



MATRIMONIAL CONFLICTS AND CHOICE OF LAW SITUATIONS IN THE NIGERIAN LEGAL SYSTEM

Ritji Timothy Yilwatda Esq.^[2] Dauda Iliya Gusnung Esq.^[2]¹

Abstract

In this paper, Marriage is considered as the legal relationship between a husband and wife. It is a union between a man and a woman, excluding marriage between persons of the same gender. Marriage in Nigeria is basically governed by three laws namely, statutory law, customary law and Islamic law. The occasions are frequent when the courts in one country must take account of some rule of law that exists in another. This becomes pertinent when marriage-related issues arise between couples with diverse backgrounds; questions as to which legal systems and norms should be applied to the relationship naturally follow with various potentially applicable systems frequently conflicting with one another. The court will have to follow the conflict of law principles of choice of law to resolve such issue by applying the connecting factors. It is the finding of this paper that where different legal systems are run concurrently in a country there is bound to be conflicts and these conflicts can be resolve if the principle of choice of law is applied. It is the recommendation of this paper judges should be trained in the application of the choice of law rules in conflict of laws. In conclusion the principle of choice of law, is useful in resolving matrimonial conflicts situation within a legal system that has different personal laws in existence.

^[2]Lecturer II, Faculty of Law, Plateau State University, Bokoŕos **PHONE NO.:** 08060922047 **EMAIL:** rityilwada@plasu.edu.ng

^[2]Lecturer II, Faculty of Law, Plateau State University, Bokoŕos, **PHONE NO.:** 08060922047 **EMAIL:** degusnung@plasu.edu.ng

Introduction

Marriage is a universal concept recognised by all nations regardless of race, religion, region and or gender. However, different rules or principles, regulate the matrimonial institution in different jurisdictions, states or countries of the world. The rationale behind Conflict of Laws, is the existence in the world of a number of separate municipal systems of law—a number of separate legal units- that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily human relationships. The occasions are frequent when the courts in one country, must take account of some rule of law that exists in another. This becomes pertinent when marriage-related issues, arise between couples with diverse backgrounds; questions as to which legal systems and norms should be applied to the relationship naturally follow with various potentially applicable systems, frequently conflicting with one another.

Nigeria as a state, practice the tripartite legal system which in turn, regulate the matrimonial institution in Nigeria and aid in identifying the applicable law in respect of each marriage. The tripartite legal systems in Nigeria in respect to marriage, are as follows:

1. The Statutory Law (govern by the Matrimonial Causes Act¹).
2. The Customary law and;
3. The Islamic law.

The standard for choice of law rules for adjudicating on issues relating to marriage, represent a balance between the various public policies of the laws involve; status and capacity are governed by the personal laws of the parties.

Marriage In Nigeria

Marriage, by universal definition, is the legal relationship between a husband and wife. It is a union between a man and a woman, at least so we thought until recently¹. Marriage in Nigeria, is basically govern by three laws namely, statutory law, customary law and Islamic law.² The Marriage Act, which is a Federal Legislation, makes provisions for the celebration of marriages in Nigeria. It is clear that the Act is designed only for the celebration of marriage between a man and a woman, and the marriage has to be a monogamous one³. A monogamous marriage has been defined in the Interpretation Act⁴ as: “A marriage which is recognized by the law of the place where

¹ Adesanya B. ‘Marriage, Divorce and Succession’ being a paper presented at a seminar to make the 10th anniversary of the Diocese of Lagos West Anglican Communion held at the archbishop veining Memorial church cathedral on the 12th June 2009.

² ibid

³ Section 1 of the same sex marriage (prohibition) Act 2013 prohibits marriage between persons of the same sex.

⁴ Section 18 interpretation Act

it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage”.

Marriage under the Marriage Act, may be celebrated in any licensed place of worship⁵ by any recognized Minister of the Church, according to the rites or usages of marriage observed in such Church⁶. However, before the Minister celebrates the marriage, the

couple shall have delivered to him the certificate of the Registrar of Marriages or the Registrar’s license authorizing such marriage⁷. Alternatively, the couple may decide not to celebrate their marriage in Church, and contract same before a duly licence Registrar appointed pursuant to the provisions of the Marriage Act. Noteworthy is the form to be observed by the Registrar whilst performing the ceremony of marriage⁹.

The issue of the celebration of marriage in Church is also as important as the capacity of individuals to marry. The Marriage Act insists that a Minister shall not celebrate any marriage if he knows of any just impediment to such marriage, nor until the parties deliver to him the Registrar’s certificate or the licence issued by the Registrar⁸. It is disheartening today to see places of worship celebrating marriages without compliance with the requirement of the law which in effect renders such marriages void. Section 33⁹ provides:

A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration

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(a) In any place other than the office of a Registrar of marriage or a licences place of worship (except were authorized by the licence issued under Section 13 of this Act) or

(b) Under a false name or names or (c) Without a Registrar’s certificate or notice or licence issued under Section 13 of this Act duly issued or

(d) By a person not being a recognized Minister of some denomination or body or a Registrar of marriage

There have been a number of contested cases in Nigerian Courts as to whether marriages contracted in Church without a Registrar’s licence are null and void. In *Obiekwe v. Obiekwe*¹⁰, a marriage solemnized in the Holy Ghost Roman Catholic Church, Enugu, was not declared null and void because the Court found that the couple did not knowingly and willfully acquiesce in the marriage without the requisite licence. However, the Judge in the course of the judgment made the following remarks¹³:

⁵ Section 6 Marriage Act CAP M 7 LFN 2004

⁶ Section 21 of the Marriage Act CAP M 7 LFN 2004

⁷ Section 8 of the Marriage Cap M7 *Laws of the Federation Nigeria 2004* ⁹S. 27 *ibid*

⁸ S. 22 *ibid*

⁹ *ibid*

¹⁰ *Akiwudike v. Akiwudike* (1963) ENLR 196. ¹³*Ibid* at page 199

A good deal has been said about “Church marriage” or marriage under Roman Catholic Church Law”. So far as the law of Nigeria is concerned, there is only one form to monogamous marriage, and that is marriage under the Ordinance. Legally a marriage in a Church (of any denomination) is either a marriage under the Ordinance or it is nothing.

Flowing from the above position, the court went further in admonishing religious ministers to thus:

The fault is entirely that of the officiating Priest who on his own admission made no attempt whatever to explain to the parties this legal position, or even ask them whether they wanted to be married under the Ordinance or not. His attitude seems to be that he knows very little about the marriage ordinance and is not interested. As the law of Nigeria confers upon Priests and Ministers of religion the right to officiate at marriages recognized by the State, it is their duty to make themselves familiar with the Ordinance and to see that people who come to them to be married understand their legal position¹¹.

This judicial pronouncement has the potential of voiding many marriages in Nigeria. In another judicial pronouncement, the Supreme Court held that where there is a dispute as to whether a Church service is a service of marriage or a Church blessing of a marriage, the “Certificate of Marriage” issued by the Church, would not be evidence of marriage unless it can be shown that the required licence of the Registrar of Marriages was produced and the certificate was in the form prescribed by the Marriage Act. In this case, the Court ruled in favour of the husband that the Church ceremony was a mere blessing of marriage, and not a marriage under the statute.¹²

Nigeria being a multi-tribal society, the customs of its people are as varied as the number of ethnic societies. In other words, there is no single, universal customary law for Nigerians. The various ethnic communities have their different customs as they relate to marriage.

Marriage under Customary Law is largely polygamous. A polygamous marriage is the union for life of one man with several wives. There is no limit to the number of wives a man can marry under customary law. Attempts have been made in the past, to claim that polyandry (where a woman is entitled to marry two or more husbands at the same time), is part of Tiv custom. In the case of *Kpelanya v. Tsoka*¹³ the woman married Mr.

¹¹ *ibid*

¹² *Anyaeqbunam v. Anyaeqbunam* 1963 ANLR 320

¹³ (1971) NMLR 86

A under native law and custom and had four children for him. She left Mr. A and took the four children with her and set up home with Mr. B. She claimed that she was married to both men and that Tiv custom allowed it. The Upper Area Court of Northern Region agreed that the woman was “a common wife” to both men, and gave the eldest and youngest children to Mr. B, and gave the two other children to Mr. A. The High Court on appeal overturned the judgment and held that the Tiv custom that allowed polyandry was not proved. In reality, marriage under customary law is essentially polygamous. However, it is to be observed that most couples initially get married under customary law and the couples thereafter marry under the Act. This is quite valid, provided the marriage is between the same persons¹⁴. The legal implication of the marriage is that, it would then be a monogamous marriage. When a man who is married under the Marriage Act, marries another woman under Customary Law, whilst the first marriage subsists the second marriage is void¹⁵. Where a man is married under customary law with one woman and he subsequently marries another woman, under the Marriage Act, the second marriage is void¹⁶.

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

- (a) Betrothal
- (b) Capacity of the parties
- (c) Consent of parties as well as consent of parents/family
- (d) Marriage consideration/dowry
- (e) Solemnization of the marriage
- (f) Consummation of the marriage¹⁷

Islamic marriage, like customary marriage, is a polygamous one with the man taking up to four wives if he desires. For an Islamic Law marriage to be valid, it must have the following pre-requisites:

- (a) Consent of the parties
- (b) Parental consent
- (c) Payment of the Saduquat (Sadaki) – dower
- (d) Solemnization¹⁸

¹⁴ Section 33 Of The Marriage Act CAP M 7 Law of the Federation of Nigeria 2004

¹⁵ *Towoeni v. Towoeni* (2002) F.W.L.R. (Pt. 122) 170

¹⁶ S. 47 of Marriage Act *op cit*

¹⁷ Adesanya B. ‘Marriage, Divorce and Succession’ being a paper presented at a seminar to make the 10th anniversary of the Diocese of Lagos West (Anglican Communion) held at the Archbishop veining Memorial church cathedral on the 12th June 2009.

¹⁸ *Ibid*

Marriage is a universal institution, in that all societies have a concept of marriage and the very different cultural traditions of those societies that have influenced the development of the concept. In different countries, Nigerian statutory law for example is basically similar to the English common law as the latter forms most of the sources of our law. Hence, Nigerian law on marriage supports the monogamous system of marriage which has been since established in England. This is not to say, however that the African tradition of polygamy has been abolished but give further credence to the fact that marriage though can be easily recognized and attendant incidence vary considerably from one society to another. The effects of conflict of laws, as it were, in marriage, is far beyond just determining the essential validity or formal validity but its tentacles are extended to cover all matrimonial suits and to determine which laws are applicable where the issue or matter is characterized by foreign elements. In Fact, there is no field that is infected with the disease known as ‘foreign element’ other than marriage itself.

Marriage in the ordinary parlance means the coming together of a man and one or more woman to become husband and wife(s). However, under the English common law, marriage is generally monogamous and it is a contract by which a man and a woman express their consent to create the relationship of husband and wife. This contract however differs fundamentally from a commercial contract in the following ways:

- a) As a general rule, it can only be concluded by a formal public act.
- b) It can only be dissolved by a formal public act.
- c) More importantly, it creates a status which is taken into account in relation to succession, tax, legitimacy of children and to some extent immigration laws.

Lord Penzance gave a widely acceptable definition of marriage. In *Hyde v Hyde*¹⁹ Lord Penzance stated that, “I conceive as understood in the Christendom, marriage may be defined as the voluntary union of one man and one woman to the exclusion of all others.” In this case, Lord Penzance, sought to define marriage for the purpose of the remedies, the adjudication and the relief of the matrimonial law of England. It was not his object to define marriage for any other purpose, but his definition characterizes the basic concept of marriage in English law and as a starting point for the conflict of laws. It must however be noted that the idea of one man and one woman, is totally English and foreign to Africa and some parts of Asia; it is totally based on the religious justification as Christianity is more or less, a universal religion in England. Furthermore, monogamy as portrayed by Lord Penzance is not the only form of marriage. The African cultural values and Islamic religion, permit polygamy (though restricted).

¹⁹ (1886) LR1, P&D 130 at 133.

A polygamous marriage may therefore be defined as a voluntary union for life of one man with one or several wives. Its essential characteristic is the capacity of the man to take as many wives as he pleases. The mere fact that at a given moment he has only one wife does not affect the character of marriage as long as the capacity of taking more wives is retained. Generally, there is no limit to the number of wives a husband could take under the polygamous system. This invariably depends on his real affluence (under the Islamic law, a man may take not more than four wives).

Essentials of A Valid Marriage Under the Nigerian Legal System. There are essentially three types of marriages under the Nigerian legal system viz:

1. Statutory marriage.
2. Islamic marriage.
3. Customary marriage.

We shall be looking at the essentials of a valid marriage under each type of marriage.

Statutory Marriage

The essential of a valid statutory marriage includes: a. Age. b. Capacity.

- c. Consent of parties.
- d. Consent of parents.
- e. Signing of prescribed form at the marriage registry.
- f. Celebration of marriage.
- g. Prohibited degree of consanguinity and affinity.
- h. Non-existence of a subsisting marriage.
- i. People of same sex.
- j. Adoptive parents and adopted child.
- k. Consummation of marriage
- l. Status bar.
- m. Sanity.

a. Age

The Marriage Act does not specify any minimum age limit. It merely states that unless a party is a widow or widower, there is need to obtain the written consent of either the parents or guardians where such person is under the age of twenty-one years. Whoever shall marry or assist any person to marry a minor under the age of twenty-one years, not being a widow or widower, shall be liable to imprisonment for two years.²⁰ This

²⁰ Section 49 Marriage Act. Cap M7 *Laws of the Federation Nigeria 2004* ²⁴ Cap C50 *Laws of the Federation of Nigeria 2004*. ²⁵Cap M7 *Laws of the Federation Nigeria 2004*

clearly shows that the age for marriage in Nigeria is 21 years akin to the contractual age. Section 21 of the Child Rights Act²⁴ stipulates eighteen (18) years as the minimum age of marriage applicable to the Marriage Act. Any person who marries or promotes the marriage of a child may be punished, on conviction with fine or imprisonment.

b. Capacity

Under the Act,²⁵ either of the parties must have passed the minority age (18 and below). Specifically, it provides that: if either party to an intended marriage, not being a consent widow or widower, is 21 years and of age, the written consent of the father or if he be dead or of unsound mind or absent from Nigeria or if both be death or of unsound mind or absent from Nigeria, of the guardian of such party must be produced, annexed to such affidavit as aforesaid before a license²¹.

c. Consent of Parties.

Both parties must consent and consent must be voluntary. Where consent is obtained by mistake, misrepresentation, duress and

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undue influence, the element of consent, stands negated and renders the marriage void for lack of consent.²²

d. Consent of Parents

It is important to determine whether parental consent is necessary for the celebration of a valid statutory marriage. This point came up for determination in the case of *Agbo v Udo*²³ where the Plaintiff contracted a statutory marriage with his wife. He later petitioned to court for dissolution of the marriage on the ground of his wife's adultery with a co-respondent. The co-respondent contended that the wife was a minor at the time the marriage was celebrated, and that no parental consent was obtained, as required by the law. Consequently, there was no valid marriage between the applicant and his wife which the court might dissolve. It was held that notwithstanding the absence of parental consent the marriage was valid under Section 33(3)²⁴ of the Marriage Act.

While the absence of parental consent does not vitiate a marriage, it is an offence punishable with two years for any person fully aware of the absence of such

²¹ S.18 Marriage Act. *ibid*

²² Section 3(1) Cap M7 *Laws of the Federation Nigeria 2004*

²³ (1947) 18 NLR 152

²⁴ This section validates all marriages except those invalidated preceding subsections of the section

consent, to marry or assist any other person to marry the minor.²⁵ Parental consent of both male and female parties, is a legal requirement but only in certain cases where if either or both parties to an intended marriage, not being a widower or widow or below twenty-one years.

e. Signing of Prescribed Form at The Marriage Registry The parties of an intended marriage shall sign and give to the Registrar of the district in which the marriage is intended to take place a notice in a prescribed form. The Registrar shall cause the notice to be entered in the marriage notice book in the registry²⁶. A copy of the notice will be displayed in the registry shall issue his certificate of notice. But the registrar must be satisfied that there is no cause why he should not allow the parties to be married²⁷. Any person whose consent to a marriage is hereby required, or who may know of any just cause why the marriage should not take place may enter a caveat against the issue of the registrar certificate, by writing at any time before the issue thereof the word “forbidden”, opposite to the entry of the notice in the marriage notice book and appending thereto his name and place of abode, and the ground upon which he claims to forbid the issue of the certificate and the registrar shall not issue his certificate until such caveat shall be removed as hereinafter is provided.²⁸

f. Celebration of Marriage.

Marriage under the Marriage Act, may be celebrated in any licensed place of worship. The Federal Minister of the Ministry of Internal Affairs may licence any place of public worship as a place of celebration of marriages.³⁴ Such licence may also be revoked. Notice of the approval or revocation must be published in the Federal Gazette.

The parties may celebrate their marriage in a licensed place of worship by a recognized Minister of the church, denomination or body to which such a place of worship belongs. The marriage must be celebrated with open doors between 8 am and 6pm. in the presence of at least two (2) witnesses beside the officiating priest and this must be done in accordance with the rites

and usages of such church²⁹ However, before the Minister of the church celebrates the marriage, the couple shall have delivered to him the certificate of the Registrar of Marriages or the Registrar’s license authorizing such marriage. Alternatively, the

²⁵ Section 48/49 of the Marriage Act Cap M7 Laws of the Federation Nigeria 2004

²⁶ Section 7 *ibid*

²⁷ Section 10 *ibid*

²⁸ Section 14 Marriage Act Cap M7 Laws of the Federation Nigeria 2004 ³⁴ Section 6 *ibid*

²⁹ Section 21 Cap M7 Laws of the Federation Nigeria 2004

couple may decide to celebrate their marriage in the Registry before a duly licensed Registrar appointed pursuant to the provisions of the Marriage Act.³⁰

g. Prohibited Degree of Consanguinity and Affinity.

The law forbids³¹ the marriage of persons related by blood or by marriage and also forbids marriage to persons of same sex. Consanguinity is marriage by two parties who are blood related. The Black's Law Dictionary³⁸ defines Consanguinity as the relationship of persons of the same blood or origin for example, uncle and niece, brother and sister Aunty and nephew.

While Affinity is marriage between two parties who are related by marriage; The Black's Law Dictionary³⁹ defines Affinity as any familial relation resulting from a marriage. For example, step father and daughter, sister-in-law and brother in law.

In both cases, the moral values of Nigerian society abhor marriage between persons in these groups. The prohibited degrees of consanguinity and affinity are now listed in the first schedule to the Matrimonial Causes Act³². Persons intending to get married must ensure that there is no impediment of consanguinity or affinity between them. The list of prohibited degrees of consanguinity and affinity applies to statutory marriages³³ A Registrar will not issue a certificate to marry unless he is satisfied by reason of a sworn affidavit by the parties that there is no such impediment. A marriage between two persons who are within the prohibited degree of consanguinity or affinity is void. Where persons are within the prohibited degrees of affinity and desire to marry, they may apply in writing to a Judge for permission to do so and if the Judge is satisfied that there are exceptional circumstances, the Judge may by an order permit the parties to marry one another³⁴ for example if the lady has been put in the family way.

H. Non-Existence of A Subsisting Marriage.

Marriage under the Act, is monogamous in nature, Parties will lack the capacity to embark on a statutory marriage if either of them is already married under the Act to another person³⁵ and the marriage has not been dissolved by any court of law. Also, no marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage, is married by native law or custom to any other person

³⁰ Section 6 Marriage Act

³¹ Matrimonial causes Act and Marriage Act Cap M7 Laws of the Federation Nigeria 2004 ³⁸Garner B. A (Ed.)(2009) *Black's law Dictionary* 9th edition USA West publishing Co. ³⁹ibid

³² Cap M7 Laws of the Federation Nigeria 2004

³³ Schedule 1 to the Matrimonial Causes Act Cap 220 Cap M7 Laws of the Federation Nigeria 2004

³⁴ Section 4 ibid

³⁵ *Obeleiniya v Obele*(1973) 1NMLR 155

other than the person with whom such marriage is had³⁶. It is therefore clear that unless the Registrar is satisfied that there is no subsisting statutory or customary law marriage on the part of any of the parties wishing to marry under the Act, he shall not issue them with a certificate to marry under the Act.

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In *Obeleiniya v. Obele*³⁷, the court observed that non-observance of the rule, makes the subsequent marriage void, and is an offence punishable by imprisonment under Section 370 of the Criminal Code of Nigeria³⁸. Sections 35 and 48 of the Marriage Act, also imposes 12 years imprisonment.

I. Sanity

Parties to a statutory marriage must be sane. If one of the parties is insane and therefore mentally incapable of understanding the nature of the marriage contract, the marriage will be void *ab initio*³⁹.

Islamic Marriage

The Essentials of a Valid Islamic Marriage Includes:

- a. Consent of parties
- b. Consent of parents
- c. Payment of saduquat or dowery
- d. Solemnization/Ceremony
- e. Prohibited degree of affinity.

a. Consent Of Parties

The parties to Islamic law marriage must freely consent to the union. However, under the Maliki School of Islamic Law, a father has the right to conclude a marriage on behalf of his infant sons and virgin girls. The ceremony is called the *Ijbar*. The exercise of this right may be ameliorated by the fact that the child has the option to repudiate the

marriage contract on the attainment of the age of puberty. However, a father loses his right of *Ijbar* where he allows his daughter to choose a husband from among her suitors.

b. Consent Of Parents

As in other systems of customary law, parental consent is necessary for the valid celebration of marriage under Islamic law.

³⁶ Section 33(1) Marriage Act

³⁷ (1973)1 NMLR 155

³⁸ Cap. C38 Laws of western Nigeria.

³⁹ Section 3(1)(d)(ii) of the Matrimonial Causes Act 2004

c. Payment Of Saduquat Or Dower

Sadaquat (sadaki) or dower represents the marriage payment made by the groom to the bride through her parents. The amount of the *sadaki* is negotiated by the prospective husband with the girl's family. It is the entitlement of the bride and not that of her parents, though it is paid through the parents.

The Sokoto State Marriage (Customary Practices) Control Law⁴⁰ provides that the prospective husband shall pay *sadaki* of a reasonable sum of not less than the value of 'Rubu'udinari' to the parents of the bride which shall be delivered to her by her parents⁴¹ the value of the 'Rubu'udinari' which is ¼ of the value of gold as at the year 1992 is 97.00. The value of each subsequent year shall be determined by the Islamic Education Trust⁴². The betrothal gift to be given to a girl during courtship (lefe) shall consist of six wearing apparels or 500, one pair of shoes, one headtie, loan pair of earrings and one blouse⁴³.

According to the *Jigawa Marriage (Expenses Control) Law*⁴³, a groom shall pay to the bride such dowry as it is reasonable in accordance with his standard and position in society. A groom may give to the bride a gift of clothing or wearing apparels known as trousseau set out in part one of the First schedule or the money

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equivalent. This includes clothing, earrings, shoes, headtie and blouses; Gaisuwauwadauba 200 (Two hundred naira) and kudinAure 500 (five hundred naira) Prohibited payments and events includes: reciprocal gifts (tukwuitci); betrothal gift (lefe); kolanut gift; bridal party and welcome gift by groom to bride. Also, proscribed are praise singers and wedding ceremonies.

Customary Marriage

There are various ethnic communities in Nigeria and the various ethnic groups have their different marriage customs. There are however some generally accepted customs common to most of them which will be discussed here.

⁴⁰ Cap 90 Laws of Sokoto State 1996

⁴¹ Section 4(1)*ibid*

⁴² section 4(2) and Fourth Schedule *ibid*

⁴³ Section 5(1) and fifth schedule. *Ibid* Exceeding the specified number constitutes an offence- section 5(3)

⁴³ Cap 94 *Laws of Jigawa State 1998*.

The essential of a valid customary marriage includes:

- i. Capacity of parties
- ii. Age
- iii. Betrothal
- iv. Consent of parties and parents
- v. Marriage consideration/ bride price.
- vi. Solemnization of marriage
- vii. Consummation of marriage
- viii. Status bar

a. Capacity:

The parties to a customary-law marriage must possess the capacity under that law to marry each other.

b. Age:

Most systems of customary law in Nigeria, do not prescribe any age for the solemnization of customary-law marriage. This lacuna in the rule of customary law has to a large extent encouraged high incidence of child marriage, with all its attendant evils. While in some area's child betrothal is rampant, marriage does not in fact take place until the parties have attained the age of puberty.

Where a girl under sixteen years marries under customary law, the consummation of that marriage does not constitute the sexual offence of having unlawful carnal knowledge of her under the Criminal Code Act⁴⁴. This is because Section 6 of the Code⁴⁵, defines 'unlawful carnal knowledge' to exclude sexual relations between husband and wife. Usually, where a provision of the Code applies only to the husband and wife of a statutory marriage, this is clearly specified. In the absence of such qualification, it is submitted that 'husband and wife', includes the parties of customarylaw marriage, which is a system of marriage recognized by Nigerian law.

In some parts of Nigeria, the minimum age for customary-law marriage has been fixed by legislation. The age of marriage under customary law is governed in the three

Eastern States of Nigeria. By Section 3(1) ⁴⁶of the Law provides that a marriage between or in respect of persons either of whom is under the age of sixteen shall be void'. If a party to such a void marriage is charged with any of the sexual offences under

⁴⁴ Cap. C38 Laws of Western Nigeria.

⁴⁵ *ibid*

⁴⁶ Age of Marriage Law 1956

the Criminal Code⁴⁷ arising from having unlawful carnal knowledge of a girl, it is a good defence to prove that the accused had reasonable cause to believe that the girl in question was his wife.

In four Native Authority areas in three of the Northern States of Nigeria-Biu (Borno State), Idoma, and Tiv (Benue State), and Borgu (Kwara State) — the marriageable age for girls has been fixed by

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the various Declarations of Native marriage law and custom Orders made in respect of these areas. The following ages for girls have been prescribed for the respective areas: Biu—fourteen years; Idoma — twelve years; Tiv — age of puberty;" and Borgu - thirteen years; In Borgu and idoma, any man who marries a girl below the stated age, and the father or guardian of such girl who permits such marriage, are guilty of an offence punishable with a fine of 100Naira or imprisonment for six months, or both. However, in Anambra,⁴⁸ Ebonyi⁴⁹, Cross River,⁵⁰ and Rivers State,⁵¹ the giving in marriage, entering and consenting to the marriage of a girl less than eighteen years of age is prohibited. Breach of the prohibition constitutes an offence punishable with fines or imprisonment. Minimum marriage of eighteen years is prescribed in Enugu,⁵²⁵³ and Bayelsa States.⁵³

c. Betrothal

When the families concerned are convinced that there are no facts that could hinder the marriage, the betrothal, which is the formal engagement of the parties will now take place. The engagement usually consists of a formal process of agreement to marry between the prospective spouses, the giving of consents by their parents or guardians and the giving of gifts (in money and/or kind) by the man to the woman and her family. After the betrothal then actual marriage takes place.

d. Consent of the Parties and Parents

⁴⁷ Cap. C38 Laws of Western Nigeria.

⁴⁸ Section 3 Reproductive Rights of Women Law, No 7 Of 2005

⁴⁹ Section 3 Harmful Traditional Practices Against Women and Children Law No.10 of 2001

⁵⁰ Girl child marriages and female circumcision or Genital Mutilation Law No.2 of 2000

⁵¹ Section 2(1) Age of Customary Marriage Law, Cap 5 *Laws of Rivers State 1999*

⁵² Section 3(1) Customary Marriage (Special Provision) Law Cap 33 *Laws of Enugu State*

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⁵³ Section 2 Age of Customary Marriage Law Cap A5 *Laws of Bayelsa State 2006*.

The intending couple has to give their consent to a customary marriage. The Supreme Court in the case of *Osamwonyi v. Osamwonyi*⁶³, held that under Bini Native Law and Customs, the consent of the parties was necessary for a valid marriage under customary law. Parental consent, is also necessary before a valid customary marriage can take place. In *Okpanum v. Okpanum*⁶⁴, the High Court of East Central State of Nigeria held, that in order to constitute a valid customary marriage, there must be parental consent and mutual agreement between the parties.

e. Marriage Consideration/Bride Price

Marriage consideration, otherwise called ‘bride price’, is one of the essential requirements of a valid customary marriage. The bride price includes any gift or payment in the form of money, natural produce or any kind of property given by an intending husband and his family to the parents or guardian of a female person on account of the marriage.

f. Solemnization of the Marriage

Solemnization or celebration is an essential ingredient of a valid customary law marriage. It generally involves breaking kola, pouring libation, sharing drinks and other activities. The bride is invariably handed over to the bridegroom and his family. In the case of *Omoga v. Badejo*⁶⁵, the Court held that there must be a formal handing over of the bride to the groom in the presence of the two families and witnesses and the acceptance and taking away of the bride to her husband’s house for marriage under Yoruba Native Law and Custom, to be valid.

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g. Consummation of the Marriage

Consummation of the marriage under Native Law and Custom is essential. Consummation simply means having sex, with a view to making a marriage complete. In traditional societies, the very night of the marriage is eagerly awaited by the groom’s family as he is expected to announce his exploits to his family and state if his wife was found intact or not

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h. Status Bar

This is when customary law in some areas prohibits marriage between free citizens and members of some castes e.g. slaves (*osu* in Igbo land). It is worthy of note that the caste system has been abolished by law but people’s attitude has not changed⁵⁴.

⁵⁴ Section 42(2) Constitution Federal Republic of Nigeria 1999Cap C20 Laws of the Federation 2004. ⁵⁶ The laws of a forum(in conflicts of Law it is used to refer to the laws of the Jurisdiction where an action is instituted)

Conflict Situations and Choice of Law in Marriage

It is well established that questions on the validity of marriage are divided into those regarding the formal validity of the marriage and those concerning the capacity of the parties to marry or the essential validity of the marriage. The distinction between formal parameters and others has always been made by English law as *lexfori*⁵⁵, but it is arguable whether this is always appropriate. Generally, as regards the formal validity of a marriage, the law of the place, rules the deed (*locus regit actum*⁵⁵) in that the formal validity of marriage is governed by the *lex loci celebrationis*⁵⁶ (law of the place of celebration). *Scrimshire v. Scrimshire*.⁵⁷ A marriage will be formally valid if the formalities required by the law of the place where it was celebrated have been observed. It does not matter whether these formalities are wholly secular or wholly religious or a mixture of the two; provided what is done has the effect under the law of the place of celebration of establishing the relationship as a marriage.⁵⁸ If the local law has special rules for certain types of foreigners, compliance with those rules will be required *Hooper v. Hooper*.⁵⁹ In *Ogden v Ogden*⁶⁰, it was held that formalities include the licensing, certification and publicity requirements, the form of ceremony, what has to be said, number of witnesses, officials present and whether proxies can be used. Other matters are more controversial such as, whether a marriage can take place without parental consents required by the under aged parties Domiciliary Law, *Ogden v Ogden*,⁶¹ or whether a party can marry contrary to the ritual required by his domiciliary law. It is instructive to note that the formal validity of a marriage in the Nigerian legal system is governed by the Marriage Act.⁶² Therefore, where the parties are locals (i.e. both are Nigerians), they must comply with the provisions of the Marriage Act.

Any marriage celebrated in contravention or where there has been flagrant disregard of the provisions of the Marriage Act will be void *ab initio*. The issue of customary law

⁵⁵ the law of the jurisdiction in which a wrongful act occurred, or where a contract was concluded, (normally determines the legal consequences of the act or validity of the contract).

⁵⁶ this law governs questions as the formalities or formal requirements for a marriage.

⁵⁷ (1752) 2 Hag. Con. 395.

⁵⁸ *Berthiaume v. Dastons* (1930) AC 79

⁵⁹ (1959) 2 All ER 575

⁶⁰ (1909) P. 46

⁶¹ *ibid*

⁶² Cap M6, Laws of the Federation of Nigeria 2004

⁶³ 1973 NMLR 26

⁶⁴ 1922 ECSR 561

⁶⁵ 1985 NCNLR 1075

marriages and conflict situations, are however restricted as customary law marriages usually take place between the locals and thus the *lex fori*, is usually applicable save in exceptional circumstances. There are some exceptions to the general rule that a marriage will only be formally valid if it complies with the formal requirements of the *lex loci*

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celebrationis. Consular marriages in foreign countries solemnized by a designated marriage officer will be valid if they comply with the rules of the consul's state. Having discussed the formal validity of a marriage vis-à-vis conflict situations and choice of law, it is crucial to discuss also the essential validity of a marriage in lieu of conflict situations and choice of law. Generally, under the Nigerian law, the parties to a marriage must possess the necessary capacity. The Marriage Act⁶³ went further in listing those requirements before a party could be said to possess the capacity to contract a valid marriage. They include:

1. Age.
2. Prohibited degrees of consanguinity and affinity.
3. None of the parties must be already married.
4. Consent of the parties.
5. Parental consent.
6. Sanity.

All these requirements must be satisfied under Nigerian Law before a person can contract an essentially valid marriage. Other countries have similar provisions as well. It must therefore be emphasized that where the courts are faced with questions bordering on the essential validity of a marriage with foreign elements i.e. where both or either of the parties has a foreign domicile, foreign nationality and/or where there are issues involving properties situated outside the forum of the *lex causae*⁶⁴.

It is established that the essential validity of a marriage is governed by personal law. While the English conflict of laws retains domicile as the determinant of the personal law, all questions of the parties to marry one another will be referred to the *lex domicilia*⁶⁵. Therefore, when the test for essential validity of marriage discloses incapacity as a result of the *lex domicilia*, the marriage is generally void.

⁶³ *ibid*

⁶⁴ the law or laws chosen by the forum court from among the relevant legal systems to arrive at its judgement of an international or interjurisdictional case.

⁶⁵ the law of the domicile by which the rights of persons are sometimes governed ⁷⁹Cap M7 Laws of the Federation Nigeria 2004.

Conflict Situations In Matrimonial Causes.

Matrimonial causes are suits and/or matters arising from a contracted marriage. Each forum including the English courts, have laid down rules governing the matrimonial suits, before considering any conflict rules on matrimonial causes, it is imperative to highlight the recognized matrimonial suit all over:

- 1) Divorce
- 2) Maintenance
- 3) Alimony
- 4) Custody
- 5) Judicial separation
- 6) Legitimacy
- 7) Restitution of conjugal rights

The contemporary law regulating Matrimonial suits in Nigeria is the Matrimonial Causes Act⁷⁹ The first question to raise when there is an issue involving divorce, judicial separation or any other matrimonial suit is that of jurisdiction. i. e. on what ground will the court assume jurisdiction to entertain a matrimonial suit; and then consider whether a question of choice of law arises in the context. Under English law, the jurisdictional rules which are exclusive are now contained in the Domicile and Matrimonial Proceedings Act.⁸⁰ As regards choice of law, the English courts always apply the

English law as *lex fori*. I.e. the issue of choice of law in a divorce proceeding does not arise. The petitioner must only establish that the marriage has irretrievably broken down. The Nigerian situation is similar to the above position. The Matrimonial Causes Act⁶⁶, listed the grounds for divorce in Sec. 15(2)⁶⁷ after providing in Sec. 15(1) ⁶⁸that a petitioner for divorce does so only if the marriage has broken down irretrievably. The grounds listed include willful and persistent refusal to consummate,

cruelty, desertion, venereal disease, adultery, e.t.c. Other provisions abound in this Act and relate to other matrimonial suits. This principle of applying the *lex fori* having considered the *lex domicile*, has also been upheld in matrimonial suit before. Amidst others is the decision of the court in *Fonsecca v. Passman*⁶⁹, where the matter before the court was the administration of the deceased estate having died interstate leaving

⁶⁶ Cap M7 Laws of the Federation Nigeria 2004

⁶⁷ Cap M7 Laws of the Federation Nigeria 2004

⁶⁸ *ibid*

⁶⁹ (1958) WRNLR 41

behind a Nigerian wife domiciled in Nigeria. He died domiciled in Nigeria and still as Portuguese. The court applied the Nigeria customary law to the proceedings notwithstanding the fact that both parties are not natives.

Conclusion

We have in the course of this paper examined the contending issues regarding marriage and choice of law situation under the Nigerian legal system. It is our humble submission that the principle of choice of law is useful in resolving matrimonial conflicts and produce harmony in the swampy waters of litigation and it is recommended that judges should be trained in the application of the choice of law rules in conflict of laws.