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An Appraisal of Customary Law Marriages in Nigeria

S. U. Nweke - Eze *

Abstract

Customary Law Marriage is one of the recognized forms of marriage in Nigeria. Owing to the fact that Nigeria is a multi-ethnic society composite of various cultures, customs and traditions, customary marriage practices differ between the various localities. This paper attempts an exposition of the basic indices of customary law marriage in the Nigerian Society. Legislations, Academic materials, Case Laws and Internet Sources were made reference to with a view to providing a concise overview of the intricacies and dynamics surrounding customary law marriages in Nigeria.

Introduction

Marriage is universally accepted to be a sacred union. It is an institution which is recognized all over the world as the foundation of the human society and as such, constitutes an indispensable organ of stabilization in the society. It is the first and oldest form of social contract or human institution on record, although with the advent of civilization and modern State system, based on law, politics and socio-economic arrangements, marriage has continued to attract redefinition and re-conceptualization. Nigeria has a dual system of marriage *viz*: the Customary Law marriage and the Statutory Marriage systems. However, the body of this paper limits itself to Customary Law Marriage System.

* BL, LL.B (Hons), Legal Practitioner, Templars (Barristers and Solicitors) The Octagon (5th Floor) 13A, A.J Marinho Drive, Victoria Island, Lagos.

Clarification of Terms

The preliminary step to take before embarking on this discourse is to provide a definition to certain recurrent terms. Some of the terms include:

Marriage

Owing to the fact that Marriage is a universal institution which is governed by the social and religious norms of the society involved, the prevailing social and religious norms of a society are usually the determining factor in the way marriage is defined. The classical definition of marriage is that given by Lord Penzance in *Hyde v Hyde*¹ as “...the voluntary union for life of one man and one woman to the exclusion of all others.” This definition is however, not without constructive criticisms especially as a result of pressures from gay people, transsexuals, hermaphrodites and pseudophrodites.²

Marriage can as well be classified into various types, some of which include:³

1. Monogamy

This is the only form a legal marriage may take in Western societies. Monogamy simply means marriage to only one person for a lifetime, or as is more common today, marriage to one person at a time (i.e. serial monogamy). Monogamy is usually between opposite sex couples.⁴ Monogamous marriage can also be defined as sexually exclusive, though a distinction must be drawn between social monogamy and biological monogamy. While social monogamy relates to the legal union of the two individuals to the exclusion of others, biological monogamy relates to sexual relations between the two individuals to the exclusion of others. The two do not always go hand in hand. Thus, whereas social monogamy might be

¹ (1886) LRIP&D 130 at 133.

² S .C. Ifemeje, *Contemporary Issues in Nigerian Family Law* (Enugu: Noli Educational Publishers, 2004) p 32.

³ Others are Polyamory, Polyfidelity, Same-Sex Marriage, Open Marriage, Common Law Marriage ,Group Marriage, Boston Marriage, Levirate Marriage, Sororate Marriage, Endogamy, Exogamy, ‘Mixed’ Marriage, Arranged Marriage, Egalitarian Marriage, Covenant Marriage, After-death Marriage and so on.- A Libertine’s Thoughts: 20 Types of Marriage’ <<http://libertinethoughts.blogspot.com/2008/01/20-types-of-Marriage.html>> accessed on 27th September, 2014 by 1:44pm.

⁴ though same-sex monogamy is becoming legal in some countries.

ubiquitous, biological monogamy is not.⁵ The monogamous marriage simply entails being married to only one spouse at a time.⁶ It is prevalent in most modern cultures.

2. Polygamy

This is when a man can have more than one spouse concurrently.⁷ A polygamous Marriage is the practice or state of a man having more than one spouse simultaneously. It can also be seen as a voluntary union for life of one man, with one or several wives.⁸

However, it is the view of some writers⁹ that such a man has actually entered into two or more separate marriage contracts concurrently with as many women but has not entered one marriage contract with two or more women considered together as a legal entity, hence there are as many marriages co-existing in a polygamous household as there are wives.

3. Polyandry

This is less common, and refers to a marriage between one woman and several husbands. It has occurred in Tibet, Mongolia, Nepal, amongst other places. Polyandry is specially suited for populations that have more males than females which is, perhaps why it is less common than Polygamy since females outnumber males in most societies.¹⁰ It is the converse of Polygamy and is not permitted under customary law in Nigeria. In fact, in the case of *Kpelanya v Tsoka & Anor*¹¹ it was held that under Tiv customary law, a woman cannot be lawfully married to two men at the same time.

Customary Law

Long before the advent of the British as colonial masters, our ancestors evolved a number of rules that governed their day-to-day relationships. These

⁵ 'A Libertine's Thoughts: 20 Types of Marriage', *op cit.*

⁶ B.A Garner *et al* (eds), *Black's Law Dictionary* (8th ed, St. Paul-Minnesota: Thomson Reuters, 2009) p. 1028.

⁷ *Ibid.*

⁸ E.I. Nwogugu, *Family Law in Nigeria* (Revised edn, Ibadan: Heinemann Educational Books Nig Ltd, 1990) p. ixvii.

⁹ S.N.C. Obi, *Modern Family Law in Southern Nigeria* (London: Sweet & Maxwell; Lagos: Africana University Press, 1966) p. 155.

¹⁰ *Ibid.*

¹¹ (1971) NNLR 86; also s. 6(2) of the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order of 1959 where it is an offence for a woman to have more than one husband.

rules were accepted as binding on all members of the community and it is not unknown to have some differences from one community to another. They were invariably unwritten, thus, they only come to be ascertained by oral evidence. These rules are what we know today as customary law.¹²

Put differently, customary law is the set of rules which guide the conduct of a given society and is the mirror of accepted usage.¹³ The Court of Appeal in the case of *Nsirim v Nsirim*¹⁴ posited that customary law implies habitual practice or cause of action that characteristically is repeated in like circumstances. It is a law formulated from time immemorial.¹⁵ It was characterized by the Court in *Lewis v Bankole*¹⁶ as being flexible in nature with an unquestionable adaptability to alter circumstances without entirely losing its character.

Customary Law Marriage

Under customary law, marriage is seen as a voluntary union of a man and woman or women for life to the exclusion of all others.¹⁷ It can also be defined as a union between a man and a woman for the duration of the woman's life being normally the gist of the wider association between two sets of families.¹⁸ Thus, the family of the wife is, loosely speaking, married to the family of the husband and vice versa.

This marriage, just as the name implies, is governed by customary law. There is no single uniform system of customary law prevailing throughout Nigeria. The term 'customary law', therefore covers a multitude of systems of law which differ from one locality to another. In Nigeria, customary law marriages include Islamic marriages.

¹² A.A.Kolajo, *Customary Law in Nigeria through the Cases* (Ibadan: Spectrum Books Limited, 2000) p.ix.

¹³ *Per* Bairamann in *Owoniyi v Omotosho* (1961) All NLR 304.

¹⁴ [1995] 9 NWLR (pt 418)144.

¹⁵ *Agbai v Okagbue* [1991] 7 NWLR (pt 391) 417.

¹⁶ (1909) 1 NLR 81.

¹⁷ E.A Odike & A.C Agu, *Modern Nigerian Family Laws* (Enugu: Richfield & Frank Renaissance Publishers, 2003).

¹⁸ S.N.C. Obi, Customary Law Marriage in Nigeria (Law Mirror, 22nd – 28th June, 1992) p.6.

Although customary law marriage is polygamous in nature thereby allowing a man to have more than one wife, the parties to the marriage must also possess the capacity under that law to marry each other.¹⁹

Types of Customary Law Marriage

Under Nigerian customary law, customary law marriage can be categorized into:

1. General/Traditional Marriage

This is the usual type of marriage celebrated between a man and a woman who has not been married before and it is celebrated according to the customs and traditions of the society involved. It is prudent to note also that a man can be married to a woman or more under this type of marriage and it is prevalent in the Eastern and Western parts of Nigeria.

2. Islamic Marriage

This is a marriage celebrated in accordance with the Maliki school of Islamic law. It is prevalent among Muslims in the Northern part of Nigeria. Its source is basically from the Holy Qur'an.

3. Sororate Marriage

This simply means the marriage of a man with the sister of his deceased wife or a substitute from the family of the deceased wife. In the marriage, there is no need for a fresh dowry as the former marriage is deemed to still be subsisting.

4. Woman – to – Woman Marriage

Here, a woman is married to another woman, not in the usual sense of marriage, since there is no sexual relations between them,²⁰ but for the newly married woman to perform some intangible services for the one who married her. The most usual of such services is the bearing of children for the woman who married the other, who may perhaps be already married but is unable to give birth or is unmarried and unable to bear children, so she marries another woman who will bear children in her stead.

5. Widow Inheritance or Levirate Marriage

¹⁹ These capacities will be considered later in the article.

²⁰ Hence it is different from a lesbian union.

This happens where on the death of a man, his wife opts to marry another male in her late husband's family without the need for fresh procedures for the marriage.

6. Deceased/Ghost Marriage

This is a union between a man who is dead and a woman who is not. It has however been held that this kind of marriage is a fiction and a fallacy as there is no way a dead person can naturally and mutually get married to someone who is living.²¹

Essential Validities of a Customary Law Marriage

These connote the basic requirements and elements of a customary law marriage which must be present or performed before a valid customary law marriage can be deemed to be in place. Although there are minor variations among the various customary law systems in Nigeria, below are some elements that are uniform in most of the systems:

1. Age

There is no fixed minimum age of marriage in customary law and this lacuna has to a large extent encouraged a high incidence of Child marriage. However, most systems do not permit marriage before the attainment of puberty.²² The Eastern part of Nigeria has a legislation known as the Age of marriage Law²³ which has fixed the minimum age of marriage to be sixteen (16) years.²⁴

2. Parental Consent

Since customary law marriage is essentially a union of two families, parental consent is very necessary and in fact mandatory in most jurisdictions. The requisite consent is that of the father or the guardian who is in *locus parentis* to the prospective spouse.²⁵

3. Consent of the Intending Spouses

Until recently, the consent of the intending spouses was unnecessary to establish a valid customary law marriage. However, there has been a marked

²¹ *Okonkwo v Okagbue* (1994) 9 NWLR (pt 368) 301.

²² Although the age of puberty is actually uncertain.

²³ Cap 6, Laws of Eastern Nigeria, 1956 (applicable to Anambra, Imo and Enugu States).

²⁴ *Emeakuna v Umejiako* (Unreported) Suit NO: AA/1A/76, High Court Awka.

²⁵ *Okpanum v Okpanum* [1972] ECLSR (pt 561) 563.

shift from this as evidenced in the cases of *Osamwoyi v Osamwoyi*²⁶ and *Omoge v Badejo*.²⁷

4. Payment of Dowry

This is also known as the “bride price”. It is what brings a wife to a husband at marriage.²⁸ It can also be referred to as the totality of the various absolutely necessary sums or fees which must be paid by the prospective husband either at different stages and/or for different heads or purposes to seal the marriage agreement between the parties and their families.²⁹

The payment of Dowry is very necessary and its acceptance by the parents of the bride is evidence of their consent. Payment of bride price is an essential ingredient of a valid customary law marriage. Its essential characteristics may be summarized as follows:

- i. It is a gift or payment.
- ii. The payment is made to the parent or guardian of the brides to be on account of the marriage of the female person.
- iii. It may take the forms of money, natural produce or some other form of property.
- iv. It is paid with respect to the marriage which is intended or has taken place.

Indeed, there is no uniformity of the rules governing the quantum of bride price throughout Nigeria. It varies from one locality to another. If a husband fails to pay bride price in respect of his wife, the family of the wife may recall her and keep her until her husband fulfils his obligation. In some areas the family has an alternative remedy of instituting legal proceedings against the husband to recover such payments.

5. Prohibited Degrees of Consanguinity and Affinity

Just as is applicable in statutory marriages, persons related by blood (consanguinity) or marriage (affinity) are not allowed to marry themselves in most regions of Nigeria.

²⁶ (1972) All NLR 366.

²⁷ (1985) NNLR 365.

²⁸ *Ibikade v Aize* (1974) 4 UILR 18.

²⁹ S.N.C. Obi, *The Customary Law Manual* (Enugu: Government Printers, 1977) p. 299.

6. Status Bar

In some customs, certain classes of persons lack the capacity to get married to persons from a different class. Example, some parts of Nigeria prohibit the inter-marriage of ‘free citizens’ and members of some castes, for instance, a slave (*Osu*). An *Osu* is, *inter alia*, a person who is a slave or offered symbolically in sacrifice to idols or a descendant of such a person. The *Osu* system has however been abolished in the Eastern States by the Abolition of the *Osu* Caste System Law.³⁰

7. Statutory Prohibition

In Nigeria, a person who is a party to an existing statutory marriage recognized under the law lacks the capacity, during the continuance of such marriage, of contracting a valid customary law marriage.³¹

Legal Implications of Customary Law Marriage

Customary law marriage has the following legal implications:

- a. It is generally polygamous.
- b. The spouses have the right to the enjoyment of each other’s property although the right of the wife is lost on the occasion of her desertion or divorce.
- c. The customary law wife is an agent of necessity of her husband³².
- d. Paternity of child is irrelevant if bride price has been refunded since the child born will belong to the former husband of the woman. It should also be noted that the case of *Eddet v Essien*³³ is a leading deviation to this rule.
- e. The marriage is between the parties and their families and not just the parties, therefore, members of the family are usually actively involved in the affairs of the couple.
- f. The couple enjoys each other’s consortium including co-habitation and reasonable sexual demands.
- g. The husband has the right to discipline his wife using reasonable punishments.
- h. A wife has no legal right to her husband’s property or income.

³⁰ 1956.

³¹ *Onwudinjo v Onwudinjo* (1957/1958) 1 ENLR 1.

³² M.C Onokah, *Family Law* (Ibadan: Spectrum Books Ltd, 2003) 167.

³³ (1932) 11 NLR 47 where the Court held that such custom is repugnant to natural justice, equity and good conscience.

Celebration of Customary Law Marriage

The procedure for the celebration of customary law marriage in Nigeria also differs from one locality to the other. This is not surprising owing to the varying cultures in the country. Nevertheless, certain practices are common to most of the cultures. The common practices go thus:

- a. A man wishing to marry a girl approaches some other members of his family. These elders carry out enquires about the girl's traits including such issues like her character, biological connections/lineage, possibility of barrenness and insanity and so on³⁴.
- b. Usually, if these enquires do not yield a negative result, they would then pay a visit (in some cases, several visits) to the girl's family and make their intentions known to them.
- c. The parents/ guardians of the girl would also consult with their relatives as well as with the girl in question. If the girl as well as the family consent, then this stage leads to betrothal³⁵ and consequently, a date is fixed for the marriage ceremony.
- d. On the said date, friends and relatives of both families gather at the girl's compound where the ceremony usually takes place. Some essential highlights in the ceremony include:
 - i. The dowry/bride price will be given to the girl's father/guardian.
 - ii. The couple will kneel down and receive blessings as well as the official consent from the most senior member of the girl's family, on behalf of her family and they share a drink from the same cup.
 - iii. After the ceremony, the girl is accompanied to the man's house and handed over to the man's family. This could be done on the same day or weeks later.

Dissolution of Customary Law Marriages

Whatever that has a beginning will definitely have an end. Of course, customary law marriage is not an exception to the aforementioned principle. Importantly, customary law does not prescribe any length of time a party must be married before initiating dissolution process quite unlike what is

³⁴ These enquires are basically aimed at unveiling facts which may constitute bars to the proposed Marriage.

³⁵ Which is the formal engagement of the parties.

obtainable in statutory marriages.³⁶ Thus, the dissolution can take place at any time after the celebration of the marriage. Generally, the unilateral act of one party and especially of the wife cannot bring about a divorce. The families of the parties participate in the divorce proceeding as they did in contracting the marriage.³⁷ Dissolution of a customary law marriage can take place in any of the following ways namely:

1. Extra-Judicial/Non-Judicial Dissolution

This involves dissolving a customary law marriage without recourse to the Courts of law.³⁸ In most cases of non-judicial dissolution, the marriage is dissolved when the bride price is refunded to the man³⁹. Indeed, none of the parties to the marriage has a legal duty to allege grounds of divorce and prove same as is required under the Matrimonial Causes Act,⁴⁰ but there must be a formal act on the part of the party who is tired and not willing to continue with the union.⁴¹ Extra-Judicial Dissolution can be effected by:

a. Mutual Consent

This is where both parties decide mutually to pull out of the union willingly.⁴²

b. Unilateral Action of either of the Spouses

Here, the act of the man or the woman is regarded as sufficient to dissolve the marriage. Some examples of such an act (on the part of the husband) are throwing out one or more of his wife's belongings, taking back his wife to her maiden home with a keg of palm-wine or by expressly telling the woman that he is no longer interested in the union. On the part of the wife, it could be by informing the man of her intentions to leave the union, by indulging in

³⁶ Where divorce action must start at any time after two years of the Marriage except where obtaining a divorce decree will offset exceptional hardship on the part of the petitioner-section 30 MCA.

³⁷ M.C. Onokah, *op.cit.*, p. 165.

³⁸ I.P Enemu, "Dissolution of Marriage under Customary Law: Need for Reform", *Unizik Law Journal*, Vol 5, No 1, 2005, p. 105.

³⁹ *Registrar of Marriages v Igbinomwanhia* (Unreported Judgment in suit No B/16m/72) delivered on 5/8/1972 by the HC of Bendel State.

⁴⁰ Cap M7, Laws of the Federation of Nigeria, 2004.

⁴¹ *Ihuoma Nwankwo v Eucharika Ubani & Ors* (2002) ISMC 231.

⁴² A.D.C Umobi & AD Umobi, *Crises in Family Law* (Onitsha: Folmech Printers and Publishers Co. Ltd, 2009) p. 121.

promiscuity while still married to her husband or by refunding the bride price paid or marrying another man.⁴³

However be the case, it is important to re-emphasize the fact that the desire to quit or terminate the matrimonial union must be accompanied by an overt act which suggests a clear intention to dissolve the marriage.⁴⁴

c. Dissolution by Option of Puberty

Where a minor has been contracted in marriage by her father or grandfather through respectable means, the minor has no option, on attaining puberty, to repudiate the marriage. However, where the marriage was procured by fraudulent means or by means which is manifestly disadvantageous to the minor, the marriage contract remains dependent on ratification by the minor, upon her attainment of majority.⁴⁵

d. Dissolution by Death

In a customary law marriage, the death of the wife terminates the marriage. On the contrary, the death of the husband does not generally terminate the customary law marriage.⁴⁶ On his death, the widow has the option of remaining in her deceased husband's family as wife of the deceased or consenting to re-marry a relative of the deceased. She may also choose to return to her parents. In either of the aforementioned instances, the original marriage is deemed to be subsisting. If she chooses to return to her parents and re-marry, her father is obliged to repay the bride price to the family of her deceased husband.

It is however worthy of note that in the case of *Yesufu v Okhia*⁴⁷, the Court held that continuation of a marriage after the death of the husband is a fiction. Thus, the principle applicable on the death of a woman should also apply upon the death of a man.

2. Judicial Dissolution

This is the dissolution of customary law marriage by a Court of competent jurisdiction. The Court with the requisite jurisdiction is usually the

⁴³ M.C Onokah, *op cit*, p. 167.

⁴⁴ *Chawere v Aihenu & Johnson* (1935) 12 NLR 4.

⁴⁵ A.D. Ajjola, *Introduction to Islamic Law* (Pakistan: International Islamic Publishers Karachi, 1981) 161.

⁴⁶ *Amachree v Goodhead* (1923) 4 NLR 101.

⁴⁷ (1976) 6 ECCLR 276.

Customary Courts and sometimes, the Magistrate Courts depending on the jurisdiction in issue.⁴⁸ It is usually resorted to in case of dispute in the extra judicial mode.

As stated earlier, there are generally no standardized or strict grounds for the dissolution of a customary law marriage. The custom of each locality includes the accepted grounds on which such marriages may be ended. The Courts in some occasions may also refuse to grant divorce of a Customary marriage if the interest of the children of the marriage will be jeopardized.⁴⁹

Grounds for Dissolution of Customary Law Marriage

1. Customary Grounds for Dissolution of Customary Law Marriage

As stated earlier, customary law has no standardized grounds for dissolving customary law marriages. Hence, the custom of each locality dictates the accepted grounds on which marriage may be ended. These petitions are usually based on reasons and not grounds strictly so-called. Again, there is no limit as such to the possible number of reasons a spouse can give for wanting to terminate a customary law marriage.⁵⁰ Such reasons may include:

- a. Husband's failure to maintain wife and children;⁵¹
- b. Addiction to crime;⁵²
- c. Impotence of the husband or the sterility of either spouse;⁵³
- d. Ill-treatment/Cruelty;⁵⁴
- e. Lunacy of either parties to the marriage;
- f. Desertion;
- g. The wife's inability to cook;
- h. Lack of respect by the wife for her husband and/or his family;
- i. Adultery of the wife;⁵⁵ among others.

⁴⁸ *Quazi v Quazi* (1979) All ER 897.

⁴⁹ *Bassey v Isich* (1972) Suit No 43/72 (Unreported).

⁵⁰ I Sagay *Nigerian Family Law* (Ibadan: Malthouse Press, 1999) p. 827.

⁵¹ *Balogun v Balogun*, Suit no 1D/WD/87 (Unreported) Lagos High Court, 25/9/87.

⁵² CK Meek, *Law & Authority in a Nigerian Tribe: A Study in Indirect Rule* (London: Oxford University Press, 1950) p. 202.

⁵³ *Abioye v Abioye* (Lagos Weekend Newspaper, 19 May, 1989).

⁵⁴ *Adeyemi v Adeyemi* (1969) 2 All NLR 161.

⁵⁵ A man is entitled to be unfaithful to his wife under most customary law Marriages, if and when he pleases. Perhaps, this is hinged on the fact that he is entitled to more than one wife unless it is coupled with moral depravity. Adultery by a woman is an indication that

2. Statutory Grounds for the Dissolution of Customary Law Marriage

In some parts of Nigeria, the grounds for the dissolution of customary law marriages are codified. An example is the marriage, divorce and Custody of Children Adoptive By-Laws Order⁵⁶ which is applicable to parts of Ogun, Oyo, Ondo and former Bendel States. Section 7 of the Law prescribed certain grounds for the dissolution of a Customary law marriage, some of which include:

- a. Betrothal under marriageable age
- b. Refusal to consummate the marriage
- c. Harmful diseases of a permanent nature which impair the fertility of the woman or the virility of the man
- d. Impotence of the husband or the sterility of the wife⁵⁷
- e. Conviction of either party for a crime involving a sentence of imprisonment of 5 years or more
- f. Ill-treatment, cruelty or neglect of other party by the other
- g. Lunacy of either parties to the marriage for 3 years or more
- h. Venereal diseases contracted by either party
- i. Desertion for a period of 2 years or more
- j. The wife's inability to cook
- k. Leprosy contracted by either of the parties
- l. Adultery of the wife.

This law therefore leaves no room for any other indigenous reason for the dissolution of customary law marriages in areas where it applies.

Procedure for the Dissolution of Customary Law Marriages

To dissolve a customary law marriage, certain acts must be performed depending on the customs of the locality. This head will be discussed with particular reference to the Eastern, Western and Northern parts of Nigeria before considering judicial dissolution of customary law marriages.

she cannot make a good mother to her daughters as far as morals are concerned; *Loye v Loye* (1981) OYSHCLR 140.

⁵⁶ 1958.

⁵⁷ *Abioye v Abioye* (Lagos Weekend Newspaper, 19 May, 1989).

Eastern Part of Nigeria

Under the Igbo native laws & customs, divorce is known as *idupu nwunye*.⁵⁸ It means no more than ordering the woman to quit the man's compound. The husband's reasons could be genuine but in some cases, flimsy. A woman can also demand divorce if she could state good reasons in support of her claim, though this will be difficult since the husband holds the stronger position in as much as he has paid a bride price for her and in that sense, she is his purchased "possession".

All that a man has to do in order to make a divorce effective is to order his wife to depart or if she shows reluctance to obey, to drive her out. As she leaves, the compound, he hurls her cooking pots after her together with one or two of her personal belongings.⁵⁹ The articles thrown after her are the only possession she is permitted to take with her. On divorce, the woman is free and left to fend for herself. The husband retains his right to receive the dowry should another man seek her in marriage. In certain districts where cruelty on the part of the husband can be proved, only a part of the dowry is ordered by the Customary Court to be refunded to him and in cases of gross cruelty, he is liable to forfeit the whole of it.

In other parts of the East⁶⁰, before a man can divorce his wife, he has to produce sufficient evidence to prove misdemeanor, failing which the man must pay reasonable compensation according to the status of the woman and he cannot claim dowry until she has re-married. In the event of a woman divorcing her husband without any just or reasonable cause, the parents have to refund double dowry and also the value of all presents given to the woman in her marriage ceremony. In either case, the children belong to the husband and are retained by him.

Western Part of Nigeria

In most parts of the Western Nigeria, there are comparatively less cases of divorce than in the East. The men are less willing to send their wives packing as it will deny them a refund of their bride price while the womenfolk are not willing to leave as to do so will result in being seen as failures. Nonetheless, the vast majority of divorce petitions are brought by women alleging desertion or infidelity.

⁵⁸ Driving out of a wife.

⁵⁹ G.T Basden, *Niger Ibos* (London: Frank Cross & Co Ltd, 1968) p. 239.

⁶⁰ Like Owerri of Imo State.

When a woman is divorced, whether by the action of the man or the woman, all the children of the marriage belong to the man from whom she is divorced. A woman has no claim or right over her children so long as she has been properly married. There is no power in the customary Courts to award custody of the children to their mother. The children of the marriage are the property of the man so that the contract cannot be dissolved so long as the woman 'possesses' any of her husband's property. She may be allowed to nurse a tender child. When the child has been weaned, the Court orders that the child should leave the mother (who at that point is seen as a common bailee) and returned to the father.

On the part of the man, it is somewhat a habit for them to desert or to drive away their wives who are of an age beyond the child bearing limit with the view that the women shall claim a divorce on grounds of desertion. Occasionally, the husband of such a woman will go as far in his ill-treatment of his wife as to compel her to desert him, thus manufacturing a legal desertion by the woman and so enabling him to claim divorce and enforce the payment of the dowry.

Northern Part of Nigeria

The basis of dissolution is contained in the Qur'an which stipulates that in the sight of Allah and his Holy Prophet Mohammed, dissolution of marriage is the 'most detestable of all permitted acts'⁶¹. However, divorce is compulsory in certain instances which include:

- a. Where the husband is incapable of matrimonial intimacy with his wife and cannot maintain her;
- b. Where all attempts to effect a reconciliation between the parties to an Islamic marriage failed;
- c. Where the husband has vowed to discontinue social intimacy with his wife and this is done for over 4 months;
- d. Where he accuses his wife of unfaithfulness resulting from ill-conduct/ill-treatment;
- e. Where one of the spouses changes religion and denounces Islam.

The maliki school of Islamic law allows some principal ways of dissolving a validly contracted Islamic marriage, they include:

⁶¹ Qur'an 2:229; AD Ajjola, *op. cit.*, 163.

1. By *Khul*

The right of a woman in demanding the dissolution of marriage is known as *Khul*.⁶² It is a legal concept under Islamic law provided for a wife to seek divorce from her husband on the condition that she returns a part or the full amount of the dowry (*mahr*). The acceptance of the dowry by her husband grounds dissolution of the marriage based on *khul*. It is one of the popular means of dissolving an Islamic marriage.

2. By way of *Qadi*

Qadi is the judicial process of ending an Islamic law marriage. It allows a wife who wants dissolution of her marriage to seek legal redress by filing a case against her husband in the Court. A wife can only sue her husband and claim a Court order terminating her marriage based on the law that regulates Islamic marriage in the locality/state.

3. By a Vow of Contenance (*Ila*)

A husband can bring an end to his marriage with his wife if he swears an oath to desist from any conjugal relationship with her and carries out his abstinence for over 4 months. Where all entreaties to make him resume his conjugal relations fail, he would be forced by the Court afterwards to either resume the relationship or divorce his wife.

4. Automatic/Death Dissolution

This occurs when either the man or the woman of the marriage dies.

Judicial Dissolution of Customary Law Marriages

The institution of District/Native Courts is popularly believed to have led to an enormous increase in the dissolution of customary law marriages. This is because, in the olden days, wives were restrained by variety of local influences but presently they could, under the Customary Courts system, seek and obtain divorce in Courts for trivial causes from judges who had no knowledge of their circumstances and no interest in promoting reconciliation.⁶³

Again, people are aware of Court proceedings and in cases where they fear an unfavourable verdict by the council of elders or by their relations, they simply approach the Courts since generally, they need not allege any

⁶² Which literally means putting off or taking off a thing or a garment.

⁶³ C.K Meek, *op cit*, p. 276.

concrete grounds⁶⁴ The Customary or Native Courts however, are usually inclined to adopt the customs of the locality strictly in areas like custody of children and other like instances.

Conclusion

It is clear that marriage is rooted in religion, customs, traditions and is also a legal relationship/institution, the meaning, boundary, tenure and implications of which is created, prescribed and governed by social, customary, legal and religious norms of the society. The fact that the family, as a by-product of the marriage institution, is recognized as the most fundamental unit/foundation of society lends credence to this position. Where this foundation is sickly, the entire society will also be infected by one social menace or the other.

Looking critically into the various customs in Nigeria, it will also be glaring that customary law marriage is an essential part of our culture and in spite of our cultural diversity, it is fair to say that in matters relating to customary law marriage, many communities share a lot in common although some customs have unique ways of celebrating and dissolving it. It is beyond dispute that the philosophy and principles underlying the institution of marriage are of immense value to every legal system and indeed, the entire human race.

⁶⁴ Save in some few circumstances as have been highlighted above.