

# **The Hermeneutics<sup>1</sup> of Equality of Spouses within Marriage: A Tall Order for Nigerian Women**

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## **1. Introduction**

Ingrained customary practices and accepted mores, unchallenged for decades, have underpinned the subordinate position of Nigerian women in all aspects of their lives. This manifests itself in the extreme inequality of treatment of spouses in marriage. The hierarchical placing of women in the lowest echelon of decision-making and standing within the sphere of consortium rights, means that the latter are violated on a daily basis without provoking public or governmental response. This has tended to colour the judicial stand of most Nigerian judges when applications relating to Matrimonial Causes are brought before them for determination, and ultimately to provoke disenchantment with the institution of matrimony.

Violations of the basic fundamental rights of most married women are evident, arising from the power imbalance in spousal relationship, with husbands reliant on a central idea of ownership of their spouses.

This paper intends to turn a legal searchlight on the reasons for the inequality in matrimony in both Act and Customary law marriages, the dangers of this inequality and the factors escalating it. Intervention strategies will be advanced, reflective of international paradigms for a more equitable family dynamic.

## **2. Defining Marriage**

Marriage is the legal union of a couple as husband and wife. In *Black's Law Dictionary*, Bryan A. Garner identifies the essential elements of a valid marriage as (1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.

He then deals with the consequences of marriage in the law of torts, criminal law, evidence, debtor-creditor relations, property and contract. He cites Joseph Madden, who argued that:

It has frequently been said by courts and even legislature that marriage is a civil contract. But to conclude from these statements that marriage . . . has all or even many of the incidents of an ordinary private contract, would be a grave error. In fact, these statements to the effect that marriage is a civil contract, will be found, upon examination, to have been used only for the purpose of expressing the idea that marriage in the American states, is a civil, and not a religious institution, or that [at least] in some states mutual consent alone, without formal celebration is sufficient to constitute a valid marriage known as a common law marriage, or that,

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<sup>1</sup> Hermeneutics: The science of interpretation of texts, originally with respect to the scriptures, but its techniques have been extended to fields such as critical legal studies.

as is true in all states, the mutual consent of the parties is essential, even in the case of a ceremonial marriage.<sup>2</sup>

A customary law marriage on the other hand, may be preceded by the practice of betrothal, still maintaining its elements of consent, but in this case that of the parents, which is *sine-qua-non*. The age of marriage is not specified, as marriages can be concluded for children.

A party to an already existing marriage does not possess the capacity to contract a fresh marriage according to statutory limitations, but this is allowed to men under the polygamous system, which enables a man to be married to more than one woman provided he has the means to maintain them. Other forms of marriages include:

(a) **Sororate** marriage occurs when, on the death of a wife, the widower is presented with a female relation of the deceased wife in order to continue the marriage;

(b) **Woman to woman** marriage must be differentiated from lesbian marriage in that no direct sexual relationship is involved. This type of marriage is mostly seen in situations where an elderly woman unable to bear children funds a bride price for a new wife, contracting a marriage for the benefit of the husband, so that he may have children through the new wife.

Sometimes a wealthy unmarried woman will pay the bride price for another woman, creating, *prima facie*, a marriage between the two, on the understanding that a member of her family (or a paramour) will be responsible for impregnating the bride, but the product of the union will belong to the woman who has assumed the position of husband.

(c) **Widow inheritance**. On the demise of a man, his brother or other close relatives may decide to inherit his widow as a wife. This does not connote automatic acquisition of the widow: she has a right to choose whether to remarry into her late husband's family or to stay unmarried, in which case, she stays with her late husband's family for her children, or opts to go back to her father's house.

### 3.0 Highlights of Some Unequal Treatment in Nigeria

#### 3.1 Consortium and the Invisible Stratification of Rights/Roles/ Duties

According to writers such as Bromley,<sup>3</sup> the concept of consortium involves rights to the benefits that one person, especially a spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support and between spouses, cohabitation and sexual relationships. A husband, could for example, bring an action against a person who had injured his wife, whereby he lost the help or companionship of his wife.

Consortium has the following elements:

(a) **Change of name**: Customary for the wife, although there is no legal obligation to do so. If she chooses to take her husband's name, she may retain it even after divorce.

(b) **Duty to cohabit**: Expected unless it can be shown that circumstances have made it difficult.

<sup>2</sup> Joseph W. Madden, *Handbook of the Law of Persons and Domestic Relations*, as cited by Bryan A. Garner, *Op. Cit.*

<sup>3</sup> Bromley, *Family*, London: Butterworth, 1966.

<sup>4</sup> (1901) A.C. 450.

(c) **Sexual intercourse:** Parties owe this as a duty to each other. Excessive demand or repeated denial could be grounds for dissolution of the marriage.

(d) **Mutual Protection / Defence:** This is intended to be reciprocal. Spouses owe each other mutual protection/defence and such protection is guaranteed by the Criminal Code Act<sup>4</sup>.

Major inequalities in the enjoyment of consortium arise in relation to mutual defence and protection. Records show most instances of loss of life or injury in women result from spousal violence. Deborah Odeyemi, aged 40, and married to Superintendent Adeyemi for 22 years, was sprayed with acid by her husband.<sup>5</sup> Veronica Ononye<sup>6</sup> was killed by her husband, a Superintendent of Police, who escaped from police custody and remains at liberty.

The many similar cases of killing and maiming cast doubt on the right of female spouses to be protected/ defended in life and limb. While their fundamental rights to life and human dignity, as enshrined in chapter IV of the 1999 Constitution of the Federal Republic of Nigeria, are clearly violated, the Police, even when called promptly, will refuse to put a stop to the situation, under the confused belief that the crime is sanctioned within marriage.

Another imbalance in marriage is the double standard of sexual behaviour, where the male is permitted to seek sexual satisfaction with many women, but the female is expected to remain a virgin until marriage, and then submit faithfully to her husband's male dominance. Despite the work of Freud, the proponent of psychoanalysis, in identifying sex as a basic instinct which must be enjoyed by both sexes,<sup>7</sup> discussion of sex in Nigeria is customarily tabooed as an unwarranted venturing into concupiscence so that a sexually unsatisfied wife cannot voice her problem to her husband. Many who dared to ask few questions have either been required to swear an oath of fidelity, or branded harlots and sent packing. But men, under most customary practices, have an unlimited degree of sexual jamboree, something nobody sees as absurd<sup>8</sup>.

### 3.2 Economic Differentiation in Status

The economy, particularly in the South-East of Nigeria, is directly linked to landed property. Unfortunately, women in this part of the country do not inherit landed property from their fathers or husbands. They are given land for use, but the power of alienating or dealing in this land is totally absent, and even its continued use for her agricultural purposes is subject to her good behaviour. Consequently, access to cash and credit is nil. Left with no landed property, battling with the little she makes as a petty trader, or a civil servant on an average income, or farming at subsistence level, a woman cannot be economically viable. She remains culturally bound to the private chores of rearing children and looking after a husband: the bride price paid makes her the husband's property<sup>9</sup>. Although section 43 of the Nigerian Constitution, 1999 states that every Nigerian citizen shall have right to acquire and own immovable property anywhere in the country, available statistics show that over 90 percent of registered lands and properties are registered in

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<sup>5</sup> Reported by *Violence Watch, Quarterly Newsletter of Project Alert*, UNIFEM, Dec. 1999, Vol. 1, Issue 3,5 and cited by Dr. Dame Carol Arinze-Umobi in *Domestic Violence Against Women: A Legal Anatomy*, Onitsha, Folmech Publishers, 2008, p.51.

<sup>6</sup> Ibid.

<sup>7</sup> See Derek Llewellyn-Jones, *Fundamentals of Obstetrics and Gynaecology*, Sydney New South Wales, Australia: Alden Press Oxford, 1980 p.892.

<sup>8</sup> Author's Interview with women from selected communities where only very few volunteered to furnish information, provided they remained anonymous.

<sup>9</sup> Lugard: *Political Memoranda*, p.92 as cited by Justice A. P. Anyebe (c), *Customary Law. The war without Army*, Enugu: Fourth Dimension Publishers, 1985, p.32.

men's names. In most parts of Nigeria, women have very limited or no property rights at all because of prevailing customary laws<sup>10</sup>.

Upon divorce, a court may rule on a woman's right to share in the family property in consideration of the settlement of property guaranteed by section 72 of Matrimonial Causes Act<sup>11</sup>. The court is expected make a settlement according to principles of equity and fairness. Because the man is deemed or presumed to be the owner of the family property, most Nigerian courts demand adequate contribution, evidenced through documents, before granting the woman a commensurate compensation: positive property adjustment is often denied her. In *Sodipe vs. Sodipe*<sup>12</sup>, *Egunjobi vs. Egunjobi*<sup>13</sup>, *Nwanya vs. Nwanya*<sup>14</sup> for instance, the Courts insisted on documentary proof of the wives' contributions before awarding them any part of the property. This demand for documentation is contrary to current practice which considers it unnatural for parties to assert ownership of property when a family is being formed, on the possibility that a day will come when he/she will be called upon to establish where title or ownership lies (see the case of *Wachtel v. Wachtel*).<sup>15</sup> This economic imbalance can be cured if courts treat spouses as equal partners by ordering fifty-fifty distribution.

Section 72 is, moreover, only available to those married under the Act. Women whose marriages are contracted under customary law have no recourse to this legal provision, as established in *Amadi vs. Nwosu*.<sup>16</sup> And even of those entitled, many do not pursue their rights in court, whether through ignorance, paucity of finance, or fear of antagonism from relatives, particularly in-laws.

The following contribute to this sharp differentiation of economic status between male and female spouses:<sup>17</sup>

- Women's economic dependence on men;
- Limited access to cash and credit;
- Discriminatory laws regarding inheritance, property rights, use of communal lands, and maintenance after divorce or widowhood;
- Limited access to employment in formal and informal sector;
- Limited access to education and training for women.

### 3.3 Attachment/Ownership of Children

In Nigeria, the wife and the children of a marriage, whether customary or under the Act, become members of the husband's family. When the marriage breaks down, complex sociological questions surface, and their solutions are a legal concern. In divorce, children under the age of six are usually left in the custody of their mother. The rule that mothers are entitled to the custody of their young children is expressed (by men) as a concession to women who are said (also by men) to find it emotionally difficult to part with their young ones. It is also said to be dictated by the

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<sup>10</sup> Anthony Hodges, *Children's and Women's Rights in Nigeria: A wake-up call*, Abuja: National Planning Commission, Abuja and UNICEF, 2001, p.180.

<sup>11</sup> Op. Cit.

<sup>12</sup> (1990) 5 NRN 98.

<sup>13</sup> (1976) Vol. 2 FNLR 78.

<sup>14</sup> (1978) 3 NWLR 699.

<sup>15</sup> (1973) Farm, 72, 93-94.

<sup>16</sup> *Amadi vs. Nwosu* (1989) 2 NWLR (Pt. 10) p.313.

<sup>17</sup> Julie Mertus, Nancy Flowers, Mallika Duth, *Local Action, Global Change*, Ohio, Northern University UNIFEM, 1999, p.100

emotional and other needs of young children. But in truth, the rule is designed to save husbands the nitty-gritty of bringing up the little brats they spawn until they are easier to manage<sup>18</sup>.

Once men discover that the children have become able to stand on their own feet, they surface to claim ownership and custody. These children are forcefully removed from their mothers, for whom they have developed strong attachment and affection, and annexed to strangers, suddenly announced as their fathers, while their hearts remain welded to their mothers<sup>19</sup>. This is an obvious imbalance in the matrimonial set-up: where is the equity, equality and justifiability for mother or children in this scenario?

### 3.4 Women and Religious Freedom

The Nigerian Constitution secures freedom of religious worship. Chapter IV, Sec. 38(1) provides that:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

Section 46(1) of the same constitution provides that:

Any person who alleges that any of the provisions of this chapter has been or is being or likely to be contravened in any state in relation to him may apply to High Court in that state for redress.

The question arises “Can a wife adopt a religion that is different from that of her husband and actually practice it without any opposition from the husband?” Many people find it unthinkable for a wife to adopt a different religion and a number of women attempting to do so have met with great resistance. Very few have had the boldness to challenge this violation of their rights in court, and yet the fundamental freedoms, including freedom of religion, guaranteed in Chapter 4 of our Constitution are for all Nigerians and not for husbands alone. A defining question would be whether the wife could forbid the husband from adopting a religion different from their original shared religion.

### 3.5 Spouses and Inheritance

Under most customary laws in Nigeria, with the very few exceptions of Abiriba, Ohafia and Afikpo, (matrilineal systems), widows of customary law marriages are denied any right of inheritance over the estate of their deceased husbands, especially if the man dies intestate. On the other hand, where a woman dies intestate, her estate is inherited by her husband.

The principle of primogeniture (inheritance and succession by the eldest son) governs the disposition of the estate. Where the man dies without any male issue, his estate will be inherited by his brother or a more distant relation even if the deceased had daughters. In *Ugboma vs. Ibeneme*<sup>20</sup> the court held that the female plaintiffs in a claim for a piece of land did not have *locus standi*, as daughters and wives do not inherit from their deceased fathers/husbands’ estate. In

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<sup>18</sup> S.N.C. Obi, *Human Rights at the Grassroots in Nigeria (with Special Reference to Women’s Rights)*, Awka, Nnamdi Azikiwe University, Awka, 2000, p.4.

<sup>19</sup> Ibid.

<sup>20</sup> (1967) ENLR 251.

*Nezianya vs. Okagbue*<sup>21</sup>, the Supreme Court of Nigeria held that: “The widow cannot inherit her deceased husband’s estate. However, she is entitled to live in her husband’s house and use his farm land if she decides not to marry ...” More recently, however, in *Mojekwu vs. Iwuchukwu*<sup>22</sup>, the Supreme Court, in upholding the decision of the Court of Appeal, maintained that daughters can inherit their deceased fathers’ estates, though this judgment was predicated on the principle of *lex situs* (the law of the place) and in this case, the *Mgbelekeke* family of Onitsha in Anambra State in Nigeria recognises kola tenancy and does not make reference to sexes.

An estate may have been developed by the collaborative and cooperative effort of both spouses, but once the man dies intestate, the wife is completely shut out, with even her capacity to continue living in the matrimonial home contested. The denial of inheritance rights to women, particularly those married under customary law, can be described as inhuman and barbarous. Inhuman treatment is defined by Justice Niki Tobi in *Uzoukwu vs. Ezeonu*<sup>23</sup> to mean, “barbarous, uncouth and cruel treatment, a treatment which has no human feelings on the part of the person inflicting the barbarity or cruelty,” while torture means inflicting anguish or excessive pain on a person.

According to Professor S.N.C. Obi<sup>24</sup> in his analysis of inheritance rights of spouses *inter se*, whatever circumstances motivated our forefathers to formulate this rule, it can no longer be justified in present-day Nigeria. To disinherit a woman totally from her husband’s estate is inappropriate to the current socio-economic setting. The eminent Professor of Law went on to hold the rule to be harsh, unconscionable, inhuman and deplorable. A woman who has lived and worked with a man as husband and wife should not be thrown into the dustbin of society merely because her husband has left for the great beyond. To do so, as we do in this country, is to deprive the widow in question of her basic human rights, a right to live in reasonable comfort: it subjects her to economic privation and consequently degrades her in social rank<sup>25</sup>.

### 3.6 Death of Spouses and Mourning Rites

The death of a spouse marks the end of that consortium which ideally incorporated love, affection, companionship, and indeed all those bundles of rights interwoven to distinguish a marital relationship from an ordinary relationship, but a widow is exposed to additional painful and degrading experiences. Her hair shaved down to the skin of her skull, not free to go to market to buy or sell, she is made to sit on a bare floor, stay in silence and dress in customary mourning attire. But the most painful assumption is usually that she killed her husband. To clear herself of this assumption, she is forced to drink the water used in bathing the corpse of her husband. Imasogie has reported that:<sup>26</sup>

among the Quas of big town and Akin Qua town of Cross River State in Nigeria, a tradition known as “Mbukpoisi” is still carried out on widows of traditional title holders and rulers known as Etuboms. When an Etubom (a traditional ruler) dies, his widow is confined to a corner of the house. Throughout the burial period, she is not

<sup>21</sup> (1963) 1 ALL NLR 352.

<sup>22</sup> (2004) 11 NWLR (pt. 883) 196.

<sup>23</sup> (1991) 6 NWLR (pt. 200) 708.

<sup>24</sup> S.N.C. Obi, *Op. Cit.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Chronicled by Dr. Mrs. M.O. Imasogie, “Intestate succession and Widowhood Rights under African Customary Law in Nigeria and South Africa”. *Nigerian Law Contemporary Issues*, Ed. Prof. M.O. Ogungbe, Benin: Igbinedion University, Okada, 2003.

allowed to go out, she does not take her bath, does not brush her mouth, does not look at a mirror, eats from a broken plate and sleeps on a dirty mat. Ironically, she is guarded by elderly women to make sure that she complies with all the rites. If the burial lasted six months, or even one year, she is expected to go through this during the period. At the end of the mourning period, she is taken to a stream to bath, her hair is cut and finally she is free.

What is the position of the *Etubom* who loses his wife? Immediately, a replacement of his deceased wife is sought so as to bring comfort and succour to the *Etubom* in this time of great sorrow. He must not be allowed to suffer too much. What an imbalance in treatment!

## 5. Conclusion and Recommendation

Imbalance of rights among couples creates an atmosphere of master-servant relationship, in which intimate terrorism is cemented by fear and draconian customary dictates. The obvious inequality is detrimental to the proper personal development of the woman.

Many factors creating this imbalance of power have been outlined above. The following recommendations are intended to counter those factors.

### 5.1 Recommendations

Nigeria must ratify international treaties, conventions and declarations and domesticate them to give them legality in line with the Section 12 of the Constitution.

Although Section 42 of the Constitution has outlawed discrimination on grounds of sex, all the negative aspects of matrimony noted are predicated on discrimination. There is need for Nigerian Courts, through the process of judicial activism, to deliver judgments that will promote the desired equality between spouses.

The Legislature should throw out all outmoded laws, customary laws, etc. and replace them with laws in line with international benchmarks.

The Executive must ensure that policies made are properly implemented and monitored. The Executive arm of the government, like the Police force, must accept jurisdiction on issues of crimes within families. Crimes committed within matrimony are not beyond the competence of the police who have a constitutional authority to maintain law and order, arrest criminals and prosecute **all** crimes before a court of competent jurisdiction.

Non-governmental organisations must be investigative in identifying rights' violations and denials, and publicising their findings in conspicuous areas of the media. They must be aggressive advocates against inequality.

Individuals involved must speak out. Charges must be pursued by women through the police and courts to finality and not dropped half-way.

The media must report violations conspicuously, not in obscure positions where people may not bother to look. Television must be sharp and to the point in exposing the dangers observed.

Traditional rulers and community gatekeepers must un-learn negative customary ideas and practices and be active in securing women's human rights, particularly with respect to equality between spouses. They must help reduce the excessive ill-treatment given to widows. Customs repugnant to natural justice, equity and good conscience, against public policy, and incompatible with the general dictates of accepted norms and mores should be discarded without delay.

All must work to end imbalances of rights in the marital arena and to realise the following provisions of the Universal Declaration of Human Rights (UDHR) 1948:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination (Article 7).

And:

men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution (Article 16(1)).

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