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PROHIBITIONS – OBSTACLES UNDER CUSTOMARY, ISLAMIC AND STATUTORY LAW MARRIAGES IN NIGERIA

Ganiat Mobolaji Olatokun (Mrs.)^{*}

INTRODUCTION

Marriage is one of the most important and oldest institution in the world. It is not an overstatement to say that, marriage, being a universal and social institution, is recognized and respected world over. Be that as it may, marriage is said to be founded on, and governed by the social and religious norms of the society. Consequently, the sanctity of marriage is a well accepted principle in the world community.

The anxiety which precedes the marriage celebration, as well as the uncertainty which follows it, leaves more to be desired and indicates that, in order to have a valid and successful marriage union, certain preliminary steps need be taken.

One of such preliminary step is to make all necessary inquiries as to whether or not all the essentials necessary for a valid marriage celebrations has been complied with⁸. It is important to stress that, even where all the essentials necessary for a valid celebration of marriage has been complied with, such marriage can still be deemed invalid. This is because there are certain obstacles-PROHIBITIONS.

At the moment, it is the concern of this present study to identify and highlight areas of prohibitions noticeable in any impending marriage celebration in Nigeria with the aim of serving as a useful guide to impending couples on what to look out for before contracting any type of marriage.

DEFINITION AND TYPES OF MARRIAGE IN NIGERIA

Marriage is said to be a contract whereby a man and a woman enter into legal relation involving rights and obligations. A glance at the literal definition of marriage shows that sex constitutes an essential determination of marriage relationship. In order to establish the existence of a valid marriage therefore, it must be proved that persons involved are man and woman.

The above contention which though, hold water in Nigerian Society, where only two types of marriage are recognized viz, monogamous and polygamous marriages, the same contention do not however hold water in the developed countries as differences of opinions exists between the English⁹ and

⁸ Essentials necessary for a valid marriage celebrations includes, marriageable age, parental and Party consent, bride price, etc.

⁹ Corbett v. Corbett (1971) p. 83, 100. For instance on this decision, see Comment "Trans-sexualism, sex Re-assignment Surgery, and the Law", 56 Cornell L. Rev. 963, 992-1002 (1971). Note also "Transsexual in Limbo" 31 MD. LR. 236, 244

¹⁰ American Courts¹⁰, illustrating fresh jurisprudential insight as it relates to problem of determining whether or not marriage has been celebrated between persons who had undergone sex – change surgery.

Thus, in Nigeria, marriage to be recognized and enforced by law, must be between a biological man and a biological woman.

a. Monogamous Marriage:

It has already been mentioned above that, monogamous marriage is one of the two systems of marriage practiced in Nigeria. Suffice is to say therefore that, statutory marriages are essentially monogamous in nature. A monogamous marriage in Nigeria is the same as in England. A monogamous marriage has been defined by Lord Penzance in the case of Hyde v. Hyde¹¹

"as ... the voluntary union for life of one man and one woman to the exclusion of all others".

There are three aspects of this definition which deserves further elaboration. In the first place, the marriage must be a voluntary union. Thus there must be free consent of both parties to the union. The absence of genuine consent will vitiate the agreement. The voluntary consent of the parties is a prerequisite for the celebration of statutory marriage. Absence of such consent, or the granting of it under duress or misapprehension, vitiates the agreements¹².

In the second place, the marriage should be a union for life. This does not however imply that the union should be indissoluble¹³. The cardinal requirement here is that at the time of contracting the marriage the parties intend that it should be for life unless dissolved earlier by a process prescribed by law¹⁴.

And lastly, it must be a union of one man and one woman to the exclusion of all others¹⁵. The marriage must, therefore be monogamous as it does not admit of taking more than one wife during the subsistence of the

(1971).

¹⁰ M.T.V.J.T. (1976) 355 A. 2d. 20. K. Ibid. p. 3.

¹¹ (1866) LR 1 P & D 130, 133.

¹² Section 3(1) (d) of the Matrimonial uses Act 1970.

¹³ Note that in modern times, couples conclude marriages for various short term objectives e.g. to

obtain a particular nationality for residence purposes. See Iise Sagay, Nigerian Family Law,

Principles, Cases Statutes and Commentaries, (Malthouse Press Ltd), p. 31.

¹⁴ Section 30 (3) Matrimonial Causes Act 1970.

¹⁵ Section 18 Interpretation Act No1 of 1964.

having more than one wife at the same time (polygny). It only lays down regulations for whichever an adherent of Islam chooses.

The above types of marriages are within the contemplation of this present study. Having decided on the type of marriage to undergo, it is important to address one's mind to the possible obstacles that can come between the marriage obstacles that lead to the unrealisation of one's dream of getting married. These obstacles come in different shapes and shades. They include:

i. **Consequently and Affinity Relationships:**

This obstacle relates to all the three types of marriages earlier discussed. Marriage is thus prohibited between persons related by blood (consanguinity) and by marriage, (Affinity). The general rule is that, the parties to a statutory marriage must not be within the prohibited degrees of consanguinity and affinity²⁸.

Under this statute, marriage is prohibited if the woman is or, has been, the man's ancestress, descendants, sister, father's sister, mother's sister, brother's daughter. Marriage is also prohibited on the ground of affinity between a man and his wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, father's wife, grandfather's wife, son's wife, son's son's wife, daughter's son's wife. The reverse position applies to a man. It is immaterial whether the relationship is of whole blood or half blood or whether it is traced through, or to any person of illegitimate birth.²⁹

An exception to this rule is contained under Section 4 Matrimonial Causes Act 1970, where two persons within the prohibited degree of affinity can get married on application in writing to a High Court Judge for permission to do so. The judge will permit such marriage only on exceptional circumstance. Determination of exceptional circumstances, though defined by the Act, is left to the discretion of the judge. Where parties get married under these circumstances, such marriage is deemed valid.

An illustration case is where parties who come from a village cohabit in a town without knowing the relationship between them and beget a child, if they want to marry each other, this may qualify as an exceptional situation.

As far as most customary law in Nigeria is concerned, parties to a customary law marriage must not be within the prohibited degrees. The general rule in some parts of the country is that marriage is forbidden between persons who are related by blood, no matter how remote the relationship is provided it can be traced or there is a local tradition to that effect.

²⁸ See Section 3(1) (b) Matrimonial Causes Act, LFN 1990.

²⁹ See Schedule I (Section 3) Matrimonial Causes Decree 1970.

Consequently, it is deemed to be traceable in these societies. This rule obtains amongst the Ibos, Yoruba, Ijaws and Itsekiris.³⁰

The Ibo rule on this subject is to the effect that, "A man is prohibited from marrying any woman who had likeable relationship with him". In the Case of the Yorubas, "prohibitions of marriage takes place between people with a faint blood relationship in their veins".

With respect to affinity, customary law in Nigeria prohibits marriage between a man and persons with whom he is related through marriage. Although, under some customary laws, it is possible for brothers to inherit each other's wife on the death of one of them. This practice is common amongst the Yorubas and it is popularly referred to as, oopo sisu.

Islamic law forbids any male and female Muslim to marry his or her descendants or ascendants, no matter how high or low. So are the sisters forbidden to brother and vice versa. Quran 4:23 provides;

"Forbidden to you are your mother's, daughters, your sister's young aunts (paternal or maternal) and a brother's daughter and a sister's daughter."

Thus, "NASAB" (Consanguinity) is a factor that makes a woman permanently prohibited to a man.³¹

"MUSAHARAH" (Affinity), under Islamic Law is another form of obstacles to any impending marriage Qur'an 4:22 provides;

"Forbidden to you are the mothers of your wives; are your step-daughters-who are your foster-children born of your wives with whom you have consummated your marriage; but if you have not consummated your marriage, you will incur no sin (by marriage with their daughters); and forbidden to you are the spouses of the sons who have sprung from your loins; and (you are forbidden) to have two sisters (as your wives at and the same time) but what is past is past for behold, God is indeed much forgiving, and a dispenser of grace."

ii. **Status Bar:**

These obstacles concerns mostly, customary law marriages certain people are barred by custom from marrying outside their own group. In other words, intermarriage is prohibited between people within this group with the so-called free citizen i.e. customary law in some parts of Nigeria, for instance, prohibits, intermarriage of so-called "free citizens" and members of some castes e.g. a slave-"osu".³²

³⁰ E. I. Nwogugu, "Family Law in Nigeria (Heinman Books Nig. Plc) Revised Edition 2004, pg 48."

³¹ op. cit. M.A. Ambali pg. 142.

³² Cap I Laws of Eastern Nigeria, 1963.

An "osu" is inter alia, a person who is a slave or has been offered symbolically in sacrifice to idols, or a descendant of such person. The "osu" is therefore subject to some legal or social disability or stigma and cannot freely marry other members of the community. Happily, throughout the four Eastern States of Nigeria, the abolition of the osu System of Law 1956 is applicable and the osu system is now made unlawful.³³

Henceforth, all persons who were previously regarded as "osu" are free from the handicaps of that status, and are able to exercise all the rights and privileges of other members of their community.

Sadly, despite the instructive motive of the Abolition of osu System Law, 1956, this piece of legislation has failed to alter the attitude of the people in the areas where the osu System existed, not even the provision of the constitution of the Federal Republic of Nigeria³⁴ could alter their attitudes and thus, this point still presents itself as a major obstacle to an impending marriage in the Eastern parts of Nigeria.

iii. Non-Native of Nigeria:

Section 2 of the Western Region Customary Court Law 1958, which applies to the Western and Lagos States, defines a "Nigerian" as:

*"a person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendant of such a person, and include any or one of whose parents was a member of such tribe"*³⁵

Furthermore, the courts are directed to apply customary law in any civil matter where the parties are natives of Nigeria or persons of Nigerian descent. But in cases between natives and non-natives, the courts are to apply English law³⁶ or any other law, unless it appears that substantial injustice to either the parties would result from the strict application of such other laws. In addition, the rules which regulate the application of customary law in any particular case are contained in the High Court Laws.³⁷

Considering the above therefore, it has become relevant to determine whether non-natives of Nigeria possess the capacity to contract customary marriages here. The position of non-Nigerians were considered in two decided cases. In *SAVAGE v. MACFOY*³⁸, Osborne C.J. held that Macfoy, a Sierra

³³ Section 3, Abolition of OSU System Law, 1956.

³⁴ See Section 42 (2), "The Constitution of the Federal Republic of Nigeria 1999.

³⁵ See also, Customary Court Edict, 1956 and section 17 Mid Western States Customary Courts No2 Edict 1966.

³⁶ Koney v. UTC (1934) 2 WACA 188.

³⁷ East-Cap 61 Laws of Eastern Nigeria, 1963 North - Cap 44 Laws of Northern Nigeria, 1963 West-Cap 11 Laws of Western Nigeria, 1959.

³⁸ (1909) 1 Rangoon L.R. 504 C. 504 Reports 504.

Leonean, was not subject to customary law in Nigeria and therefore, lacked the capacity to contract a valid customary law marriage, the fact that he had acquired a domicile of choice in Nigeria, notwithstanding. Subsequently, in *FONSECA v. PASSMAN*³⁹, Hedges J. held that the deceased, being an European, lacked the capacity to contract a customary law marriage in Nigeria while domiciled in Portugal. The learned judge said, obiter, that the position would have been the same if the deceased had been domiciled in Nigeria.

It would appear therefore that non-natives are not subject of customary law and thus, cannot contract customary law marriage. It must however be pointed out here that there is some doubt as to the continue validity of the decision in *Savage v. Mactoy* (Supra) especially in the Northern States of Nigeria, because, customary law is now applicable to any person whose parents were members of any tribe or tribes indigenous to some parts of Africa or one of whose parents was a members of such tribe.

Consequently, Mactoy may now be regarded as a person who is subject to customary law in the Northern states and may therefore contract a customary law marriage. However, in other parts of the federation, the decision may still be valid, as only Nigerians are subject to customary law in these areas and thus, being a non-native of Nigeria can constitute a major obstacle in contracting a customary law marriage.

iv. Previous Marriage:

Another obstacle to an impending marriage and which poses relevancy under English law (i.e. statutory marriage) customary law and Islamic law is where either party to the marriage has been previously married. Marriage under the act is essentially monogamous in nature, being a union of one man and one woman to the exclusion of all others. Consequently, a party to a subsisting statutory or customary law marriage has no capacity to enter into another statutory marriage with another person. Non-observance of this rule makes the subsequent marriage void and is an offence punishable by imprisonment.⁴⁰

A party to a subsisting marriage under customary law has no capacity to contract a statutory marriage with a third party⁴¹. But the same parties to the customary law marriage may contract a subsequent and valid statutory marriage.⁴²

³⁹ (1958) WRNLR 41. See also, *Short v. Morris*, 3 WALR 339, Nelson v. Nelson (1951) 12 WACA 248.

⁴⁰ Section 370 Criminal Code Prescribes 7 Years Imprisonment, Section 35 and 48 Marriage Act prescribes 5 years imprisonment. See also, *R. v. Prince Will* (1963) NNLR 54.

⁴¹ Section 33 (1) Marriage Act.

⁴² Ibid.

In the light of the above rules, it may be said that persons who may be parties to a valid statutory marriage are;

- (a) Persons who are not married to a third party, either under the Marriage Act or under customary law;
- (b) Persons who having been previously married under the Marriage Act, have obtained valid decrees of divorce; and
- (c) In the case of subsisting customary law marriage, the parties there to, so long as the subsisting statutory marriage is between them.

Furthermore, a man married to several wives under customary law, may contract a valid statutory marriage with one of his customary law wives, or with a third party, so long as he dissolves the other marriages. Under Islamic law, a man who has four wives has exhausted his right to marry more wives. The fifth wife is referred to as AL-KHAMISAH. It is illegal with far reaching legal implications. She is not recognized by the law as a wife⁴³.

Based on the above therefore, previous marriage could present itself as an obstacle to an impending statutory, customary or Islamic law marriage.

V. Marriage to a Pagan:

Marriage to a pagan is another obstacle to an impending Islamic law marriage and thus, no Muslim, male or female, is permitted to marry anyone who has no divine book or God-sent prophet to follow⁴⁴. The Qur'an in Chapter 2: 221 stress the point thus;

"Do not marry idolatresses, until they believe (in God), a believing slave girl is surely better than an idolatress, though you may admire her. And do not marry idolaters, until they believe, verily a believing slave is better than an idolater, though you may admire him".

The above injunction limits the field of non-Muslim eligible to those who believe in God and have a divine scripture. Another limitation is that, no Muslim woman is permitted to marry a non-Muslim man⁴⁵. This is the unanimous resolution of Muslims from the days of the prophet till the present time. That leaves only the possibility of religious intermarriages between Muslim men and non-Muslim women who believe in God, follow a prophet, and have a divine scripture. These are notably, Jewish and Christian women.

Muslims almost unanimously allow such intermarriages. In one of the few chapters revealed towards the end of Mohammed's (S.A.W.) life, the Qur'an 5: 5 - 6 says:

"Today the good things are permitted to you, and the food of those who were given the book (i.e. the Jews and the Christians) is permitted to you, and permitted to them is your food. Likewise, (lawful to you are) believing chaste women in wedlock, and in wedlock chaste women of them who were given the Book before you if you give them their due dowry, and desire chastity, in wedlock and not in license or as taking secret lovers".

Based on this statement, the opinion of the overwhelming majority of Muslim is that intermarriages are permitted between Muslim men and non Muslim women if the latter believe in God and recognize the Book that was given before Islam.

vi. Fostrage:

Fostrage is another obstacle to an impending Islamic law marriage. All law schools accept the authenticity of the tradition which stipulates that the forbidden degree due to lactation fostrage are the same as those due to consanguineal relationships. For example, a man's foster sister is as unlawful for him as his own natural sister⁴⁶.

The Qur'an⁴⁷ states briefly that, unlawful for men are their milk mothers⁴⁸ and sisters⁴⁹. This prohibition is extended to other milk relatives. This extension derives from the traditions of the prophet (S.A.W.). In another words, it is illegal for a man to marry his foster mother, because she is in the position of his mother. He should not marry her mother, who is his foster grandmother. The mother of the husband of his foster mother is his foster granny. The sister of his foster mother is his foster maternal aunt. The sister of the husband of the foster mother is his foster paternal aunt. The foster mother's grand daughters are his foster nieces.

All the above categories are forbidden for a man to marry by virtue of fostrage⁵⁰.

⁴³ op. cit. M.A. Ambali. Pg. 155.

⁴⁴ Hammudah 'Abdal 'Ati, "The Family Structure in Islam", (Islamic publications Bureau, Lagos,

Nigeria) (1982) pg. 137.

⁴⁵ Qur'an 60: 12, Qur'an 2: 221.

⁴⁶ op. cit. Hammudah 'Abdal 'A.L.T. pg 131

⁴⁷ Quran 4:23.

⁴⁸ Wet nurse from who a man sucks.

⁴⁹ A girl born of a man's wet nurse (foster mother)

⁵⁰ op. cit. M.A. Ambali; pg. 142 - 143.

CONCLUSION

Marriage, viewed from whatever angle is an important stepping stone in the lives of every mankind and its future and prospects should not be taken with levity. Based on this, this present study illustrated several obstacles which might constitute itself to an impending marriage between parties.

Consequently, every citizenry has to be properly guided in order not to fall into any of these folds, and this has been the major brain behind writing on this very subject.

It is therefore hoped that, sincere and genuine fact finding mission would be undergone by both parties in order that, the precise stand of their relationship will be known right from the onset.