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Interaction of Customs and Colonial Heritage

Their Impact on Marriage and Children in Nigeria

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Abstract. – Marriage is regulated by two parallel frameworks in Nigeria. Some Common Wealth countries have attempted harmonisation. Inequality and exclusions are phenomena that assail most developing nations. As Nigeria is a country with enormous financial and economic potentials, it is not surprising that a few would take full advantage of any privilege which is occasioned by conflicts rather than redefine structures for inclusion. It is in this light that this article examines illegitimacy as is known in English jurisprudence vis-à-vis local understanding and customs in the context of the tension generated by colonial heritage. *[Nigeria, African culture, marriage, child welfare, human dignity, colonial heritage]*

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1 Introduction

Marriage is the foundation of society (Aguda 1971: 1; Rahmatian 1996: 282). The constituents of marriage receive deservedly serious attention in all societies. It does appear though, that culture and religion have played larger roles than the law in shaping the content and definition of marriage in many societies. For many of the world's religions, it is a sacrament involving religious and cultural rites. To a legal mind, the nature of marriage and legitimacy of state intervention in it is not free from difficulties.

Customary marriage in Nigeria is in some sense a contract not strictly between two parties but two families. It is potentially polygamous and for this reason a double-decked variant of customary and statutory marriage in one package, developed *Jadesimi* v. *Okotie-Eboh* (1996: 128; S. C.). When one speaks of two families, it must be noted that it is not all the time that this entails outlandishness, because sometimes "families" may be merely representative and symbolic, consisting of at least two persons from each side.

English law states, according to one view, "the law of England says that marriage is a contract resulting in a status" (E. G. M. 1932: 294). It may be said that there are two parts to this statement, one is the contract between the parties entailed by the mere fact that they have decided to marry one another and the other is the status which this decision confers on them by the state. It is from here that the arguments for illegitimacy are taken. The contents of marriage in this instance envisage a strict contract between two parties to which may be added some symbolic paraphernalia which adds nothing to the original envisagement of the contract between the parties. Concerning Nigerian customary marriages, the reverse is the case and the symbolisms more than the decision constitute the marriage.

In Nigeria, where the marriage is statutory, case law, although not consistent, appears to treat marriage as contract (*Da Costa* v. *Fasheun* 1986). At other times, it is treated as an obligation arising by virtue of the provisions of the Marriage Act 2004 (hereafter MA), (*Marquis* v. *Marquis* 1981; *Anyaegbunam* v. *Anyaegbuna* 1963: 320). Thus, when a marriage is conducted as if it is under the MA but is not evidenced by a certificate from a Registrar or License under the Act, it is taken to be in breach of the provisions of the MA and becomes either void or

voidable by virtue of the provisions of sections 39, 46, and 47 of the MA, as well as section 3 (1) (a) of the Matrimonial Causes Act 2004 (hereafter MCA). It does not matter that the marriage has been conducted in a church unless such a church has a validly issued licence under the MA (*Anyaegbunam* v. *Anyaegbunam*). Sometimes, if the marriage is a hybrid, it is allowed to stand as customary marriage (*James Egbuson & Ors* v. *Joseph Ikechiuku* 1977).

It has been estimated that 9 out of ten men are polygamous (Ibidapo-Obe 1981), i.e., 95% of men are polygamous (Aguda 1971). In *Jadesimi* v. *Okotie-Eboh*, the Nigerian Supreme Court, per Uwais, CJN said, "it is common knowledge that inspite of the punishment provided under section 47 of the Marriage Act against any of the parties entering another customary marriage, the male folk in particular observe the restriction more in breach than obedience with impunity" (128). These cases of bigamy are not in the same sense bigamy as is understood in English jurisprudence. In this sense, a man would either marry for the first time under customary law (*Agbeja* v. *Agbeja* 1985) and then subsequently under the Statute or marry under the Statute and then become a polygamist (*Okwueze* v. *Okwueze* 1989). Customary law marriage, not being usually registered and sometimes not elaborate, can provide a loophole for one party, usually the man, to deny its existence.

While customary law marriage is potentially polygamous, marriage under the Act is monogamous and bigamy punishable by 5 years imprisonment (MA 2004: sections 35, 39, 46, 47). There is also an offence of bigamy in the Nigerian Criminal Code, Act (Section 370 Criminal Code Act; Iriekpen and Andrews 2011). However, since some foreigners were convicted for bigamy, there has been no recorded action for bigamy in Nigeria (*R.* v. *Princewill* 1963 N. N. L. R. 54; 1963 All NLR 31). This is so even when cases before the courts constitute one and by section 62 of the MCA a court may initiate the intervention of the attorney general to investigate bigamy.[1]

This article examines the interaction of customs with the received English law on the subject of illegitimacy. It queries the relevance of the common law variant in modern Nigerian society. This has become relevant because of the increasing tension from double-decker marriage and its incidents in the light of the irrelevance of bigamy to Nigerian legal process. Bigamy appears irrelevant to the legal process because of the polygamous nature of customary law marriage which is the preferred framework for men. Women and children usually fall prey to the negative outcome of this situation.

Although the case study is the Nigerian context, the conflicts and tensions that inhere in these issues require conversations from beyond the geographical boundaries of Nigeria. As Pollock noted (1932: 41), there is need to pay attention to the offshoots of the Common law "planted and taken root around the world." Furthermore, regardless of whether globalisation is to be applauded or condemned, it has had the undeniable effect of bringing more people and cultures together. The result for the family law practitioner is a world of new and challenging legal issues as well as new possibilities prompted by the cross-fertilisation of legal ideas (Boele-Woelki 2008, taken from Blair and Weiner 2003: 3).

The article x-rays marriage and its expressions in Nigeria particularly as it concerns bigamy. While in Nigeria it may not connote strict contractual relations as in many Western societies, the claim for illegitimacy proceeds primarily from this context. Since the doctrine of illegitimacy envisages use of the state apparatus for enforcement, it will be necessary to examine the role of the state in marriage. Some specific issues with respect to relevance of illegitimacy in modern-day Nigeria in the light of constitutional provisions and case law are also analysed. The discourse is premised on the conceptual and practical framework of marriage in Nigeria which is demonstrated as incompatible with illegitimacy in English jurisprudence. Consequently, the academic furore over illegitimacy ought to be directed at renegotiating the meaning and content of marriage for the woman in modern-day Nigeria. The article excludes the discourse on children's rights.

2 Marriage Laws and the Turmoil

The celebration of marriage is a hydra-headed event, usually coming legitimately in four to five packages for one marriage celebration. This is because of the outcome of each of the marriage types which necessitates women securing their position in the marriage and ultimately its effect has been to forestall the man openly becoming polygamous (*Jadesimi* v. *Okotie-Eboh* (1996: 128). A typical marriage of a southern or northern Christian woman would encompass all five events. Aguda (1971: 66 f.; see also Ekow Daniels 1964: 574, 601–610) provides a succinct account of the origin of this state of affairs:

> As Europeans commenced to settle here, relatively permanently, and in some appreciable numbers, it became

1 See, for instance, *Okwueze* v. *Okwueze* (1989: 321); *Kuforiji & Anor.* v. *V.Y.B.* (Nigeria Ltd.) (1981); *Agbeja* v. *Agbeja* (1985: 11) CA; *Jadesimi* v *Okotie-Eboh* (1996).

necessary to introduce a system of marriage which would be more in line with their own personal law. And what was of equal importance, the new converts into Christian faith were forced to believe that unless they abandoned their customary system of marriage their souls would not be saved. In most cases those who had more than one wife were not allowed to take sacrament. Hence the first Marriage Ordinance was passed in 1863. This was replaced by the Marriage Ordinance 1884. … It became necessary in 1914 to pass a Validation Ordinance which validated retrospectively certain marriages and extended the provisions of the Marriage Ordinance to some other parts of Nigeria. We need not go into details of these here. It is perhaps only pertinent to note that even today some Roman Catholic Churches still continue to perform marriage ceremonies without complying with the Marriage Act, the legal validity of which is very doubtful, except as taking effect as marriages under customary law.[2]

Ekow Daniels notes that of prime importance was the enforcement of monogamy why many policies were introduced including section 36 of the Marriage Ordinance which had extraordinary punitive measures on succession matters conflicting with the new norm (1964).

There are as many customary forms of marriages as are diverse ethnic groups in Nigeria. Customary marriages are intertwined with African traditional religion and beliefs. One peculiar variant is the ceremony of marriage amongst the Igbo people of the eastern part of Nigeria, which expresses a firm belief in reincarnation.

Aside from strict customary marriages, there is also the Islamic-type marriage, based on Islam and applicable mainly amongst core northern Nigerians and other Moslems spread across the western parts of Nigeria. A more detailed account of marriages and their nature in Nigeria is provided by Rahmatian (1996: 283–291).[3] Monogamy is the marriage of one man to one woman and is a basic tenet of Christianity. Most Southerners are Christians. Statutory marriage and Christian marriages capture this tenet. The main attributes of monogamy are to be found in the securing of the marriage against third parties which is achieved through bigamy and intestate succession rights of the wife or husband. Increasingly, the attribute of a monogamous marriage in Western societies has shifted from this and is said to be more obvious in its consequences on divorce (Eekelaar 2007).

Polygyny is the marriage of one man to many women. Its main attribute is that the man is a patriarch and is usually unaccountable to any of the women. This is the feature of polygamy, at least under Nigerian customary laws. Thus, there is no question of succession rights for any of the wives. Succession is either through the sons of the marriages or through brothers. It must be noted that on this front people of western Nigeria now allow devolution of property to female children although wives are still excluded.

Does monogamy in Nigeria change the consequences of marriage for wives in Nigeria? The answer is in the negative. Bigamy is carried out openly. In cases of divorce, property is usually not distributable and, recently, if settlement is to be made at all, it is paltry and any claim on property is dependent on strict proof by the wife. Intestate succession is ousted at least in federal laws by the expunction of section 36 of the Marriage Ordinance which provided for automatic intestate succession for the wife of a polygamous marriage from the current Marriage Act. Thus, the motivation for marriage now lies not in the security which marriage provides or in what monogamy has to offer but elsewhere.

It is expected that persons of marriageable age, men or women, should marry. However, for a woman an marriage determines her status, unless such single status is prescribed by the gods or she is pristine in a convent.[4] Regrettably this position which was definitive of the life of the society at a particular point in time, cannot rationally be expected to govern life in modern Nigeria for many reasons. One reason is that the population pattern shows that adult women outnumber adult men and this is in spite of the fact that the census normally would not capture the accurate number of female children and rural women (National Population Commission).

Thus, the reality is that the demographic and sociological patterns of the society are such that if the norm is monogamy and assuming all men will marry, some women will be married while others will not, even if they were desirous of doing so. As the society is a patriarchal one, the direction the tide of marriage will flow is reasonably discernable (Atsenuwa 2011: 6–8).

2 It must be noted that this is no longer the case with Roman Catholic Churches although some other churches continue in this light deliberately or inadvertently.

3 Islamic marriages and precepts are not within the scope of this article. It is only noted herein that in the core of northern Nigeria, the Sharia appears to be the basic law regulating marriages. The state may as in Kano matchmake, as well as make financial and sundry provisions for single women and widows to be married off. Christianity does not have any enforcement machinery outside the state apparatus, quite unlike Islam that has an enforcement machinery vide the Sharia.

4 Rahmatian (1996: 309, fn. 3); Atsenuwa (2011: 6); Ibidapo-Obe (1981: 128). – See the Nigerian Population Commission website. This is aside from the fact that while men would always be counted, many women, rural and market women, will not even participate in the exercise.

Marriage is crucial and important for all who are in or aspire to it, whereas on the other hand, there are single people, men, women, young, and old (Atsenuwa 2011: 6). While it is expected that people will marry, unfortunately, the state does not matchmake and on this point providence not law must largely resolve the fate of the individual. Inspite of the place of marriage in Nigerian society, nowadays, a few women elect to stay unmarried but would usually opt to have children and some will not elect to do so but will be forced to do so if they cannot marry (Aofolaju 2012; Egbemode 2012a/b/c). One report from a sociological survey states:

> Apart from this, cultural cum societal attitudes often seem to weigh heavily in the mind of Nigerian women in deciding whether or not to get married or remain single. For instance, in a survey by the writer in Mushin and Ikeja areas of Lagos, it was discovered that majority in polygamous union in the pool were in the union not so much for the essence of marriage but to avoid the alleged "social stigma" associated with single motherhood. But ironically, these women are more or less *de facto* single – mothers. For instance, twenty-five out of forty of them said they are financially independent, expect little or no financial or material provision from their husbands, and are only in the union for the sake of marital status. Seventeen of them were in their second marriage. But surprisingly more than 50% of twenty unmarried ladies in yet another pool would rather be in polygamous union than be single mothers.[5]

It has been repeatedly argued that the Achilles' heel of the MCA is the failure to take into cognisance the nature and consequences of the customary-type marriage as potentially polygamous and its effect, the result of which has been unfavourable for women and children. This situation is not to anyone's advantage as the circumstances indicated above put pressure on men to take advantage of the situation while women allow themselves to flow in the tide rather than be without social protection.[6] While all marriages under customary law are recognised by the people and sanctioned by law, with or without a statutory variant, many do not take notice of bigamy. Marriages under the Act are conducted mainly at the behest of women. The social position is clearly in conflict with the legal position. This is because, as Ibidapo-Obe explains, "observance of the customary form of marriage in addition to, but not in substitution of, the statutory marriage [is required] in order to gain recognition amongst his clan as a married couple. It is more or less a taboo to avoid customary marriage in preference to statutory marriage in Ibo-land" (1981: 128). In *Kuforiji & Anor.* v. *V.Y.B.* (*Nigeria Ltd.*) Obaseki, the Justice of the Supreme Court stated that bigamy even though a dead letter law was "in our Statute book."

Aguda (1971: 120f.) states the problem succinctly:

> The vast majority of Nigerian men, may be the percentage is over 95, practice polygamy in one form or the other. A number of these ostensibly practise monogamy but have one or two other "wives". Some of them who are cautious do not perform "marriage ceremonies" with the other "wives". But some in fact do perform these ceremonies to which they in fact invite people who have to do with administration of justice including Police Officers, Doctors, Lawyers, Ministers of State and Religion, top civil servants, etc., who do attend such ceremonies with full knowledge of the correct situation. The fact is that, as I have said earlier, some of these people themselves have perhaps indulged in a similar breach of the law.

Other male commentators on the subject have expressed similar views.[7] Welstaed and Nwogugu (2006: 22) ask:

> Should the offence of bigamy be retained in our law? A positive answer should be given because it reflects our constitutional and legal framework. Once a man is given the freedom to move from the monogamous to the polygamous union at will and irrespective of the feelings of his partner, we would have undermined our legal system. What is required is the cultivation of strict obedience to and enforcement of the law. There is a role for education and enlightenment of women as to their legal rights.

Earlier on the Nigerian Family Law Reform Commission (2004) proposed the removal of bigamy from the law in line with the sociological results of the offence, that it had fallen into disuse, but so far there has been no response to the proposal from the legislature.

The Tanzanian Government paper referred to earlier, reported its assessment of a similar situation in its own jurisdiction:

> As it is not the basic law of Tanganyika, but certain religious law, which prohibit polygamy, the Government proposes that when the parties freely agree to convert the nature of their marriage, the law of the country should not prohibit the man from marrying another woman. Such a prohibition of law would be unrealistic, as it will not deter the man from marrying the other woman but will force him to divorce his first wife. The Government proposes that in such a case the man should not be forced into a

5 Peters (1996–98: 25); see also Aluko and Aransiola (2003); Gage-Brandon (1992).

6 Peters (1996–98: 25); Rahmatian (1996); Aguda (1971); *James Egbuson & Ors* v. *Joseph Ikechiuku* (1977); *Okwueze* v. *Okwueze* (1989); *Kuforiji & Anor.* v. *V.Y.B.* (*Nigeria Ltd.*) (1981).

7 Akpamgbo (1977); Nwogugu (1990); Kasunmu (1961); Oyebanji (1981).

position whereby he has either to divorce his first wife, or cohabit with the other woman with the inevitable result that their union would be a union not recognised by the law and the offspring of such a union would be illegitimate (Government Paper No. 1 of 1969, para 12).[8]

This assessment captures the dilemma of the Nigerian man whose escapades, due to loopholes and unaccountability provided by the law, have now extended in leaps and bounds (Ikhariale 2013: 17).[9] It will be noticed immediately, that while the Tanzanian White paper attributes its own position to religion, the Nigerian experience, even though it has religion as the underlining impetus, is precipitated by the prevailing socio-legal structure of the Nigerian society.

The cases of *Moses-Taiga* v. *Taiga* (2005), *Agbeja* v. *Agbeja* (1985), and *Ohochukwu* v. *Ohochukwu* (1960) are illustrative, all three cases were on questions of the interrelationship of statutory marriage and customary one. In the first case, the English Court of Appeal was faced with the tension of plurality of marriage that affected two Nigerian residents in England. It had to differ the question of validity of marriage to Nigerian courts for determination. The respondent was married to another woman by a statutory marriage in Nigeria from whom he was estranged. The Court of Appeal in Nigeria held that the second purported marriage was either non-existent or a nullity. Prior to this declaration, there were two twins of the relationship (*Taiga* v. *Moses-Taiga* 2012). A similar case is *MO* v. *RO & Rig Ltd.* (2013). This latter case concerned a Nigerian man who had married one woman under customary laws in Nigeria. He subsequently travelled to England where he met and married another woman under customary law.[10] On return to Lagos he married this second lady again under the MA. The Nigerian Court of Appeal unanimously held that the second marriage was a nullity. These two cases typify the dilemma of Nigerian women in the customary and statutory marriage dynamics. The accuracy of the court's conclusions on this case will, however, be analysed below.

In *MO* v. *RO & Rig Ltd.* (2013), the application was for a declaration of marital status under section 55 (1) (1) of the Family Law Reform Act, 1986 (English). MO, the applicant, claimed that she was married to RO, the respondent, in a customary law marriage ceremony in Lagos. RO had been previously married to Mary from whom he was estranged and who had remarried. Mary testified on his behalf. The respondent denied that there has been any such marriage, although at some stage (just as in *Moses-Taiga*) he asserted that if there was such a marriage, it was void by virtue of its being polygamous and entered into at a time when he was domiciled in England. The applicant was a non-native from Ghana. While the case was pending, RO instituted another proceeding in Lagos. A hearing took place in April 2012 and on May 18, 2012, a declaration was made that no marriage ever took place between the applicant and the respondent with a "perpetual injunction restraining the applicant from asserting or boasting that she was ever married to the respondent under Nigerian law" (2013: 7). There were two children born to the parties during the duration of the relationship, both now distinguished adults. The woman has met the man at the age of 24 and this proceeding was conducted at the age of 60. Jackson, J., while declaring that he could not establish that there was any marriage noted of RO, "the fact that the respondent can (to say the very least) take no pride whatsoever in his conduct is, I am afraid, neither here nor there" (2013: 26). This is a typical plight of women who are persuaded by the framework of marriages in Nigeria.

Ohochukwu v. *Ohochukwu* was the earlier of the four cases. Here the parties were married in Nigeria under customary law. In England they entered a valid marriage under the English Matrimonial Causes Act, 1950. Having lived in England for three years, the wife petitioned for divorce on grounds of cruelty. The judge established cruelty as a fact and dissolved the marriage under the Act but concluded that he could not dissolve the customary law marriage for, as he noted, it was a polygamous marriage over which the court had no jurisdiction. This third case is relevant to demonstrate the difficulty encountered in dissolving Nigerian marriages which also leads to the frustrations the parties experience, i.e., mostly men who would then prefer to carry on disregarding the need to dissolve earlier marriages.

When *Moses-Taiga* v. *Taiga* arrived in Nigeria as *Taiga* v. *Moses-Taiga*, the Court of Appeal held that where a person who has a prior subsisting statutory marriage conducts a marriage with another under native law and custom while the earlier statutory marriage was subsisting, by the provisions of

8 As this paper is concerned with children, comments on the proposal, and its outcome, the Tanzanian Marriage Act (1971) is reserved for another occasion, as it concerns women.

9 This article asks – in response to the news that a governor had made extravagant gifts to a musician whose marriage ceremony was taking place in Dubai – "I learnt that the groom has already fathered many children from different women. So what is the big deal about such a marriage?"

10 It is perfectly in order to conduct a customary law marriage anywhere since what is important are the rituals and symbolic gestures of the ceremony.

section 35 of the MA, the latter marriage is invalid. There is, however, no evidence from the report that the Court then put the Criminal Justice process in motion to bring about the application of section 39 on bigamy (*Taiga* v. *Moses-Taiga* 2012 – 3 NWLR 219 CA).

In *Jadesimi* v. *Okotie-Eboh* (1996: 128), Uwaifo CJN held unequivocally that where parties marry under customary law and subsequently marry according to the MA, the second marriage merely reaffirms the first and converts the potentially customary marriage to a monogamous one. In this case, Okotie-Eboh, who was the first post-independence Minister of Finance, although married to this particular woman had several other children from many other women.

It must be noted that in this case the parties were the same. Therefore, this case cannot be determinative as in a case when the parties are different people. Thus, the question remains on what the position is where a man previously married to a woman under customary law then proceeds to marry another one according to the MA. The other issue arising from this case is how the dissolution of a double-decked marriage becomes effective. Would the conversion mean that only the statutory marriage necessitates dissolution? The answer is clearly no, as the case of *Ohochukwu* v. *Ohochukwu* demonstrates. The dissolution of the two marriages must be independently done. The customary one becomes effective with the return and acceptance of the dowry by the husband's family, as was done by the estranged wife Mary in *MO* v. *RO & Rig Ltd.* (2013: 20).

In resolving the first issue the Court of Appeal in *Agbeja* v. *Agbeja* (1985) held that the customary law marriage superseded the statutory one. The testimony of the first customary "wife" (second respondent) was that:

> the deceased went to England in 1951. I had just delivered. He left me living with his mother at Ilesha. He returned from England in 1952. … I continued to live with his mother. When I thought it was time for me to get pregnant I wrote to him saying I would like to come to him, or he should come to me. He did not reply. Later I heard that he had pregnanted a woman in England. I asked him and he said it was true. Then I said I did not mind and that I could continue to live with his mother. He refused. He asked me to pack out from his mother's house. I refused and continued to live there. Then in 1954 I heard that he had married another woman. Then in 1955 I left for my father's house. Up to 1955 the marriage between myself and the deceased was never dissolved (1985: 17 – 3 NWLR (Pt. 11) 11, 17).

The case came to the conclusion that the "English wife" who was married under the Act to the deceased was a mistress or concubine. When the "English wife" returned to Nigeria, she was with child. Although the customary "wife" subsequently went ahead to have other children, the Court of Appeal still ruled that the second marriage that was conducted in England according to Nigerian customary law and consolidated with another ceremony under the MA was a nullity. It followed that this child, whose parents lived as married for well over twenty years, had now become "illegitimate." In this case, it was the grown-up daughter of the customary "wife" who put the machinery of justice in motion on behalf of her mother to determine marital status after the death of the "husband."

In *Olufemi Marquis* v. *Olukemi Marquis* (1986), another typical case Professor Olufemi Marquis died intestate on May 6, 1982. He had married the first plaintiff in 1960 at St. Mary's Catholic Church Sunderland, England. There were four children of the marriage. Professor Marquis subsequently married a Nigerian woman with whom he lived until his death and had three children without dissolution of the first marriage. On his death the question arose of who was entitled to a grant of a letter of Administration, and it was held that without doubt the first woman was so entitled, the court describing the wife under native law and customs as a mere mistress and the children of the marriage as illegitimate (Uzodike 1990: 403; 2011: 28). In *Da Costa* v. *Fasehun* (1981).

In the case above mentioned, the High Court expressed a strong opinion that in a marriage parties have contracted to live on specific terms and conditions, and that paternal acknowledgement of children in a subsequent customary law marriage cannot interfere with that contract and thus such children "were illegitimate, 'all and sundry' who are out for a booty." A respected Nigerian family law professor, Itse Sagay, commenting on the judgement referred to it as "both unfortunate and grossly incorrect" and stated: "Where a man has children outside his marriage, whom he acknowledges, under no circumstances can such children be regarded as 'all and sundry'" (1992/1993) Vol. 16, 17 & 18 JPPL 1.

Aguda (1971: 86) decried the situation: "What does society gain by what we have at the moment – penalising the innocent children of women who are second wives to men who opt to contract marriage under the Act? The women are not penalised – in fact, they are well received in society, the men are not penalised because society does not seriously frown upon their iniquity, but it is the children who suffer in being disinherited. The situation is terrible and must not be allowed to continue to exist any longer."

Lagos, a state in Nigeria, has now expunged bigamy for falling into disuse from its statute books in 2012, whereas generally men hailed the action as the "triumph of common sense" women rejected it and have since proceeded to the courts. It has to be noted though, that this has very little significance as the offence remains in all Federal Legislations.

There are other circumstances in which single women bear children such as "woman to woman" marriage, succession strategies, etc. Although "woman to woman" marriage is referred to as a marriage, in reality the woman is single for life. By this custom, sometimes a daughter of the family is made to bear children for the family while remaining single.[11]

This is usually done because it exists a son preference. Thus, where a wife does not bear a male issue, her daughter may be made to fall in her shoes to bear such issues. Needless to add that this may never happen as often times, this daughter will have all female issues. At other times, a woman simply chooses to be treated as a man and, therefore, marries another woman to bear her children. At some other time, a wife who is unable to bear children marries another woman for her husband (Akpamgbo 1985). There are other variants, but the Supreme Court of Nigeria since the 70s has struck down the custom on the repugnancy doctrine.[12]

Some other customs require women to be single to be entitled to inheritance. Thus, the Ikweres' of Rivers State of Nigeria are amongst this class. It follows that a woman may have children but must not be married. This custom, therefore, is a species of the "woman to woman" marriage, although not cloaked a marriage.

Invariably, men would prefer that Nigeria is the *forum conveniens* of adjudications on disputes relating to marriage. In *Agbaje* v. *Akinnoye-Agbaje* (2010), the United Kingdom Supreme Court applied Part III of the Matrimonial Family Proceedings Act, 1984 (MFPA) to resolve an inequity in the distribution of the property of a divorced Nigerian/British couple. In this case the couple had been married for thirty-eight years, lived and had all five children in England. To divorce the woman, the husband turned to Nigerian Courts where the wife was awarded a mere life interest in a property in Lagos. The wife sought relief under MFPA and got fuller and fairer relief.[13]

It would also be noticed that all cases were instituted by women. This is because many men would maintain the status quo one way or the other because usually in Nigeria, unless the man simply throws her out, a woman would rather tolerate the situation as having a man's protection is preferable to any incidental psychological or actual injury she may suffer from remaining in the liaison.

3 Marriage, Contract, and the Child

The majority opinion resp. majority view is that marriage in the English law is a contract between two persons to which civil consequences were attached (Marriage Laws 1863: 1). Some, however, have noted that it is neither a contract nor an institution. In Nigeria and as in *Da Costa* v. *Fasehun*, marriage sometimes is conceived as a contract between two persons for which the state is a regulator. Under Nigerian customary laws the community had no specific interests in marriages. It was a private family arrangement to which members of the community merely took notice as observers. As has been noted above, the state intervention is a relatively recent introduction in the course of the colonisation.

The consequences of marriage as a contract and its privileging by the state affect the parties in very unique ways, bringing with it legal, social, and psychological benefits when they marry, while they are married, and when it ends (*R* – on the application of Baiai & Ors – v. *Sec. of State for the Home Department* 2008).

However, the case in Nigeria requires closer scrutiny. A monogamous marriage as a contract has

11 Akpamgbo (1985); Uzodike (1990); Oboler (1980); Greene (1998).

12 The custom, however, has support from many notable people from that part of the country and, therefore, is obeyed more in breach than in obedience. To shore up her position on illegitimacy being a safeguard for marriages, Uzodike supports "woman to woman" marriage, otherwise in the light of her plea for the retention of common law illegitimacy it would be difficult to rationalise this custom (1990). This custom deserves to be put to extinction, albeit, through legislative as opposed to judicial action. This is because a judicial action will never achieve the desired result as the effect of case law since then has shown and is likely to lead to an unjust outcome that would bring about disinheritance and perceived the "illegitimating" of people born under the custom. Current advocates of the common law illegitimacy may have been born through this custom as a host of people and clans were born into this custom, not just in Nigeria but in other parts of Africa (Oboler 1980; Greene 1998).

13 The wife in/of *Egunjobi* v. *Egunjobi* (1976) was subjected to the strictest proof of her contribution and in the relatively more recent case of *Adaku Amadi* v. *Edward Nwosu* (1992) her claim was totally dismissed as she was said not to have shown any material contribution to the matrimonial property. In *Ayangabyi* v. *Ayangbayi* (HD/92/77 of Lagos State) 1, the court declined to exercise the inherent jurisdiction by virtue of sections 15 and 72 of the Matrimonial Causes Act 2004 (MCA) to settle property on dissolution of marriage.

a major check which is bigamy and a major consequence, i.e., succession rights. Indeed, the issues of the marriage are not of immediate concern to the institution of marriage except as it pertains to divorce and succession. In Nigeria bigamy, which forms the bedrock of sanctity of monogamous marriages, as has been pointed out above, is a dead letter law. Aside from this, the MA has now expunged section 36 of the previous Marriage Ordinance which provided for automatic succession rights for a widow of a monogamous marriage. This provision is reinforced by the provisions on devolution of land under the Land Use Act which recognises transfers only according to the customary laws of the area where the land is situate unless a Will provides otherwise (sections 24–26). In interpreting Wills in Nigeria, the Supreme Court has, however, put its stamp of authority on patriarchy by stating that primogeniture cannot be ousted by a Will (*Idehen* v. *Idehen* 1991: 382). It follows that monogamy, as was known under the English law, is not quite the same in the Nigerian law, at least, in practice. For a Nigerian man, divorce as a prelude to taking a second wife is often not an option (*Taiga* v. *Moses Taiga* 2012: 219). It is easier not to bother with the cumbrous and slow processes of divorce and veer into the cushion of customary law (*Jadesimi* v. *Okotie-Eboh* 1996).

That contract envisages mutuality of rights is a trite principle of law. But customary law marriage invariably results in a woman being divorced at will. In *Solomon* v. *Gbobo* 1974), Holden CJ refused to enforce a rule of customary law that did not give the wife the same right.

Customary law marriages have a fluid or flexible pattern, usually unregistered and potentially polygamous. The statutory variant affords no certainty or security (*Agbeja* v. *Agbeja* 1985). In this case, the second wife took every precaution by marrying first, under customary law in England and then at the Marriage Registry in Lagos, yet the marriage was held void. Although it must be noted that declaring this marriage a nullity was wrong, because since the first marriage that was upheld was customary and hence potentially polygamous, the least the second marriage would be is a polygyny. In respect of *Moses Taiga* v. *Taiga* (2005), in the Nigerian trial the petitioner claimed that there was no marriage and that the ceremony relied on by the wife was one for paternal acknowledgement of the children. This is very unlikely, as paternal acknowledgement in Nigeria does not necessitate any elaborate ceremony. The petitioner also claimed alternatively that if it was a marriage, then being still married to his wife under the Act such a subsequent marriage was a nullity. The deadness of bigamy in Nigeria is well illustrated by the fact that men would actually accuse themselves of an existing offence in the Criminal Code and Marriage Act (see also (*MO* v. *RO & Rig Ltd.* 2013).

For a contract that would afford notice and caveat in law, registration must be uniform and means of notice easily accessible and verifiable. Where this is not the case, then a proprietary kind of right that is enforceable against the whole world cannot exist or arise, and if it is said to, it is unjust. Thus, the consequences of marriage, as aptly spelt out by Baroness Hale in *Re P* (*Adoption Unmarried Couple*) 2008, cannot in any good sense apply in Nigeria. Even here, as the case so well indicates, the consequences of marriage only extend to rights between the couple and not necessarily to children. For children, the overriding principle is what is in their best interest as autonomous beings. Thus, in all developed jurisdictions a separate law is developed to govern them and regulate their affairs.

Marriage in Nigeria confers only personal rights and in the absence of automatic intestate succession for a spouse it does not signify the same thing as marriage under English Law. If marriage is a contract, then a breach of it can only justify such an award of damages as contract affords specific performance and sundry remedies, which is actually engaged in the Nigerian circumstances.[14] It is, however, settled law that a specific performance would normally only be granted in respect of such contracts affecting irreplaceable or invaluable items such as land, and even then this is by principles of equity. The most readily awarded remedy for the breach of a contract is damages. At any rate at the point a marriage has or about to hit the rocks, it could not qualify for irreplaceable.

Assuming that the law would often grant a specific performance concerning a breach of the terms of a marriage contract (this may be deduced from the several provisions made towards reconciliation of a couple and divorce as a last resort by the MCA), it would still not detract from the society's right to exact responsibility and accountability from adult parties for a child in or out of wedlock or deprive a child of inalienable rights and dignity. The law implies a contract to accept all the natural consequences of sexual relations.[15] Furthermore, a contractual relation with one party does not preclude another

14 Regarding how Nigerian courts have dealt with distribution of property on divorce see Chinwuba (2011).

15 In the old case of *Hegarty* v. *Shine* (1878) it was held that a woman who had sex with a man and contracted a disease having consented to the essential act of sexual intercourse consented to all its natural consequences. It is certainly sen-

contract with a different party (or parties) on other terms and on such conditions which are acceptable to the parties. It cannot also justifiably stand to prejudice the rights of an innocent party to whom one party to the contract extends another contractual relationship, insofar as the contractor is not incapacitated from doing so. This latter fact must be easily ascertainable.

At any rate, once a child is born, it should always be recognised that another contract has been formed implicitly with the child by both parents, whichever of them has gone beyond the terms of the extant contract. The main consequence of marriage and the origin of illegitimacy can be seen to stem from succession to the property of a patriarch. In Nigeria, these consequences are absent as distribution does not fall in the same manner as the English laws, whether by testacy or intestacy. At any rate, the current position even with respect to distribution, as has been seen in the cases analysed above, is that in the absence of a Will the property of a deceased father will be divided equally.

The problem with sanctity of marriage, therefore, cannot be addressed from illegitimacy and must be sought elsewhere. If marriage is a contract, the legitimacy of which is in perfection and notice (also provided for other forms of contract), then breaches in relation to same is rationally in damages. The logic of a civil contract producing a criminal sanction is unclear and as has been demonstrated above will remain so to the majority of Nigerians.

4 Legitimacy of State Intervention in Marriages

In Nigeria, marriage cannot be legitimately perceived as providing a legitimisation of sex. The role of sex is taken for granted in the normative basis of marriage under customs as well as indeed under the statute. The same may in fact be said of procreation. Thus, it is not unusual to see wives who have no children in marriage loved by the husband and his family till the end. The resolution was not in divorcing her but in polygamy and its variant of "woman to woman" marriage. Marriage in Nigeria tends to focus more on a man's responsibility. Thus a man is considered a responsible member of society when he is married. For the woman marriage represents respect and acquisition of status in society. Marriage gains her admission to the ranks of protected persons, that is, the security afforded by a man.

At common law, the view is that the state had an interest not just in the contract between the parties but also in legitimising sexual relations and securing succession of legitimate heirs to family property (*R* v. *Sec. of State for the Home Department* 2008). The place of property has always been on a questionable pedestal in English law.[16] In modern times, testate succession, pre-/anti-nuptials, trust, and the evolution of charity as trust have displaced the high esteem of marriage. Concerning legitimisation of sex, this perhaps was based on the almost universal perception that a woman's body is an object of sex. Nowadays, the uniqueness of a woman lies in motherhood which in turn has been influenced by medical advancements. In Nigeria, since independence the English law on marriage has not played any significant role on devolution while under customary law marriage has no role in the devolution of property. It follows that the legitimacy of state intervention in marriage must be looked for elsewhere.[17] As Eekelaar notes, "… whereas marriage used to be a socially prescribed context for the exercise of long-term sexual relationships and, in particular, the raising of a family, the strength of that social prescription has declined, for many to vanishing point" (2007: 431).

It has also been stated, that: "[t]he Law of England says that marriage is a contract resulting in a status … The Catholic Church gives an answer differing only in one word; marriage is a contract resulting in a relationship … Now, relationship differs from status in this: that it is a God-made thing, which man cannot alter" (E. G. M. 1932: 294).

But what does status entail, in fact? It can mean no more than affording notice to other people and securing the marriage/contractual terms to the parties. This has been the main objective of legislation on marriage in developed nations. The success of which has been the subject of much academic writing (Barlow and James 2004). In Nigeria, as has been demonstrated, legislation has offered very limited security. When one speaks of status, it is important to find out what this entails. Does the state actually add anything new to the standing of the parties after marriage? It appears that the answer is in the

sible to extend this to the positive aspect of sexual relationships.

16 It is only recently that tort law has began to shift the emphasis, which English law placed on property, even almost above that on the welfare of the person as evidenced by the development of negligence and strict liability torts.

17 Moreover, it may be that state intervention in marriage and by implication in sex is overstretched. It may be that it is the attention on marriage that has elevated sex to an undeserving height in human relations, because life, whether male or female, can be fully actualised without both and relationships thrive first in better matters than sex.

negative and the state adds nothing to the original intendment of the parties to be married other than to provide guidelines on breaches of the express and implied terms of the contract called marriage.

One wonders then, whether there is in fact any difference between what a state does in enacting a Marriage resp. Matrimonial Cause Act and a Bill of Sales Act resp. Civil Procedure rules? In respect of the wedding referred to Western-type marriages and the symbolisms for customary-type marriages one can only wonder whether this is the business of the state as say, for instance, "my taking of the Holy Communion," "one's taking of a blood covenant with a sweetheart," "or swearing to an oath before a shrine." If the state has no business with these matters, then the basis of some of the involvements of the state in this matter appears worrisome, such as the requirements for divorce which sometimes necessitate revelations of very intimate aspects of the parties' private lives, eliciting a criminal offence from the breach of a civil marriage agreement between two persons and incarcerating a fourth party for life who has no remote connection with the marriage agreement.

More recently, Munby J. states: "It seems to me that … these observations about the husband's duty to protect and maintain and the wife's duty of submission have now to be read with very considerable caution. Indeed, I doubt they any longer have any place in our contemporaneous understanding of marriage … as a civil institution whose duties and obligations are regulated by the secular courts of an increasingly secular society. For, although, we live in a multicultural society of many faiths, it must not be forgotten that as a secular judge my concern … is with marriage as a civil contract, not as a religious vow" (*Sheffield City Council* v. *E & Anor.* 2004: EWCH 2808, par. 116).

Affording security has also been the experience of the role of the law in other areas of civil law such as commerce and property. Here it has been working well enough providing rights of preferences and pursuits for parties who have deployed the help of the state to secure their contracts by following due processes. Thus it is not clear why the same principle is overstretched with respect to marriage. Security, therefore, is not a premise for the state to mix up itself so intimately with the business of the parties or the marriage itself. Some of the provisions of the MCA taken from a mix of the English and Australian Acts of a similar era which may still be called matrimonial offences, and some which are aimed at keeping the parties against their wishes, such as issues relating to incapacity to consummate marriage, are in fact interferences for which the state may be sued for in modern times for breach of the parties rights to privacy. The right of privacy for family life and correspondence is not only enshrined in international and regional instruments but also in section 37 of the Constitution of the Federal Republic of Nigeria.

This mix-up as to what marriage is or is not has resulted in placing marriage in a privileged position on human affairs. In Nigeria, the MCA, for instance, provides for paternal presumption in a curious manner. By section 84 it provides: "Notwithstanding any rule of law, in proceedings under this Act either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any time, but shall not be compellable to give such evidence if it would show or tend to show that a child born to the wife during the marriage was illegitimate" (Matrimonial Causes Act, Cap M7, Laws of the Federation 2004). Other provisions include joining of adulterers and claims for damages etc.

This has led to struggles for extension of its privileges to several other relationships. This privileging is quite in order if the institution is under the auspices of organisations that have the power not only to privilege one set of people over others but is not run with taxpayer's funds nor run in trust for the whole of society. That the state's intervention in marriage is based on securing order is not sustainable because that is the overall function of the state even for singles.

Lord Millet in the case of *Ghaidan* v. *Godin-Mendoza* (2004: 557, 591) makes a noteworthy observation:

> There is, indeed a paradox at the heart of modern society. For centuries the civil and canon law, the common law of Europe as it has been called, did not require any form of religious or secular ceremony to constitute a marriage. Persons who openly set up home together and lived together as man and wife were presumed to be married; and if they had consummated the marriage they were married; marriage was by habit and repute. The combined effect of the Council of Trent and the Marriage Acts put an end to all that. But there is nothing new in treating men and women who live openly together as husband and wife as if they were married; it is a reversion to an older tradition.

It means that even the English did not find marriage in its present form. It is still the habit today that the woman in cohabiting arrangement is derogatorily referred to as "common law wife." Love was the premise for men and women being together. There is no historical data indicating that the era was a chaos. In Nigeria, marriage has always been accompanied by gestures and ceremonies. Uzodike states that marriage is meant to be for procreation

under Nigerian customary laws (Rahmatian 1996: 292). But if this were the case, there would be nothing like "woman to woman" marriages. Although viewed on the surface, this institution appears to aid only succession, this is not quite the case. The ceremony is done usually where the wife in issue is invaluable. Thus, it is the love between the initial parties to the marriage that necessitates the initiation of the marriage ceremony.

The point being made here is that even in traditional Nigerian societies romantic love and affection played a significant part in marriages. At this time, there were women who for one reason or the other were single. Being a single woman, in many parts of Nigeria was not abominable even before colonisation.

The definition, content, and incidents of marriage on earth cannot be left to the dictatorship of alien beings, for if that were the case, it would not need a seer to discern that the institution which will evolve will end up as a crash site for the vessels of the invaders. This is well captured by Borten (2002: 1128):

> Reproductive technology, evolving notions of personal privacy, and perhaps the recognition that the law cannot effectively control sexual activity, have combined to make the case for marriage as regulation of sex less compelling. The legitimate concern with family stability remains, but there are better predictors of stability than the fact that a sexual relationship exists between the parties: Cohabitation, joint ownership of property, and the joint custody of children are all factors that indicate the social desirability of, and a good prognosis for, stability. Yet sex remains the central "term" of the marriage relation to this day according to the letter of the law and the assumptions of those hoping to broaden it to include same-sex relationships. In the absence of a practical reason for maintaining a sex-based conception of marriage, irresolvable conflicts over sexual morality dominate the debate and distract us from an examination of what it is we realistically expect civil marriage to do for society. The banality of *M. T.* v *J. T.*'s analysis, by casting a harsh light on the sexual basis for traditional marriage, can perhaps point us in a new direction, towards a redefinition of marriage and family that is not only more inclusive, but which even better fosters the stability, responsibility, and commitment that we have always relied on family law to promote.

Aguda suggests that the scope of the state's involvement in marriage should be limited to recording (1971: 123). To this end, he recommends that all marriages, customary, Islamic, and statutory should engage compulsory registration. This suggestion must be taken to mean that the state's duty is to provide notice to other persons. In his view, the question of advantages and responsibilities should be left to the parties, their families, and religious affiliations.

5 The Relevance of the Doctrine of Illegitimacy in Contemporary Nigeria

In an inaugural lecture titled "Trends of Human Rights Campaign in Family Law" a strong call was made for many positions, one was for retention of the doctrine of illegitimacy in Nigerian jurisprudence.[18] The lecture stated that abolishing the status of illegitimacy, specifically the common law brand, "will undermine the institution of marriage and its role in our social life and structure" (Uzodike 2011: 51, 26–30). The lecture also stated that illegitimacy should be retained to punish the "parents of an illegitimate child" for their misdeeds (51, 26–30). According to the lecturer, "although Ige JCA held in *Salubi* v. *Nwariaku* that section 42 (2) of the Constitution of the Federal Republic of Nigeria abolished the status of illegitimacy, the writer's position is that the language of the constitution is clear enough to show that section 42 (2) is not concerned with the abolition of the status of illegitimacy but is out to ensure that illegitimate persons shall not suffer any disability or deprivation merely because they were born illegitimate. However, until the Nigerian Supreme Court rules on the matter, it remains inconclusive especially with the differing opinions in the Court of Appeal (Uzodike 2011: 29).[19]

As Silberman states, "ideas have consequences … even those that may be thought by some to be silly and those that seem put forward merely for their shock value. Remember ideas have consequences" (Atsenuwa 2013: 1, fn. 1). Thus, if a common law position of the mid ages that has been attacked as barbaric and brutal (Van Doren 1916), a shame (Henaghan 2008), and reformed both by its patriarchal judiciary and legislation as well as regional and international instrument is being canvassed as law of modern Nigeria, it must be taken to intend to shock, and as ideas do have consequences, this one requires repudiation.

First of all, the Nigerian Supreme Court had adjudicated this case which is reported as *Re P* (*Adoption Unmarried Couple*) 2003 – 7 NWLR (Pt. 819)

18 Uzodike takes the position that "adoption is strictly to provide childless couples who craved to have children with children and not really to find homes for unwanted and orphaned children" (2011: 22–25). However, see *Re P* (*Adoption Unmarried Couple*) 2008. Women's inheritance rights should be protected by human rights standards and not the law as it is or as it is under customary law (Uzodike 2011: 35–45, 52 §§ 2, 3).

19 Section 42 (2) of the Constitution of the Federal Republic of Nigeria states that "no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth" (Cap. C23, Laws of the Federation, 2004).

426. Secondly, the lead judgement to which all the other judges concurred at the Court of Appeal was by Akintan JCA, not Ige JCA who merely added a few remarks to the lead judgement. The decision at the Court of Appeal was unanimous and to the same effect (1997) 5 NWLR (part 505) 442, 477). On appeal to the Supreme Court, the matter of *Salubi* v. *Nwariaku* was disposed off in these words by Ayoola JSC with whose judgment the rest of the court concurred:

> Having regard to the view I hold that the relief properly granted in the case should be confined to the relief sought, it is not expedient to deal with the other issues in the appeal which relate to matters beyond and outside the relief claimed in the case. It suffices to hold that the Court below was right in holding that the trial court had jurisdiction to entertain the claim before it and that the two issues born out wedlock are entitled in equal shares with the two other issues of the marriage of the deceased and the widow (*Salubi* v. *Nwariaku* 2003: 426, 456).

From the foregoing, the Supreme Court resolved the issues on non discriminatory principles and it is clear from case law that this is the trend.

After *Salubi* v. *Nwariaku* there was *Muojekwu* v. *Ejikeme* 403. Here Fabiyi, JCA who delivered the lead judgement to which all the other justices of the Court of Appeal concurred said, "It must be pointed out that the fact that the plaintiff/appellants were born out of wedlock is immaterial … this must be so since the child must belong to a family and should not be rendered homeless for a situation he did not create" (2000: 403, 425 f.).

This was also the case with the celebrated judgment of Niki Tobi JSC in *Mojekwu* v. *Mojekwu*, affirmed substantially by the Supreme Court. The case was affirmed in relation to the questions of circumstances of birth, that is, of the two female children of the deceased (*Mojekwu* v. *Mojekwu* 1997: 283; *Mojekwi* v. *Iwuchukwu* 2004: 196). More recently the Court of Appeal reiterated that the effect of section 42 and Article 18 (3) of the "African Charter on Human and Peoples' Rights" is freedom from discrimination (*Nwosu* v. *Nwosu* 2012: 1, 27).[20]

All these cases were decided to the same effect, namely, that children are to be treated equally, unless there are circumstances under the law which makes this impossible, such as the provisions of a valid Will or Trust. One other issue arising from the inaugural statement is the question of "the misdeed of parents." The statement did not qualify which of the parents was being indicted, whether both or just the mother. Since elsewhere, Uzodike makes the case although in all summation, it must refer to the mother.[21] Thus it falls to be ascertained whether if a woman as she is entitled to under Nigerian laws, elects to adopt a child whose parents did not marry themselves this woman's conduct too, will qualify as misdeed. Secondly, if a woman who is not married chooses to have a child through the in vitro fertilisation method or surrogacy, this too falls to be categorised as misdeed for which the children must then bear a tag of illegitimate or born out of wedlock. In addition, would the "woman to woman" marriage, regarded by Nigerian judiciary as "otiose," "indecent," "repugnant to equity and good conscience" but approved by the lecture, be regarded as valid?[22] It is also not clear how and on whose authority the punishment is to proceed, as there is no offence in the Criminal Code Act or any other national legislation in the country prescribing an offence or punishment for having children under these circumstances.

The second arm of the statement will be dismissed with three points. One, section 42 (2) usually appears in human rights instruments, but in the Nigerian case it appears as a constitutional provision which indicates its nature. The aspiration of the Nigerian Constitution in chapter 2 is equality which was consolidated by section 42 (2). As a constitutional provision, its interpretation is not literal but purposive in line with the intention of the legislature and the peculiar local circumstances surrounding its enactment (*Minister of Homes* v. *Fisher* 1980). Secondly, the peculiar background to the enactment of the subsection as published was targeted specifically to extending equal rights to children in a federation characterised by diversity.[23] Thirdly, Nigeria is

20 Article 18 (3) enjoins state parties to remove discrimination against women and children.

21 This is because elsewhere the author had made a case that barrenness should be a ground for divorce to allow a man express his vital role (Rahmatian 1996).

22 The concept of "woman to woman" marriage does not equate with same-sex marriages as currently understood. This form of marriage is one where a woman who is incapable of bearing issues marries another woman to do so on her behalf. There are several variants ranging from son preference to a desire by a woman to become male. Nigerian courts have consistently rejected this phenomenon on the basis of discrimination.

23 This enactment followed a debate by the Constitutional Drafting Committee on how best to make children equal and assure their dignity in concession to those who thought that inappropriate wordings might convey the wrong notions and that the Constitution was promoting promiscuity (see *Reports of the Constitution…* Vol. 1 p. xvii in Nwogugu 1990: 308–311). Thus, it was reported that the debate followed the proposal on these terms, "there is no doubt that all of us have had no choice, nor were we given an option, as to who would be our parents before we were born. If we were given an option, I am sure that there is none of us who would prefer to

a pro-life nation. Abortion is a crime and many laws are in place to protect women in their role as mothers (Umar 2011).

The approach to legislating on the matter is not free from difficulties. It is more so in interpretation and drafting as care must be taken not to convey the wrong impressions to people which can bring disorder into settled family environments, but invariably the underlining intent is clear and the only practicable thing is to do justice. For this reason, academic exercise in this area must be done with a serious sense of responsibility. That the due care approach adopted by the Supreme Court of Nigeria in this area is the correct approach is borne out by the fact that this is the same approach adopted both at the drafting of the United Nations Convention on the Right of the Child (1989) and by other regional instruments (Van Bueren 1994: 40–43). It is, however, easily ascertainable that the Supreme Court of Nigeria, without resorting to interpretation of the subsection, will always do justice with zero tolerance for discrimination against children, howsoever conjured on account of circumstances of birth.

The position of the author is based on the perception that marriage alone legitimises sex. This is clear from the fact that the article adopts the custom of "woman to woman" marriage but closes up marriage for same-sex. The custom not only humiliates a woman but denies her the chance of meaningful intimate marriage relations. The article also reveals an inadequate appreciation of the local circumstances surrounding birth out of wedlock in Nigeria and the nature, role, and evolution of illegitimacy even in English jurisprudence.

6 Illegitimacy at Common Law and in Nigeria

Legitimacy in English law as its antithesis illegitimacy has clear-cut principles with specific rules and guidelines on its application and operation. A person will be termed illegitimate in that jurisdiction if he is born in wedlock, but there is doubt as to paternity or he is born out of wedlock. In the first case, the husband could disavow paternity and a third party through specific processes acknowledge paternity. In the latter case, a person could be legitimated through specific processes such as the subsequent marriage of his parents. It would appear that nowadays the main focus of the English law is with respect to where a child is born within marriage and paternity is in doubt (Eekelaar 1980: 42).

Illegitimacy does not occur under these circumstances in Nigerian jurisprudence. All over Nigeria the presumption of paternity holds sway over and is reinforced statutorily by the MCA. In many parts of Nigeria, with respect to the second case, there was never an illegitimate birth in the first place and conceptually the subsequent marriage of the parents does not change the matter. In the eastern parts of Nigeria, the child's paternity relays back to the grandfather. Amongst the people of the western parts of Nigeria, paternal acknowledgment is enough and this is mainly by reputation or symbolic gestures. Illegitimacy would occur in these circumstances only when a father is unknown. This would be extremely rare in a modern country as Nigeria with considerable enlightened social and medical ethos. There is also no provision for illegitimacy either in the MA or MCA. Any claims to this will only be by implication of monogamous marriage which the MCA envisages (Onuoha 2008: 230).

Eekelaar notes that legitimacy in English law is a question of status, what it holds out for the person who is legitimate and the one who is not (1980: 43). Concerning the one who is illegitimate, there are different inheritance rights than for a legitimate person. In case of inheritance the illegitimate person is treated as if he had no grandparents or siblings and so on. He cannot acquire U.K. citizenship by descent, whereas the legitimate person can acquire it from his father. If he is a child, the maintenance on his behalf can be sought only by his mother against the father. For a father the situation appears to be near universal, he has no rights towards the child and the mother. The restrictions as regards a father since then have received favourable attention in the English law, and it must be said correctly so. Many of the common law positions in English law, including inheritance rights, have been reversed by legislation.

These implications will be examined sequentially for Nigeria. Prior to and after independence, succession rights of a child born out of marriage are akin to Will making. If the father acknowledges him or her, then the circumstances of birth are irrelevant.[24]

Nigerian citizenship is available by section 25 of the Constitution of the Federal Republic of Nigeria to persons by birth once any of the parents is a citizen of Nigeria. Regarding maintenance, parents maintain children at will since there is no manda-

be borne by wretched parents, to be born of a slave or even to be borne by prostitutes. We would prefer to be borne by people who are legally married … This amendment is saying that on no account should a person be discriminated against merely by reason of circumstance of his birth" (ibid. 308, 311).

24 Kasunmu (1964); Itua (2012); *Ors* v. *Younan* (1961) *Adeyemi* v. *Bamidele* (1968).

tory law to do so. Traditionally, this falls on both parents married or unmarried. More than, e.g., section 36 of the MA, the Legitimacy Ordinance of 1929, which encapsulated the English illegitimacy in Nigerian Legal Framework, is conspicuously absent in the current Laws of the Federation.

A father in the Nigerian case would usually be searched out by a child even if he denied paternity. Such a child often becomes the bread-winner in many of such families (Onuoha 2008: 247). Thus, one thing that is common to both the Nigerian and English position is tribute to motherhood whereas "in stark contrast to the negative view of the unmarried fathers, the unmarried mother is consistently portrayed as an inherently worthy parent however the child was conceived" (Harris-Short and Miles 2011: 677).

Illegitimacy as is known under the common law is unknown to customary law and since the end of the colonial administration is unknown to Nigerian law. In *Lawal Ors.* v. *Younan & Sons* (1961), delivering the judgment of the Nigerian Supreme Court it is stated that "it is clear legitimacy in England is a different concept to legitimacy in Nigeria." This was referred to with approval in *Adeyemi* v. *Bamidele* (1968: 37) where the Supreme Court once again declared: "The status of legitimacy (or its antithesis that of illegitimacy) may have different implications according to the system of law to which it is referred and it is hardly appropriate in the context purely and solely of Yoruba customary law to describe a person as an illegitimate child of the father since even if he was born out of wedlock he would be legitimate if his paternity is acknowledged by the putative father." Communality tended to operate towards inclusion rather than exclusion, particularly as the general African view is that children are a blessing and greater than wealth. Nigerian customary law thus contains much more about human rights than most Western laws have on the subject. For this reason alone the common law illegitimacy would never have taken sway in customary parlance. It is, therefore, not surprising that recently a popular Nigerian columnist advised women that when suitors are not forthcoming and their biological clock is fast and children arrive ancillary issues should be left to providence (Egbemode 2012a).

At common law, illegitimacy operated to deny a child name and identity. Not surprisingly has been described as brutal, barbaric, and a shame (Van Doren 1916; Heneghan 2008). As far away as 1916, the *Columbian Law Review* editor states:

> … all these things are a tacit acknowledgement of the inexpediency and injustice of disposing of the [child] with the summary brutality of the common law. It does not help to discourage illicit intercourse to allow the father to escape all responsibility for the maintenance and education of his illegitimate offspring. The holy institution of matrimony is not exalted, nor is the public weal advanced, by the creation of an anomalous pauper class, the issue of temporary unions where passion may be given full sway because the cares of paternity and the sharing of name and heritage do not accompany it. Only by holding parents strictly to account can promiscuous propagation be restrained by law (Van Doren 1916: 700).[25]

In many Western societies, the doctrine of illegitimacy was based on fault and arose from canonical doctrines and the need to protect succession rights in a monogamous culture. It also envisages legitimisation of sexual relations through marriage (Borten 2002: 1128; Eekelaar 2007: 431). The doctrine was ultimately rejected because, although the doctrine appeared to target public morality and sanctity of marriage, it was rooted in gender bias and its effect on children seen as unjust and unconstructive (*Occleston* v. *Fullalove* 1873–1874). "As a society," Henaghan writes, "we have removed the shame of illegitimacy for newborn children" (2008: 165, 181). Baroness Hale L. J. in *Re R.* (2001) noted that it was a matter of regret that a case had been reported using the term "illegitimate" in its title.[26]

7 Interaction of Customs, English Law, and the Child Born out of Marriage

Traditionally, the expressions and outcomes of patriarchy in the Nigerian setting have always been different from male domination in Western societies. One of the outcomes of the interaction of customary and English law in Nigeria is the resistance of customary law which has seen the latter static. One of the attributes of customary law is polygamy and it has been demonstrated that legislation has had no positive effect nor has it changed the tenor at all. Rather, it has brought about a worse scenario, where women are seriously short-changed. Adultery remains a right of the man despite colonial structures and current legislations (Aguda 1971: 99, 120 f.; Kasunmu 1971: 135).

25 Traditional societies in Nigeria also had such practices aimed at cushioning patriarchy (Akpamgbo 1977).

26 The state of the law in this area in England is rather confusing. Despite all the literature available that the question of legitimation is now a matter for the monarchy, honours, and titles, texts are still replete with the status of illegitimacy (see, for instance, Kerridge 2009: 18–20, 270–272 ff.; and Fox and Fletcher 2012).

Invariably, the outcome is that illegitimacy in Nigeria had different connotations from that of the British colonisers. It is rarely deployed and if it is, it was a direct means of sanctioning a woman's adultery. Regrettably, even this in fact turns out to be a more direct punishment for the child (*Mojekwu* v. *Mojekwu* 1997, 2004). It is therefore not surprising that some Nigerian societies took the reverse position, directing the sanction for adultery at avoiding illegitimacy rather than implicating it by extreme powerful presumptions of paternity in favour of a husband (Kasunmu 1964; see also Quansah 1991).[27] In many customs until the dowry is returned any child born in the interval, whether in another or out of marriage, takes paternity from the extant marriage.[28] This is preserved by section 84 of the MCA. In the English law this is now a rebuttable presumption.

In the cases before independence, Nigerian courts refused to uphold such customs declaring them repugnant, but in post-independence cases the customs were sometimes upheld. In *Mariyama* v. *Sadiku Ejo* (1961), a pre-independence case, Holden CJ took the stance that "the native law and custom … would have this girl taken for life from her natural parents, the appellant and her present husband, and given to a total stranger. We feel that to make such an order would be contrary to natural justice and good conscience, and we are therefore not prepared to do so" (1961: 83).

On the other hand, in *Mayaki* v. *Nda* (1993), a post-independence case, the Court applied such a custom to grant custody of a child who apparently could not have been the natural issue to a previous husband. While this position is supported by academics such as Quansah (1991: 347), others take the position of pre-independence judges (Yakubu 1995). In similar cases, under the "woman to woman" marriage customs, all the courts have taken the pre-independence position.[29]

In *Ikechiuku* v. *Egbuson* (1977: LPELR – SC 183/1975; 1977: ALL N. L. R. 194; 1977: 6 S. C. 1) the Nigerian Supreme Court disposed of a case of excommunication of the founder of a church on the grounds of the provision of the church constitution. In this case, the founder of a Christian church had effectively contracted a monogamous marriage according to the precepts of the church constitution, although not under the Act he subsequently married six more wives. The church constitution had also provided that members who were old and impecunious could cohabit with widows in concubinage. An attempt by some other members to excommunicate the founder of the church for going polygamous failed. The Supreme Court ruled that the constitution of a church that accommodated concubinage could not be said to be one founded on monogamy. The rationale of that judgement is to be found in the Supreme Court's declaration that the church's constitution is a valid legal document, binding members. Would it then be the case, that if children were to be born to the authorised concubines, that they would be illegitimate? Such matters, which arise regularly, certainly involve complex questions of law and necessitates a comprehensive review of marriage laws in Nigeria with a broad-based term of reference as well as broad participation of segments of society, not just lawyers.

The Tanzanian experience provides an analogous platform to the interaction of customs and colonial heritage and their effect on marriage and children which culminated in its Law of Marriage Act 1971 (Rahmatian 1996; Oyebanji 1981). The government paper prepared prior to the enactment of the Tanzanian law recognised that the interaction of religion and colonial legal heritage with local marriage institutions created a tension with negative impact, not just on adults but also on children. It states that "every human being has a right to dignity and he cannot be deprived of his right merely because his parents could not get lawfully married … For this reason, the law will permit conversion of a monogamous marriage into a polygamous marriage provided, of course, the wife has voluntarily and freely agreed to such conversion" (Oyebanji 1981: 160).

South Africa adopts a similar position as Tanzania recognising polygyny and giving it effective institutional propping (Pienaar 2003). Pienaar notes that this was not an approval of polygyny but that "of extreme importance to the legislature was the challenge to formalise this practice in such a way as to achieve the best protection for all partners involved" (2003: 265). The South African law thus focuses on protection of the parties to a relationship which inevitably is a good strategy as it is bound to rub off not just on the parties but on children and the overall socio-economic strata of society.

Some Nigerians have canvassed for the adoption of a similar position as exists in Tanzania and South Africa in order to resolve the current tension evident in the socio-legal marriage structure of the

27 Paternity is presumed where a man and woman are lawfully married, and in many parts of eastern Nigeria children born by a woman remain that of the husband until dowry is returned. See section 84 of the MCA 2004. In the English law although such presumptions were in place they are now rebuttable with advancement in technology (*Re H. and A. [Children]* 2002).

28 *Edet* v. *Essien* (1932); *Mariyama* v. *Sadiku Ejo* (1961); *Mayaki* v. *Nda* (1993: 313); see also Agbede (1991: 57–70).

29 Akpamgbo (1977); Uzodike (1991); for further reading see Greene (1998) and Oboler (1980).

country (Ibidapo-Obe 1981; Aguda 1971). Just as liberty and freedom along with learning from mistakes bring about growth and true realisation of the human essence, so marriage in a libertarian society must find and derive its own sanctity in itself, because it proves to be good.[30] Thus, married persons must prove that marriage is good by being committed to it, thereby showing that it has merited its privileging from society. Where marriages are based on diabolical agenda, the state cannot bring about magical repairs (Ibelema 2013: 16). It is the statutory wife who must initiate the action to divorce her from her adulterous or bigamous husband and bring about the scrutiny of the law. This duty cannot be shifted to the state or other innocent persons.

8 Conclusion

English and Western jurisdictions understand monogamy and bigamy and are perhaps comfortable with its concept and practice. In Nigeria, the interaction of customary and colonial heritages has made the nexus of the state to bigamy quite unclear. It appears that this is the difficulty with enforcing bigamy in Nigeria. Typically, a Nigerian man considers it incomprehensible to stay committed to one woman for a lifetime. The Nigerian wife on her part finds no comfort in turning her "social and financial security" to the state for incarceration. This dilemma brings monogamy to a halt and also forms the basis of the inaction of the legislature and impotence of the judiciary.

The MCA by section 32 makes damages available to a spouse against an adulterer. There is evidently more logic in extending this to bigamy as a breach of the terms of the contract of marriage. Such a breach may be termed deceit, actionable either in contract or tort and exemplary damage availing the claimant. A party, other than the spouse who has been affected by the deceit, could also make claims in damages. This is likely to be a more workable strategy to stemming bigamy and the tension from the interaction of both systems of law in Nigeria. This will encourage litigation by women.

Statutory backing of monogamy in southern Nigeria has not given it social legitimacy. Religion (customary or Christian), rather than the law appear to have had more impact. As Boele-Woelki states, "in venturing comparative family law narrow-mindedness and prejudice are to be avoided. Instead openness, neutrality, curiosity and flexibility are required" (2008: 24).

In Nigeria, the question of children born out of marriage is not rooted in illicit sex but for the woman, in survival instincts and the man his interests, protected by steep patriarchy. Resolution cannot be vide a prejudiced framework nor can it be easy. While reform of some aspects of marriage laws, customary and statutory, may go a long way, it cannot go long enough. Other variables must come into play of which the most important is by far the strengthening of the woman's self-worth, her capacity for autonomous expressions, and self-actualisation. At the moment the Constitution, the courts, regional and international instruments aim at forging equal protection for children, and Nigeria has been a responsible partner in these endeavours. Nigeria should take a bold step towards reinforcing this with responsible parenting that puts paternal accountability on the front burner.

To shift the consequences of adult choices to children is unjust. If an adult were to be sentenced for one minute for another's offence, it would be alarming and would attract global outrage. Under the doctrine of illegitimacy a person is sentenced for a lifetime. The injustice and illogicality of the doctrine becomes clearer in that while this individual is excluded from self-actualisation, should he marry and have children he (contrary to all legal notions of transfer that a person cannot give that which he does not have) confers legitimacy on his own children. Anyone of these children in turn can campaign for illegitimacy as a tool for sanctity of marriage.

An arguable premise for the retention of the doctrine can only be sustained in a coercive framework of compulsory marriage without rights of preferences. Rather than strengthen marriage this weak strategy has more potential for weakening it with its inherent propensities in erosion of honesty and altruism. In the face of the outcomes of marriages it is not difficult to see that there is need for a conceptual and practical restructuring of marriage in Nigeria. The legislature and judiciary have serious roles to play.

The conclusions reached also the query whether without some empirical enquiries the law can serve as an effective tool in the resolution of matters arising from the interaction of local customs and colonial heritage and their impact on women and children. Thus, is polygyny an intrinsic and integral attribute of the Nigerian man or a mere negative expression of masculinity that is reinforced by disempowerment of women? What is the attitude of men of African descent who have made a home in other mainly monogamous cultures? It is in the

30 Growth is an evolutionary process in human character and elsewhere. Thus, in the western parts of Nigeria where polygamy is a right for the Moslem, one finds that many men, albeit educated, opt for monogamy.

face of these doubts that the following suggestions are made as interim measures. Is illegitimacy a contractual, deterrence, or rights discourse?

Suggestions or Way Forward

1. Gender studies which have only recently been introduced in Nigeria should be boosted by the government. Early sex education ultimately places emphasises on the worth of the individual and his or her body.
2. State regulation of marriage should focus on the contractual nature of marriage and perfection of the intentions of the parties. It should leave out issues of presumptions and divorce to the parties or to their religious affiliations to agree on prior to or in marriage. The state as in other areas of the law can adjudicate quantum of settlements where relevant. Section 84 of the MCA should be repealed.
3. Accountability and responsible parenting should be the paramount consideration in response to issues relating to children.
4. Customary law marriages should be strengthened by efficient and easily accessible registration structures. The structure should be contextual and must be such that men, who usually prefer this variant (not necessarily for reasons of polygamy but rather for its flexibility), are provided with the avenue for demonstrating commitment to the success of the marriage as well as the well-being of the wife or wives. The property and succession rights of wives in such a structure must be clearly spelt out. A clear process of taking a second wife as well as contracting out of or converting to polygyny at the first stage must also be in place. This may be a bridge from chaos to monogamy in an evolutionary manner.
5. An effective and efficient route for exit where the union is not satisfactory must be contemplated in any review. A realistic divorce structure must provide for effective and equitable distribution of property acquired by the parties in the course of marriage. Settlement and maintenance of the wife ought to be made for the mere fact of the union even where there is no joint matrimonial property.
6. Nigerians rarely prepare for death which is why many husbands and fathers die intestate. Estate planning, Wills and Trusts, usually a preserve of the extremely rich, should be efficient and contemplate middle- and lower-class individuals. This will shift emphasis from intestate succession (statutory and customary).
7. Bigamy should be contextualised and made to work for the Nigerian as a compensable civil breach rather than a crime.
8. Breach of promise of marriage should be developed to create a balance between its common law variant and contextual applicability in Nigeria.

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