A CASE FOR THE RECOGNITION OF THE RIGHT OF SPOUSES UNDER CUSTOMARY LAW TO MAINTENANCE

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ABSTRACT

Customary law marriages in Nigeria are not only recognised as legal unions but also confer on parties a measure of rights and privileges. Unfortunately, these rights and privileges are far less attractive compared to those associated with marriages conducted under the Marriage Act. Prominent among these rights is the right to maintenance. The purpose of this paper is to make a case for the recognition of the right of spouses under customary law to maintenance, especially giving that customary law is dynamic, flexible and must be acceptable to the people. This research reveals that recent behaviours under traditional African customary law tend to favour the extension of the English rule of maintenance to spouses of customary law marriage, especially the wife. Recent judicial pronouncements ascribing important proprietary right to Nigerian women and the general and gradual changes in certain obnoxious and oppressive customary gender-based practices as well as recent local legislation restoring the prestige and status of the woman in Nigeria all tend to support the case that it is high time the right of spouses under customary law to maintenance was recognised.

Keywords: Recognition, Spouses, Customary Law, Maintenance

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INTRODUCTION

The dissimilarities in the nature of rights,[1] duties,[2] privileges[3] and liabilities which follow marriages conducted under the Marriage Act[4] and those which accompany spouses married under native law and custom[5] are not only significant, but somewhat give the impression that marriages under customary law are lesser unions to those under the Act.[6] There are a number of benefits which avail parties to a statutory marriage which are not applicable to customary law marriages. One of such benefits conferred on spouses of statutory marriages is the right to maintenance.

It is not in dispute in Nigeria that marriages contracted under native law and custom are legal and as valid as their counterpart under the Act is not in dispute.[7] What appears to have sponsored a disparity between the two types of marriage is in the area of the status conferred on both types of marriages by certain statutes, particularly, the Criminal Code Act[8] and the Evidence Act,[9] leaving behind a legal condition with far reaching social consequences, which legal condition has continued to bug the minds of legal writers and sociologists alike.

While this research is not dedicated to the examination of the various disparities[10] which exist between customary law marriages and marriages under the Act, the work attempts to give a comprehensive overview of the need for the recognition of the right to customary law maintenance. The work also questions the juridical basis for the non-enforcement, exclusion or lack of recognition of the right of a woman married under customary law to maintenance in Nigeria.

THE BENEFITS OF STATUTORY MARRIAGES AND THE EXCLUSION OF CUSTOMARY LAW SPOUSES

Various statutes in Nigeria in conferring one benefit or the other on the parties to marriage under the Act have given varying definitions to the term ‘marriage’ in attempt to exclude customary law spouses from the application of such statutes. The Criminal Code Act[11] is one of such statutes. The Criminal Code Act limits the scope of the application of some of the benefits created by the Code to what it terms ‘Christian marriage’ and defines Christian

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marriage as: "A marriage, which is recognized by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others."

It is very glaring that the definition above does not anticipate the inclusion of customary law marriage in the application of the Criminal Code Act. Flowing from the definition of 'Christian Marriage' above, it appears too that the Criminal Code Act does not necessarily require a marriage to comply with the Marriage Act before the parties thereto can be qualified to benefit from its provisions. This is so as a Christian marriage is not necessarily a marriage under the Marriage Act. In Ayo v. State[12] the point was made very clear that the "celebration of a church marriage does not *a fortiori* confer statutory flavour" for the benefits of section 161 (2) of the Evidence Act.[13] It is significant to note that while the Criminal Code Act sets out the meaning of the phrase "Christian Marriage" at the onset, the Act appears to abandon the phrase as same is not repeated in the code. Rather, the Criminal Code Act severally uses other phrase like "Lawful Marriage."[14] The old Evidence Act[15] on the other hand defined the term "wife and husband"[16] for the purpose of the application of the Act, as "wife and husband of monogamous marriages."[17]

It can be deduced therefore that the intention of the legislatures in defining the term 'Christian marriage', and 'lawful marriage' in the Criminal Code Act, and in the use of the phrase 'wife and husband' in the Evidence Act is to ensure that the affected statutes apply only to persons married in accordance with British marriage tradition which the Marriage Act and the Matrimonial Causes Act represent.

The obligation to maintain one's spouse is created under section 70 of the MCA, a statute which is not applicable to customary law spouses. This has been the major platform for the contention that customary law wives do not have enforceable right to maintenance against their husbands.[18] As smooth as this may sound, it is worth noting that the courts have at some point in time expounded the application of certain derogatory provisions of English statutes to include customary law spouses. The question is: why should customary law spouses bear certain burdens created under English law but cannot enjoy certain benefits created under English laws? For instance, the Wills Act of 1837 (a statute of general application) provides that a bequest by the testator to a witness or the spouses of a witness shall be void.[19] In *Bangbose v. Daniel*,[20] the question arose as to whether the word "spouse" in the said section included a person married under customary law. Ordinarily, the statute was enacted in England

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where monogamy is the only type of marriage recognized. But the Privy Council held that the meaning and effect of the statute was 'wider than it would have been under the purely domestic laws of England.' Accordingly, the Privy Council rejected the Appellant's contention that the statute could not be applied to polygamous union because of the difficulty of applying its provision to a plurality of wives. The import of the decision of the Privy Council is that section 15 of the Wills Act 1837 must be interpreted to include spouses under customary law even though the Act was an English statutes enacted originally for English people but now received as part of Nigeria laws. The question is: if it were some benefits that the statute conferred on spouses, would the court have expounded the scope of the statute to accommodate spouses under customary law? It is doubtful.

MAINTENANCE GENERALLY

The concept of maintenance is of common law origin. At common law, a husband is obliged to maintain his wife. This is an obligation which arose from the fact of cohabitation and the wife management by the husband. Where the man fails to provide his wife maintenance the wife at common law became an agent of necessity.[21] This practice was therefore part of the received English law in Nigeria. Prior to the enactment of the MCA in 1970, recourse was feely had to the common law for the application for maintenance in Nigeria.[22] After the enactment of the MCA, the MCA took over from the common law and became the statutory foundation for applying for maintenance in Nigeria.[23]

Under customary law, the husband equally has a duty to maintain his wife. Thus, where the husband fails, a breach of this customary law duty can ground a reason for divorce. There are customary practices which confirm that the husband has a duty to maintain his wife. For instance, in the eastern part of Nigeria where a customary law husband forces the wife and her children or his pregnant wife from the matrimonial home to her father's house, whenever the husband desires to have his family back, he is under a customary obligation to pay for the cost of maintaining his wife and his children while they were with the wife's parents.[24] Though, customary law imposes some duties on the husband to maintain his wife, the challenge is usually that of enforcement.

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THE NOTION OF MAINTENANCE UNDER NATIVE LAW AND CUSTOM

There is no clear practice of the doctrine of maintenance under native law and custom. Even though customary law is limited in its application and applies to only those who are subject to it, there appears to be no record of any particular traditional African society where the practice of wife maintenance after divorce is widely recognised under customary law. According to Unokah,[25]

> Unlike the wife married under the Act who may, on desertion by her husband, apply to the court for an order for maintenance against the husband, the customary law wife has no right of maintenance should she and her husband live apart following a dispute.[26]

The idea of maintenance of the wife was initially seen as a direct conflict with Africa social and cultural background. To this extent, some Nigerian judges were not comfortable with the application of the concept in Nigeria. According to Thompson J. in *Akinsemoyin v. Akinsemoyin*,[27]

> …the history of maintenance in England is different from the history here. We have merely inherited a statutory provision based on the custom of the people of England, which are not only unknown in this country but is in contradiction to our own. The English man who received dowry from his wife's family has got a pecuniary benefit from the marriage part of which the law [requires] him to return on the dissolution of the union. The Nigerian man is not so blessed. He pays donation *proper nuptias*… Anthropologists call it bride price. Now it will be ridiculous and indeed unreasonable to expect a man who has gone into all that expenses in order to get married to be overburdened with maintenance for the woman unless there are exceptional circumstances warranting it.

Given the above reasons, many Nigerian judges have been very reluctant to grant order of maintenance even in favour of wives married under the Marriage Act. For instance, in *Okafor v. Okafor*,[28] Oputa J. (as he then was) said that:

> Since it is the trend under the Matrimonial Causes Decree to facilitate the dissolution of marriages, a wife/petitioner eager to have all links with her

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> husband broken should not keep alive any financial link with a man she no longer regards as her husband, a man she no longer owes any marital obligation including the obligation to maintain. Why should there not be a complete dissolution including the dissolution of all erstwhile financial bonds and obligation?

Some other Nigerian judges influenced by their cultural background reluctantly granted maintenance order overstretching the spirit and letters of the MCA. For instance, in *Achugbue v. Achugbue*[29] Ogbobine, J. awarded £2 per month to the petitioner as maintenance but added that the payment would cease if: (1) the petitioner remarried (ii) live with any other man or (iii) had a child by any other man. These factors considered by the court in both cases do not derive their authority from the MCA. These factors rather support the sentiment of traditional Nigerian judges towards maintenance even in respect of application founded under the M.C.A. This goes to show too, why the practice of maintenance in favour of customary law wives has continued to receive resistance in traditional African societies.

ARGUMENT AGAINST CUSTOMARY LAW MAINTENANCE

Most of the views expressed against customary law maintenance in the past do not appear to hold water in modern time. Some of those views are the view of Thompson J. in *Akinsemoyin v. Akinsemoyin*[30] that cultural differences on the notion of bride price alone were sufficient for the nonpayment of maintenance in Nigeria. This view can no longer be accepted in Nigeria, particularly in modern times. The question is: Is it really 'ridiculous' and 'unreasonable' that a man who went through marriage expenses is being expected to maintain his wife? upon divorce.[31] The basis for the unwillingness to make maintenance order under native law and custom is not far from the general oppressive nature of customary law towards women,[32] and not necessarily on the basis of who receives bride price in Nigeria as advanced by Thompson J. in *Akinsemoyin v. Akinsemoyin.* Under most customary practices, the African women generally are without right. According to Freeman:[33]

> Her husband had near-absolute control over her property as well as her person. She had no right to custody of their children and no right to testamentary

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> freedom. Her husband even had the power of 'domestic chastisement.' A married woman could not refuse consent to sexual intercourse with her husband.

This no-right situation in which women found themselves under customary law marriage in Africa is beginning to wane. A wife under native law and custom in most African societies could not inherit their husband's properties because they themselves were considered as chattel to be inherited.[34] From this background, it is obvious why the notion of maintenance has been viewed by some Africans even in modern times as unreasonable and unacceptable under native law and custom. Today, most of these obnoxious notions about the female sex have been erased and the affected rules of customary law or practices stopped by the court. Certain local[35] and international documents[36] have helped to enhance the rights of the women in modern times. Today, Nigerian women are holding very high political positions with very high educational qualifications. The Nigerian woman sixty years ago is no longer the Nigerian woman of today. The customary statement of law that women are chattels is no more as popular as before, rather same sounds somewhat offensive to the ears n modern times. Given the flexibility of customary law and modern trends as well as constant change in society, it is in order to argue that it is now time customary law maintenance is given a more serious thought.

The opinion of those opposed to payment of maintenance in Nigeria on ground of cultural disparity between Nigerian and English marriage culture do not sound very convincing. Can the dowry which the man pays to the family of his wife be compared with maintenance which should be paid to the wife given the fact that in some locality in Nigeria, the bride price or dowry is worth not more than the value of a bottle of soft drink?[37] Beside, under English law, the wife can be ordered to maintain her husband[38] yet the man receives dowry from the wife's family in England. If there is anyone that deserves maintenance most, it is the African customary law wife, who under native law and custom is expected by tradition to render unalloyed obeisance to her husband. Her whole life is her husband yet so unprotected by law unlike her English counterpart. She has no right of action against her husband over allegation of adultery no matter how brazenly the husband goes about it. She must be faithful at all times to her husband. She can easily be replaced. What is more? The husband has the unfettered right to share the matrimonial home not only with subsequent women married by him under native law and custom but also with concubines. He has no limit to the number of wives he can marry. The wife may have given him all her support in becoming what he is, but where the marriage

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breaks down she is not entitled to any property. She goes away with nothing except her personal effect. Shortly thereafter another woman steps in to take over from her.

Again, in most African societies, the family name is usually perpetuated through the male line. Thus, the girl child is not seen as a permanent member of the family.[39] She is always seen as having her place in her husband's home.[40] Where the marriage is no more, she is believed as one who would soon be owned by another man and as such it was seen as absurd for a man to maintain another man's wife. This line of argument is completely conceived outside the content of the contribution which a married woman may have made to the success of her home and her enterprise. The argument lacks moral foundation and not supported by fairness given the limited economic role women were given in traditional African societies. This argument does not promote good law, certainly not a good customary law. A good law is not always divested of morality.[41]

THE JURIDICAL BASIS FOR NON - ENFORCEMENT OF CUSTOMARY LAW MAINTENANCE

There is no doubt that the idea of maintenance generally initially appeared strange to most African judges even though there is no strict legal rule forbidding it. Udo-Udoma J. in Coker v. Coker[42] had the view that:

> It is almost unprecedented in this country for a wife having divorced her husband to turn around and seek maintenance from same husband. The very idea of maintaining a wife after divorce appears to me to be foreign to the African conception of marriage and divorce. A situation like the present cries aloud for distinct Nigerian rule.[43]

The opinion of Udo-Udoma J. should not be misunderstood to mean a situation of frustration occasioned by absence of "distinct Nigerian rule" in favour of maintenance. If this were so, a more liberal approach would have been adopted on the issue of wife maintenance after the enactment of the Matrimonial Causes Act 1970 which distinctly provided for maintenance. The idea that maintenance is alien to Africa did not change immediately even after the enactment of the MCA which expressly provides for maintenance. Aguda[44] had this to say:

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> This may be understandable in England, but in this country, it appears extremely harsh to the man except in exceptional circumstances. Here again one must bear in mind our own custom and even current practices. In England and European countries, it is the custom of the women to take the husband's substantial article of wealth as dowry on their wedding, but here in Nigeria the opposite is the case… the dowry may run into hundreds of pounds; and the man generally speaking in addition to the dowry pays for the entire wedding ceremony. It is also well known that by and large the Nigerian woman married under the Marriage Act is very much (aware of) the benefit to be derived from such a status, but is in most cases unwilling to face its responsibilities. Her ties to her father's family are almost unbreakable so that where she works and earns a substantial sum of money her first financial obligation is to herself, the next is to her parents and brothers and sisters and lastly to her own home. In the circumstances, it is my considered opinion that the obligations to maintain a wife must end with a decree of dissolution of nullity of that marriage, except in exceptional circumstances, the proof of which must lie to the woman in this regard, section 70 of the Decree needs some amendment.

The above opinion of the learned author, no doubt, raises a myriad of moral and social arguments. Again, Aguda appears to have been seriously influenced by the history of the origin of dowry in Europe in determining the applicability of maintenance in Nigeria. It should be noted that there is no existing rule of customary law which forbids or makes its application impossible. The point has been made in this work[45] that the judicial inertia towards the granting of maintenance application upon divorce even after the coming into force of the Matrimonial Causes Act was purely as a result of the reservations of the judges based on traditions which discriminate against the woman. Though, it is arguable that while there is no rule of customary law against wife maintenance upon divorce there is also no explicit customary law rule or practice as a basis for its application. Thus, the Courts should be open to granting of maintenance application even under customary law at least in some circumstances which shall be discussed later.[46]

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A BRIEF OVERVIEW OF THE POSITION IN SOUTH AFRICA AND PAPUA NEW GUINEA

South Africa

In South Africa, customary law marriage generally were not recognized prior to 1993 owing to their polygamous nature.[47] Following the recommendation of the South Africa Law Reform Commission, the Interim Constitution (Constitution of the Republic of South Africa),[48] and the Final Constitution of the Republic of South Africa, 1996, a new dispensation was introduced.[49] Section 15(3) of the Constitution, for instance, provides that nothing shall prevent legislation from recognizing, *inter alia*, marriages concluded under any tradition or system of religion, personal or family law.[50] Following this constitutional background, the Recognition of Customary Marriage Act[51] was enacted primarily to give a specific statutory backing to marriages contracted under customary law. The said Act does not only recognize customary marriages as valid and legal but also empowers the courts to grant order of maintenance. Section 6(4) of the Recognition of Customary Marriages Act provides that: "A Court granting a decree for dissolution of a customary marriage… May, when 'making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law"

Thus, recognition of customary law including customary law marriages was brought about in South Africa by codification of customary law rules which were extended to give comprehensive rights and duties to spouses of customary law marriage similar to those associated with spouses under English law.

Papua New Guinea

In Papua New Guinea, like most other jurisdictions, there is no issue as to the power of the court to order maintenance in favour of the wife under statutory marriage. In fact, there exist in Papua New Guinea several legislations which vest the right of maintenance in the wife of statutory marriage.[52] These statutes do not recognize the right of customary law wife to maintenance.[53] Interestingly, however, the people of Papua New Guinea have moved beyond the cliché that maintenance is foreign to the people of Africa. According to Sao Reigari Gagi,[54]

> The literature on payment of maintenance indicates that the payment of maintenance is foreign to the customary law of Papua New Guinea. However,

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> increasing village court, which are empowered to apply custom only, are making maintenance order in conjunction with custody orders. This seems to suggest the development of new custom in Papua New Guinea.

This new development in Papua New Guinea demonstrates the dynamic nature of customary law, an approach which other jurisdiction should encourage. This is because "true customary law will be that which recognizes and acknowledges the changes which continually take place."[55]

A CASE FOR CUSTOMARY LAW MAINTENANCE IN NIGERIA

The call for customary law maintenance is not new in Nigeria, neither is the idea of maintenance completely new to native law and custom. According to Olangunju.[56]

> Under customary law the husband's duty of maintenance is usually limited to the period of cohabitation. It should be understood that periods when the husband and wife of customary law marriage live apart, as a result of the spouses job being at different localities or area are still considered to be period of cohabitation between them. But if they live apart because the wife is in desertion, there is no general recognized duty of man to provide maintenance for the so-called wife.

This has been the custom so far. But there is a development which tends to suggest that the society is no longer comfortable with some of these traditions. For instance, there is now a growing culture of marriage which Onokah[57] refers to as "double deck" marriage. This involves the celebration of marriage by the same couple under one system and their subsequent marriage under another system. Today, in an attempt to avoid the inadequate and the limitation inherent in the nature of rights and privileges under customary law marriage, couples, particularly the women now insist on celebrating same marriage previously contracted under native law, under the Marriage Act notwithstanding the attendant cost implication. It is therefore true that the growing interest for statutory marriage in Nigeria today is because of its legal "superiority" to customary law marriage. In other words, most people whose marriage are "double-decked" would have been satisfied with native law celebration if both types of marriage enjoy some modicum of equality in terms of matrimonial rights, duties, and privileges, chief among which is the right to maintenance after divorce. The question therefore is: if the increasing influx into

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statutory marriage in Nigeria is because of its benefits which are not available to customary law spouses, can it still be safely concluded that the right of the wife to maintenance which is one of such benefits is still alien in Nigeria? We think that the answer is NO. It is our argument that if the right to maintenance after divorce is no longer alien in Nigeria, then it is immaterial, that it was not originally part of our customary law. Whenever any group of people start behaving in a particular way, that becomes their custom, and it must be so recognized.

For instance, in the year 1965, a bill was introduced by a member of the then Eastern Nigeria House of Assembly with the title: The Married Women (Maintenance) Bill." The bill was designed to give statutory provision for the maintenance of wives of customary law marriage in the East. Unfortunately, this bill was killed almost on arrival. The bill was intended to empower customary court to make an order of periodic maintenance to a wife if the husband had deserted her or been guilty of persistent cruelty or willful neglect to provide for her with reasonable maintenance or had ever compelled her to submit herself to prostitution.

NEGATIVE INFLUENCE OF JUDICIAL PRONOUNCEMENTS

It is not in doubt that the realization of customary law right to maintenance has been seriously affected by opinions of jurists and the pronouncements of the court at different times even though there exists sufficient frame work for the application of customary law maintenance in Nigeria. For instance, the pronouncements of Thompson J in *Akinsemoyin v. Akinsemoyin*,[58] *Okafor v. Okafor*,[59] and that of Aguda[60] have not helped wives married strictly under customary law in attempting to claim the payment of maintenance upon divorce. Unfortunately, however, these pronouncement by the courts tending to decide customary law right to maintenance were not based on customary application for maintenance. Rather they are some form of wide *obiter dicta* by which the judges generally expressed their personal feelings towards the idea of maintenance application whether under the Act or Customary law. There was no rule of customary law which was brought to the judges in the above cases as to warrant the pronouncement that wife maintenance was not a Nigerian culture or that the payment of maintenance must end with an order of dissolution of marriage.

Most Customary Court Laws have jurisdiction over matrimonial causes and matters. For instance, section 20 (1) of the Delta State Customary Court Law[61] provides that "the

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jurisdiction and power of a customary court in civil cases and matters shall be as set out in the First Schedule to the Law." The First Schedule on the other hand provides for the limit of jurisdiction and power of the Area and District Customary Court in civil matters. Item No 2 in the First Schedule is on matrimonial causes and matters and on this, the jurisdiction of both the Area and the District Customary Court is unlimited. This should give a general and sufficient background for the acceptance of application for maintenance order even upon divorce. Commenting on section 20 (1) above, Emiaso[62] is of the view that:

> *"Present understanding and practice is that a customary court enjoys unlimited jurisdiction in matrimonial causes and other matters between person married only under customary law or arising from or connected with a union contracted under customary law."*

Olangunju[63] may therefore not be correct when he said:

> There does not appear to be any judicial machinery in place for the enforcement of the husband customary law duty to maintain his wife in customary law marriage. Where, therefore, there is failure of the husband to discharge the obligation, the wife may only resort to extra-marital legal process. For instance, she may express her grievance to direct parent or the extended family of her husband. In turn the husband or where he still refuses, his family may be forced to provide for such a wife. Where this is done by the husband's family, it is considered as part of their conjugal responsibility.

Recourse to 'extra-legal process' for enforcement of the duty of the husband under customary law to maintain his wife does not necessarily mean that judicial machinery for doing so is absent. If there is a customary duty on a man to maintain his wife while the marriage subsists then a breach of that (which falls under matrimonial causes and matters) should ordinarily be redressed under the unlimited jurisdiction of the customary court in matrimonial causes and matters, if we use the Delta State Customary Court Law as a reference point. The option of resort to extra-legal process is just an alternative dispute resolution mechanism and not a suggestion that the customary courts have no jurisdiction to entertain maintenance application. Furthermore, courts of summary jurisdiction in any State in Nigeria have jurisdiction under the Matrimonial Causes Act[64] to ensure payment of maintenance order made by the High Court in respect of marriages under the Act.[65] Thus, if a court of summary jurisdiction (e.g. Magistrate

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or District Courts) can enforce maintenance order made by the High Court, why should not the customary court be able to make and enforce a similar order based on duty of the husband under customary law to maintain his wife? The laws as they stand do not support that general conclusion that customary law maintenance is an alien idea. According to Aduba,[66] "[E]ven if the absence of the provision of maintenance after a break down in marriage could be justified in the past, it continuous absence in modern times appear unjustifiable especially to the woman."

It is a truism; African women need the right to maintenance more than their English counterpart. An African woman who is divorced goes about with a lot of stigma in the society. This is because, customary law does not encourage divorce.[67] It is usually the last resort after both families have tried their best in resolving the dispute between both spouses. The status of an African man remains intact even after divorce while the woman on the other hand is not so blessed. Some persons have argued that this cultural disparity encourages the African man to care less for his wives and discard them anytime he wants. According to Okagbue,[68]

> From a modern perspective the sheer injustice and calculated self-interest of these traditional norms is breath-taking. They are designed to render-divorce totally unviable option for women but at the same time leave men unfettered to discard wives they may be tired of and even profit by it in so doing and they are clearly in contravention of Article 16 (1) (c) of C.E.D.A.W which provides the same rights and responsibilities on dissolution of marriage.

These obnoxious rules of customary law of marriage, no doubt, have provided a general background from which many have drawn the conclusion that maintenance right does not avail the customary law wife. There is no apparent reason to leave the rules of customary law to continue to prejudice the opportunity of the women under native law and custom to maintenance. Thus, there is the need to harmonize all matrimonial laws in Nigeria to avoid the dichotomy which the Marriage Act and the MCA have introduced. Nwogugu[69] emphasizing this point says:

> There is no apparent or convincing reason why in a non-Christian country like Nigeria a distinction should be drawn between the status conferred by statutory and customary law marriages. By Nigerian law, marriage under both system of law is valid and binding and the status of husband and wife is conferred on the spouses

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of such marriage. It is suggested that this anomaly should be rectified by statutory amendments, which will give equal privileges in these branches of law to all husband and wives.[70]

The Evidence Act[71] having been amended for instance, the meaning of "wife and husband" in the Act has been expounded to include wife and husband of other types of marriage including customary law marriage.

THE WAY FORWARD

Since there is no strict customary law rule prohibiting the payment of maintenance to a wife married under customary law, it is suggested that if both parties (the husband and wife) consent to the order of maintenance even after divorce, the Court should make and enforce such order. This is so as the jurisdiction of the customary court in matrimonial causes in most states is unlimited.[72] Furthermore, it is suggested that Customary Courts should recognize certain special circumstances which should warrant customary order of maintenance. The following conditions should be treated as special circumstances where they exist:

i. **Where there is any young child or children of the marriage:**

A young woman who has no issue for the husband should not ordinarily be entitled to maintenance.[73] However, where a wife has young children and she is unmarried, the order of maintenance should not be in respect of the children alone. It should include the divorced wife.

ii. **Where the wife contributed positively to the wealth or success of the marriage:**[74]

A customary law husband who has ridden on the back of his wife to high heights only to push the wife away should be made to maintain the wife or share with the ex-wife the property of the marriage.

iii. **Where the breaking down of the marriage was as a result of the fault of the husband:**

The degree of blame on both sides should be considered. If the husband caused the breakup of the marriage, notwithstanding that the divorce petition was taken out by the wife, the wife should be entitled to an order of maintenance. But where the wife is responsible for the breakup, she should not be assisted with maintenance order except the husband consents

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to it, having regards to the children of the marriage. In this circumstance, the maintenance order should be strictly in favour of the children.[75] This is because the chances of the wife remarrying are very high.[76]

CONCLUSION

Having regard to the state of the law on the issue of maintenance under native law and custom in Nigeria, it has become imperative that the rules of customary law marriage be codified like the approached adopted by the South Africa government. This is so as the Customary Courts have not been able to brace up to expound the various enabling statutes in giving due recognition to the payment to customary law wives upon divorce, unlike the position in Papua New Guinea.

ENDNOTES

[1] For instance, section 34 of the Criminal Code Act Cap. C. 20 Laws of the Federation of Nigeria (L.F.N.) 2004 excludes a husband and wife of a statutory marriage from the offence of criminal conspiracy.
[2] For instance, section 187 of the Evidence Act 2011 puts no duty or legal responsibility on a husband or wife to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married. He or she is not also permitted to disclose any such communication.
[3] Section 36 of the Criminal Code Act forbids either party to statutory marriage from instituting criminal proceedings against the other while they are living together.
[4] Cap. M.6 L. F .N, 2004.
[5] Marriages under native law and custom are also referred to as customary law marriages or traditional marriages, thus these nomenclatures are used interchangeably in this work.
[6] The phase 'marriage under the Act' and 'statutory marriage' are used interchangeably. The phase 'marriage under the Act means the same thing as 'marriage under the Marriage Act' in this work.
[7] This point has been widely made and recognized. African traditional marriages are essentially polygamous, however, this does not subtract from its legal validity. Prof. Akintunde Emiola is therefore right when he calls for the rejection of the opinion of Hamilton C. J. in *R. v. Amkeyo* (1917) 7 E.A.L.R. 14, that "the use of the word marriage to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer." See Emiola, A., *The Principles of African Customary Law* 2nd ed. (Ogbomosho: Emiola (Publishers Ltd., 2005) pp. 90-91. The opinion of Halmiton C.J. is the common opinion of western jurist over African customary law. This is also the while "for many years parliament and the courts (in South Africa) found it difficult to refer to marriage concluded in terms of customary law as "marriage" and the terms "customary union" was preferred due to its polygamous nature. See Benneth, "The Equality Clause and Customary Law" *South Africa Journal of Human Rights* (1994) 122-127 cited by Herbst, M. and Plessis, W. du "Customary Law v. Common Law Marriage: a Hybrid Approach in South Africa" (2008) *Electronic Journal of Comparative Law* available at *http://.www.ejcl.org*, last visited on 2nd August, 2013. Obviously, there is no universal definition for the term 'marriage'. It is therefore wrong for anyone to use the understanding of a particular people to set a standard for others in this regard. It is also in this vein that the definition of Justice Wilde in *Hyde v. Hyde & Anor*. (1866) All E.R. Rep. 175 which put marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" cannot be used as a general standard for determine which relationship qualifies as marriage. What is more? With the emergence of 'gay marriage' even in Christendom, the definition of Christian marriage by Wilde J. can no longer be a good definition in England.
[8] Cap. C 20 L.F.N. 2004

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[9] 1945, thereafter Cap. E. 12 L.F.N.,1990. Subsequently, Cap E. 14 L.F.N, 2004, now amended in 2011.
[10] Another disparity is in the area of settlement of matrimonial property upon divorce under section 72 of the Matrimonial Causes Act Cap. M7 L.F.N, 2004. This section gives the court power to order the parties to statutory marriage to make for the benefit of all or any of the parties and the children of the marriage, such settlement of property to which the parties are, or either of them is, entitled as the court considers just and equitable in the circumstance of each case. See generally, Umukoro, B. E., "Settlement of Matrimonial Property upon Divorce: Challenges and Need for Reform in Nigeria and some other Commonwealth Countries in Africa" (2006) *Commercial & Property Law Journal* Vol. 1, pp. 116-131. It is significant to note that under customary law marriage, the wife particularly is not usually entitled to anything upon the death of the husband except her personal effect. See Umobi, C. "Discrimination/Inequitable Distribution of Matrimonial Property upon Divorce-Critique of Sec. 72" UNIZIK Law Journal, Vol. 4 p. 196.
[11] See section 1 of the Criminal Code Act.
[12] (2010) All FWLR (Pt530) 1377 at 1450.
[13] Now section 182 (1) of the Evidence Act, 2011.
[14] See section 33, 34 and 36 of the Criminal Code Act. It is not clear whether "Christian marriage" is used synonymously with the phrase "lawful marriage" in the Criminal Code Act. A literal definition of the phrase 'lawful marriage' would mean any marriage that is in accordance with law, and this includes native law and custom. But it is doubtful if this interpretation was intended by the lawmakers having regard to the cultural background of those who enacted the Act.
[15] Cap. E14 L.F.N., 2004.
[16]The Evidence Act, 2011 in section 258 equally defines "wife and husband" but in broader manner to mean "the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic law or a Customary law applicable in Nigeria, and include any marriage recognized as valid under the Marriage Act."
[17] See section 2 of the Evidence Act Cap. E14 L.F.N. 2004.
[18] Other considerations for denying customary law spouses of maintenance appear to be borne out of a community reading of all the various statutes which tend to exclude spouses of customary law marriage from almost every rights and obligation created in them.
[19] See section 15. This Act has been re-enactment by the various state legislature in Nigeria as State law. In Delta State, it is section 15 of the Wills Law, Cap. W4 Law of Delta State, 2006.
[20] (1954) 14 W.A.C.A 111
[21] See *Emery v. Emery* (1827) 14 & 501, *Baker v. Sampson* (1863) 14 CBNS 383 for the term 'necessaries' includes food, clothing, medical expenses and other basic needs, excluding luxury.
[22] Under the Common Law, the obligation to maintain was only that of the husband and not the wife as the wife was regarded as agent of necessity to the husband.
[23] For instances, section 70 (1) of the MCA provides: "subject to this section, the court may, in proceedings with respect to the maintenance of a party to the marriage other than proceedings for an order of maintenance pending the disposal of proceedings, make such orders as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances." Though, some judges erroneously, still relied on the common law after the enactment of the MCA. For instance, in *Erhahon v. Erhahon* (1997) 6 NWLR (pt 510) 667 at 713, the Court of Appeal per Nsofor JCA said as follows: "A man has a common law duty to maintain his wife and such a wife then has a right to be maintained. The right of a wife to maintenance against her husband is not contractual in nature. The husband is obliged to maintain his wife and may by law be compelled to find her necessaries as meat, drink, clothes, etc suitable to her husband estate or circumstances." The position as adumbrated by Honorable Justice Nsofor is very correct of the common law; however as at 1997 when this case was decided, the common law had ceased to regulate the incidence of maintenance in Nigeria. It is therefore wrong to continue to rely on the common law position after the coming into effect of the MCA. See Sagay, Itse, *Nigerian Family Law (Principles, Case, Statutes and Commentaries)* (Lagos: Malthouse, 1999) pp. 458-459 where the learned author asserts that the Court of Appeal in *Erhahon v. Erhahon* missed the fact that under the Matrimonial Causes Act 1970, the distinction between men and women, husband and wives, as far as maintenance is concerned, has been swept away. In order words, under the MCA there is no insinuation that maintenance is only a right of the wife against the husband as it was under the common law. There is however, no record of application for maintenance order by the husband against the wife since the coming into effect of the MCA. Again, there is also no more duty to maintain a wife to the degree of her husband's estate. The rule that a wife should be maintained to the degree of her husband's estate was a common law rule which no longer applies in Nigeria. See *Olu-Ibukun v. Olu- Ibukun* (1974) 2 SC. 41.
[24] See Obi S.N.C., *The Ibo Law of Property* cited by Unokah, M.C. *Family Law* (Ibadan: Spectrum, 2003) p.235. This custom is commonly practised amongst the Ibo people of Nigeria.
[25] *Ibid*.
[26] It is immaterial too that, it was the wife that was responsible for the desertion.

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[27] (1971)N.M.R. 272 at 275.
[28] Unreported Suit No. O/6D/71.
[29] Unreported Suit No UTTC/ 21/70 of 26/11/71.
[30] *Supra.*
[31] If this is so then this tends to suggest that bride price is a purchase price or a fee for securing the 'ownership' of the woman. It is only on this ground that it may sound unreasonable to call on a man who has paid so much in 'purchasing' his wife to continue to shoulder the responsibility of such woman after the 'contract' has been terminated.
[32] In ancient African society, and to some extent, in modern times, women generally do not enjoy full legal status. See generally Ogene, S.O.N. "Right of Women and Children under Customary Law and the 1999 Constitution" C. Maidoh, Tonwe & Dibia, eds.) *Judicial Administration and other Legal Issue in Nigeria* (Lagos: Malthous, 2010) 223-244; Enemo, 1.P. "Dissolution of Marriage under Customary Law; Need for Reform" 2005 *UNIZIK Law Journal* Vol 5. No. 1 pp. 105-120; Taiwo, E.A. "Women Right and Gender Discrimination in Nigeria: Socio-Cultural and Legal Perspectives (2008) Vol. 1 No. 1 *Nigerian Journal of Public Law*, 240-256; Emiola, *supra* note 7 at pp. 37-38.
[33] Freeman, Sandra *Discrimination Law* (Oxford: Oxford University Press, 2002), 28 cited in Taiwo, E. A. *supra* note 33, p. 244.
[34] See *Suberu v. Sumonu* (1957) SCNLR p.45. Worst still, in Ibo land, the only way a woman could have a right to property in law was if her husband bequeathed it to her as an outright gift during his life time or expressly declared so in his will. This was so until the court came out in full force in the landmark cases of *Mojekwu v. Mojekwu* (1997) 7 NWLR (Pt 572) 473 and *Mojekwu v. Ejikeme* (2000) 5 NWLR (Pt 647) p. 402 at 434-425. See generally, Adesanya, Bambo (SAN), Marriage, Divorce and Succession: The Legal Aspect" being a text of paper delivered at the seminar marking the 10th Anniversary of the Diocese of Lagos West (Anglican Communion) at the Archbishop Veining Memorial Church Cathedral on the 12th of June, 2009 available at www.*dioceseoflagoswest*.org, last visited 20th August,2013.
[35] Several states in Nigeria have enacted laws prohibiting female genital mutilation. On female genital mutilation, See generally, Arinze-Umobi, C. and Ikeze, O.V.C, "Female Genital Mutilation, An Affront to Section 33,34 (1) (g) of the Constitution of the Federal Republic of Nigeria 1999: A Medo – Legal Perspective" 2005 *UNIZIK Law Journal*, Vol. 5 No. pp. 297- 308.
[36] See the Convention on the Elimination of all Forms of Discriminations against Women adopted by the United Nation in December, 18 1979. The text of the Convention is available at *www.orgwomenwatch/daw/cedaw/cedaw.htm.*
[37] In some part of Delta State, particularly, among the Urhobos and some part of Isoko, the bride price ranges between ₦100 to ₦120. Some years back, the bride price was not in terms of money alone. Many years back, the bride price could be in form of labour services which included farm work, splitting of fire wood, fetching of water, etc. When these services were commuted to money it was still a token. See Begho, M.A., *Law and Culture in the Nigerian and Roman World* (Benin: 1971) cited by Emiola, *supra* note 7, pp. 101-102. Today, apart from the fact that bride price has become completely monetised, it is not uncommon to find a Nigerian woman even sponsoring her marriage ceremony by herself all alone as long as the man is willing to marry her.
[38] See *Calderbank v. Calderbank* (1975) 3 WLR, 586. The English law of maintenance of the husband by the wife should even be considered under customary law in the appropriate case? Sagay, supra note 23 at p.458 said "considering the fact that there is an increasing proportion of professionally qualified and highly skilled Nigerian women earning high salaries, the possibility of a *Calderbank* type of decision in this country cannot be far off.
[39] According to Emiola, *supra* note 7 at pp. 37-38, the woman "graduated from control of her father as a child to that of her husband in later years."
[40] There is the old adage that even postulates that a woman's place is in the kitchen. See Hon. Justice Isibor, P.O "Women's Right and Status under Edo Native Law and Custom: Myth and Realities" at page 6, available at *http:ll.www.nigerianlawguru.com/article/customary* last visited 3/8/13
[41] See generally, Baxter, H., "Dworkin's One- System" Conception of Law and Morality (2010*) Boston University Law Review*, pp. 857-862, also available at *http:www.bu.edu/law/central/jd/organizations/journal/burl/document/BAXTER.pdf.* See also, Bickenbach, J. E. "Law and Morality" (1989) *Law and Philosophy* (2007) also available at *http.llschaship.law.wn.edu/wmlr/vol48/iss5/2*
[42] Suit No WD/19/61 of 71/163 (unreported) Lagos High Court cited in Unokah, *supra* note 24 at 247
[43] The question is: what is the "African conception of marriage and divorce" which is incompatible with the idea of maintenance of a wife by her husband after divorce? It is true that Udo-Udoma J. was looking at a situation where the wife is the one who took out the divorce petition and brought the marriage to an end. It may be argued here that such a wife would have been allowed to benefit from her own wrong by the court if after divorcing her husband; the court thereafter compensates her with a maintenance order. The argument may be pushed further

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that it is against the rule of morality for a man or a woman to benefit from his or her own wrong and that customary laws are always moral laws. But this still does not completely resolve the issue of the basis for the nonpayment of maintenance under customary law. For instance, what if the wife took the divorce proceedings because she was under frustration from the husband and has no desire to remarry but to stay with her children and bring them up.

[44] See Aguda, T.A " An Examination of the Matrimonial Causes Decree 1970" being a test of paper presented at a Conference at the University of Lagos, June 5th,1970 cited in Unokah, *supra* note 24 at 247

[45] See the discussion under the subtopic: "Is there any Merit in the Argument against Customary Law Maintenance in Modern Times?"

[46] It appears too blunt a statement of law to conclude that wife maintenance is not permissible under native law and custom. If any group of people consider it proper having regard to modern or western influence, to incorporate such culture into their body of traditions, then such practice should be enforced in court since one of the striking features of customary law is that it is dynamic. See *Balogun v. Oshodi* (1929) 10 NLR 36 at 50 per Osborne C.J. It is improper to inhibit such opportunity by way of general judicial pronouncement as some of the judges have done.

[47] See generally, Herbst and Plessis, *supra* note 7 at p. 2 where the authors say that: "The non-recognition of customary law marriage sometimes led to severe hardship in that children were not regarded as legitimate and that wives of customary marriages were not given the same status as wives from civil marriage in terms of intestate succession and maintenance."

[48] 200 of 1993

[49] Herbst and Plessis *supra* note 7 at p. 2.

[50] Section 9 of the said Constitution of South Africa further stipulates that everyone shall have the right to equal protection of the law.

[51] 120 of 1998

[52] Sao Reigairi Gabi "Law Reform in Papua New Guinea: The Law of Maintenance in Papua New Guinea-Working paper no 23 June, 1989 available at *http:llwww.paclii.org/LRC/wp/WP/-23 html*.

[53] According to Garbi, "under the existing law (of Papua New Guinea) maintenance is governed by the provision of the Deserted Wives and Children Act, the Child Welfare Act and the Matrimonial Cause Act. Each statute confers maintenance jurisdiction on a different court. *Ibid*.

[54] See generally, Luluaki J.Y. "Customary Marriage Laws in the Commonwealth: A Comparison between Papua New Guinea and Anglophonic Africa (1997) vol. 11/1 *Int. Journal Law, Policy and the Family*, Pp. 1-35 also available at *www.lawfam.oxfordjournal.org*.

[55] See the South African case of *Bhe and Ors v. Magistrate* 2005 '(1) BCCRA (cc) (S.Afr.) at page 86 cited in Kent, A.D. "Custody, Maintenance and Succession. The Internalization of Women and Children Right under Customary Law in Africa (2005) 5/25 *Michigan Journal of International Law*, 537.

[56] Olangunju R.I. "Concept of Maintenance: A Legal Analysis on Tripartite Comparison, Vol.3/2 *Kogi State University Bi-Annual Journal of Public Law* at 311. Under native law and custom, where the husband dies, then the widow's maintenance depends on her state. If she desires to marry within the late husband's family ,the duty to maintain her will devolve on the new husband. But where she remains in the deceased husband's family without remarrying as a result of old age, the obligation to maintain her would be partly of her children, and partly that of the extended family. If she remarries, this duty stops. *Ibid*.

[57] See Onokah, *supra* note 24 at Chapter Five.

[58] *Supra*

[59] *Supra*

[60] Aguda, *supra* note 42.

[61] Cap. C25 Laws of Delta State, 2006.

[62] See Emiaso, M. , *Law, Practice and Procedure Area Customary Court in Nigeria* (Lagos: Peakmans Ltd., 2010) p.116

[63] Olangunju *supra* note 56 at p. 312

[64] See section 2 (1) of the Matrimonial Causes Act Cap. M.7. Laws of the Federation of Nigeria, 2004. Note that section 114 of the MCA defines 'courts of summary jurisdiction' to mean 'A Magistrate Court or District Court.' Emiaso has argued that this definition excludes customary courts. See Emiaso, *supra* note 62 at pp. 120-121.

[65] It suffices to note that under English law acrimony strictly relates to financial provision made by husband in favour of his wife.

[66] Aduba, J. N., "A Critique of some Aspect of the Law Relating to the Dissolution of Marriage under Customary Law in Nigeria, at 6 available at *http.llwww.dspace.unijos.edu.ng* last visited on 7th August, 2013.

[67] See Emiola, *supra* note 7 at pp. 109-110. In fact a writer describes divorce in Africa society as "a delicate accident in marital relationship." See Ajisafe, A.K., *Law and Custom of the Yoruba People*, p.8 cited in Emiola, *Ibid*.

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[68] Okagbue, (I. A. Ayua, ed.) *Law, Justice, and the Nigerian Society*, (Nigerian Institutes of Advanced Legal Studies, 1995), p. .212, cited in Aduba, *op. cit*. Okagbue continues at pages 212-213 by adding that: "in practice, the position a woman finds herself in divorce is a subject of negotiation between the two families involved. However, this leaves the woman dependent on goodwill which may not exist and on the decision and advice of senior male member of her family with whom she may not agree. The grave disincentives for women to opt out of miserable marriage and their lack of any enforceable rights if abandoned mean that many women are effectively denied personal freedom and autonomy within marriage. They cannot take their destinies into their own hands and at all times their material and psychological well being are dependent on the man in their lives"

[69] Nwogugu, E. I. *Family Law in Nigeria*, Revised edition (Ibadan: Heinemann, 1990), p.100.
[70] Internal citations omitted.
[71] See section 258 of the Evidence Act 2011.
[72] See for instance the 1st Schedule to the Delta State Customary Court Law, Laws of Delta State 2019.
[73] But if the wife has spent the best part of her life in the marriage, it should be immaterial that she has no issue. She should be maintained by her ex-husband particularly if the husband has been her only source of sustenance.
[74] Even in determining how matrimonial properties should be settled under the MCA, reference is usually made to the contribution of the wife. See generally Umukoro B.E. Settlement of Matrimonial Property upon Divorce: Challenges and Need for Reform in Nigeria and some other Commonwealth Countries in Africa, *supra* note 10 pp. 116-131
[75] The court can order a father to maintain his child who is with his/her mother. According to Odewale, "the prevalent customary laws of the southern Nigeria on maintenance obligation vary. However, the common practice is for the customary court to mandate the father to pay child maintenance to a mother who has custody of the children. In cases where the father has the custody, the law does not impose payment of maintenance on the mother. However, the mother can do whatever she feels like towards maintaining the children though this is a voluntary act and not mandatory as it is on the father. See Odewale, S., "Situation Report on Child Maintenance in Africa: Report on Nigeria" available at *http//www.heidelberg.conference2013.deltl-files* last visited 20th August, 2013.
[76] A maintenance order made strictly in favour of an ex-wife should be vacated the moment she remarries under any system of law.

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