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Critique of the Exclusive Jurisdiction of the High Court over Statutory Marriages and Other Incidental Matters

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Abstract

It is common knowledge that all lawyers in Nigeria who want to file matrimonial matters bordering on Statutory Marriages head to the High Court. This is because it has been so from time immemorial and has continued to be so. It is of no contention that the High Court has jurisdiction over Statutory Marriages by law. The bone of contention rather is the seemingly exclusive jurisdiction conferred on it. What is the basis upon which this exclusivity of jurisdiction of the High Court on Act marriages lie? A thorough search through the laws has shown that there is a provision conferring jurisdiction on the High Court but non conferring exclusive Jurisdiction on same. To get to the root of this conclusion, doctrinal method was used. This revealed that other courts outside the High Court share jurisdiction with the High Court in addressing Act marriages under the Act. To cure this wrong perception among lawyers, it is recommended that the provisions of the law empowering the High Court and other Courts alongside to adjudicate on Statutory Marriages should be brought to the knowledge of the lawyers. Judges of the High Courts can help educate lawyers who appear before them.

Keywords: Jurisdiction, Exclusive Jurisdiction, Matrimony / marriage, Statutory Marriage and Dissolution

1.0 INTRODUCTION

The exclusive legislative list of the constitution[1] made provision for the creation and dissolution of statutory marriages or marriages under the Act and other matters incidental to it. This means that the National Assembly makes the laws governing matrimonial causes. The National Assembly's principal legislation on marriage is the Marriage Act. The Matrimonial Causes Act mainly governs dissolution of marriage, custody and the welfare of children in Nigeria. In 1983, the Matrimonial Causes Rules was made pursuant to the Matrimonial Causes Act. These Rules set out the procedure for instituting actions for the dissolution of marriageand other incidental matters. Embedded in the said Matrimonial Causes Act is the provision empowering the High Court to have jurisdiction on matters of marriages under the Act.

It is therefore not surprising that when lawyers are asked the Courts that have jurisdiction over Statutory Marriages, they simply respond by saying "High Court" without thinking twice. This is a notorious fact. Though the response is very correct and as such they cannot be faulted for their swift and correct answers. The jurisdiction of Statutory Marriageshas for long been conferred on the High Court such that there is now a presumption that it is only the High Court that has jurisdiction on such matters. But recently, there has been a kind of argument on this exclusive jurisdiction seemingly conferred on the High Court by somelegal minds on the ground that the provisions of the Matrimonial Causes Act[2] itself never made such jurisdiction exclusive. There is therefore need to embark on this research to determine the rightness or otherwise of this seeming exclusive jurisdiction of the High Court.

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[1] The Constitution of the Federal Republic of Nigeria, 1999
[2]Cap. M7 LFN 2004

2.0 DEFINITION OF TERMS

2.1 Jurisdiction

Jurisdiction has been defined as both the authority or power of the court to determine the dispute between parties as well as the territory over which the legal authority of a court extends.[3]

2.2 Exclusive Jurisdiction

Exclusive jurisdiction refers to power of a court to adjudicate a case to the exclusion of all other courts. It is the sole forum for determination of a particular type of case. Exclusive jurisdiction is decided on the basis of the subject matter dealt with by a particular court.[4]

2.3 Matrimony/Marriage

Matrimony means of or relating to marriage, the married state, or married persons.[5]Law Dictionary 8th edition 2004 defines marriage as the legal union of a couple as husband and wife.

[3] Jurisdiction Definition <https://www.lexisnexis.co.uk/legal/glossary/jurisdiction> accessed 20 April 2022
[4] Exclusive Jurisdiction Law and Legal Definitions <https://definitions.uslegal.com/e/exclusive- >accessed 11 January 2022
[5]Definition of matrimonial <https://www.merriam-webster.com>20 Feb. 2022

2.4 Statutory Marriages

A Statutory Marriagein Nigeria is a union of a man and woman as defined by the Marriage Act.[6]

2.5 Dissolution

Black's Law Dictionary[7] defines dissolution as "the act of bringing to an end; termination. It is the cancellation or abrogation of a contract, with the effect of annulling the contracts binding force and restoring the parties to their original positions…"

3.0 TYPES OF MARRIAGES IN NIGERIA

Basically, there are three different types of marriages in Nigeria. These are:

a. Statutory marriage
b. Customary marriage
c. Islamic marriage

3.1. Statutory Marriages

This is marriage contracted under the Marriage Act,[8] a Federal enactment designed for the celebration of a voluntary union between a man and a woman to the exclusion of all others during the continuance of the marriage. Marriage under the Act as it is often referred to by its nature, is therefore monogamous. It is a union that terminates at the death of either spouse. This statute together with the Matrimonial Causes Act[9] basically governs everything about statutory marriages which is obviously outside the purview of this paper.

3.2. Customary Marriage

Customary marriage has been defined by Justice A. P. Anyebe[10] as "... a union of one man and a woman or women to the exclusion of all others. The union extends even beyond the life of the man but terminates substantially at the death of the

[6] Overview of Statutory Marriage In Nigeria available at <**Error! Hyperlink reference not valid.**> accessed 20 April 2022https://www.mondaq.com/nigeria/family-law/985124/overview-of-statutory-marriage-in-nigeria -:~:text=In%20sum%2C%20a%20statutory%20marriage,defined%20by%20the%20Marriage%20Act.&text=Section%203%20and%205%20of,or%20voidable%20under%20Nigerian%20law.
[7] Garner, B. A., *Blacks' Law Dictionary* (9th ed., Texas: Law Prose Inc., 2009) p. 541
[8] Cap M6 LFN 2004
[9] Cap M7 LFN 2004
[10] Anyebe A. P., *Customary Law: the war without Arms* (1st ed. Enugu: Fourth Dimension Publishing Co. Ltd, 1985) 92

woman…" It is a marriage contracted under the native laws and custom of the various communities in Nigeria. From the foregoing, it is clear that ample allowance is provided under customary law for the enjoyment of polygamy, given that there is no limit to the number of wives a man can marry under customary law. Although, it must be said that this fact may constitute a general but vital disincentive to women who may be desirous of exclusive right, possession and enjoyment of their husbands in undertaking marriages under customary law. Nonetheless, it is the commonest form of marriage and it gets statutory recognition even in the Marriage Act.[11] It is common to see many couples who enter into statutory marriages precede them with customary marriage by way of what is popularly referred to as "double- decker" marriages.

3.3 Islamic Marriage

Islamic Marriage is that conducted according to the tenets of Islamic law. Islamic marriage which is a specie of customary law marriage, is governed by Islamic or Sharia law. No certificate is issued. It is also not limited to one man and one woman. Indeed, a man can marry as many as four wives provided he is capable of meeting the requirement and conditions stipulated under Islamic Law.

4.0 DISSOLUTION OFMARRIAGE

Marriages does not ever seem to be anything capable of turning sore at any point in time whenever the couple starts their marriages. This is simply because it seems so heavenly to imagine such possibility. But unfortunately or shockingly, many marriages hit brick walls somewhere along the line to the extent that the couples do not want to set their eyes on each other anymore. It is at this point that the dreaded dissolution creeps into the marriage.In the past, a broken marriage was perceived as a taboo such that no matter what happens in the marriages, couples were seen managing to get along. However, in the recent times, this is no longer the case as long lists of cases are now seen in courts in charge of matrimonial cases. The reasons for this are multi-faceted and however do not fall within the purview of this paper.

Dissolution in respect of marriage is the end point of a failed marriage irrespective of the form of marriage entered into by the parties. The pursuit of

[11] Section 35 of the Marriage Act, Cap M6 LFN 2004

dissolution of marriage carries along with it some consequences such as alimony and custody of children.

4.1. Alimony/Maintenance underthe Law

The concept of wife maintenance otherwise called alimony is of common law origin. At common law, a husband is legally obliged to provide maintenance for his wife. At common law, a wife becomes a person who is referred to as "agent of necessity." This practice was therefore part of received English law in Nigeria. After the enactment of the Matrimonial Causes Act 1970, the Matrimonial Causes Act took over the regulation of the issue of maintenance or alimony in relation to Matrimonial Marriages. There is however no obligation under customary law for the payment of wife maintenance or alimony under customary marriages.[12]

The Black's Law Dictionary defines alimony as an allowance paid by one spouse to another by order of a court for the maintenance of the other spouse while they are separated, during divorce proceedings, or after they are divorced.[13]The Matrimonial Causes Act,[14] which is the primary legislation governing matrimonial matters makes provisions for Alimony. The word "maintenance" was used in the stead of "alimony" in the Act to describe the payment of an allowance to a spouse upon separation, during or after a divorce. Hence Nigerian courts end up using the two terms interchangeably,suggestive of the fact that they refer to one and the same thing.[15] Part IV of the Matrimonial Causes Act provides generally for the making of orders for maintenance, custody and settlements in favour of a husband, wife, children, or adopted children of marriage upon divorce.

4.2. Custody of children

One of the most contentious aspects of dissolution of statutory marriages, like other forms of marriages is the issue of the custody of children. Althoughthe term

[12]*Akinsemoyin v Akinsemoyin* (1971) N.M.R. 272 at 275
[13]Garner, B. A., *Blacks' Law Dictionary* (9th ed., Texas: Law Prose Inc., 2009)
[14]LFN 1990
[15]Efe Etomi and Elvis Asia, 'Family law in Nigeria: overview' <https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType> accessed 27 April 2022

'custody' itself is not defined in the Matrimonial Causes Act,[16]but Black's Law Dictionary,[17]defined custody of children as "The care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding". The various laws bothering on matrimonial matters made provisions on custody of children. The Customary Courts Law of the various states contains provisions relating to custody of children in the event of dissolution of customary law marriages by customary courts. Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State) confers jurisdiction of Customary Courts in Edo State in the area of guardianship and custody of children under customary law as unlimited.[18]Again, under the Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State) in any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration (Section 27(1) Customary Courts Law 1984 of defunct Bendel State (as applicable to Edo State which is *impari materia* with section 27(1) of the Customary Courts Law 1997 of Delta State and section 17(1) of the Customary Court Law Abia State.). Consequently, the primacy of the **"best interest of the child principle"** in custody of children issues has become the prevailing general roadmap that customary court in Nigeria adopt in the determination of this issue.

Away from the Laws bothering on matrimonial matters, the Child's Right Act which is the law that guarantees the rights of all children in Nigeria, also made very clear provision in relation to the custody of children. The Act provides thus:[19]
In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.

This same principle of**"best interest of the child principle"** in custody of children issues as stated above is also the prevailing general roadmap that other courts in Nigeria adopt in the determination of this issue. It is also settled law that the

[16]Resolution Law Firm,'Child Custody After Divorce And Child Maintenance In Nigeria'<https://www.resolutionlawng.com/child-custody-after-divorce-in-nigeria> accessed 20 April 2022
[17]Bryan A. Garner, *Blacks' Law Dictionary* (9th ed., Texas: Law Prose Inc., 2009)
[18] The Customary Courts Law of defunct Bendel State 1984 as applicable to Edo State, Section 20(1) of and the 1st Schedule thereto (*impari materia* with section 20(1) 1st Schedule to the Customary Courts Law of Delta State 1997).
[19] s1 of the CRA 2003

applicable principle in statutory marriages is also the same principle ones contested in the courts.This can be seen in the provision of section 71(1) of the Matrimonial Causes Act which provides thus:

> In the proceeding with respect to the custody, guardianship, welfare, advancement oreducation of children of the marriage, the court shall regard the interest of those children as the paramount consideration and subject thereto the court may make such order in respect to those Matters as it thinks proper.

In view of the fact that similar provision is adopted in statutory marriages under the Marriage Act, there exist a plethora of judicial decision upholding this principle and defining what constitute the best interest and welfare of a child.It is submitted that these judicial authorities are also relevant in the determination of the question of what constitute this principle under customary marriages.In the case of *Buwanhot v. Buwanhot*,[20]the Court of Appeal held that the welfare of the children of the marriage, in terms of their peace of mind, happiness, education and co-existence is the prime consideration in granting custody.

Also in this regard, Belgore JSC in the case of *Odogwu v Odogwu*[21]stated thus:

> Welfare of a child is not the material provisions in the house - good clothes, food, air-conditioners, television, all gadgets normally associated with middle class, it is more of the happiness of the child and his psychological development…while it is good for a child to be brought up by the complimentary care of the two parties living together. It is psychologically detrimental to his welfare and ultimate happiness and psychological development if the maternal care available is denied him…

Similarly in the case of *Odusote v Odusote*[22] the court defined interests of the children to include their welfare, education, security and overall well-being and development.

[20] (2011) All FWLR pt. 566-552
[21] (1997) 2 NWLR pt. 225-239
[22] (2012) 3 NWLR pt. 478

It is apposite here to underscore the following points in relation to the issue of custody.Firstly, although the best interest of the child is the first and paramount consideration, it is certainly not the only consideration.In the case of *Obajimi v Obajimi*,[23]the Court of Appeal, held *inter alia* that although the welfare of the minor is the first and paramount consideration, it is not the sole consideration. The conduct of the parties is a matter to also be taken into account. In other words, before making an order for custody, the trial court must take into consideration, the interest and welfare of the children as well as the conduct of the father and the mother and their respective resources, comportment and total bio data.

Secondly, although, there is no rule of law which says that a female child or a child of tender age should remain in the custody of the mother when the marriage is dissolved.However, it cannot also be seriously disputed that children who are female and in their growing or formative years are better cared for and looked after by their mother, except the contrary is shown by credible evidence. It is generally presumed that such children would be happier and more at peace because of the closeness and intimacy which breed affection and familiarity with the mother who most of the time was there for them as spelt out in the case of *Odusote v Odusote*.[24]The court in the case of *Odusote v Odusote (supra)* held that unless it is abundantly clear that the mother suffers from moral conduct, infectious disease, insanity, lack of reasonable means or is cruel to the children etc., children of tender age, male or female are ordinarily better off in terms of welfare and upbringing with their mother. Of course there may be exceptions that are far apart where the father may be better off than some mothers in the upbringing of the children. There is always that rebuttable presumption in favour of the mother in the consideration of broken down marriages.
Thirdly, custody of children is not a once and for all thing. It is rather a revolving thing wherein custody can change as circumstances change. This is clearly because of the significance of the welfare of children and recognition of the fluidity of circumstances that may influence this consideration. In *Obajimi v Obajimi*,[25]where Ikyegh JCA in respect of this stated that:

[23] (2012) All FWLR pt. 649 at 1168
[24] (2012) 3 NWLR (pt. 478).See also the case of *Tabansi v Tabansi* (2018)18 NWLR(pt.1651) 279 at 287 where the same view was given.
[25]((2012) All FWLR pt. 649-1168

> Custody of children is an ongoing exercise akin to recurrent decimal. It is a day to day or revolving affair. Whenever any of the spouses discovers conditions have changed or altered for the worse in respect of the interest, benefit and welfare of the children or child in the custody of another person or spouse, he or she can apply to the court to review the custody order. The court upon hearing the parties would reach a decision in the best interest of the child or children as the case may be.

Generally, dissolution of marriage under Statutory Marriages is perceived as herculean, more cumbersome, more technical and difficult than say for example customary law which is easier. Other issues involved in dissolution of marriage includes the rights and obligations of the parties, the mode of dissolution, procedure, incidence and even venue for contestation of the divorce and ancillary proceedings.[26]

Of all the issues tied to the dissolution of statutory marriage, that of the venue for contestation stands out. It is still a difficult question to answer why all Statutory Marriage cases head for the High court. Is it that it is what the law says or just an adopted style which lawyers prefer to use?

5.0 JURISDICTION FOR STATUTORY MARRIAGES

As earlier pointed out, all matters pertaining to marriages under the Act are settled by the High court. The reason for this may not be farfetched as lawyers follow the provisions of the laws to determine courts with jurisdiction. A close look at the Matrimonial Causes Act provision clearly shows that the jurisdiction to try statutory marriages is conferred on the High Courts. Hence whenever lawyers have reasons to file any case bordering on the dissolution of marriage and custody and maintenance matters incidental to the dissolution of marriage, they simply head for the High Courts. This is understandablyso and therefore in order as the guiding law has so spelt it outthat the High Courts have Jurisdiction for such matters and as such not in any form of contention. The only contention

[26]B. E. Oniha, Dissolution of Marriage and Custody of Children Under Customary Law in Nigeria, https://edojudiciary.gov.ng/wp-content/uploads/2017/07/DISSOLUTION-OF-MARRIAGE-AND-CUSTODY-OF-CHILDREN-UNDER-CUSTOMARY-LAW-IN-NIGERIA accessed 11 April 2022

that seems to arise is where the said jurisdiction of the High courts is now termed exclusive. Put differently, where there is the notion that only High Courts to the exclusion of other courts have jurisdiction on the said matters amounts to rocking the boat. This issue can only be settled by having a cursory look at the provisions of the Matrimonial Causes Act where the powers over the adjudication of matrimonial matters are spelt out.

> Section 2 (1) of the Matrimonial Causes Act 1970,[27] which gives powers to the High Court to adjudicate on Act marriages provides thus:
>
> > (1) Subject to this Act, a person ***may*** institute a matrimonial cause under this Act in the High Court of any State of the Federation; and for that purpose the High Court of each State of the Federation shall have jurisdiction to hear and determine
> >
> > *(a)* matrimonial causes instituted under this Act; and
> >
> > *(b)* matrimonial causes (not being matrimonial causes to which section 101 of this Act applies) continued in accordance with the provisions of Part IX of this Act, so however that jurisdiction under this Act in respect of matrimonial causes within this paragraph shall be restricted to the court in which the matrimonial cause was instituted,
> >
> > and in any case where maintenance is ordered in proceedings in a High Court, a court of summary jurisdiction in any State shall have jurisdiction to enforce payment in summary manner. (word in italics and bold mine)

This provision has long led to the exclusive ultimate power ascribed to the High Court as the only court that can deal on matrimonial matters pertaining to Marriages under the Act. Hence all such matrimonial cases are filed by lawyers and heard in the High Courts.

In taking a second look at the said provision conferring the High Court with exclusive jurisdiction on marriages under the Matrimonial Causes Act, it can be

[27] Cap M7 LFN, 2004

seen that the word "may" was used which clearly indicates no compulsion. The word may was explained in the case of *Edewor v. Uwegba & Ors*[28] as thus:

> Generally the word 'may' always means 'may'. It has long been settled that may is a permissive or enabling expression. In *Messy v. Council Of The Municipality Of Yass* (1922) 22 s.r.n.s.w. 494 per Cullen, CJ at pp.497, 498 it was held that the use of the word 'may' prima facie conveys that the authority which has power to do such an act has an option either to do it or not to do it.

In view of the foregoing, it can be said that the use of the word may in section 2 of the Act connotes not mandatory. The word shall is used to indicate compulsion, hence used when compulsion is intended. This was expressed in the case of *Tippi v. Notani*,[29] where the courts held in its wisdom thus:

> Going by the above pronouncements of the Supreme Court in the Case of *Ugwu & Anor v. Ararume & Anor*[30] , it goes without any dispute whatsoever that the word "shall" ordinarily denotes mandatoriness and is thus obligatory whenever it is used in a Statute or Rules of Court. Now, faced with the above succinct pronouncements of the Supreme Court on the interpretation of the word "shall", what should this Court do when faced with the interpretation of the same word "shall" as used in *Order 31(2)(1) of the Rules of the Court* below, this Court being a Court lower in the hierarchy of Courts to the Supreme Court?

The above case simply shows that the word shall is indicative of compulsion as against the word 'may' that shows permissiveness.

Another point of argument here is that the intention of the law maker must be read into the meanings of the laws for purposes of rightful interpretations. In such a case, the wordings must be put into their various concepts.In this case, under rules of legislative drafting, whenever the lawmaker desires to make a jurisdiction exclusive to any court, the lawmaker expressly spells it out.This is so as the issue of jurisdiction of courts is very crucial and as such, can never be left

[28] (1987) LPELR-1009 (SC)
[29](2014) LPELR-24191(CA)
[30](2007) 6 SC (Pt.1) 88

open to speculation or guesses. This line of reasoning can be likened to the provision of Section 251 of the 1999 Constitution of the Federal Republic of Nigeria where the lawmakers created an exclusive jurisdiction for the Federal High Court.In this section the lawmakers expressly used words to indicate exclusivity. It stated thus:

> (1) Notwithstanding anything to the contrary contained in this constitution, and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court *shall* have and exercise exclusive jurisdiction to the exclusion of any other court in civil causes and matters …(emphasis mine)

The word shall indicative of compulsion was wisely chosen by the lawmakers as against shall and even further strengthened it by adding the word exclusive. Going by the different rules for the interpretation of statutes, the literal rule applies here as the words are given their surface meanings. This is because there is no ambiguity to call for other forms of interpretation.

5.1 Conclusion

In view of the above analysis from both statutory provisions and case laws, it can be safely submitted that at no point was an exclusive jurisdiction conferred on the High courts with respect to matters concerning marriages under the Act. Put differently, there is nothing contained in the said section of the Matrimonial Causes Act thatgives exclusive jurisdiction to the High Courts for matrimonial causes arising from marriages under the Act. This becomes even more so when the provision of section 251 of the Constitution is read to show how careful the lawmakers chose their words in the Act of lawmaking to prevent ambiguity.

This provision of section 2 of the matrimonial causes act is therefore not a mandatory one as the lawmaker did not use “shall” which would have meant compulsion. The interpretation of section 2 is that every High Court in every state of the federation can entertain a matrimonial cause instituted therein without any form of geographical restrictions.

It is finally submitted that words should not be forced into a provision where such is nonexistent. Courts should only be ascribed what the laws ascribe to them. Therefore unless a court is expressly conferred with exclusivityof jurisdiction by

legislation, such cannot be read into the legislation. There is no such exclusivity contained in Section 2 of the Matrimonial Causes Act or any other section therein, as such it should not be assigned exclusivity. It is therefore recommended that Lawyers should henceforth have the liberty to file their cases in the courts they so desire without tying exclusivity to the High Courts. Judges on the other hand should welcome such cases without expressing surprises. Once this is done, the provision of the law will be said to have taken its cause as the laws pertaining to the jurisdiction of Matrimonial Causes will be said to have been given its proper interpretations.