

THE DEBILITATING EFFECT OF CIRCUMSTANCE OF BIRTH ON LEADERSHIP IN IGBOLAND: A TRIP INTO MARRIAGE, THE DEAD AND THE LAW

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Abstract

Custom being the accepted usage of a people is dynamic. Being dynamic means, it changes with the times. Has it changed in Igbo land to be accepted as part of the customary law, a marriage between the living and the deceased? This paper seeks to expose the instances of marriages between the living and the dead in Igbo-land, and the validity of such marriages alongside the marriage laws in Nigeria. The paper will also discuss the rejection facing the products of such so called marriages, in the area of leadership at various levels of existence, and possible suggestions as to the way forward shall be proffered.

Nigerian Statute Books (Legislations by authorized law making body) are replete with provisions covering all aspects of life, rights and obligation of Nigerian people. Customary law, and practice, although they form a source of Nigerian law, cannot override Statutory and Constitutional provisions especially on human rights. Despite the array of statutory provisions including the 1999 Constitution of the Federal Republic of Nigeria, some repugnant customary practices have continued to linger, impacting negatively on the lives of many people. The obnoxious practices have found expression also in incidences of marriage and the rights and obligations accruing therefrom. In some cultures and areas in Igbo-land, it is common to find celebrations of marriages between a living person and a dead person albeit under different circumstances.

Death is the cessation of all biological functions that sustain a living organism. With death also come to an end, all social functions of a person including marriage. Legal consequences also follow death and the most important is the removal from the person, what in legal terminology is called person-hood. Marriage is a socially or ritually recognized union or, legal contract between spouses that establishes rights and obligations between them and their children, and between them and their in-laws (Haviland *et al* 2011). It would seem that while death puts an end to marriages defined above, it also forms the basis for the “celebration” of some forms of marriages celebrated only as customary practice. The same cultural and traditional practices and observations that have created such marriages also place the products of such marriages in a precarious position in the area of leadership. This paper will look at such marriages, side by side with conventional type of marriages, and examine their repugnancy or otherwise. It will also x-ray the impediments faced by children of such marriages in the area of leadership in Igbo-land.

Instances of Marriages between the Dead and the Living

In the traditional Igbo communities where this is allowed, various circumstances may give rise to a marriage ceremony between the living and the dead. This may arise where;

- In a polygamous home, the only son of one of the wives dies without an issue; The sisters may marry a wife for him to beget children who will inherit their father’s properties with the male children of the other wives. The idea is to avoid the termination of their mother’s lineage in the family. This situation is of course liable to abuse as sometimes, it is not known whether the sisters use it as a ploy to partake in the inheritance of their father’s real properties since females do not inherit real properties in Igbo-land. Madam P (real name withheld) is a married woman who has her own family and resides in her marital village of their town. She comes from a polygamous home where she had only one brother who died a very long time ago in his teens without a child. Madame P is claiming a parcel of land belonging to her family of birth contending to be doing so on behalf of her deceased brothers’ children, who were all born, long after the death of her brother. She claims her late brother had a wife as recognized by custom. This is a live case which is pending in a High Court of one of the commercial nerve centers of the South East of Nigeria.
- Another instance could be where a man dies without a child and the wife herself cannot produce children. She may, where it is permitted marry a woman in her late husband’s name, who will raise children for the deceased and who will subsequently inherit him (Ewelukwa 2008).

- Sometimes a man may have children before his death both male and female (especially the much desired male children). After his death, his sisters may for whatever reason, marry a wife in his name, who goes ahead to raise more children in the dead man's name, for purposes of recognition, continuation of lineage and even inheritance. This was the case in *Okonkwo v. Okagbue (2008)* where the dead man's actual biological children found themselves with brothers and sisters calling themselves heirs to their father's estate. In the Court of first instance, there was no sympathy for the biological children until the case reached the Supreme Court in 1994.
- Sometimes a couple may be intending to get married when tragedy strikes and the woman dies. Depending on the particular circumstance, the man may be required to perform marriage rites of the dead woman. This is very rampant in situations where a living child is involved. For the man to claim his child, he may be required to perform the marriage rites to have legitimate claim to the child. The Caption, "Family wants man to marry dead woman's corpse" reported in 'The Sun Newspaper of October 27th 2013 is a semblance of the above scenario.

According to the report, the parents of the girl claimed their daughter was deceived into living with one Kingsley, who proposed marriage to her. He kept disappointing them each time he fixed a date for the marriage rites. They (the girl's parents) therefore took a decision of 'watch and see' more so when at this time, their daughter had already given birth to a baby for him. He continued to live together with her for fifteen years when she died just after childbirth (the third child). The parents and their kinsmen demanded that he brings his kinsmen to perform the marriage rites of the corpse before she can be buried.

A variation of this situation is where a man intends to marry a girl who is already pregnant for him and who dies in the pregnancy. For the sake of the love he has for her, and for the sake of the unborn child, he may decide to perform the marriage rites on the corpse and have her buried with his unborn child in his home.

In the above instances, the fathers of the children are known, and they are the ones expected to marry the corpse of their mothers. In all the other instances narrated before, there is usually no mention of the children's biological father because no one cared who he was. In the eyes of custom and its laws, the children were the off springs of the various dead-men whose lineages were sought to be either expanded or not allowed to go into extinction.

This paper has tacitly left the issue of widow inheritance and its products out of discourse. The obvious reason is that in this, the connection is between two living persons, and the father of the products is a known entity even if he performs the task in the name of his late brother.

Ghost Marriages *Vis-à-vis* Marriages in Nigerian

Colonization ushered into Nigeria a tripartite system of marriage, with corresponding governing laws. The statutory marriage and the laws guiding it were superimposed on the cultural fabric of the Nigerian society without being completely absorbed (Anyogu 2013). Broadly speaking there are three forms of marriage in Nigeria, Customary, Islamic and Act Marriages. These can then be classified into Monogamous and polygamous marriages, and are governed by three different laws respectively. While customary law governs customary marriage, Islamic laws govern Islamic marriages and Act Marriages are governed by the Marriage Act. (LFN 2004). While customary and Islamic marriages are potentially polygamous, Act Marriages are essentially Monogamous and are for life by the definition in *Hyde v Hyde* (1886). Whichever of the three marriages recognized and held valid in Nigeria, three essential features stand out, and these are

- Parties legally capable of contracting to marry.
- Mutual consent or agreement and
- An actual contracting in the form prescribed by the relevant governing laws.

An examination of marriage to a dead person *vis-à-vis* these features will show that a dead person (male or female) is incapable of contracting to marry, since death brings to an end; all biological and social functions of the dead person. The dead is also incapable of giving consent, whether informed or induced.

It is also deducible that where the first two features are absent, there can hardly be actual contracting in which ever form. It should also be noted that the dead is incapable of contracting as prescribed by the first feature, not because of any other reason but the simple fact, that the dead do not exist physically and cannot consummate a marriage. Islam recommends marriage when parties are ready financially and emotionally thereby tacitly encouraging child marriage. Even at that, the bridegroom and the guardian of the bride (*wali*) must both agree that the marriage must take place manifesting consent from a living being (the groom).

The above discourse disqualifies marriage to the dead as any form of marriage held valid in Nigeria. Some have argued that a purported marriage in the name of the dead (e.g. where a woman marries another in the name of her dead husband or brother) is equivalent to a gay marriage (This Day live). The authors must quickly assert here

that, a gay marriage is one where people of opposite sex live together as married couples and have sexual relations. In the type of marriage under discussion, the sexual relationship is usually between the wife and real men, not between the two women. The sole aim of the arrangement is usually to continue the family line of descent, but is it really the actual family line that is being continued?, even where the natural fathers of the products of the arrangement are not members of the family. The human right to marry and form a family belongs to a living being not the dead. It is therefore an unanswered question of whose human right is sought to be enforced here, and must it be done at the violation of the right to dignity of the human person of another?.

Those who have argued that it is not a gay marriage contend that there is no sexual relation between the parties; rather it is for the procreation of children who we submit are rightly products of marriage. In effect, they have agreed that principal actors in the consummation and continual consortium of the alignment are not parties to the purported marriage.

This group has also likened marriage to and procreation in the name of the dead to the application of cryogenetics to human sperm (Ewelukwa 2008). By this, it is possible to retrieve sperm from the dead and use the gametes retrieved in subsequent assisted reproduction. Some distinction could be made here. In the cryogenetics to human sperm, it is actually the living cell of the dead that is used, but there is no sexual contact for the conception to take place. If this is performed on the surviving spouse of the dead person then that product is naturally their offspring. The sperm cell is collected while the person is alive probably for medical treatment and subsequently used on the spouse, should he die before the treatment is over.

These cultural practices are not only barbaric, repugnant to natural justice, equity and good conscience; they also trample on the right to dignity of the living, in preference to the dead who cannot give informed consent to the entire practice. The writers humbly submit that ‘marriage’ to the dead is just an arrangement where for the self actualization of another, a woman is taken in and encouraged to give herself sexually to men for the purpose of procreation. For the purposes of inheritance and other vital endeavours in life, judicial pronouncements (as shall be seen later in this work), have tended to disqualify the products of these arrangements and so have rules put in place by the same cultures that allow their existence.

Judicial and Legal Response to Marriage to the Dead, and the Consequences of Posthumous Procreation:

1. CEDAW

The practice of marrying the dead is not only repugnant; it is also against the spirit of CEDAW (1981). It states;

State Parties shall take all appropriate measures including legislation to suppress all forms of traffic in women and exploitation of prostitution of women.

The CEDAW Committee has also expressed dismay at the persistence of customs and practices like the Levirate, Female Genital Mutilation, Polygamy and others which undermine the dignity of women and grossly violate their human rights. The committee also recommends that governments prohibit such practices through legislations which carry severe penalties for perpetrators.

It should be noted that Nigeria ratified CEDAW in 1985, but up till now has not domesticated it in consonance with the structure on International treaties in the Constitution of the Federal Republic of Nigeria. Never the less Nigeria has put in place some protective policies for women and some of these are informed by the provisions of CEDAW, although policies are not justiciable.

The 1999 Constitution of Nigeria

S. 42 of the Constitution prohibits Discrimination on account of place of origin, sex, ethnic group, circumstance of birth among others. The relevant section states;

- (i) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person;
- (a) Be subjected either expressly by; or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject, or
- (c) No citizen of Nigeria shall be subjected to any disability or depravity merely by reason of the circumstance of his birth.

The import of this provision is that no child is illegitimate in Nigeria. No matter the circumstance of one's birth, he/she is assimilated into the Nigerian society as a full-fledged citizen with respect to the exercise of all the rights guaranteed by the Constitution. It is to be noted however that S.42 of the Constitution is limited to prohibiting discrimination on application of the law or by government action. It hardly extends to actions by private actors especially in family circles.

Eugene Meribe V. Joshua Egwu (1976)

It was held in this case that woman-to-woman marriage is repugnant to natural justice, equity and good conscience and therefore void. In this case a barren woman married another for her husband for the sole purpose of procreation which the barren woman claims to be her own. The husband went ahead and had children with the fertile woman married for him. Even though the Courts did not view this as a woman to woman marriage, the Court still reiterated the ingredients of a valid marriage in the following terms;

In every system of jurisprudence known, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating a status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a 'woman-to-woman' marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14 (3) of the Evidence Act and ought not to be upheld by the Court.

It should be noted that there is a distinction between the marriage discussed above, and marriage to the dead which forms the focal point of this paper. In the instant case, the barren wife only procured a wife for her living husband to have children whom she called her own. This is to be distinguished from a situation where a woman is alleged to be procured for a dead man.

Okonkwo v. Okagbue (1994).

The Supreme Court also had occasion to in more recent time in the above case to express its displeasure in the absurd practice of ghost marriage. In this case, a man Nnanyelugo Unebue Okonkwo had lived his life with his wife and children and died in 1931. Thirty years later, his sisters married a wife in his name who now produced six children. In the case which got to the highest Court in the land, the plaintiffs/appellants were the surviving sons of the late Okonkwo born to him by his first (and only) wife. The first and second defendants were the surviving sisters of Okonkwo and while the third defendant was the wife the sisters married for him after his death. The issues in this case were the validity of the marriage contracted by the first and second defendants on behalf of the late Nnanyelugo Okonkwo, and the inheritance rights of children born to such a marriage. The Supreme Court noted that marriage is commonly known to be a union of a man and a woman and that the husband has to be physically present for the marriage to be consummated. The Court also observed that one of the essentials of customary marriage is procreation which can only be achieved where both husband and wife are alive and together. The Court observed that at best what happened in this case was a marriage between Okonkwo's sisters and the third defendant and that marriage on

behalf of the dead is repugnant to natural justice, equity and good conscience and therefore void.

By the doctrine of Stare Decisis and judicial precedent a decision by the Supreme Court binds every other Court in the country. It therefore means that such marriages are void, and their products not recognized for the purposes of inheritance.

Children of such Marriages and Leadership in Igbo-land: Igweship

It is common knowledge that one has to be ‘a fully fledged freeborn son of the soil’ to be the Igwe, Eze or Obi of his community. Those things may not be so spelt out but are tacitly and even sometimes expressly implied. A look at the Igwe-ship constitution of some towns in Igbo-land e.g. Abacha town in Idemili, in Anambra State, will buttress the position. The very first requirement in this constitution is that, “His father must be from Abacha” (Abacha town. Org) This is closely followed by, “the parents shall be at his birth lawfully married to each other. There can never be a marriage between a dead man and a living person, neither is marriage between a woman and another woman acceptable in Igbo land. The import of this is that any purported offspring from such a purported marriage is automatically excluded from the race of the Igweship in most communities. Some communities even mandate that both parents should be natives of the same community. A typical example is Onitsha in Anambra State, where the intending Obi must be the child of two Onitsha indigenes. It would seem that the same culture that accepts the existence of such people also creates bottlenecks to their enjoyment and participation of self actualization processes in their communities.

National Politics

The present democratic dispensation is characterized by representative capacity and from the grass roots. If one gets disqualified from leading his people locally, would he qualify to lead or represent them in the broader national capacity? In the 1979 elections, a governorship aspirant got a rude shock when some people imported a Fulani man into Igbo land saying he was the governor ship aspirant’s father. According to the story, when his father died, his mother moved to the North with her older children. There she met the Fulani man and had the governorship aspirant with him.

The implication was that he was not a true son of his community and so could not be a governor in Igbo land despite the fact that his mother was an Igbo woman. The debilitating effect of circumstance of birth with respect to leadership in Igbo land does not end with Igweship and politics. In many communities where Iba mmuo (masquerade) is practiced, one is also expected to be born properly (by parents being married and father being a son of the soil of his community) to qualify.

The case of *Okonkwo v. Okagbue (1994)* discussed earlier represents the position of the law with respect to inheritance. Children purported to be born in the name of a dead man cannot legally inherit his property. The custom itself has failed them hence the Court actions. Law is an agent of social change and if customary law is a source of Nigeria law, then it must of necessity be amenable to change within the acceptable standard of what is positive and progressive.

The view of some adherents of unchanging cultures is that customs and traditions be left as they are since they serve some purpose. For instance in this work, the custom under review ensures continuation of family line and name. Should this be achieved by producing human beings who will be excluded from participating in certain life endeavours by the same culture? It has also been observed that what is repugnant is but a question of fact. The variations and diversity of customs and traditions have made the uniformity of customary laws in Nigeria difficult and that is why the validity test has a positive effect on the development of customary law. It not only helps to remove injustice but also ensures that people do not hide under custom to perpetuate absurdity.

Conclusion

This paper has discussed the instances of marriage to the dead and life synopsis of same. In the paper we have also discussed the marriages recognized and held valid in Nigeria bringing out the missing elements and ingredients in the ghost marriages. The legal and judicial response in Nigeria has also been given. The difficulties faced by children born from marriage to the dead in the area of leadership in Igbo-land was also x-rayed. Valuable recommendations have also been made in this and it is hoped that when implemented they will help bring the affected Igbo communities out of the doldrums of the relics of the dark ages.

Recommendations

The following recommendations are hereunder proffered;

- All customs that are inimical to the exercise and enjoyment of human rights should be eradicated.
- The validity test should strictly be observed to eliminate the observance of cultures and traditions that lead to absurdity. It is absurd for one to consider marrying a wife for the dead, and have children indiscriminately and pretending that they belong to the dead person.
- Women should be empowered. Nigeria has taken steps to do this, but what is required is empowerment that results from persons to families and to the entire nation. Women who lend themselves out for this practice are so poor and needy that they are prepared to be married to a family in the name of its dead member, in exchange for being housed and fed.

- Domestication of International treaties and Conventions which protect human rights and the dignity of the human person should be encouraged. The Domestication of CEDAW is very necessary.

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