ANALYSIS OF LEGAL ISSUES INVOLVED IN THE TERMINATION OF “DOUBLE-DECKER” MARRIAGE UNDER NIGERIA LAW

by

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Introduction

And the Lord said, it is not good that the man should be alone, I will make him an help mate for him

…marry woman of your choice two or three or four of them….

The above quoted verses are words used by God both in the Bible1 and Quran2 to encourage marriage for the continuous existence of man on earth. Similarly, the Bible3 says, ‘Let Man not put apart those whom God has joined. “Likewise in the Quran, Allah4 said, ‘Those who break the covenants of Allah after ratifying it and tear apart what Allah ordered to be joined…they are the ones who are losers.’”

However, under certain circumstances, separation of couples may be necessary. If this occurs, different courts both in the South and in the North have jurisdiction to entertain the suit and if necessary order divorce. A High Court has the exclusive

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1. See Genesis 2 : 18.
2. See Quran 4 : 3.
4. Quran 2: 27.
jurisdiction to terminate a statutory marriage. While a marriage celebrated under the custom will legally be terminated either in the Customary Courts, or in the Area Courts.

**Types of Marriage in Nigeria**

In Nigeria, we have both monogamous and polygamous types of marriage. In the monogamous marriage:

…The law requires that a party to a contract of marriage must possess the single status that is, not being at the time of promise of marriage, married to a third party.…

This was echoed by the Court of Appeal in *Wilson v. Carnley* where it was held that any contract of marriage between an already married person to a third party is against public policy and morals and is therefore void”. Thus, a monogamous marriage is

…a marriage which is recognized by the law of the place where it is contracted as voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage…. It is…the legal Union of man and woman as husband and wife.…

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6. This in the southern part of Nigeria.
7. This in the Northern part of Nigeria.
9. (1908), KB 729.
Not only that, a monogamous marriage in *Hyde v. Hyde*\(^{12}\) was said to be “the voluntary union for life of one man and one woman to the exclusion of all others”. It is “…the legal status, condition or relation of one man and one woman united in law for life or until divorced…”\(^{13}\) Any other marriage which allows one to have more than one wife is a polygamous marriage.\(^{14}\) Thus, a polygamous marriage on the other hand is “…a voluntary union for life of one man with one or several wives…”.\(^{15}\)

It is also pertinent to note that polygamy in Nigeria is a customary law institution.\(^{16}\) Therefore, Polygamous system of marriage is strictly governed by customary law.\(^{17}\) A “customary law marriage allows the husband to validly marry other wives under it”.\(^{18}\) One of the reasons why people engage in polygamous marriage in Nigeria according to Jonnson\(^{19}\) is that:

Polygamy enables all females to marry and safeguarded widows by “widow inheritance” so that there was no problem of neglected old woman.

Coker\(^{20}\) also stated that “in the early part of this century, monogamy inevitably drove men to adultery particularly in the periods when their wives nurse their babies. Aguda\(^{21}\) further
observed that one major problem with the Marriage Act in Nigeria is the proscription of polygamy. According to him:

One main thing that made the Marriage Act unworkable in Nigeria is the proscription of polygamy.

From the foregoing, one clear deducible fact is that, even though polygamous type of marriage is not statutorily recognized in Nigeria, it is customarily legal. Thus, either one contracts a statutory or customary marriage; the most important thing is to celebrate such a marriage according to the prescribed form by meeting the essential requirements of a valid marriage.22

What is a “Double-Decker” Marriage?
As rightly observed by Abdulmalik23, nowhere in the Marriage Act is “double-decker” marriage defined. However, according to him “the dictionary meaning of double-decker is a vehicle with two decks or a sandwich with two layers of filing”. The word “Double-decker” is a coinage of Margaret C. Onoka24 which she used to describe a type of marriage that

…involves the celebration by the same couple, of a marriage under one system and their subsequent marriage under another system….

“Double-Decker” Marriage is a chameleonic type of marriage which has the flavour and characteristics of both the customary and statutory Marriage. All the features that makes customary

22. For details of these essentials, see Kasunmu and Salacuse: Nigerian Family Law, (London; Butterworth,1966), see also Itsey Sagey: Nigerian Family Law; Principles, Cases, Statutes and Commentaries, (Malthouse Law Books,1999).
marriage to be valid in law also makes a “Double-decker” marriage to be valid. And most of the essential requirements of a valid statutory marriage to a large extent serve as the requirements for a valid “Double-decker” Marriage.

Reasons for “Double-Decker” Marriages in Nigeria
Since there is no law in Nigeria presently that forbid a double-decker marriage in clear terms, people tend to believe that their tradition makes it imperative and that the two marriages are traditionally recognised. In fact

...The average native rarely fails to carry out the prevailing marriage ceremony when taken a bride... people speak of a woman acquired without the customary marriage ceremonies as a lover or concubine...25

Another reason why people engage in “double-decker” marriage is to look for a legal force or security for their earlier customary marriage. The non-codification of the customary law marriage among the regime of Federal Legislations inevitably induces some Nigerians to look at it as mere conventional ceremony and that under the Act as one with legal force26, even though this notion is wrong.27

In addition to these, some group of couple contracted double marriages as a way of preserving their customs and tradition of their fore-fathers.28 This belief is so fanatical among Nigerian

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women to the extent that without a traditional marriage, some women do not see themselves as properly married. Thus, after the traditional marriage, many still contract Act marriage for prestige and because of the official purpose the certificate will serve. 29 To some people, each marriage serves a purpose and the combined effect gives solid foundation to the marriage. 30 In some instances, pressures from the religious circle or sect with which the couples and family belong do calls for a contract of double-decker marriage. 31

However, recent researches 32 have shown that the incidents of a marriage celebrated under the Act and a marriage celebrated under custom differ considerably. Not only that, the process and legal issues involved in the termination of each marriage also differs and each cannot be relegated to the background.

Analysis of the Legal Issues Involved in the Termination of “Double-Decker” Marriage under Nigerian Law

(a) Termination by Divorce

The argument of the “Conversion theorists’” was that, once couples after their customary marriage undergo a statutory marriage, the former customary marriage automatically converts its legality to the latter statutory marriage, thus:

The two marriages do not coexist; the customary marriage merges into the ordinance marriage and loses all its distinction and characteristics, its legal incidents and consequences… 33

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29. As held in Ohochuku v. Ohockuwu (1960) 1 ALL ER 253
30. Ibid.
And to terminate such a marriage by divorce, petition must only be presented in the High Court which has exclusively original jurisdiction to dissolve statutory marriages. The conversion theorists believed, as was held in *Teriba v. Teriba and Rickett*\(^{35}\), that:

The true position is that the customary marriage is converted by the Act marriage which in effect, supersedes it. Therefore, if the Act marriage is subsequently dissolved, the customary marriage cannot revive.

Nwogugu\(^{36}\) seems to lend credence to this position in his submission, when he said the correct position is that a subsequent statutory marriage supersedes a previous customary law union. He justified his position further by saying that the first relationship into which parties enters by solemnizing a statutory marriage is one which is unknown to customary law and therefore, a different law system will apply to the situation.\(^{37}\) According to him

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\text{...marriage under the marriage Act clothes the parties to it with rights and obligations, which are un-known to customary law.}^{38}\]

He submitted further that according to Nigerian law, the *decree nisi* would dissolve both the former customary and subsequent statutory marriages. And he concluded that

\[\text{34. S. (2) (1) M.C.A. 1970.}\]
\[\text{35. Suit no 1/211/67 of 2/769 (unreported) Ibadan High Court.}\]
\[\text{37. Ibid p. 59.}\]
\[\text{38. Ibid.}\]
Matrimonial relief can only be sought in respect of acts or events which took place after the celebration of the subsequent statutory marriage….

On the termination by divorce, the argument of the “Co-existence” theorists was that, both the first customary marriage and the latter statutory marriage co-exist; both marriages incidents are legal and valid. And to terminate such marriage, it has to be dissolved differently in different courts. According to them, the Magistrate Courts would have jurisdiction to dissolve only the initial customary law marriage, while the subsequent Act or Statutory marriage is to be dissolved by the High Court. This was also the position of the Court in Afonne v. Afonne where it was held that:

…Where two legally recognized Marriages are involved, the party seeking dissolution and a decree of divorce should clearly specify which marriage or marriages he or she wants dissolved.…

Thus, going by the Co-existence theory, the dissolution of the Act Marriage could not operate as ipsofacto dissolution of the customary marriage. To them, if the customary marriage terminate, it would not affect the continuance of the statutory marriage. Because, under our law, there are different legal approaches as regards the incidents and their dissolution.

(a) Termination by Death
In the event of death of a spouse who contracted a “double-decker” marriage especially if it were the husband,

41. As held in Akparanta v. Akparanta (1972) 2 E.C.S.N.L.R. 779 at 783.
…the co-existence theory asserts that although the married status of the parties under the Act marriage would automatically be terminated, their customary law marriage status would require the performance of certain acts for its termination…⁴³

Whereas, in the events it was the wife who pre-deceased her husband, the widower’s relationship with his parents-in-law still subsists especially “where there are issues of the marriage. Thus, the

Automatic termination by death of her married status under the Act would have no effect whatsoever under the customary marriage law. She maintains her status as “wife” in her late husband’s family.⁴⁴

Such a woman may be inherited by the deceased heir and will have to remain with the deceased husband’s family. The only condition that can make such marriage to be terminated according to the co-existence theorist is “until she either re-maries or refunds the marriage symbol which her late husband’s family had given to her.⁴⁵

The conversion theorists on the other hand are of the opinion that the marriage status of the “double-decker” married couple comes to an end on the death of either of the spouse. Hence, death ipso facto terminates the marriage relationship of the statutory spouses.⁴⁶ And that is why under the M.C.A. 1970⁴⁷ a party can

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⁴³. Margaret, op cit p. 287.
⁴⁴. Ibid.
⁴⁵. Ibid. p. 287.
⁴⁶. Ibid. p. 230.
⁴⁷. S. 15 (2) (b).
file a petition to have marriage terminated on the allegation “that the other party to the marriage has been absent from the petitioner for such a time and in such circumstances as to provide reasonable ground for presuming that he or she is dead”.

**Conclusion and Recommendations**

**Conclusion**

From the foregoing discussion, it is clear that the termination of “double-decker” marriage is not a straightforward jacket thing. It is an action that is fully engulfed in controversy. To the conversion theorists, the petition for the termination of double-decker marriage should lie with the High Court because, the customary marriage is converted by the Act Marriage which in effect supersedes… 48 And in that circumstance, a termination of double-deck marriage under the Act automatically ends the customary aspect of the marriage.

However, a critical appraisal of this theory seems not to be a true reflection of the people’s perception of the legal status of double-decker marriages. It has been stated elsewhere in this work, that people engage in double-decker marriages either to preserve their tradition or to gain their cultural recognition; and in fact, this act pre-dates the Act marriages. For that, it is the humble opinion of this writer that, the aim of those people is not to convert their customary marriage to a statutory one. More so since both customary and statutory laws are recognised in Nigeria, there is no basis saying that one law looks powerful or “supersedes” another. In *Jadesimi v. Okotie Eboh*, 49 the Supreme Court held that:

> The status of being married under Islamic Law or Customary law is well recognized in this country and such marriages should not be accorded any

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status that is inferior to that of marriage under the Marriage Act.

Not only that, going by the Supreme Court Ordinance\(^50\) and the various High Court Laws of the state, the “native law and custom” has equal recognition as enforceable laws. And since both are “recognised” as enforceable laws it is the candid opinion of the writer that the assertion of the conversion theorists sounds weak. It is more reasonable for the High Court to have jurisdiction to dissolve the statutory bond of a double-decker marriage and … leaving the dissolution of the customary law bond to the jurisdiction of the Customary or District Court of a State\(^51\).

A critical appraisal of the stand point of the co-existence theorists on the termination of “double-decker” marriage too, that if the petition is presented first in the Customary or Area Court, either of them would have jurisdiction to dissolve only the initial customary law marriage, leaving the Act Marriage to be dissolve by the High Court\(^52\) seems to equally be cloud with practical difficulties. The reason being that some of the incidents of the customary marriages can not be accommodated by the Act; for example, the issue of widow inheritance by the family of the deceased which is encouraged under the customary marriage but otherwise under the statutory marriage system.

Furthermore, the fact that none of the legal essentials of a valid customary law marriage …is expressly or impliedly mentioned in the Marriage Act seems to suggest that the drafts men had not intended the operation of any aspect of the incidents of customary law marriage to be subject to the operation of any incidents of the Act Marriage…\(^53\)

\(^{50}\) S. 19.
\(^{51}\) Margaret \textit{op cit} p. 279.
\(^{52}\) \textit{Ibid} p. 278.
\(^{53}\) \textit{Ibid.} p. 288.
From all the aforesaid, it is clear that the legal issues involved in the termination of double-deck marriage in Nigeria are enormous. Amongst such issues are:

(a) The incompatibility between what terminates marriages under the Act and what terminate same under the customary law. For instance while adultery and intolerability is a “fact” evidencing the irretrievable breakdown of marriage under the Act, such is only a ground for divorce available exclusively to the husband under the customary law marriage system.
(b) The silence of the Marriage Act on the subsequent Act Marriage after a customary marriage.
(c) The non recognition of a double-decker marriage as a class of marriage under any Nigerian law.
(d) A complete adoption of the co-existence theory will bring some practical difficulties as discussed in this chapter and a wholly adoption of the “conversion” theory may as well produce a bigger problems than it solves.

**Recommendations**

Even though Marriage Act does not expressly forbids a couple already married under the customary law from subsequently marring under it, and the customary law neither frown at the subsequent marriage under the Act after the initial customary marriage, however due to the unresolved legal issues concerning the termination of double-decker marriage and since…a party who celebrated a “double-decker” marriage could not have two different types of marriage status – one under the customary law and the other under the statute….this writer humbly proffer the following recommendations for the improvement on the law as regards the termination of “double-decker” marriages:

(a) **The Law Makers**
In order to clear the controversies associated with double deck marriages, there is the need by the lawmakers to introduce a new marriage law that will prohibit dual marriage in Nigeria. The passage of such law will curb the extravagant and unnecessary spending by couples on a single marriage. Such law will make it mandatory for couples to either contract Act marriage,\(^{56}\) or contract customary marriage\(^{57}\) only.

Not only that, since both customary and statutory marriage are recognised under the Nigerian law\(^ {58}\) as a valid marriage, it is further recommended that both the Evidence and Criminal Code Act\(^ {59}\) be amended and all the rights and privileges ascribed only to the benefit of statutory marriage couples therein be extended to the benefit of the customary marriage couples too.

(b) **Marriage Registry**
The Registry should embark on a vigorous enlightenment campaign to discourage couples from wasting their money on the re-celebration of a marriage that has already been celebrated customarily. Couples should be educated that... in Nigeria Customary Marriage is a legal marriage, a marriage recognised by customary law... and that the re-celebration will not add anything to their status. This will halt or at least reduce the erroneous

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56. Which will be terminated only in the High Court.
57. Which will be terminated either in the Area in the North or Customary Court in the South.
58. As was held in *Jadesimi v. Okotie Eboh* (1996) 2 N.W.L.R. 128 at pp. 147-148.
59. Especially as regards the issues of competence and compellability of couples in evidence against one another and other related issues as outlined in sections, 161,162 and 164 of Evidence Act CAP 112 Laws of the Federation of Nigeria(1990), and section 34 and 36 Criminal Code Act CAP 77 Laws of the Federation of Nigeria(1990).
belief that it is until when couples contracted a double-decker marriage before their marriage can be legal, safe and protected.

(c) The spouses
The spouses should have a firm mind whenever contemplating on marriage, they should either contract a marriage according to the custom which is a customary law marriage, or they should go for a pure Act marriage since both are recognised in Nigeria. The Supreme Court confirmed this in *Jadesimi v. Okotie-Eboh*\(^6^1\), that:

> The status of being married under Islamic law or Customary Law is well recognised in this country….

(d) Communities
Since status of being married under Islamic law or customary law is well recognised in this country and since “Native law and custom” has equal recognition as enforceable laws,\(^6^2\) communities should be mandated to present certificate to couples as an evidence of such marriage in order to allay the fears of marrying couples with regard to the documentation of their relationship.

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62. See section 19 Supreme Court Ordinance No. 4 of 1876.