (now Edo and Delta) and other states that have adopted local legislations do now register customary divorces through the issuance of divorce certificates.¹⁷ By reason of the importance of record of evidence in judicial customary divorce, 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.¹⁸

Though, this need to have recorded evidence of divorce does make judicial customary divorce much more attractive these days, parties quickly resort to the extra-judicial dissolution procedure in the event that the court refuses to grant decree. This ends the whole procedural process in a vicious circle, where the rule is to try it one way and if it fails, resort to the other. Meanwhile the party agitating for the divorce begins with either of the two procedural options most likely to avail the end of the marriage as sought. The applicable guide is not the law but merely expediency. In the opinion of this work, it would seem more reasonable if the rule is to compulsorily start with the non-judicial procedure and then resort to the judicial as an appellate option.

In all, the return of bride price is the critical threshold in the customary divorce procedure. Once, the bride price is returned by the father of the bride or whoever stands in his place with valid ‘locus standi’, all incidents of customary marriage fall apart irretrievably. Before such a repayment, it is the law and custom that the marriage subsists albeit inchoately. Surprisingly, this appears to apply even in instances of judicial divorce mediated either by the customary or magistrate courts.

¹⁶ It is pertinent to point out that for any unilateral dissolution to produce the desired effect namely: divorce, it may be one occasioned by the husband. A customary divorce cannot therefore be predicated upon a unilateral action of a woman-wife.

¹⁷ C. Mwalimu, *op. cit.*, p.518.

¹⁸ A. B. Kasunmu and J. W. Salacuse, “Nigerian Family Law”, London: Butterworths, 1966, p. 175., available at <http://www.justice.gov/eoir/vll/intdec/vol 16/2542>. Pdf accessed on 7/01/2013.

Return of Bride Price: Critical Threshold in the Customary Divorce Procedure

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 de facto dissolved marriage is considered to have continued¹⁹, 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”.²⁰ In fact, even where marriage is dissolved by order of the customary court, it is held that “it is the refund of the bride price or dowry that puts to an end to all incidents of customary law marriage and not an order of any court dissolving such marriage. Any order dissolving any customary law marriage without a consequent order for the refund or acceptance of the bride price or dowry is meaningless”.²¹ The problem with this reasoning is that the customary courts appear to have been robbed of their jurisdiction by the mere extra-judicial act of refund of bride price. But the better reasoning is that the jurisdiction of the court remains intact but such an order made dissolving a customary marriage becomes effective by the refund of the bride price.

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 such renunciation; (2) Where a 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 bride price. In such a case the wife may petition the court that the marriage be dissolved and bride prize 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, a husband who institutes divorce proceedings or repudiates his wife orally is deprived of the right to the refund of bride price.

¹⁹ *Registrar of Marriages v. Igbinomwanhia*, suit No. B/16M/72 unreported, High Court, Benin 5 August 1972.

²⁰ This custom may be declared repugnant to Natural Justice – *Edet v. Essien* (1972) II N.L. R. 47.

²¹ *Eze v. Omeke*, (1977) IANSLR, 136.

In all situations where bride price is to be refunded, the quantum of what is recoverable by the husband differs from locality to locality. In some it is limited to the bride price paid at marriage, but in others incidental expenses are included. Sometimes, the amount of bride price repayable is directly proportional to the duration of the marriage. However, statutory limitations have been imposed in some parts of Nigeria regarding what is recoverable”.²²

On the question of who re-pays and when: the primary responsibility of refund of bride price is that 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 juridical and non juridical 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 re-marry, customary law confers on each spouse a right to re-marry after the dissolution of their marriage except in few cases seen in Islamic law and others.

Reliefs Predicated upon Customary Divorce

Once a customary divorce crystallizes, the various questions regarding: what is refundable to the husband, who takes custody of the children (where there are some), and what happens to properties jointly held by the parties may arise. These questions and/or issues relate to possible reliefs predicated upon customary divorce. It must however be underscored that the type of divorce procedure²³ resorted to is critical in determining which reliefs are possible, available and applicable. Where recourse is made to judicial customary divorce, due regard is usually had to the duration of the marriage, conduct of the parties and the sexes of the children born of the marriage. Such reliefs come in the form of court orders, disobedience of which materialises in committal proceeding in contempt. But where the divorce procedure is non-judicial and unilateral, the above considerations are most unlikely to apply, at least, as a rule binding on parties.

It is contestable, that refund of marriage symbol²⁴, or what Nwogugu calls “return of bride-price”²⁵, is essentially a relief predicated upon customary

²² cf *Marriage, Divorce and Custody of children Adoptive By-laws order* 1958, WRLN, 456.

²³ Judicial or non judicial.

²⁴ M. C. Onokah, *op. cit.*, p. 175.

divorce. This is because it is that event (return of bride-price) that actually dissolves a marriage celebrated under the customary law. In a sense, refund of bride-price crystallizes a de jure divorce. Yet, it is of the nature of a relief asked for and/or granted after divorce has occasioned. The difficulty here consists in taking what really materializes at the end of a series of events to be that which is asked for and granted after the end has occurred. In theory, a logico-hermeneutical hurdle arises here but in practice the escapist distinction between a de facto and de jure divorce easily solves the problem. Hence, the right to demand for the return of marriage symbols/bride-price does not crystallize until there has been a de facto divorce²⁶ and the court makes an order for refund only subsequent to an order of dissolution of marriage.²⁷ A better explanation could come thus, that when a marriage has broken down irretrievably; de facto divorce crystallizes with the right of refund of bride-price. When eventually the right of refund is made, the right of relief arising under the de facto divorce is satisfied bringing all incidents of the marriage to an end – de jure divorce. Interestingly, under the customary law, a husband may opt to waive the refund as a relief open to him.²⁸

It is the general rule that the amount recoverable by a husband upon divorce is the amount paid at the bride-price ceremony, subject to the exception that a lesser amount could be refunded where the woman has gotten children for the man. The rationale behind this practice is that value has been received by the man for “buying” the woman and thus the woman has suffered ‘wear and tear’ by reason of which depreciation has occurred. These days, in furtherance of the modern tendencies to achieve some degree of discipline and order in the rather arbitrary rules of customary divorce, some local statutes have attempted to introduce limitation to the extent of marriage symbol recoverable when divorce occurs.²⁹ But despite the illegality of refunding or receiving more than the law stipulates, local preferences prevail over statutory positions. Accordingly, people refund more than stipulated and even resort to extra-judicial divorce where statutory rules seem inconvenient.

The combination of the factors of patriarchy, paternity (as determined by gift of marriage symbol) and patrilineal identity prevalent among the various

²⁵ E. I. Nwogugu, *op. cit.*, p. 219.

²⁶ *Nwako & Anon v. Uba* (1994) Appeal No. H0/1A/74, Okigwe H. C. (unreported).

²⁷ *Egri v. Uperi* (1974) 4 E.C.S.N.L.R. 632 at pp. 637-638.

²⁸ M. C. Onokah, *op. cit.*, p. 176; see also, *Ikedingwu v. Okafor*, (1966-1967) 10 E.N.L.R. 78.

²⁹ Cf. *The Limitation of Dowry Law of Eastern Nigeria*, 1963, Cap. 76.

cultural systems in Nigeria, a father, reserves an exclusive right of custody of children and even ownership of same. As a matter of fact, the “dominant position of the Nigerian man in both domestic and economic spheres...ensures that the husband enjoys custodial rights over the children of the marriage.”³⁰ It is immaterial that the woman is rich enough, healthy and comparatively better placed to care for her children. One thing certain is that the welfare of the child principle applicable in statutory custody cases is not a necessary issue for consideration in customary divorce. A more pathetic case that often arises relates to where a woman gives birth to a child after a de facto divorce has taken place but before refund of bride-price is accomplished and where, according to the prevailing custom, the husband remains the rightful custodian/”owner” of the child, even where in fact he is not the biological father of the child³¹. As it is expected, in the present international best practice legal regime, this piece of customary rule has failed the evidential test of repugnancy to natural justice, equity and good conscience and has been repeatedly struckdown by the superior court on appeal.³²

Settlement of property is, in theory, an available relief under the customary law divorce regime but in practice it is non-existent. The reason being that within the Southern part of Nigeria, especially among the Igbo, wives are strictly considered as among the properties/possessions of the husband. This being the case, whatever a woman may claim to have acquired in terms of property are in *stricto sensu* the husband’s property by extension. Hence, upon customary divorce, it is difficult to “lawfully” establish anything as belonging to the wife. However, most men in the exercise of equitable discretion allow their divorced wife to take out with them all such things like clothes and personal effects with which they came into the marriage. Others extend these to those properties given to the woman by her beloved family by way of settlement (*idu uno*) when she got married. Most assets, even where they were single or jointly acquired are not conceded to the woman except by the man’s “charity”. In this way, settlement of property under the customary law becomes a discretionary relief to be granted by the man as he pleases. This conclusion is of course without prejudice to any decision the customary court

³⁰ M. C. Onokah, *op. cit.*, p. 179.

³¹ See the Native court’s decision on the *Edet v. Essien* (1932) 11W.L.R. 47. See also *Ogbu v. Essien* (Suit No. MD/152A/1980 of 11/3/52 (unreported); *Agasha v. Ayobi* (Suit No. MD/182A/1977 of 4/5/79 (unreported).

³² See the appellate Court’s decision in the case of *Edet v. Essien*, *Supra*; see also *Mariyama v. Sadiku Eyo* (1961) N.R.N.L.R. 81.

may find contingent and pragmatic, due regards being had to the circumstances of each case.

A Critique of Certain Aspects of Customary Divorce Provisions

The whole structure of customary divorce is organised in a manner prejudicial against the “wife parties”. If for instance the husband sends out his wife and refuses to take back the bride-price, he binds the woman who cannot lawfully re-marry under the circumstance of fettered bride-price. The man on the other hand can marry because the law permits polygamy but not polyandry. Considered from another perspective, if the man (husband), wanting to take back the bride-price, demands same but the family of the woman refuses, again, the woman is bound while the man can go further to contract a new and second marriage, at best, he becomes a polygamist which is even a positive and recommended practice under the customs. Either way, the woman is left at the crossroads. According to Ayua:

From a modern perspective, the sheer injustice and calculated self-interest of these traditional norms are breathtaking. They are designed to render divorce totally unviable option for women but at the same time have men unfettered to discard wives they may be tired of and even profit by it in so doing.³³

This lopsided gender compliance/sensitivity of the customary provisions obviously runs contrary to the provisions of the CEDAW, which provides for the same rights and responsibilities upon dissolution of marriage.³⁴ And by reason of the fact that CEDAW has been domesticated, such customary provisions flies on the face of the constitution of the Federal Republic of Nigeria and are to the extent of their inconsistencies void.³⁵

A still more critical issue challenging the integrity of customary divorce is the necessity to refund bride-price, so as to put to an end all incidents of the broken marriage. While the payment of bride-price in the first place could be defended by reason of a symbolic gesture of appreciation to the family of the wife, to insist on its refund upon a failed marriage would becloud all vestiges

³³ I. A. Ayua ed. *Law Justice and the Nigerian Society*, Nigerian Institute of Advance Legal Studies, 1995, p. 212.

³⁴ CEDAW, article 16(I)(C).

³⁵ S. I (3), 1999, CFRN as amended.

of symbolic gestures to import an alien sense of commercialization. Thus it is pertinent to isolate and emphasize the fact that:

The continued practice of refund of the marriage symbol is dehumanizing. It revives the colonial notion that a wife is a chattel bought by way of marriage and returned on divorce, for a refund.³⁶

As a matter of fact, a purchaser of the product seeks to get value for money. In the case of the wife bought with the bride-price the value includes but not limited to the expectation that the woman bears as many children as possible. The implication is such that if the woman is barren or gives birth to female children only “the woman is no longer a viable commodity purchased for the value of bearing the types of children required and for all intents and purposes the marriage has terminated because the value in the commodity has not materialized.”³⁷ This commodification of the woman is an absurdity in the new world of human rights and freedom of persons.

Although it could be argued that customary law marriage and divorce procedure predicated upon it are systems standing on their own right and having the recognition of the constitution of the Federal Republic of Nigeria, this work takes exception to the above opinion, which is self-defeating. The issue is that the customary idea of marriage as *contract of services* and not as deep-seated covenanted human relationship grossly falls short of the true nature of marriage, international best practice and its complex import for parties and society. Against this backdrop, customary divorce procedure is *ab initio* unjust, against women, abnormal by references to natural modes of human “intercourse” and in effect unsustainable in legal logic. By the standard of our courts, it is contrary to natural justice, equity and good conscience. What is more, a piece of custom that dehumanizes persons, one in which persons are viewed and treated as things or less is by every standard contrary to public policy and by a stronger reason inconsistent to most existing laws in force in the federation.

Note that it is more or less the “grounds” of customary law divorce that raise more critical issues than all else. It is arguable and indeed defensible, that there are no known grounds upon which customary law divorce can be sustained/established. The gravamen of the argument is such that where

³⁶ M. C. Onokah, *op. cit.*, pp. 177-178.

³⁷ C. Mwalimu, *op. cit.*, p. 546.

everything is a ground, nothing indeed is particularly a ground. It becomes rather a business of absolute convenience and rests on the whims and caprices of party or parties. And “for the fact that divorce under the customary law can be effectuated by mutual consent of the spouses there is technically no ground for divorce”³⁸. Emphasis is merely on the unmeasured fact that a marriage has broken down irretrievably. Such an omnibus ground is capable of occasioning disarray in the sacred field of marriage. Most of the issues raised are just because of the unfortunate institution of non-judicial divorce.

Another aspect of dissolution of customary marriage which is diminutive of human value and the tall order to which marriage belongs is the fact that it can be dissolved in the traditional way without formalities. This is just because of the option of a non-judicial divorce. The outcome of such divorce by a wave of hand is: that there is no security in the contract of marriage. Hence, a 20-year old marriage with children to show for it can be dissolved for any flimsy reason; that there are no procedural devices to checkmate such quick and on-the-spot irresponsible divorce capable of causing great dispute to lives of children, parties, friends and society.³⁹ Granted that a wide spectrum of attempts at reconciliation are available and usually explored pending the return of bride-price yet, for the reason such attempts are not court-ordered, party could close-up against all reconciliatory advances.

And of course given the aperture for a non-judicial divorce which is arguably available to men alone to effectuate a unilateral dissolution, customary divorce becomes an instrument of gender-based violence in the hand of men-folk, especially among people where single women are stigmatized and unprotected. Hence, at the least misunderstanding, the husband brandishes his power of unilateral divorce and by that couches the wife to a psychological subjugation - a person to be seen and not to be he heard.

There is no gainsaying that reliefs available upon customary law divorce are organized to service men’s authority in a patriarchal world. Thus custody of children is the sole right of men; maintenance provisions terminate upon the

³⁸ J. N. Aduba, “A Critique of Some Aspects of the Law Relating to the Dissolution of Marriage Under Customary Law in Nigeria,” available at <http://dspace.unijos.edu.ng/bitstream/10485/154/1/A%20Aspects%20of%20the%20Law%20Relating%20to%20the%20Dissol.pdf>. Accessed on 5/01/2013 at 3:00am

³⁹ http://www.noun.edu.ng/noun/Noun_ocl/pdf/pdf2/law%20343.pdf. Assessed on 2/01/2013, at 7pm.

refund of bride-price as there is no post divorce maintenance known to customary law⁴⁰, settlement of property is a sham as the wife herself is a chattel under the customary law.

Conclusion

Customary law according to the Supreme Court in the case of *Oyewunmi v. Ogunesan*⁴¹ is “the living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic and not static.” Customary law as it were, mirrors the culture of the people and controls all socio-economic transactions among them, marriage not excluded. That Customary law marriage is valid under Nigerian Laws is not therefore put to doubt and that not all customs qualify to be enforced as law is trite. The above propositions *mutatis mutandis* apply to Customary law divorce in respect of its grounds, procedure and reliefs attaching thereto. There is therefore the need for experts to jointly and severally examine and evaluate the corpus of laws and procedure relating to Customary law divorce in order to align the same with international best practices and to resonate it with the contemporary sensitivity to human rights and freedom for both genders. The present entry is a step in that direction. What it has done is to call attention to the respective areas of Customary law divorce for purposes of legislative and judicial action in lieu of updating. It is believed that by this contribution, the grounds of divorce will be restricted to only a few justifiable conditions instead of being predicated upon any and/or minutest disaffection with one’s spouse. The procedure and reliefs too are hoped to adjust in terms of being more human-rights and freedom compliant.

Recommendations

To achieve the intendment of this paper, it is hereby recommended as follows:

1. That there be promulgated, common statutory limitations to the facts qualifying as grounds for Customary law divorce. In this way, much of what operates to perpetuate male dominance in marriage will be excluded and only reasonable and just grounds retained.
2. That the concept and practice of non judicial divorce be completely abolished so as to ensure and enshrine equality, equity and fair play in the whole process of divorce transactions.

⁴⁰ Onoka M. C. *op. cit.*, p. 179.

⁴¹ (1990) 3 NWLR (part 137) 187, per Obaseki JSC, at p. 207.

3. That all the reliefs which the Matrimonial Causes Act has made available for divorce under the Act be adopted and given customary flavour.
4. That the practice of refund of bride-price at the instance of Customary law divorce be abolished so as to end any sense of commodifying women and/or commercializing marriage transactions.
5. That there be strict commitment by the Courts in the enforcement of article 16(1) (C) of *CEDAW* which provides for equal rights of parties upon dissolution of marriage.