

Judicial And Scholarship Dilemma In Statutory and Customary Law Divorce In Nigeria*

Abstract

The current practice on marriage in Nigerian is that most who marry under the customary law go further to marry under the Act, and vice versa. This paper argues that legal challenges are bound to arise if the parties seek dissolution of the marriages because the different regimes of marriage laws in Nigeria provide for different ways of terminating the two systems of marriage. It makes the argument that there is no conversion of customary marriage (polygamous de jure) to statutory marriage (monogamous de jure) by the process requiring dissolution of only the latter as invariably dissolving the former. It questions the legality of the current practice whereby the parties dissolve only the statutory marriage and assume it to invariably dissolve the customary marriage. It contends that the legal basis for the regulation of marriage and divorce in Nigeria are the province of different laws, making it impossible for the termination of a preceding statutory marriage to end a previous customary law marriage by the same parties.

Introduction

The law of marriage and divorce in Nigeria also known as family law, like all other aspects of Nigeria law, has a peculiarity that reflects the experience of our people through colonisation. Accordingly, our marriage law recognises two systems: the monogamous or common-law marriage¹ and polygamous or customary law marriage.² Monogamous marriage has the

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¹ The monogamous marriage, the common law marriage, statutory marriage or marriage under the Act will be used interchangeably throughout this paper. They all refer to monogamous marriage.

² Polygamous marriage, customary law marriage and native law and custom will also be used inter-changeably throughout this paper to refer to polygamous marriage.

imprint of the English law of marriage and divorce and they have the same character and incidence. It is the marriage which was described by Penzance in *Hyde v Hyde* as “...the voluntary union for life of one man and one woman to the exclusion of all others”.³ It is important to note that the Nigerian Interpretation Act 1964⁴ adopts this definition of monogamous marriage in Nigeria. Mainly the Marriage Act⁵ and the Matrimonial Causes Act⁶ regulates the monogamous marriage in Nigeria. Polygamous marriage or customary law marriage in Nigeria on the other hand is a customary law⁷ institution. The customary law governs its character and incidence. The Nigerian customary law, however, does not have a documented history like the common law. Therefore, customary law marriage does not have a settled definition like the marriage under the Act,⁸ as customary law marriage may be defined as voluntary union for life of one man to one or more women.

One major difference between monogamous and the polygamous marriage in Nigeria is that polygamous marriages permit the marriage of one man to more than one woman at the same time⁹ while monogamous marriage does not permit the marriage to more than one wife at a time.¹⁰ The Act permits marriage between a customary law couples who wish to marry under the Act, but a customary law husband is forbidden under the Act¹¹ to contract a common law marriage with any other woman other than his customary law wife. It is a common practice in modern Nigeria for intending couples

³ (1886) LR 1 P & D 130, 133.

⁴ No. 1 of 1964 section 18, Cap 118 Laws of Nigeria (LFN)1959.

⁵ Cap M6 LFN 2004

⁶ Cap M7 LFN 2004

⁷ This paper acknowledges that there are two types of customary law in Nigeria – the indigenous customary law and the non indigenous (Islamic) customary law. The difference between the two types of customary law is not relevant and, therefore outside the scope of this paper as the discussion in this paper is concerned with the indigenous customary law.

⁸ See the definition in *Hyde v Hyde supra* note 3.

⁹ Note that the marriage to one woman by a customary law husband does not make the marriage a monogamous marriage as long as the customary law husband retains the capacity to take more wives.

¹⁰ The qualifying phrase here is one wife at a time. The common law husband is forbidden from taking more than one wife at a time but he could have several wives at different times as is the case with serial monogamy.

¹¹ Section 33 Marriage Act, Cap M6 Law of the Federation 2004.

to marry under the native law and custom and, thereafter marry under the Act. This is commonly referred to as ‘double decker’ marriage in the Nigerian family law.¹² However, dissolution of such double decker marriages only goes through a single process of dissolution of the marriage under the Act. This paper explores the validity or otherwise of such a ‘single decker’ dissolutions of a double decker marriage.

There is a divergence of judicial opinion about the validity of this single decker dissolution of a double decker marriage.¹³ However, most Nigerian family law experts argue that dissolution of statutory marriage brings the customary law marriage before it to an end.¹⁴ The requirements for the dissolution of a monogamous marriage differ materially from the requirements for the dissolution of a polygamous marriage. This paper seeks to review the law of marriage and divorce in Nigeria with a view to determining the validity of the current trend of the application of single decker dissolution of a double decker marriage under the Nigerian family law.

Part II is a concise discussion of the ingredients of validity for both marriages. Part III will discuss the divorce under the statute and under native law and custom while Part IV will discuss the relationship between the received English law and customary law, especially the personal law of marriage and divorce and the legal implication of dissolution under the two marriage systems in Nigeria. Part V will review judicial and expert opinions on the validity of a single decker dissolution of a double decker marriage, while Part VI will critique the opinions reviewed in Part V. Part VII the concluding Part will review the differences in the two marriage systems and the applicability of a single decker dissolution to a double decker marriage.

¹² MC Onoka, *Family Law* (Ibadan: Spectrum Books Limited, 2007) 143-162, 163-186.

¹³ See *Ohochuku v Ohochuku* [1960] 1 All ER 253; *Mrs Alero Jadesimi v Victoria Okotie-Eboh & two ors* (1996) 2 NWLR (pt. 429) 128 & *Afonne* (1975) 5 ECSLR 159 at 168.

¹⁴ See I Sagay, *Nigerian Family Law: Principles, Cases, Statutes & Commentaries* (Ikeja: Malthouse Press Ltd, 1999)p. 831; E. I. Nwogugu, *Family Law in Nigeria* (Ibadan: HEBN Publishers, 2011) p. 67.

The Marriage Institution in Nigeria

There are two systems of marriage in Nigeria – statutory marriage and marriage under native law and custom. Marriages, under the two systems carry their incidence and create different rights and obligations. However, these rights and obligations are predicated on the existence of a valid statutory or customary law marriage.

Customary law marriage is a voluntary union for life of one man and one or more women. There is no customary law marriage system that is universal to Nigeria. Every community operate a customary law marriage system relative to their individual community. However, there are essential similarities in the basic requirements for a valid customary law marriage across the different ethnic communities in Nigeria. Some of these requirements are:

- (1) Capacity of the parties,
- (2) Consent of the parties and, the consent of the parents of the bride, especially the consent of the father of the bride;
- (3) Statutory prohibition,
- (4) Prohibited degree of relationships,
- (5) Payment of bride price and
- (6) Celebration of marriage.

A statutory marriage on the other hand, is a marriage contracted in accordance with the provisions of the Marriage Act.¹⁵ A valid statutory marriage must satisfy the six essential factors required for a valid statutory marriage as well as fulfil the formal requirements.¹⁶ Unlike customary law marriage, statutory marriage is regulated by the Act and any person purporting to marry under the Act must satisfy the provisions of the law as any infraction of the provisions of the Act may render the marriage void or voidable under the Act.

Dissolution of Marriage

This part will discuss dissolution of customary law marriage and statutory marriage to find the causal connection between the two in order to discover

¹⁵ CAP M6 Laws of the Federation of Nigeria, 2004.

¹⁶ The six essential requirements for a valid statutory marriage are: age, prohibited degree of consanguinity and affinity, neither party must be already married, consent of the parties, parental consent and sanity.

how the dissolution of statutory marriage can end a customary law marriage. Dissolution according to Oxford English dictionary is “the formal closing down or ending of an official body or agreement”.¹⁷ Dissolution of marriage, therefore, is the formal ending of a marriage contract.

The plurality of marriage systems in Nigeria is also reflected in the dissolution processes of marriages in Nigeria. Apart from the fact that different courts are vested with jurisdiction on matrimonial causes for the different types of marriage, the applicable rules and consequences of dissolution are also different. For example, the return of bride price¹⁸ an essential requirement for the dissolution of a customary law marriage is unknown to statutory marriage.

Dissolution of Customary Law Marriage

There are essentially three ways by which a customary law marriage may be dissolved - extra-judicially, judicially or by death:

- (a) **Extra-judicial dissolution:** This is the process by which a customary law marriage may be terminated without recourse to the court of law. Extra-judicial divorce may be unilateral or by the mutual agreement of the parties. The process of unilateral divorce begins where the husband evicts the wife from the matrimonial home with the intention not to allow her back or where the wife leaves the matrimonial home with the intention never to return. Such action by a customary law wife or a customary law husband will set a divorce process in motion. The refund of bride price concludes the divorce process. Note that where it is the woman that leaves the matrimonial home, the bride price becomes immediately refundable but where the husband evicted her, the bride price becomes due only when she remarries or when she is able to pay.
- (b) **Judicial dissolution:** The customary courts have exclusive original jurisdiction in customary matrimonial causes.¹⁹ Parties to a

¹⁷ C Soanes. & S Hawker (eds.), *Oxford English Dictionary* (Oxford: Oxford University Press; 2006). p. 287.

¹⁸ Bride price and dowry will be used inter-changeably in this paper. They both mean the payment to the family of the bride in the process of a customary law marriage.

¹⁹ See *Okpakpa v Okor and Anor*, Suit No. 1/634/1969 9 (unreported) High Court Lagos 22 May 1970.

customary law matrimonial proceeding base their petition on reasons²⁰ rather than grounds, as is the case with matrimonial causes under the Statute. Although, one of the reasons for the grant of divorce in a customary matrimonial cause is adultery, unlike matrimonial cause under the Act, adultery as a reason under customary matrimonial cause is applicable only with respect of the husband's' case against the wife. In a customary matrimonial cause, divorce will readily be granted and the refund of bride price ordered once it is obvious that the parties to the marriage can no longer be reconciled or where one party is determined to see to the end of the union.²¹

- (c) **Dissolution by Death:** Death constitutes dissolution of a customary law marriage only with respect to the customary law wife, as the death of a customary law husband does not end a customary law marriage. It is only the refund of the bride price rather than the death of a customary law husband that can terminate a customary law marriage. In *Amachree v Goodhead*,²² it was decided that after the death of a customary law husband, a customary law wife continued to belong to the customary law husbands' family until the bride price is refunded.

(i) **When Customary Law Marriage is in Fact Dissolved**

The fact that the refund of bride price concludes the dissolution of a customary law marriage whether it is dissolved judicial or extra-judicially or by death, means that the issue of bride price is primary to customary matrimonial causes.²³ It is important,

²⁰ Some of the reason for the grant of divorce in customary marriage matrimonial causes are as contained in the *Adaptive By-Laws of Western Nigeria 1958*. Betrothal under marriageable age; refusal to consummate the marriage; harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man; impotence of a husband or the sterility of a wife; conviction of either party for a crime involving a sentence of imprisonment of five years or more; ill treatment, cruelty, neglect of either party by the other, venereal disease contracted by either party; lunacy of either party for three years or more; adultery, leprosy contracted by either party; desertion for a period of two years or more etc.

²¹ See *Paul Okuweze v Febisola Okuweze*, Suit no. 1 CA/H/154/83 delivered 21, March 1985.

²² (1923) 4 NLR 101.

²³ See *Registrar of Marriages v Ighinomwanhia*, Suit no. B/16M/22 (unreported) High Court, Benin, 5 August 1972. See also *Eze v Omeke* [1977] ANSLR 136.

therefore, to determine when a customary law marriage is in fact dissolved. For extra-judicial divorce, the courts have held in *Registrar of Marriages v Igbinomwanhia*,²⁴ per Obaseki J.(as he then was), that separation does not constitute divorce under Bini customary law and that customary law marriage can only be dissolved by the refund of bride price. On the other hand, if it is a judicial divorce, it has been stated in *Eze v Omeke*²⁵ that a specific order dissolving any customary law marriage was unnecessary because it is the refund of bride price that puts an end to the incidence of a customary law marriage. The implication is that a customary law marriage cannot be dissolved without the refund of bride price.

Dissolution of a Statutory Marriage

The *Matrimonial Causes Act*²⁶ provides for only one ground for the dissolution of marriage, namely, that the marriage has broken down irretrievably.²⁷ However, the provisions of factual situation in section 15(2), which must be proved before a marriage can be held to have broken down irretrievably appears to create the real grounds for dissolution of marriage. This is because those fact situations are symptoms of a marriage that have broken down irretrievably. All a petitioner for matrimonial relief may need to prove to establish irretrievable breakdown of marriage is one of the facts under Section 15(2) as the petitioner is not required to prove irretrievable breakdown.

However, apart from the grounds/facts as provided in Section 15(2), Section 16(1) provides additional facts, any of which if proved, would also constitute the fact in Section 15(2) (c) which is that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. It appears misleading to say that the MCA provides for only one ground for dissolution of marriage according to Section 15(1) MCA because a petitioner does not need to prove irretrievable breakdown but a proof of the facts in Section 15(2) as evidence

²⁴ See *Registrar Marriages v Igbinomwanhia* supra.

²⁵ See *Eze v Omeke* [1977] ANSLR 136.

²⁶ CAP. M7 LFN 2004.

²⁷ Ibid, Section 15(1).

of the fact that the marriage has broken down irretrievably. Therefore, the real grounds for dissolution of statutory marriage are the grounds as provided in Sections 15(2) and 16(1) MCA, as decided by the Enugu division of the Court of Appeal in *Justin Obidi Megwalu v Adline Njideka Megwalu*.²⁸ It was stated in *Okojie v Okojie*,²⁹ that under the Nigerian law, a court cannot dissolve a marriage even though it has broken down irretrievably unless one of the facts under section 15(2) is established to the satisfaction of the court.

A Dual Legal System: Implications for Marriage and Divorce

From the preceding part, it is clear that the rules applicable to and the consequence of dissolution of a customary law marriage are diametrically different from that of a statutory marriage, especially the differences about how a valid customary law marriage and statutory marriage may be contracted. These differences notwithstanding, some learned writers³⁰ argue that a customary law marriage contracted before a statutory marriage by the same parties is subsumed under the subsequent statutory marriage, so that the dissolution of the subsequent statutory marriage terminates the previous customary law marriage. This view above raises some questions for our legal system, which is beyond the scope of this paper. However, we need to understand the likely implications of not meeting the legal requirements for a valid customary law divorce where a marriage contracted under the customary law and the statute is dissolve only by a single process in accordance with the Act.

The existence of a dual marriage system like many aspects of the Nigerian legal system is the consequence of the colonization of Nigeria by the British. The colonial government, however, did not alter the customary laws existing in Nigeria, especially the personal laws of legitimacy, succession and divorce.³¹ The need for law to be relevant to the immediate environment and respond to social changes cannot be overemphasised. For law to fulfil this function there is the need for law to be flexible. The

²⁸ (1994) 7 NWLR (Part 359) 730.

²⁹ Suit No. WD/21/73 High Court of Lagos State, March 10 1976.

³⁰ See I. Sagay & E. Nwogugu, *supra* (n. 12).

³¹ O.E. Emiri, "A New Duty For Unmarried Couples" (2002) 5 (2) LASU Law Journal 139.

need for responsiveness and flexibility may have influenced the decision by the colonialists not to alter the personal law of the natives because this area of the law touches on the person. In fact, this area of the law regulates the personal life of the citizens and the national character of law is felt more in this area.³² Instead of supplanting the customary law in this area of law, the colonialists simply supplemented these with English proto-types.³³ Customary laws were made applicable to the natives while human face was given it by shutting off its oddities by the repugnancy test.³⁴

Statutory marriage and customary law marriage have a parallel application, so that intending couples have a free choice of the system that they wish to contract under. Therefore, couples are bound by the incidence and consequence of whatever system of marriage they chose.

Marriage under customary law like marriage under the Act creates rights and imposes obligations on the parties. The rights and incidence of a customary law marriage are different from the rights under the Act. The recognition for a customary law marriage is not superficial and the personal nature of customary law marriage is reflected in the fact of the duty of the father of a bride or the family head to give the hand of the bride in marriage. This relationship between two families in a customary law marriage, which is beyond the marriage contract between the parties to the union, cannot be dismissed by a High Court in the process of dissolving a statutory marriage. Where statutory marriage is contracted overseas between two Nigerians, the current practice is that the parties when they return proceed to marry under native law and custom. The subsequent customary law marriage does not subsume the previous statutory marriage. It only creates a new relationship between the two families. Therefore, the rights under the two contracts – statutory marriage contract and customary marriage contract exist side by side.

Opinions on the Termination of Customary Law Marriage by a Statutory Marriage Dissolution

There are mixed judicial opinions on the consequence of the dissolution of a subsequent statutory marriage on a previous customary law marriage

³² *Supra* note 69.

³³ *Ibid.*

³⁴ See Justice J. C. Pat Acholonu, (extra-judicial), "The Relevance of the Customary laws in Nigerian Legal System" Unpublished paper delivered at the Lagos State University on the 16th December 1997.

between the same parties. While some are of the view that the dissolution of a subsequent statutory marriage extinguishes the rights under a previous customary law marriage, others hold the view that the High Court which are vested with jurisdictions in statutory matrimonial causes does not have the jurisdiction to interfere with the rights of the parties under a customary law arrangement. However, most of current family law scholarship appears to favour the view that dissolution of a subsequent statutory marriage terminates the rights and obligations under a customary law marriage before it.

The earliest judicial decision that brought the issue under review to the fore was the decision in *Ohochuku v Ohochuku*.³⁵ The couple in this case were Nigerians and Christians married under the native law and custom before the husband travelled to England. When the wife joined her husband in England, the requirement of a marriage certificate, which is unknown to customary law, was the main reason that the parties went through a statutory marriage in England in 1953. When the wife later petitioned for divorce, the English court pronounced a *divorce nisi* for the dissolution of the statutory marriage but declined jurisdiction for the customary law marriage.

In the later Nigerian case of *Akparanta v Akparanta*,³⁶ Agbakoba J. stated that a subsequent statutory marriage is merely superimposed on a customary marriage as the later is not extinguished but co-exists with the former and the termination of the statutory marriage would not affect the continued existence of the customary law marriage.

However, current decisions by the Nigeria courts appear to favour the view that the dissolution of a subsequent statutory marriage extinguishes the rights under a previous customary law marriage. In *Okotie Eboh v Okotie Eboh*,³⁷ the court had the opportunity to discuss the implication of

³⁵ *But cf. Mohamed v Knott* [1968] 2 W.L.R. 1446 with respect to vested rights.

³⁶ (1972) 2 E.C.S.L.R. 779. See also *Afunne's case* [1975] E.C.S.L.R. 159 at 168, where the court stated that the party seeking dissolution of two legally recognised marriages should specify which marriage he or she wants dissolved and the grounds upon which the dissolution is sought in each case. This view appears to follow the view in *Ohochuku v Ohochuku*, that is that a subsequent statutory marriage exist in parallel to a previous customary law marriage so that a dissolution of the statutory marriage does not affect the rights under the customary law marriage.

³⁷ (1996) 2 NWLR (pt. 429) 128. See also the earlier case of *A. O. Oseni v R. O Oseni* decided on the 18th December 1927, Lagos High Court, Lagos Judicial Division per Dosunmu J. Where he stated that a subsequent statutory marriage supersedes the previous customary law marriage.

going through a subsequent statutory marriage after previously marrying under the native law and custom. The court stated: "Where the couples marry according to the appropriate native law and custom and later on marry under the Act, the two marriages do not co-exist". The court went further to state that the previous customary law marriage collapses into statutory marriage thereby losing its distinctiveness and character. The decision in *Okotie Eboh's case* followed an earlier decision of *Mrs Bassey Ita Okon v Administrator General (Cross River State)*³⁸

The views that are material to the issue under discussion are the views of two eminent authors on the subject - Sagay³⁹ and Nwogugu.⁴⁰ Both learned writers support the view that the dissolution of a subsequent statutory marriage terminates the customary law marriage before it although for different reasons. While Nwogugu canvasses the position of the law to support his view, Sagay's grounds his position on the convenience of the parties.

According to Nwogugu, the decision in *Ohochuku's*⁴¹ case would have been different if litigated under Nigerian law, as the *decree nisi* would dissolve both the statutory and customary law marriage. He states that the correct legal position concerning the incidents of marriage is that where parties married under customary law subsequently marries under the Act, they are entitled to the rights and obligations of that system as whatever rights they acquired under the previous customary law marriage is superseded.⁴² The learned author premised his view on the fact that the new relationship acquired under the statute is unknown to customary law, and that the new marriage under the Act clothes the parties with rights and obligations that are unknown to customary law.⁴³

It is important to note that the learned author agrees that the husband involved in this double decker marriage is entitled to the refund of the bride price paid. In his view the right to refund would be founded on

³⁸ (1992) 6 NWLR (pt. 248) 473 at 485.

³⁹ See I Sagay, op. cit., p. 831.

⁴⁰ See EI Nwogugu, op. cit., p. 66.

⁴¹ E I Nwogugu, op. cit., note 12.

⁴² Ibid, p. 67.

⁴³ Ibid, p. 68.

contract rather than a matrimonial right. So it does not result out of the relationship of husband and wife.⁴⁴ However, what the learned author did not tell, is the basis for the contract for which a refund of bride price is due upon the dissolution of the marriage. May be it would be on a count of 'money had and received.' Itse Sagay on the other hand grounds his position on convenience relying for support of this view on decided cases⁴⁵ and the fact that subjecting spouses to customary law marriage rights after the dissolution of their statutory marriage could cause serious inconvenience if followed in practice.⁴⁶ He further states that if the customary law right would subsist as the parties remained married under customary law after the dissolution of the statutory marriage, it would mean that the wife is obliged to refund the bride price after a second divorce under customary law. Without this second divorce, therefore, any statutory marriage by the husband will be void. The wife on her part will be unable to contract any statutory or customary law marriage because that will mean that she is married to two men.⁴⁷ However, I suggest that these positions do not properly reflect the law.

A Critique of Judicial and Scholarship Opinions

It is submitted that the dissolution of a subsequent statutory marriage does not bring to an end the customary law marriage before it. I support the decision in *Ohochuku's case*.⁴⁸ The court in that case denied jurisdiction to dissolve a customary law marriage while dissolving a statutory marriage. The views expressed by the courts in *Okon v Administrator General (Cross River State)*⁴⁹ and *Okotie Eboh v Okotie Eboh*⁵⁰ are unfounded in law and indeed practice. First, the State High Courts from where the two cases were appealed to the Court of Appeal and the Supreme Court respectively had not have original jurisdiction to pronounce on customary law marriage.⁵¹

⁴⁴ Ibid

⁴⁵ *Oseni v Oseni* and *Oshodiya* supra and *Okotie Eboh v Okotie Eboh* (supra), in which he said that the Supreme Court gave its imprimatur to the other view that the rights under a customary law marriage are not affected by the dissolution of a subsequent statutory marriage.

⁴⁶ I Sagay, op. cit, p. 831.

⁴⁷ Ibid p. 832.

⁴⁸ See *Ohochuku v Ohochuku*, (supra) note 73.

⁴⁹ Supra.

⁵⁰ Supra.

⁵¹ See Section 69 MCA. See also *Okpaku v Okor and Anor*, Suit No. 1/634/1969 (Unreported) High Court Lagos 22 May 1970.

If the High Court has no jurisdiction over customary law marriage, what is, therefore, the basis for the jurisdiction of the court? It is submitted that the only basis upon which a High Court could assume jurisdiction in a customary matrimonial cause under this circumstance is the assumption by the court that a subsequent statutory marriage terminates a customary law marriage already existing between the parties. This assumption has no basis in law and in fact. The marriage Act did not say that a statutory marriage ends a previous customary law marriage. In fact, the Act acknowledges marriage under native law and custom and, therefore prohibits any marriage under the Act to a third party by any party already married under customary law.⁵²

Second, the Supreme Court in *Okotie-Eboh's case*, per Uwais CJN stated that "it is never intended by the practice that the marriage under the marriage Act should nullify the customary marriage or engagement...".⁵³ This paper agrees with this view. But how did the same Supreme Court conclude, "such a second marriage under the Marriage Act converts the customary law marriage that was "potentially polygamous" to a monogamous marriage...".⁵⁴ The implication of this conclusion is that if the polygamous marriage is converted to a monogamous one then the rights and obligations under the polygamous marriage are extinguished. But this does not address the question about the children born before the conversion of the customary law marriage. It is submitted that certain rights recognised by law must be treated as vested and so not extinguishable.

I submit that where the rights and obligations available under any contract (marriage contract or other) are extinguished, the life of that contract is ended and the contract is no longer in existence. Herein lays the dilemma in this case. In this case, the Supreme Court relied on a valid and existing customary law marriage to save *Okotie-Eboh's Will* from destruction by the subsequent marriage under the marriage Act yet the same court found it convenient to pronounce the rights and obligations under the same customary law marriage extinguished.

⁵² Section 33 MCA.

⁵³ Supra note 11 at 132.

⁵⁴ Ibid at 135.

The provisions of Section 18 of the Wills Act 1837⁵⁵ is very clear "every will made by a man or woman shall be revoked by his or her marriage...". This section was held inapplicable in this case because of the combined effects of Section 15 of the Wills Law of Western Nigeria⁵⁶ and local circumstances, which limits the applicability of the received English laws. According to Iguh JSC.

No doubt, under section 18 of the Wills Act, 1837 of England, the marriage which can revoke or invalidate an existing Will of either of the parties, is a marriage within the English concept. This connotes a marriage between a man and a woman each of whom at the time of the marriage was unmarried or free to get married and therefore possessed the capacity to contract a lawful marriage. ... the marriage contemplated under section 18 of the Will Act, 1837 of England cannot conceivably include a subsequent marriage under the Marriage Act, Cap. 115 between a man and a woman who are already validly married under customary law and living together as husband and wife ...⁵⁷

If the Wills Act cannot prevail in this case under review because of the existence of a valid customary law marriage, it is, therefore, inconceivable that a subsequent marriage under the Marriage Act can terminate the rights and obligations under a pre-existing valid customary law marriage. The only basis for the protection of Okotie-Eboh's Will by the Supreme Court is the existence of a valid customary law marriage existing side by side with the subsequent marriage under the Marriage Act. After all Iguh JSC. approved⁵⁸ the submission by Kehinde Sofola SAN that, "a marriage under the Marriage Act, Cap. 115 after going through a customary law marriage is simply a surplusage"⁵⁹ It is therefore conclusive from the views of the Supreme Court as expressed above that if the existing customary

⁵⁵ The Wills Act 1837 (7 Will. 4, & 1 Vict. C. 26).

⁵⁶ Section 15 Will Law of Western Nigeria, Cap. 133 of the Laws of Western Nigeria (applicable in all the states of the old Western Region, including Lagos, Edo and Delta states) applicable in this case provides: 'every will made by a man or woman shall be revoked by his or her marriage (other than a marriage in accordance with customary law)...'.

⁵⁷ Supra note 11 at 134.

⁵⁸ Supra, note 11 at 133-134.

⁵⁹ Ibid, at 142.

law marriage saved the Will from revocation by the subsequent marriage under the Marriage Act, the customary law marriage is valid and subsisting with all the rights and obligations under it as any other conclusion will lead to absurdity.

Third, a valid customary law marriage can only be dissolved, whether judicially, extra-judicially or by death by the refund of bride price.⁶⁰ This means that the issue of bride price is primary to any customary matrimonial cause. In the case of extra-judicial divorce, the courts have held in the case of the *Registrar of Marriages v Igbinomwanhia*,⁶¹ per Obaseki J.(as he then was), that separation does not constitute divorce under Bini customary law and that customary law marriage can only be dissolved by the refund of bride price. With regards, to judicial divorce, it was stated in *Eze v Omeke*⁶² that a specific order dissolving any customary law marriage was unnecessary because it is the refund of bride price that puts an end to the incidence of a customary law marriage as there can be no customary law marriage without the payment of bride price.

As stated earlier, Nwogugu's view that the husband is entitled to the bride price after the dissolution of the subsequent statutory marriage suggests the continuance of a customary law marriage after the dissolution of the statutory marriage.⁶³ In a discussion on bride price, the learned author cited the case of *Ibikade v Aize*,⁶⁴ where Oki J. stated

"... dowry in a customary law marriage is the total of the various necessary sums or fees, which must be paid by the prospective husband either at different stages and/or for different heads or purposes to seal the marriage agreement between the parties and their families."⁶⁵

The learned author accepts the dictum above as representing the purpose of bride price in a marriage agreement. The same author, however, concluded that the refund of bride price after a subsequent statutory marriage is

⁶⁰ See *Registrar of Marriages v Igbinomwanhia*, suit no. B/16M/22 (unreported) High Court, Benin, 5 August 1972. See also supra note 56.

⁶¹ See (n. 54).

⁶² See (n. 56).

⁶³ See Nwogugu op. cit., p. 68.

⁶⁴ (1974) 4 U. I. L. R. 18.

⁶⁵ Dowry and bride price are used interchangeably in this paper and they are also used interchangeably by Professor Nwogugu. See El Nwogugu, op. cit., p. 51.

dissolved, (which he admits that a husband involved in a double decker marriage is entitled to after the dissolution of the subsequent statutory marriage) is only obtainable under contract rather than as a matrimonial right. As stated above the question that the learned Professor left unanswered is – what would be the basis for the contract upon which the refund of the bride price is due? If it is a marriage contract, which it is in this case, then the learned author's view lack legal foundation. The legal basis for the refund of bride price is the subsistence of a customary law marriage, which the dissolution of a subsequent statutory marriage did not affect.

Sagay on his part as stated earlier did not discuss any legal basis for the view that the dissolution of a subsequent statutory marriage terminates all the rights and obligations under the previous customary law marriage between the parties. Nevertheless, his suggestion that the Supreme Court by the view in *Okotie Eboh v Okotie Eboh*⁶⁶ gave its imprimatur to the "conversion" school is misleading. Yes, the Supreme Court may have given authority to the view that the dissolution of a subsequent statutory marriage extinguishes the rights and obligations under a previous customary law marriage between the same parties but that does not make the view infallible.⁶⁷ The view of the Supreme Court in this case could not with all due respect serve as correct position of the law as the learned author seems to suggest.

Conclusion

Current judicial and scholarly views favour the position that the dissolution of a subsequent statutory marriage by parties to a double decker marriage terminates the customary law marriage before it. However, the requirements for a valid marriage and divorce in the two systems of marriage practiced in Nigeria appear to contradict this view. For example, a customary law marriage cannot be concluded without the payment of bride price and the handover of the bride to the husbands' family in a celebration of the marriage

⁶⁶ Supra note 74.

⁶⁷ According to C. A. Oputa (J.S.C.), in the case of *Adegoke Motors v Adesanya & Anor* (1989) 3 NWLR (pt. 109) 250 at 274, the Supreme Court is 'not final because we are infallible, rather we are infallible because we are final. Justices of this Court are human-beings, capable of erring. It will certainly be short-sighted arrogance not to accept this obvious truth...!.

involving the two families. Statutory marriage on the other hand is celebrated in a licensed place of worship or a Registrar's office with at least two witnesses present. There is no requirement that the witnesses shall be any relations of the parties. Another area of fundamental difference is the mode and the requirement for a divorce under the two systems. Under the customary law, whether a divorce is judicial or extra-judicial it is only the refund of bride price that can terminate the marriage. Apart from the consequence of the payment and refund of bride price to customary law marriage and divorce, different courts have jurisdictions on any matters relating to marriage under the two systems. The High Court is the court that has original jurisdiction in matters of statutory marriage while Customary Courts are the only courts that have original jurisdiction in customary law marriage matrimonial causes. Parties that contract a statutory marriage subsequent to a customary law marriage are merely doing the "paper work" to enjoy the rights under the Act. This does not in my humble view relieve them of their rights and obligations under the customary law. A polygamous marriage recognised as valid by the law of the domicile of the parties cannot be disregarded as a ceremony, which in no way affects the rights of the parties to it because the parties decided to take advantage of the benefits of a statutory marriage by doing the paper work.