THE CONSEQUENCES OF FAMILY BREAKDOWN IN POST-INDEPENDENCE NIGERIA: A CASE STUDY OF BORNO STATE.

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ABSTRACT

THE CONSEQUENCES OF FAMILY BREAKDOWN IN NIGERIA: A CASE STUDY OF BORNO STATE.

Hamidu Bagwan USMAN

This is a study of the social and legal consequences of family breakdown in Nigeria as a whole but with specific reference to Borno State. It examines the effects of family breakdown on the husband and wife or wives and their children under the General Law, Customary Law and Islamic Law of the people of Maiduguri, Biu, and Gwoza areas of Borno State. The study covers the post-Independence period-i.e from 1960 to today.

The aim of the study is to show how the social and economic changes in society affect the family at divorce. Although social change is part of any society, this study shows that the formal law on family breakdown and its consequences have not kept pace with social change, and that the dichotomy between state law and customary or Islamic law on family breakdown exists only in court. Thus the authority of the extended family, and within it, the dominance of men over women, has not been specifically disturbed by the increasing Westernisation and rural-urban migration that has taken place since Independence. It is under this situation that the rights of women, property settlement on divorce, maintenance, and custody of children, as the main indicators of the consequences of family breakdown in any society has to be gauged.

The role of the law and the state is also discussed. We argue that all the post-Colonial governments in the Federation were responsible for the present deplorable condition of victims of family breakdown not only in Borno State but throughout the country. Thus there has been no state-provided Social welfare to cater for deserted wives, children, and destitutes despite the ever increasing needs of such persons in a society that is rapidly changing. It is within this context that the effect of family breakdown on the people of Borno State is examined. The study argues that the various state authorities in Nigeria tend to abandon their responsibility to the family to the traditional customary institutions, such as the extended family, which are now incapable of meeting the needs of victims of family breakdown. Moreover, the traditional family based economic system does not help women on divorce because it is predicated on the traditional power structure within the home which is in favour of men. On divorce, women are invariably left high and dry, and with few alternatives than to return home to their parents or other extended family members for support.

ABREVIATIONS

ALL N.L.R.	All Nigeria Law Reports
ALL E.R.	All England Law Reports
E.R.L.R.	Eastern Region of Nigeria Law Reports
C.C.H.J.	Selected Judgements of the Lagos High Court
J.A.L.	Journal of African Law
L.L.R.	Lagos Law Reports
N.L.R.	Nigeria Law Reports
N.N.L.R.	Northern Nigeria Law Reports
N.R.N.L.R.	Northern Region of Nigeria Law Reports
N.R.L.N.	Northern Region Legal Notice
N.M.L.R.	Nigeria Monthly Law Reports
W.A.C.A.	West African Court of Appeal
W.N.L.R.	Western Nigeria Law Reports
W.R.L.R.	Western Region Law Reports
S.C.N.	Supreme Court of Nigeria Reports
U.I.L.R.	University of Ife Law Reports

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CHAPTER ONE

INTRODUCTION

I became interested in the laws and consequences of family breakdown in Nigeria and Borno State for two reasons. Firstly, in the course of my work as a Lecturer in law at the Faculty of Law, University of Maiduguri, I became aware of the diverse and incoherent nature of the laws dealing with the family in general in Nigeria. Secondly, I also realized that most of the laws on family breakdown and its consequences were enacted before Nigeria became independent in 1960, and yet the country had undergone social and economic changes which were bound to affect not only the socio-economic development of the country but also the family.

Since independence from Britain in 1960,[1] Nigeria has undergone tremendous social and economic changes. The country has moved from being an exporter of agricultural produce in the 1960s to an oil exporter and influential member of OPEC (Organisation of Petroleum Exporting Countries). The transformation took place within the decade of 1970 to 1980;[2]

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1 At Independence in 1960,the Queen became a Constitutional Monarch. It was in 1963 that Nigeria became a fully independent Federal Republic and member of the Commonwealth. A President replaced the Queen as the Head of State.

2 For example the export of Groundnuts from Nigeria slumped from 19,134 tons in 1972 to zero tons in 1976; and for Palm Oil, exports slumped from 242 tons in 1972 to zero tons in 1976; but the export of Crude Oil jumped from 1,176,171 tons in 1972 to 6,196,188 tons in 1976. For more details, see Nwosu, E.J. 1980, " Patterns of Agricultural and Industrial Production and their Implications for the Development of Nigeria", in Amucheazi, E.C.(ed.) *Readings*

and within this same time period, Nigerians began to migrate, in their thousands into the urban areas in search of a better life. There was an upward shift in the living standard of the generality of the population (particularly the urban dwellers) as a result of the oil boom.[3] But this oil boom rapidly deteriorated into oil doom due to corruption and mismanagement. And by the early 1980s thousands of Nigerians were unemployed and prices of goods were galloping at an alarming rate. Food shortages set in due to the fact that there were not enough farmers left in the rural areas to produce the food items needed. With all these changes, one would have expected the formal state law to keep pace with the developments. But the formal law on the family remained largely intact except for the enactment of the Matrimonial Causes Act, 1970, (which deals only with general law marriages).Therefore one felt that it would be of enormous benefit to conduct research in family law with particular reference to family breakdown so as to reveal whether the law, both on the formal and informal level has or has not been influenced by the rapid economic changes that have taken place. Furthermore one was particularly concerned with the general dearth of legal materials on the consequences of family breakdown in Borno and other Northern States. The majority of academic work on the family in Nigeria either

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in Social Sciences: Issues in National Development, Fourth Dimension Publishers, Enugu, P.148

[3] The publication of the Udoji Commission Report on the Civil Service in Nigeria in 1974 resulted in the doubling of wages and salaries of workers in the Public sector (although many others obtained similar rises). For a detailed examination of the Udoji Public Service Review Commission Report, see Amucheazi (ed.), 1980, p.198

concentrates on the formal rules (which are mainly on the general law and hardly affects most marriages in the North) or ignores the rules in the North as a whole.[4] A great deal of the writing on Nigerian family law over the years had tended to ignore Islamic family law altogether or had tended to mention it either in passing or as part of the indigenous customary law.[5] Again, while the Southern States are highly Westernised in all aspects of life, the Northern States have remained relatively traditionalist. Formal State law has been passed in Nigeria over the years to specifically tackle certain problems connected to the family in Nigeria. But these formal laws do not seem to have attained their objectives yet.[6] In order to ascertain the reasons for the apparent failure of the formal law to solve the problems associated with family breakdown, I have chosen Borno State as my area of study. Borno is predominantly Muslim but at the same time, due to the diversity of population, it has a large number of

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[4] It is pertinent to state that Professor J.N.D. Anderson, in *Islamic Law in Africa* and numerous other works has written on the Muslim family in the Northern States, but his work does not specifically address the issue of family breakdown and its consequences. Ronald Cohen, in his :*Kanuri of Borno*, deals with the question of high divorce rate among the Kanuri from the Anthropological point of view and concentrates on one Kanuri village.

[5] See for instance, Nwogugu, E.I, 1974, *Family Law in Nigeria*, Heinemann, pp.128-130; and Elias, T.O; 1972, *The Nature of African Customary Law* Manchester University Press; Anyebe, A.P; 1985, *Customary law: the War without Arms*, Fourth Dimension, Enugu,pp.7-42; Kasunmu,A.B. and J.W.Salacuse, 1966, *Nigerian Family Law*, London Butterworth; Adesanya, S.A, 1973, *Laws of Matrimonial Causes*: Ibadan Univ. Press;

[6] See for instance the various provisions contained on the limitation of bride-price in the Biu, Borgu, Idoma, and the Tiv Declarations on traditional Customary marriage and divorce; and the Limitation of Dowry Law, (Cap.76, Laws of Eastern Nigeria, 1963), where the provisions on limitation of bride-price had been ineffective.

Christians, living largely in the southern parts of the State, and traditional communities that are neither Muslim nor Christian living on the Gwoza Hills. The main ethnic group of Borno is the Kanuri and they are overwhelmingly Muslim, and therefore the Islamic rules discussed in this thesis applies to the Kanuris far more than any of the other ethnic groups.

Legal pluralism in the field of family law is a feature of most communities in Nigeria and Borno State is not an exception. Christians in Borno, found mainly in Biu area and Maiduguri, the State capital, generally contract marriage under the general law. Muslims are governed by Islamic family law, while traditionalists are governed by their own traditional customary norms on the family. However, as will be revealed in the body of the thesis, the functions of these norms on the family overlap one another and one may find that a person married under the general law, for instance, may nevertheless be conducting his family life in accordance with his traditional customary law. Thus Maiduguri, Biu, and Gwoza areas were specifically chosen for the research.The Chapters of the thesis are divided as follows: This introductory Chapter introduces Nigeria and Borno State to the reader by giving a brief account of the country and state's history, geography, its people, the general family structure, the literature on the family in general and the family law systems in the State. Finally, a detailed outline is made of the method of the research, with its attendant problems.

Chapter two considers State intervention in the family in Nigeria. It examines the areas of intervention and non-

intervention, as the case may be, and their consequences on members of a broken family in Nigeria. The Chapter attempts to show that there is an inextricable link between the state and the family, may not be apparent from the formal rules governing family relations alone. The effects of State policy on taxation and tax relief for family members, education for children, and the provision of social welfare are considered in terms of their effect on the victims of family breakdown.

Chapter three examines the development of Nigerian family law, with particular reference to the rules on family breakdown, from independence to today. The Chapter concentrates on the laws on marriage and divorce under the general law, customary law, and Islamic law and identifies how and why the laws were made, and touches on the conflict that arises between these laws. The Chapter argues that " Nigerian Independence further accentuated the division between the general law and customary law rather than bringing harmony between them as far as family matters are concerned." The Matrimonial Causes Decree, 1970,(hereinafter called the Matrimonial Causes Act, 1970), [7] is examined in terms of its aims and objectives in settling family disputes in a plural society like Nigeria. The relevance or otherwise of such a

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7 The Decree became an Act due to the provision of section 274(1)(a) of the 1979 Federal Constitution, which states:

" (1) Subject to the provision of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be - (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws..."

supposedly secular law on the settlement of family disputes in a predominantly Muslim State is also looked at.

Chapter four analyses the process of matrimonial dispute settlement under the plurality of laws in Nigeria, and uses specific examples of family dispute settlement from Borno State. Family breakdown caused by the death of a spouse is not specifically included in this thesis. However, certain aspects of such type of breakdown, such as inheritance rights, are mentioned throughout the thesis.

Women constitute a vital part of any society, and in the field of family law, the extent of legal recognition of their rights to property, maintenance, and custody of their children on divorce has a direct bearing on the consequences that they may face on marriage break down. The fifth Chapter therefore examines the role of women in the family in Nigeria by analysing the rules affecting women during and after marriage. The role of the woman as a wife, mother, divorcee etc, in the patriarchal Nigerian society may have a direct bearing on the way formal and informal law treats women on divorce. For the past two decades or so, there has been a systematic call, by the educated women, for women's liberation in Nigeria. As to how far, if at all, Nigerian law affecting women in the family reflects current trend towards women's liberation is also examined in this Chapter. The Chapter argues that despite the Constitutional provisions guaranteeing women's rights, as long as women continue to lack equal opportunity in many walks of life, their positions under

formal and informal law vis-a-vis their husbands will never change.

Chapter six looks at the rights of the husband and wife to the custody of their children on divorce. The traditional African rules on the custody of children seem to rely on various factors, chief among which is the question of the rights of the father as determined by the payment of the bride-price, and the age of the child involved. Under the general law, the concept of the welfare of the child being of paramount importance seems to have superceded any other consideration. Significantly, customary courts seem to have adopted the Welfare principle to settle all custody cases that come before them. The role that the social welfare officials play in the settlement of custody disputes is examined in relation to its future development of the Nigerian law on custody.

One of the fundamental rights of any human society is the right to acquire and dispose of property. This right may or may not be affected by the act of marriage or divorce. It all depends on the particular society that one belongs to. Chapter seven examines the rights of husband and wife to property both during and after the dissolution of the marriage. The rules governing the property rights of those married under the general law are compared with those governing Customary and Islamic marriages in terms of their effect on divorced women in particular. The Chapter argues that marriage *per se*, does not in reality seem to confer any special right to property, especially as regards the wife claiming jointly acquired

property after divorce. The reasons for this apparent contradiction, particularly under the general law, are made clear in this chapter with specific reference to cases from Borno and other parts of Nigeria.

Chapter eight examines the rights of spouses and their children to maintenance both during and after the breakdown of marriage. Maintenance in Nigeria, unlike in England and Wales, seems to be still heavily influenced by the traditions of the people. Thus the duty to maintain the family is invariably placed upon the husband but such duty comes to an end when the marriage has broken down. A divorced woman does not normally have the right to claim maintenance from her ex-husband except in the cases where she was divorced during pregnancy or is nursing a small child. Yet under the provisions of the Matrimonial Causes Act, 1970, the courts have the power to order either of the parties to maintain the other whether the marriage was at an end or not. This chapter considers the situation as regards post divorce maintenance and suggests possible ways of solving the problems faced by divorced women in Nigeria as a whole. The final Chapter summarises and draws conclusions from the findings of the research as well as makes suggestions for possible improvement.

NIGERIA

Nigeria is located in the West Coast of Africa. The country is bordered by the Niger Republic in the North, the Republic of Chad in the North-East, the Republic of Cameroon in the East, the Republic of Benin in the West, and by the Atlantic Ocean in the South. The rivers Niger and Benue divide

the country into three. The World Bank estimated the population of the country, as of 1982, as 90 million people and increasing at a rate of 2.6 per cent. Forty six per cent of the adult population, and 23 per cent of the female population are literate. But a staggering 47.8 per cent of the entire population are below the age of 15 years.Nigeria is a Federal Republic made up of 21 States and a Federal Capital territory. There are over 250 different ethnic groups in the country. English is the official language even though Hausa is more widely spoken in the country.

In 1862 the British took over Lagos from King Docemu and incorporated it into the then Gold Coast Colony. British rule over the territory was extended gradually East and Northward until by 1906 the entire area now called Nigeria came under British rule. However the Eastern, Western and Northern parts of the country were administered separately until 1914 when they were all amalgamated into a single nation. Even the name "Nigeria" was coined by Lady Lugard, Lord Lugard's wife. Lord Lugard was one of the colonial Governor Generals and was noted for his introduction of the concept of "indirect rule" in the Northern parts of the country.[8] Britain ruled the country for over a Century before granting independence in 1960. An important aspect of British rule, for the purposes of this Thesis, is the fact that the indigenous customary family laws were allowed to exist side by side with the introduced general law on the family. The Gold Coast Marriage Ordinance was introduced in 1884, and was initially meant for the expatriate

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[8] See, Read,J.S. 1972, *Indirect Rule and the Search for Justice* Oxford University Press.

population but was later extended to the native African population who were Christian.[9] This was a landmark in the development of Nigerian Family law because it introduced a system of marriage and divorce that was totally alien to the traditional African concept of marriage and its effects are still to be found in Nigeria today. For instance the general law rules on monogamy and succession were totally and diametrically opposed to the customary rules on the same.[10] Courts were also introduced and staffed by the British themselves to apply the newly introduced laws. This had the effect of dividing the rules on the family as well as the courts administering them into two. On the one hand there are the British established courts applying English law, and on the other there are the traditional customary courts, such as the Alkali courts in the North, staffed by local personnel and applying the traditional customary law on family matters.[11] Following the departure of the British in 1960, Nigeria had a democratically elected government modelled on the British

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9 This was due to pressure from the Missionaries who wanted the marriages of their African converts recognised.

10 Customary law practices polygyny and has rules that bars women from inheritance in most cases, while the general law permits only monogamy and allows women to inherit property just as men.

11 See Okany,M.C. 1984, *The role of customary courts in Nigeria*: Fourth Dimension Publishers, Enugu, Nigeria, pp.1-139.

Parliamentary system.[12] But the experiment with democracy did not last long due to tribalism and sectionalism.

The Military took over power in 1966 and immediately sub-divided the country into twelve States - six in the North and six in the South. This was done on the basis that it would bring development closer to the grass roots and foster a sense of security and belonging among the minority ethnic groups in the country who felt marginalized under the hitherto existing regional set up. One of the new States was the North-Eastern State which was made up of the provinces of Borno, Bauchi, Adamawa, and Sardauna. The capital of the State was initially located at Bauchi but was later moved to Maiduguri in Borno province. The State was diverse and there was constant agitation for the creation of more States out of it. The calls for more States were heeded in 1976 under the Murtala regime when seven more States were created in the country. The North-Eastern State was divided into three new States- Borno, Bauchi, and Gongola States.[13] The State creation exercise of 1976 brought the total number of States in the country to 19 and this remained so until two more States were created by the

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12 At Independence in 1960, apart from the English Statutes received in general terms into Nigeria, there were also English statutes on specific subjects. For instance, English statutes on divorce and Matrimonial Causes "for the time being in force in England" applied in Nigeria by virtue of section 4 of the State Courts(Federal Jurisdiction) Act, (cap. 177, Laws of the Federation of Nigeria and Lagos, 1958 Revision); and the provision of the High Court Laws of the Regions except the Western Region where the High Court Law (cap.44 Laws of Western Nigeria, 1959) was silent on the application of these English statutes.

13 See Barbour, K.M., "North-Eastern Nigeria- a Case study of State formation" Journal of Modern African Studies, 9,i(1971), pp.49-71

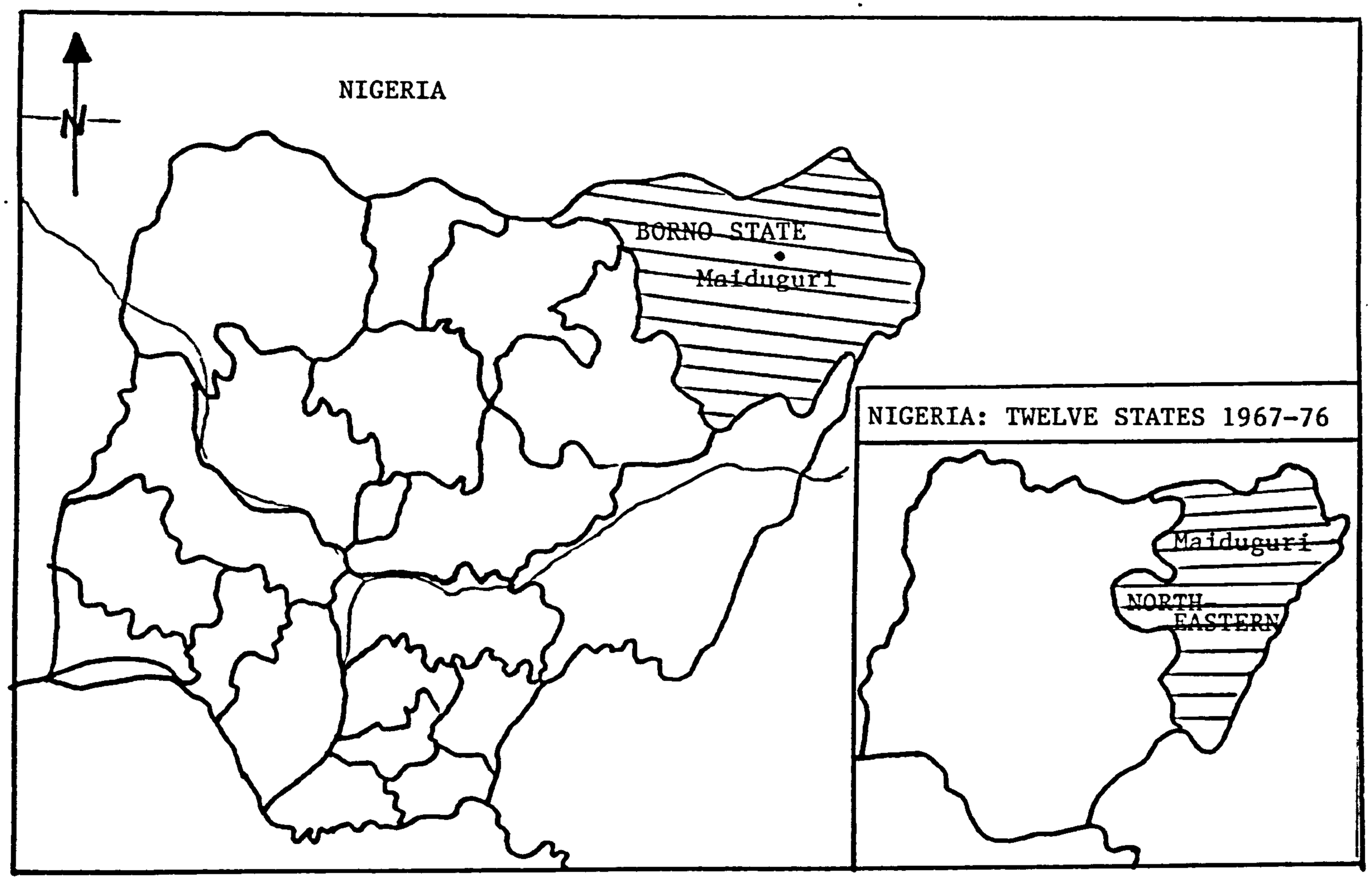

DIAGRAM C1(i) Showing the location of Borno State and the former North-Eastern State.

Babangida regime-Katsina and Akwa-Ibom States- in 1986. Each State of the Federation has its own Civil Service, Judiciary, Courts, Legislature, and other infrastructure. And each State has exclusive legislative competence on certain matters, for instance customary family law matters, and concurrent legislative competence with the Federal government on others such as education.

BORNO STATE

Borno is one of the well known African empires that existed prior to the division of the African Continent under European Colonialism (other empires were Ghana, Songhai, Mali, Hausa, Wadai, Darfur and Baghirmi). The present location of Borno is in the North-Eastern corner of Nigeria. But its ancient empire extended over the whole of the Chad basin. Among all the Kingdoms that existed in the North of Nigeria prior to British rule, it is only the Kingdom of Borno that withstood the might of the Fulani Jihad in the 19 th Century under the leadership of Sheikh Usman Dan Fodio.

Borno is the largest State in Nigeria in terms of land area. It has an area of 116,589 square Kilometres and an estimated population of 6.5 million people.[14] The people of the

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[14] This figure represents the projected estimate based on the 1963 national population census. Since 1963, Nigeria's efforts at conducting a national census has failed due to the political significance attached to population figures which results in inordinate inflation of the figures. For further information on Borno State, see, " Brief on Borno State", 1986, Borno Ministry of Information, pp.1-5; Cohen, R, 1967, *The Kanuri of Bornu*, Holt, Rinehart and Winston, New York; Cohen, R; and John Middleton (eds.), 1970, *From Tribe to Nation in Africa: Studies in the Incorporation Process*: Chandler Publishing Company, p.150; *The Biu Book, a collection of Anthropological works on the people of Biu;*

State are made up of the Kanuri, Ngamo, Fulani, Babur, Marghi, Bolewa, Waha, Shuwa, Guduf, Ngizim, and Kare-Kare. It is a predominantly savannah country which is quite flat with few trees, especially in the extreme Northern parts of the State. The Southern parts of the State are made up of the Hills of Gwoza and the Savannah woodland of Biu and Askira Uba, and has heavy rainfall. The overall climate of the State, which determines the economic activities of the people of the State, is dominated by the hot and dry season which lasts for about 200 days of the year. The rainy season varies from 120 days in the Northern parts to 140 days in the Southern parts. Most of the inhabitants of Borno State are farmers and cattle rearers.The main crops cultivated are Millet,Wheat, Groundnuts and Maize. Gum-Arabic is also produced in commercial quantity in the northern parts of the State. But Borno is best known as the largest livestock producer in Nigeria.

The State is divided into eighteen Local Government Areas, and these are: Bade, Biu, Fika, Askira/Uba, Ngala, Bama, Gwoza, Geidam, Kukawa, Nguru, Konduga, Maiduguri, Damaturu, Fune, Gujba, Damboa, Monguno, and Kaga. Most of the people in these local government areas live in rural village communities although there are some large urban areas such as Maiduguri, Bama, Biu, Potiskum and Dikwa.The remote rural village communities have no pipe borne water nor electricity, and roads are still relatively primitive. But the State government is currently making efforts to extend such services

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A.B. Mathew, " The Pagan District of Geidam"; B.M. Magfaria, *Report on Gwoza, Ashigashiya Hills Pagans.*

to the rural areas.I provide below a brief description of the main areas where research was carried out.

Maiduguri Metropolitan Area

Maiduguri is the State Capital of Borno. The estimated population of the town is 700,000 people. It is also the Headquarters of the Maiduguri Metropolitan local government area.The town has an International Airport, a Railway Station, a University, a Teaching Hospital, other Hospitals and Clinics, several Motor Parks, an Air force base and numerous other modern facilities connected with a cosmopolitan town. In the center of the town stands the Palace of the Shehu of Borno, traditional ruler of the Kanuri and the descendant of the past rulers of Borno empire. Many Mosques and Churches are to be found in the town which caters for the diversity of the population. The main economic activity in the town seems to be retailing even though there is a Flour Mill, a Shoe Factory, a Stock Market and a Bricks and Clay Products factory. Traders sell all sorts of wares ranging from fruits and vegetables to cars. Economically, Maiduguri is a huge market for subsistence farmers and traders alike to sell and buy goods from. All the High Courts and Sharia courts are based in the town. In addition, each Ward of the town has a Social Welfare office that deals with the social problems of living in an urban environment. Most of the materials required for this research,therefore, are to be found in the town.

Biu Area

Biu Local government area lies about 200 kilometres South-west of Maiduguri. Biu town which is the Headquarters of Biu Local Government Area, has a population of 80,000 people. Most of the people in this area are Muslims but there is also a substantial Christian minority. The main ethnic groups of Biu area are the Babur and the Bura. There are no modern industries in the area and most of the people are farmers. The research in Biu was concentrated on the Christian community of the area. For theoretically, Christians conduct their marriages under the provision of the general law on marriage. The research in this area was meant to find out, *inter alia*, whether the general law rules on family break down are observed in the area or not.[15] In practice, due to the procedure for general law marriages contained in the Marriage Act, 1914, as well as the incidence of such marriage, it is rare to find a non-Christian marrying under the Act in Nigeria.[16]

Gwoza Hill Dwellers

The people of Gwoza Local Government Area are divided into two groups- those living on the plains and those living

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15 In the case of Obiekwe v. Obiekwe,High court of the former Eastern Region,(unreported), Palmer J, said," A good deal has been said about "Church marriage" or "marriage under Roman Catholic law", so far as the law of Nigeria is concerned, there is only one form of monogamous marriage and that is marriage under the Ordinance [Act]"

16 All matrimonial causes of general law marriages must be settled in the High courts in Nigeria and since going to such courts entails a lot of expense, not many people can afford to, or bother to go to court to effect a divorce for instance.

on the Gwoza Hills. Majority of the Hill Dwellers are still pagans while those living on the Plains are mostly Muslims and Christians. The Hill Dwellers still live largely in accordance with their traditional customs, and therefore one wanted to find out how a traditional community dealt with the consequences of family break down. Access to the Hill Dwellers is extremely difficult due to the terrain and the general reluctance of the people to meet strangers. However, the people regularly come to market in Gwoza town on Saturdays where access to them is much easier. Moreover, a lot of the Hill Dwellers are being resettled by the State government on the plains and so most of the interviews in Gwoza were conducted with the resettled people.

While focus is placed on these areas of Borno State, information relating to the whole of Nigeria was used where relevant.

The nature of marriage in Nigeria

A valid marriage has legal effects or incidents which exist as long as the marriage is intact. Even on break down of marriage, certain incidents, such as maintenance for instance, may still continue.[17] While the marriage subsists, the parties may be oblivious of the consequences that may ensue in terms

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[17] For the general incidents of marriage, see Bromley, P.M. 1981, *Family Law*, 6th ed. (London: Butterworth); for monogamous marriages; Pearl, D, (1979), *A Textbook on Muslim Law* (Croom Helm: London); Abdl Ati, (1982),*The Family Structure in Islam* (Islamic Publication Bureau, Lagos, Nigeria) for Islamic marriages; and Anyebe, A.P. (1985), *Customary Law:the War Without Arms* (Fourth Dimension Publishers, Enugu, Nigeria); and Nwogugu, E.I.(1974), *Family Law in Nigeria* (Heinemann) for customary marriages.

of their rights to property, maintenance, and custody of their children for instance. However social changes may eventually bring about an increasing recognition of extra marital relationships in the acquisition of rights that are traditionally associated with marriage. But at present cohabitation, does not give parties rights similar to those of married persons under the law.[18]

Nigerian society still accords the man the dominant position within the home. This is reflected in several rules and conventions which collectively make the man the breadwinner, the provider of the matrimonial home, and the "owner" of the children of the marriage. One can observe this happening in Nigeria through the general reluctance of the courts to award maintenance to a divorced wife who has no children,(Nwogugu,1874:195; Adesanya,1980:207); the incapacity of a woman to contract herself into marriage; the incapacity of a woman to unilaterally terminate her own marriage and the absence of a social welfare system all contribute in no small measure in the continued dominance of women by men and the suffering of women on divorce. Furthermore, the continued retention of a plural system of formal law on the family seems to militate against the development of a single and coherent system of law on the family in Nigeria,[19] and may be a recipe

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18 See the African Guardian, March 7, 1988, pp.15-20; and for the situation in the Western European countries, see Glendon,M.A., (1977), *State, Law and Family: Family Law in Transition in the United States and Western Europe* (Amsterdam: North Holland).

19 All the rules on marriages other than under Islamic or customary law were included in the Exclusive Legislative List(which only the Federal Government has power to legislate on) under the Independence Constitution,1960, the

for chaos and uncertainty. The general law on marriage and divorce still favours a Western type family unit where the man, woman and their immediate children constitute the basic family with the man having the responsibility for the maintenance of the wife and children. However, on breakdown of the marriage, either spouse may be ordered to maintain the other or the children of the marriage (s. 70, of the Matrimonial Causes Act, 1970). Customary and Islamic rules on the other hand have their own distinctive rules which do not depend on the discretion of a Judge. For instance, Customary law does not provide for maintenance after divorce and Islamic law restricts post-divorce maintenance of the wife to the duration of the *iddah* period only.[20] Under both customary and Islamic law, divorce terminates all the obligations that the parties have towards each other. Therefore the husband is not obliged to maintain his ex-wife (Anyebe:1985; Abdl Ati:1982). How does one reconcile these divergent formal rules on the family in Nigeria, especially in view of the fact that the Constitution of the country, specifically forbids discrimination of any kind? One answer is that formal law differs considerably with the folk or customary law, particularly in the field of family law. The formal law on the family, particularly the general law seem to reflect the

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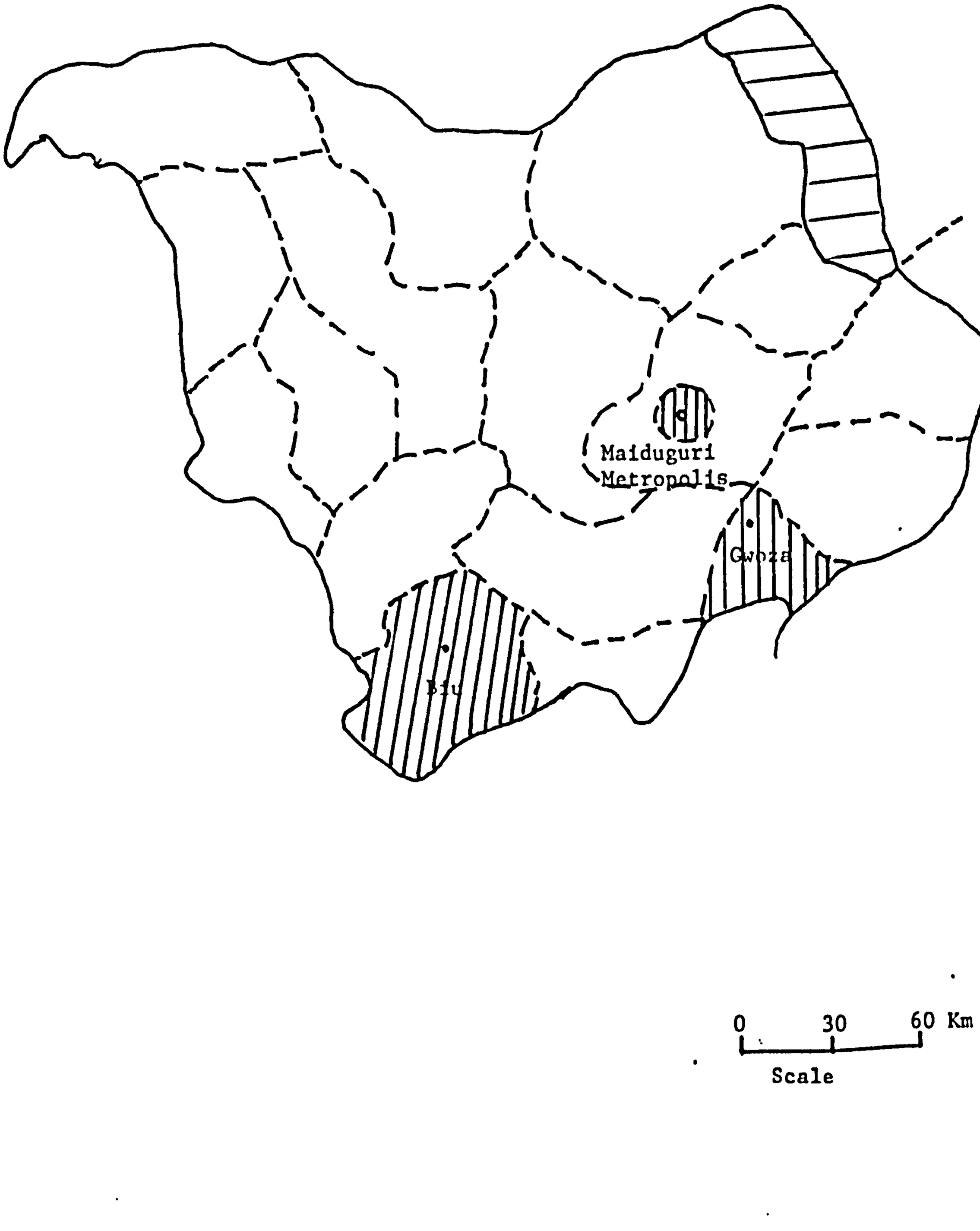
Republican Constitution, 1963, and the Presidential Constitution, 1979.

20 Iddah is the period of waiting before remarriage that a divorced Muslim wife has to observe. It is designed to ascertain whether she was pregnant at the time of the divorce or not. If so she cannot legally remarry until the child has been born. Iddah lasts for three menstrual cycles for divorce and four months and ten days in the case of the death of the husband. See, Coulson, N.J. (1971), *Succession in the Muslim Family* (Cambridge University Press)

ideological desire of the Western educated elite's development path for the Nigerian family while the majority population sticks to the traditional family system.The concept of the family in the different communities in Nigeria, differs from the concept of the family as understood in a Western industrialized country such as Britain for instance. Consequently, even among the elite that marry under the general law, one may find that the customary rules on the family are still strictly adhered to. As a result, one may find polygamy being practiced in a supposedly monogamous family (Allot:1960,1970).One reason why Nigeria has been adopting the English rules on monogamous marriages since Independence, despite their unsuitability to the society, lies with what is commonly referred to as the "Colonial mentality". That is the tendency to regard anything Western or British as being superior to the Nigerian one, and therefore by copying it Nigeria would thus achieve "development" (Jinadu: 1985). An example of such copying of foreign ideas or rules is illustrated by the adoption of the English Divorce Reform Act, 1969, as well as the Australian Matrimonial Causes Act, 1959, into the Nigerian Matrimonial Causes Act, 1970,without any consideration as to its suitability to Nigerian society.

In the division of marital property after divorce or the death of a spouse, the problem seems to be much more acute due to the different interest groups involved. For in Nigeria there is a clear distinction between "family property" (which belongs to the family as a whole) and individual property. Therefore on the break down of marriage, one may find conflict of interest between family members and a spouse, especially

DIAGRAM C1(ii) Map of Borno State showing Biu, Gwoza and Maiduguri Metropolitan L.G. Areas.



the wife, as to the ownership or entitlement to property (Allot:1968; Nwogugu:1974; Lloyd:1962; Obi:1963,1966). As regards individual property, disputes may arise as to the right to property acquired by a woman during her marriage, and her right to remain in occupation of the matrimonial home after divorce or the death of her husband.[21] It would therefore be of interest to discover what rights, if any, the spouses have as regards property, maintenance and custody of children on divorce.

The nature of the family

The family is generally recognised as the smallest unit in the social structure and the bedrock of society. Since it forms the basis of every human society, it can rightly be regarded as the nucleus of society.[22] However, a precise definition of the family from a legal point of view is not an easy task. For in one sense the "family" means all persons related by blood through a common ancestor. This is sometimes referred to as the "extended family". Green referred to this type of family as

"...a group of closely related people, known by common name and consisting usually of a man and his wives and children, his sons wives and children, his brothers and half brothers

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21 The Igbos and the Yorubas do not allow a woman to take her husband's property; see Obi, S.N.C; 1966, *Modern Family Law in Southern Nigeria* (London: Sweet and Maxwell); and Coker, G.B.A.(1966), *Family Property Among the Yoruba* (2nd. ed.) (London: Sweet and Maxwell), pp.49-55

22 See Hogget,B.M. and David S.Pearl, 1983, *The Family, Law and Society*: (London: Butterworth) pp.1-11; Stone, L. 1977, *The Family, Sex and Marriage in England*: (London); . Barret and McIntosh, 1987, *Anti-Social Family* (Verso), hold the view that the family is not necessarily for the benefit of the members because of the inequalities that exists within it.

and their wives and children and probably other near relations..."[23]

This is referring to the extended family in a community that practices polygamy. But within the extended family one may still find a smaller group, consisting of a man, his wife or wives, their children and other dependents. This group is equally identifiable as a family but much more restricted in number than the extended family. In other words this sub-group of the extended family may be described as the "nuclear family" of a polygamous community. The extended family in Nigeria can be regarded as a corporate group which may own property and to which certain individually acquired property may devolve upon the death of the owner. This type of family can be contrasted with the Western nuclear family which is characterised by a man and wife and their children. The Western nuclear family of today has also developed out of the extended family system over the centuries.[24] The Western nuclear family is, unlike the African family, based on monogamy and (in principle) permanent marriage, with a consequently rigid distinction between the status of legitimate children (those born in lawful wedlock) and illegitimate children (those born out of wedlock). Recent development in the law has made divorce much easier, provided greater recognition of women's rights in the home and has rendered the distinction between legitimate and illegitimate

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23 Green,M.M, 1941, *Land Tenure in an Ibo Village*: (Lund Humphries), pp.2-3

24 See, Shorter, E. 1979, *The Making of the Modern Family* Fontana; where a detailed observance of the Western Family from pre-industrial to post-industrial period is made.

children, in terms of welfare, superfluous.[25] While the Western concept of the family is undergoing these tremendous changes the family in Third World countries is trying to reconcile traditional norms of the family with modern developments. Formal Western laws are being adopted in Nigeria as a means of achieving "modernisation" and "development". Development is a term that usually connotes a social change- usually for the better.[26] But in terms of many Third World countries, particularly in the field of family law, the adoption of Western notions of the family may not necessarily lead to development. For what may be suitable for a Western industrialized nation may not be suitable for a Third World country. The underlying assumption that such copying of Western ideas would thereby bring about development ignores the important point that the formal laws of a society are not made in total disregard for the underlying social norms.Thus the importance of history and culture in the development of a particular law on the family is of vital importance. Law does not operate independently of society, but is intimately related to society's views, values, aspirations and practices. Failure to take this point into consideration in the process of enacting formal law would invariably lead to formal law becoming ineffective.[27]

The family and ideology in Nigeria

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[25] See the case of Lawal v. Younan [1961] 1 All N.L.R. 245

[26] See Elkan,W. 1976, *An Introduction to Development Economics* (Penguin Books) P.13

[27] See, Zabel, S, " Legislative History of the Gold Coast and Lagos Marriage Ordinance" in: J.A.L. 23 No.1,1979,p. 11

Apart from the direct imposition of a particular law on society as a means of bringing development to the people, legal pluralism, particularly in the field of family law, was resorted to during the Colonial period in Nigeria as an ideological means of achieving the Colonial objectives of subjugation and exploitation of the people through "indirect rule". The traditional law on the Family was preserved, but at the same time English law was introduced. The people were allowed to opt out of their traditional system of marriage and its consequences by contracting marriage under English law (Fitzpatrick, 1980; Snyder, 1981 (1)). The Colonialists made sure that the preserved local law on the family was subordinate to their own laws on the family by ensuring that in any case of conflict between the two, the introduced law prevailed.

The basis of the moral values of any given society, which is sanctioned by its laws, is the level and nature of its development. This social development depends on the manner that the society produces, distributes, and exchanges its wealth as well as the type of relations that this type of production creates among its members.

The traditional value system that existed in Nigeria prior to colonisation has changed enormously. Before colonisation, the family and the clan formed the basis of society and within that structure, communalism, whereby co-operation in all economic activities was its hallmark, was the order of the day. Colonialism transformed this system and brought about individualism in all aspects of economic

activity.[28] The Colonial period introduced a new economic structure which dramatically changed the Nigerian's traditional outlook on life. Still the traditional outlook on life lingers on in one form or the other. For instance, the practice of polygamy still exists despite the introduction of monogamous general law marriage by the Colonialists.In terms of social organisation, the peasant economy that existed before colonisation, demanded much human physical labour and co-operation which were only available through the institution of the family. The village was made up of either an extended family or a group of such families. It was therefore necessary to maintain the solidarity of the family as a means of economic survival. The image of the ancestors and the powers of the elders of each family, as the custodians of the symbol of authority within the family, were frequently invoked to ensure the continued survival of the family. The wealth of the family was communally produced and enjoyed. And because the economy of the society was communally organised its social organisation was also communal. The communal society was dominated by the men. The elders who became the heads of the families and the custodians of the values of the society were men. Thus they constantly reminded the young of their duties towards the elders, and the women were reminded of their positions as wives and mothers. Men also owned the land and other economic resources of the family, and this ensured that women remained perpetually dependent on men.

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[28] See, Usman,Y.B. 1987, " Political Economy and Political Community: The Lessons of the Nineteenth Century", in *The Manipulation of Religion in Nigeria* 1977-1987, Vanguard Publishers, Kano, Nigeria, pp.95-118

European colonialism brought with it the concept of capitalism which resulted in economic dependence on the metropolis. All available means, including legislation and force, are used in trying to replace the traditional social system with the new capitalist system. That explains why for instance, the British, through the Christian Missions, introduced the Marriage Ordinance and other laws into the Gold Coast Colony when they knew that the traditional laws on marriage were diametrically opposed to their system (Okany:84) Economic control was effected by the British in the West African coast first through merchants, (for example the Royal Niger Company was granted Royal Charter in 1886 to trade with the natives in the area), then it was followed by political control through military conquest. Next came domination through educational institutions and religious organisations. This systematic attack on the communal system by the capitalist system led invariably to change, albeit gradually, in the communal system of production (Yakubu:85; Usman:87).

A hallmark of the capitalist system is the emphasis on individual acquisition of wealth through private, as opposed to communal, enterprise. Thus, individualism and the acquisitive instinct enjoins competition among individuals. Since individuals compete not with their kinsmen and family members but against them, the individual becomes the referee and the individual conscience becomes the source of moral judgement. What is good and what is right is no longer determined by what the community approves but by what the individual feels and decides for himself. The colonialists provided the facilities for the operation of the system. Laws

were passed or adopted from the colonisers' mother country and made to apply to the capitalist system in the new colony while the traditional law was preserved for the traditional system only (Seidman:1968). The linkage of the traditional system to the needs of the newly introduced capitalist system by the preservation of the former was aptly observed by Fitzpatrick(1978:130) in the case of Papua New Guinea. Here he observed that legal pluralism was explained in the economic ordering of the state. The introduced law was made applicable only to the expatriate population while customary law was preserved for the indigenous population. The traditional system was not only preserved in a manner that it continued to provide the new system with a ready available pool of wage labour, but at the same time adjustments were made to it by law so that the people could be encouraged or forced to come out of the traditional system in search of wage labour. Fitzpatrick gave the example of the Law and Tribal boundaries system introduced in Papua New Guinea by the British, which ensured the continued separate identity of each tribe, clan and family. This was made to prevent the growth of a local capitalist class that would threaten the interest of the colonialists.

The control of the family through the private means of production has long been identified by the founders of Marxism (Engels:1978). Marxism identifies the rules on the interrelationship of the members of a family with one another as inextricably linked to the structure of society, since it is largely based on the ownership of private property. This further explains, for instance, the continued subjugation of

women in the family structure, particularly in societies that are relatively underdeveloped. Men's power in the family includes the control of women's labour. In most Third World countries the capitalist system excludes women from effective participation. Moreover, women's house work as housewives is not, and has never been given any economic recognition because in a capitalist dominated wage economy, it is not regarded as having any value that can be measured by a wage.

The continued existence of family laws that maintain the distinction between men and women in the family in the capitalist countries is a reflection of the underlying exploitative nature of the system. This state of affairs is buttressed by the law, which in itself, emanates from and sustains the underlying social, economic and property relations that are established by the capitalist system. Thus the laws on the rights of spouses in marriage, such as to matrimonial property, maintenance etc. reflect the economic system of a given society.[29]

The Western conjugal family is generally considered to be based on the mutual desire of two persons, male and female, to live together as man and wife. But in Nigeria this may not be the case due to the predominance of the traditional type of marriage where the wishes of the families of the two parties are far more important. Thus extended family members, the parties themselves, and their children all have a legal

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[29] In Islam the relative position of men and women are prescribed in the Holy Qur'an itself and therefore cannot be said to be determined by or reflect the economic situation that the society itself creates. See Al-Qur'an Surah 11 Verse 228

interest in the continued survival of a marriage. But the rules on marriage and divorce in Nigeria vary from state to state due to religious, cultural, and economic differences. Although traditionally the family has been viewed as an institution for the upbringing of children and for the general welfare of its members, radical criticism, (eg.Barrett & Mcintosh: 1987,43-81), suggests that the family is not necessarily for the benefit of its weaker members such as women and children. The" anti-social family" inflicts hardship and suffering on its members and partly explains state intervention as a means of protecting its weaker members. And, although marriage is intended to last for ever, divorce is permitted because it is the only means of relieving parties from an unhappy union. But it has only recently been possible for parties to a marriage in Nigeria to sue for divorce on the ground of irretrievable breakdown of the union. Before that, matrimonial fault not only provided the grounds for divorce but also affected the determination of ancillary orders such as maintenance or custody of the children of the marriage. The new rules for easy divorce puts the parties on an equal footing in terms of the right to ancillary orders. These rules are of immense significance in the development of the general law on the consequences of family breakdown. But since Nigeria adopted the concept of the no-fault divorce from countries with different social background, its effectiveness may be subject to the local Nigerian conditions.

Types of families in Nigeria

Despite the difficulty in defining the family precisely, nevertheless it is incontrovertible that the mode of forming the family is basically through the process of marriage.[30] There are three types of marriages in Nigeria- general law, Islamic law, and customary law. These lead to the formation of three different types of family. The Western style nuclear family, which is characterized by monogamy, is formed by marriage under the general law- the Nigerian Marriage Act, 1914. It seems that only Christians marry under the general law despite the fact that it is a secular law. The reason for this goes back to Colonial times when the 1884 Marriage Ordinance was introduced and made applicable to any African Christian who wanted to marry under its provisions. A Muslim or a traditionalist cannot marry under the general law without giving up polygamy. For marriage under the Act is strictly monogamous.The Nigerian nuclear family, unlike its English counterpart, does not sever its link with the extended family. A man, however much committed to his immediate family, is expected by social sanction, to contribute towards the well-being of the members of his extended family on a regular basis otherwise he may be ostracized. A well known Hausa proverb aptly describes the importance of family solidarity thus: " *Kowa ya bar gida, gida ya bar shi*" which roughly translates as " whoever abandons home, home will abandon him". Under this obligation a man may be required to raise the children of his less fortunate relations, as well as to look after his aged parents and grandparents. The reason for this lies in the fact

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[30] The modern trends in the West whereby cohabiting parties are also recognised as family does not, as yet, seem to have caught on in Nigeria.

that traditionally the African family has a strong communal bond which is constantly strengthened by giving and receiving and generally helping each other out. So that once a family member has " made it ", so to speak, he has a compelling social and moral duty to help his family members. This is very important for one to bear in mind when examining family breakdown and its consequences in Nigeria. This is because, the rules on the general law marital breakdown and its consequences are laid down in statutes but their implementation may be subject to the traditional obligations to the family as a whole.

The Islamic family

The second type of family to be found in Nigeria is the Islamic family. Islam came to Nigeria in the 11 th Century A.D. and established itself in the Borno Caliphate and later on in the Hausa Kingdoms such as Kano and Katsina. It was the Sokoto Jihad, led by the Sheikh Usman Dan Fodio, which began in 1804, that succeeded in purifying and entrenching Islam in the Northern parts of Nigeria by 1810.[31] Today Islam is the main religion in Nigeria and it is to be found mostly in the Northern and Western States. A notable characteristic of Islamic law on Marriage, Divorce, and Succession, which is a legacy of British Colonialism, is that it is only applied in the Northern States. Muslims in the Western States are governed by the traditional non- Islamic law. Another characteristic, which will be made more evident in subsequent Chapters of this thesis, is the tendency of Muslims to mix the

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[31] See Bala, Y.B, op. cit. 114

traditional customary rules on the family with the Islamic rules. The Islamic family has been defined as a collection of persons who are related to one another by blood and are all Muslims, and who owe each other mutual obligations prescribed by the Muslim religion, reinforced by law and observed by the individual Muslim (Abdl Ati:1982). the family members may or may not occupy the same residential unit; as long as they meet the criteria of a Muslim family, they are a family. In other words the nuclear family which is archetypical of the modern Western family does not exist in complete isolation from the wider family under Islamic law. However this does not mean that the Muslim family must, at all times, be an extended family or polygamous. It may be extended, de facto monogamous, polygamous, extended and polygamous, or neither. This is because there is no provision in the Holy Qur'an that the Muslim family must take a specific form. The most important aspect of the Muslim family for the purposes of this thesis is the mutual expectations or obligations that the family tie gives to the family members. It is only when the family members have failed to carry out their obligations and duties towards each other that Islam commands society to take whatever action is necessary to maintain equality and harmony between family members. This is derived from the fact that a Muslim family does not exist in isolation but forms part of the community of believers (ummah), the well-being of which is the duty of all Muslims. A significant reflection of the importance of the community in Islam is shown by the Maliki law principle of the Bait-al-Mal (Public Treasury) whereby if a Muslim has no heirs to inherit his property the property

goes to the community through the Bait-al-Mal where it is used for the common benefit of the community.

Islamic law offers checks and balances to the day to day existence of family members with one another. For instance if the family ties are remote, the religious bonds are expected to strengthen the relationship and maintain the responsibility that family members owe each other (Qur'an 4: 7-8, 36). On the other hand if the family ties are too strong in other respects, as for instance between a parent and one particular child, Islam prohibits the exploitation of it to the detriment of the other members of the family. One must emphasize the fact that under Islamic law, familial rights and obligations, whether before or after the breakdown of marriage, are not determined by the whims and caprices of family members or by the discretion of a family judge. They are prescribed by the *Sharia* (Islamic Law). Therefore an important question for this thesis is the extent to which the Islamic rules are observed in practice in Nigeria.

Traditional Customary Family

The traditional African Customary family,[32] historically preceded both the Islamic and general law family types in Nigeria. The Muslim merchants that brought Islam to Nigeria from North Africa in the 11 th Century, and the British who came to the area in the 19 th Century, found the traditional

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[32] By the "traditional customary family" one is referring to the non-colonised and non-Islamic family.See Allot, A.N, 1960, *Essays in African Law*, and *New Essays in African Law*(1970), Butterworth, London; and Elias, T.O. 1972, *The Nature of African Customary Law* Manchester University Press.

African family in Nigeria. As mentioned earlier, the British preserved both the customary and Islamic laws on the family under the system of "Indirect Rule" in Nigeria both as a means of making Colonialism acceptable to the people and as a means of effecting smooth colonial government. But in preserving customary law, the British also changed the true nature of it. As a result, the customary law that was preserved may not truly be said to be "customary".[33] Customary Courts, Judges, Assessors and other personnel were set up to administer customary law where they did not exist before. Customary laws were identified and written down, and litigants were required to observe English law type procedural rules in court. As a result, the traditional customary law has been altered both in substance and in form.

Traditional customary family is polygamous or potentially polygamous in that a man may marry as many wives as he wants. Large extended families were a feature of the traditional family and the more wives and children that a man had the more important his status became in the community. Today however, the harsh economic position of most communities in Nigeria

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33 Recently the term "customary law" has come under close academic re-examination, particularly as regards the law as applied in the courts set up by the Colonialists. Academics like G. Woodman, S. Roberts, R. Abel, and P. Fitzpatrick, have all put forward the view that the law being applied in the customary courts is not" customary law" but a law created by the courts themselves. See for instance, Bradford W. More and Gordon R. Woodman (eds.), " Indigenous law and the State(1987)" in which there is a Chapter by Woodman entitled," How State courts create customary law in Ghana and Nigeria". See also, Roberts, S. " Some notes on African customary law"; Abel, R. " Custom, Rules, Administration, Community"; Fitzpatrick, P. " Traditionalism and Traditional Law"; all in J.A.L. vol.28, 1984, Nos. 1 and 2, pp.1-20

seems to have affected the number of wives that a traditionalist may marry. Nevertheless, particularly in the rural areas, there are still polygamists living in the traditional ways.

Customary law is not uniform in Nigeria. Each community has its own rules on marriage and divorce. For instance, the customary family law of the Guduf people of Gwoza may not be made applicable to the Bura people of Biu unless they happen to be similar. A persons customary law is the same as the customary law of his ethnic group or his community. The only time that he may not be bound by it is when he contracts a marriage under the general law or marries under Islamic law in the Northern States.

The traditional family has undergone enormous changes since the advent of Colonialism. The family had to adapt so as to meet the new capitalist economic system that colonisation brought. Under the capitalist system, which still thrives in Nigeria, family members may be forced directly or indirectly, through the state's mechanisms (such as taxation), or by economic needs which the system has cultivated in the members of the family (such as the need to buy the goods produced for sale using the new money), to abandon or partly abandon the traditional communal system in favour of the capitalist system. This type of transformation of the economic functions of the family took place throughout the colonies(Snyder:1981; Fitpatrick:1978). Industries in the Colonisers' home countries needed raw materials such as Cotton,Timber, Iron Ore, Cocoa etc. and most of these were either not available or were not

available in sufficient quantities to meet the demand. So they had to be produced in the Colonies. The indigenous population who were not engaged in cash-cropping, mining, or logging for exports had to be forced or encouraged to do so. Encouragement was made in the form of the introduction of finely woven cloth which could only be obtained by purchase using the newly introduced currency as the medium of exchange. The new currency could only be obtained through wage labour or the production and sale of the needed raw materials. Coercion was in the form of taxation where all adults were required to pay tax or face the possibility of imprisonment (Lugard:65). The family thus had to reorganize its priority from subsistence farming to cash-cropping or a combination of both. The disruptive effect of this on the traditional family was enormous. For it meant that family members had to go to towns and cities in search of wage labour, and that individual family members turned to producing cash-crops for their own personal use rather than for the use of the entire extended family. Isolation from the extended family also had disruptive effect on the traditional rules on marriage and divorce. A young man living in the urban area and earning a wage, with a family of his own, may be more concerned with the needs of his immediate family than the remote, rural based extended family.

There was also the effect of contact with Europeans in itself. Family members were taught to read and write and take jobs as Civil Servants in the Colonial administrations; family members became converts to Christianity, and adopted the culture of the coloniser as a means of attaining the status of being "civilised" (Fitzpatrick, 1978, 1980, 1981). Young men

also joined the Colonial Police and Army, travelled all over the World and came back with different ideas and outlook to life. One of the aspects of the traditional family to suffer as a result of this seems to be the need for family members to stay together for the common good. The process of change has been continuous and therefore what is customary today may not have been so in the days of colonisation of the people. Still the traditional African customary family has survived.

Methodology

The research began with the reading of general literature of the family, particularly the family in Africa and Nigeria. However, certain well known cases on Nigerian family law, and texts on Maliki School of Islamic law as applied in the Northern States of Nigeria, could not be obtained from the Warwick Library. So one had to obtain them from other sources. Even so it became apparent that there were no sufficient materials on the family law in Borno State. Therefore one had to travel to Borno State for the collection of data and this was done in 1987 (during the second year of the research)

Before going back to Borno, questions were drawn up in the form of a Questionnaire for administering in the three localities of the State- Maiduguri, Biu and Gwoza. Questionnaires were resorted to as a means of supplementing the other sources of information. The three areas were chosen because they each represent the three types of family that the thesis is concerned with. Maiduguri was chosen for its cosmopolitan nature; Biu was chosen for the large number of Christians in the area; and Gwoza was chosen for the Hill

Dwellers. The State as a whole is predominantly Muslim and therefore Islamic cases were collected from all areas of the State. The Questionnaire was eventually used as a guide to the questions that were orally put to the respondents. This method was resorted to when it transpired that most of the respondents could not read or write. Moreover, some of the respondents could not speak Hausa, the common language of communication in the Northern States, so one had to rely on educated research assistants from each of the chosen areas to conduct the interviews. In fact all the research assistants used were law students from the University of Maiduguri Law School. This had the added advantage of ensuring that the interviewers were conversant with family law in general as well as with their local languages and customs.

In all the interviews conducted in Borno for the purpose of this Thesis, the "Judgement sampling method" (Burgess 1987:55) was used. Under this, the respondents were selected according to status (i.e. by sex, education, religion, marital status, geographical area of origin and occupation). The common factor that binds all the respondents is their experience of divorce or marriage breakdown. The researcher's knowledge of the "universe" or area and subject of the research was utilised in drawing up the criteria for choosing the individuals for the interview.

The questions asked in the interview were specifically concerned with divorce and its consequences under the three family types in Borno State. Therefore the respondents were chosen on the basis of them having gone through divorce or

some other form of marital break down. There were both open-ended and close-ended type questions asked. The closed-ended questions, such as Questions 9 and 11, " was bride-price paid for the marriage?", and " have you ever had more than one wife or co-wife" required either a "yes" or a "no" response. While questions like " How many children do you have?", and " Where did you stay after the divorce" were opened to the respondents. A third type of question, such as Questions 47-52, were propositions that required the respondents to indicate their opinions on a particular matter concerning the consequences of family break down. In each of the three chosen areas, 100 persons (50 men and 50 women) were interviewed.

Apart from the interviews conducted with the 300 persons, which provided that quantitative aspect of the response, unstructured interviews was conducted with prominent members of the three chosen communities. Thus Ward Heads, Village Heads, Chiefs, Imams, Judges, Islamic Scholars, and Social Welfare Officers were interviewed because of their direct involvement with the process of divorce or for their knowledge of the law or the local custom. Their response, particularly the Judges, Social Welfare Officers, and Islamic Scholars, provided the qualitative aspect of the research. Thus the information on the Maliki School of Islamic law, the Hill Dwellers of Gwoza, and the customs of the Bura of Biu, were all obtained through unstructured interviews.

A valuable source for materials was the decisions of the local courts, and these were obtained through the kind permission of the Chief Justice of Borno, Justice M. Kolo.

A special interview was also conducted by the researcher with 50 prostitutes in Maiduguri town so as to test the hypothesis that economic hardship on women, brought on by family breakdown and the absence of State or extended family support, makes divorced or abandoned women to resort to prostitution as a means of survival.

Problems of Fieldwork

The most pressing problem encountered was the lack of adequate finance to meet the cost of transport to and from the three areas for the research. Money was also needed constantly to secure the co-operation of some clerks and officers, without whose support one would not have obtained most of the court cases. Apart from this, custom requires, in most of Borno, that one give "Kola" (gift of money or Kolanuts) in order to get the co-operation of anyone in any venture. Thus the research assistants and some of the respondents had to be paid first before their support was obtained. Access to women in purdah also presented a problem and so female research assistants were specifically assigned the task of interviewing women at home.

Finally, all the judgements of the courts in Borno, apart from the High Court, are written in Hausa and therefore had to be meticulously translated into English by me. This took up precious time and consequently reduced the total volume of cases that one would have liked to have collected.

Summary

In Nigeria today all the family types described here exist side by side but with different rules governing each of them. Different courts also administer cases involving the three family types. But despite all this people in practice seem to disregard the distinction between the different family types. Thus a man married under the general law may purport to divorce his wife under the traditional customary law, or even deny the woman her right to the custody of the children without having gone to court. Similarly, a Muslim may fail to observe the Islamic requirement for the maintenance of a divorced wife during the iddah period. All this is bound to have serious consequences on the effectiveness or otherwise of the formal law on family breakdown.

There is still a wide gap between the rural family and the urban family. State provided facilities for family dispute settlement such as the courts and the Social Welfare offices are concentrated in the urban areas and thereby make it extremely difficult for rural dwellers to seek redress in court. The difference in economic activities between the rural and urban based family also has an effect on the options that are available to a divorced woman for instance. There are still communities in Borno, such as the Hill Dwellers of Gwoza and the nomadic Fulani, whose family life is governed by the old traditions, while others are heavily influenced by modern life. The effects of the changes that took place in Nigeria since Independence on the family are examined in this thesis as regards family breakdown and its consequences with specific reference to Borno State. Among the specific issues that the thesis considers are:

What are the rules on divorce and the rights to ancillary orders following divorce in Nigeria.

What effect does the absence of a Social Welfare system have on the post-divorce needs of family members.

CHAPTER TWO

State Intervention in the Family in Nigeria

Introduction

The state is often said to intervene when the family has broken down through such laws on divorce, custody of children and property settlement (Eekelaar,1971). However there are other public law provisions which as such, may not be regarded as interventionist, but which nevertheless have a bearing on how the family functions. For instance the state laws on the mode of contracting a marriage, social welfare, taxation, education, health and housing, may all have a direct bearing on the family (Olsen, 1985). In Nigeria, the colonial period signalled direct state intervention in the family, and therefore all the present state of the family vis-a-vis the state in the country has to be understood from the colonial experience. Colonialism did not only introduce the general law on marriage but also all the modern laws that directly affect the family today. The colonial policy of "preserving" the traditional family system, whereby all the traditional laws on marriage, divorce, custody of children, property settlement etc. were allowed to continue for those members of the indigenous population that did not contract marriage under the general law, meant that the present pluralism in the laws had been established. State policy on the family since then has varied from one family type to another, while the provision of social welfare has been left largely to voluntary service agencies.

This Chapter attempts to answer the question: " upon whom does the responsibility of caring for the victims of family breakdown fall in Nigeria-the state or the extended family, and why"? There is a brief discussion of the theoretical issues followed by a historical examination of the reasons for state intervention in the family during Colonial times and the situation as it exists today.

Theoretical Perspectives

"State intervention" in the family presupposes that there is a time or stage when the state does not intervene in the family at all. This raises the question of the family being categorized into "private" (where there is no state intervention) and "public" (in which there is some form of state intervention). This may not necessarily be so. For state intervention in the family seems to be a matter of degree, in that it is hardly plausible to have a totally unregulated family on the one hand and a totally regulated one on the other within a state. the state defines by law what constitutes a valid marriage, divorce, and family. It further provides or upholds the norms that sustains the family. These rules may be changed by the social and economic circumstances of the society, thereby either producing less or more state regulation of the family (O'Donovan, 1985; Eekelaar, 1971; Kahn-Freund and Wedderburn, 1971; Fitzpatrick, 1983).

The Private Family

Despite the fact that state law defines and reinforces roles and hierarchical standings within the family, it is

generally regarded as non-intervention. This seems to imply that the family exists separate from legal regulation and that the state merely recognises this natural family order by enforcing the rules. This also seem to buttress the fact that in all societies, there are other forms of the "family", such as for instance, unmarried couples, concubinage, etc. which the state has not recognised. In other words in practice there is a de jure family and a de facto family.[1] This idea of the private unregulated family goes back, at least in the Western countries, to the 19 th Century when the family constituted a far larger group than the modern day nuclear family. Moreover, the family entailed an ordered system of hierarchy within which the husband was the bread-winner and went out to work to support his wife and children. The wife's primary duty was to bear children and to maintain the home. The state supported this structure of the family including the husband's unquestionable rights over the wife.

Social roles within the family determine the "privateness" of the family. The setting of roles within the family requires political choices, (such as encouraging male dominance over women by sustaining the role of the husband as the bread-winner) and these cannot but reinforce the lack of neutrality of the state in family matters. Thus the belief during the 19th Century was that by empowering the head of the family-the husband and father-to act for the family and to

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1 See Olsen, F.E., " The Myth of State Intervention in the Family", University of Michigan Journal of Law Reform, Vol. 18 No. 4 1985, pp. 835-864 at 846.

settle inter family disputes, the state could avoid intervening in the family.

Any state action, either by legislation or through the process of court settlement of family disputes, which contravened any of the above powers of the husband was considered to be state intervention and therefore undesirable. Thus if the wife abandoned her husband, she was forcibly taken back to him; and if she were to leave with the children the courts would grant the husband the writ of habeas corpus ordering her to return the children to him.[2]

Modern states extend laws against sex discrimination in all walks of life, include the family thus diminishing the husband's power over the wife , in favour of the formal equality of power for both parties. Certain states, such as the U.S.A., Canada, France etc. which have written Constitutions, ensure that provisions are made in the Constitution which not only uphold the sanctity of family life, but guarantee personal freedom. But no state, as yet, has removed parental rights and power over children. Instead parental rights over children may be strengthened by ensuring that parents are made responsible for the actions of their children. That is why in the Common Law countries, it is only when parental authority over children seems to have failed or

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[2] The position of the wife changed for the better following the decision in the case of R v. Jackson [1891] 1 Q.B. 671, where a wife who was being confined to her home by force obtained, for the first time, a writ of habeas corpus against her husband. The Court of Appeal held that she was entitled to her freedom despite her husband's claim that he was merely confining her in order to enforce his rights to her consortium.

is not properly exercised, or is being misused, that the state steps in to correct the situation. Parents still have power over their children (often expressed in their choice of name for the child, choice of schooling, moral or religious education for the child etc.) which are established and sanctioned by state regulations but they are seldom considered to be state intervention in the family.

The interrelationship of family members can be significantly affected by economic dependence of wives on their husbands and children on their parents. In the Western World in the 19th Century, this dependence was reinforced by the laws on property (wives and children's property belonged to the husband) and by the law of majority and minority of children (children were minors under the tutelage of their father until they attain the age of twenty one) despite the fact that children could and did enter into employment at a very early age. Today these laws, particularly as regards the right to property of a wife, recognise the rights of children and wives to their own separate property, and the age of majority in most countries has been reduced to 18 years. Yet in Nigeria, due to the absence of a single law on the family, the state has "preserved" the traditional family types (with their Victorian like attitudes to the supremacy of the husband), and at the same time provided for the modern family nuclear family type where both partners are, theoretically, equal.

This supposed "private family's" existence, according to o'Donovan, has been championed by the state through such

organs as the legislature, the judiciary as well as by legal scholars. She contends that the state deliberately overlooks the power inequalities that exist within the family so as to maintain this myth of the private family.[3] However, it is not merely power inequalities within the home but the whole system of normative regulation which is created by the state, through its organs, that puts doubt on the privateness of the family. Examples of the normative regulation include legislation on the contentious issue of the ownership of the matrimonial home, child protection laws, laws against incest etc. The decision of Atkin L.J. in Balfour v. Balfour [4] to the effect that a husband's promise to pay his wife £30 a month maintenance was unenforceable because there was no intention to create legal relations was another example of the judiciary's deliberate policy of ignoring relationships within the family.[5] Several other scholars echo this traditional view. Eekelaar, states that "English practice has been to refrain from formulating general principles as to how families should be managed".6 Kahn-Freund and Wedderburn, writing in the some work said:

" The normal behaviour of husband and wife or parents and children towards each other is beyond the law - as long as the family is healthy. The law comes in when things go wrong. More than that, the mere hint by anyone concerned that the law may

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3 See O'Donovan, K, 1985, *Sexual Divisions in Law; Weidenfeld and Nicolson. London. p. 12*

4 [1919] 2 K.B. 571

5 O'Donovan, K; op. cit. p.13

6 See Eekelaar, J. 1971, *Family Security and Family Breakdown.* Harmonsworth: Penguin. P. 76

come in is the surest sign that things are or will soon be going wrong."[7]

State intervention in the family is normally used to describe the operation of state laws and institutions in dealing with the consequences of family breakdown. That is the state intervenes to protect the interests of weaker members of the family. Olsen compares this with the reasons often cited for state intervention in the operation of the free market system. She said;

"The protective intervention argument applies in a similar manner to both laisez faire and non-intervention in the family; whenever either the market or the family malfunctions the state should intervene to correct inequality and protect the defenseless."[8]

Olsen further argues that the state is not and can never be neutral in a free market place. It takes sides by providing the laws under which the free market system functions. Similarly, the state can never be neutral in the functioning of the family. Thus the state, through its laws on child care, ensures that parental rights and duties are maintained by the return of runaway children to their parents, and the committal of difficult and delinquent children into care. The law also functions as a protector of children that might be abused or are being abused, by the family or within the family, by taking them into protective care. In view of this, Olsen concludes that:

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7 Kahn-Freund, O. and Wedderburn, K.W. "Editorial Foreword" to J. Eekelaar, op. cit. note 7, p.7.

8 Olsen, F.E; Op. cit. p.836

"Because the state is deeply implicated in the formation and functioning of families, it is nonsense to talk about whether the state does or does not intervene in the family."[9]

State intervention or non-intervention in the family must always be looked at, especially as regards the consequences of family breakdown, from the diametrically opposed options - family solutions and state solutions. The private law of the family exists in the context of certain public law developments which have given to the state certain family functions. State laws on employment, taxation, and social security affect the functioning of the family, as well as solving some of the problems that family breakdown brings.

In the context of Nigeria and many other Third World countries however, state intervention in the family seems to be geared towards achieving "social development" rather than the enhancement of one type of family system. Because of the complexity of family types to be found in such countries, it is much more difficult for state intervention to be properly organised and achieved. Religious, ethnic, and cultural diversity makes it politically difficult for state policy to overtly favour one family type over the others. Where this has been so, the favoured family type, for instance the general law family type in Nigeria, is not made mandatory on the population but provided as an alternative to the traditional family types. Furthermore, the vast economic and human resources required in a comprehensive state involvement in the provision of services to the family, as in the case of Western

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[9] Ibid. p. 837

countries, is lacking in Nigeria and many of the Third World countries.

The importance of relating social development needs in any country to the cultural values of the society was also emphasized by Paiva. For human communities have different outlooks and needs, which might be lost if blind copying of other countries were to be the norm. Dr. Pratt visualized social welfare needs of a given society as ranging from "remedial to developmental".10 That is, social welfare may be designed to remedy a particular social problem such as unemployment, child care etc. or formulated as part of the overall development plans of nations. She concluded that the development approach "has the greatest potential for contributing to national development in new and poor countries".

In Nigeria, as will be revealed in subsequent Chapters of this Thesis, the state and the extended family are still very active in solving the problems of families either before breakdown or after breakdown. The traditional welfare system which relied heavily on extended family co-operation is still, as shown in Chapter three, very influential in Nigeria. At the same time the state in Nigeria is increasingly assuming the role of the extended family (as the settler of family disputes, the protector of the weaker members of the family etc.) especially in the case of the nuclear family.

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10 See Mildred Pratt, "A Model for Social Welfare and National development", in: International Social Work, vol. XIII, No.1 (January 1970), p.2

The Islamic and Customary family can be likened to the Victorian family in England and Wales prior to the changes introduced to reduce the power of the husband. The rules governing the power structure between family members as well as the basic duties and rights of each family member in these family types are different. As a result, state intervention in the family in Nigeria, through such policies as taxation, social welfare, etc. are bound to have different effects as between the different family types. For instance, in England and Wales, the law on the economic consequences of family breakdown is uniform and applicable to all sections of the community. Under the English Matrimonial Causes Act, 1973, the courts have the power, following a divorce or judicial separation, to order one spouse to make financial provisions for the other,and, or the children of the marriage. Furthermore the courts can order the parties to settle property that is in dispute or order transfers of property. [11] This is meant to alleviate the hardship that family members may go through following a divorce, and it is based on a fundamental assumption that family members are basically responsible for each other's anguish or happiness, whether during marriage or after marriage. In Nigeria however, despite the fact that there is an almost identical provision for family support under the Matrimonial Causes Act, 1970, the underlying assumption is that spouses owe each other the duty of maintenance only during the subsistence of marriage. The traditional customary law practice of not allowing for post-divorce maintenance seems to have influenced the application

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[11] See sections 23 and 24 of the Matrimonial Causes Act, 1973.

of the statutory provisions on the subject.[12] Again the provision is meant for only one type of family - the general law family , while customary and Islamic family rules still govern post-divorce settlements for such family types.

Introduction of the general law

The state under colonialism brought in another form of the family into Nigeria ostensibly to provide for the expatriate population in the country. But there were underlying ideological reasons for such an act as well. The Colonialists considered their own marriage and family system to be superior to the indigenous family system and offered it to the indigenous population as an alternative to the traditional family system. This was linked to the Christian religion in such a way that an African Christian had to marry under the new system. Moreover, marriage under the general law was considered by the Colonialists as a sign of being "civilised", and therefore any African that wanted to be considered as "civilised" would contract marriage under the general law. Those that were married under the general law were then given the advantage, in terms of the rules on family relations, over those married under the traditional system because they were the one more likely to benefit from the Western family type. This resulted in a deliberate policy of preserving the traditional family and not to implement the full rigours of the Western family. The colonialists also could not transform all customary rules on marriage, by force

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[12] See Part 1V, section 70(1-4) of the Matrimonial Causes Act, 1970.

for instance, without facing the wrath of the local population and therefore the procedure adopted was the only one feasible.

Following Independence from Britain in the 1960s, many of the former Colonies have nevertheless retained the general law on marriage as well as the traditional law. Such laws have been retained as the secular law on the family open to all. But despite the contrary view of Professor J.S. Read, to the effect that "... the marriage laws in question have had little formative impact upon the direction or character of social change in Africa",[13] it is submitted that these laws have had tremendous effect in influencing the development of inter-family relations not only between persons married under the Ordinance but between persons married under customary law as well. The laws on legitimacy of children, custody of children, maintenance of the wife and children, as well as general family dispute settlement in all family types are aspects of the direct involvement of the state in the family.

State intervention in the contract of marriage is reflected, not only on the state rules for the formation of the contract, but also in the rules governing the termination of such contract. In Nigeria, at the time of the introduction of the general law, the state acted in consort with the Christian Church and put into effect the desire of the Christian community to have a law that recognises their marriages. And since the state authorities at that time happened to be Christian as well, the achievement of such a

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13 See J.S.Read, 1979, " Studies in the Making of Colonial Laws: an Introduction" [1979] , J.A.L. Vol. 23 No.1, pp.1-9

wish was a fait accompli. But with the eventual realisation that not all the population in Nigeria were Christians or will ever be so, the Colonialists, and their neo-Colonial successors, preserved customary law marriages and stated that general law marriages are "secular" and therefore open to all citizens despite the retention of all the Christian trappings in the procedure for contracting such marriages. For instance, the only religious place of worship that can celebrate such marriages in Nigeria are the Churches of the numerous Christian denominations. Yet the status of persons married under the general law, in terms of their entitlement to state provided institutions of dispute settlement and rights to property etc; are superior to those provided for those married under the traditional customary law. Therefore in Nigeria married persons seem to have been deliberately categorized into two - those married under the general law and those married under customary law. But whatever category they may belong to, it is an undeniable fact that all married persons belong to a special category as of right. For the state, through its laws and institutions, assigns certain peculiar legal and social capacities or incapacities to them.

It is a fact that the Nigerian society has been irreparably altered by, not only state intervention in the family, but also by numerous other factors such as modern education, and contact with other cultures and ideas. And all these changes are bound to reflect on the family system as well. This was aptly commented upon by Nwogugu thus:

"The content of the general law with respect to the matrimonial causes is strongly influenced by several factors, including the Christian religion, Western culture and the

colonial tutelage. The obvious result is that these laws are built on values and attitudes which are alien to Nigerians, culturally, socially and economically. It is not surprising, therefore, to find that in quite a good number of cases where Nigerians are married under the general law... their actions and attitudes to the marriage are determined by values which are rooted in the indigenous system."[14]

As a result in Nigeria today although there is a state-provided distinction between family types, the practical implementation of the rules governing these family types by the state organs themselves tends to ignore some of the distinctions. In other words the effectiveness of state intervention in the general law family depends on the willingness of the judicial arm of the state to fully implement its rules. A closer examination of the state rules on customary law, taxation, education and social welfare would further reveal the way in which the state attempts to shape the family. At this juncture, suffice it to state that the introduction of the general law marriage as a privileged institution was a primary form of state intervention. And the preservation of the customary and Islamic marriages did not mean that they were not subjected to state intervention or transformation. This took the form of religious and cultural influences as well as in the day to day application of law and dispute settlement.

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14 See Nwogugu, E.I. 1980, " Formal Marriage Law and its Underlying Assumptions in Nigeria", in: Eekelaar, J.M. and Sanford Katz (eds.), "Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change". Butterworth, Toronto. p116

State intervention in Customary law

In 1945 a provision was made in the Native Authority Ordinance by the then Colonial authority for the codification of customary law in Nigeria.[15] The Native Authority Ordinance (which was later repealed) gave the requisite power to the various Regions which later passed laws that enabled Local governments within their areas to carry out the task of codifying customary law.[16] Most of these laws provided that a Local Authority has the power, or, when so instructed by the Governor, a duty, to make a declaration, either of what it considers the customary law on a particular topic within its area is, or any modification to the law which it regards desirable. Provisions are also made for the Local Government bodies to achieve the same objectives by the use of adoptive by-laws.[17]

The statutes have given rise to the enactment of numerous statutes throughout the country which purport to codify and clarify the Customary Laws of Local communities on various topics. The most prominent area is customary family law. Here the declarations cover such topics as the age of marriage, consent to marriage, bride-price, divorce, custody of

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15 See section 30 of the Native Authority Ordinance, Cap. 40 of the 1948 Edition of the Laws of the Federation of Nigeria.

16 See for instance, the Western Nigeria Local Government Law, cap.68, section 78; and the Northern Nigeria Native Authority Law, cap.77, section 48.

17 See for instance the Western Nigeria Local Government Law, cap. 68, section 83; and the Eastern Nigeria Local Government Law, cap. 79, section 90.

children, as well as the registration of customary marriages.[18] As can be seen by the various dates of enactment, these laws originated under colonial rule but are still being adapted and used by the various State governments in Nigeria. Such a systematic intervention in the customary law is bound to have an important effect on the development of the customary family. The following are some examples of the effects that the statutes have on the traditional family.

Traditional customary law does not lay down a fixed age for marriage in most communities. The attainment of the age of marriage may be determined by a number of events in a person's life, such as, for instance, age-grade ceremonies. The performance of these ceremonies in most communities serve to reinforce the power structure within the family and within the community as a whole. Children must undergo such ceremonies before they can attain the status of adulthood and the respect of other members of their families and community. Parental power is often reflected by these ceremonies and by the rights of parents to determine whom their children can marry and at what age. State intervention in fixing the age for marriage under customary law however, seems to be motivated by the desire to protect children from being

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18 Among the enactments are, the Age of Marriage Law, 1956, (Esatern Nigeria); the Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964; the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, 1959; the Native Authority (Declaration of Tive Native Marriage Law and Custom) Order, 1955; the Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order, 1961; the Marriage, Divorce and Custody of Children Adoptive By-Laws (Western Region), 1958; and the Local Authority (Modification of Bornu Native Law and Custom Relating to Marriage) Order, 1971, and many others.

exploited by their parents. Thus Nigeria has made it a criminal offence for children to be married off without having attained the age of marriage.[19] Yet the state recognises the dilemma of retaining customary law on the one hand and trying to influence its application by law, in that where children are validly married under customary law, even though they might not have attained the age for marriage, consummation of such marriages does not constitute unlawful carnal knowledge of the girl involved. Therefore the state's interest seems to be confined to preventing such marriages from being contracted in the first place.

In all these cases the state has taken the place of parents as the overall body responsible for the welfare of children, but at the same time it reinforces the customary family system which forms the bedrock of the society. By so doing the state ensures that the family continues to bear the responsibility for its members' needs at all times.

Registration of Customary Marriages

State intervention in the customary family extends to, in some areas, the requirement that marriages must be registered otherwise they are not valid. Traditionally, the elaborate procedure for the contracting of marriage ensured that most members of the community were witnesses to the marriage. But sometimes this form of attestation may fail to prove the existence of the marriage especially where the witnesses have died or have moved away from the community, or

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19 See sections 13, 221, and 232 of the Criminal Code Act, cap. 42, Laws of the Federation of Nigeria, 1958.

there was conflicting evidence between the witnesses. To alleviate the uncertainty that this caused to the proof of customary marriage, especially when such marriage is brought before the state institutions for the settlement of disputes, the state provided that all Local Authorities may make provisions for the registration of all marriages contracted in their areas.

In the Northern States too provision was made for the registration of customary marriages.[20] But the response in the Northern States, unlike in the Western States for instance, has been lukewarm. The Igala Native Authority and the Tiv Native Authority did adopt enactments for the registration of customary marriages.[21] The Tiv Declaration went as far as to declare that an unregistered customary marriage is invalid! The case of Soughul Tyough v. Tyoginengen Keghuyu' [22], shows how state policy in the family may be out of step with the reality of the situation. In the instant case, the appellant had sued the respondent, claiming his wife back. The appellant had stated to the court that he had married his wife under custom and that they had lived together for over ten years before she left him for the respondent in 1975. He further stated that his wife had given birth to two children for him and that she was pregnant at the time of her departure. He had

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20 See section 38 of the Native Authority Law, cap. 77, Laws of Northern Nigeria, 1963.

21 See Igala Native Authority (Registration of Marriages) Rules, 1968, CWSNALN 5 of 1968; and section 2(e) of the Declaration of Tiv Native Marriage Law and Custom Order, 1955.

22 Case No. MD/13A/1976, Tiv Grade 11 Area Court (unreported)

paid a bride-price of five hundred Naira but did not register the marriage. The appellant called witnesses who supported his case. The respondent failed to appear. The trial court duly gave judgment for the appellant and ordered the respondent to return the appellants wife to him. But the respondent refused and appealed to the Upper Area Court instead. The appellate court set aside the lower court's decision on the ground that the appellant did not register "his marriage with the disputed wife in an Area Court which is one of the conditions of a valid marriage falling under section 2(e) of the Declaration of Tiv Native Marriage Law and Custom Order, 1955, and as such the lower court was wrong to give judgement for him." Here, a perfectly valid customary marriage was invalidated by a mere technicality, and despite the decision of the Federal Supreme Court in the case of Adepeju v. Adereti,[23] to the effect that the validity of a customary marriage must be proved in judicial proceedings. The best proof is the testimony of persons that took place in the formation of the marriage, and from the evidence presented in the Soughul case, this criterion seemed to have been met. Therefore there seems to be a deliberate state effort in Nigeria to change the nature of the customary family law through legislation but the effort has been fruitless.

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23 [1961] WNLR 154, 155; see also Igbokwe and ano. v. UCH Board of Management [1961] WNLR 173; Lawal v. Younan [1959] WNLR 155, as approved by the Supreme Court [1961] WNLR 197; and Abisogun v. Abisogun [1963] 1 ALL NLR 237

State intervention in customary family dispute settlement

As we have observed in Chapter three, state institutions of family dispute settlement operate side by side, and as alternative, to the customary institutions of family dispute settlement in Nigeria. Disputants have the choice of taking their disputes either to the state or non-state institutions. But the reality of the situation is that due to the unequal power of the two types of institutions for family dispute settlement, it means that state institutions of family dispute settlement have more recognition by litigants because of their power of enforcement. Therefore the apparent ambivalence of the state towards the non-state institutions in itself may amount to an indirect form of intervention in the family. For it is when disputes cannot be settled in the non-state institutions that they are brought to the state institutions. State institutions, unlike the non-state institutions, appear on the face of it, to be impartial in the settlement of family disputes, while non-state institutions seem to perpetuate the status quo within the customary family (i.e. male supremacy over women, male responsibility for the maintenance of the wife and children, male responsibility for the provision of shelter etc. for the family). But a closer examination of the state institutions themselves seem to show that they too reflect in their solutions to disputes, the underlying norms (customary) of the society. For instance the numerous cases of Customary and Area courts ordering runaway wives to return to their husbands irrespective of their desire to terminate the marriage seems to be on a par with the practice of family councils on the same matter. Despite all these, as we shall

shortly see, state institutions for dispute settlement have a revolutionary effect on the development of the customary family system.

When customary family disputes are not settled by the non-state institutions and are then brought before the state institutions, it means that the customary social norms of the society have failed in resolving the dispute. The involvement of the state institutions in the settlement of customary family disputes represents a new development in the dispute settlement process which cannot be said to be "customary". The procedure for dispute settlement before the state institutions is quite distinct from the procedure before the non-state institutions. Although customary court procedures do not normally follow the highly technical route of the higher courts (except in the Southern States where lawyers are allowed to appear), nevertheless all disputes that come before the courts are translated into English law concepts, particularly at the appellate level. All claims before the courts, whether for the maintenance of the wife and children, custody of children, damages for adultery, return of a runaway wife etc. have to be framed in a form that is acceptable to the courts and this is often at variance with customary procedure (Woodman, 1987:7). Remedies, or the solutions that the courts can order and do order may sometimes turn out to be totally contrary to customary law, as for instance an order giving custody of a child to another man rather than to its "legal" father under customary law: Mariyama v. Ejoh,[24].

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[24] [1961] NRNLR 81

The underlying reasons for the systematic intervention in the traditional family in Nigeria was to transform the family but at the same time preserve its customary nature. For by so doing the state could benefit in the transformation of the family (through the weakening of the extended family bonds which work against the capitalist systems) and at the same time save the state from bearing the cost for the care of family members that may otherwise look to the state for support. The Colonialists were motivated by the desire to utilise all the preserved customary institutions for their maximum benefit and thus any institution that could not serve this purpose was denigrated or prohibited altogether. The desire to have a smooth Colonial administration also influenced the British decision to preserve some of the customary institutions (Read:72; Jinadu:85)

Since Independence Nigerians have had the opportunity of either eliminating or retaining all the British introduced laws which affected customary laws. But neither course has been undertaken. Instead, the general law has been allowed to flourish, and has even been further elevated above the traditional law. This apparent failure of state intervention to bring about a coherent system of family law in the country seems to have been due to the Colonial mentality of the elite, as well as the fact that the system is for their benefit. Intervention is also meant to achieve a desirable social transformation in the society. Among the desired social aims that such intervention may be designed for are: nation building, modernisation, secularisation, liberalisation and mobilisation (Allott 1980:177).

Nation building entails the provision of laws that are applicable to all citizens within a given state irrespective of race, religion or sex. This is of particular importance in a nation of diverse ethnic and religious composition like Nigeria. Post colonial rulers of Nigeria have found it difficult to do away with the plural nature of the society due to the increasing internal pressure from various ethnic groups for the creation of states, the preservation of their religions and customs etc. No politician could ignore such demands and still survive - even the Military were not immune from this pressure, as evidenced by the numerous Military Coups that have taken place since 1960. Apart from the political implications of such actions, a total imposition of the general law on the family in Nigeria would lead to a chaotic situation in which the formal law is at variance with the law in practice. On the other hand a total abrogation of the Colonial laws on the family in favour of traditional law on the family, would be vehemently opposed not only by the elites themselves, but also by the Christian community to whom the general law on the family is synonymous with Christian family law.

Modernisation entails the updating of old rules or their replacement with new ones so that the society keeps pace with modern development. For instance changes in taxation law may be introduced to meet the introduction of a new fiscal policy; new rules on education may be brought in, e.g. calling for free education at all levels - this too may be caused by a desire to modernise the society or keep pace with modern developments in other countries. For in this field, as in many

others, the popular saying that "no country is an Island" seem to hold true. However modernisation does not mean the wholesale destruction or replacement of the old order. This is shown by the continued influence of customary law on the general law on family relations in Nigeria even though the two are not supposed to function together. In other words the desire for modernisation in Nigeria has not led to the destruction of the customary law on the family. Moreover the "preservation" of the customary system ensures that the extended family, rather than the state, retains the responsibility for the care of victims of family break down.

Secularisation, as a means or reason for a state's conscious intervention in its social institutions, was referred to by Allott thus:

"The predominant and received opinion in developed Western countries is profoundly secularising. It is the business of a modern government, it is felt, to concern itself solely with this age, this World, the secular in its etymological sense; and laws should neither touch nor express interests and activities inspired by other Worlds than those of the senses. Any law which expresses the contrary philosophy is a candidate for early suppression." [25]

In the case of Nigeria, this was echoed in the Constitution of 1979, thus: "The Government of the Federation or of a State shall not adopt any religion as state Religion."[26]. What this means in practice is that the Nigerian state, through legislation, adjudication or the performance of its general functions, cannot sanction the cause of any

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25 See Allott, A.N., 1980, *The Limits of Law*. London Butterworth, pp.177-178

26 See section 10 of the Constitution of the Federal Republic of Nigeria, 1979, as amended by Decree No.1 (Constitution Suspension and Modification) Decree, 1984.

religion. The practice has been, however, particularly by the courts, rather different. The practice in the Western States, where there is a large number of Muslims, has always been for traditional customary laws on marriage, divorce, succession etc. to be applied to Muslims while their counterparts in the Northern States are governed by Islamic law. Therefore the secularising principle as a means for state intervention in the family in Nigeria has not been objectively adhered to, due largely to the influence of the Colonially derived, Christian-oriented legal system.

Liberalisation seems to be aimed at encouraging the rights of the individual as opposed to the extended family unit. Individuals are permitted by law to dispose of self-acquired property without the prior knowledge or approval of the extended family; they are permitted to marry without the consent of their parents or guardians; to adopt children as their own without extended family approval, and to generally pursue the course for individual happiness without undue hindrance from the state or the extended family. But although this is provided for by various enactments and guaranteed by the Constitution, the actual practice may be different due to the reality of the level of social, educational, and economic development of the nation which as yet, has not reached the stage whereby individuals would value their individuality more than their sense of belonging to a group - the extended family. Moreover, for such liberalisation to be effective, both males and females must benefit from it. But females in Nigeria, as will be revealed in Chapter five, are still second class citizens within the family. Liberalisation also seems to

have the effect of encouraging private enterprise. Family members under such a system are encouraged to abandon the collective security of the extended family unit in favour of individualism and the pursuit of wealth. The state sees itself through its laws, as the champion of the individual. Thus a husband's right to his wife's services are prescribed by law; a child's rights vis-a-vis its parents are protected by state law; the procedures for the formation and termination of marriage are provided for by state law so that no individual may have his rights unjustifiably trampled.

The provision of Social Welfare

Social poverty in any state is created by the lack of a systematic and comprehensive provision for social welfare for all the citizenry. This situation is still to be found in Nigeria, three decades after Independence from Britain. Despite the enormous Petro-Dollars that the country gained in the 1960s and 1970s, social poverty has remained the rule rather than the exception and the situation has even deteriorated further under the present Military regime which has been slavishly implementing I.M.F policies with scant regard for the hardships that those policies are causing to the generality of the population. The state had provided in the 1979 Constitution that both the Federal and State governments must provide social welfare for the people. But this has never been implemented by any government, Civilian or Military.[27] Once in power, the elite in Nigeria seem to be

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[27] See Chapter 11, " Fundamental Objectives and Directive Principles of State Policy", sections 16, 17, and 18 of the

always busy lining their pockets rather than catering for the needs of the people. Until social welfare is fully available for all in Nigeria, the social problems that are being increasingly made worse by the rapid social change, such as destitution, lack of housing, unemployment, armed robbery, juvenile delinquency, and abandoned wives and children, will continue to plague the country. It is only the state that has the financial and legal power to effectively formulate a social welfare policy which would tackle the social ills that often follow family breakdown.

The current state of affairs as regards the provision of social welfare in Nigeria seems to be interlinked with the ideas of the elite, as represented by the various governments, which are of an economic nature, and go back to Colonial times. Generally there appears to be a tradition in Nigeria of allowing state intervention in the provision of social services only in cases that are economically rational. For instance before the 1930s the official attitude of the Colonial government was that Nigeria could not afford to have social services that could not be paid for from her own resources. The only social services that were provided were ad hoc in nature and were designed to meet specific natural disasters such as drought, flooding or Locust invasion. Social welfare for the support of family members and others that might have fallen on hard times was left to the Christian Missionaries to provide. And they, as in the provision of other services such as education and health, linked the

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Constitution of the Federal Republic of Nigeria, 1979, as amended by Decree No.1 of 1984.

reception of such aid with conversion to the Christian faith. This meant that the majority of the population, who were not Christians, had no social services whatsoever and continued to depend on their extended family members for support.

The current system of social welfare provision in Nigeria which victims of family breakdown have to cope with, is woefully inadequate, but its inadequacies cannot be solely blamed on the British Colonial welfare system. For Nigeria has been a sovereign and Independent nation for nearly three decades now. The system is geared towards encouraging self and family help, and it is only when family members, who might have been adversely affected by family breakdown, cannot sort their problems out that they approach the social welfare services, not for material support (which is largely left to the voluntary service agencies) but for advice and settlement of disputes. It is in the light of this inadequacy of the social service system that we now examine the alternative avenues that the state utilises to help family members, such as taxation law, education policy, and so on.

Taxation Policy

The imposition of taxation on the population of a nation represents another form of state intervention in the functioning of the family. For the rules on the need for taxation, i.e. who is to pay, how much is to be paid, and what allowances, if any, are to be made, may have a direct bearing on the economic hardship or benefit that might accrue to family members. An obvious example here is the case of child allowance - if child allowance is stopped altogether, it means

that more families would be adversely affected, and if child allowance is linked to a specific number of children only (for instance two children per family only), then families with large numbers of children, as is the case in Nigeria, would find it difficult to care for their children properly.

The main legislation on income tax and tax relief in Nigeria since Independence has been derived from the Constitutional provisions on the matter. Section 60 of the Independence Constitution of 1960, and section 74 of the Republican Constitution of 1963 provided that the national legislature may make laws for Nigeria or any part thereof with respect to taxes on incomes and profits of Companies. But this did not include the right to fix penalties nor to prescribe personal tax allowances. Such powers were left for the Regional legislatures to implement through legislation. But the Constitutional provisions gave rise to the enactment of two main statutes on taxation in Nigeria, the Income Tax Management Act, 1961 (ITMA), and the Personal Income Tax Act, 1961 (PITA).

The provisions of the (PITA), 1961 were adopted in the Northern part of the country in 1962. But a peculiar feature of the application of the law in the North was that section 49 of the Act approved the imposition of Poll Tax (Haraji) and Cattle Tax (Jangali) which had been a feature of taxation in the North before the advent of Colonialism. The Commissioner of each Province was empowered under section 49, to assess the tax payable by a community (using census or any other means) and after approval of such assessment by the Commissioner of

Local Government, the Local Authority would then decide how much each adult member of the community would pay. If an individual, such as a salary earning government employee, is assessed for tax through the pay as you earn system, he would be exempt from community tax. Community tax does not distinguish between a rich man and a poor man, between those in full time employment and those out of work, and between women in purdah and women that go out to work - all must pay. This is bound to have a harsh effect on divorced or deserted wives who might have depended on their husbands for maintenance and the payment of the tax. A case that illustrates this very point is Binta Dan Katsina v. Ward Head of Zango, [28].

Binta was a 35 year old dependent housewife who had five children with her husband, Dan Katsina. They were living in the Zango Ward of Maiduguri, Borno State. Her husband worked as a labourer. In 1972, the Ward Head of Zango Ward, assessed the total amount of poll tax to be paid by each adult member of the Ward as 10 Naira and had started to collect the amount from adults in the area. Dan Katsina was jailed for a year for petty theft in the same year. While he was in jail, his wife had to support herself and the children on her own and she did that by doing household chores for neighbours and friends. When the Ward Head came to the Dan Katsina household to collect the tax, he demanded 20 Naira tax for Binta and her husband from Binta. Binta had no money to pay. She was so afraid of what might happen to her children if she too was put

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28 Social Welfare Case No. FCW/227/72 Abbaganaram Social Welfare Office, Maiduguri.

in jail, for the penalty for not paying tax was imprisonment, that she went to the Social Welfare Office and asked them to order the Ward Head to exempt her from that year's tax. The Social Welfare duly sent an Officer to the Ward Head and explained the situation to him, but he was adamant and insisted that no exception must be made. So the Officer paid the 20 Naira tax out of his own pocket for Binta.

This case illustrates the pathetic situation in which families may be placed. Binta's case was further aggravated by the fact that neither she nor her husband had close family relations who could have helped. And the Social Welfare Offices have no budgetary allocation for such cases.

Tax Relief

Tax relief or allowances are made by the state to persons in salaried employment as a matter of fiscal policy. The vast majority of the population in Nigeria are not employed in Government work and so do not benefit from tax relief. Apart from the fact that a lot of self-employed business men and traders are extremely wealthy and do not pay tax according to their wealth, the linkage of tax relief to only those in employment means that those not in employment who pay poll tax are discriminated against.

The actual amount of tax relief that may be given to a tax payer for a year of assessment depends on the tax payer's income as well as on the policy of the state. For instance the state may decide to encourage savings by individuals by making premiums paid for life insurance tax deductible. State policy

may also be geared towards the care of the old, the care of children, and the boosting of education by making personal tax relief for children and dependent relatives, especially in a country like Nigeria where extended family links and responsibilities are still very strong, and as yet there is no Social Welfare to provide for these services. The Income Tax Management Act, 1975, contains the current provisions on tax relief. Under section 20 of the Act, there are four basic allowances that may be given to an individual tax payer either as of right or when claimed. These are: Personal allowance, Marriage Allowance, Child Allowance, and Dependent Relative Allowance. All these allowances are available to all those that pay tax except, it seems, the payers of Poll and Cattle tax.

Every tax payer in Nigeria is entitled to a personal tax allowance of six hundred Naira if his annual income does not exceed 2,500 Naira. Where the annual income is more than this amount the personal allowance is doubled to 1,200 Naira, or 600 Naira plus ten per cent of the person's income, whichever is the higher.[29]

Marriage allowance also exists for married and working people in Nigeria. Section 19 of the Personal Income Tax Act, 1961, was the first provision for tax allowance for married persons. It stated that an allowance of 100 Pounds, (Nigeria was still using Pounds Shillings and Pence), was to be given to a man who had a wife living with or maintained by him

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29 Per section 4(1) of the Income Tax Act, 1962, (No.35 of 1962); Laws of the Federation of Nigeria, 1962, p. A 415

during the year preceding the year of the assessment, or of the amount of any alimony, not exceeding one hundred Pounds, paid to a former wife under a court order. This provision was later amended to include a deduction of the amount of any payments made by the individual during the said preceding year, in accordance with a deed of separation or an order of a court, to a spouse from whom the individual was separated.[30] In any case the alimony or any other payment or both must not exceed one hundred Pounds. Today a sum of three hundred Naira is granted as marriage allowance to a male individual who is able to prove that at any time during the year preceding the year of assessment he had a wife living with and maintained by him. In other words married women who are also working or have another source of income, such as trading, other than their husband's earnings, are not entitled to this allowance. Before a married woman can obtain this allowance, she must show that she is separated from her husband (by producing a deed of separation for instance) and that she had been maintaining herself. The state seems to reflect the traditional view that women's place is at home, and that women, even if they work, are generally maintained by their husbands and therefore to prevent a double claim for the marriage allowance, only the husband's claim is entertained. And even in the case of the husband, he can only claim for one wife. If he has two or more wives, the state only recognises one for the purposes of tax allowance despite the fact that polygamy is recognised as valid under Nigerian law. Furthermore the restriction on the

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30 All the provisions on personal, marriage, children and dependent relative relief are contained under section 20(A) of the ITMA as amended by Act No. 7 of 1975

right of married women to claim this allowance blatantly contravenes the Constitutional provision against sexual or any other discrimination. Male dominance over women seems to have been upheld by this provision of the Income Tax Act despite the fact that under the general law at least, man and wife have the same rights and duties towards each other as regards maintenance. There are several married women business tycoons and high-ranking Civil Servants in the country who maintain their husbands and families and yet the law still regards them as subordinate to their husbands.

A further problem of the provision of the Act on marriage allowance lies in the mode of proving who is married and who isn't. Customary law marriages, as we have stated earlier, are largely unregistered. How then do the tax authorities ascertain the validity of a man's claim that he is married? The answer does not seem to be easy. But from my own personal interviews with the tax officials in the Inland Revenue Office in Maiduguri, they seem to place more emphasis on the truthfulness of each tax return, and the warning given to each claimant of the allowance that false claims may result in a claimant being prosecuted.

The provision for an allowance of 300 Naira for alimony to any individual, in respect of an amount paid as alimony to a former wife under a court order, again seems to reflect the short-comings of most of the provisions on tax relief in Nigeria in that it fails to understand that only general law marriages have payment of alimony to former wives. Only persons married under the Marriage Act must have their

marriages terminated in a court of competent jurisdiction (the High Court), and may be ordered to pay alimony to an ex-spouse. The law here specifically mentions an "ex-wife" while the Matrimonial Causes Act, 1970, provides that either spouse may be ordered to pay alimony to the other.[31] Customary or Islamic husbands and wives do not pay alimony to their ex-spouses, and yet the provision of the law applies equally to Customary, Islamic and general law marriages.

An allowance of 250 Naira is also made for each child (up to a maximum of four children) for an individual as tax relief, in any year of assessment provided that the children were maintained by the individual in the year preceding the year of assessment. The children must not be more than 16 years old, and if they are, they must be undergoing full time education in a recognised education institution. For the purpose of ascertaining the maximum number of children that a person can claim the allowance for, husband and wife or wives not separated from him by court order are regarded as one individual. Therefore even if a man has four wives and sixteen children, he can only claim the allowance for four children who meet the criteria of age, schooling and marital status. The wife or wives of such an individual cannot claim the allowance as well because the household is regarded, for this purpose, as the individual. Where the child or children are maintained by both the husband and the wife or wives, and both spouses claim the child allowance for the same child or children, the tax authority has the power to apportion the 250

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[31] Section 70(1-4) of the Matrimonial Causes Act, 1970.

Naira allowance for each child between the husband and wife in any proportion that may seem to be just. A widow with children,who has remarried, is also allowed to claim child allowance in respect of her children with the deceased husband assuming that she had custody of the children.

Again there are several inconsistencies within the provision as regards the actual situation in the society. Children who are more than sixteen years old and are not attending Schools may, and are often, maintained by their parents, particularly in areas of high unemployment. Moreover, traditionally, children do not leave home and abandon their parents just because they might have attained a certain age. The educational system in Nigeria, particularly in the Northern States, has never been fully accepted by the people. Many families still look down on Western education and consider it to be immoral, unIslamic, and not conducive to traditional family life, and therefore do not send their children to School. Again the limitation of the total number of children that a person can claim child allowance for to four presupposes that four children per household is the norm in Nigeria.It seems to be an attempt to disadvantage large families. Since there are no reliable Census figures for the total number of people in the country, and the distribution of the population geographically and by age groups, the limit of four children per household may not reflect the true nature of the need. And in the case of those that pay Poll tax, child allowance is denied to them altogether. Therefore to link the allowance to children still undergoing education does not make

sense if the aim of such an allowance is to improve the conditions for the upbringing of children.

The absence of a comprehensive social welfare system in Nigeria to provide for the old, sick, and unemployed means that most needy members of the community still depend on their families for assistance. Old people depend on their children and grandchildren for support. The practice is still so strong that even the High Courts that have power to order for maintenance in cases of general law spouses take into consideration a person's commitment in the care of a dependent relative such as one's aged parents.[32] The state recognises the importance of this by making an individual's expenditure towards the upkeep of his father, mother, grandfather, grandmother or any other relative, tax deductible.

Summary

State intervention in the family in Nigeria can therefore be viewed from two standpoints. First there is intervention in that the state provides the rules for the formation and dissolution of the family tie. Secondly, there is state intervention whenever state rules are applied or forums set up to tackle the problems of family breakdown, or extreme poverty within the family. The latter form of state intervention, though highly developed in the Western industrialized nations

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32 Odesanya J. (as he then was) referred to this practice in the case of Dawodu v. Dawodu, (Case No. CCHJ/5/74, Lagos High Court, 1974) (unreported), where he refused to increase the maintenance mutually agreed between the husband and wife on the ground that it would be at the expense of the wife's mother-in-law who was being maintained by her son.

such as Britain and America, is yet to take root in Nigeria. Therefore as regards the latter form of intervention, one may say that state intervention has so far failed to remove the hardships that family members face on divorce. This may be due to the continued existence of the family support system which caters for family members or to the fact that the provision of such services costs a great deal of money and a Third World country like Nigeria is not as yet in a position to meet the costs. That is why the state's role in this area is confined to the provision of tax allowance for children and dependent relatives. This too is unsatisfactory due to the fact that it benefits only those in full time employment.

Although traditional customary law was preserved by the state in Nigeria, the reasons for the preservation do not seem to be for the benefit of family members, rather, the political considerations, both during Colonialism and after Independence seem to have overshadowed all others. Preservation of custom during Colonial times ensured that the traditional system survived so as to provide the pool of labour, and market, that the Colonial system required for its continued viability, and at the same time it was transformed (for instance through the economic system, where men were required to engage in wage labour or to produce cash crops so as to obtain the cash to buy goods or to pay the taxes with). The post-Independence elite also maintained the traditional system because it is in their economic interests to do so. Thus a lot of rural dwellers are still illiterate, have no modern amenities whatsoever, and consequently still dependent of family members for their needs. If the masses of the people were to be

provided with education under state policy, then they would become aware of the functioning of the state and therefore would not stand for any nonsense from the elite who have been squandering the resources of the country for three decades now.

State provisions in the Constitution for the freedom from discrimination for all seems to be totally ignored especially as regards the relationship of men and women in the family. Men still have the exclusive right to divorce their wives unilaterally. They can also beat their wives but the state seldom intervenes on women's behalf. On divorce, a woman may be thrown out of the matrimonial home even if she had contributed to the purchase of it. On the death of her husband, her husband's relatives may throw her out of the matrimonial home and take her children away from her. These and many more injustices to women are still being perpetrated in Nigeria in the name of custom, and state intervention, if at all, has been to preserve the traditional family practices.

The high cost of living in the urban areas, and the fact that the extended family system is not as strong in the urban areas has meant that family members in the urban areas have been forced to go to the Social Welfare Offices for help. But the Social Welfare Offices have been set up primarily to deal with cases of juvenile delinquency rather than as providers of social welfare for the needy. Even in their functions as settlers of family disputes, the Social Welfare Officials are limited to giving advice to the parties. They have no power to force the parties to comply with their decision. And therefore

their intervention in settlement of family disputes appears to be due to the general breakdown of the extended family system in the urban areas where they are based.

One may therefore conclude that state intervention in the family in Nigeria has not, as yet, reached a stage whereby the responsibilities of the extended family towards its members, especially those that their immediate families have broken down, is taken over by the state. This fact is very important for one to bear in mind in the subsequent discussion on the consequences of family breakdown.

CHAPTER THREE

The Development of the law on Family breakdown

Introduction

Family breakdown may not be synonymous with divorce. A marriage may have broken down and yet the parties may still be together. Conversely a marriage may, de jure, still be intact and yet the family may have broken down for all intents and purposes. However, law is a significant influence in family break down. Family breakdown may result in both social and legal consequences not only for the parties themselves but also for the society as a whole. The breakdown is normally established in several ways. The family is said to have broken down when the principal parties to it, i.e. the husband and wife, have stopped living together as husband and wife either through consent or desertion with or without a court order. Family breakdown caused by the death of one of the parties, as stated in Chapter one, is not examined in this thesis.

In Nigeria due to the different types of families that exist side by side, the mode of effecting divorce also varies. All general law marriages can only be terminated in the High Court while Customary and Islamic marriages may be terminated both in and out of court. For the formal law on the termination of an Islamic or Customary marriage only comes into operation when the matter is brought to court by one of the parties. Family disputes settlement does not only take place in the courts but also in such venues as the family, friends, neighbours and the Social Welfare offices. However,

in this Chapter only the development of the formal law on matrimonial causes is examined. The formal and informal family dispute settlement process is examined in the next Chapter. The Chapter argues that" Nigerian Independence did not particularly further the cause for the integration of the laws on matrimonial causes in the country". In this regard the enactments passed on divorce, the various courts set up together with their jurisdiction on matrimonial causes are also examined in terms of their roles in the systematic control of the family dispute settlement process. For access to the courts is of vital importance in the establishment of family breakdown and the availability of remedies for family members. The Area Courts Law,1967, and the Matrimonial Causes Act, 1970, are examined in terms of their effectiveness or otherwise in dealing with the problems often associated with family breakdown.

1. The General Law

As stated in the previous Chapter, marriage under the general law (often referred to as "Church marriage", "Christian marriage" or "Court marriage") in Nigeria had always been governed by the provisions of the Marriage Act, 1914, which is a direct product of the Gold Coast Marriage Ordinance of 1884.[1] From the arrival of the British in 1862 up to their departure in 1960, and the enactment of the Matrimonial Causes Act, in 1970, statutory matrimonial causes

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[1] See Morris, H.F. " Attitudes towards Succession law in Nigeria during the colonial period" J.A.L. (1970) vol. 14 No.1 pp.5-129; and " The development of Statutory Marriage law in Twentieth Century British Colonial Africa",*J.A.L.*(1979) Vol. 23,No.1 pp.37-64

in Nigeria had always been governed by English law.[2] The continued application of English law after 1960 in part can be attributed to a Colonial mentality. However, there are enormous political considerations that the National Assembly had to take into account in any attempts at law reform less it be considered by any section of the country as an encroachment on their liberty. As a result all the English statutes on matrimonial causes up to 1970 were being directly applied to Nigeria even though the two societies are totally different.If there was a national desire, after Independence, to have a totally Nigerian law on matrimonial causes, it could have been easily done by the National Assembly.

There were various enabling statutes for the application of English law in Nigeria. The Law (Miscellaneous Provisions) Act, 1958 provided under section 45(1) that:

" The Common law of England and the doctrines of equity together with the statutes of general application that were in force in England on the first day of January 1900, shall be in force in Lagos and in so far as they relate to any matter within the exclusive legislative competence of the Federal Legislature, shall be in force elsewhere in the Federation."3

Similar provisions were made for the application of English law in the Northern and Eastern States (the then Northern and Eastern Regions) under various provisions of the

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2 The Matrimonial Causes Act, 1970, was promulgated as a Decree because at that time Nigeria was under Military rule and all Federal legislations were called Decrees while State legislations were called Edicts. But with the resumption of civilian government in 1979, all Military Decrees and Edicts which were not repealed became Laws.

3 See Cap. 89 of the Laws of the Federation and Lagos, 1958 edition.

High Court laws of the areas.[4] But in the Western States (the former Western Region) the Law of England (Application) Law,1959 stated under section 7 that English law was to continue to apply but subject to local enactments. [5]

In all the States however, the introduced English law was to apply subject to the provisions of any written law (locally enacted law) and local conditions and circumstances. In other words the laws on matrimonial causes were not to be applied if they were considered to be contrary to the Nigerian conditions. But then one may question the seriousness of the post-independence Nigerian legislature in trying to promote the development of law in this field when such development is left to the British-trained lawyers and judges to implement.[6] For the courts were also required to administer law and equity jointly as they were administered by Her Majesty's High Court of Justice in England.[7] Therefore if the justice of a particular case required it, the principles of the Common law

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[4] See section 28 of the High Court Law (Cap.49) of the Laws of Northern Nigeria, 1963 edition; Section 15(1) of the High Court Law,(Cap.61), 1963 edition of the Laws of Eastern Nigeria.

[5] See Cap. 60 of the High Court Laws of the Western Region, 1959 edition.

[6] See s. 45(2) and (3) of the Laws (Miscellaneous Provisions) Act; s.29(1) and (2) of the High Court Law of Northern Nigeria, 1963 (Cap.49); s.13 of the Interpretation Law (Cap.52) of the Laws of Northern Nigeria, 1963; s. 13 of the Interpretation Law (Cap.51) of the Laws of Western Nigeria, 1959; s. 15(2)(a) and (b) of the High Court Law, (Cap.59) of the Laws of Eastern Nigeria, 1963; and s. 15 of the Interpretation Law,(cap.56) Laws of Eastern Nigeria.

[7] See s. 30 of the High Court Law of the Northern Region; s.13 of the High Court Law of Lagos; s.19(1) of the High Court Law of Eastern Region; and s.13 of the High Court law of the Western Region.

and equity in particular were to be applied irrespective of the contrary views as to local circumstances. Again, since the Eastern and Western Regions could and did change the English law on matrimonial causes through local enactment, there was no justifiable reason why the Federal government could not do so for the entire country apart from the political considerations earlier mentioned.

Lack of action by the Federal government on this issue was not due to the lack of legislative power either. For the Republican Constitution of 1963 had given the Federal government the exclusive power on matters concerning the " formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto."[8] Only the Federal government could, and still can, legislate on any matter concerning marriages under the general law. And at Independence in 1960, instead of broadening the jurisdiction of the lower courts in matrimonial causes to cover general law marriages as well and thereby make the law more accessible to the generality of the public, the Federal government reconfirmed the exclusive jurisdiction that the High Courts had on general law matrimonial causes. Customary and Area courts were confined to the jurisdiction that they had under the Colonial government.

The jurisdiction of the High courts after Independence was the same as Her Majesty's High Court in England. The only

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[8] See section 69, Item 23 of the Schedule (Part 1) of the Exclusive Legislative List of the 1963 Republican Constitution.

concession to the uniqueness of the family system in Nigeria was the requirement that the High courts were to take into account the relevant local circumstances. But as to how far the judges could go, or would be willing to go in view of their training in English Law, was not clear.

Matrimonial Causes Law from 1960 to 1970

In order to understand the nature of the general law on matrimonial causes in Nigeria and the reasons why it has remained so inaccessible since its formation, one has to go as far back as the English Matrimonial Causes Act of 1857, which was applied to Nigeria by virtue of the various High Court Laws. The law was passed in England to alleviate the then uncertainty of the law as regards matrimonial offences.[9] The Act introduced divorce through the judicial process for the first time. Hitherto divorce was a matter for the legislature and the ecclesiastical courts, and only available, in exceptional circumstances, to the rich and highly placed in the English society. Divorce was mostly, prior to the 1857 Act, available to the husband. The Act removed this inequality to a certain extent. The husband could petition for divorce on the ground of his wife's adultery alone, but the wife had to prove adultery together with either incest or bigamy, cruelty or two years' desertion by her husband. Under sections 30 and 31 of the Act the courts had the power to deny the petitioner the decree of divorce if he himself was guilty of a matrimonial offence such as adultery.

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[9] See Bromley, P.M. *Family Law* 6 th Ed,(Butterworth), p.237

The law remained like this until 1923 when the matrimonial Causes Act of that year put the husband and the wife on the same footing by allowing the wife to petition for divorce based on the adultery of her husband alone. Fourteen years later, following the report of the Gorrell Commission, the Matrimonial Causes Act, 1937, under sections 2 and 3, further extended the grounds for divorce to include cruelty, desertion for three years and incurable insanity.[10] Furthermore, either party to the marriage may petition for divorce based on any of those grounds.

After the Second World War, as a result of enormous social changes that had taken place, English society began to reconsider the law on divorce. The rate of divorce had also gone up due to the availability of Legal Aid. The attitude of society towards the "guilty party" to a divorce had also changed from one of condemnation to one of sympathy; and religious bodies were becoming more tolerant of divorced couples.[11] All these changes led to the abandonment of the idea that divorce was only available to the "innocent" spouse following the commission of a matrimonial offence by the "guilty" spouse. Divorce became a matter to be observed from its true social function- a means of enabling the parties to enter into fresh marital relations with other parties. Hence the fault based divorce was to be replaced with one based on the irretrievable breakdown of the marriage.

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10 See the Gorell Commission (1909) Cd. 6478

11 Smart, C. 1984, *The Ties that Bind* Routledge and Kegan Paul, pp.27-129

All the debates and new ideas on divorce that were being generated in England in the 1960s were closely followed in Nigeria due to the fact that the courts were still applying the English law to general law matrimonial causes. Nigerians too had their own peculiar problems in implementing the general law on matrimonial causes due to the differences between English and Nigerian society's attitude to the family. Nigerian family life was, and still is, largely male dominated, and the practice of polygamy had always been the corner stone of marriage. As a result men often combined customary marriages with marriage under the general law and the law did nothing about it. The incidents of customary marriages, such as quick divorce at the instance of the husband, extended family interest in the marriage itself, the exclusion of women from their husband's property and home after divorce etc. were applied to marriages contracted under the general law despite statutory prohibition of such practice. However, while Nigerians might have been mindful of the desire for legislative independence, this was formal only. Instead of looking inwards for possible solutions to the matter, the Colonial mentality in Nigerians led to the Matrimonial Causes Act, 1970, which closely followed the ideas put forward in England in the Divorce Reform Act of 1969.

The Matrimonial Causes Act, 1970

Although the Matrimonial Causes Act was designed to meet Nigerian requirements, it was based partly on the Australian Matrimonial Causes Act, 1959, and partly on the English

Divorce Reform Act, 1969.[12] The explanation for this dependence seems to lie in the fact that even the English Divorce Reform Act took into consideration the experience of other Commonwealth countries, such as Canada, Australia and New Zealand, in dealing with matrimonial causes, and therefore Nigeria must have felt that by incorporating the experience of other Commonwealth countries, particularly those with a similar political organisation, it would have more to gain than if it fashioned its own law from scratch. Australia has a Federal system similar to Nigeria and the Australian Act had codified the law on matrimonial causes which used to vary from State to State. In so doing it also drew on the experience of the New Zealand Divorce and Matrimonial Causes Act, 1920. Elias said of this:

"The Matrimonial Causes Decree, 1970, represents a movement away from the English patterns of family relationship towards a more dynamic socialization of the rules governing matrimonial causes, such as divorce, judicial separation, custody of infants, and maintenance. Although there is a body of opinion that this enactment does not go far enough in achieving what has been described as a truly African practice in those matters, the Decree represents an attempt to achieve a delicate balance between the need for stability and integrity of marriage and the need for change; it frankly recognises the situation that arises where a marriage has irretrievably broken down."13

As from the 17 th March, 1970, when the Act came into effect in Nigeria, almost all the English law on matrimonial causes which hitherto applied to the country ceased to apply.

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12 See the Matrimonial Causes Act of Australia, 1959, as ammended by the Matrimonial Causes Act, 1965, (No.99 of 1965) of Australia.

13 See Elias, T.O., 1972, " Towards a Common Law in Nigeria", in *Law and Social Change in Nigeria* T.O. Elias (ed.), University of Lagos, Nigeria, p. 259

But the Act did not constitute a total break with English law on matrimonial causes. For under section 98, the law and practice to be followed in any matrimonial cause which were pending at the commencement of the Act were to be those existing at that time, although the court could grant an amendment to the pending petition so as to include grounds set out in the Act. Section 112(1) of the Act empowered the Chief Justice of the Federation, after due consultation with the Chief Justices of the States, and Presidents of the Courts of Appeal, to make rules of practice and procedure for the courts in regard to the Act. Until then the English rules on practice and procedure immediately in force at the commencement of the Act would continue to apply. Moreover English rules of the Common law, including the doctrines of Equity and the Statutes of general application which were still in force in Nigeria still applied to Nigeria by virtue of the fact that the Nigerian legal system was based on the English legal system and the lawyers and Judges were all trained in that system. Such laws operated to fill in any gaps in the Act or any other locally enacted law. For example the question of the domicile of parties to a general law marriage in Nigeria was left untouched by the Act and so was to be determined by the Common law rules on the matter even though such rules might have been subsequently changed in England itself. The English rules of procedure in matrimonial causes were followed in Nigeria until 1983 when the Nigeria Matrimonial Causes Rules,1983, were passed.

The exclusive jurisdiction of the High Court in matrimonial causes prior to the enactment of the 1970 Act was

far from satisfactory. In England, minor courts, such as the Magistrates courts, were given the power to grant minor matrimonial relief such as separation, maintenance and custody. [14] But in Nigeria, prior to 1970, the High Court had exclusive jurisdiction on general law matrimonial causes despite the fact that the Magistrates courts were more numerous and more accessible to the people than the High Courts. The Act has gone some way to meet some of these shortcomings. Although jurisdiction in matrimonial causes is still conferred exclusively on the High Courts, once maintenance has been ordered for the benefit of a spouse by the High Court, a Magistrate's court or a District court in any State of the Federation, has been given the power to enforce the order in summary manner.[15] It would go a long way in reducing costs and making the law more accessible to the generality of the public if the lower courts were to be given the power to make certain minor orders, such as for maintenance as well. Even today, almost two decades after the Act was passed, and three decades after Independence, inordinate delay and high cost of litigation is the order of the day in the High Courts in Nigeria.[16]

The general law on marriage and its sister legislation, the Matrimonial Causes Act, 1970, are applicable throughout Nigeria. But since Nigeria is a Federation of 21 States, the

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14 See for instance the Matrimonial Proceedings (Magistrates Courts) Act, 1960, of England.

15 See section 2(1) and section 114(1) respectively of the Matrimonial Causes Act, (No,17 of 1970) 1970.

16 See, " Not yet for everyone", in "This Week", Vol.8, No.3, of March 28. 1988, pp.14-23

question arises as to whether a Nigerian has the domicile of his State of origin or the domicile of the entire country?

ii. Jurisdiction based on Domicile

Domicile determines whether or not a Nigerian is subject to the jurisdiction of a particular High Court in any matrimonial dispute. If a court lacks jurisdiction because the parties have not met the rules on domicile or residence then they have to seek out the right court to hear their case. This may involve delay and more expense.

Domicile is a term that denotes a person's permanent home.[17] It is distinct from nationality which refers to the political entity to which one owes allegiance.[18] In a Federation like Nigeria, it may be possible for one person to have more than one domicile.The domicile of origin of a legitimate child or legitimated child is the domicile of the father at the time the child was born. An illegitimate child or a posthumous child takes the domicile of its mother. But where neither the mother nor the father of a child is known then the child's domicile of origin is the country where he was found.

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17 See Le Mesurier v. Le Mesurier [1895] A.C. 517; Shyngle v. Shyngle (1923) 4 N.L.R. 94; Jones v. Jones (1938) 14 N.L.R. 12; the statement of Kindersley, V.C. in Whicker v. Hume [1843] All E.R.R. 450; Lord Chelmsford in Moorhouse v. Lord [1863] 10 H.L. 272; and Dicey, A.V. and Morris, J.H.C. 1967, *Conflict of Laws*, 8th ed. (Stevens: London) 84 Rule 6(3).

18 See Nwogugu, E.I; 1976, *Family Law in Nigeria*, Heinemann, p. 96

A married woman takes the domicile of her husband as long as the marriage subsists. She cannot acquire another domicile which is different from her husband's domicile while still validly married to him. If the husband changes his domicile that of the wife automatically changes too.[19] Consequently if the marriage between the parties was void ab initio it follows that the wife will not acquire her husband's domicile - her domicile will still remain the one she had before contracting the void marriage. Where the marriage is voidable the woman acquires her husband's domicile until the marriage is made void. Death of the husband or divorce releases the wife from depending on her husband's domicile, but she still retains her husband's last domicile until she acquires her own domicile of choice.

Apart from infants and married women, any person can change his domicile by acquiring a domicile of choice. An infant's domicile depends on its parents' domicile while that of a married woman depends on her husband's domicile. Infants domicile of dependence ends with the attainment of the age of majority while that of married women ends with divorce or the death of their husbands. A person can acquire a domicile of choice by establishing residence in another place other than in his domicile of origin, but with the intention of making the new residence his permanent home.[20]

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19 See Lord Advocate v. Jeffrey [1921] 1 A.C. 146; *Attorney General for Alberta v. Cook* [1926] A.C. 444; H.v.H (1928) P. 206; and Herd v. Herd [1936] P. 205.

20 See Re Martin [1900] P. 211; and Bowie v. Liverpool Royal Infirmary [1930] A.C. 588

Under the Matrimonial Causes act, proceedings for matrimonial causes,i.e. for a decree of dissolution of the marriage, judicial separation, restitution of conjugal rights, and jactitation of marriage, may only be instituted by a person domiciled in Nigeria.[21] A person domiciled in any State of the Federation is deemed to be domiciled in Nigeria and can institute proceedings under the Act in any High Court of any State, whether or not he is domiciled in that State.[22] The Act therefore created one Nigerian domicile for statutory marriage matrimonial causes and put to rest the arguments that hitherto existed on the matter.

The Act also made special provisions as regards the domicile of a married woman. As stated earlier, under the Common law a married woman takes her husband's domicile during the subsistence of the marriage. This rule was adopted in Nigeria, but it was found to cause hardship to the woman. For instance if she wanted to divorce her husband she had to institute proceedings in a court in his domicile. And, obviously a husband that was not willing to divorce his wife could cause untold hardship to her by simply changing his domicile. To alleviate this problem, the Act presumes that a deserted wife who is domiciled in Nigeria, either immediately before her marriage or before the desertion, to be still domiciled in Nigeria and thereby enabling the Nigerian courts to have jurisdiction under section 2(2) of the Act. But before a married woman can avail herself of this provision, two

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21 See section 114(1) of the Matrimonial Causes Act, 1970

22 Per section 2(2) and (3) of the Act.

conditions must be met. First, she must be domiciled in Nigeria either shortly before the marriage or shortly before the desertion. Secondly she must prove that she is a deserted wife at the time she commences the proceedings.

Another ground for jurisdiction in matrimonial causes under the Act is residence. A married woman may institute proceedings under the Act if she can establish that she is resident in Nigeria and has been so resident for a period of at least three years immediately preceding the date of the institution of the proceedings.[23] That is she must prove that she has a place of permanent abode in Nigeria. And that she must have been so resident for a period of three years before the proceedings. That is the residence must have been on a permanent basis. Mere absence on holidays or business trips abroad does not disrupt the continuity of the residence.

Applicable rules of court

As stated earlier, prior to the enactment of the Matrimonial Causes Act, 1970, the current English law on matrimonial causes applied to Nigeria by virtue of section 4 of the Regional, then State Courts (Federal Jurisdiction) Act, 1958. Now the combined effect of sections 115(2) and 8 of the Matrimonial Causes Act is to repeal section 4 of the 1958 Act. Section 8 of the 1970 Act provides that the High Court was to exercise its jurisdiction in matrimonial causes in conformity with the provision of the Act. But the Act had no provision as

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23 Per section 7(b) of the Act; the section is similar to the English Matrimonial Causes Act, 1950; see also Adeoye v. Adeoye [1961] All N.L.R. 792.

to the rules of court to be applied. It only provided that the Chief Justice was to make rules for the application of the Act. In the meantime English law procedural rules were to continue to apply. In the Eastern States the applicable rules were deemed to be the English Matrimonial Causes Rules, 1957, as amended up to 1960 because the Eastern States restricted the applicable English law to the pre-Independence laws. In the rest of the country the English Matrimonial Causes Rules of 1968 were applied. This state of affairs continued for over a decade before the Chief Justice of Nigeria enacted the Nigerian Matrimonial Causes Rules, 1983.[24] The rules came into effect on Independence Day, 1 st October, 1983. Under order 1 rule 1(2), it was provided that the rules of court for the time being in force in the High Court of Justice in England providing for the practice and procedure of that court in respect of divorce and matrimonial causes ceased to apply to Nigeria as from the commencement of the rules. Therefore English law rules on practice and procedure in matrimonial causes ceased to apply in Nigeria as from the 1 st of October, 1983.

The Matrimonial Causes Rules, 1983, are divided into twenty three Orders and cover all aspects of matrimonial causes such as, for instance, applications for dissolution of marriage or judicial separation; petitions for dissolution of marriage, nullity of marriage, judicial separation and restitution of conjugal rights; proceedings for ancillary

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[24] See Statutory Instrument (S.I) No.44 of 1983 at p. B149

relief; as well as the enforcement of orders and Decrees made under the Matrimonial Causes Act, 1970.[25]

Thus the general law on matrimonial causes in Nigeria after Independence remained largely foreign despite the desire for change in the country. This is partly explained by the Colonial mentality which considers everything foreign to be superior, and partly by the political desire to maintain the separateness of the various laws on the family so as not to upset certain communities in the country. As a result persons married under the general law have their family life ordered by statute law while those married under the traditional customary law have the option of either availing themselves to the prescribed formal laws for the settlement of family disputes or sticking to the traditional mode of family dispute settlement.

2. Customary Law

i. The nature of customary law in Nigeria

Before examining the development of the traditional customary rules and courts that deal with matrimonial causes, we should first of all examine,briefly, the nature of customary law in Nigeria.

"Customary law" may be defined as the customs or norms of behaviour of a community. The norms must be accepted by all members of the community as binding upon them. The norms may or may not be written down. Traditionally, customary law was

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25 See Order lV, rule 1-4; Order V, rule 11-26; Order XlV, rule 1-26; and Order XV11, rule 1-34 respectively.

not written down. But with the advent of Colonialism and the need for order and certainty, the customs of various communities in Nigeria were written down. The acceptance of the customs of a community as the law or norms of the community means that the customs must actually reflect the current mode of behaviour of the people of the community. Therefore it necessarily follows that when the behavioural pattern of the community changes, the customary law must change along with it. Thus Customary law has been described as the "mirror of accepted usage".[26]

Customary law derives its strength from its acceptance by members of the community. In the words of Elias,

> " this recognition must be in accordance with the principles of their social imperative, because operating in every community is a dynamic of social conduct, an accepted norm of behaviour, which the vast majority of its members regard as absolutely necessary for the common weal".[27]

Any custom or tradition which does not command such acceptance lacks the force of law. Likewise if a custom has been recognised and accepted by the community as having the force of law, and has not been altered by modern practices, it cannot be said to be contrary to custom of the community. Any person that questions the existence of a particular custom of

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26 Section 2 of the Native Courts' Law of the Northern States includes Islamic law in its definition of customary law even though the two are quite distinct. See Bairamian, F.J. dictum in Owonyin v. Omotosho [1961] 1 All N.L.R 304 at 309; Eshugbayi Eleko v. Government of Nigeria [1931] A.C. 662 at 673; and the recent decision of the Federal Supreme Court in Olowu v. Olowu & Anor.[1985] 3 N.W.L.R 372 to the effect that a Nigerian can become a member of another tribe, and therefore acquire a new customary law, by the process of acculturalisation.

27 See Elias, T.O.1972, *The Nature Of African Customary Law* (Manchester University Press) p.55

a community in court must prove the existence of the alternative custom. For customary law to be valid, therefore, it must not only be recognised and accepted by the community, but also be in existence at the time of its application. That is it must not be custom of a bygone age. Moreover customary law as the mirror of human society, must necessarily be flexible and adaptable to modern changes in society.[28]

Customary law also differs from community to community. And since Nigeria consists of over 250 different ethnic groups, there is no one customary law that can be called "Nigerian Customary Law" as such. But since customary law in the Northern States includes Islamic law, one may say that all the Muslims in the Northern States, irrespective of their tribal customary law, have one"customary law".

To eliminate the so-called "defect" of customary law, that is its oral nature, as far back as 1945 efforts were made by the British under the repealed Native Authority Ordinance to codify customary laws in Nigeria. The law was adopted in the Northern and Western parts of the country under various other enactments.[29] The statutes empowered the local authorities to make a declaration of either what they deemed to be the customary law of a community to be on a given subject, or the modification of it where it is deemed desirable to modify it. Once a custom has been declared and

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28 See Speed, Ag. C.J, in Lewis v. Bankole [1908] 1 N.L.R 81 at 83; and Alfa v. Arepo [1963] W.N.L.R 95

29 For instance the Western Nigeria Local Government Law (Cap. 68) section 78; and the Northern Nigeria Native Authority Law (Cap.77) section 48

approved by the Governor it becomes the customary law of that particular community on the subject. Thus the Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964, for instance, was enacted following this directive and it compiled all the customary laws on marriage and divorce in the Biu area and declared them to be the customary law for all in the area on the subject. Codification of the customary law may bring certainty but at the same time, unless frequent review is conducted, there is the danger that the codified law would soon be out of date. There are still many communities in Nigeria, such as the Gwoza Hill Dwellers of Borno, and the Koma people of Gongola State, whose customary laws have not been codified.

ii. The development of customary courts

The arrival of the British in Nigeria brought with it a fundamental change in the administration of customary justice. The change also left a legacy that is still present in the country's judicial system. The first enactment dealing with the establishment of customary courts, which were then called Native Courts, was the Native Court Proclamation, 1900 which established customary courts in the southern parts of the country.[30] The jurisdiction of the courts was limited to their own areas, which were formed by grouping together a number of villages. The Proclamation empowered the High Commissioner to establish, by order, native councils and minor courts and to specify their jurisdiction. Such councils consisted of the

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30 See Nwabueze, B.O. 1963, *The Machinery of Justice in Nigeria*,pp.70-71; and Proclamation No.9 of 1900

District Commissioner (an English Colonial Official) as President, and Nigerians appointed by warrant to represent their local villages and towns. The Nigerian members of the Council were mere Assessors who were consulted only when the President needed their assistance on a matter of custom of the community. Since the President was dominant in the council, the procedure followed was based on English law. As a result the "native" courts were no more "native" than the President himself. However the native courts at that time had one thing in common with their pre-Colonial counterparts and that was the fact that their jurisdiction was confined to natives only.

In the Northern parts of the country the British were impressed with the existing system of administering justice in the Muslim Emirates so much that they preserved, and adapted it under the system of "Indirect Rule", to their own benefit. In 1900 a Native Courts Proclamation was enacted " for better regulation and control of native courts", rather than the establishment of a new native courts system altogether as happened in the case of the southern parts of the country. A Colonial Official known as the Resident was empowered by the Proclamation, after due consultation with the Emir (the local ruler) to establish native courts by warrant and to define their jurisdiction. Such courts were then to apply the native law and custom prevailing in the area of their jurisdiction. And in the Northern Emirates, the native law and custom prevailing in the area was, and still is, Islamic law. And since the Emir had the power before the advent of Colonialism to appoint members of the local courts, the Resident left the task of appointing such personnel to the Emir, subject to the

approval of the Resident to any appointment made by the Emir. In areas that did not and had never had a local court, the Resident had the power to appoint anyone to the courts.

The courts had no jurisdiction over non-natives nor natives that were in the Colonial service. They were only subject to the jurisdiction of the English-type courts.The rules on practice and procedure were to be governed by customary law, and again this meant Islamic law rules. The Resident had the overall supervisory power over the courts. Thus the seed of legal pluralism in the law on the family had been sown as far back as the beginning of the 20 th Century.

Therefore while the pre-1900 courts in the Northern parts of Nigeria were presided over by a single Alkali, [31] the Proclamation provided for a court made up of four members, one Alkali and four Assessors. But the Emirs were not happy with the new system of courts which they saw as an encroachment on their powers. So in 1906 another Native Courts Proclamation was passed. This law established three types of courts. First there was the Emir's court which was presided over by the Emir and had his close advisers as members. It had both judicial and administrative function and so it was gazetted as a "judicial council". Secondly there was the Alkali court but this time with the Alkali as the sole judge which was a reversion to the constitution of the court prior to the reforms in 1900. The Alkali could or could not sit with an Assessor. If the case involved customary or non Islamic law, then the Alkali may call upon the Assessor who has knowledge

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31 *Alkali* is a Hausarised version of the Arabic *Qadi*-Judge

of the local custom to assist him. Islamic matters were to be decided by the Alkali alone. Finally, in the non Muslim areas, where a local Chief existed, he and his councillors were constituted into a court. Where there were no Chiefs, the Resident had the power to appoint persons as Chiefs and then set up courts for them to administer.

The changes introduced in the North were extended to the South after the amalgamation of the country in 1914, and they remained so until 1933. In that year a number of new Ordinances were passed. These were the Protectorate Courts Ordinance, the Native Courts Ordinance, and the West African Court of Appeal Ordinance. The Protectorate Courts Ordinance created the High Court and the Magistrates Courts to replace the Provincial Courts. The High Court was given the power to enforce native law and custom in all disputes except land matters. This exception was extended in 1943 to include all matters of marriage, family status, guardianship of children, inheritance and disposition of property on death which were reserved for the native courts. This exception has remained in force up to today as far as customary matrimonial matters are concerned.

An appeal system was also introduced by the Ordinances to allow for appeals from customary courts to go to the English type courts, namely the Magistrate and High Court. Decisions of Emir and Alkali courts went on appeal to the English type courts even on matters concerning Islamic law. This was despite the fact that the English type courts were presided over by English Judges who had no knowledge of Islamic law

whatsoever. The situation did not change until the notorious case of Tsofo v. Gwandu N.A. [32] where it was held that even though a native court had the power to punish an accused convicted of contravening customary law (in this case Islamic law), nevertheless it could not impose a penalty that was deemed to be contrary to the Criminal Code(English law) for the same offence. The decision caused a lot of disquiet among the Muslim community in the North. As a result a Commission of Inquiry, the Brooks' Commission, was set up in 1948 to sort out the conflict between English law and customary law.

One of the outcomes of the Brooks' Commission's report was the creation of the Muslim Court of Appeal in 1956.[33] Appeals from the native courts on matters of Islamic law went to the Muslim Court of Appeal, but there was still provision for further appeal from the court to the High Court. The conflict between English and Islamic law continued unabated and so another panel was set up by the Northern Region Government to advise on the possible fusing of the various laws operating in the Region as well as modernising the whole legal system in view of the impending Independence.[34] The Report of the Panel resulted in the enactment of various laws which came into force on Independence Day in 1960. Among these

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32 [1947] 12 W.A.C.A 141

33 See the Muslim Court of Appeal Law, 1956, of the Northern Region (No.10 of 1956)

34 Members of the Panel were: Sayad Mohammed Abu Ranad, Chief Justice of Sudan; Mr. Justice Sherif, Chairman of the Pakistan Law Commission; Professor J.N.D Anderson of the School of Oriental and African Studies; Sir Kashim Ibrahim, the Waziri of Borno; Peter Achimugu; and M. Musa, the Chief Alkali of Bida.

was the Penal Code, the Criminal Procedure Code, and the Sharia Court of Appeal Law. A Judicial Service Commission was also set up to advise the Governor on the appointment and dismissal of members of native courts. The Sharia Court of Appeal was established in place of the Muslim Court of Appeal as the final court of appeal in matters of Muslim personal law such as Marriage, Divorce, Wills, Succession etc. Appeals from customary courts and other civil matters of Islamic law went to the High Court which was given a Native Courts Appellate Division consisting of two High Court Judges and one Judge of the Sharia Court of Appeal.[35] The effect of these changes was to create a distinct line of appeals and to restrict the application of customary law to civil matters and family matters.

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35 See the Sharia Court of Appeal Law, 1960,(Cap.122 Laws of Northern Nigeria, 1963); and section 63 of the High Court Law (Cap.49) Laws of Northern Nigeria, 1963.

iii. Changes introduced in 1966

The advent of military rule in Nigeria in 1966 brought about enormous changes in the structure and functions of the courts, particularly customary courts, in the country. In 1967 the country was sub-divided into 12 States, and in the same year the Area Courts Law was promulgated for the 10 Northern States. The Act, which came into force on the 1 st of April 1968, replaced the Native Courts Law, 1956, in its application to the States. Under the Act, customary courts were to be set up in all the Northern States and they were to be known as Area Courts. Judges and other officials of the courts were to be public officers serving under the Public Service of each State. This differed from the pre-1967 system whereby judges were appointed by the Resident, the Governor and the Native Authority. It also removed totally, for the first time, the judicial power of the Emirs and Chiefs by abolishing their courts. The Alkali court was reconstituted and renamed an Area Court. The Chief Justice of each State was in charge of all the Area courts in his State. However, the jurisdiction of the courts as regards Muslim personal law remained intact.[36]

Today there are four grades of Customary courts in the Northern States and these are: Upper Area Courts (which have appellate jurisdiction on all other grades of Area Courts); Area Courts Grade 1, Grade 11, and Grade 111. An Area court is presided over by an Area Judge sitting alone or with two other members. Matters concerning Muslim personal law are dealt with

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36 See the States (Creation and Transition Provisions) Act, 1967(No.14) of 1967; and Area Courts Law (No.2 of 1967) 1967

by an Area judge sitting alone. The courts sitting with an Alkali and two other members are known as President Courts and the Alkali is the President of the court. Such courts deal with both customary and Islamic matters. The two members sitting with the Alkali are versed, or supposed to be versed, in the local non-Islamic customary law. All the judges in the Area courts are presumed to know the customary or Islamic law that they are to apply and so proof of the law does not seem to be required. If it happens that they do not know of a particular custom or Islamic law, they are allowed to call expert witnesses to testify on the matter.

The appellate system is similar to the one in existence prior to the reforms of 1967. Appeals from Area courts lie to the Upper Area Courts. From the Upper Area Courts appeals go to the Sharia Court of Appeal (on matters of Muslim personal law) and to the High Court in customary law matters. Litigants are required to fill a form (Form 9) in the court of first instance indicating the law applicable to their case.

Section 15 of the Area Courts Law lists the persons over whom an Area court has jurisdiction. Such persons are either indigenous Nigerians or indigenous Africans living in the Northern States. The Act also permits any person to chose to bring his case in an Area Court, provided there are no statutory rules against such a move. All Area courts have unlimited jurisdiction in customary matrimonial causes. This includes cases of child custody, divorce, maintenance, Succession to property as well as the administration of estates under customary law.

In 1976 the Federal Court of Appeal (now called the Court of Appeal) was created.[37] The court was to hear appeals from all the High courts in all matters, including Islamic law. But under sections 220-225 of the Federal Constitution of 1979, the court's jurisdiction was extended to cover appeals from the Sharia Court of Appeal as well. Further appeal from the court goes to the federal Supreme Court.

As in the case of the development of the general law the emphasis on the development of the customary law since Independence in Nigeria has been on the preservation of each community's customary laws rather than an attempt to formulate a single and coherent Nigerian law on matrimonial causes.The formulation of a single law on matrimonial causes in Nigeria may not necessarily be for the better. For the general law has always been made to apply throughout the country with little appreciable benefit for the Nigerian family. Therefore there is no convincing reason why matrimonial causes rules cannot be formulated to cover all marriages in the country.The legislative autonomy that came with Independence only served to strengthen the division between the general law and customary law on this matter. But, as we shall see in later Chapters of this thesis, customary law matrimonial causes seems to be preferred, even by those married under the general law, to the cumbersome and expensive procedure that accompany general law matrimonial causes in the High courts.

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37 See the Federal Court of Appeal Act, No. 43 of 1976

iV. Customary Civil Procedure

Area courts administer customary law in all civil causes and matters including matrimonial causes. But even though this is the general rule, nevertheless procedure in these courts is governed by the rules of court which are derived from English law. For it is provided under section 26 of the Native Courts Law of the Northern States that customary law is to be applied in all procedural matters in the courts' exercise of their civil jurisdiction. Furthermore, the Native Courts (Civil Procedure) Rules, 1960, provides that the Alkali Court [Area Court] shall continue to apply Islamic law on practice and procedure in all civil causes.[38] In the non Islamic customary courts procedural rules were to be governed by the Rules of court similar to those applicable in Magistrates courts, and which applied to the Eastern and Western parts of the country. In the event of conflict between the customary rules of procedure and the Rules of court the former was to prevail.[39]

In the Eastern States, although the customary courts law of the former Eastern Region empowered the Minister (now the Commissioner) to make Rules of practice and procedure for the courts, the Customary Courts Rules, 1957, which were made in pursuance of this power, had the effect of ousting customary law from procedural matters altogether. And in the Western States customary law is totally excluded from procedural matters by section 27 of the Customary Courts Law, 1957, which

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38 See Order Xl, Part 1, Native Courts (Civil Procedure) Rules, 1960 (N.R.L.N. 84 of 1960)

39 Ibid. Order lX, Part 11, Rule 9.

provided that all procedural matters were to be governed by the rules of court.

The effect of all these rules is that in the non-Muslim Customary courts in Nigeria civil procedure is governed by the Colonially derived rules of procedure. This was aptly referred to by Keay and Richardson in their work on Customary law thus:

"... Civil procedure in customary courts is becoming increasingly formalised by the imposition of Rules essentially English in origin, content and application. The tendency is towards ousting completely indigenous customary practices and to burden the courts with much of the paraphernalia of English precedent in the interpretation of the Rules."[40]

This is still the case in all areas of the country but particularly the Western and Eastern States where there was no indigenous customary law on procedure before the advent of Colonialism. In such areas, the rules of procedure followed in the early days were a simplified version of the English procedural rules. Even in the Northern States where there was, and still is, Islamic law on procedure, the setting up of formal courts brought about a change in the procedure. Thus the current procedural rules applied in the Area courts in the Northern States owe more to English law than to Islamic law. For instance the rules on customary procedure prescribe the mode of instituting civil procedure as well as affecting process. Provisions are made for interlocutory applications, the order of proceedings at the hearing of the suit, rules of evidence, awards of costs, and execution of orders. Further Orders provide for garnishee and interpleader proceedings, the

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40 See Keay, E.A. and S.S. Richardson, 1966, *The Native and Customary Courts of Nigeria* (London: Sweet and Maxwell) pp. 10-354

issue of writs of possession, the duties of bailiffs and Messengers, the procedure for appeals and the keeping of records and accounts.[41] The Islamic law on civil procedure is applied side by side with the civil procedure rules in the Area courts. The Islamic rules include those on admission of evidence, calling of witnesses, cross-examination, the form of the trial itself, the burden of proof, as well as the admission of oaths. All these combine to form an atmosphere of dispute settlement that is totally different from what obtains before a family council for instance and may have an influence on the choice of whether family members take their disputes to court or not.

V. Legal representation in Customary Courts

Prior to the promulgation of the Federal Constitution of 1979, legal representation in customary courts in the Northern States was not allowed. This was due largely to the Islamic nature of most of the local courts in the area. Most of the judges were Muslim Scholars learned in Islamic law rather than in the Common law. And therefore to allow trained lawyers to appear before untrained judges would cause problems for the administration of justice in the area. In other parts of the country legal representation in customary courts was allowed but subject to several restrictions.[42] The practice of

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41 See Western Region Legal Notice 258 of 1958; Customary courts Rules (Lagos Laws 1973, cap.33); and Eastern Region Legal Notice 254, 1957; Garnishee proceedings are provided in the Northern States only; see Order XX, Northern Region Legal Notice 84, 1960.

42 See for instance s.28(1) of the Native Courts Law, 1956, (Northern States); s.32 of the Customary Courts Law, 1956 (Eastern States); s.28(1)and (2) of the Customary Courts

excluding counsel from customary courts goes back to colonial times. Legal representation was originally permitted in the Native courts in the southern parts of the country between 1900 to 1914. However the practice proved unpopular with the British because the "Native" lawyers were accused of using the courts to foment trouble between the native communities. Such actions of course were deemed by the British to be contrary to their interests. So legal representation in native courts was banned in 1914 and remained so until 1957 when the Western Region allowed legal representation in customary courts again. But this was restricted to courts presided over by legally qualified judges.

Apart from the above, there are several reasons linked to the reluctance to allow legal representation in customary courts prior to 1979. First there is the view that since lawyers are learned in the English Common law, they should not be allowed to appear in the customary courts where only local customary law is applied. For they may not have the knowledge of the custom being applied and therefore would only complicate matters by their use of Common law principles to customary law situations. This necessarily means that if the customary court is dealing with a matter that is not customary, which is rare in itself, then the lawyers can appear. Secondly, legal representation in customary courts was objected to on the basis of costs. That is since lawyers command hefty legal fees, their appearance in customary

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Law, 1957, (Western States); and s.28 of the Area Courts Law, 1967,(Northern States); and s.33 of the 1979 Constitution which now permits legal representation in customary courts.

courts, which normally deal with minor domestic and civil causes, would render the courts as expensive and inaccessible as the High Courts where all litigants must be represented by a lawyer. Moreover legal representation would cause more delays in the cases since lawyers have the tendency to ask for adjournments on the flimsiest of reasons and to waste time arguing legal technicalities. Most judges in the customary courts are laymen and therefore would not understand the common law principles that the lawyers would bring up and would be overawed by the presence of the lawyers in any case.

Since 1979, legal representation in all courts in Nigeria has been Constitutionally guaranteed for everyone under section 33 of the constitution of 1979. Under this section a person involved in a case in any court is entitled to a fair hearing. Fair hearing includes the right to legal representation in any court in the land. In practice however, most litigants that come before the customary courts either cannot afford the services of lawyers or are unaware of the right to a lawyer. As a result, legal representation in the customary courts, particularly in the Northern States is almost non-existent.

3. The Courts in Borno State

The nature and distribution of the courts in Borno State may determine their availability to litigants. Therefore we now examine the courts in Borno as a whole but with specific emphasis on those courts that deal with matrimonial causes.

The courts in Borno are made up of the High Courts, the Sharia Court of Appeal, Magistrates Courts, and Area courts. There are five High courts in Maiduguri, the State Capital, as well as three others in Biu, Bama and Potiskum. The Sharia Court of Appeal has four Qadis and is situated in the High Court buildings in Maiduguri even though it sits in other parts of the State from time to time. Magistrates and Area courts are situated all over the State, but mainly in the Headquarters of the eighteen Local Government areas. Each Local Government area has at least one Upper Area court and two Area courts. Miaduguri has two Upper Area courts as well as ten Area courts located in Wards throughout the town.

As in the case of other High courts in the country, the High court in Borno has jurisdiction in general law matrimonial causes. It also acts as a Court of Appeal for all other courts in the State except in cases of Islamic personal law where the Sharia Court of Appeal has jurisdiction.

The Sharia Court of Appeal in the State plays a very important role in the judicial process due to the fact that the State is predominantly Muslim, and the majority of the courts, the Area courts, apply Islamic personal law as the local customary law. The court functions as the highest court of appeal at the State level in all matters concerning Muslim personal law such as Marriage, Divorce, and Succession.

Magistrates courts in Borno State are known as District courts when the courts are dealing with a civil dispute. The jurisdiction of the court as a District court is governed by the District Courts Law, 1963, which applies to all the eleven

Northern States as well as the Federal Capital Territory, Abuja. As a Magistrates court, its jurisdiction is limited to criminal cases only.[43]

The Upper Area court in Borno constitutes the first court of appeal for all cases emanating from the Area courts. It has unlimited jurisdiction in civil matters as provided by section 17 of the Area Courts Law, 1968. As stated earlier, although the Constitution provides for legal representation lawyers are still seldom seen in the Area courts in Borno due to the reasons mentioned ealier.

We shall now examine the volume and nature of the cases that came before the courts in Borno since the creation of the State in 1976. From 1967 to 1976 Borno formed part of the North - Eastern State, and prior to that Borno was a Province in the Northern Region. Data for cases heard before 1976 was extremely difficult to obtain because of general bad record keeping. So the record of cases heard from 1977 to 1986, in two year intervals, is examined below.

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43 See Part lV of the District Courts Law, 1963, in Vol.1 of the Laws of Northern Nigeria, 1963, (Cap.33).

DIAGRAM C2(I) Cases heard in 1977

Type of Court	Type of Case	Registered Cases	Family Cases	Disposed Cases	Pending Cases	% of Fam.
S.C.	Civil	719	519	589	205	65.36
Appeal	Probate	75				
High Court	Civil	160	15	361	110	3.18
	Criminal	96				
	Probate	110				
	Appeals	105				
M/trates Courts	Civil	416	0	2,420	1,074	0
	Criminal	3,078				
Area Courts	Civil	11,250	5,615	12,017	4,220	49.9
Totals		20,996	6,149	15,387	5,609	29.2

DIAGRAM C2 (II) Cases heard in 1981

Type of Court	Type of Case	Registered Cases	Family Cases	Disposed Cases	Pending Cases	% of Family Cases
S.C. of Appeal	Civil	831	618	778	145	66.95
	Probate	92				
High Court	Civil	172	11	602	96	1.58
	Criminal	150				
	Probate	209				
	Appeals	167				
M/trates Courts	Civil	518	0	2,407	224	0
	Criminal	2,113				
Area Courts	Civil	18,108	6,115	22,514	3,687	33.76
	Criminal	8,093				
Totals		30,453	6,744	26,301	4,152	22.14

DIAGRAM C2 (III) Cases heard in 1983

Type of Court	Type of Case	Registered Cases	Family Cases	Disposed Cases	Pending Cases	% of Fam. Cases
S.C. of Appeal	Civil	1222	907	1,257	66	68.55
	Probate	101				
High Courts	Civil	205	6	638	246	0.68
	Criminal	170				
	Probate	309				
	Appeals	200				
M/trates Courts	Civil	457	0	2,877	830	0
	Crim.	3,250				
Area Courts	Civil	23,115	10,200	27,775	3,349	44.1
	Crim.	8,009				
Totals		37,038	11,113	32,547	4,491	30.0

DIAGRAM C2 (V) Cases heard in 1986

Type of Court	Type of Case	Registered Cases	Family Cases	Disposed Cases	Pending Cases	% Fam. Cases
S.C. of Appeal	Civil	889	677	1,029	368	48.46
	Probate	508				
High Courts	Civil	352	8	587	365	0.84
	Crim.	190				
	Probate	207				
	Appeals	203				
M/trates Courts	Civil	396	0	2,260	487	0
	Crim.	2,351				
Area Courts	Civil	21,503	9,501	24,583	6,091	44.18
	Crim.	9,171				
Totals		35,770	10,186	28,459	7,311	28.47

DIAGRAM C2 (V)

Type of Court	Type of Case	Registered Cases	Family Cases	Disposed Cases	Pending Cases	% of Fam. Cases
S.C. of Appeal	Civil	697	507	845	243	46.60
	Probate	391				
High Courts	Civil	234	4	564	193	0.52
	Crim.	200				
	Probate	160				
	Appeals	163				
M/trates Courts	Civil	495	0	1,677	818	0
	Crim.	2,000				
Area Courts	Civil	26,808	10,504	24,631	12,240	28.48
	Crim.	10,063				
Totals		41,211	11,015	27,717	13,494	26.72

Cases heard in Borno from 1979 to 1986

Source: Borno High Court Records Office

Key

S.C. = Sharia Court

Fam. = Family

M/trates = Magistrates

Crim. = Criminal

As can be seen from Diagram C2 (i) to Diagram C2 V the total number of cases registered and disposed off in the courts in Borno State from 1977 to 1986 showed a marked degree of unequal distribution between the lower and upper courts. The lower courts hear more cases than the higher courts because of their relative accessibility and availability. While there were less than seven High courts in the State, and all located in the State Capital, there were lower courts established throughout the Local government areas of the State. Moreover litigation in the Higher courts was and still is more expensive than in the lower courts. For instance in 1977 it cost, on average, 500 Naira just to file a case in the High court and that did not include lawyers' fees. While in the lower courts it cost 10 Naira and there are, in most cases in the Area courts, no lawyers.

The distribution of family cases between the courts also showed that most family cases were heard by the Area courts. This is also due to the fact that the higher courts have jurisdiction in general law cases only while the lower courts have jurisdiction in customary and Islamic cases as well. There is also a tendency for those married under the general law to go to the lower courts or to the traditional institutions for the settlement of their family disputes instead of going to the High courts as it is required by statute.

Social Welfare Cases

The role of the Social Welfare Department in family dispute settlement does not fall under the ambit of the "judiciary", and therefore cases handled by the Social Welfare Offices in Borno have not been included here. However, in the next Chapter and subsequent Chapters, the role of the Social Welfare Officers in family dispute settlement are examined along with the cases from the courts.

Summary

The development of the Nigerian law on family breakdown since 1960 can be summarised as being characterized by the efforts at abandoning the English law in relation to general law marriages, to the efforts at preserving and reforming the traditional customary laws and courts. But the efforts, particularly as evidenced by the enactment of the Matrimonial Causes Act, seem to have resulted in the copying of more foreign ideas on matrimonial causes. This may be explained either by the desire to achieve "modernisation", or laziness, through the minimum of costs and therefore the copying of ideas from developed nations rather than the formulation of a Nigerian law based on its cultural and family system. The consequences of this, as will soon be revealed in the following Chapters, is the existence of a multitude of rules on family breakdown and its consequences. A person married under the general law may face different consequences when his marriage breaks down from someone married under customary or Islamic law. And this is despite the Constitutional prohibition of discrimination of any kind in the country.

The rules in the Matrimonial Causes Act, 1970, on no fault divorce were adopted from outside Nigeria even though the traditional customary law in Nigeria has always recognised the concept. As a result one may find that divorce of persons married under the general law is still being conducted out of court in accordance with the traditional customs of the parties. And in Borno State, the general law marriage, though still widely contracted in the Christian areas of the State, does not seem to generate the volume of cases that one might expect it to do. The cases that came before the High courts between 1977 to 1986 on family disputes were either brought by expatriates living in the State or by Nigerians from other parts of the country. This means that those married under the general law in Borno prefer to settle their family disputes in accordance with customary law. The next Chapter will perhaps confirm or refute this when the process and institutions of family dispute settlement in the State are examined.

CHAPTER FOUR

Family Dispute Settlement in Nigeria

Having examined the development of the courts, that is the state institutions of dispute settlement, in the previous Chapter, we now examine their operation in practice as well as the operation of the non-state institutions for dispute settlement.

Theoretical Perspectives

Recent academic discussions on family dispute settlement, particularly as it operates in the West, seem to have laid more emphasis on the effectiveness or otherwise of the processes of mediation and conciliation, and the role of the state, through the social welfare system, in catering for the victims of family breakdown (Glendon:1977; Murch:1980; Brown: 1980; Hogget and Pearl:1983(1), 1983(2); Davis: 1983; Eekelaar (1): 1984, (2) 1984).In Third World countries like Nigeria, where social welfare does not exist, or if it exists, it does not fully function, the discussion on family dispute settlement needs to be centred on the question of how disputes are settled within the framework of legal pluralism, underdevelopment, and cultural and social differences between the various ethnic groups. Such discussions seems to have been dominated, particularly as regards Africa in general, by Anthropologists (Bohannan:1967; Gluckman:1967,1969; Kuper:1965; Salamone:1983; Snyder:1981; Roberts:1983; and Von Benda-Beckman:1983). Academic legal writings on the family in Nigeria on the other hand seems to have totally ignored the

role and importance of non-state institutions of family dispute settlement, and has concentrated, instead, on the formal state law as administered by the state institutions of judicial dispute settlement (Salacuse:1965; Obi:1966; Nwogugu:1971; Anyebe:1985; Allott:1960,1970; and Adesanya:1973).

An examination would, perhaps, help one to gain a better understanding of the actual workings of the family as well as the social and legal frameworks within which the family exists in the country. One may also gain an insight into the importance or otherwise of having different systems of formal and informal laws.

Anthropological literature on dispute settlement in the Third World seems to have been concerned with the normative factors that determine the choice of a particular institution for the settlement of a dispute, as well as the actual dispute management process. Thus Gluckman:1955; Abel:1973,1979; and Black:1976, all indicated that these normative factors include the nature of the relationship of the disputants to each other; the relationship of the disputants to the institutions of dispute settlement; the intentions of the disputants; and the social, political and economic status of the disputants. The proposition has been that disputants who are related to each other through marriage and by blood, such as in cross-cousin marriages, or parties that have been married for a long time and have many children, tend to take their disputes to the customary institutions of dispute settlement rather than to the state institutions. While parties that are not so

closely related tend to take their disputes to the state institutions for settlement. This latter view is expressed by both Gluckman and Abel. To this central proposition one may add the religion of the parties. This is particularly so for communities that are still religiously conscious such as the Muslim Emirates of the Northern States of Nigeria. The ethnic factor, that is the adherence to one's tribal norms, may also be of vital importance because rules that apply in one community may not be applied in another community. Other variations to this central proposition include the actual strength of the disputants (Rothenberger:1978); the subject matter of the dispute (Collier:1973; Starr:1978; and Nader:1978); and the degree to which inter-individual disputes are transformed into inter-group disputes (Rothenberger:1978; and Von Benda-Beckman:1981)

In Nigeria and in Borno State in particular, the degree to which religious belief of the disputants, as well as extended family pressure, may have on the disputants choice of institution for the settlement of their family dispute, may also be of significance. The extent of the influence of the formal state law on the choice of the institution of family dispute settlement as well as the relative effectiveness of the various institutions in settling disputes may also determine the relative popularity of the different institutions. For disputes form the eternal heart and core of law. Yet it could be said that disputes are about areas of periphery rather than law. It is when two people are in dispute, especially a dispute that has not been settled, that the law shows its societal value (Llewellyn:1962). Disputes

seem to be taken to court only when other non-state institutions of dispute settlement have failed to resolve them.

In Nigeria in general, although there is no statistical evidence to substantiate this, family disputes seem to be settled more in the non-state institutions than in the state institutions. This can be deduced from the fact that the majority of the population, about 75 per cent, are illiterate rural dwellers who have no easy access to the state institutions of dispute settlement which are mostly based in the urban areas.[1] Argument, wrangling, and self assertion seem to be the main mode of dispute settlement in the non-state institutions. In both the state and non state institutions, the dominance of men over women, which is still a feature of the rural communities in Nigeria, is manifest by the fact that men are invariably in charge and their decisions invariably tend to mirror this dominance. Bargaining, compromise, and mediation also appear to be a feature of dispute settlement in the non-state institutions as well as in the state institutions but not to the same extent. The state institutions are manned by third parties, judges and lawyers,

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1 The proportion of the urban population to the rural population in Nigeria from 1963 to 1972 are as follows:

1963	1968	1969	1970	1971	1972
R : U	R : U	R : U	R : U	R : U	R : U
80:19	78:21	78:21	77 :22	77: 22	76: 23

These figures were projected from the 1963 population census which has so far been the only accepted census returns for the country since Independence. For further details, see, Olayide, S, and Francis Idachaba (eds.) 1981, *Elements of Rural Economics* Ibadan University Press, p.11

who are remote from the disputants and therefore have no personal interest in the outcome of such disputes unlike family members of the disputants, for instance.

It seems that family disputes are taken to relatives and friends by the disputants for mediation in the first place due either to economic constraints (i.e. they cannot afford to take the matter to court) or socio-cultural constraints (that is the need to conform to the community's mode of family dispute settlement). Furthermore, solution of disputes by friends, neighbours, or family members, may be more acceptable to the disputants due to the need to respect one's elders, than the decision of courts which appear to be imposed (under the threat of punitive sanction for refusal to adhere to the decision). Moreover, court adjudication in family disputes may inevitably lead to a solution whereby one of the disputants is labelled as a "winner" and the other a "loser". Such labelling may often lead to more conflict between the parties particularly in cases where there is a need for a post-divorce settlement of property or rights to the custody of children. The characteristics of the state institutions of dispute settlement may account for such institutions' comparative unpopularity in the field of family dispute settlement in Nigeria.

As we have stated in the previous Chapter, the formal law institutions of family dispute settlement in Nigeria are broadly divided into two categories: the Federal courts which deal with general law matrimonial causes, and the traditional customary courts which deal with customary family disputes.

The latter group may also be sub-divided into the Islamic courts which deal specifically with Islamic family matters and the traditional courts which deal with non-Islamic customary law. However in the Northern States, particularly in the field of family law, Islamic principles seem to have been intermingled with the traditional law (Salamone:1983,33-34). To these institutions may be added the Social Welfare Offices, the Police, the Ward and Village heads, who are state institutions but have no power to enforce their decisions on family disputes. They are there to facilitate reconciliation or mediation, but without the power of enforcement. They also act as intermediaries between the customary institutions of family dispute settlement such as neighbours, friends, family heads, and the Waliyyi,2 and the state institutions-the courts. Often the Police and the Social Welfare Officers refer family dispute cases to the courts on their own accord so as to protect the interests of one of the parties or the welfare of the children. See Diagram C3 below for more details.

One aspect of family dispute settlement which can also be seen from Diagram C3, and which is equally applicable to all the Northern States of Nigeria, is the fact that the non-state institutions of dispute settlement do not stand in a hierarchy in relation to each other. Disputants may, and often do, take

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2 "Waliyyi" as used here means the person invested with the legal right, under Islamic law, to exercise the powers of a marriage guardian over an unmarried young woman. Such persons normally include the Father, Father's brother, Bride's brother, Son of the bride (in case of women that have been married before) and Grandfather of the bride. In the Northern States of Nigeria it is often the Waliyyi that the woman runs to for the settlement of any dispute that she might have with her husband.

their disputes to the institution of their choice. It is when the dispute comes to the state institutions of dispute settlement that the hierarchical order of the institutions has to be followed. This may also have a direct bearing on the expensive nature of the state institutions where the higher the dispute goes up in the hierarchy the more it costs the disputants. The non-state institutions on the other hand, operate as a free service to the community. The personnel of the state and non-state institutions are totally separate and do not come together in the process of family dispute settlement.

Women in family dispute settlement

Although the general position of women in the family in Nigeria is examined in Chapter five, it is pertinent to mention here some aspects of the way women's position in terms of men affects their role in the family dispute settlement process.

Women are still largely subject to male control in the contracting and dissolution of marriages in the Northern States. Families are headed by men, and it is the family head that determines when and whom a woman should marry. All the non-state institutions of family dispute settlement are presided over by men. The state institutions too are overwhelmingly staffed by men.[3] This means that women may be put at a disadvantage in the settlement of family disputes in

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[3] In Borno State for instance in 1986, out of a total number of 198 Judges in the State's judiciary, only 4 (2 High court Judges and 2 Magistrates) were women. And significantly, non of the four were Muslim women.

both types of institutions. Even if the dispute remains between the husband and the wife within the home, the woman may still be at a disadvantage due to the generally accepted belief that the man is, and must always be, the head of the family, and whatever he says, within reason, must be obeyed by the woman. The extended family heads of the husband and wife, whenever they come together for the settlement of a dispute involving their children, may be more inclined to listen to the views of the husband than the views of the wife, especially if the bride-price has to be refunded after the divorce. In this situation it would not be surprising to find that women prefer to take their disputes to more neutral and sympathetic institutions, such as the state courts and the social welfare offices. This has been borne out by research done on the topic from different societies (Harrell-Bond:1975; Mitchell:1981; and Rwezaura:1982), as well as by myself (Chapters 5,6,7, and 8). Here suffice it to state the fact that female subordination in the family in Nigeria is linked to or is determined by, the ideological leaning of the personnel of the institutions and the religious beliefs (particularly Muslims) of the disputants and the mediators.

Customary and Islamic religious norms combine to restrict the freedom of the woman to seek redress against her husband. If a woman insists on her rights she is more likely to be divorced unilaterally and forced to refund the bride-price, and may end up not being married again because men would be unwilling to marry a woman that is known to be a "trouble maker". A man has the right to chastise his wife, keep her in purdah, and generally control her life, but the wife has no

such corresponding rights to control her husband. In return for her dutiful obedience, the man has the duty to maintain her by feeding, housing, and clothing her. If she transgress, she may forfeit all her rights to maintenance and could even end up being divorced. And since most wives seem to be dependent on their husbands for all their needs, divorce may mean a severe change in a woman's economic position. Consequently a woman may be forced to accept, during mediation, conditions which she would otherwise not accept if her economic position was different.

Since men dominate the institutions of family dispute settlement, it may also mean that their decisions on any family dispute would closely mirror " society's" views on the role of women in the family. Theoretically, all personnel of state institution of family dispute settlement must be neutral but the actual practice may not reflect this idealistic view. Even in the Social Welfare Offices where their mediation appear to be neutral, the fact that their efforts are geared towards the restoration of harmony in the family by ensuring that parties adhere to their responsibilities to each other and to their children, means that they are in fact in favour of the continuation of the status quo where women are oppressed in the family. Women's responsibilities are essentially seen to be mothering, that is child-centred. Under this view, women must at all times remain at home to bear and look after children. Any woman that disrupts this set up is unlikely to have the support or the sympathy of the male-dominated institutions of family dispute settlement. For example in the state institutions in Borno State, especially

the Area courts, women disputants do not sit in open court but sit in cubicles where only the judge can easily see them; they are required to be properly dressed, and to adopt the demeanour of submissiveness by not speaking until spoken to, not raising their voices in anger and not being arrogant. Though these rules may be linked to the general Islamic requirement for the behaviour of women in public, nevertheless they serve to reinforce the superiority of men over women.

1. General law family dispute settlement

As stated in the previous Chapter, marriage under the Marriage Act, 1914, is monogamous and all matrimonial causes thereto have to be heard by the High court. The general law on family dispute settlement, just as the law on marriage itself, reflects the Christian and Western European values on the family upon which the original legislation, the Marriage Ordinance, 1884, was based. Consequently man and wife are considered to be equal in terms of the entitlement to the rights and obligations of marriage, especially when the marriage breaks down. Despite the clear distinction between the general law and traditional customary law on marriage and family dispute settlement procedure, Nigerians married under the Act have a tendency to combine the two types of marriages.[4] Even where the marriages are not combined the traditional customary practices for the formation and dissolution of marriage are still made to apply to the general

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[4] See Toyin Muyi's article on the current state of the practice of polygamy in Nigeria, entitled,"Polygamy: for better for worse". Guardian Newspaper, Nigeria, February 28, 1988.

law marriage. Thus the payment of bride-price, which is a feature of customary marriage, has been made part of the requirements for the marriage under the Act even though the statute does not provide for the payment of bride-price for such marriages (Anyebe:1985,71-79; Nwogugu:1974,49-52; 1980,118).

Bride-price seems to have the effect of ensuring that the woman stays with her husband even if she is unhappy because of the onus of having to refund the amount on divorce. If the bride-price was to be paid by instalments, then until the amount has been fully paid, then, as among the Guduf of Gwoza, any children of the marriage belong to the wife. This does not seem to be applicable to Nigeria alone, for similar findings had been made for some communities in East Africa (Rwezaura:1982). All these have no formal legal validity in the formation and dissolution of general law marriages in Nigeria.

The Marriage Act enhances further the control of the nuclear family over its members by providing that where either party to the marriage, not being a widow or widower, is under the age of twenty-one, he or she must obtain the written consent of his or her father. Similar provisions exists in the Western industrialized nations except that the age is 18 years instead of 21 years. Since the promulgation of the Federal Constitution of Nigeria in 1979, the age of majority has similarly been reduced from twenty-one to eighteen years. In any case the consent of the parents is made so vital that in the absence of the father, the mother may give the written

consent. And in the absence of both parents, either the guardian or the State governor may give the written consent.[5] Thus the statute ensures through this provision that the customary requirement for the payment of bride-price is indirectly adhered to. For the person giving the consent to the intended marriage would obviously ensure that all the customary rules are adhered to first before consenting to the marriage.

As we have seen in the case of Cole v. Cole, any Nigerian that marries under the general law loses all links, theoretically, with his traditional customary rules on marriage and divorce.[6] He is subsequently bound by statutory rules, derived from the English Common law, on divorce, maintenance, custody of children, inheritance, and property rights vis-a-vis his fellow spouse. He cannot marry again while the general law marriage subsists; he cannot unilaterally terminate his marriage like his counterpart under customary or Islamic law can; and he cannot opt out of the incidents of the general law marriage.

As stated in Chapter two, prior to the enactment of the Matrimonial Causes Act in 1970, the law governing matrimonial causes in Nigeria was the same as the law in England. Parties seeking divorce had to prove a matrimonial offence against the other, and they must not have connived in the commission of the offence nor condoned it. The restrictions placed on the availability of divorce prior to the general reforms that took

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5 Per section 18 of the Marriage Act, 1914.

6 [1898] 1 NLR 15; see also Fonseca v. Passman [1958] WRLR 41

place in the sixties and seventies reflected the underlying principle of the general law, which is based on Christian ideology, that marriage was more than a contract and was a solemn union entered into for life.7 Therefore divorce was not to be granted save in exceptional circumstances.

On the face of it the Matrimonial Causes Act seem to provide for the irretrievable breakdown of marriage as the sole ground for divorce. But before irretrievable breakdown can be held to have been established, at least one of certain elements (which are the old grounds for divorce contained in the pre-1970 statutes, such as adultery, desertion, cruelty etc.) were to be proved first. The elements in themselves did not constitute the breakdown but the symptoms of it. The dominant criterion under the breakdown principle is the degree to which the marriage ceases to be a relationship which is worth maintaining. The onus of declaring a marriage to have broken down irretrievably is placed on the High Court but subject to the petitioner satisfying the court that one or all of the elements that used to form the grounds for divorce has been established.[8] But despite the wide-ranging power given to the court it was also recognised that family breakdown may have social and economic consequences not only on the parties but also on their children. Therefore it is provided under section 57 of the Act that the court should not make a final order for the dissolution of the marriage unless it is satisfied that proper arrangements have been made for the

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7 The Bible states that a husband and wife, " they twain shall be one flesh"; see Genesis 2:24; Mathew 19:5; and Mark 10:8

8 See section 15 (2) of the Matrimonial Causes Act, 1970.

welfare, advancement and education of the children. The combined effect of sections 15 and 57 of the Act is not only to place great emphasis on the need for wisdom and understanding of the court in such matters but also to clearly identify breakdown of marriage as entailing a combination of complex legal, social and economic consequences which cannot be taken lightly.

A major assumption of the Nigerian legislature in adopting most of the principles embodied in the Matrimonial Causes Act from abroad was that they would function smoothly in Nigeria. Even in the Western nations where similar laws exist, problems abound as to their implementation. And in Nigeria, bearing in mind the importance of the influence of the extended family in all aspects of family life, the result is a general disregard for the provisions of the Act on divorce. But before we find out why this is so, particularly in Borno State, we shall first examine the process of reconciliation and its role in the settlement of general law family disputes.

Reconciliation

The concept of the irretrievable breakdown of marriage pre-supposes that all the avenues for reconciling the parties must have been pursued and exhausted without success. For if parties to marital dispute can be reconciled and are in fact reconciled, then the marriage cannot truly be held to have broken down irretrievably. Parties to a general law family dispute in Nigeria do not have to submit themselves to any institution for reconciliation if they do not want to be

reconciled. For the decisions of such institutions, apart from the court appointed ones, do not have legal authority to enforce their solutions to the disputes.

Although the debate in England on reconciliation was closely followed in Nigeria, there had always been an effective indigenous system of effecting reconciliation and that is the family council. Unlike in England where court reconciliation may be the only attempt to reconcile the parties, in Nigeria court cases and the attendant reconciliation procedure constitute the last ditch effort at finding a solution to the family dispute. Family disputes are taken to the family heads, Ward head, or even neighbours first before being brought to court. This is because the views of family members carry more weight than the views of a judge who is regarded as an outsider. As Nwogugu said of marriages in Nigeria"

"...Marriage involves a split level relationship between the parties and between their families. The families are, therefore, involved in the formation, subsistence and dissolution of the marriage. In case of matrimonial dispute... the families are involved in the peace efforts aimed at saving the marriage. These normally take the form of family pressures regardless of whether or not the parties are still willing to live together as husband and wife."[9]

The basic nature of reconciliation in family disputes in Nigeria was known not only to the legislature that enacted the Matrimonial Causes Act, but also to the Judges and Lawyers who implement it, and yet the English law provisions on

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9 See Nwogugu, E.I. 1980, " Formal marriage law and its underlying assumptions in Nigeria", in: John Eekelaar and Sanford Katz (eds.), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change*. Butterworth Toronto, p.117

reconciliation were copied into the Matrimonial Causes Act, 1970, without due regard being had as to its suitability to the Nigeria. Reconciliation, as provided for under the English law, came into being after the parties have gone to court and tabled their grievances against each other before the court. At such a stage, it is doubtful whether parties may be amenable to genuine efforts at reconciliation. This problem was identified and commented upon by the *Finer Report* thus:

" The prospects of reconciliation are much more favourable in the early stages of marital disharmony than in the later stages. At that stage both parties are likely to be willing to co-operate in an effort to save the marriage; but if the conflict has become so chronic that one or both of the parties has lost the power or desire to co-operate further, the prospects sharply diminish. By the time the conflict reaches a hearing in the divorce court, the prospects are as a rule very small."[10]

The provisions on reconciliation emphasises court ordered reconciliation. It is provided under sections 11 to 14 of the Act that if at any time during the proceedings before a court it appears to the judge, either from the nature of the case and the evidence presented in the proceedings, or from the attitude of the parties to the case, that there is a reasonable possibility of reconciliation, he may adjourn the proceedings for the purpose of reconciliation. The judge himself may interview the parties in his chambers or appoint a person of experience or training in marriage conciliation to try and reconcile the parties. Once the court has been adjourned for the purposes of reconciliation, such attempts at reconciliation must be completed within fourteen days from the date of the adjournment. If the reconciliation efforts fails,

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10 See the Finer Report (Report of the Committee on One-Parent Families) 1974, 4.298

either of the parties may request the judge to resume the case or that another judge should take over.

The requirement that it is up to the judge to decide whether to adjourn a case for reconciliation does not seem to be realistic bearing in mind the way that the Nigerian courts operate. Overcrowding in the courts make it particularly difficult, if not impossible, for any High Court judge to seriously consider adjourning a case for the purpose of reconciliation (Okany:84). Moreover, the consent of the parties to the case must be obtained first otherwise the refusal of one or both of the parties would frustrate the effort. Again there is the possibility that after two weeks of attempts at reconciliation, nothing will come of it thereby further wasting the court's precious time and adding to the financial costs of the parties. Marriage conciliators have never been established by the state as a separate professional body in Nigeria, and therefore to ask a court to appoint a person of "experience" or "training" in marriage conciliation to try and reconcile the parties is an exercise in futility (Adesanya:73). The only state institution that comes anywhere near the description of "Marriage Conciliator" is the Social Welfare Offices of all the States of the Federation. But the main functions of these offices is to deal with the social problems, such as juvenile delinquency, abandoned children, and destitutes, which are commonly found in the ever growing urban areas. They function as family dispute settlers when members of families choose to go to them rather than being sent by courts of law for the purpose of reconciliation.

Conciliation

Conciliation, as opposed to reconciliation, is also of vital importance in the process of general law family dispute settlement. But unlike reconciliation, conciliation (as will be revealed in Chapters 5-8) is of more relevance in statutory marriages in Nigeria than it is under traditional Customary law or Islamic law marriages. Conciliation is the process of assisting parties who have been divorced or are about to be divorced, to deal with the consequences of that divorce by encouraging them to reach agreements on such often contentious issues as the custody, support and education of children; financial provision for either spouse; the disposition of the matrimonial home; and any other issue that might have arisen from the breakdown of the marriage.[11] Conciliation differs from reconciliation in that the latter is concerned with bringing the parties back together , while the former is concerned with assisting parties in coming to an amicable settlement of issues which are the consequences of breakdown.

Hitherto in Nigeria, disputes, concerning children of persons married under the general law, were settled by the decision of a judge of the High Court. Each parent put forward his or her case, together with evidence from friends and neighbours or from extended family members, and then the judge made his decision. But now under the provision of section 72 of the Matrimonial Causes Act, the court may order that the parties themselves come to an agreement on any matter at issue

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11 See Burgoyne,J; Ormrod R; and Martin Richards, 1987, *Divorce Matters*. Penguin Books, pp.176-8

before the trial. If they still fail to settle the matter, the court can either order a settlement or order the parties to appear before an independent conciliator appointed by the court. The conciliator's role is not to judge between the conflicting claims of the parties but to suggest areas of common ground and compromise that may be acceptable to both parties as well as to provide an extra, and independent, forum for informal family dispute settlement which is free from family pressure that may often accompany conciliation by extended family members.

Conciliation is of more relevance in general law marriages than in customary or Islamic marriages because in the latter there is seldom dispute about ancillary matters. Rights to the custody of children as well as to property under customary and Islamic law marriages are generally settled before the marriage comes to an end. Moreover under both systems of law, once a marriage has ended then the parties are free of each other and free of any maintenance claims against each other.

The Matrimonial Causes Rules, 1983, provide for a compulsory conference to be held in any defended matrimonial dispute where the question of maintenance, settlement of property, custody or guardianship of children of the marriage are to be settled. The conference is meant to be one at which the petitioner and respondent discuss, in the presence of their lawyers, and make a <u>bona fide</u> effort to agree on any of

the matters that need to be resolved.[12] However the Rules recognise the fact that often the parties do not want to face each other again after the matter has gone as far as the court. So a provision has also been made for either party to opt out of attending the conference and to have his or her lawyer attend instead. Evidence of anything said or admission made in the course of the conference is not admissible in any court proceedings in Nigeria.[13]

When an agreement is reached during the conciliation conference, it is reported back to the court for its approval. In other words the statutory provisions on reconciliation and conciliation in Nigeria, for general law marriages, have now recognised the value of the informal procedure for family dispute settlement which has always been the feature of customary family dispute settlement. That is why the need for a court appointed neutral conciliator has been stressed in the Matrimonial Causes Rules in place of the Matrimonial Causes Act's emphasis of reconciliation being at the discretion of the trial judge. But still all these rules have to function within the Nigerian society which emphasises family solidarity. Disputes tend to go to court only when the larger family has failed to resolve such disputes.

2. Customary family dispute settlement

The family still forms the central and most cohesive unit of most African societies. Everyone belongs to a kinship or

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12 Order XI Rules 33 to 37 of the Matrimonial Causes Rules, 1983

13 Order XI Rule 35(2), Ibid.

family group which gives him the right to draw on the resources of the group for support,(when in need) both moral and economic (Allot 1968:131-157). Being a member of a traditional family group also entails the responsibility of observing the underlying rules or behaviour of the group and contributing to the overall needs of the members of the group. This need for family cohesiveness and support may be affected by modern economic and social developments within a given state. In Nigeria, although such economic and social developments have taken place since Independence and are still taking place, the extended family system seems to have survived. The continued existence of legal pluralism, particularly in the field of family law, is an illustration of the importance of the traditional family system which is unique to each community.[14] Family co-operation and solidarity cuts across the ethnic and religious divide. In fact many families have members that belong to different religions and yet their religious differences do not seem to hinder the traditional requirement for co-operation. This is of vital importance for one to bear in mind throughout the discussion on family breakdown and its consequences.

As stated earlier, customary family disputes in Nigeria may be settled by various institutions. Parties may take their

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14 See Ann Seidman and Robert Seidman, "The Political economy of Customary law in the former British territories of Africa"; J.A.L. Vol. 28, Nos. 1 & 2 of 1984, pp.44-55; Von Benda-Beckman, F. " Law out of context: a comment on the creation of traditional law discussion" J.A.L. (1984) Vol. 28 Nos. 1 & 2, pp. 28-43; and Galanter, M. " Justice in many rooms" (1981) Journal of Legal Pluralism, 19. See also " Illusion of the Tribes" Hotline, December 27, 1987 to January 10 1988, pp. 9-13.

disputes straight to court for settlement without having approached any of the non-state institutions of dispute settlement. Alternatively, a dispute may be taken to the non-state institutions first before being taken to the state institutions. In most cases however, it seems that family disputes are made known to the persons or institutions that are close at hand such as the neighbour and the friend, as well as the family member, or to a mediator (who in most cases is the person through whom the marriage negotiations were conducted) (Anyebe 1985, 61-62). The dispute is normally made known to the outside World by the wife leaving her matrimonial home and returning to her parents' home, or to a close family member's home. Her abandonment of the matrimonial home without good cause (i.e. without her husband's consent) would indicate to the person with whom she had sought refuge that all is not well with the marriage. She would then be asked to explain why she had run away from her husband. Conversely, and this seems to be a modern practice that is widely used in the Northern States by Muslims and non-Muslims alike, a man may issue his wife with a "divorce note" in which he would state that he had divorced her or that she had offended him in some way and should take the note back home to her parents. The husband may or may not state the reasons for his action in the divorce note. But even if reasons are stated in the divorce note, still efforts will be made by the families of the two parties, either through their respective family heads or through any other person chosen by the two families to try and find a solution to the dispute. It is only when efforts at settling the dispute have failed that the next step in the divorce

process would be undertaken. This normally involves the refund of the bride-price and the removal of the wife's personal belongings from the matrimonial home. If the family members succeed in reconciling the parties, then the wife is returned to her husband's home (normally with a stern warning from her parents to behave herself in future even if she was not to blame for the dispute in the first place) (Yusuf:76).

Women, unlike men, have no right to unilaterally terminate their marriages out of court under customary law in Borno. They are required by society to remain in their matrimonial homes and try to make the marriage work. But if matters become unbearable for married women in their matrimonial homes, and their extended family members are not supportive, customary courts are the only venues for them to go and seek relief. However, for a dependent housewife, with no independent means of her own, going to court to settle a dispute with her husband is a rather daunting prospect. But generally women prefer not to go to court because of the expense involved and the likelihood of upsetting family members. This may be particularly so for the rural dwellers who are more likely to be influenced by the traditional norms of family life than their urban counterparts.

The actual procedure for the settlement of family disputes before the family council or any other non-state institution may involve the parties themselves or their representatives putting their case forward. Solutions are then offered by the mediator and the parties are then expected, due normally to the respect of elders, to conform with it. There

are no coercive powers for the non-state institutions and therefore the parties are free to follow the decision of the mediator or to refuse to follow it. In practice, a party that does not agree with the solution proffered by the mediator would either ignore it altogether or would then proceed to the state institutions for adjudication. In whichever forum the dispute is settled, the underlying basis of the settlement is still the same, and that is the overriding interest of the extended family to protect the welfare of its members.

3. Islamic Family Dispute Settlement.

Marriage is recommended for all Muslims as a means of legitimate procreation and satisfaction of the sexual desire. Celibacy, even for ascetic reasons, is strongly discouraged. There is no exception between Muslim spiritual leaders (Ulema), ordinary men and women, and even Holy Prophets, in the call for all to marry and establish a family. The Qur'an and the Hadith of the Prophet state that when a Muslim marries he perfects half of his religion and should be God-fearing in respect of the other half.[15] But even though marriage is compulsory for Muslims it is only made so for those that are capable of meeting the responsibilities involved. But in Islam, poverty in itself is not a barrier to marriage; for Allah, the Supreme Creator, has undertaken to provide for all His creations.[16]

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[15] See Qur'an 4:29; 13:38; 24:32-33.

[16] Qur'an 4:29; 11:8; 24:32-33

Islam also recognises the fact that marriage has to come to an end at some stage and therefore provides rules for such an eventuality. But at the same time Islam does not approve of unqualified liberalization of divorce. For it may lead to peril for family members and chaos within the community. An outright prohibition of divorce on the other hand is recognised by Islam to be an untenable ideal and would be contrary to the Islamic ideology itself which prescribes only what is humanly possible.[17] The marriage contract in Islam is neither a civil act nor a sacramental vow, rather, it is a fusion of both. Its dissolution is therefore admissible; it is not unrestricted like some civil liberties, and it is not indissoluble like some sacramental vows (Abdl Ati 1982:220).

Divorce in Islam is prescribed under certain circumstances, and is meant to be implemented so that the end result reflects Islamic principles. Under certain conditions, such as where there is no possibility of the parties being reconciled, or the continuance of a peaceful family life, divorce is recommended. It is also recommended if the wife has been found to have been unfaithful to her husband, or has consistently been unmindful of her religious duties. It is also undesirable to resort to divorce where there is no good reason for it; for such an action may lead to the disturbance of the peaceful co-existence of members of the Muslim community-the "Ummah". And all Muslims are forbidden from undertaking any action that may bring harm or disharmony within the Muslim community. But even if a justifiable reason

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[17] Qur'an 2:233, 286

for it has been found, divorce is still regarded as one of the most serious things (though permitted) that a Muslim can undertake and therefore no Muslim should take divorce lightly.[18]

The rules on divorce in Islam therefore are part and parcel of the Islamic faith, and are implemented so as to ensure the continuation of happy family life. Parties to a marriage are enjoined to live together in peace and harmony otherwise they should part in such a manner that the disruptive and acrimonious aspects of family breakdown are minimised or avoided altogether. As a result, third parties, such as lawyers, are forbidden from interfering and capitalizing on the situation. Third parties can only come in as peace makers whose sole aim should be to reconcile the parties. The moral, religious and social consequences of family breakdown by divorce are emphasised by the Holy Qur'an so that no true Muslim can contemplate divorce lightly.[19]

Islam seem to recognise (in terms of repudiation by talaq) only one ground for divorce and that is the irretrievable breakdown of the marriage (Ruxton:1914, 121-130; Abdl Ati:82,217-250; Risalah, Chapter 32). This is supported by the fact that reconciliation plays a major part in the procedure for divorce. It is only when attempts to reconcile the parties have failed that divorce is effected. The process

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18 The Holy Prophet (S.A.W.) was reported to have said that Divorce is the most repugnant, in the sight of Allah, of all things. See Ibn. Qudamah, Vol. 7 pp.296-7; Roberts, pp.18-19; Siddiqui p.81; and Abu Zahrah, pp.70-71.

19 Qur'a 2:227-228; 4:19-21

of talaq, the unilateral repudiation of the wife by the husband is designed to facilitate reconciliation of the parties. A husband would issue one talaq to his wife and she would then have to observe an iddah (a waiting period of three months, or the duration of a pregnancy if the wife was pregnant) and if the parties are not reconciled during the waiting period, then the divorce becomes final and irrevocable. If a man divorces his wife three times, then the marriage comes to an end and the parties cannot be reconciled. In Nigeria however, as will be revealed in subsequent Chapters, men often triply divorce their wives at one instance (a practice known in Islam as talaq al-bid'a or customary repudiation) which is not recommended because it does not offer the chance for reconciliation. Women have no right under the formal Islamic law to repudiate their husbands by the process of talaq. Women have to go to court to seek a divorce based on a ground such as lack of maintenance. Alternatively the parties may effect a khuli divorce where the wife would make a financial offer to her husband in return for his agreement to release her from the marriage. Once the parties have come to an agreement, the marriage is irrevocably terminated.

However one must make the point here that there is a great deal of difference between the Islamic rules as contained in the legal manuals and the law as applied in the community, particularly out of court. Traditional customary influences on divorce may affect the way that Muslims apply the rules on divorce. For instance, the rule that the dowry must not be refunded upon divorce is seldom observed in

divorce cases that do not come to court, and the khuli which is not supposed to be based on the amount of dowry paid is often set by the husband so as to reflect not only the dowry but all the expenses that he might have incurred on the woman during the marriage. Unless the local customary practices are blatantly contrary to the Islamic principles on divorce, they are allowed to continue because Islam is a way of life that does not function in total isolation of the local environment (Anderson 1957, 86-88; 1960, 433-442; 1965)

In the practice of family dispute settlement therefore, the Islamic rules seem to have been diluted with customary practices. For instance the issuing of talaq has become a matter purely at the discretion of the husband who may, and often does, use it without any due regard being had of the checks and balances, such as for instance, the fact that the husband must not repudiate his wife during her menstrual period, nor when he had just had sexual intercourse with her. He may not remarry his wife who has been irrevocably divorced without her having remarried someone else and been irrevocably divorced (Salamone:83). The practice in the Northern States of Nigeria however, especially in cases where the marriage breakdown was effected out of court, is for the parties to remarry at any time after the divorce even if the iddah had been completed. After parties had been properly reconciled within the rules of the Sharia, the marriage is still intact and therefore there is no need for them to re-enter into a fresh contract of marriage. But again in Nigeria, if parties are reconciled before the expiration of the iddah, new contracts of marriage are entered into. Again under the

Sharia, a divorced woman is required to remain in her matrimonial home until the completion of her iddah. During the iddah period, she is to be maintained by her husband just as if there was no repudiation. This is to facilitate easy reconciliation between the parties. But here too the customary practice whereby a divorced woman is either thrown out of her matrimonial home or ordered to return to her parents seems to have taken over the Islamic rules, and divorced Muslim women in the Northern States seldom remain in their matrimonial homes after divorce.

As in the case of traditional customary family dispute settlement, Islamic family dispute settlement in Borno and the other Northern States is normally initiated by the parties themselves, either through their respective marriage guardians or through their family heads. After the issuing of the talaq, the wife may then return home to her parents, contrary to the Islamic rules, for the completion of her iddah period. Alternatively the wife herself may run back home to her parents following a quarrel with her husband. Her parents may then initiate the reconciliation process or the husband himself may send an emissary after his wife to try and bring her back. The latter process is known as "biko" in Hausa and it means to follow a runaway wife and try to bring her back to her husband. If the husband does not want her back then he would not make a "biko" and so the next step in the process of the termination of the marriage, such as the collection of her property from the husband's home, may then be undertaken.

A woman that has a grievance against her husband, and does not want to return home to her parents or does not want to terminate the marriage, may go to the local Sharia courts, the Area courts, and seek a solution to the problem from the courts. If a man fails to meet his marital obligations, the courts normally give him a period of grace of one year within which to comply; and if he still fails to meet his obligation to his wife, the courts have the power to order him to release his wife using the khuli method.

We shall now examine the actual practice of general law family dispute settlement using examples from decided cases and the response to the interview conducted in Borno State.

For the result of the interview,see Diagram C3

DIAGRAM C3

Showing the interview response to

Questions on Family dispute settlement

from Borno State. Figures are numbers, not percentages

Q.9 Was bride-price paid for the marriage?

Area	M/duguri		Biu		Gwoza	
Options	Yes	No	Yes	No	Yes	No
Gen.Law	30	2	36	4	16	0
Cus.Law	28	0	20	0	60	0
Isl.Law	40	0	40	0	24	0

Q.10 If yes, how much was paid as bride-price?

Options	N1-100			N101-500			N501-1,000			> N1,000		
Area	M	B	Gz	M	B	Gz	M	B	Gz	M	B	Gz
Gen.Law	2	2	3	10	6	6	12	8	5	6	20	2
Cus.Law	4	2	10	10	2	30	10	4	12	4	12	8
Isl.Law	2	2	0	4	3	2	18	5	20	16	30	2

Key: N= Naira, M= Maiduguri, B= Biu, Gz= Gwoza

>= More than

Q.25. Were there attempts to reconcile you before the divorce

Area	M/duguri		Biu		Gwoza	
Options	Yes	No	Yes	No	Yes	No
Gen. Law	28	4	36	4	16	0
Cus. Law	28	0	20	0	20	0
Isl. Law	40	0	40	0	24	0

Q.26 If yes, who conducted the reconciliation attempt?

Area	M/duguri				Biu				Gwoza			
Options	F	N	C	S.W	F	N	C	S.W	F	N	C	S.W
Gen.Law	12	2	6	8	20	0	6	10	10	0	4	2
Cus.Law	20	4	0	4	10	2	4	4	44	8	4	4
Isl.Law	20	8	8	4	25	5	5	5	20	4	0	0

Key: F= Family, N= Neighbour, C= Court, S.W= Social Welfare

Q.27. Did you refund or receive a refund of the bride-price?

Area	M/duguri		Biu		Gwoza	
Options	Yes	No	Yes	No	Yes	No
Gen. Law	20	12	30	6	16	0
Cus. Law	28	0	16	4	50	10
Isl. Law	36	4	40	0	24	0

Q.28 (a). If yes, how much did you refund or receive and why?

Area	M/duguri				Biu				Gwoza			
Opt.	.25	.50	.75	All	.25	.50	.75	All	.25	.50	.75	All
G.L.	0	3	2	15	0	10	4	16	0	5	5	6
C.L	4	6	2	16	0	4	2	10	0	14	26	10
I.L.	0	8	4	24	0	5	2	33	5	5	10	14

Q.28(b) Reasons

Area	M/duguri				Biu				Gwoza			
Opt.	W	D/M	B/C	C/S	W	D/M	B/C	C/S	W	D/M	B/C	C/S
G.L.	12	0	3	17	0	0	4	26	0	0	10	6
C.L.	0	12	6	10	0	2	4	10	6	6	30	8
I.L.	4	4	8	20	0	2	5	33	0	5	15	0

Key: W= Waiver, D/M= Duration of Marriage, B/C= Birth of Child C/S= Conduct of Spouse, G.L.= General Law, C.L.= Customary Law I.L.= Islamic Law.

Analysis of the interview findings on family dispute settlement

The result of the questionnaire/interview from all areas shows that bride-price is essential for marriage.

Since the bride-price has to be refunded on divorce, and payment of and refund of bride-price is not sanctioned by the general law, it follows that this may be one of the factors why most married persons in Borno State seem to prefer to terminate their general law marriages out of court. Refund of bride-price thus seems to be the main issue rather than divorce itself.

As regards the actual institutions of family dispute settlement that the respondents used in Borno, Family members seem to be the most popular institution. Eighty seven per cent of the respondents indicated that they had gone through reconciliation attempts before the divorce. Forty two per cent of the latter group indicated that their family members had tried to reconcile them. Social Welfare officers and court officials were the next most popular venues for the reconciliation attempts, with 27 and 21 per cent respectively. Seven per cent went through reconciliation attempt by neighbours and friends.

A striking feature of the response on reconciliation is that most had gone to non-state institutions for the

settlement of their disputes. The reason for this may lie in the comparatively easy access that family disputants have to the non-state institutions compared with state institutions. The High Courts, are expensive and located in Maiduguri and therefore disputants may have to travel long distances to avail themselves of the services of the courts. Moreover family pressure may be put on the disputants to go to a family council for the settlement of the dispute rather than to a court. Thus the theoretical perspective that the choice of venue for dispute settlement may be determined by the inter-family relationship of the parties seems to have support from the response from Borno.

One may draw a tentative conclusion from the figures on reconciliation from Borno State that it is rare, (only 12.5 per cent in Maiduguri, 11.11 in Biu , and 0 per cent from Gwoza), for matrimonial disputes to be taken straight to the courts without having been referred to the non-state institutions for dispute settlement first. Most of the family disputes that came to court or were eventually taken to court,(71 per cent in Maiduguri, 75 per cent in Gwoza, and 83 per cent in Biu) were taken to non-state institutions for settlement first. Therefore the general law provisions on reconciliation, as contained in the Matrimonial Causes Act, 1970, have been based on the wrong assumption that such disputes come to court without having exhausted avenues for reconciliation.

Most of the disputants that go to the Social Welfare offices in Maiduguri seem to be people from other States of

the Federation, particularly from the Southern States. This may be due to the awareness of such persons of the existence of the Social Welfare Offices, or that such persons might have lost contact with their extended family which might otherwise have settled their dispute. So the next best thing would be for them to go to an independent and inexpensive institution to settle their dispute. It is submitted that as the Nigerian population continues to grow and as more and more rural dwellers move into the urban areas in search of a better life, so the importance of the Social Welfare Offices will become greater. This has been observed in the case of Papua New Guinea and Sierra Leone (Luluaki;1984; Harrel-Bond,1975). For Nigeria the following cases, illustrate this point:

In Abala v. Abala (ASWO/FCW/231/78), the parties were married under customary law in the Village of Malamfatori, which is sixty Kilometres away from Maiduguri. They then came to live in Maiduguri town. After six years of married life without an issue, the parties quarrelled and so the husband ordered his wife to go back to her parents in their Village. The wife refused to go and, instead, she went to her senior brother's house. Her brother tried to reconcile them but without success. So her husband went to the Social Welfare Office and asked them to make his wife go back to her parents and to refund his bride-price. His wife accused him of beating her. Eventually the Social Welfare Officials reconciled the parties.

Similarly, in Oluwasegun v. Aduke ASWO/FCW/255/78, the parties were from Oyo State in the Southern part of the

country. The husband complained to the Social Welfare Office that ever since he married his wife, he had no peace of mind because she is troublesome, hot-tempered and liked to fight him and her co-wives. He took her back home to her parents so that they may instil discipline into her, but to no avail. So he went to a customary court in Oyo State to divorce her but she refused to appear in court. Eventually they were reconciled by their families and they came back to Maiduguri. Now, He claimed that she has started her bad behaviour again. He therefore wanted the Social Welfare Office to help him send her back home. But the Social Welfare Office said that since the matter has been to court, and was still before the court in Oyo, there was nothing they could do.

Both these cases illustrate the point that irrespective of the type of marriage involved, once there is a dispute, parties tend to go to their relatives first before going to court or to the Social Welfare Offices, especially if they are living in the urban areas. For in the urban areas, unless the other extended family members happen to be close at hand parties have no alternative than to go to the courts or to the social welfare offices for the settlement of their disputes.

The main institutions for family dispute settlement are summarised below. As has been indicated already there is no necessary hierarchy of process.

1.Party Settlement

Here the family dispute may be settled by the parties themselves without any outside intervention. This may, depending on the type of marriage and the local customary law, take the form of unilateral repudiation by the husband using talaq, or it may involve the payment of khulli by the wife, if the parties are Muslims. Alternatively the wife may simply leave the matrimonial home and return to her parents, or to live with another man. In this case, there follows either the process of divorce or reconciliation.

2.Family Mediation

If the parties fail to resolve their dispute by themselves, the wife may return to her parents home on her own accord or be sent back home by her husband. In either case the parents of the wife may then inform the husband and his family head of the need for a settlement. Conversely, when the wife runs back home to her parents without her husband's consent, the husband may then send for her to return, but before she returns, the families of the two parties and the Marriage guardians may call upon them to iron out their differences before the family council.

3.Community Mediation

Members of the community of the parties such as neighbours, friends, and age-mates, may sometimes intervene when family efforts at settlement of the dispute fails. Sometimes a prominent member of the community who has no official state function, such as the local religious leader, a

Priest (for Christians) or a Mallam (for Muslims) may invoke religious beliefs of the parties and appeal to them to resume married life.

4.Informal State Mediation

If all the previous steps for family dispute settlement fail, the parties may seek outside help. Here the institutions are state institutions but have no power of enforcing their decisions. There services are advisory and available to anyone that needs them. The institutions include the Ward or Village Head of the parties, the Police, and the Social Welfare Officials. The parties can of course go straight to these institutions when there is a dispute.

5.State Adjudication

The state institutions - the courts, are resorted to when all other institutions have failed, or the parties have no wish to take their dispute to any other institution for settlement. The fact that these institutions have the power to enforce their findings may also serve as a reason for parties to go there.

Summary

A striking feature of the mode of family dispute settlement in Borno and other Northern States is the prominence of the non-state institutions such as the Family, Neighbours and Friends, Ward Heads and Marriage Guardians as opposed to the state institutions such as the Social Welfare Offices and the Courts. The latter institutions seem to be

regarded as venues of last resort and parties tend to go to them when they have failed to resolve their dispute in the non-state institutions. The nature of the family dispute, i.e. whether it is a serious dispute that can only be resolved by divorce, or a minor misunderstanding, seems also to have a bearing on the choice of institution for its settlement. Serious disputes seem to be taken straight to the courts, while those with a possibility of settlement are taken to the family members, marriage guardians or neighbours and friends first. The nature of the family (whether customary or general law) and the relationship between the parties (whether there is mutual love and respect) seems also to have an effect on the choice of the institution. Parties that have no more love for each other and are determined to terminate the marriage tend either to effect the divorce themselves (either by the wife running away or being ordered out by her husband with or without a divorce note) or to go straight to the courts.

Islamic and customary marriages seem to generate more cases before the non-state institutions than the general law marriages even though a substantial number of those married under the general law seem to prefer the non-state institutions. This may perhaps be explained by the fact that the extended family system, which still plays far more active role in the formation and dissolution of customary marriages, is still very much in use for all marriages but particularly for customary ones. But at the same time, parties that generally marry under the general law are more educated, economically better off, and more aware of the legal implications of the general law marriage and therefore would

be more inclined to go to the state institutions. than their counterparts under customary or Islamic marriages. Such persons may also be more alienated from the customary institutions.

Due to the influence of family members on one another (particularly the influence of men over women in the family), it appears that solutions to family disputes that were found by family members may carry more weight, and therefore much more likely to be followed, than those of the state institutions. Formal state law on the choice of institutions for the settlement of family disputes may also have an indirect effect on the choice of those institutions by the disputants. For instance, the provision of the Matrimonial Causes Act, 1970, to the effect that all general law family disputes must be taken to the High Court for settlement, can only be adhered to by those that are aware of it and are in a position, financially, to take a case to the High Court. From the response to the interview, it seems that a large number of those married under the general law are not even aware of this provision.

Although customary and Islamic marriages may also be settled in court, there are no corresponding legislation like the Matrimonial Causes Act, to compel parties to settle their disputes in the courts. As a result, state and non-state institutions of family dispute settlement operate side by side. The non-state institutions operate as alternatives to each other rather than in a hierarchical order. Disputants may resort to all the institutions, whether state or non-state,

during the course of the dispute before it is finally settled. The hierarchical structure of the state institutions too may influence a disputant; for it would mean that if he or she is not satisfied with the decision of one court, he or she can proceed to the next one in the hierarchy.

The differences in the procedures and the costs of dispute settlement between the state and non-state institutions may be a crucial factor. As stated earlier, all non-state institutions operate free of charge while the state institutions, with the exception of the Social Welfare Offices, cost money for the disputants.[20] The efforts of the non-state institutions seem to be geared towards reconciling the parties, while in the state institutions, due to the adversarial nature of the system, efforts seem to be geared towards the apportioning of blame and the ruling based on such blame.

Another feature of the result from Borno was that even those married under the general law preferred the non-state institutions for the settlement of their family disputes. Out of the total number of 300 persons interviewed, 88 (29 per cent) were married under the general law. Only twenty seven per cent of this number went to the High court, a state institution, for the settlement of their family dispute. The remaining 73 per cent went to a non-state institution despite the existence of the statutory provision that the matrimonial causes of such marriages must be heard in court. A comparative

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20 Dispute settlement before the non-state institutions is free

examination of the figures for those that were married under customary and Islamic law shows that out of the 212 persons interviewed, only 8 (3.7 per cent) went only to a state institution for the settlement of their dispute, while the remaining 204 (96.3 per cent) went to non-state institutions only.

The need for the payment of bride-price for marriage and its refund on divorce seem to be the cause for the continued influence of the family in the settlement of disputes of its members. The absence of a general social security system to cater for deserted wives and children in Nigeria may also have a direct bearing on why women still have to return home to their parents and rely on family members for support in any dispute with their husbands. This also makes it difficult for women to reject any solution to a dispute that their family members may have made.

CHAPTER FIVE

The Position of Women in the Family

Introduction

The general position of women in the family and in society is of vital importance in determining the effect or consequences of family breakdown, particularly as it affects women's rights. The relationship of power that exists within the family means that women, in any given community in Nigeria are not only responsible for looking after the home but also for supplementing the income of the household by engaging in wage labour or in subsistence farming or petty trading. Women also provide the moral support and the conducive family atmosphere for their menfolk to go out and work. Yet women have in general been subordinate to men. Men, through their natural physical strength, and dominant position in society, had, over the years, excluded women in most economic, social and political activities. In the Western industrialized nations of today, women's rights have been given legal recognition. But the implementation of the laws in practice is a different matter altogether. In the Third World Countries like Nigeria however, the position of women differs considerably from area to area. For instance, Western educated women seemed to be more "liberated" in that they have more freedom to go out and work than their illiterate counterparts. Moreover, in the predominantly Muslim areas of the Northern States of Nigeria, such as Borno, there is a conflict between the Western educated Muslim women who are calling for more freedom for women within the family and in all walks of life

and the traditionalists who consider Western education as sinful, especially for women. Women are still subjected, consciously or otherwise, to discriminatory practices in varying fields of family relationship. They lack the freedom to enter into marriages of their own choice; they are still forced to bear the practice of polygamy ; they have only restricted rights to custody; they are denied the right to education, especially in the Muslim areas; they have no security of family life since they can still be summarily divorced by their husbands in most parts of the country. All these areas of female subordination seem to have their origins in the traditional customary practice of the people as well as the economic needs of the people. And in the Northern States, religious belief also has an effect on the position of women. The problems that women in Nigeria may face after divorce may be interlinked with their position in the family and the society as a whole.

This Chapter therefore examines the implications of female subordination to men for the consequences of family breakdown. In this regard, the effect of patriarchal relationship within the family, on women in general is examined before looking at the specific case of Nigeria. Here, the position of women in the customary, Islamic and general law is examined. Finally the position of women in Borno is examined under the sub-heads of prostitution, land tenure, and forced marriages, using case studies from the courts,the social welfare offices, and personal interviews from various areas of the State. The Chapter emphasises the point that despite Constitutional, religious, and other statutory

provisions recognising women's rights within the family, traditional attitudes, combined with the relative economic weakness of women as a whole, has effectively neutralised any positive benefit that women may have gained from the formal law.

Nigerian Woman's Position in Society

Discussions (e.g. Amucheazi,1980; Nwapa, 1981; Imam, 1985; Jinadu, 1985; and Akpan, 1988) on the position of women in the family or in the society in Nigeria as a whole tend to concentrate on three postulates. First that the Nigerian woman's position is based on a naturally ordained division of labour based on gender which ensures that the woman's position is confined to the home. Secondly, that women's position in the family and society as a whole is based on a systematic and universal practice of male dominance. Thirdly, that women's position is based on class structure which automatically places women into the position of second class citizens. All these postulates may be valid to a certain extent, but none can claim to be the sole reason or answer to the problem of women's subordination to men in the family and society as a whole.

The problems of women in the Third World are not synonymous with those of women in the Western industrialized nations. Although elite women in Nigeria and elsewhere in the Third World may be in need of liberation from gender stereotyped roles, male chauvinism, and patriarchal dominance, the majority of women are in need of liberation from the social and economic systems which exploits them. Many of the

issues raised by Western women liberation movements are of little relevance or concern to the majority of illiterate, rural-based women who constitute 70 per cent of the female population.[1] Most of these women are involved in subsistence agriculture with their family members. They must either work with their husbands on the farm, trade in the market place, or if they are confined to their matrimonial home, engage in petty trading and craft work in order to supplement the income of the family. Their main concern is not whether their husbands stay out late, but whether their harvests are going to be bountiful or not, whether they can afford to dispense with their children's labour while they are at School, and so on. In addition to these concerns which affect both men and women in Nigeria, there are certain problems which affect women only. These include insecurity in marriage due to polygamy; the power of men to divorce their wives unilaterally; the social pressure on women to be mothers; the lack of inheritance rights; and the double burden of being housewives and farmers or traders at the same time.

In the urban centers of Nigeria too, women, particularly the majority who either work in factories or in petty trading

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1 For a discussion of the feminist issues involved in the subordination of women in general, see: O'Donovan (1985), *Sexual Divisions in the Law*. (Weidenfeld and Nicolson. London); Engels, F. *The Origins of the Family Private Property and the State*.(International Publishers, New York, 1975); Firestone, S. (1970), *The Dialectic of Sex*. (Bantam Books, New York); Delphy, C. (1977), *The Main Enemy*. (Women's Research and Resources Centre Publication, London); Valerie Amos and Pratibha Parma, "Challenging Imperial Feminism", Feminist Review, No.17, July 1984; Michele Barrett and Mary McIntosh, "Ethnocentrism and Socialist Feminist Theory", Feminist Review, No.20, June 1985; and Smart, C. 1989, *Feminism and the Power of the Law* (Routledge, London and New York)

as "market women", similar problems confront them daily. Many women live alone, bearing the economic and emotional consequences of family breakdown, such as how to earn a living, pay the rent, and rear children, by themselves. The extended family support that may be available to a divorced woman in the rural areas may not be available to a woman in the urban areas. This makes the problem doubly difficult for women, especially since there are no state-provided social welfare systems in Nigeria. One consequence of this, as will be revealed later, is the resort to prostitution as a means of earning a living.[2]

These three main frameworks of examining the position of women in society are each affected by some short comings. The first posits an isomorphism between biology and social behaviour as the explanation for female subordination which may not and does not seem to exist. The second is over-general and more ahistorical with little or no relevance to the continued oppression of women in the family and society as a whole. The final category too has its short comings, in that it fails to encompass all the specificities of female subordination and their attendant ramifications for the family and society as a whole. Therefore an analysis of the continued subordination of women in the family must account for gender hierarchies, class relations, cultural and religious influences as well as the economic reasons that lie behind such oppression. The role of the formal law in perpetuation of

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2 Foucault argues that sexual liberation of women is an illusion based on the misconception of the power relationship within the family. See Foucault, M. (1979), *The history of sexuality* Vol. 1 (London: Allen Lane)

the situation as well as in trying to bring about equality between males and females must also be examined.

Nigerian women and Patriarchal relations

Patriarchal relationship within a family is characterized by the dominance of the father or the Paterfamilias over all other members of the family particularly the female members. The dominance is supported by laws which differentiate between the sexes within the family, such as rules on primogeniture in inheritance, and on the ownership of property.[3] Primogeniture makes the eldest male child of the paterfamilias the heir to the title and property of the paterfamilias. Younger sons are lower in rank to the first born son, but are above female children within the family. Thus patriarchy reflects the hierarchical structure of male dominance over women in the family. And in Nigeria, the practice seems to be the dominant one despite the existence of formal laws to the contrary. An exception to this seems to be the traditional Yoruba customary law of inheritance where all children are treated equally irrespective of age or sex. But even here, it is only the first born male child that can succeed to the title of the paterfamilias - the head of the family (known as the "dawodu").

Most Nigerian women, as in the case of women in Medieval England, seem to accept patriarchy as the natural order of things and therefore tend to resign themselves to the inferior

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[3] See O'Donovan, K. op. cit. p.22; and Smart, C. (1984), *The ties that bind Law, Marriage and the reproduction of patriarchal relations.* (Routledge and Kegan Paul)

position that they occupy within the family. The few educated NIGERIAN women that consider the situation tend to argue that the position of women in the society can only be improved by the enactment of formal state laws specifically for the benefit of women.[4] Their arguments tend to ignore the fact that NIGERIAN women unlike their Western counterparts, have always had economic, social and political opportunities within the social system long before the advent of Colonialism. This is evidenced by the existence of Queens and female business tycoons throughout the country before the advent of British rule. And the majority of women could also engage in such economic activities such as farming and trading without any hindrance from their menfolk. Women also had the right to own property. Problems arose when interpersonal relations such as marriage had broken down; then the male dominance manifested itself in the denial of women's rights to their property or to inheritance. Patriarchal relations then combine to keep women down and to deny them their rights.[5] But patriarchal relations have not prevented Muslim women in the Northern States, particularly those that are confined to their matrimonial homes under the system of purdah or "kulle", from overcoming some of their problems through such economic activities as petty trading. The only hindrance seems to be that such activities have to be conducted through agents or emissaries,

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4 See Imam, A. "Women's liberation: myth or reality?" Sunday Tribune, May 25, 1985, pp.5-11; Odugbemi, T. "Women's rights: anything like it? The Concord, April 4, 1988, p.7; and Akpan, P. "What hope for today's woman?" The Punch, March, 8, 1988, p.5

5 See Sudarkasa, N. " Where women work: A study of Yoruba women in the market place and the home" (University of Michigan, !973, Anthropological paper No. 53)

and women must obtain their husbands' permission first before embarking on such activities. Rural women are seldom kept in purdah and therefore do farm work as well as their domestic duties.

It is within the family that Nigerian women face male dominance far more than in any other field of activity. At birth, a girl is under the total control of her father who may have a say in whether or not she attends school, and if so, whether she completes her education or not; her father would decide, in the majority of cases, whom she may marry and whether bride-price may be paid for the wedding or not; and when a woman is married, she falls under the total control of her husband and his male relations who, by custom, expect certain behaviour from her. She cannot transgress from the traditional norms of behaviour towards her husband and his relations without risking summary divorce.

On the breakdown of marriage by the death of the husband, a married woman under most Nigerian customary laws has no right to inherit her husband's property nor to remain in occupation of the matrimonial home with no strings attached. Even in cases of Islamic and general law marriages where formal laws exists for the protection of the woman's rights in such circumstances, customary practices may, and are often applied by the relations of the deceased to deny the woman her rights. It is only when a woman takes the matter to court that her rights might be given to her. But even here, especially in the customary courts which are enjoined to apply the

traditional customary laws of the parties or of the area, the outcome of the case may be against the interests of the woman.

The right to terminate a marriage unilaterally under customary or Islamic law is only available for the man; and even in the case of those married under the general law, one may find that the influence of traditional custom is so pervasive that a woman may be divorced unilaterally out of court. On divorce a woman may be thrown out of the matrimonial home even if she contribute in its acquisition. She may, if her husband had died, be required to remarry someone from within her deceased husband's family otherwise she may lose the right to remain in the matrimonial home altogether. A married woman may be forced to share the attention of her husband with one or more co-wives under the system of polygamy which is still a feature of marriage in Nigeria.

Nigerian men too seem to contribute to the continued subordination of women in the family. Married men seem to trust their own mothers and sisters far more than they trust their own wives, and this has the effect of making married women feel like strangers in their own matrimonial homes.[6] Generally men do not do any house work. The division of labour between men and women within the home is instilled into men and women at an early age. Therefore if a married man or a young man were to engage in house work, or work that is generally considered to be women's work, he would invariably face ridicule and disgrace not only among his male peer group

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6 See Nwapa, F. (1981), *One is enough.* (Tana Press, Enugu, Nigeria)

but also, surprisingly, from the women as well. A woman that dares to behave, or put herself about as equal to men may even face worse consequences. She may be labelled as a loose woman, a mad woman, a woman that must not be married by any man that values his dignity. In short, she may be ostracized by the community. In this regard, modern Western educated women in Nigeria are increasingly finding themselves in the dilemma of being educationally equal or better than the men on the one hand but culturally and socially expected to remain or behave inferior to men. Thus most men would prefer to marry illiterate or semi-literate rural women than to marry the "ACADA" women (the academic women) who would not be easy to control.[7] Educated women that go out to work may also be faced with the problem of keeping a home and maintaining a job. In other words, to most Nigerian men the traditional male chauvinist belief that women's place is in the home still applies irrespective of the women's educational and economic circumstance.

The gradual dispersal of the traditional family support system, particularly in the urban areas, has made the position of married women much more difficult. For it means that the married woman's duties of looking after the home and the children have to be carried out without the help of near relations. Modern developments such as education, easy mobility and urbanisation has made close family ties and

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[7] This seems to be the reason why most parents in the Northern States tend to remove their daughters from School at an early age for marriage purposes. For they consider that the higher that a girl goes in the educational ladder, the more difficult it may become for her to be married.

dependence less and less effective. The rural woman's position seems to be even worse than her urban counterpart. In the rural areas, women still have to bear the brunt of their traditional roles such as cooking, rearing children, fetching water and firewood as well as engaging in subsistence agriculture or petty trading. Most of the modern amenities that urban women take for granted, such as pipe-borne water, electricity, Hospitals etc. are seldom available to the rural women. The rural woman is not only deprived of these modern amenities but is still confined in the patriarchal social set up that limits her functions to being a wife and mother. Her only consolation is that the extended family support system is still there to meet her needs when her marriages breaks down.

Polygyny and general societal attitudes also seem to put pressure on women to have many children. Thus there may be competition between co-wives to have more and more children. Therefore many polygamous households have a lot of children and these children may not be adequately maintained, and may be forced to accompany their parents to the farms or hawk fruits and other economic items for sale. In such a situation, it is not surprising to find that young girls are married off at an early age so that their bride-price may help their parents. Such forced marriages often end in divorce and the parents may then be required to refund the bride-price. Parental pressure may therefore be put on the girls to remain in an unhappy marriage rather than get a divorce. The alternative for such women, especially in the urban areas, is to escape from the unhappy marriage by going into prostitution.

Formal laws do exist in Nigeria against forced marriages and for the protection of women's rights in general.[8] The problem however seem to be lack of enforcement. This is because the laws were made by the "enlightened" few who seem to believe that the enactment of laws alone would bring about female emancipation in Nigeria. The laws themselves do not seem to have addressed the real areas of female oppression in the society. Thus there are no laws banning the practice of primogeniture in inheritance; there are no laws against polygamy; there are no laws against the unilateral repudiation of wives by their husbands; and the few laws that exist against domestic violence and forced marriages are seldom, if ever, implemented. The consequences that women face in such a situation, following divorce, may be directly linked to their treatment by the chauvinistic and patriarchal nature of the society.

The few womens' organisations in the country seem to emphasis the political aspects of female subordination in the society by stating that Nigerian women would be liberated if only they were given equal employment and political appointments in government.[9] To them there cannot be dignity and sharing of power with men without the sharing of responsibility in all walks of life, including the domestic

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8 See for instance, the Criminal Code Act, (Cap. 42 Laws of the Federation of Nigeria, 1958) sections 218, 221, 222, which forbid the defilement of girls under 13, and the indecent treatment of girls under 16 respectively.

9 See Obafemi, O. "The Strides of Women", Punch, March 25, 1988; and the views of the various women's societies as expressed in the African Guardian, "Women Up in Arms" March 7 1988 at pp. 18-20

sphere. Women can only claim equality with men within marriage if they are willing to share in the financial and decision-making burdens of marriage. But they seem to ignore the fact that the majority of women would still continue to be emotionally and financially dependent on men. Other social and religious influences seem to be at work as well. For instance, under Islam, the burden of maintaining the wife and children is placed squarely on the husband even if the wife happens to be better off than the husband. Thus total liberation of women, as canvassed by women's liberation movements in Nigeria, through the redistribution of economic and political duties within and outside the home, would never meet total approval from the women themselves. For the women in Nigeria are divided on ideological, ethnic, and religious lines.[10]

Women in the Islamic Family

In the pre-Islamic societies of Arabia, women's position in the family and in society as a whole was nothing more than sexual objects. Women were subjects of ownership which could be transferred to other men by sale or inheritance. The wealthier a man was the more wives he would have. Women had no right to own property and in the rare occasions that they did come across property, men always found ways to deprive them of

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10 Among the various women's organisations in Nigeria are: (WIN) Women in Nigeria; (NCWS) National Council of Women's Societies; (MWS) Media Women's Society; (AUW) Association of University Women; (MWS) Market Women and Muslim Women Society etc.

the property. In short, women were at the mercy of their menfolk.[11]

One of the most criticised and misunderstood aspect of Islamic marriage is the practice of polygamy. This has been seen by feminists and unbelievers alike as chauvinist and degrading to women. It has even led to the practice being banned or restricted in some Muslim countries.[12] The whole controversy seem to have stemmed from a misunderstanding of the Qur'anic injunction on polygamy. For the Qur'an states:

"And if you fear that you will not act justly towards the orphans, marry such women as seem good to you, two, three, four; but if you fear that you will not be equitable, then only one, or what your right hand owns; so it is likelier that you will not be partial."[13]

But this passage on its own does not do justice to the Islamic provision on polygamy. It is therefore read in conjunction with the provision of Chapter 4 Verse 129 of the Qur'an which provides:

"You will not be able to be equitable between your wives, even so you be eager. Yet, do not be altogether partial so that you leave her [i.e the wife discriminated against] as it were suspended. If you set things right, and are God fearing, God is All-forgiving, All-compassionate."

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11 See Abdl Ati, H. (1982) *The Family Structure in Islam.* (Islamic Publications Bureau, Lagos, Nigeria) pp. 1-19

12 See for instance, the Jordanian Law of Family rights, 1951; The Iranian Family Protection Act, 1967 (the Islamic revolution that took place under Imam Khomeini in 1979 restored Islamic law in the country. See Haleh Afshar," Women, State and Ideology in Iran" Third World Quarterly, Vol. 7 No. 2 (April 1985) pp.256-78); the Iraqi Law of Personal Status, 1959; the Tunisian Code of Personal Status, 1956; and the Moroccan Code of Personal Status, 1958, as discussed in David Pearl's, *A Textbook on Muslim Law* 1979, at pp. 69-75

13 Qur'an Cap. 4 v.3

The first passage is often interpreted by modern Islamic scholars and others who are against the practice of polygamy in general to mean that polygamy in Islam is lawful only if there is fear of injustice to the orphan Wards, and is forbidden if the husband is not sure or capable of treating his wives equally.[14] Therefore since equity is a prerequisite to the practice of polygamy, and since the second passage states that, in practice, no man would be able to achieve equity of love between his wives, it follows that polygamy in Islam, in the final analysis, is unlawful.

Among Muslims however, the interpretation of the two passages can be summarised into four basic points. First the practice has been provided for by the Qur'an itself, the sunnah or precedents of the Prophet and by the concensus of all the Muslim jurists. Secondly polygamy was introduced as a solution to the problem of widows during the various Holy wars. In a society that was still largely male dominated, a woman that had no man to cater for her would be in enormous hardship. Thirdly polygamy was prescribed for Muslims that could not treat their wives equally. Finally, the unattainable equity which the Qur'an refers to is the absolute equity which includes the husband's love and tangible treatment of his wives. It is the absolute equity that no man is capable of providing for all his wives. Therefore this does not mean that the Qur'an condones discriminatory treatment of wives, rather, the Qur'an only prescribes what is humanly possible.

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14 See for instance, Linton, R. (1936), The Study of Man. (D. Appleton Century, New York) pp.28-9; and Murdock, G.P. (1965), Social Structure. (The Free Press, New York), p.30.

And in this case it calls for equal treatment of wives in terms of equal companionship, provisions and all aspects of family life. Feelings, or love, may sometimes defy control (as is illustrated by marital quarrels and divorce) and therefore it would be futile for divine law to decree that a man's feelings for his wives must be equal. Even in the Western societies where marriage is based on love, such marriages breakdown due to a change in the feelings of the parties towards each other. The practice of polygamy in Islam is therefore a permissible act, and like all other lawful acts, in principle it only becomes forbidden if it involves unlawful (i.e. unIslamic) practices or leads to injustice within the family.

Sheikh Usman Dan Fodio, the Islamic Scholar, teacher and leader of the Fulani Jihad that conquered the Northern Kingdoms in the 19 th Century, except Borno, launched the Jihad specifically to purify Islam in the area. In his writings, he commented upon the deplorable treatment of women in the area prior to the Jihad thus:

"Most of our educated men leave their wives, their daughters and their captives morally abandoned, like beasts, without teaching them what God prescribed should be taught them. Thus, they leave them ignorant of the rules regarding ablutions, prayer, fasting, business dealings, and other duties which they have to fulfil, and which God commands that they should be taught."[15]

Though this passage refers to the situation nearly two hundred years ago the present position in the Northern States is not far from being the same. Men still keep their wives and daughters in total ignorance of most religious and worldly

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15 "Nur al- albab", by Sheikh Usman Dan Fodio, p. 15

matters. For instance it is still very common to find women that can recite some verses of the Qur'an but it is rare to find those that know the meaning of the verses. Again women may be made to believe that it is sinful to listen to the radio, to watch Television or even to wear a Watch. All these beliefs are encouraged by the menfolk as a means of keeping women under their total control in all aspects of family life. The practice was the same prior to the Jihad of Sheikh Usman Dan Fodio. For the Sheikh further said:

"Men treat these beings [women] like household implements which become broken after long use and which are then thrown out on the dung-heap. This is an abominable crime. How can they [men] thus shut up their wives, their daughters and their captives, in the darkness of ignorance, while daily they impart knowledge to their students?"[16]

This passage referred to men in general as well as to the Mallams, the religious teachers, who kept their wives and daughters in purdah and in ignorance.Even the practice of purdah itself was based on a misinterpretation of the Qur'anic injunction that women should dress decently and should not mix freely with men other than those they are related to or married to. Therefore the deprivation of the right to education and the freedom of movement is not Islamic at all but a means of perpetuating male dominance over women in the family and in society as whole. For if women are kept in the dark as to what their true roles are in the family and the society as a whole, then they cannot subsequently challenge their menfolk for disinheriting them or throwing them out of their matrimonial homes at divorce before the completion of their iddah periods.

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16 Ibid. p.19

Therefore in order to understand the need for women's liberation within the Nigerian family and society, the cultural and religious beliefs of the Muslims must be taken into account and respected. That is, the actual Islamic rules on the status of women in the family and in society as a whole, not the rules as interpreted by the Mallams, must be respected. The Western secular type of women's liberation movements which were once characterized by activities that were purely cosmetic in nature, such as bra-burning, the wearing of men's clothes are not suited to a male dominated Muslim community like the Northern States of Nigeria. Female liberation for Muslims must stick to the full implementation of the divinely ordained rights of women.

Women in the Traditional Customary Family.

The role of women in the traditional customary family in Nigeria varies from community to community due to the diversity of the customs. However, the general treatment of women is similar to that of the Muslim families in the North. That is, men dominate in the home and out of the home in all activities excepts ones that are specifically reserved for or considered to be for females only. There are still some remote communities such as the Hill Dwellers of Gwoza and the Koma people of Gongola State where traditional practices have hardly been touched by modern influences. While women are primarily responsible for bearing and rearing children as well as cooking and generally maintaining the home, men are the main providers and protectors of the home. Children are raised to conform with the normative rules of behaviour which

reinforces the dominant position of men. Girls remain with women so as to learn the duties of women in the home. Boys remain with the men so as to learn the duties of men. But it must be stated that the traditional family is so closely identified that both the Islamic family and the general law family may be considered to be traditional in their treatment of women.

The traditional family has undergone and is still undergoing enormous changes due to such factors as modern education, rural-urban migration, as well as the general modern Western ideas that emphasize equality for women both within the home and out of it. For instance since the promulgation of the Marriage Ordinance of 1884, women in Nigeria have been made aware of the existence of a formal law that equates their rights to those of men in the family. At the same time traditional customary law continues to deny them those rights. The outcome has been the existence of a superficial formal law on the relationship of men and women in the family which purports to guarantee equal rights to women but which is ignored in practice. This is because the formal laws were based on traditions and customs of the British.

Women in the general law Family.

The position of Nigerian women in the Western type nuclear family vis-a-vis their husbands, theoretically at least, is much better than their counterparts under Islamic and customary laws. For here the relationship of man and wife in all aspects of family life is governed by statutory provisions. In this regard, the right to property, custody of

children, and maintenance (which are examined in Chapters six, seven and eight respectively) are relevant. But since this is examined in the following Chapters, here we shall briefly examine therelationship of husband and wife in tort.

Prior to 1846, a husband could recover damages for injury caused to his wife by a third party but he could not recover any damages for the death of his wife due to the tort of a third party. In 1846, the Fatal Accidents Act was passed to rectify the situation, and under section 1 of the Act, action may be brought for the benefit of the members of immediate family of the deceased, which includes parents, children, widow or widows and widower of the deceased. The provision of the Act of 1846 together with the provision of the Fatal Accidents Act, 1864, have been adopted in Nigeria as statutes of general application and have since been re-enacted by all the States in the Federation so as to reflect the local conditions.[17] Both members of general and customary law marriages may benefit from the provisions of these Acts. The only slight difference is that in the case of those married under the general law, the action has to be brought by or in the name of, the executor or the administrator of the deceased's estate. But if the deceased was subject to customary law the court has to decide whether such a person is entitled, under the customary law to represent the deceased.

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17 See the Fatal Accidents Law, 1956, (Cap. 52 of the Laws of Eastern Nigeria) 1963; Fatal Accidents Law, 1956 (Cap. 43 Laws of Northern Nigeria), 1963; Torts Law, 1958 (Cap. 122 Laws of Western Nigeria) 1959. See also Jirigho v.Anamali [1958] WRNLR 195; Eguriase v. UAC [1959] WRNLR 72; Lawal v. Younan [1961] 1 All N.L.R 245; and Okafor v. Nnodi [1964] NMLR 132

In other words, customary rules, on the rights of husband and wife to inheritance and property ownership has to be taken into account before, for instance, a widow could be allowed to institute such action and to benefit from the award of damages.

These rules on the relationship of general law husband and wife in tort have to be understood from the underlying concept that man and wife in marriage have equal rights. But the woman is still comparatively lower in standing to her husband - that is why all the provisions are geared towards the removal of women's disabilities.

Women in the Household in Borno State

A household may be made up of a group of families, all related, living within the same compound but with different rooms or areas for the different families. Larger households are to be found in the urban areas such as Maiduguri, Bama, Biu, Potiskum etc. where the elite members of Borno society live. In such households, the compound may contain not only family members but others who may be renting some parts of the compound. This is due to the general shortage of accommodation in the urban areas.

Rural based households are becoming more fragmented in that most of their male members now prefer to move to the urban areas in search of jobs. Thus many young men in Borno State may have a traditional home based in the rural areas while they themselves live in the congested urban areas in more individualistic family homes or rented accommodation.

Contact between family members living in the urban and rural areas seem to depend on the degree of economic relationship that might still exist between the two. As for instance the production of farm produce by the rural family members and its subsequent sale in the urban areas by the urban-based family member. The degree of the need for support of old members of the rural family, who are invariably left behind, by the young urban-based family members also ensures that the two are in regular contact.

The division of labour within the household in Borno is based largely on the sex, age and the status of the family members within the household. Women are responsible for keeping the home as well as cultivating land that might have been allocated to them. In the urban areas, if the women are not confined to their homes under purdah, they may engage in petty trading. But surprisingly, the majority of women that responded to my Questionnaire, (80 per cent), had indicated that they were mere housewives and did not engage in any trading nor other economic activity out of the home. Young and unmarried girls are commonly found hawking fruits and other food items for sale in the urban areas. Such young girls may either be hawking the items for their mothers or, most likely, for themselves. For it is part of the tradition in Nigeria that girls utilise the proceeds of such trading for the purchase of their marital property. The hawking of the items by the girls also serve the purpose of indicating that the girls are free for marriage. But the practice is also fraught with danger. For often girls get pregnant and abandoned by their boyfriends and they have no option other than abortion

or the abandoning of the illegitimate child. Parents in the urban areas, unlike the traditional rural practice, are less likely to take the responsibility of raising an illegitimate grandchild.

The sphere of activity that is normally reserved for the men in Borno are large-scale farming, ranching, meat trade, religious teaching and traditional administration. These activities may be termed the traditional occupations which have been in use before Colonialism. However there are modern occupations such as modern administration, social work, teaching, nursing, and police work. Men also predominate in the Markets, Shops, Hospitals, Schools etc. And within the family, male dominance is reflected by the fact that most, if not all, family heads are men. The family head has the responsibility for the well-being of all members of his family. Thus he is responsible for purchasing the main staple food for the family such as Millet, Rice, Guinea Corn or Yams, while the women are responsible for purchasing (from the housekeeping allowance provided by the family head), the ingredients for making the traditional sauces. The washing and ironing of clothes, contrary to popular belief, is not done by the women but by professional Washermen at the expense of the family head.

The position of women in the family in Borno is therefore still one of total subordination to men, a status which is reflected in the consequences of marriage break down. Women's subordination to men shifts from paternal dominance to affinal dominance and back to paternal dominance after

divorce. Women are not expected to be independent of men, and any woman that tries to be independent may face ostracism. Thus most of the independent minded women tend to leave the rural based family for the large and impersonal urban areas where there is no parental power to force them into marriage. But the urban areas do not offer the support that the family and community do in times of individual need and so one may find women, who may have rebelled against the strictures of a male dominated society, resorting to prostitution in order to survive. The economic system of urban areas, where essential services cost money, makes it even more difficult for a single woman to cope without resorting to prostitution. The case studies from Maiduguri on this issue may serve as an illustration on the general thesis that the consequences of family breakdown on the family members are primarily determined by traditional, religious, legal, and economic norms of the community which effectively treat women as second class citizens. Consequently, women may suffer more as a result of the breakdown of their families than men. We shall now examine some case studies from Borno State on the position of women in the family in relation to forced marriage and prostitution.

Forced Marriages

As mentioned in Chapter two, it is an offence under section 361 of the Criminal Code for any person in Nigeria to force a girl to marry someone against her will. However, we have also seen that under customary and Islamic law , a father or a marriage guardian of a girl can contract her into her

first marriage with or without her consent. Thus the rules against forced marriages have to be interpreted in conjunction with the customary and Islamic rules. Most of the cases examined here were obtained from personal interviews and Social Welfare family cases.

In the case of Aishe Ahmad,[19], Aishe was a 23 year old housewife. She was married to one Ardo Ahmad in Maiduguri, but she claimed that she had never consented to the marriage. She blamed her parents for accepting expensive presents from Ahmad so that they could force her into the marriage. An exorbitant bride-price of 5,000 Naira was paid and she was forcibly taken to Ahmad's house. She kept on running back home to her parents' home in Bama town, but she was always forcibly taken back. So on 16 th June 1987, she left her matrimonial home but did not go back to her parents, instead she started to wander along the streets in Maiduguri. She was eventually found by her husband who tried to force her back home, and in the ensuing fracas, the police and the social welfare officers were called in to settle the matter.

Aishe's parents denied the allegation that she was forced into marriage. Ahmad refused to appear before the Social Welfare Officers but insisted on either his wife coming back to him or the refund of his bride-price. Her parents were not in a position to refund the bride-price, and Aishe could not, as a Muslim, go to court to seek a divorce because there was no ground for it. Eventually Aishe decided to return to her matrimonial home.

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19 Case No. A.S.W.O/FCW/625/87

This is a clear illustration of the types of problems faced by women in Borno and many of the Northern States. Aishe was dependent on her parents in the first place and then upon her husband. Her marriage (forced though it was) was at an end for all purposes but due to her economic dependence and the lack of the means to buy her freedom, she had to return to a forced and unhappy marriage. If she was educated and earning a salary, or engaged in some trade of her own, then no doubt she might have been able to refund the bride-price.

A similar case to the above was that of Zara Adamu, a 16 year old housewife.[20] Zara was the first born of her family. Her mother was divorced when Zara was three years old. Therefore her father sent her to her paternal grandmother who raised her and gave her into marriage to a 55 years old man, called Alhaji Danjuma. Zara was the third wife of Danjuma. Danjuma had eleven children, most of whom were older than Zara. Zara found it difficult to stay in the matrimonial home because of constant teasing by Danjuma's children. She complained to the Social Welfare office that she was forced to marry by her grandmother. Her grandmother confirmed that it was she who gave Zara into marriage, but insisted that it was with the consent of Zara. Zara refused to return to her husband and eventually her husband demanded the return of his bride-price of 1,000 Naira. Zara's father paid the amount on behalf of his daughter.[21]

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20 Case No. A.S.W.O./ FCW/627/87

21 See Zaid Al Qaira-wani, A.M.A. *El Risal* Chapter 32, pp.89-98. An interesting aspect of this case, apart from the forced marriage, was the fact that even though the parties

In the Sharia court case of Ya Cha Bukar and Ya Bintu v. Ali Walase, [22] Ya Cha Bukar and her mother, Ya Bintu, took Ya Cha's father, Ali Walase to court to restrain him from forcibly marrying her off to a man whom, they claimed, was a madman. The lower court found against them on the ground that the man was not a madman, and therefore under Islamic law, the father had the power of "ijbar" over Ya Cha and may contract her into marriage with any sane Muslim man. On appeal to the Upper area court, the lower court's decision was upheld and Ya Cha was ordered to comply with her father's decision, and Ya Bintu was ordered to desist from encouraging her daughter to disobey her father. A similar decision was reached in the earlier case of Hauwa Yusuf v. Mallam Sulaiman, [23] where a woman was forced to return to her husband despite her claim that she was forcibly contracted into marriage by her father.

Both of these cases are typical of the cases that come before the Area Courts in Borno State, and they illustrate further the struggle by women to assert themselves in the face of overwhelming social, religious and economic obstacles. The religious injunction that one must respect one's parents at all times means that girls seldom object to being forced into marriage.[24] But when women object to forced marriage they can

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were Muslims, the Islamic rules on marriage guardians were not implemented.

22 Case No. BUAC/CVA/48/85, Borno Upper Area Court (unreported)

23 Case No. SCA/CV/28/Bo/79, Sharia Court of Appeal, Borno State (unreported)

24 Borno is not the only State with the problem of forced marriage. All the Northern States have the problem as it was reported in the National Concord, 10 th April, 1988, at p.15, a 20 year old girl from Sokoto State, who had just

only do so in court or at the social welfare office. In the courts, the Islamic rules are often cited to justify the matter irrespective of the suffering that might be caused to the woman. The alternative for such women is to go back home to the parents who might have forced them into the marriage in the first place or to run away into prostitution in the urban areas. And in a society where women are still largely dependent on men, and social norms do not approve of single women to set up home on their own, the solutions to forced marriage are still far off.

Prostitution

In order to ascertain whether there is any link between the economic consequences of family breakdown on women and prostitution, as well as any other relevant factor responsible for the practice, 30 professional prostitutes were interviewed in Maiduguri town. The town was chosen for this exercise due to its cosmopolitan nature and easy access.[25] Twenty part-time prostitutes were also interviewed - making a total of 50 prostitutes altogether. The following are the findings from the interview.

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finished College, was forcibly contracted into marriage by her father to an 80 year old man!

25 The other major towns, such as Biu, Gwoza, Potiskum etc. are comparatively small and prostitutes (though they exist) are not easily identifiable for the purpose of the research.

Table One

Age	16-20	21-25	26-30	31-35	36-40	Above 40
Number	10	14	12	8	6	0

Distribution by age

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Table Two

Occupation	Trader	Student	Housewife	Unemployed
Number	8	6	4	2

Other Occupations of Part-time Prostitutes

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Table Three

Number of Divorces	0	1	2	3	4	5	> 5
Number of Prosts.	10	20	14	4	2	0	0

Number of Divorces experienced by the Prostitutes

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As can be seen from Table one, out of the total number of prostitutes interviewed, 72 per cent (36 out of 50) were aged 30 or below. The largest number fell between the age of 21 and 25 years while no one was above the age of 40 years. This may be due to the general nature of the trade where young girls may be preferred to older ones.

Among the part-time Prostitutes interviewed (Table Two), 40 per cent said that they had day time jobs as petty traders selling all sorts of wares, ranging from food items to clothing. Most of the food sellers were based in the Motor Parks, while the others had their own traditional restaurants called "Bukaterias". Thirty per cent, (6 out of 20) were students in full time education in an institution of Higher learning in Maiduguri town. The main reason for Prostitution in the case of the students was that life is expensive and that their parental contribution or grant was insufficient for them to live on. Some students revealed that they had no other source of income. The four housewives in this category were separated from their husbands, and all of them came from other towns or Villages within the State and neither their husbands nor their parents knew that they were in Maiduguri, nor that they were partly engaged in Prostitution. Unemployment has been a serious problem in Nigeria since the collapse of the oil market in the early 1980s. And the two girls that indicated that they were unemployed stated that they were actively seeking work and therefore they had resorted to prostitution as a temporary measure.

It is pertinent to consider the number of divorces that each Prostitute had gone through so as to identify any correlation between prostitution and divorce. As can be seen from the figures in Table Three, 20 per cent of the respondents had never gone through divorce, and this includes the four women that were separated from their husbands. The other six were the students who were in full time education and had never been married. Therefore a staggering 80 per cent

of the remaining Prostitutes had been married before. The highest number, 40 per cent, were divorced once, followed by 28 per cent who were divorced twice, 8 per cent divorced three times and 4 per cent divorced four times. Those divorced more than once frequently cited either domestic violence, forced marriage, or lack of proper maintenance as the main cause for the divorce. As to why they resorted to prostitution, the most common answer was that they had to feed and clothe themselves as well as pay rent, and since there are no jobs, and there are no relatives to support them, they had to find an alternative means of livelihood. This was buttressed by their unanimous response to the effect that they would stop prostituting themselves if they found jobs or were happily married.

A detailed case study of four Prostitutes was made so as to gain a better insight into their social background as well as the reasons why they went into prostitution.

For the protection of the privacy of the respondents, their names have been altered.

Case Study 1

This was the case of Bola, a 20 year old student. She had never been married. She had eight other brothers and sisters who were all dependent on their father (a local fisherman) and mother (a market woman) living in Bendel State. She gained admission into an institution of Higher Learning but her parents could not afford the fees and her State government does not grant Scholarships. So she spent a year in Lagos

earning money through prostitution before starting her course. She still engages in prostitution at week ends during term time by taking a Hotel room for the purpose. During vacation, she does the same thing in Benin and Lagos. To Bola, her prostitution is a means to an end and she said that she will stop as soon as she graduates and finds a job. Being an educated girl, she stated that if state Scholarship or parental support was available for her from the beginning, then she would not have started prostituting herself especially in this day and age of AIDS.

Case Study 2

Falmata was a 30 year old Kanuri woman. She had been forcibly married to a 50 year old man when she was 13 years old. She ran away but was forced back by her parents. She ran away again and eventually the marriage was terminated when she was 14 years old. At the age of 15 she was again married off to another man who constantly beat her and accused her of being clumsy and not being able to cook. She endured the marriage for two years, and she did not have a child. She eventually ran back to her father's house but he threw her out due to her inability to stay in marriage. She then came to Maiduguri and stayed in the house of a local woman who had other girls staying with her. In the house, it was made clear to her that she must pay for her board and lodging and the only way she could do that was to go into prostitution. And ever since then, apart from a short period when she visited Kano and Kaduna, she had never been out of Maiduguri town let alone to go back to Gamboru town to see her parents. She now

has her own one-room house and a food stall, all purchased from her earnings as a prostitute. She says she has no intention of marrying again.

Case Study 3

Ladi was a 28 year old Hausa girl. She said that she was 13 years old when she was married off. She came to Maiduguri from Azare in Bauchi State. She had been married and divorced three times. She says that the reason for her frequent divorce was that she did not like living with co-wives who constantly tried to kill her with witchcraft. She also said that she had a miscarriage when she was 15 years old and since then she had never been pregnant, and as a result, most of her former husbands accused her of being barren, useless, fit for nothing but consuming their wealth. Her last marriage was to a man in Bauchi town and when it ended in divorce in 1984, she went back home to her parents. But her parents soon died one after the other in 1985 and 1986. She has two elder sisters who were happily married. So she decided to leave her home area and to start a new life in Maiduguri. Owing to the difficulty of finding a job or a place to live, she went into prostitution. She also said that men do not want to marry her due to her barrenness and troubled marital history. She has no other job except prostitution and stays in a rented room in the red light district of Maiduguri town. She said she earns about 20 to 50 Naira per night.

Case Study 4

Mary was a 19 year old girl from Biu. She had just completed her higher education but could not secure a place to a University. She came to Maiduguri in 1986 hoping to find a job. But having looked for a job without success and having exhausted all her money she had no one to turn to. So she went to the G.R.A (Government Reservation Area) where most of the Guest Houses are located and was picked up by a man who later gave her a lot of money. This made her realise that she could resort to prostitution in order to get what she wants and has been doing that ever since. But she too was adamant that when she has collected enough money, she would stop prostituting herself and either start a business or go on to University. She said she earns about 50 to 100 Naira per night on average.

All these cases of girls and women engaged in prostitution have the common link of economic necessity as the main reason. This is particularly so for those engaged in the business on a part-time basis. Those that are in the business on a full time basis seem to have exhausted all the traditional family support system, such as the parents or the husbands, and therefore have no alternative than to engage in prostitution. Women that ran away from harsh marital conditions or broken families in the rural areas into the urban areas are faced with the realities of life in the urban areas where everything has to be paid for in cash. The high divorce rate among prostitutes also may have a significance in that forced or unhappy marriages seem to have the effect of driving women away from their parents (who are involved in

forced marriages) and into the cosmopolitan and impersonal urban areas. If there was a comprehensive social welfare system in Nigeria, then, perhaps, some of these women would have remained within their families and out of prostitution.

Interview response on status of women

All the respondents were asked questions about their occupation and their inheritance preferences. Their response is shown in DIAGRAM CV.

A total of 90 women interviewed indicated that they were dependent housewives. This represents 60 per cent of the female respondents and 30 per cent of the whole number of respondents. Twenty per cent of the women were also self-employed - that is they were housewives who were also engaged in petty trading and subsistence farming in the rural areas. Just over ten per cent of those interviewed were in Government employment and were all based in the urban areas such as Maiduguri and Biu. The 9.33 per cent that were unemployed were mainly students in search of jobs or destitute. The most striking aspect of the response was that most of the women, 80 per cent, were dependent in some way or other on their husbands for most of their needs, and had housekeeping as their main occupation. The response of the men however seems to be much more evenly spread between job types. Farming and salaried employment may, and often are, combined by most men in the rainy season. Therefore the figures for these two occupations may overlap.

One may therefore state that women in Borno are still largely dependent on men for sustenance although quite a number of them are now becoming salary earners. Economic needs seems also to be forcing women that might hitherto have relied entirely on their husbands for all their needs to come out and seek jobs or to engage in petty trading. But the latter group are still few and far between. Thus the economic consequences for family breakdown for the majority of women is still severe.

The possibility that men and women may react differently to rights in inheritance was tested in a question as to who they would prefer to inherit their property. The response of the women showed that 93.33 per cent of them would prefer their children to inherit their property, followed by their parents (78 per cent) and their brothers and sisters (68.66 per cent). Husbands were relegated to fourth place and other relatives came last. The response of Muslim women does not seem to have taken into account the fact that under the Islamic rules some of the heirs may exclude each other.

Ninety per cent of the men interviewed indicated that they would prefer their children to inherit their property, followed by their brothers and sisters (79.33 per cent), and parents (70 per cent). Wives and other relatives, as in the case of women, were relegated to fourth and fifth places respectively. The indication of children as heirs, irrespective of sex, seems to go against the traditional practice of preferring male children. In both the male and female response to this question, those that indicated their

spouses as possible heirs turned out to be educated and mostly engaged in salaried employment. Therefore modern views may have influenced their views on the matter.

Summary

The position of women in the family in Nigeria, irrespective of marriage type, is still dominated by the local custom of the parties. Educational standard, as well as class position of the parties within the community (whether they are wealthy or members of the ruling elite) also seems to have a bearing on how female members of the family are treated by their male counterparts. Religious belief of the parties, especially if they are a Muslim family, is of enormous significance because the Islam itself lays down the legal rights of men and women in the family. However, tradition and economic needs seem to make some Muslim men to deny their wives their legal rights to such things as property or freedom to seek knowledge.

In the Upper Class families in Borno, the husband is the breadwinner and the woman's place, particularly among Muslims, is in the home. A significant number of women in the Working Class families combine their domestic duties with outside work such as petty trading and subsistence agriculture. Educated Middle Class women combine Office work with housework, and unlike in the Western industrialized nations where industrial production has given women a degree of choice between outside work and domestic housework, educated women who devote their time solely to office or industrial work in Nigeria are few and far between. Furthermore, even the few women that work in

the market places, in the few food packaging industries, or on subsistence farms, have to take their young children along with them because of the lack of child care facilities. This is particularly so in the urban areas where the families may not be so close as in the rural areas where there are always other family members available to look after children.

Forced marriage, the practice of polygamy, the disinheritance of wives and daughters, and the indiscriminate repudiation of wives by their husbands are all practices that still combine to keep women in Borno State in total subordination to their menfolk. The existence of the formal law and the courts to apply them, on the face of it, seem to offer a solution to any woman that may feel oppressed. But in practice the courts may be as remote or oppressive to a woman as the men within the her family. This was aptly commented upon by Philip and Morris as far back as 1971 thus:

> "...the coercion of women by their customary law guardians into marriage against their wishes are by no means things of the past. A woman forced against her will to marry would doubtless obtain redress from a court of law, which would declare in the interest of natural justice, that such a marriage was invalid, but recourse to the courts in such cases would be unlikely, nor is it easy in Africa any more than other societies, to distinguish between parental force and persuasion in such matters."[26]

The power structure within the family in Borno and the relative underdevelopment of most parts of the State has meant that the majority of women who live in the rural areas still toil for hours in the fields, have no formal modern education, have few or no modern amenities, and are still responsible for

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26 See Philips, A. and Morris, H.F. (1971) *Marriage Laws in Africa*. (Oxford University Press), p.49

the traditional domestic duties such as cooking and caring for children. Custom is often cited by men to deprive women of their rights. And the lack of any formal education makes it even more difficult for women to be aware of their rights let alone pursue them in the courts. Islamic injunctions are also deliberately misrepresented so as to deny women the right to education, property etc. The combined effect of this is that the consequences of family breakdown is far more serious for women than for men in Borno State.

Sex				Occupation
Female	Housewife	Gov. Worker	Trader	Unemployed
Response	90	16	30	14
% females	60	10.66	20	9.33
% Total	30	5.33	10	4.66

Male	Gov. Worker	Farmer	Trader	Unemployed
Response	70	30	40	10
% Males	46.66	20	26.66	6.66
% Total	23.33	10	13.33	3.33

Q.53. Who among the following should inherit your property when you die? (You may indicate more than one).

Male Response

Options	Children	Wives	Parents	Bros. & Sisters	Others
Response	135	49	105	119	19
% Male	90	32.66	70	79.33	12.66
% Total	45	16.33	35	39.66	6.33

Female Response

Response	140	23	117	103	14
% Females	93.33	15.33	78	68.66	9.33
% Total	46.66	7.66	39	34.33	4.66

DIAGRAM CV. The Occupation and Inheritance Preference of Men and Women in Borno State.

CHAPTER SIX

Custody of Children

Introduction

One other consequence of family breakdown is the determination of the custody of the children of the marriage. That is, on the breakdown of marriage, the question has to be answered as to who, among the spouses, should have the custody of the children. Should the spouses be given joint custody, and if so, how is the child's time with its parents to be divided or shared? What are the rules or criteria to be used to determine custody? All these and many other questions are of vital importance whenever the future of the children of a broken family is to be settled in court. In custody cases that do not come to court, some of these questions may be ignored altogether and the criteria for the determination of custody may not be the same as in court. The question of the legal status of a child in Nigeria, either as a legitimate or illegitimate child, may be of vital significance in determining who gets custody. And since custody of a child entails the ability of the custodian to maintain the child, the relative economic position of the claimants, especially under the general law, is even more important. Therefore this Chapter is closely related to the next Chapter (which deals with maintenance). The Chapter examines the process of acquiring the status of legitimacy under the General Law, Customary Law and Islamic Law first before examining the rights to custody of children in general. The concept of the "Welfare of the Child" as being of paramount importance in

determining custody cases in Nigeria is also examined in terms of its effectiveness particularly as regards custody cases in the customary courts. It is suggested that despite the formal law on custody in Nigeria which favours equality between the spouses, the actual practice seems to re-inforce the dominance of men over women through economic and patriarchal power. That is, Nigerian men's dominant position in the home and in the economic sphere ensures that most custody cases are determined in their favour.

The Concept of Custody of Children

There is little formal legal provision in Nigerian law governing the relationship between children and parents. Most of the rules are derived from case law on the subject in England, and as stated in Chapter Six, the law has closely followed those of divorce and matrimonial property (Nwogugu:74; Obi:66; Adesanya:73).

At Common law the father of a child was the sole guardian of his child; the mother's position was entirely secondary. A situation that is akin to the one under traditional Customary law in Nigeria today. The King in England, theoretically, was the father of the whole community, parens patrie, and therefore children were his wards and under his overall protection. This role was delegated to the Lord Chancellor and through him to the Judges of the Court of Equity who deal with disputes about the custody of children and their financial affairs. This is the origin of the expression "ward of court". A person could, and still can, take the formal steps required to make a child a ward of court, and thereafter the Judge has

all the powers of a guardian over the child made a ward of court (Maidment:85; O'Donovan:85).

A Judge acting in any case involving a child is required to act in the best interests of the child. And subject to some procedural constraints, the Judges, both in England and Nigeria, are free to proceed in any manner deemed appropriate. Whenever there was a dispute between the mother and the father as to the custody of the child, the father was given custody unless he had behaved in such a way, or was a man of such bad character, that giving custody to him would harm the child's interest, in which case the mother was given custody. The mother had no rights or power in relation to her children. In Nigeria, as we shall soon see, this situation still exists particularly as regards customary and Islamic marriages and custody cases that do not come to court.

In the Nigerian society of today, although mothers play a more active role in the upbringing of their children than their Victorian counterparts did in England, nevertheless their economic and social position is still so weak, vis-a-vis their husbands, that few can afford to raise a family of several children on their own. And the practice of having Nannies, housekeepers and domestic servants that was prevalent for the wealthy in Victorian England has its equivalent in Nigeria today where the trend is for the elite members of society to have cooks, houseboys, and nannies. At the same time in Nigeria, the strong extended family system of raising children communally still survives particularly in the rural communities. In the urban areas however, the family is more

nuclear than extended and this has the effect of placing the burden of raising the children of the marriage squarely on the parents unless they can afford to hire domestic staff. Under such conditions, it is more difficult for an urban man to be able to care for young children following divorce.As mothers are dependent housewives, at divorce they have to resort to their parents or any other relative for support. They therefore find it difficult to provide for the children. All these considerations are important in determining any custody contest between the parents.

Custody law in the west has been influenced until recently by the principle that care and control by the mother is important for the well being of the child (Smart, 1984). In Nigeria on the other hand it seems that this principle has never developed a strong influence although it may be occasionally present as in Adeyinka and Afonja (examined below). Aternatively it may be that the courts in such cases were copying English attitudes without due consideration of Nigerian circumstances or that the cases involve acceptance of a degree of westernisation among the elite.

The outcome of the changes that have taken place in family relations since the end of the Second World War, in England at least, has been to eliminate the dominant position of the father and to put both parents on an equal footing in terms of the right to the custody of their children. This has been due in part, to the social and economic progress that women had made in England since the Second World War, as well as to the change in the ability of the fathers to obtain the

house help that hitherto meant that they had no problems in looking after, or ensuring that their children were looked after. Modern psychological theories about the development of children, which emphasise maternal care too have had their effects in the increase in cases of women having custody. The increasing divorce rate also led to the abandonment of the "guilt" aspect, especially for women, in the consideration for awarding custody.

In Nigeria however, although the general changes that took place in England were closely followed by legislation up to the enactment of the Matrimonial Causes Act, 1970, there hasn't been the same social and economic progress for women. Moreover while England has only one law on the family, there are three different laws applicable to Nigeria and each has its own rules on the rights of parents to the custody of their children. The general law on custody of children in Nigeria is almost identical to English law upon which it is based. However, the rules are divided into three broad categories. First there are the rules as contained in the Pre -1900 Statutes of general application which apply to all the States except the Western and Bendel States; second there is the Infants Law, 1958, which applies to the Western and Bendel States; and thirdly there is the Matrimonial Causes Act, 1970, which applies throughout the country. As the provisions of these statutes are covered by the latter Act, we shall now examine it so as to see how it tackles the issue of custody of children.

The Matrimonial Causes Act, 1970, applies to custody proceedings which are ancillary to a matrimonial cause such as divorce or judicial separation. Section 71(1) states:

"In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper."

Although this provision, just as the entire Act itself, is meant for general law marriages only, nevertheless proceedings for custody, welfare, guardianship or advancement of the "children of a marriage" covers all types of children as long as they fall into the category of children of the marriage. Thus children born to either party out of a previous customary marriage, illegitimate children (whether acknowledged or not), and children born of the general law marriage are all covered by this provision as long as they had been recognised by the parties as children of the general law marriage.

Within the welfare principle, various criteria are followed by the Nigerian courts in determining custody of a child. Thus the age, sex, and personal preference of the child as well as arrangements made for upbringing and general welfare is considered. The conduct of the claimants towards the breakdown of the marriage as well as their general character are also considered in terms of their suitability in raising the child. The fact that a child is of tender age or is a girl is of immense significance in Nigeria but it does not necessarily mean that its custody would automatically be granted to the mother. For instance in the case of Oladetohun

v. Oladetohun,[1] although the court found the mother of the child to be an unsatisfactory wife, nonetheless it granted custody of the only child of the marriage to her, who was then only three years old, on the ground that it was in the best interest of the child. However the court stated that it would review the case when the child was a little older. But Adams v. Adams,[2] where the mother's claim for custody of her daughter was refused by the court on the basis of her bad conduct seemes to have ignored the welfare principle as the main consideration for custody. The parties in that case were English expatriates living in Nigeria. In 1970, the plaintiff, the wife, left the matrimonial home following a disagreement with the respondent and took up residence with another man. She then sought custody of the child of the marriage.

This decision is in line with the common law and some of the pre-1900 statutes which denied women the right to the custody of their children, especially if they were guilty of adultery. The introduction of the no fault divorce by the Matrimonial Causes Act, 1970, was supposed to put parties on an equal footing in terms of the right to custody of their children. But formal legal provisions, particularly in a sensitive area such as child custody, have to be applied in the light of the general social conditions and practices of the society. And in Nigerian customary tradition generally, women do not have the right to the custody of their children after divorce, and this is bound to influence the courts in

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1 Suit No. HD/111/70 Lagos High Court, (unreported)

2 [1971] 2 ALL N.L.R. 82

applying the general law especially where the parties are Nigerians.

The Welfare Principle

"Welfare" of a child is not an easy matter to determine. The concept is so value-laden that what constitutes welfare or best interest of a child in one community or society may not necessarily be the same for a child in another community or society. Moreover, welfare of the child may not only be concerned with the future of the child alone but also with the future of the parents as well. Faced with such uncertainty, it is not surprising that the bulk of the welfare provisions in statutes are vague as to what it contains, and it is left to the courts to determine in each case. The courts rely on the known facts in each case such as the situation in which the child and its parents are living. It is then up to the court to decide whether the situation is satisfactory for the welfare of the child or warrant a change. If the court decides that the present position of the parties constitutes the best for all, then it may be more inclined to leave custody of the child with the parent who already has custody. On the other hand if the court finds the present position of the parties to be unsatisfactory, it may then decide who can provide the most suitable conditions for the child.

Proper upbringing of a child is so important for its future welfare that society's idea as to what constitutes proper upbringing has to be taken into account. Thus the present position in Nigeria is still for children to be brought up in a two-parent family rather than the single-

parent family that is becoming more acceptable in the western industrialized nations like Britain, America and Germany. The welfare of a Nigerian child therefore would consider whether the child is to be brought up by its father or mother alone or as part of a larger family. Education (both secular and religious), proper accommodation, feeding and clothing, and proper moral training are all aspects of welfare that the courts have to decide as to who, among the claimants for custody, is best suited to provide for the child. The effect of all these in Nigeria, theoretically at least, where traditionally, mothers' right to custody is subordinate to the rights of fathers, would be to enhance the position of the mothers. As we have seen in Chapter three, at divorce, it is the mother that is required to leave the matrimonial home and to return to her parents with only her personal property. If she had children she may or may not be allowed to take them along with her - all depending on the age of the children and whether the bride-price for her marriage had been fully paid or not. In the majority of cases where the children remain with their father, there are usually other close female relatives of the father to look after the children or there are wives (in a polygamous household) to perform the same function. Thus the children remain in the same home, go to the same School, have the same friends, and have the same care and protection of their father. The economic and social security that this provides for the children is so strong that the mother does not normally get custody. The children may of course miss the company of their mother, but the traditional divorce system is such that children do not lose contact with

their mothers. And having custody does not mean that the other parent is precluded from getting in touch with the children. The problems of single-parenthood therefore do not normally arise for a traditional Nigerian father. It is against the mother, invariably, especially if she does not have sufficient means of her own and does not remarry, that the welfare principle may work.

The welfare principle seems, on the face of it, to be child-centred. That is it depends on what is understood to be the best interest for the child. Even during Victorian times in England, the concept was linked to the social and cultural values of society, and thus women who had committed adultery were denied the custody of their children on the premise that an adulteress was not fit to raise children. The Victorians also believed in strict paternal discipline of children and therefore custody was invariably given to the father. But the welfare principle is still so much dependent on moral, religious, social, and today, social science-based theories on the upbringing of children that it raises serious questions as to whether it is really child-centred. The decisions for custody have always been made by adults for the supposed benefit of children but actually are primarily concerned with who, among the competing adults, should have custody and care of the child. Children may be treated merely as property - they seldom have a say in the decision that would fundamentally affect their future. Even if children are called upon to express an opinion in the matter, the premise for such an opinion is false because the child cannot truly be said to

be in a position to know what is best for him or her (Maidment:85).

The welfare principle also seems to rely on an assumption that children of divorce are necessarily at risk. For the decision-making process involved in custody cases emphasises the child nurturance and protection concept far more than anything else. Thus the process of divorce itself is made dependent on the arrangements that the divorcing parents might have made for the children of the marriage. For instance under section 57(1) of the Nigerian Matrimonial Causes Act, 1970, no decree of divorce may be made absolute until the court has declared by order that it is satisfied that proper arrangements have been made by the parties, for the welfare, advancement, and education of children of the marriage who are below the age of sixteen. Failure to comply with the section means that the decree nisi cannot be made into a decree absolute.

General Law Custody Case Studies

In the Afonja v. Afonja case mentioned earlier, the facts were that the husband had petitioned for divorce based on irretrievable breakdown of the marriage, and had cited desertion as a proof of the breakdown. He was also granted custody of the two children of the marriage, girls aged 6 and 4 respectively. The mother of the children did not contest the divorce but she claimed custody and maintenance for the children. In awarding custody to the father, the trial Judge took into account the fact that the mother was not a good Christian. She therefore appealed against the lower court's

decision. The Court of Appeal cited the cases of D v.D,3 and Re G. (Infants),4 as well as section 1 of the Infants Act 1925 on the welfare of the child as the paramount consideration in such cases, and granted custody of the children to the mother. No discussion took place as to the proper arrangements that the mother might have made, if at all, for the proper care of the children. The court seemed to have been swayed by the consideration of the ages and sex of the children as well as the fact that the father left them with his extended family members. For the court then ordered the father of the children to make periodical payments for the maintenance of the children. If welfare of the children was the proper yardstick for the decision, then the children should have been left with their father who had the means to meet their daily needs rather than for them to depend on the maintenance that their mother may get from him.

Sometimes the courts seem to base their decisions for custody on factors that are not relevant to the welfare of the child. For instance in the case of Adeyinka v. Adeyinka,[5] the husband had filed and obtained a divorce petition against his wife. The petition was undefended. There were two children of the marriage and the trial Judge granted custody to their father. But the mother of the children appealed against the custody order on the ground that in making the order the lower court had erred because there was no evidence to the effect

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3 [1965] 109 Solicitors' Journal 573 C.A.

4 [1965] 109 Solicitors' Journal 576 C.A

5 [1972] 2 U.I.L.R. 302

that such an action was in the best interest of the children. This was despite the fact that the father of the children had produced evidence in the lower court in which he revealed his plans for the children's education up to the University level, their housing and general maintenance. But the appellate court held that the lower court had not complied with the requirements of section 57(1) of the Matrimonial Causes Act, which requires courts to be satisfied of the arrangements made for the welfare of the children first before making orders for decree absolute. Therefore the matter was remitted to the lower court for proper consideration. Obviously the arrangements made by the father were made known to the lower court for they were included in the record of the case. Moreover, the mother did not provide any alternative arrangements for the care of the children in the lower court because she chose not to contest the case. The father had even made it clear to the lower court that the mother of the children was free to visit the children at any time she liked.

In Ajala v. Ajala,[6] the parties had two children, both boys aged 7 and 4 years respectively. The petitioner (wife) had sought divorce based on irretrievable breakdown. She cited desertion and adultery as the elements for the irretrievable breakdown, and sought the custody of the children. The respondent filed no answer but chose to forward to the court a letter and an affidavit in which he contested part of the petition. The court established the fact that the respondent had been in desertion for three years, and during that time

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[6] Case No. 10/CCHJ 2333 (1977) Lagos High Court (unreported)

he did not show any interest in the children nor care for them. The children had remained with their mother who catered for all their needs. In granting custody of the children to their mother, the trial Judge, Desalu, J. said:

"... the children were well cared for by the Petitioner. The Respondent, impresses me as an irresponsible man, who has no regard for the sanctity of marriage or for the welfare of his children whom he had wantonly and unjustly deserted."

The Petitioner was also allowed to apply to the court for maintenance of the children from the Respondent. This was due to the fact that the Petitioner did not reveal the means and earning capacity of the Respondent in her petition to the court which is essential for determining the amount of maintenance that may be ordered. The Respondent was also allowed access to the children - details of which were left to the parties themselves to work out. The welfare of the children in this case obviously demanded that they should be left with their mother. But the continued importance of a father in the lives of his children is shown by the access order that was given to the Respondent and the possibility that he may yet end up being responsible for the maintenance of the children. That is how most communities in Nigeria see the relationship of parents to their children - fathers providing for their children and mothers administering the care and control where necessary.

In the case of Odueyungbo v. Odueyungbo, [7], the parties had been married for over twenty years and they had five children whose ages ranged from nine to twenty years. The

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[7] Case No. (1977) 10/CCHJ/2341

husband petitioned for divorce based on irretrievable breakdown of the marriage, and also sought the custody of the children. The parties had been separated for over three years, and at the time of instituting the proceedings, four of the children were living with the Petitioner. The Respondent cross-petitioned for divorce based on adultery of the Petitioner. She claimed that the Petitioner had married another woman under customary law and had children by the other woman. She objected to this but was thrown out of the matrimonial home by the Petitioner. The Respondent sought the custody of the children, but only the two youngest children aged 9 and 11 years respectively.

The trial Judge, Bada, J. said:

"... if she [the Respondent] was so concerned about the welfare of these two children, one would have expected her to have made an application to the court for their custody soon after she left the matrimonial home at a time when the children would need her attention most; this the respondent did not do."

As a result, the court held that in the absence of positive evidence that the children would derive any advantage by changing their custody from the petitioner to the respondent, and taking into consideration the advantage of sisterhood and brotherhood to the other children of the marriage, it would not be in the best interest of the children to be given to their mother. Therefore custody of all the children was given to the petitioner and the respondent was given right to access.

The welfare principle in this case seems to have been expressed in terms of the need to keep the children together.

The fact that the Respondent sought only the custody of the two youngest daughters and the fact that she had left the matrimonial home without the children was used against her. Moreover, it was revealed at the trial that the children were all being educated at a private school by their father and that even if custody was given to their mother, she could not afford to keep them in the same School nor maintain them in the same manner that they were being maintained by their father. This was buttressed by the fact that the Respondent, in her cross-petition, had asked for a lump sum from the Petitioner. Thus the welfare principle here was determined on the economic position of the claimants as well as the desire not to move the children. And since the father in most of these cases in Nigeria is more economically sound than the mother, the father would always be at an advantage.

The conduct of the parties in the breakdown of the marriage may also overshadow the needs of the children in determining their custody. And this happened in the case of Ezirin v. Ezirin, [8] where the husband petitioned for divorce based on adultery of his wife. He accused his wife of being a loose woman who had the habit of associating with several men and going out till late at night. There were two children of the marriage. The wife also cross-petitioned for divorce based on the irretrievable breakdown of the marriage caused by the husband's adultery. Both parties sought the custody of the two children, one male and one female aged 8 and 6 years

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[8] Case No. (1977) 10/CCHJ/2355

respectively. The trial Judge, Johnson, J, having established the adultery of the husband, said,

> "... the Petitioner has shown complete disregard for the feelings of the Respondent or the sanctity of their marriage... The petition of the Petitioner therefore fails. The cross-petition of the Respondent succeeds and is allowed... On the question of the custody of the children, the paramount consideration is the welfare of the said children. Having taken into consideration the behaviour of the Petitioner and the tenderness of the ages of the children, I have come to the conclusion that it would be in their best interest for them to remain in the custody of the mother."

Therefore the "guilt" of the father in the breakdown of the marriage had been used to deprive him of the custody of his children rather than his inability to cater for them as the welfare principle requires. Under the irretrievable breakdown of marriage principle no spouse is supposed to be held responsible for the breakdown of the marriage. The conduct of the parties may not, unless specifically directed to the children, be relevant for the custody issue. If the welfare of the children, which is to be determined by weighing up all the present and future benefits that the children might gain from the custodial parent, calls for them to be given to a parent who might have been responsible for the breakdown of the marriage, then they must be given to him or her. For the essence of the welfare rule is that the needs of the children are paramount in all custody cases.

All these general law custody cases confirm the point that in Nigeria the implementation of statutory provisions on family relations are affected by considerations which may not have the sanction of the statutes. Thus in the case of custody of children, the conduct of the claimants in the breakdown of the marriage as well as their relative economic strength seem

to be far more important than the actual welfare needs of the children. The underlying customary practice of having young children stay with their mother (especially if they are female) as long as she had not abandoned them, seem also to have been adopted for general law custody cases. Mothers also seem to reflect this customary practice by seeking the custody of their daughters only, thereby re-inforcing the point made in Chapter five that Nigerian parents' responsibility towards their children is shared according to gender - male children being attached to the father while the female children are attached to the mother. The tendency therefore is for mothers to seek the custody of their daughters and to claim maintenance for the children from their father. That is, although the general law has put both parties, theoretically at least, on an equal footing, the reality of the situation is that women are largely dependent on men and unless they happen to be in a strong economic position, as in the case of the Appellant in the Williams case, their custody claims are less likely to be favorably treated.

General law custody cases in Borno state, as in the case of family dispute settlement, are mostly heard by the non-state institutions of family dispute settlement or by the Social Welfare Officials. The few cases that one has come across in the High courts involved either Nigerians from the Southern States or expatriates from Overseas.

In Njoka v. Oleka,[9] Peter Oleka had married Eunice Njoka under the general law in Benin in Bendel State. They had one

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[9] Case No. A.S.W.O/FCW/608/87

daughter. They came to live in Maiduguri, Borno State. However the marriage did not last and was terminated unilaterally by Peter. Peter retained the custody of the child and then remarried. Eunice complained to the Social Welfare Office that Peter's second wife was mistreating her daughter and therefore she wanted the custody of the child to be given to her. Peter denied that the child was being mistreated by his second wife, but he agreed to take his daughter home to Benin to be looked after by his parents instead. Eunice also agreed with this arrangement. The Social Welfare Officials here did not investigate nor seek any clarification of the conditions that the child might be brought up in Benin; all that they were concerned with is to ensure that the dispute is settled irrespective of whether the welfare of the child is protected or not. For the Social Welfare Officials do not know the welfare principle that govern all custody cases in courts.

A case that involved a child born out of an affair of the mother (who was married under the general law to another man) was Victoria v. Anthony Mekankwe.[10] Victoria was married under the general law in 1970 at Owerri in Imo State. Her husband was a Soldier based in Lagos. The parties had three children. One day her husband threw her out of the matrimonial home for no reason (according to her). And so she went back home to her parents alone and stayed there for a year. Her husband did not send for her. She then came to Maiduguri and stayed with her brother, who was a trader, before she met Anthony Mekankwe. They were not married but lived together and had a baby boy. A

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[10] Case No. A.S.W.O/FCW/617/87

year after the birth of the child, her husband in Lagos sent for her to return to him. She wanted to return to her husband and children in Lagos but feared that if she went back to him with the child born in Maiduguri, he would kill her. So she went to the Social Welfare Office and asked the Officials to make Mr. Mekankwe accept custody and responsibility for the child. But Mr. Mekankwe refused and claimed that Victoria was a harlot whom he met in a Hotel, had sex with her, and had paid cash for it. Therefore the child was not his and cannot be made responsible for it.

The Welfare Officials tried to persuade the parties to come to an agreement but to no avail. Eventually Victoria's brother, Mr. Clement Nwosu, was called and asked whether he could help. He stated that since the child belonged to his sister he was willing to help. However since he was not married, and his occupation involved constant travel, he could not care for a one year old child. So he suggested that the child should be sent back to its maternal grandparents in Owerri at the expense of Mr. Mekankwe. Mr. Mekankwe agreed to pay for only the child's transport fare to Owerri.

Here too the extended family support system has come in to rescue a child that might have ended up being abandoned. The lack of co-ercive power by the Social Welfare Officers makes their tasks in these types of cases even more difficult. The Nigerian state, as yet, has not fully assumed the responsibility of being parens patriae proper in these cases, (as for instance occurs in England and Wales) where children in need or at risk from possible abuse or neglect by the

parents are taken into care by the state. The Nigerian state still prefers the family to meet its obligations towards its members on its own and the Social Welfare Offices are primarily there to ensure that this is complied with through persuasion rather than through co-ercion.

In cases of pure custody contest between parents of children, the Welfare Officers show their inability to solve the dispute by referring the matter to the courts. This occurred in the case of Fidelis Okoliko v. Mary Okoliko,[11]. The parties were married under the general law and they had two children. Mary had another child by her previous marriage staying with her because she had no close female relation to care for the child. But Fidelis objected to the child being in his house. This eventually led to Fidelis divorcing Mary unilaterally and ordering her out of the matrimonial home. Mary left the home with her daughter from her previous marriage. She established herself in business and then wanted the custody of her two other children from Fidelis. Fidelis refused on the ground that under his traditional custom (Igala custom) the children belonged to him. The Social Welfare Officials failed to resolve the matter and so advised the parties to go court for settlement.

2.Custody under Customary Law

The general customary rule that any child born to a man's wife is the legitimate child of the man, irrespective of whether he is the biological father or not, is still very much

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11 Case No. A.S.W.O./FCW/621/87

the case in Nigeria despite the existence of the repugnancy clause.[12] Even if the parties are separated and there was no possibility of the husband being the father of the child, still custom considers such a child to be his and therefore he is responsible for the child's needs. The husband of course has the right to disown a child born to his wife on the ground that he is not the father. Once he has done so the person responsible for the birth of the child may either pay compensation to the woman's husband before claiming the child or he may refund to the husband the bride-price that he paid on the woman and thus become the new husband of the wife. this is still very common practice among the Wula-Wula community of Borno State. In either case the practice ensures that the welfare of such children is catered for. In the case of matrilineal communities, which are very rare today, traditionally, children born to a woman and her husband are considered to be the legitimate children of their maternal uncle and therefore the linkage of bride-price to rights to the children does not follow.[13] However in the superior courts

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12 The practice is still recognised among the Igbos, the Yoruba, the Bura, Babur, and many other ethnic groups. See Nwogugu, E.I; 1974 *Family Law in Nigeria*, Heinemann Studies in Nigerian Law, p.220; Mariyama v. Ejoh [1961] N.R.N.L.R 81; and Edet v. Esien [1932] 11 N.L.R 47

13 For instance among the Chamba community of Gongola State (to whom the writer belongs), prior to the advent of modern influences, a child born in wedlock was considered to belong to its maternal uncle rather than to its biological father (see Meek,C.K. " *The Northern Tribes of Nigeria*," Vol. 1, Frank Cass & Co. Ltd. London, 1971; Obi, S.N.C; 1966, *Modern Family Law in Southern Nigeria*, Lodon Sweet and Maxwell, pp. 290-306; Anyebe, A.P. 1985, *Customary Law: the War without Arms*, Fourth Dimension Publishers, Enugu, Nigeria, p.114; and Briggs v. Briggs [1957] 11 E.R.L.R. 6

the repugnancy doctrine is applied against such customary rules.

Paternity seems to have always been the yardstick for determining custody of children under customary law. The legal father of a child, that is the husband of the child's mother, has the right to the custody of his legitimate children. On the death of the father, right to the custody of the children goes to the family head of the deceased's family, or to any other male relative of the deceased who may be in a position to care for the children. At divorce a man may take his children away from their mother whether they are weaned or not. But normally very young or unweaned children are left with the mother until such time that their father wants them back. A woman that wants to remarry has to return her children to her previous husband so as to prevent the possibility of her new husband claiming the children as his. Polygamy and the extended family system enables men to claim very young children from the custody of their divorced wives. For the remaining wife or wives have the duty to look after all children of the household as if they were their own children, and if a man has no wife to look after his children he can always fall back on the support of the extended family members.

Therefore the main determining factor for the claim of custody is paternity which in turn depends on the payment of bride-price. And since men are the ones that pay bride-price on women, and they are economically more capable of meeting the costs of maintaining children, especially after divorce,

it is not surprising that custody of children invariably belongs to the men. Contact with Western ideas on childhood and child welfare, as stated earlier, resulted in the introduction of the welfare principle as the paramount consideration in all customary custody cases that come to court.[14] But the welfare principle has to be considered from the overall position of the claimants as well as children in the Nigerian society. Divorced women generally do not, and are not expected to, raise children on their own, let alone to contest for the custody of the children against the children's father following a divorce. And the enormity of the task involved for women raising children on their own is such that normally women insist on fathers relieving them of their children at divorce rather than claiming custody.

In Borno and the other Northern States, the law governing custody of children is now contained in the Area Courts Law, 1968. As we have seen in Chapter three, this law is supposed to govern both Customary and Area courts. The law contains, under section 23, a provision which is derived from the general law, that in all cases of custody of children, the courts are to be governed by the welfare of the children. The means of determining the welfare of the child, as in the case of the general law, has not been specified, but it is left to the courts to decide in each case. Patriarchal dominance in the traditional family as well as the weak economic position of women generally means that the welfare of the child may be

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14 The provision was first adopted in Nigeria in the Native Courts Ordinance, section 11, and applied in the case of Edet v. Esien [1932] 11 N.L.R. 47

better served by the man than the woman in most custody claims. There is also the added traditional family pressure on divorced women to remarry rather than remain as one-parent families burdened with the responsibility of raising the children of a man to whom they are no longer married, and who may come and remove the children at any time.

It is only when mothers are economically self sufficient and more aware of their rights under the formal law that they will seek custody of their children in court. This is illustrated by the case of Olayemi v. Adeyemi,[15] where the parties were married under traditional Yoruba Customary Law. They had one child. The parties were living in Jos, Plateau State. Following their divorce, the woman applied to the Area Court for the custody of the child. But the court held that in accordance with traditional Yoruba custom, the child cannot be given to the mother, for it belonged to the father. There was no mention of the welfare principle. The woman appealed to the Upper Area Court but the decision of the lower court was upheld as being right since it was in accordance with Yoruba customary law. On further appeal to the High Court, it was stated that although the lower courts' decision was correct according to local custom of the parties, nevertheless the courts should have applied the welfare principle instead. Accordingly the court applied the welfare principle and awarded custody to the mother of the child.

Apart from the Area Courts Law, the various Declarations of Customary Laws in the Northern States also provide for the

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[15] Suit No. J.D./22A/60 Jos High Court (unreported)

application of the welfare principle in all cases of child custody. However, the wording of the provisions, which are identical, recognise the superior claim of the husband/father to the custody of the children under customary law by stating that custody of children following divorce must be given to their father unless their welfare demands that they should be given to their mother. For instance the Biu Declaration states:

"13.(1) At the time of granting the divorce the court shall make an order as to the custody of the children born to the wife during the period of the marriage. The custody of all children in respect of whom an order is made...shall be given to the husband unless it shall appear to the court that their interest and welfare would thereby be adversely affected, in which case the court may, having due regard to the local custom, award custody to any person who would care for their interest and welfare.... Provided that if any child has not been weaned the court shall order that the child remain in its mothers custody until it has been weaned... provided further that if the husband, having been awarded custody of the child, wishes to leave it in the custody of its mother after the weaning, he is not thereby debarred from claiming custody at a later date."[16]

This provision, on the face of it, seems to replace customary law rules on the custody of children with the welfare principle. But a closer examination of it shows that it re-inforces the fathers' traditional rights to custody. For the welfare principle has to be applied in the light of the local custom on custody of children whereby men generally gained the custody of their children following divorce. This is still the case among the ethnic groups of the Biu area, such as the Bura, Babur, Kilba, and Marghi, where the declaration applies.

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16 Per section 13 (1) and (2) of the Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964 (N.A.L.N. 9 of 1964); see also section 15(2) of the Borgu N.A (Declaration of Borgu Native Marriage Law and Custom) Order, 1961.

The father has the right to decide whether the unweaned children should remain with their mother or not.

The customary courts themselves seem to have difficulty in distinguishing between claims for custody and claims for paternity and paternal rights. Custody entails all the duties and responsibilities for the care and control of a child while paternal rights may be determined without the added responsibility for the care of the child being apportioned. As a result, customary courts are not in the habit of granting custody of a child to a person who is not the natural or legal parent nor the blood relative of the child on the ground that it is contrary to natural justice, equity and good conscience to do so. Yet the welfare principle overrides the repugnancy doctrine and a stranger to a child, who is in a much better position to cater for the child's welfare than its natural parents should be given custody of the child in preference to the natural parent. This principle, even though it goes against the traditional African abhorrence of the adoption of non-blood relatives, is becoming more important in the urban areas where there are increasing number of cases of abandoned children in need of a home.

Customary Custody Case Studies

The traditional customary rules on custody of children in Borno State is dominated by the linkage of the right of custody to the payment of the bride-price. This is the case among the Bura, Babur, Chibok, Marghi of Biu area as well as the Waha, Guduf, Wula-Wula, and Mandara of Gwoza area. In the latter area, the linkage is so important that unless the bride-price had been fully paid, then the children belong to their mother at divorce. In the Biu area however, payment of the first instalment of the bride-price entitles the payer to claim the custody of any children born to the woman. In all these areas the rules apply where the parties are not Muslims.

The linkage of bride-price to the right to custody is so strong that men claim all children born to their wives as theirs. This has been recognised by the Biu Declaration which provides that even if a husband is dead, the children born to his widow belongs to him as long as the widow has not remarried outside the family of the deceased.[17] And among the Gwoza people the importance of the bride-price as the means of claiming custody has even been refined to the extent that the number of children born determine how, if any, of the bride-price has to be refunded by the woman following a divorce. For instance, if she had more than three children, the bride-price cannot be refunded; if she had two children then a quarter of the bride-price must be refunded; if she had only one child, then half of the bride-price must be refunded. In all these cases the children then belong to the man. But if the man had

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[17] Biu Declaration, op. cit. note 8, section 18

not fully paid the bride-price the children belong to their mother and the woman may only refund the amount paid. Thus the children are deemed to have been acquired by their father through his payment of the bride-price over their mother.

But when custody cases come to court, the traditional rules may or may not be reflected in the outcome.

In the case of Audu v. Yero, [18] the parties were both members of the Waha community of the Hill-Dwellers of Gwoza. They married under traditional custom and had three daughters. In 1985 Audu divorced Dije Yero and sent her back home to her parents. Yero, Dije's father, later came to Yero's house to collect the three girls on the ground that Audu had not paid the bride-price and therefore the children do not belong to him. Audu contended that he paid part of the bride-price and therefore was entitled to the children. The matter was taken before the council of elders where the local custom, to the effect that part payment of the bride-price does not entitle the payer to the children, was re-iterated, and Audu was advised to hand over the girls to their maternal grandfather - Yero. Audu disagreed with the decision of the council and so took the matter to the Area court. It was revealed in the court that Audu had in fact paid one Cow (out of 5 Cows, 3 Goats and 3 Sheep that was the agreed bride-price) and therefore he had not fully paid the bride-price. The court then ordered him to either pay the remainder of the bride-price to Yero or to hand over the children to him. Audu agreed to pay the remainder of the bride-price instead.

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[18] Case No. 16/86, Area Court 11, Gwoza (unreported)

Here the welfare principle was not raised at all. But it can be argued that the outcome was in effect for the benefit of the children since their father is naturally in a better position to cater for them than their grandfather. However, only the welfare principle could have properly determined who was in a better position to care for the children.

In a case involving a member of the Wula-Wula community and a Cameroonian, all the ingredients for the application of the welfare principle, such as difference in customs of the claimants, were there but again the local custom was preferred by the lower court until the matter went on appeal to the Upper Area Court. The case was Maina Nana v. Sule Goje. [19] Maina married Zara under customary law and had paid 500 Naira as bride-price. There were no children of the marriage. The marriage lasted for three years before Zara ran away into the neighbouring Cameroon Republic. There she had an association with one Sule Goje and a child was born. Goje then decided to marry Zara and so he sent 1,000 Naira to her father as bride-price. When Maina heard of it he sued Sule Goje and Zara's father in the local Area court and claimed the return of his wife together with the child she bore in Cameroon. At the court Zara admitted running away from her husband but claimed that she did so because he was incapable of giving her children. The court held that under the local custom, a child born to a married woman belongs to the woman's husband. And since Maina had not divorced Zara before the purported marriage with Sule, she was still legally Maina's wife.

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19 Case No. 9/85, Area Court 11, Gwoza (lower court) and BUAC/CV/11/87, (appellate court) (unreported)

Accordingly, the court ordered Zara to return with her child, to Maina. But she refused and appealed to the Upper Area Court on the ground that the child does not belong to Maina and that she is willing to refund the bride-price he had paid on her. The Upper Area court said that although the lower court was correct on the custom of the parties, nevertheless it should have applied the repugnancy doctrine and the welfare principle to the case. The welfare of the child required it to be raised by its natural parents (Sule and Zara) in an atmosphere of happy family life. Zara's father was ordered to refund the bride-price out of the 1,000 Naira that Sule had given him on account of his marriage to Zara.

Here again the lower court ignored all the statutory provisions for the application of the repugnancy doctrine and the welfare principle in such cases. If the parties had not gone on to appeal, then undoubtedly the local custom would have prevailed and the child would have been removed from its natural father and mother and given to its legal father. The marriage of Zara and Maina had broken down due to the lack of children and therefore to force her back to him, especially when she had committed adultery and given birth as a consequence of it, would not have been for the best interest of the child.

From Biu area we have the case of Ali Saleh v. Tina Saleh and Jauro. [20] Ali married Tina under Bura customary law. The parties had one child named Safiya, who was born in 1981. In

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[20] Case No. BUAC/B/CV/110/86 Borno Upper Area Court (unreported)

1983 Safiya was taken by her father to her paternal grandparents to be raised by them despite Tina's objections. Tina went back to her parents as a result. She remained with her parents for one and a half years despite several attempts by the families to reconcile the parties. During her stay with her parents, Tina met Jauro and had sexual relations with him which resulted in the birth of a boy, whom Jauro named Dabo. When Ali heard this he promptly sent a letter of divorce to Tina and claimed the refund of the bride-price as well as the custody of Dabo (whom he had renamed as Iliya). Tina agreed to refund the bride-price but refused to hand over Dabo to Ali on the ground that Dabo was not his child. Ali took the matter to the Area court where Tina further claimed the custody of Safiya on the ground that the child was not being properly looked after by her grandparents, and in the case of Dabo, that he was not Ali's child. The court held that Ali was entitled to the custody of both children, because, in the case of Safiya there was no doubt that she was Ali's daughter while in the case of Dabo, the court cited section 7(1)(c) of the Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964, to the effect that a man is entitled to claim any child born to his wife. On appeal to the Upper Area Court, section 23 of the Area Courts Law was cited to justify the grant of custody of Dabo to Tina and Jauro while Safiya was ordered to remain with her grandparents.

Apart from custody cases involving children born in wedlock, cases may arise where two men may claim the custody of a child born to an unmarried woman. As stated in the Introductory Chapter, in such cases, normally the child is

considered to belong to the mother and her family. But sometimes the parents of the woman who has given birth out of wedlock, if the man responsible is known, may demand either monetary compensation from him or the payment of the appropriate amount of bride-price. In either case, if the man complies, then the child is legally his. However if two persons claim the right to the custody of a child born out of wedlock, then the implementation of the welfare principle becomes even more imperative.

The matter came up in Ati v. Akaagba,[21] where two men claimed the custody of a child born to a woman whom neither of the parties were married to. The welfare principle, as contained in section 23(1) of the Area Court's Law, 1968, was cited by the court in justifying its decision to award custody to the mother rather than to the two men. Yet the welfare principle in such types of cases requires the courts to consider the economic factors much more than they do at the moment. The relative economic position of women to men in Nigeria as a whole is inferior and therefore courts should, under the ambit of the welfare principle, consider whether a particular female claimant for custody has the means to meet the child's needs better than the male claimant or not. This is not necessarily suggesting that in all cases involving custody claims between men and women, the men should be given custody, but that the proper welfare of the child, especially in view of the fact that most Nigerian women depend on men for

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21 Case No. MD/336A/77 (unreported)

their needs, must be considered in terms of who is better suited to meet the child's needs.

3.Custody under Islamic Law

In Islam the legal relationship between parent and child is that of rights and dependency. The parent has rights over the child, while the child depends on the parent. However the dependent rights of the child over its parents cannot be ascertained unless the status of the child (i.e. legitimate or illegitimate) is determined. The child's rights to succession or inheritance as well as to maintenance depends on its status.

Legitimacy of a child in Islam means, in the words of Coser, " that every child shall have a father, and one father only."[22] And the importance of parenthood is also emphasised by the Holy Qur'an which calls on all Muslim parents to look after their children properly.[23] This means that parents must not abandon their children following divorce. But since in Islam the maintenance and care of children as a whole is the primary duty of the husband, it means that custody of the children after divorce has to go to the father (care and control may be with the mother). But all the rights of a child vis-a-vis its father are predicated on it being born legitimate.

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22 See Coser, R. 1964, " *The Family: its Structure and Functions*". St. Martins Press, New York

23 See the Qur'an Chapter 4, Verse 11

A child born out of wedlock in Islam is a product of "zina" (illicit sexual relations) and therefore illegitimate. In a pure Islamic state, "zina" is a criminal offence that carries the severest of punishment (stoning to death or whipping). As stated in Chapter three, pure Islamic law no longer applies in Nigeria since the promulgation of the Northern Nigerian Penal Code in 1960. As a result illegitimate birth among the Muslim community no longer carries any serious sanction. However, Islamic rules as to parental rights on illegitimacy apply.

The presumption of legitimacy of a child born to a lawfully married woman within the approved periods of gestation may however be rebutted by the process of li'an (an oath of imprecation). It is a process whereby the husband would disown the paternity of a child born to his wife within the prescribed gestation periods, by swearing four oaths on the Holy Qur'an to the effect that the child is not his, and invoking the curse of God upon himself if he were to have lied. The procedure cannot be invoked by the husband in case of a child that he might have accepted as his before. And this can be evidenced by his performance of any of the duties that father's perform for their children, such as for instance performing the naming ceremony. Once the oath of imprecation has been taken, the parties are effectively irrevocably divorced. Therefore Li'an must be performed shortly after the conception or birth of the child. The mother of the child must also take four oaths on the Holy Qur'an to the effect that the Child belongs to her husband and invoking the curse of God upon herself should she be lying. Her oath absolves her from

any punishment for "zina" which she might otherwise have to face. The effect of Li'an on the child is to bastardize him for all purposes in relation to the husband of the woman or any of his relatives.

Acknowledgement of Paternity (Iqrar)

Acknowledgement of the paternity of a child by a man is recognised by Islam but not as a process of conferring the status of legitimacy (as under the traditional customary law process for instance) to an illegitimate child, but as the means of proving the legitimacy of a child whose legitimacy would not otherwise be established by legal presumption. But in the actual practice to be found in the Northern States, as we shall shortly see from the case studies from Borno, the traditional practice of acknowledgement is often utilized by Muslims to legitimate illegitimate children.

Custody of Children

Under the Maliki School of Islamic law the parents have the joint custody of their children during the subsistence of the marriage. After divorce, young children remain under the custody of their mother, unless she is unfit to cater for them or remarries outside the immediate family of her ex-husband. Divorce as such therefore does not disqualify a mother from having custody of her children. However while the mother is given custody of the young children, the father still has the responsibility for their maintenance. He alone is legally responsible for the children's housing, feeding, and general upbringing even though they may be in the custody of their

stranger. Yet we have seen that the welfare principle contained in the Area Courts Law, 1968, applies equally to Islamic and non-Islamic custody cases that come to court in Nigeria. Therefore these Islamic rules on the custody of children, may, when the cases are brought to court, be subject to the repugnancy rules as well as the welfare principle.

As we have noted in the case of customary courts, not all the courts apply the welfare principle to cases that come before them. In the case of the Area courts hearing custody disputes between Muslims, the tendency is even more apparent for them to totally ignore it, and in their case, unlike in the case of traditional customary law, appeals are heard by Islamic courts which apply the Islamic rules to the letter. This is perfectly understandable in that Islam is not only a religion but a total way of life which cannot be effectively followed if some secular based notions or concepts are allowed to upset its basic tenets.

We shall now examine custody case studies from Borno and other states of the North to see how the Islamic rules are implemented in practice.

Islamic Custody Case Studies

The problems of hidden pregnancies and the lack of proper observance of the rules regarding the iddah may sometimes result in men contesting the custody of a child born to a divorced woman. This happened in the case of Muhammad Bida and

mother. This may sometimes be a source of quarrels especially where the husband refuses or fails to meet his obligations towards the children. But it may also help to reconcile the parties, especially during the iddah period in cases of revocable divorce.

The importance of the paternal link in custody cases is emphasised by the restrictions that Islam places on the mother's right to custody of her children following divorce. Her right to the custody of male children lasts until they attain the age of puberty, while in the case of female children it lasts until they marry. This is due to the relative roles that are assigned to Muslim men and women. Women are expected to remain with their mothers and learn how to be good wives and mothers while male children are required to be with their fathers so that they may then learn the duties of men to their wives and children. Moreover the high incidence of divorce and remarriage among Muslim women in general also limits their effectiveness in gaining and retaining custody of their children at divorce. Most Muslim women in the Northern States of Nigeria are confined in purdah and so depend on their husbands for all their needs, thereby further restricting their ability to retain the custody of their children independent of some form of financial support from men. Furthermore men are less likely to marry a divorcee who has children from her previous marriage to cater for.

From the foregoing, it can be seen that there can be no basis for a custody claim or contest for a Muslim child to arise between the natural parent of the child and a total

Amina v. Muhammad Dwafu. [24] In this case, Amina, the second appellant had secured a Khulli divorce from her first husband, Muhammadu Dwafu, the respondent. She then married Muhammadu Bida. Her former husband sued her and alleged that she was pregnant at the time of the divorce but had concealed the fact from him. He therefore wanted the court to annul the marriage of Amina with Muhammadu Bida until she delivers the child and hands it over to him. Amina denied that she was pregnant at the time of the divorce. It was held that a statement by a divorced woman as to the expiration of her iddah may be taken (under Islamic law) as providing conclusive evidence as to that fact without her having to swear an oath on the Qur'an or being subjected to a medical examination. Accordingly the child was held to be the child of the second husband. Thus although Islam lays down strict rules as to the observance of iddah and gestation periods, when it comes to the matter of concealed pregnancies, it is the word of the woman that counts.

In Palmata v. Abdullahi, [25] Abdullahi, the respondent, brought an action against his wife, Palmata, to the effect that she had given birth to a child seven months after their marriage and therefore the child did not belong to him. Palmata admitted that she had a concealed pregnancy by her former husband, Corporal Kolo. Kolo said that he knew of the pregnancy at the time of divorcing Palmata and had reproached

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24 Sharia Court of Appeal, Niger State, 31 January, 1978 (unreported)

25 Sharia Court of Appeal, Borno State, 17 th August, 1976 (unreported)

her for concealing it. Kolo wanted the court to declare the child as his and grant him custody. However the court did not believe Palmata nor Kolo and held that the child belongs to Abdullahi. Palmata appealed to the Upper Area Court which dismissed her appeal. She then appealed to the Sharia Court of Appeal. The court, presided over by the Grand Kadi of Borno State, the Hon. Justice Baba Kura Imam, held:

(1) That when a child is born to a Muslim couple after the minimum period of gestation of six months the child belongs to the legal husband. And since the child in this case was born seven months after the marriage the child belongs to the respondent, Abdullahi - the husband.

(2) That pregnancy becomes discernible (under Sharia law) after three months of conception. Therefore in this case the pregnancy could not have been discernible to the previous husband, Kolo, as he had claimed.

The first thing that comes to mind about these two cases is that they contradict each other. The first case stated that a divorced woman's statement as to the completion of her iddah was to be conclusive while the second case rejected that view and decided on the strict rules of gestation. In both cases there was no mention of the welfare principle at all. If the women in these cases were allowed to remain in their matrimonial homes during the iddah period as required by the Sharia then any sign of pregnancy would have been made evident. Furthermore in both cases the emphasis was on the right of the husband or father to the custody of the child. The mothers rights seem to have been relegated to the

background. This is not surprising, for it falls into the general negation of womens' rights in all fields of family law that we have observed so far in the area.

In the case of Ibrahim v. Hauwa Maina,[26] the general practice of regarding the grant of custody of children to their mother as temporary was revealed. The parties had four children, namely, Hauwa Kulu, 8 years old, Fanta, 7 years old, Mustafa, 6 years old, and Audu, 2 years old. Ibrahim had divorced Hauwa and she went home to her parents with the children. Ibrahim sued her for the custody of the children on the ground that she was about to remarry. He also stated that he had divorced her for a long time and therefore it was time for her to return the children to him. Hauwa insisted on keeping custody on the ground that the children were still young and that whenever they visited their father, their step mother, Ibrahim's second wife, beats them. The lower court gave custody to Hauwa on the ground that under Maliki law, custody of young children belong to their mother (until boys reach the age of puberty and girls reach the age of marriage when their custody reverts back to their father). Therefore since the children in this case were still young, the court decided that they should remain with their mother. Ibrahim appealed to the Upper Area Court but the court also upheld the lower court's decision as being sound and in accordance with Islamic law.[27]

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26 Case No. BUAC/CVA/36/85, Borno Upper Area Court 1 (unreported)

27 Similar decision was made in the case of Kawuwa Muhammed v. Laraba Ibrahim, Case No. BUAC/CVA/72/85, Borno Upper Area

Here, if the mother of the children was to remarry as claimed by Ibrahim, then the welfare of the children, which theoretically supercedes all "customary law", should have been invoked and the children returned to their father. For it is inconceivable that the children's mother's new husband would be willing to take the responsibility of raising four children that belong to someone else and may be removed from him at any time. On the other hand, the allegation of beating of the children by their step mother also constituted a serious threat to their welfare if they were to be given to their father at that tender age. Therefore the decision may have been the right one both from the religious and welfare point of view.

We have observed that in the case of the father of the children dying under customary law, the custody of his children goes to his male relatives who are in a position to care for them rather than to the mother of the children. In Islam, death of the father should render the right of the mother to the custody of her children more secure. In the case of Ya Kaka v. Usman Kolo and Ya Mariam, [28] Ya Kaka brought a case in the lower court for the custody of her 2 year old daughter who was being raised by the relatives of her deceased husband, Usman Kolo and Ya Mariam. She claimed that after the death of her husband, Usman and Ya Mariam had taken her daughter away. She went to the Area court for custody but the court awarded custody to the girl's paternal relatives. The

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Court (unreported) where the ages of the children were 6 and 2 years respectively.

[28] Case No. BUAC/CVA/9/87, Borno Upper Area Court (unreported)

latter had claimed that the girl's father had given them the girl to raise prior to his death. Ya Kaka appealed to the Upper Area Court which found that the actions of the lower court was not in accordance with Islamic law. For under Islam, the mother has the right to the custody of her young child as opposed to even the father of the child when there is a divorce. Even when the mother is dead, the mother's mother or her sons have the right to the custody of the child as opposed to the father or the relatives of the father. In this case the lower court ignored this rule even though the mother and the maternal relatives of the child were alive. The lower court was influenced by the general customary practice whereby men have the right to give their children to any relative to raise with or without the approval of the child's mother. In view of this the Upper Area court held that the child must be handed over to its mother. The decision was in line with an earlier decision in Bukar v. Dikwa,[29] where the lower court had given the appellant's daughter to its grandmother (maternal).

From the cases we have just considered, it is clear that the Islamic rules on the custody of children are strictly adhered to in most cases. At the same time the cases show a tendency of the people to combine the traditional customary rules with the Islamic ones. The grant of custody of children to their mother seem to be limited to very young children and even this seems to be on a temporary basis. Neither the father nor the mother is excluded totally from having access to their children. Moreover even if the mother has custody, the

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29 Case No. SCA/CV/73/BO/75, Sharia Court of Appeal, Borno, (unreported)

overall responsibility for care and control (through the provision of maintenance) is still with the father. It is in the cases where the father might have died that the full custody may be given to the mother. The welfare principle which is supposed to govern all custody cases that come to the Area courts seems to be ignored by the courts.

4. Interview Response on Custody of Children

Questions 36 to 46 of the Questionnaire were specifically concerned with custody of children, and all the three hundred persons interviewed in Borno had indicated their views on this. But since "custody of children" has or may have different meanings to different persons, Question 36 was put in a manner that both court awarded custody and custody determined by traditional methods are catered for.

It can be seen from the answers to Question 36 (see Diagram CVii) that in all the three areas of the interview, more than sixty per cent of the respondents that had custody of the children were all fathers. Maiduguri had 72 per cent, Biu had 68 per cent and Gwoza had 62 per cent of the respondents who indicated that the children stayed with their father after the divorce. This represents an overall percentage of 67.33 of those interviewed. It is not surprising that fathers had custody in the majority of cases because of the customary rules that favour them and the fact that economically, men are better off than the women.

Mothers had, or were indicated to have had custody of the children (this may not have been permanent custody since

young children may temporarily remain with their mothers after divorce until weaned or their father decides to take them back) in 25.33 per cent of those interviewed only. And the break down area by area reveals that Biu had the largest number with 32 per cent, followed by Gwoza with 26 per cent and lastly Maiduguri with 18 per cent of the respondents who indicated that the children remained with their mother after the divorce. It must be borne in mind that even in cases where the children remain with their mothers, the overall responsibility for their maintenance still lies with their father. And this seems to have been borne out by the response to Question 40 which asked the respondents to indicate whether they contributed financially to the support of the children after the divorce. Sixty two per cent of the respondents (50 per cent men and 12 per cent women) from Maiduguri, 52 per cent (42 per cent men and 10 per cent women) from Biu, and 56 per cent (48 per cent men and 8 per cent women) from Gwoza indicated that they contributed financially to the care of the children. This indicated an overall percentage of 56 per cent (46 per cent men and 10 per cent women) who had answered affirmatively to Question 40. Those that did not contribute financially to the upkeep of the children were mostly women (with 36.66 per cent). Only 6.66 per cent of the men did not contribute financially to the upkeep of the children. The latter group may represent those that did not have custody of the children or had someone else in their extended family looking after the children.

Questions 37 and 39 were meant to reveal whether the wishes of parents as to the custody or otherwise of their

children after the divorce had been reflected in what actually happened in the case of the respondents or not. Thus 214 of the men (71%) and 20 of the women (6.66%) indicated that they had wanted the children to remain with them after the divorce, as indicated in the response to Question 37. The remaining 66 of the respondents had indicated that they did not want the children to remain with them after the divorce. This latter group was subdivided into 61 women (20.33%) and 5 men (1.66%). As for the reason why such a large number of women did not want the custody of the children, one can only link it to the general customary rule in the area that children belong to their father, and the fact that divorced women may wish to remarry and if they had the custody of children from a previous marriage this may diminish their chances of remarriage. A further question to see whether those that wanted the custody of their children did in fact succeed in getting custody or not was revealed by the response to Question 38. Here out of the total number of 234 respondents that wanted the children to remain with them, only 20 (6.66%) failed to have custody, and the reasons for the failure, as indicated by the response to Question 39, was mostly customary rules on custody (12 out of 20), followed by court ruling and the forceful removal of the children with 4 respondents out of 20 each.

Questions 41(a) and 41(b) were meant to discover whether the parents of the children did make any other arrangements, whether for the welfare of the children or otherwise, or not. The response indicated that an overwhelming majority, (212 out of 300) indicated that there were no other arrangements

concerning the children. The remaining 88 respondents indicated that there were other arrangements apart from custody. The other arrangements consisted of right to access to the children, maintenance and the payment of the School fees for the children. The latter two being also part of maintenance. The most common arrangement , with 46.60 of the respondents was for maintenance, followed by access to the children with 32.60 per cent, and payment of School fees with 20.45 of the response.

The respondents were then asked to indicate their opinions on certain statements pertaining to the right of parents to the custody of their children. The opinions of the respondents as to who among the parents, has the right to the custody of the children following divorce, the majority of the response from all areas indicated that the father of the children has the right to the custody of his children. For 194 of the respondents (64.66%) indicated that in their opinion the father has the right to the custody of his children to the exclusion of the mother. Only 6 out of 300 (2%) indicated that the mother has the right to the custody of children to the exclusion of the father. A hundred of the respondents (33.33%) indicated that both the mother and the father have the right to the custody of their children. And as for the reasons for giving custody to the father the response showed a variation from area to area. As shown in the response to Question 43 the majority reason was for the welfare of the child, followed by the custom of the parties. Surprisingly, the payment of bride-price came third as the reason for giving custody to the father. Even in Gwoza area where the right to custody of

children has a greater link to payment of bride-price, the respondents in the area had indicated child welfare, followed by the custom of the parties, as the main reason for giving custody to the father. But then one may include payment of bride-price into the custom of the parties and conclude that the traditional rules on custody of children following divorce determine whether the father or the mother has the custody of the children.

As for the main reasons for giving custody of a child to its mother, the sex and age of the child were indicated, in Maiduguri and Gwoza, as the main reasons. In Biu area however, the welfare and age of the child were indicated to be the main reasons for granting custody to the mother. The payment of bride-price (or the lack of it in the case of women) was indicated in the Gwoza area to be the fourth main reason for the granting of custody to the mother after divorce. This seems to bear out the general practice in the area where non-payment of bride-price deprives a man the right to claim custody of his children. The response to Question 44 therefore further stresses the point that custody is given to the father unless the children have not been weaned or the father is not interested in them.

The fact that children normally maintain contact with both parents after divorce, irrespective of who has custody was also vindicated by the response to Question 46. Although here too the response showed the general dominant position of men in custody matters, there are nevertheless indications of the mother retaining contact with their children.

Finally the respondents were asked to indicate whether they were satisfied with the custody arrangements after the divorce or not in Question 45. More than seventy per cent indicated that they were fully satisfied while there was an equal number (10.66%) each of the respondents who were partly satisfied and not satisfied respectively.

Summary

Custody of children in Borno and most parts of Nigeria is invariably given to the father. Mothers have the legal obligation to care for their children too but in their case, this responsibility seems to stop after divorce especially in cases where they have not been granted the custody of the children. But even if the mothers have custody, the responsibility for maintenance seem to remain with the father of the children. The reason for this is partly economic (the mothers having no means to care for the children) and partly customary (traditional custom regards children as belonging to their father). And since there is no state aid in the form of income support for single parents available in Nigeria, a divorced woman that had hitherto depended on her husband for all her needs would find it extremely difficult to meet the burden of maintenance of children that goes with full custody. Therefore in the majority of cases, as we have observed from the cases examined, where the woman had custody of the children, she invariably depended on maintenance from the father or sought the courts to order the father to maintain his children. The traditional Nigerian practice of regarding children as "belonging" to their father means that the father,

or his male relatives, may claim the children from their mother at any time.

The dominance of the men in custody claims with women is reflected in Borno State by the provision in the Biu Declaration to the effect that women's right to the custody of their children is limited to unweaned children, and by the customary practice of giving custody to the mother only in the rare cases where the bride-price had not been fully paid before the divorce (as in Gwoza). The welfare principle which was derived from the English law was primarily meant for children born of monogamous marriages and was only recently extended to cases under customary law under the Area Courts Law, 1968. Therefore its effectiveness has only been in the Higher courts and in cases where the parties were prepared to go on appeal. And as regards custody cases involving Muslims, the welfare principle is totally ignored in preference to the Islamic rules even on appeal. This is because family matters are governed purely by Islamic law. And Islamic law restricts, in most cases, the rights of the parents to the custody of their children vis-a-vis each other following a divorce. Women have the right to the custody of their daughter until they reach the age of marriage while their rights to the custody of boys lasts until the age of puberty. It is only when the father of the children is dead that the right of their mother to their custody becomes more permanent.

As regards those married under the general law in Borno, as we have observed in previous Chapters as well, the tendency is to ignore the statutory provisions in preference to the

customary rules on custody or to interpret them as if in accordance with customary rules. Thus apart from the few cases of Nigerians from the Southern States and expatriates seeking custody in the High Court, there are hardly any cases of indigenous Borno people seeking custody under the general law. The reason seem to lie not only with the influence of custom but also with the general expense involved in taking cases to the High court as opposed to the customary courts or the non-state institutions of dispute settlement. Moreover, the welfare principle, which determines all custody cases for the general law ignores the customary rules and therefore parties may be more willing to go to institutions that respect their customs than to those that do not.

DIAGRAM C V1

Interview Response To Custody of Children

Q.36. With whom did the children stay after the divorce?

Options

	M/duguri	Biu	Gwoza
Father	72	68	62 = 67.33%
Mother	18	32	26 = 25.33%
F.'s relatives	8	0	12 = 6.66%
M.'s relatives	2	0	0 = 0.66%
Total	100	100	100

Q.37. Did you want the Children to stay with you?

Area	Options					
	(M)	Yes	(F)	(M)	No	(F)
M/duguri	66		4	5		25
Biu	60		16	0		24
Gwoza	88		0	0		12
Total	214		20	5		61
Percentage =	71%	=	6.66%	= 1.66%	=	20.33%

Q.38. If yes, did you succeed in having them?

Area	Options	
	Yes	No
M/duguri	66	4
Biu	60	16
Gwoza	88	0
	258	

Q.39. If no, why didn't you succeed?

Options	Area		
	M/duguri	Biu	Gwoza
Custom applied	4	8	0
Court denied custody	0	4	0
Children taken by father	0	4	0

Q.40. Did you contribute to the financial support of the children after the divorce?

Area	Options			
	Yes		No	
M/duguri	(M) 50	(F) 12	(M) 0	(F) 38
Biu	(M) 42	(F) 10	(M) 8	(F) 40
Gwoza	(M) 48	(F) 8	(M) 12	(F) 32
Total	140	30	20	110
Percentage	= 46%	= 10%	=6.66%	=36.66%

Q.41. (a) and (b). Apart from custody, was there any other arrangement concerning the children?

(b). If yes, what was the arrangement?

	Answer to (a)		Answer to (b)		
Area	Yes	No	M/tenance	Access	S/fees
M/duguri	26	74	10	10	6
Biu	34	66	15	9	10
Gwoza	28	72	16	10	2

Q.42. Who, among the following, do you think has the right to the custody of a child after divorce?

	M/duguri	Biu	Gwoza	
a. Father	74	52	68	= 194 = 64.66%
b. Mother	2	4	0	= 6 = 2%
c. Both parents	24	44	32	= 100 = 33.33%

Q.43. What are the main reasons for giving custody of a child to his/her father? (You may tick more than one).

	M/duguri	Biu	Gwoza
a. Sex of child	8	6	2
b. Age of child	8	8	0
c. Payment of b/price	12	12	30
d. Child's welfare	30	78	52
e. Custom of parties	80	40	34
f. Other...	0	0	0

Q.44. What are the main reasons for giving custody of a child to his/her mother? (You may tick more than one).

	M/duguri	Biu	Gwoza
a. Sex of child	60	34	38
b. Age of child	56	42	38
c. Payment of b/price	2	8	18
d. Child's welfare	26	60	30
e. Custom of parties	22	12	6
f. Other...	0	0	0

CHAPTER SEVEN

Property Settlement On Divorce

Introduction

Family breakdown invariably involves a change in the economic position of the parties and their children. If the family hitherto depended solely on the income of the husband, then divorce or separation may have serious consequences on the well-being of the wife and the children. The extent of the economic consequences that may face a family on divorce in a country like Nigeria depends on a number of factors. First, the nature of the marriage may determine the right of the spouse in need for support claims from the other spouse. For there is no comprehensive legislation for the care of deserted wives for instance. It is only the wives of general law marriages that have the right to seek post-divorce support from their ex-husbands. Secondly, as we have observed in Chapter Five, the existence or otherwise of a functioning social welfare system in the country also has a profound effect on those family members that were dependent on their fellow spouse during the marriage. Nigeria has no Social welfare and therefore every victim of family breakdown has to rely on either the extended family or self-employment which may take several forms, ranging from petty trading to prostitution. Thirdly, the assets of the family as a whole or individual assets that existed prior to the divorce may turn out to be of more value to a needy spouse after divorce than if the family or the family member has no tangible assets at all. Here the rules on property ownership, both ante-nuptial and post-

nuptial, as well as the mode of sharing out such property after divorce under all the marriage types in Nigeria affects the nature and the rate of post-divorce property dispute settlement.

In Nigeria where the payment of bride-price is still the norm rather than the exception, and polygamy is still widely practiced, any discussion on the economic consequences of divorce must necessarily consider the effect that refund of the bride-price and remarriage of divorcees may have on the need for post-divorce maintenance, custody of children and property settlement. The husband of a polygamous household may, on divorce of one of his wives, still be saddled with the responsibility of maintaining not only his remaining wife or wives and children, but also his aged parents and other extended family members. Therefore to order such a person to share his resources between the divorced wife and his family may amount to injustice.

The Nigerian society as a whole is still largely male dominated and this is reflected by the comparatively weaker economic standing of women vis-a-vis their male counterparts even in cases where they partake in the family based economic system. Men can, and do still divorce their wives unilaterally even if the marriage was contracted under the general law. Thus on divorce, women may be thrown out of the matrimonial home, denied custody and access to their children, and denied right to any property acquired during marriage. In this Chapter the economic consequences of family breakdown is examined with particular reference to property settlement. Property rights of spouses during marriage and after marriage under the various marriage types in Nigeria, with particular reference to Borno State is

examined first. The significance of the refund of bride-price on divorce, and the payment of the Islamic proper dower as well as the "khula" is also examined in terms of its significance in property settlement after divorce. The nature of traditional "family property", and the patrilocal nature of most marriages in Nigeria is also examined in terms of its effect on the mode of post-divorce property settlement between parties to all marriage types. Due to the dearth of general law cases on post-divorce property settlement in Borno State, case studies obtained from interviews in the area and social welfare cases are relied upon.

1. The General Law

The introduction of the English law on marriage into Nigeria meant that all the Common law rules on property rights and settlement affecting husband and wife of such marriages were equally applicable in Nigeria. The Married Women's Property Act,1882, was, and still is, the main statute dealing with property rights in Nigeria. Although the Western States had re-enacted the English laws on this matter, the contents of the new indigenous laws closely followed that of the 1882 Act.[1] These Acts were made applicable to persons marrying under the general law in Nigeria despite the differences in social set up of Nigeria and England. As a result a statutory law wife in Nigeria may institute proceedings against all persons for the protection

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1 See Park,A; *Sources of Nigerian Law* Sweet and Maxwell, 1963, pp. 24-36; Ogedegbe v. Ogedegbe [1964] LLR 209; Asomugha v. Asomugha, CCHJ/12/72, 91; The Married Women's Property Law, 1958, is a re-enactment of the Married Women's Property Act, 1882, and the English Law Reform (Married Women and Tortfeasors) Act, 1935.

of her separate property as if she were a *femme sole*.[2] Disputes between husband and wife, both during and after marriage, as to the ownership of property have to be settled under either the provisions of the 1882 Act or the Married Women's Property Law, 1958, which applies to the Western and Bendel States. Section 17 of the 1882 Act, which still applies, *mutatis mutandis*, to the rest of Nigeria other than the Western states provides:

> " In any question between husband and wife as to the title to or possession of property either of them may apply for an order to the High Court or a County Court and the judge may make such order with respect to the property in dispute...as he thinks fit." [3]

In 1970, with the promulgation of the Matrimonial Causes Act, another law on property settlement for general law marriages came into being in Nigeria. Unlike the 1882 Act, and the 1958 Law, the 1970 Act applied throughout the country to persons married under the general law. The 1970 Act empowered the courts to make orders, in any matrimonial cause that involved the settlement of property, for the settlement of the property in any manner whatsoever as long as justice is done.[4] From this it may appear that the Matrimonial Causes Act, 1970, might have replaced the earlier two laws on property settlement. However this is not

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2 Per section 12 of the 1882 Act and section 10 of the 1958 Law

3 Section 17 of the Married Women's Property Act, 1882; similar provision exists under section 17 of the Married Women's Property Law, 1958. One of the differences between the two is that only the High Court in Nigeria has jurisdiction over general law matrimonial causes.

4 See section 72 of the Matrimonial Causes Act, 1970; Order XlV, rule 4 of the Matrimonial Causes Rules 1983 provide that parties seeking ancillary relief such as property settlement must furnish the court with the relevant information as to ownership, or contribution to the acquisition of the property as well as the general financial position of the parties.

the case. For the 1970 Act is primarily concerned with the general reorganisation of the spouses's affairs, including property settlement, after the breakdown of the marriage has been established by the grant of a principal relief such as a divorce. The 1882 Act and the 1958 Law on the other hand can be invoked in any dispute on property rights between husband and wife irrespective of whether a principal relief had been granted or not. Therefore where a proceeding had been instituted for the settlement of a family property dispute under the Married Women's Property Law for instance, such proceedings may be thwarted by another proceeding being instituted under the Matrimonial Causes Act in another court for a principal relief and ancillary relief.

As we've observed in previous Chapters, in the field of the application of most general law rules on the family, statute law differs drastically, and is often influenced by the customary law. Customary law recognises the right of each party to a marriage to his or her own separate property, but on divorce, some customs,such as the Bura of Biu and the Guduf of Gwoza, consider all property within the matrimonial home as belonging to the husband. The nature of bride-price is such that all marriages are predicated upon the payment of it irrespective of what the general law may say about it. Divorce is normally left to the husband to implement and he usually does this by the physical removal of the wife's property from the home. It is also incumbent on the wife or her parents to refund all the property that the husband might have expended on the marriage. Therefore the question of the wife being compensated on divorce by her ex-husband does not arise. The "matrimonial home", particularly in

the rural areas, may consist of the extended family compound where the husband's other relations and their families may also be residing. A divorced wife under such circumstances cannot demand the right to remain in occupation of the home.This has also been found to be the case in Tanzania (Rwezaura:1982).

Principles governing property settlement

The traditional common law rules on property rights of spouses as well as the statutory rules that subsequently modified such rules are essentially based on society's views on the respective roles of men and women within the marital relationship. Aristotle, the Greek Philosopher, considered the function of men and women within the home as separate but complementary. He said, " men and women have different parts to play in the home: his to acquire, hers to conserve." [5] Thus the relationship is a form of partnership which is characterised by the acquisition of property by the husband and the conservation of it by the wife. But this is a rather simplistic way of considering the matter, especially in this day and age where more women go out to work than in the days gone by. The Common law relied on the mode of acquisition of the property as the basis of entitlement on divorce. The housewife who stayed at home and looked after the family did not, and still does not benefit much under the derivation principle of property settlement. Thus Gray's statement on the dichotomy between the wife's domestic role and right to property on divorce is equally applicable to Nigeria. Gray said:

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5 Aristotle, *The Politics* Book 111, Chapter 4

" It has always been the case that domestic effort of the wife in caring for the children and looking after the home, is the least compatible with the property concepts which have traditionally dominated Common Law thinking on matrimonial property. The recognition of such a "matrimonial " consideration is alien to the historic conception of property law, and domestic labour has always been regarded as constituting the weakest claim to entitlement when the property relationship of the parties is dissolved on divorce. A distinct step towards a non-discriminatory formula for the reallocation of property would be taken if a good case were made for the legal recognition of domestic effort as a form of positive participation in the acquisition of the assets of husband and wife during marriage."[6]

The historic conception of property law that Gray refers to, as regards property rights of spouses, were embodied in the provisions of the various Married Women's Property Acts, as stated earlier, and are still applicable to Nigeria. Moreover the Criminal Code in Nigeria provides that parties to a general law marriage, while living together, cannot be criminally responsible for any offence committed by one against the property of the other except where the guilty spouse was in desertion or was about to desert the other.[7] The Criminal Procedure Act provides that a Christian Marriage wife

"shall have in her own name against all persons whatsoever, including the husband of such marriage... the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as an unmarried woman."[8]

However this section is made subject to the provision of section 36 of the Criminal Code - that is the parties cannot sue each other for property while still living together. A married

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6 See Gray, K.J; 1977, *Reallocation of Property on Divorce*: Professional Books Ltd. Abingdon Oxon.

7 Per section 36 Of the Criminal Code

8 See section 148 of the Criminal Procedure Act (Laws of the Federation of Nigeria, 1958, Revised Ed.) Cap. 43.

woman that uses her husband's money to invest, without his consent, has no absolute right to such an investment and the husband may claim such investment. The combined effect of all these rules is to emphasise the separation of property between husband and wife in Nigeria. Each spouse is thus entitled to his or her self-acquired property.

Although the wife's thrift in managing the home may contribute to the acquisition of family property, so long as entitlement to property in dispute is determined in Nigeria as the basis for a share, the wife would continue to have nothing on divorce. Her contribution to the family property may not be easily identifiable nor be equal to her husband's, nevertheless it is contribution that she should be rewarded for when her marriage ends in divorce. As Kahn-Freund said :

> "The wife's thrift and the husband's industry are equally contributions to the family wealth. They are not equal contributions within the ambit of the separation norm. In terms of the separation norm what is required is an act of counter-discrimination, that is an act by which unequal cash contributions are treated equally."[9]

The general pressure that exists on a married woman to have children also makes it difficult for her to compete in the wage market with her husband. And from the time that a woman conceives to the time that she gives birth to the child, her contribution to the family wealth is severely restricted. If she or her husband cannot afford house help, then her period of economic inactivity may even extend up to the time that the child is of school going age or even longer. Even if she manages to combine

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[9] Sir Otto Kahn-Freund, in (1974) 4 Human Rights Journal 493, 505: " Matrimonial Property and Equality Before the Law: Some sceptical Reflections. "

her domestic responsibility with an outside job, her performance in the outside job may be severely curtailed by her domestic responsibilities. Therefore in whichever way one considers it, the earning capacity of the wife is inferior to that of her husband. Total statutory removal of discrimination against women in employment, as already provided for under the Constitution in Nigeria, would not result, and has not so far resulted, in any significant change in the position of the married woman without a composite change being had in the traditional position of man and woman in marriage.

As stated in Chapter two, the rules governing general law matrimonial causes in Nigeria prior to the promulgation of the Matrimonial Causes Act, 1970, was the law and practice in force in England. This meant in effect that all the English law rules, *mutatis mutandis*, on marital property dispute settlement were equally applicable to Nigeria. And for most of this period there existed an imbalance in the post-divorce property rights of husband and wife. The imbalance was based on the courts' construction of section 17 of the 1882 Act which was based on a rudimentary concept of sexual equality in marriage in that both husband and wife were considered to be equal in terms of the right to acquire and own property. Thus any post- divorce property dispute was settled on the basis of acquisition or ownership of the item in question. Jointly owned property that was the subject of a dispute was settled on the basis of contribution to its acquisition. And since most of the capital assets of the family both in Nigeria were more likely to have been acquired by the husband, it meant that divorced women were

often left with nothing. The most that a needy divorced woman could expect from her ex-husband was an income payment, (alimony), which could be made as a lump sum payment or periodic payments. In case of periodic payments, as soon as the wife remarried, such payments were stopped on the premise that by remarriage the woman no longer needed support from her ex-husband. On divorce, a woman lost the right to remain in the matrimonial home, if it was owned by the husband.[10] Therefore in the application of the provisions of the 1882 Act, the courts in Nigeria were more concerned with the protection of property rights of the spouses than with doing justice to a needy spouse. The injustice that the strict adherence to the separate property rules caused to divorced women resulted, in England at least, in an increasing demand for the law to be changed.

The Nigerian Matrimonial Causes Act,1970, was promulgated at a time of Military rule and therefore there was no prior debate as to its suitability or otherwise to the nation. The High Court was given the power to settle any property dispute between spouses in any manner whatsoever as long as justice is done to the parties. Thus section 72 of the Act provides that the court may order the parties to the marriage or either of them to settle for the benefit of all, or any of the parties, or the children of the marriage, any property in possession or reversion if it considers that to do so would be just and equitable. Traditional

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10 See for instance the cases of *Blackwell v. Blackwell* [1943] 2 ALL E.R. 579; and *Murcutt v. Murcutt* [1953] P. 266; where in the former case the wife's claim to the sum of £100 saved out of the housekeeping money given to her by her husband failed, and in the latter case the husband's right to expel the wife from the matrimonial home on divorce was upheld.

customary "family property" to which either of the parties has an interest does not come under the definition of "property" that the section refers to. This is due to the unique nature of family property and the rights attached thereto.[11]

General Law Property Settlement in Borno State

During the course of the research in Borno, it soon became apparent that general law cases on property settlement seldom come to court. In fact this fitted the pattern of the general dearth of local cases of divorce that come to the Borno High Court. As a result one had to resort to Social Welfare cases and personal interview data.

Case study 1

Joseph and Mary [12]

Joseph married Mary in Church in 1980. They had three children. Joseph had paid a bride-price of 2,000 Naira cash, plus other incidental expenses which totalled 1,507 Naira. Joseph was a senior Civil Servant while Mary worked as a Primary School teacher. Joseph had purchased a plot of land in Maiduguri for 800 Naira and built a four bedroom bungalow on it. Mary contributed to the purchase of the household furniture and property which included a Television, Settee, Fridge, Gas Cooker, and Carpets. However she was not sure how much she had contributed altogether. Her husband also bought a Car on hire purchase and while the repayment was being deducted from his salary, Mary's salary was

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[11] See **Coker v Coker** [1938] 14 NLR 83 at 86

[12] A.S.W./FCW/15/87

used for food and the paying of the household Bills. In 1987 Joseph married Salamatu under Customary law and brought her into the same matrimonial home. Mary objected to this and moved out to a rented accommodation alone. One day she went back to the matrimonial home to see her children and to collect some of her property. But Joseph prevented her from taking any item of property on the ground that she did not own any property in his house. Joseph also gave Mary a "divorce note" in which he stated that he had divorced her and that he had waived his right to the refund of the bride-price because of the children that Mary had given him. Mary complained to the Social Welfare Office and asked the Officers to make Joseph return her property to her. After fruitless efforts at trying to resolve the issue, the Social Welfare Officials advised the parties to go to court. Mary however was not willing to go to court and following further efforts to reconcile the parties, Joseph agreed to pay 2,150 to Mary and Mary accepted it.

A striking feature of this case is the fact that even though the parties were highly educated, they were nevertheless unaware or chose to ignore the consequences of a general law marriage. Mary accepted the divorce as valid, and allowed Joseph to quantify the amount of money she had contributed to the purchase of the household items rather than doing so herself. Her reaction however is understandable when one considers the fact that most women in Borno State, irrespective of the type of marriage that they had contracted, have no right to jointly acquired property on divorce.

Case Study 2.

Bulus v. Amina__[13]

Bulus and Amina were married in Church in 1982 in Biu. Bulus paid a bride-price of 2,500 Naira cash, Clothes and suitcases for the bride worth 2,000 Naira, and an undertaking to pay the school fees of Diya, Amina's sister until she finished her schooling. He paid her school fees and maintenance costs for four years- i.e. from 1983 to 1986, and the total cost amounted to 2,156 Naira. Bulus worked as a trainee Bank Manager while Amina was a house wife. They had no children. In 1987, following a quarrel, Amina ran back home to her parents. Bulus did not send for her to come back, but instead, he demanded the refund of all his expenses on Amina, which he quantified as 10,806 Naira. Amina's parents could not afford to pay so they first took the matter to their local Ward Head to try and solve but without success, and then they took the matter to the Police who told them that it was a domestic matter and they would not interfere. Eventually the matter was brought to the Social Welfare Office where Bulus still insisted on being repaid all the expenses he had incurred. Amina also claimed that Bulus had confiscated her Radio Cassette worth 200 Naira, her bed worth 400 Naira, and her Kitchen ware worth 1,000 Naira. She therefore wanted those items to be given back to her before any refund of the bride-price can be made. Bulus said that the items claimed by Amina were bought with his money and therefore belonged to him. And he went on to say, " the only property that she brought to my house which is not mine is 6

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[13] A.S.W.O./FCW/19/87

pieces of Gold Coins which her parents gave to her". After a protracted period of argument, the parties came to an agreement that Amina would refund the bride-price after Bulus had released the items that he had confiscated from her.

This case also illustrates the point that husband and wife of all marriages in Borno specifically know which items of property belong to who during the marriage. And due to the nature of marriages and divorce in general, where men expend a lot of money on marriage and demand the refund of it on divorce, it is very rare indeed for divorced women to claim a share of the property of their ex-husband. Again, the fact that post-divorce support for ex-wives does not normally occur under customary law seems to have influenced parties to general law marriages as well. In this instant case and in the previous case, if the matter had gone to court, then the provision of section 72 of the Matrimonial Causes Act, 1970, would have been applied and the result would also have been markedly different.

Case Study 3.

Thompson v. Kande[14]

Thompson married Kande under customary law first before the marriage was solemnised in Church in 1975. Bride-price was waived by Kande's parents. In 1976 Thomson had given Kande the sum of 2,000 Naira with which she started a Newsagents shop. By 1984, when the parties separated, the shop was worth more than 30,000 Naira. Thompson confiscated the shop. He also prevented Kande

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[14] G.A.S.W.O./F.C.W/5/85

from removing any item of property from the home on the ground that everything belonged to him. Kande complained to their respective family heads but the family council sided with Thompson. So she went to the Social Welfare Office where they were both reconciled and Thompson agreed to take Kande back but on the condition that she relinquished all claims to the shop. Kande agreed but insisted on her husband paying her half the estimated value of the shop. Thompson paid her 15,000 Naira, and she used the amount to set up her own shop.

Here too customary rules have been applied to a dispute involving parties married under the general law. Although the initial marriage was contracted under customary law, the Church ceremony had converted it into a general law marriage. On the basis of contribution, it is true that the initial capital for the shop was provided by Thompson and therefore he was entitled to a share in it; but Kande's effort at making the shop viable was equally important. Under traditional customary law, especially of the Bura people, to whom the parties belonged, Kande had no right to claim ownership of the shop or to claim a share of it when the marriage had broken down or even when the marriage had not broken down. The solution arrived at by the Social Welfare Officials illustrates a new development where the customary and general law rules are set aside in favour of an equitable solution.

Interview response to questions on property settlement

The 300 persons interviewed in Borno State were also asked specific questions on property ownership (the matrimonial home in particular) during marriage and property settlement on divorce as well as a couple of questions designed to show their preference for the types of property settlement on divorce. We now examine the response of the 100 persons that were married under the general law.

Q.16. Where did you live when you were married?

Options	Response	
a. Your own home	19 (M),	0 (F)
b. Your wife's home	0 (M)	
c. Your husband's home		35 (F)
d. Your wife's parents' home	0 (M)	
e. Your husband's parents' home	13 (M)	5 (F)
f. Rented Accommodation	18 (M)	10 (F)
g. Jointly owned home	0 (M)	0 (F)
Total	50	50

Q.34. Was there any settlement of property between you and your former husband or wife on divorce?

Options	Response	
Yes	15 (M)	5 (F)
No	35 (M)	45 (F)
Total	50	50

The response to Question 16 confirms what we had observed in Chapter five; that is the fact that women rely on their

husbands for the provision of accommodation, and that ownership of real property is largely in the hands of men. Women must live within their husbands' matrimonial home whether or not they have their own homes. The high number of parties residing in rented accommodation were mainly found to be among urban dwellers and persons in government employment. As for the settlement of property, 80 per cent of those interviewed said that they did not share or settle any property after the divorce. Of the remaining 20 per cent, the property that was mentioned more than any other was the refunded bride-price. All the 5 females that responded affirmatively to this question cited the refunded bride-price as the property settled, while 10 males mentioned bride-price along with household furniture. Five males stated that they had to share the proceeds of jointly acquired property such as Cars, Television sets, and a jointly held bank account (one male interviewed mentioned this). In all these cases the divorce was effected out of court.

The interviewees were then asked to indicate whether they agreed with the following statements on property settlement on divorce or not.

Q.47. At divorce, husband and wife should share all their property equally.

Options	Response	
Agree	9 (M)	21 (F)
Disagree	41 (M)	29 (F)
Total	50	50

Q.48. At divorce, each party should take only the property that belongs to him or her.

Options	Response			
Agree	48	(M)	45	(F)
Disagree	2	(M)	5	(F)
Total	50		50	

The response to the first option reveals an enormous divergence between the views of men, who overwhelmingly disagreed with the proposition, and the women who were almost equally divided in their views. However, a majority of the women, 29 out of 50, disagreed with the proposition that spouses should share their property equally on divorce. Male negative response can be understood from the fact that most matrimonial assets are owned by them and therefore they would naturally prefer the status quo where property is reallocated on the basis of ownership. Women too recognised the fact that on divorce they lose in terms of property rights that is why 21 per cent of them, as opposed to 9 per cent of men, were in favour of the proposition.

However the second proposition that each party should take only the property that belongs to him or her, elicited a remarkable consensus of opinion from both sexes. Ninety three per cent of the interviewees (48 per cent of men and 45 per cent of women) were in favour of property being shared in accordance with entitlement. Although the views of women here seem to contradict their views on the previous proposition, it can be understood from the point that women naturally want to share in

their husbands' property but they do not want their husbands to share in their property on divorce.

Thus property settlement for general law spouses in Nigeria is linked with the post-divorce maintenance needs of the parties, particularly the woman, and it may serve as an alternative to payment of maintenance itself. Moreover, maintenance payments may cease automatically on the remarriage of the recipient.[15] In such a case, it would undoubtedly be to the disadvantage of the wife if her economic contribution to the marriage was not fully reimbursed by reason only of her remarriage. Property settlement would compensate her once and for all and would not hinder her remarriage nor continue to burden her husband (as a periodic payment would). Furthermore, a divorced or deserted wife's receipt of maintenance from her former husband affects her entitlement to personal income tax relief as observed in Chapter two. Similar restrictions exist in England and Wales where social welfare is provided for persons in need, and a woman's receipt of maintenance on a regular basis may affect her entitlement to welfare benefits.[16] In the absence of social welfare in Nigeria, the needs of the divorced woman may be more acute without the continued existence of the extended family based support system.

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15 See section 73(2) of the Matrimonial Causes Act, 1970. Similar provision exists in England under section 28(1) of the Matrimonial Causes Act, 1973.

16 For example under the Supplementary Benefits Act, 1976, Schedule 1, Part 111, Paragraph 19, it is better for a divorced woman to get a lump sum payment from her ex-husband; for if she uses the lump sum for a deposit for the purchase of a home, and the lump sum does not exceed £1,200, she would still be entitled to supplementary benefit.

2. Customary Law

Under customary law generally, spouses have no right to each other's property during or after marriage. Neither has the right to control or influence the other's enjoyment of his or her property. A woman's property is inherited by her children or in their absence, by her parents and other blood relations. The property of the husband is also inherited by his children, the first born male usually taking the lion's share or having preference over others.[17] However Nigerians recognise the personal rights of a married woman to own property independent of her husband. Even among the Idoma of Benue State of whom Armstrong had written: "... in principle the property a woman accumulates during her married life is the property of her husband, and may be claimed by his heirs when he dies",[18] there is a clear distinction between the property of the wife and the husband. Armstrong had obviously construed the practice of widow inheritance among the Idoma to be synonymous with depriving the woman of her property rights. The separation of property is also confirmed by the Idoma Declaration [19] which mandates all disputes on property ownership to be settled in accordance with local custom. This was aptly followed in the case of Onyaimu Ogah v.

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17 See Kasunmu and Salacuse, *Nigerian Family Law*. Butterworth, London, pp.266, 297; Allott, A.N; 1960 *Essays in African Law* pp. 234-235; Neziora v. Okagbue (1939) 15 NLR 31; and Philips, A.; and Morris, H.F; 1971, " Marriage law in Africa" Oxford University Press, p. 52

18 Armstrong, R.G. " The Idoma speaking people", in : *The people of the Niger Benue Confluence*" 1955 D. Forde(ed.) p.99

19 See the Native Authority (Declaration of Idoma Native Law and Custom) Order, 1959, as amended in 1970, section 14

Oche Awulu [20] where a husband was prevented from claiming the farm produce of his wife on the ground that it was contrary to Idoma Customary law.

The Tiv too recognise the principle of separation of property between husband and wife. In the case of Asen Taakpee v. Ember Gigya, [21] the appellant had divorced his wife on the ground of barrenness after seven years of marriage without a child. In addition, he seized her clothes and personal effects (a practice that is very common in the Northern States especially where the marriage is short and ends in acrimony) to the value of 230 Naira. She successfully sued the husband for this.

As we have observed in the previous Chapter in the case of the Bura, Babur of Biu area, and most of the Hill Dwellers of Gwoza, it is generally understood that the land allotted to a wife by her husband for cultivation still belongs to the husband. And any loans or advance that the husband might have given the wife to start a Business has to be refunded on divorce. All profits acquired from the Business or in selling the surplus farm produce belongs to the wife. And therefore she is entitled to take them with her on divorce.

The payment of bride -price enables her to purchase her own separate household property. Such purchases may be supplemented by gifts from her parents and the traditional wedding items. Even if the marriage lasts for only a few days, the woman is entitled

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20 Case No. MD/46A/1975, The High Court, Benue State, 29 th January, 1976, Bate C.J. presiding (unreported)

21 Case No. MD/15A/82, Benue High Court,4/2/83 (unreported)

to keep the property. Her obligation at divorce is to ensure that the bride-price paid on account of the marriage is refunded to her husband (unless it is waived) so that she can be free to remarry. The onus for the refund usually lies with the parents of the woman or with any other person who was in *loco parentis* to the woman at the time of the marriage. And the fact that most customary law marriages are virilocal means that the matrimonial home belongs to the husband and so the wife has no claim to it on divorce.

Thus customary law in Nigeria places the wife in a comparatively disadvantaged economic position which is reflected in her not having any legal interest to his property on divorce or on his death. Her role in marriage seem to be limited to being a wife, mother, and house keeper.

Refund of bride-price and other items of property.

The dissolution of traditional marriages (and Islamic marriages in the Northern States as well) are normally effected by the refund of the bride-price.[22] The elaborate procedure for reconciliation that normally precedes any customary divorce is also aimed at settling any dispute as to the ownership of property between the parties before the divorce is made effective, whether by a court or a family council. Where there are disputes as to the ownership of property or the actual amount paid as bride-price, then the witnesses to the marriage, if they

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22 See Nwogugu, E.I. *Family law in Nigeria* Heinemann (1974), pp. 183-186; Anyebe, A.P. 1985, Customary Law: the War without Arms Fourth Dimension Publishers, Enugu, Nigeria, pp.71-79

are still available, are called to determine the matter. Certain communities, such as the Igbos, suspend the refund until the woman has remarried. In most communities, it is the duration of the marriage, the birth of children, and the nature of the divorce (amicable or not) which generally determines whether the bride-price and other items are to be refunded.[23] Apart from this, no woman would risk remarriage without having refunded the bride-price, or having obtained a waiver, due to the possibility of a future conflict of paternity or right to the custody of children that she might bear.

Items recoverable on Divorce

Apart from the statutory limitations placed on what is recoverable as bride-price in some parts of Nigeria,[24] any item that was paid towards or in consideration for a customary marriage may be recovered. It is the right of the husband to include all the items that he wants refunded in his demand for the refund of the bride-price. He may alternatively choose to forego everything as was the case in Oluji v. Ikpa [25] where the divorced woman had three children and so her husband waived his right to the refund of the bride-price on account of the

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23 This is the case among the Marghi, Kare-Kare, Bolewa, Guduf, Bura people of Borno State.

24 The Limitation of Dowry Law(cap.76 Laws of Eastern Nigeria, 1963) put a limit of 60 Naira as the amount recoverable as bride-price; the Marriage, Divorce and Custody of Children Adoptive By-Laws Order, 1958, fixed the limit, depending on the duration of the marriage and subject to local modifications, from 40 to 70 Naira; and the N.A. (Declaration of Biu Native Marriage Law and Custom) Order, 1964, fixed the amount at £20 (which is now valued at about 240 Naira.

25 Case No. OHC/72A/81, Otukpo High Court, 1982 (unreported)

children. What constitutes an essential payment for the marriage, is a matter of fact to be determined by the court or the family council. But generally, money given in cash does not constitute a gift that is totally independent of the marriage expenses unless clearly stated otherwise. For example the practice among the Hausa people of giving *toshi* (monetary gift by the suitor to the future bride, made on a regular basis - i.e. on important occasions such as Market days, and traditional and religious festivals) is normally recognised as forming part of the bride-price, and so a woman is expected to refund all the *toshi* in the event of her not marrying the suitor. But customary courts seem to place more emphasis on the refund of the bride-price alone even though other items of property might have been expended. This is illustrated by the decisions in the cases of Abu v. Adaji,[26] Sule v. Igono,[27] Idakwo v. Yusufu [28] where it was held that the cost of clothes bought for the wife, the cost of crockery and other household utensils, and gifts made to the wife during the marriage respectively, were not recoverable. In each of these cases the husband had claimed the refund of other expenses as well as the bride-price. It is pertinent to remind ourselves here that the courts in most of these cases are implementing " court or judge-made customary law" (Woodman:1985) rather than the customary law as understood by the people. For it is inconceivable that men would consistently claim the refund of all their expenses incurred on a woman during marriage if

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[26] Case No. MD/233A/78 Abejukolo Area Court (unreported)

[27] Case No. MD/49A/79 Ofugo Area Court 11 (unreported)

[28] Case No. ID/22A/80 Ofugo Area Court 11 (unreported)

customary law does not provide for it. This apparent confusion about what may and may not be recoverable was further illustrated by the cases of Musa v. Omale [29] and Ogwuche v. Omachoko [30]. In the former case, the wife had petitioned for divorce and had offered to refund as the bride-price, the sum of 150 Naira which she itemised as 100 Naira bride-price, 40 Naira for crockery and cooking utensils, and 10 Naira for her clothes. The husband on the other hand claimed the sum of 1,169 Naira and itemised the amount as consent fee, gifts for the wife and her relations, clothing for the wife, bride-price, cost of crockery and money given to the wife by the husband's friends. The lower court held that the wife and her parents must refund all that they had received from the husband on account of the marriage. The wife appealed to the High court where it was held that the parties were not even validly married and therefore the wife was not liable to refund any of the items received. In the *Ogwuche* case, the lower court and the High court rejected the husband's claim of 200 Naira as bride-price because it included the cost of clothes for the wife, the cost of a sacrifice made to a local idol so that the wife may recover from an illness, and gifts made to the wife. Thus gifts, medical expenses, cost of clothes bought after the marriage would seem to be excluded from the items recoverable because of the husband's obligation to maintain his wife. But this all depends not only on the local custom, but also on the cause of the divorce. If the woman was responsible for the

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[29] Case No. ID/2A/79 High Court Idah (unreported)

[30] Case No. MD/113A/78 High Court Idah (unreported)

divorce, then it is most likely that she may be made to refund all that the husband might have spent on her.

Since customary law in itself is not uniform in Nigeria, there are numerous variations as to the items that may be recovered on divorce. The only common factor to all the customs is that some form of recompense, bride-price or whatever, has to be made to the husband when the marriage breaks down. Although invariably it is the divorced woman who may be in need of support, customary rules and ideology have firmly established that it is she who should pay when the marriage breaks down.

Customary case studies on property settlement

Case study 1.

Bala Karim v. Dudu Sani[31]

Bala and Dudu were members of the Guduf community of Gwoza and they were married under traditional customary law in 1977. Bala had paid a bride-price of 150 Naira cash plus two cows and two goats. The marriage lasted for seven years and was blessed with three children. Dudu brought the livestock given as bride-price with her to the matrimonial home and mixed them with Bala's livestock. In 1984 Bala divorced Dudu unilaterally and she went back home to her parents. He further demanded the refund of the 150 Naira bride-price and said that the livestock that Dudu brought to his house belong to him. The matter was taken to court by Dudu where the Area court held that under Guduf customary law

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31 Case No. 43/86 Area Court 11, Gwoza (unreported); and BUAC/CVA/187/87 (unreported)

the birth of children nullifies the husband's claim to the refund of the bride-price. And in this case Bala was ordered to hand over Dudu's livestock to her.

This case also illustrates the common customary law rule of regarding property within the home as belonging to the man. If Dudu had left the livestock in her parents' home then there would have been no possibility of her husband claiming them. Here the fact that she gave birth to children saved her from refunding the bride-price.

Case study 2.

Yahya Kabo v. Halima Mohammed[32]

Yahya and Halima were married in 1972 under customary law in Pulka. Halima took 10 head of cattle of her own to her husband's house. By 1984, the cattle had increased to 65. Halima permitted her husband to sell some of the Cattle and to buy a Taxi, and build an extension to the family home with the proceeds. In 1985, Yahya sold some Cattle and used the proceeds to marry a second wife. Halima objected to this and went back home to her parents who promptly called upon Yahya to divorce their daughter and to pay for the livestock he had sold without Halima's permission. Yahya refused and took the matter to court but the court found in Halima's favour and ordered Yahya to refund the value of the livestock he had sold without Halima's consent. Yahya appealed to the Upper Area Court but the court upheld the lower court's decision and also ordered Yahya to refund all the money he had

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32 Case No. 75/86 Area Court 1, Magumeri, (unreported)

made from the sale of all the livestock. But before he could do so, the parties were reconciled.

Although the parties in this case were married under customary law in Gwoza, the question of the property of the wife becoming that of the husband, which is still very common in the area, was not raised in this case. Perhaps the fact that the husband in this case sought the permission of his wife first for his dealings with her property persuaded the courts to hold that strict property separation existed in the household. Halima did not object to her husband using her property until he had used it to marry another wife. If her marriage had ended in divorce, then no doubt she would have been entitled to the Taxi business and a claim to the part of the home built with her money.

The payment of exorbitant bride-price and the use of such amounts for the purchase of the household property for the wife causes a lot of problems for women on divorce due to the obligation to refund the bride-price when the marriage breaks down. The following two case illustrate this point.

Case Study 3.

Salamatu Maina v. Sule Hamza [33]

Sule married Salamatu in 1982. He had paid bride-price of 2,000 Naira cash, 12 pieces of Gold coins (then worth 1,200 Naira). He also incurred incidental expenses of 300 Naira for Salamatu's clothes, 200 Naira for her parents' ceremonial clothes, 1,100 Naira for transport costs for the wedding, gifts,

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[33] Case No. 91/85 Biu Area Court 1 (unreported)

and entertainment for guests at the wedding. Thus he had spent a total sum of 4,800 Naira. Salamatu could not get on with her co-wife and so she constantly ran back home to her parents' home. After one year of marriage without any children, Sule agreed to divorce her but on condition that all the 4,800 Naira must be refunded to him. Halima insisted on refunding only the 12 pieces of Gold coins on the ground that all the other expenses were not bride-price. Sule disagreed and took the matter to court where it was held that under the traditional custom of the Mandara people, the husband was entitled to a refund of the bride-price only. The other items of expenditure, though essential for the contract of marriage, cannot be recovered.

In all these cases on property rights and settlement on divorce under customary law, the outstanding feature is the burden of refunding the bride-price that is placed on the woman and her family. Matrimonial homes must be vacated by the wife at divorce, unless she happens to own the home, which is very rare indeed. Moreover, since customary law does not provide for the maintenance of divorced wives, the courts have not, as yet, evolved a system whereby a former husband may be ordered to settle property for the benefit of his ex-wife. We shall now examine the response of the interviewees from Borno State to the questions on property ownership and settlement on divorce.

Interview response to property settlement Questions

Q.16. Where did you live when you were married?

Options	Response	
a. Your own home	30 (M)	0 (F)
b. Your wive's home	0 (M)	0 (F)
c. Your husband's home	0 (M)	38 (F)
d. Wive's parents' home	0 (M)	0 (F)
e. Husband's Parents' H.	15 (M)	9 (F)
f. Rented Accommodation	5 (M)	3 (F)
g. Jointly owned home	0 (M)	0 (F)
Total	50	50

Here the total percentage of those residing in the husband's home or his parents' home amounted to 92 per cent. The remaining 8 per cent stayed in rented accommodation. In sum total it can be said that customary marriage spouses either stay in the husband's home or his father's family home. It is in the urban areas where accommodation is hard to obtain that one finds couples starting married life in rented accommodation. None of those interviewed indicated that they stayed in the house of the wife nor that the home was jointly owned. This of course does not necessarily mean that there are no such cases. It could be that such cases are few, and under such a situation, it is not surprising to find that the overwhelming majority of cases of divorce under customary law result in the wife being thrown out of the matrimonial home by the husband. This is the type of situation that faces divorced women not only under customary law but also under the general and Islamic law. As long as wives do not stand

up for their rights by resorting to court, they may lose their property.

Q.34. Was there any settlement of property between you and your former husband or wife?

Options	Response			
Yes	13	(M)	38	(F)
No.	37	(M)	12	(F)
Total	50		50	

A high proportion of the interviewees, 49 per cent, did not engage in any form of property settlement after their divorce. However most of those that did not have any form of property settlement did not consider the refund of the bride-price as forming part of the process of property settlement. The 38 women and 13 men who responded positively to this question, enumerated items of property, ranging from livestock to bride-price, as the property that they settled on divorce. The majority, 51 per cent, that were involved in property settlement were made up of mostly women (38 per cent), and this also seems to support the practice of women having to refund bride-price on divorce.

Q.47. At divorce, husband and wife should share all their property equally .

Options	Response	
Agree	5 (M)	14 (F)
Disagree	45 (M)	36 (F)
Total	50	50

As in the case of those married under the general law, here too the overwhelming view was not in favour of equal sharing of property on divorce. Women who would normally benefit from equal division of property on divorce were nevertheless not in favour of it. Property still seems to be considered as either belonging to the husband or the wife, and joint ownership of property still seems to be a novelty among customary law couples, especially in Borno State. Thus the response of the interviewees to the proposition that husband and wife should take only the property that belongs to them, as shown in the following diagram, was overwhelmingly positive.

Q.48. At divorce, each party should take only the property that belongs to him or her.

Options	Response	
Agree	50 (M)	48 (F)
Disagree	0 (M)	2 (F)
Total	50	50

3. Islamic Law

On marriage, a Muslim woman's rights as a wife do not generally override or absorb her former rights as an individual. She has her own independent personality insofar as private possessions and acquisitions are concerned. Women are allowed to hold property in their own names and to dispose of such property independently.

However, in the Maliki school of Islamic law, which is followed in Nigeria and many West and North African countries, there are some restrictions placed on the wife's right to dispose of her property. For instance, the husband has the right to reside in the wife's house. But this depends on the proviso that the wife owns a house while her husband does not, and cannot provide her with one. For one of the pre-requisites of an Islamic marriage is that the husband must be in a position to house, feed and generally maintain his wife or wives at a standard commensurate with that provided by their parents. The right to live in the house does not mean that the husband thus acquires ownership of the property. Furthermore, the husband has the right to use all objects belonging to his wife and any alienation of the wife's property which exceeds one-third of the total is invalid without the husband's consent. It is provided that:

" The husband may use all objects belonging to his wife; he may even wear certain clothes which can be worn by both. The word use here means that he can prevent his wife from selling or giving away the articles. If they were not bought with the wife's dower, but at the wife's personal expense, the husband may prevent his wife from alienating more than one-third of the whole..." [34]

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[34] See *Maliki Law*, Chapter Xl, section 1, p, 148

Here again it is not a question of sharing with the wife the ownership or possession of the estate, but of limiting her freedom to dispose of her own property, which will, in any case , remain her own as long as she lives. The requirement of the husband's consent for the disposal of one-third of her property is, or seems to be, linked to the inheritance rights of the husband and any other heirs that the wife might have. As we have seen in the previous Chapter, under Islam, the wife is an heir of the husband and vice versa. Since this is so, the husband has potential rights in the wife's property under the rules relating to bequests.[35] Therefore in order to protect the legitimate, though potential, rights of the heirs to the property, the restriction has thus been put on the wife's right to dispose of her property. If the wife were to become needy due to her misuse or abuse of her property, it is her potential heirs, her husband included, who would bear the responsibility of caring for her. To balance the rights of the property owner and that of the heirs, the one-third rule has been introduced.

Dowry (Mahr)

The Islamic dowry constitutes what the Muslim groom gives to his bride. It is her personal property which she is entitled to waive, reduce, return to her husband or dispose of as she pleases. It may be paid promptly, deferred, or divided, depending on the agreement of the parties. The prompt portion must be paid before or upon consummation of the marriage. The deferred portion becomes due in case of divorce or widowhood. The wife is

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35 See Coulson, N.J. 1971, *Succession in the Muslim Family*, Chapters 13 and 14, at pp.213-259

entitled to the dower as a wife, i.e. by virtue of marriage. Dowry is enjoined by the Holy Qur'an, the *Sunnah* of the Prophet and the consensus of all the Muslim jurists.[36] It may consist of money, property, or services rendered to the bride herself.

There is no upper limit on the amount of dower to be paid. The emphasis in Islam is on moderation. The Prophet was reported to have said that the most blessed marriage is one that is least costly. This falls in line with Islam's general encouragement of marriage, i.e. by not fixing a minimum amount as dowry, more people would get married. It may have been a measure designed to narrow the gap between the various social strata. For the amount of dowry paid may serve as a status symbol- the higher the amount the higher the rank of the payer in the social strata. However, the Qur'an emphatically disapproves of class distinctions.[37]

Dowry is considered to be a symbol of the groom's cognizance of the serious economic responsibilities that marriage entails and his readiness to discharge all such responsibilities subsequent to marriage; it may also represent a symbolic undertaking on the groom's part and an assurance from him that the bride's economic rights and security will be maintained; it may represent an acknowledgement that the groom will dissociate the purpose of marriage from the economic exploitation of the woman; since women are usually the ones that need reassurance on the true intentions of men, dowry may serve as a tangible

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36 Al-Qur'an, 4:4; 23:33; Al Shafi'i, Muhammad Ibn. Idris, *Al Umm*, al Naggar (ed.), Cairo: Maktabat al Kulliyat al Azhariyyah, vol.5, p.57

37 Al Qur'an, 59:7-10

evidence of the groom's serious commitment to the woman; and to the family of the bride, dowry is a gesture of mutual respect and friendship as well as an assurance that their daughter will be well looked after. All these possible ways of rationalising the existence of dowry in Islam are on a par with the declared aims of marriage in the Qur'an. However, they all represent religious and moral ideals which may or may not be implemented in practice.

The Dower in Maliki Law

The dower under Maliki law may be made up of anything lawful as property in Islam (therefore forbidden items such as alcohol or pigs cannot be given as dower) and are of material value to the wife. It must not be less than one-quarter of a Dinar. If it is, Maliki law considers the marriage to be null and void. Payment of the dower may be made on the actual day of consummation of the marriage or it may be deferred until the husband finds himself in a better pecuniary position to do so; provided that the husband is comfortably off and there is reasonable hope or likelihood that his material position would improve. Normally the dowry must be paid at once and in full, but the groom may pay half immediately and the other half at a later date if he has financial problems.

The father of the bride or her guardian may sell the goods which constitute her dower in order to buy the necessary marriage outfits (clothes etc.), which the bride may need in her matrimonial home. Women that had been married before and therefore are no longer under the authority of their fathers and have no guardian, shall always receive the dower paid on account

of their marriage. Where a daughter is still under her father's authority, then it is the latter who receives the dower on her behalf. [38]

On divorce a Muslim woman's right to her separate property remains intact. However, the practice of khulla divorce, seems, particularly in Borno and most of the Northern States, to have been equated with the customary law practice of the refund of the bride-price on divorce. Ideally, khulla can be more or less than the amount of dower given, and it should be offered by the wife to the husband. She may decide to offer her husband cash, property, or even the dowry as consideration for his releasing her from the marriage. But the khulla must not be quantified on the basis of the expected cost of remarriage of the husband to another woman.[39]

Khulla as a substitute for property settlement

Some salient features of the khulla divorce as applied in Borno State will now be examined, using some relevant cases where necessary.

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38 All these rules on the Maliki law on dower are to be found in the following works: Abdur Rahim, *The Principles of Muhammadan Jurisprudence according to the Hanafi, Maliki, Shafii, and Hanbali Schools* : London and Madras 1911; Lane E. W; *The Manners and Customs of Modern Egyptians* (5th ed.) 1904; Macdonald, D.B; *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, London, 1903; A.D. Russell and Abdullah Al-Ma Mun Suhrawardy, " First step in Muslim Jurisprudence" consisting of excerpts from *Risalah* Of Abu Zaid; W.F. Gowers, " Notes on Muhammadan Law in Northern Nigeria ", mainly extracts from the *Risalah* of Abu Zaid, Zungeru, Nigeria, 1908.

39 Al- Qur'an 2:229

The compensation or khulla may be paid to the husband by another person other than his wife, provided that the payer is not a minor. Thus a father may secure the release of his daughter from a marriage, using khulla, provided that the daughter is still subject to his authority. But a guardian who has no control over a woman must obtain her consent first before securing her release using khulla. This gives rise to the possibility of several women being forced out of marriage by parents and guardians who may be influenced by financial considerations. A wealthy person may entice a woman out of her matrimonial home with the promise of giving her the money to pay as khuli; and the courts may be inclined to order for a khulla divorce in cases where the wife insists on divorce even though her husband has not committed any matrimonial offence. In such cases in Nigeria, the khulli may be made up of the total value of the marriage payments, plus any extra amount that the husband may add as a means of expressing his disapproval of the divorce. Maliki law allows for a forced khulla but only on the recommendation of two arbitrators appointed by the court. The practice in Borno and other Muslim areas of the Northern States is for the courts to resort to khulla where the wife has refused to obey a court order for instance for restitution of conjugal rights. The reason for this may lie in the fact that traditional customary law in the area generally allows for divorce by the refund of the bride-price by the wife instead of forcing unwilling wives to return to their husbands. There are numerous instances of the influence of custom over the Islamic rules outlined here, and the following cases illustrate some of these influences.

Case study 1.

Ya Mariam v. Goni Fatimami[40]

This was an appeal from Magumeri Village Area court to the Upper Area Court 1 in Maiduguri, by Ya Mariam, the divorced wife of Goni Fatimami. She appealed against the lower court's decision that she was still married to Goni Fatimami on two grounds:

First, that Fatimami and his father, Bukar, had jointly divorced her 9 years back; and that the divorce was effected by them taking back the dower of 6 Gold Coins and one Cow.

Secondly, that after she had completed her iddah she was remarried to her present husband and had been with him for the past nine years. That Fatimami was aware of this but had not objected until now when he went to court and claimed that she was still his wife and the lower court agreed with him.

According to the evidence presented to the court, Fatimami had claimed that he had been out of the State on Business and when he came back he found that his wife had been divorced by his father and that she had remarried someone else. He said that he does not agree with the purported divorce of his wife by his father. He called witnesses to substantiate his claim. But Ya Mariam insisted that it was Goni and his father that jointly divorced her. She stated that she and Goni were contracted into marriage when they were children, and that a dowry of 6 Gold Coins and a Cow was paid. After six months of marriage, she and

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40 Case No. BUAC/CVA/21/85, Borno Upper Area Court 1, Maiduguri (unreported)

Goni could not get along. So her father, and Goni and his father got together and decided that since there was no peace and harmony between them, the dowry should be refunded and the marriage brought to and end. The dowry was promptly refunded by her father to Goni's father and that Goni used the refunded dowry to marry another wife. Ya Mariam then remarried someone else after the completion of her iddah.

Goni was asked whether he had agreed with his father's action (in divorcing his wife for him) or not, and he said that he did not object at the time because he was a child, but now that he had grown up, he had changed his mind.

The Upper Area Court held that since the dowry was refunded, and Ya Mariam had completed her iddah and had remarried someone else, there was no more marriage between Goni and Ya Mariam.

This case illustrates the Maliki School's practice of allowing the khulla divorce to be effected by parents of minor children whom they had forcibly contracted into marriage (Ruxton:1914, 122). However, the refund of the actual amount of dowry in this case reflects the customary law practice rather than the Islamic rule which forbids the refund of the dowry on divorce. Khulla does not depend on the amount of dowry paid, nor on the expenses incurred on maintaining the wife. The following case aptly illustrates this point.

The influence of customary law on the payment and refunding of the dowry in Borno State seems to be so pervasive that most divorces that involved the payment of khuli that I have come across do not seem to distinguish between the Islamic dowry and

the traditional customary bride-price. Moreover, husbands invariably try to recoup all their expenses on their wives when the marriage breaks down by fixing the amount of khuli to reflect the expenses. Others, as in the case of Hajja Falmata and Maina Mai Turare, the exorbitant amount of khuli fixed is directly proportional to the wealth of the wife seeking the divorce or the wealth of her suitor, as well as the husband's determination to either preserve his marriage at all costs or to make it extremely difficult and expensive for the wife to buy her freedom. In the event that the woman cannot afford to pay the khuli, she has either to remain wedded to her husband or abandon him. The sharing of the dowry paid upon a woman by her relatives is common in Borno, despite the Islamic rule that the dowry belongs to the wife. This often results in disputes between relatives on their entitlement to such dowry. For instance in Hajja Fanna v. Hajja Kaltum [41], two female relations of the bride, Kaltum Gana, quarrelled over the sharing out of the dowry paid on account of her marriage. Hajja Fanna, with whom Kaltum Gana was staying before she was married, and who was her maternal grandmother, had sued Hajja Kaltum, Kaltum Gan's mother, for her share of the dowry paid on Kaltum Gana. It was revealed at the trial that only two Gold Coins were paid as dowry and that it was Kaltum Gana's father who had contracted her into marriage. The lower court held that under Islamic law, there is no bride-price for the relatives to share. Hajja Fanna appealed to the Upper Area court which rejected her appeal.

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[41] Case No. BUAC/CVA/57/85, Borno Upper Area Court 1 (unreported)

An interesting case that came to court and in which the court attempted to link the agricultural services performed by the wife during the marriage to the amount of khuli that the husband may demand was the case of Musa Muhammed v. Boyi and Shatu Boyi [42], where the parties went to court to try and solve their domestic quarrel. The court gave them two weeks to reconcile, but after two weeks, they went back to the court and said that they could not be reconciled. Shatu was asked by the court to go back to her husband but she refused, so the husband was asked to divorce her but he too refused. Then the court asked Musa whether he was willing to set a khuli for her, and he said that the total of his wealth over Shatu was 220 Naira. But the court said that since Shatu performed agricultural duties for Musa, the amount of khuli should be reduced to 100 Naira. But Musa appealed to the Upper Area court on the ground that the lower court had terminated his marriage without returning his property. The Upper Area court ordered Shatu to pay 146 Naira instead of the 100 that the lower court had ordered. Musa appealed to the Sharia Court of Appeal where he stated that all along he wanted his wife back but that the lower court had forced him to set the khuli, and to accept the amount of 146 instead of the 220 that he had set. The Sharia Court of Appeal held that the correct khuli was the one set by Musa in the first place and therefore ordered Shatu to pay the 220 Naira. The court stated that the khuli set by the husband cannot be reduced by the court under any circumstances.

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[42] Case No. SCA/CV/49/79, Sharia Court of Appeal, Borno State, 1979, (unreported)

The overwhelming response of those interviewed in Borno, who were Muslims, to the question of property ownership and settlement on divorce show the continued preference for the separation of property. Although most of the cases discussed show that Islamic principles on the property rights of women are respected by the courts, out of court property disputes tend to be settled under traditional customary rules where the married or divorced woman's rights to property are restricted to property that has no link whatsoever with her husband's property. Under these circumstances, the property consequences of divorce for Muslim women in Borno, are the same as for customary law wives. Moreover, despite the Islamic rule against the refund of the dowry on divorce, Muslim women in Borno are still subjected to the burden of having to refund the dowry at divorce. The Maliki law rule that the married woman, who is at death sickness, cannot dispose of more than one-third of her property (Risalah, Chapter 36) without her husband's consent, seems to have been utilised by men as a means of depriving women generally of their property.

Response of Muslims to the questions on Property.

Q.16 Where did you live when you were married?

The response to this question followed the same pattern as the response of those married under customary law. Eighty three per cent of those interviewed indicated that the matrimonial home was owned by the husband. There was no cases of joint ownership or wife-owned homes. Fifteen per cent indicated that the matrimonial home was rented and in all the cases of rental, both

for customary and general law marriages, it was indicated that the husband was responsible for the payment of the rent.

Q.34 Was there any settlement of property between you and your former husband or wife?

Seventy seven per cent of the respondents to this question responded positively and they indicated the refund of the bride-price (in the form of the khuli) as the settlement of property.

The response to the two hypothetical questions 47 and 48 showed that male interviewees were unanimous in their response in wishing to maintain the present situation where each spouse takes his or her property on divorce. This is not surprising because, unless waived, the Muslim husband has the right to gain property on divorce (through khuli and the customary bride-price refund) as opposed to a wife's burden of having to refund money and property expended on her by her husband. Yet only 26 per cent of the women (13 women) were in favour of a community of property system to be introduced in Nigeria to ensure that spouses share equally all their property on divorce.

Q.16

Options	Response
a. Your own home	38 (M) 0 (F)
b. Your wife's home	0 (M) 0 (F)
c. Husband's home	0 (M) 45 (F)
d. Wife's Parents home	0 (M) 0 (F)
e. Husband's Parents home	2 (M) 0 (F)
f. Rented Accommodation	10 (M) 5 (F)

g. Jointly owned home 0 (M) 0 (F)

Total 50 50

Q.34.

Options	Response			
Yes	41	(M)	36	(F)
No	9	(M)	14	(F)

Q.47

Options	Response			
Agree	0	(M)	13	(F)
Disagree	50	(M)	37	(F)

Q.48.

Options	Response			
Agree	50	(M)	37	
Disagree	0	(M)	13	(F)

Summary

Property settlement on divorce falls within the bounds of the economic consequences of family breakdown. Parties to a marriage and their children may be adversely affected by the breakdown of the marriage. Childless couples may settle their post-divorce property disputes more easily than those with children; and as demonstrated in the case of England and Wales by Eekelaar and Maclean (1983), the manner of settling property after divorce may be affected by the existence of children or otherwise. In Nigeria, the general law property settlement on divorce may not only be affected by the above factors but also by others that are uniquely Nigerian. For example the practice of

polygamy enables the husband to keep the matrimonial home for his and the remaining wives' benefit rather than it being settled for the benefit of the divorced wife as is the case, or may be the case in England and Wales. Lack of a comprehensive social welfare system to provide for the needs of divorced wives means that the traditional family support system, together with its rules on property ownership, continues to thrive and cater for divorced women who may be in need. The lack of total separation of property between husband and wife, particularly under customary law, makes it extremely difficult for a divorced woman in Nigeria to convince a court that certain items of family property belong to her rather than to her husband. Furthermore the fact that women in Nigeria do not generally go out to work without the prior approval of their husbands also strengthens the notion that household property belongs to the husband and therefore on divorce the wife must only take what is clearly identified as hers.

The present system of property settlement on divorce in Nigeria, for all marriage types, is unsatisfactory for the following reasons. First, the needs of the family members on divorce may not be served by, and may be totally unrelated to, the distribution of the family assets based on contribution or ownership. If the family assets are primarily made up of the family home, the divorced wife's contribution to the acquisition of it may not be sufficient to enable her claim a share of it. If the home is jointly owned, still the wife may have to find the money to buy out her husband. Secondly, her contribution as a

housewife cannot be quantified in monetary terms so as to enable her gain a share of the home.

CHAPTER EIGHT

MAINTENANCE

Introduction

The third element of the financial consequences of family breakdown is the support or maintenance of a spouse by his or her former spouse. There are two views on this subject. One view is that the history of the marriage should determine the entitlement, if any,. of each spouse to support or property settlement as the case may be. The second perspective is prospective in that it considers the future needs of the spouses and thereby apportions the property or the responsibility for support accordingly. Whenever a marriage breaks down, either party to the marriage may be in need of support, financial or otherwise, in order to carry on life as normal as possible. Thus the first perspective emphasises the assets or property of the spouses while the second is concerned with the needs of the parties. These two perspectives are referred to as the 'property' and 'support' approach respectively.[43] Statutory rules on maintenance after divorce in general tend to combine both 'property' and 'support' perspectives.[44] For the award of alimony or periodical payments may be a mode of property distribution while the award of a lump sum or even the matrimonial home to a spouse may amount to maintenance.[45]

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[43] See Gray, Kevin J., 1977, *Reallocation of Property on Divorce*, Professional Books p. 278.

[44] See for instance, section 70(1-4), Matrimonial Causes Act, 1970 of Nigeria and section 25(1) of the English Matrimonial Causes Act, 1973.

[45] In Saunders v. Saunders [1967] 116 C.L.R., the Matrimonial Causes Act, 1959, (which we have stated earlier, was adopted

The Chapter considers first of all, the duty to maintain a spouse during marriage under the general law, Customary Law and Islamic Law in Nigeria before proceeding to look at the interview response to maintenance on divorce. Here the discussion will be limited to husband and wife alone - the custody and maintenance of children has been examined in Chapter Six.

1. The General Law

(i) Maintenance During Marriage.

Under the Common Law, due to the doctrine of the unity of the spouses, the wife was subordinated in every way to her husband. She lacked the capacity to hold property and to enter into contract. This meant that the husband, as the head of the family and main breadwinner, was bound to maintain his wife. This duty entailed the provision of necessaries such as food, shelter and clothing. The wife had no corresponding duty to maintain her husband. Moreover, her right to maintenance depended on her not being guilty of adultery or desertion.[46] Where the wife had lost her right to maintenance due to adultery or desertion, the conduct of the husband was irrelevant except where he had condoned or connived at the adultery. In the latter case he was obliged to maintain her. An agency of necessity is created for the wife as a means of enforcing the duty to maintain

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by Nigeria as a model for its own Matrimonial Causes Act, 1970) under s.84, the allocation of the matrimonial home to a spouse was interpreted as maintenance.

46 See Chilton v. Chilton [1952] 1 All E.R. 1322 at 1325, (the duty to maintain his wife is co-extensive with the wife's right to the consortium of the husband); Wright and Webb v. Annandale [1930] 2 K.B.8 (no maintenance if guilty of adultery); and Jones v. Newton and Llanidloes Guardians [1920] 3 K.B. 381 (no maintenance when in desertion) - in the latter case, the duty to maintain the wife revives at the end of the desertion.

her where the husband had failed to do so in that the wife could pledge her husband's credit for the supply of necessaries.[47]

In order that the sexes should be equal in the home, as demanded by feminists and supported by laws on fundamental rights, then it follows that the concept of maintenance of one spouse by the other (the husband maintaining the wife) during marriage and after the end of the marriage must be abrogated. Thus calls for a change in the law were aimed at making provisions whereby the burden for maintenance would be redistributed equally, or made incumbent on both husband and wife. And this has been done in England and Wales, as well as in Nigeria, by statutory provisions to that effect.[48] These changes have also come about, (particularly in Nigeria where the general law of marriage, though originally meant for Christians only, was transformed into a secular law on marriage by the central authority) as a result of the predominance of the secular ideology in Western society which has made redundant the

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47 The Court of Appeal held in Biberfield v. Berens [1952] 2 Q.B. 770 that the wife's agency of necessity only exists when she has no sufficient means of her own. In Nigeria today this rule is applied in conjunction with the provision of section 43(3) of the Matrimonial Causes Act, 1970, which provides that if "in consequences of making a decree of judicial separation a husband is ordered to pay maintenance to his wife, and the maintenance is not duly paid, the husband shall be liable for necessaries supplied for the wife's use". Thus it seems to be irrelevant whether the wife has sufficient means of her own or not in Nigeria.

48 See Sections 23-25 of the Matrimonial Causes Act, 1973 of England and Wales, and Section 70(1-4) of the Matrimonial Causes Act, 1970, of Nigeria where the courts have been given the power to order either party to support the other. These were not the first statutory provisions to make a wife liable to maintain her husband. For the Matrimonial Causes Act, 1937, of England, under Section 10(2) provided that a wife was obliged to maintain her husband but only in cases of judicial separation or divorce on the ground of the husband's insanity.

religious notion that marriage creates a lifelong support obligation on the husband and that civil divorce cannot absolve the husband of such an obligation. In Nigeria, as we've observed in Chapter Five, although there has been, since 1970, a statutory provision for easy divorce, no corresponding development has as yet taken place in the after care of victims of divorce by the state. Solutions to post-divorce needs are still a matter of private law, left to the individual to pursue in the courts in Nigeria if she or he can afford it. Otherwise resort must be had to the traditional family.

The case law from Nigeria seem to be leaning neither towards the 'clean break' principle nor towards the provision of maintenance on divorce. A possible solution to this rather uncertain position is for Nigeria to adopt a new principle for post-divorce support such as that support for the divorced and needy wife (irrespective of marriage type) should be ordered by the courts when it is proved that the extended family has failed to provide it. Alternatively, a principle may be adopted based on the welfare of the children by providing that all divorced wives with dependent children must be supported by their ex-husbands. As of now, emphasis is placed on the Nigerian property law and this has failed to meet the needs of the divorced woman.

Property settlement where there is property, could counter any economic disadvantage that divorced women might face. At the same time, it means that any post-divorce financial settlement should be limited in duration and should be aimed at rehabilitating the needy spouse to enable him or her to acquire financial independence for the future. This rehabilitative

concept depends to a large extent on the relative participation of women in the economic activities of society as a whole. In a largely illiterate, rural-based community like Borno, the concept would not be of particular value to the needy ex-spouse.

The implementation of the above principles to general law marriages in Nigeria is subject to the unique nature of the family system as well as the relationship of husband and wife inter se. As stated in the previous chapter, a divorced wife (under Customary Law) has no claim whatsoever in the property of her former husband, nor is she entitled to any compensation for her domestic services. this was reiterated by Udo-Udoma, J. (as he then was) in Coker v. Coker[49] where he said:

> "It is almost unprecedented in this country for a wife having divorced her husband to turn rough and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appears to be foreign to the African conception of marriage and divorce ..."

Although this particular case involved parties married under Customary Law, nevertheless it shows the extent of the influence that foreign ideas may have in such matters. For the woman would not have sought post-divorce support if not for foreign influence.

iii. General Law Maintenance in Nigeria since 1960

Prior to the commencement of the Matrimonial Causes Act, 1970, it was not clear whether parties to a general law marriage (especially the wife) could institute an action for maintenance alone. In England, it was only in 1949 that a wife could obtain financial relief in the superior courts in an independent

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[49] Suit No. WD/19/1961, High Court, Lagos, 7/1/1963 (unreported).

proceeding.[50] But before such order could be made the husband must have been found guilty of wilful neglect to maintain the wife or any children to which the provision applies. Furthermore, the court must have the jurisdiction to entertain proceedings for judicial separation by the wife. In Nigeria however, it was held in the case of Okpaku v. Okpaku[51] that a wife could not sue her husband for maintenance simpliciter. And, as there was no local enactment in Nigeria conferring English law jurisdiction in such matters on the Supreme Court or the Magistrates Court, a general law wife could not sue for maintenance without seeking a divorce or judicial separation. As stated in chapter three, the then Regional High Courts in Nigeria (including the High Court of Lagos) derived their jurisdiction in general law matrimonial causes from section 4 of the Regional Courts (Federal) Jurisdiction) Act, 1958, which enjoined the courts to apply the current English law on matrimonial causes subject to any regional law on matrimonial causes. And all the Regional High Courts had adopted the provision of the 1958 Federal Act on jurisdiction.[52]

Yet the uncertainty of the application of the law on maintenance for a wife was further illustrated by the case of Ekisola v. Ekisola[53] where the wife instituted proceedings for a

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50 See the Law Reform (Miscellaneous Provisions) Act, 1949, s.5, later re-enacted in the Matrimonial Causes Act, 1965, s.22.

51 [1947] 12 W.A.C.A. 137.

52 See for instance Section 16 of the High Court of Lagos Law; and s.16 of the High Court Law, 1955, Eastern Region.

53 [1961] L.L.R. 8; this was followed in Ehigiator v.Ehigiator [1966] N.M.L.R. 372.

maintenance order in favour of herself and the children of the marriage. She alleged that her husband had neglected her and the children of the marriage. The proceedings were brought under section 23 of the Matrimonial Causes Act, 1950, of England, which was a re-enactment of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949.[54] Coker, J. (as he then was) upheld the wife's claim on the ground that section 16 of the High Court of Lagos Act enjoined the Court to exercise its jurisdiction in Matrimonial Causes in conformity with the law and practice for the time being in force in England, and that the English law was contained in section 23 of the 1950 Act. This decision was criticised on the ground that independent proceedings for maintenance did not constitute a matrimonial cause and since the High Court was empowered to apply the current English law on 'matrimonial causes', it ought not to have granted the wife's application.

The last English statute applicable in Nigeria was the Matrimonial Causes Act, 1965. Section 22 of the Act was applied in cases of general law wives seeking maintenance from their husbands. But as in the case of the Act of 1950, the wife seeking maintenance had to show that her husband had neglected her or the children of the marriage. Nigerian Courts therefore had not only the power to order maintenance for a wife who had been deserted or neglected but also the power to make interim orders for the payment of alimony in any case for divorce or nullity of a

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54 This section was further re-enacted into Section 22 of the Matrimonial Causes Act, 1965.

general law marriage.[55] The High Court had the discretionary power to make an order that a husband of a general law marriage involved in divorce or nullity proceedings should provide adequate security for the payment of a lump sum or periodical payment to his wife as alimony. The actual amount that the courts could order depended on the husband's means, the wife's fortune, if any, and the conduct of the parties, while the actual duration could be for the rest of the wife's lifetime (irrespective of whether she remarried or not) but must not exceed her lifetime. An important distinction between a lump sum and an annual, monthly or weekly payment of maintenance was that the former needed to be secured while the latter did not. Furthermore, while a monthly or weekly payment was co-extensive with the joint lives of the parties and so was determined at the death of either party, a secured annual or lump sum could be made co-extensive only with the life of the wife; in the event of the husband predeceasing the wife it had to be paid out of his estate.[56]

(iv) The current law on maintenance

The current law on maintenance in Nigeria for general law marriages is contained in the Matrimonial Causes Act, 1970. Section 8 of the Act, as we've stated in Chapter Three, has abolished the statutes that had provided for the application of the current English Law on matrimonial causes in Nigeria. And the provision of section 112(4) of the Act, to the effect that English Law rules of court were to apply pending the enactment of

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55 Per section 15 of the Matrimonial Causes Act, 1965.

56 Per section 16(1), Ibid.

an indigenous matrimonial causes, has also now been abolished by the Matrimonial Causes Rules, 1983.

Part IV and section 70 of the Act contains the detailed rules for making maintenance orders for the benefit of parties to a general law marriage or children of such a marriage.

Under section 70(1), (2) and (3), the courts were given the power to make orders for maintenance of parties to a marriage during any matrimonial proceeding before them, and the parties were not to be denied the benefit of such orders simply because a decree has been issued against them. In other words guilt was not to be a factor in determining the right to maintenance, and both husband and wife could benefit. A wife could be ordered to maintain her husband just as he would be ordered to maintain her. Absolute discretion on whether an order for maintenance could or should be made, and for whose benefit, was given to the judges despite the requirement that they should take into consideration the means, earning capacity, conduct of the parties and any other relevant circumstances. The latter requirement seems to have been designed purposely for countering arguments, such as that of Udo Udoma in Coker v. Coker, that the general law rules are not suited to Nigerian conditions. Judges may cite, as relevant circumstances, the fact that men do not generally maintain divorced wives under Customary Law, nor do women maintain their husbands both during marriage and after its breakdown, as well as the extended family responsibilities that the parties might have at the time of the marriage. But, as the analysis of some cases will shortly show, the courts in Nigeria have not as yet utilised the provisions of the Act to formulate a uniquely Nigerian law on

maintenance. If anything, a lot of their decisions lack lucid reasons and therefore one does not know whether the motivating factor for the decision had been economic, cultural or not.

In the case of Segun v. Segun[57] the wife had claimed maintenance pendente lite. In conformity with the provisions of section 70(2), Lambo, J., then proceeded to consider the means of the parties and found that the wife was earning N5,270 per annum. Moreover, it was made evident before the court that the wife's monthly expenditure was far in excess of her monthly salary. This fact, significant though it might have been, was not pursued, rather, the judge placed more emphasis on the court's discretion on the matter of awarding maintenance and proceeded to award the wife an alimony of £10 (20 Naira) per month pendente lite. The judge's reason for the award further illustrated the confusing nature of the matter:

> "A close scrutiny of the details of the applicant's income and expenditure reveals that her standard of living has not shown any downward trend since the parties separated. Furthermore, I have no details of what the applicant used to enjoy which has not been denied her by reason of their separation. Bearing in mind that the court has an unfettered discretion in these matters I propose to award the applicant alimony of £10 per month pendente lite."

The award in this case was certainly not based on the needs of the applicant whose salary was almost the same as her husband's and her standard of living had not been affected by the separation. And since the case was still pending, the award could not have been based on any guilt factor on the part of the husband.

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57 Case No. WD/73/72, Lagos High Court, (unreported).

A case that went the opposite way to the above was Arinye v. Arinye[58] where the marriage was dissolved on a cross-petition by the wife based on desertion. The wife was a police officer earning N2,000 per annum while her husband was a Captain in the Army. His salary was not disclosed (in keeping with the practice of the Nigerian military not revealing their earnings) but was revealed to be earning 'good salary'. Presumably his salary as an Army Officer was substantially better than that of his police officer wife. Nevetheless Savage, J., rejected the wife's claim for maintenance from her ex-husband. The learned judge said:

> "The powers of the court with regard to the maintenance of a party to a marriage, or of the children of the marriage are discretionary, and in the exercise of this discretion regard being had to the means and earning capacity of the parties to the marriage, and to all the circumstances of this case, it is my view that the only award that ought to be made is one of maintenance of the children."

This decision seems to have been based more on the traditional Customary practice of not paying maintenance for divorced wives than on the provisions of the Statute. For although the wife was innocent of any wrong-doing, and her salary was far smaller than her husband's, the judge seemed to have invented other 'circumstances of this case', which he did not elaborate, as a basis for not making the award. Similarly, in Smith v. Smith[59] the marriage was dissolved based on irretrievable breakdown although no specific element of irretrievable breakdown was cited. The wife applied for

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58 Case No. HD/30/71, Lagos High Court (unreported)

59 See for instance, Negbenebor v. Negbenebor [1971] 1 All N.L.R. 213; Enahoro v. Enahoro (WD/79/72) Lagos High Court, (unreported); Shokunbi v. Shokunbi (IK/28WD/73), Lagos High Court, (unreported); and Ibukun v. Ibukun (WD/32/72), Lagos High Court (unreported).

maintenance. Her salary was N1,010 per annum while her husband's salary was N4,992 per annum. Yet Adeeipe, J., refused to award maintenance. In so doing, he revealed his true reasons when he declared that the wife "is only 38, attractive, and has every chance of getting married again". In other words she should go and find another husband rather than seek maintenance from her former husband! Such attitudes, emanating from learned judges, and in the face of clear-cut statutory provisions on the matter, can only be explained by the overtly chauvinistic influences that Nigerian society has on all and sundry. For this decision seems to suggest that women's position in the Nigerian society is always as wives, dependent on their husbands.

The exercise of the courts' discretionary power to the award of maintenance not only leads to inconsistency between one decision and the next, but also to injustice which the higher appellate courts find it difficult to upset on appeal.

In Enahoro v. Enahoro,[60] the trial judge refused to order any maintenance in favour of the wife on the ground that the husband's income was not known and therefore there was no basis of arriving at an amount as maintenance. These mechanical ways of determining the amount of maintenance to be ordered in favour of a divorced wife do not only fail to take into consideration the needs of the woman, but also the traditional Customary obligations that the husband may have towards members of his wider family. It is still part and parcel of Nigerian society, unlike English society, that a person's obligations towards his

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60 (WD/78/72) Lagos High Court, (unreported).

extended family are of vital importance and cannot be shirked without loosing the support or respect of the community as a whole. But, as lamented by Sowemimo, J., (as he then was) in Giwa v. Giwa[61] the enacted laws on the general law marriage do not take into consideration such Customary responsibilities. And the English cases that are often cited in Nigerian Courts are of little use to the Nigerian situation. This conflict between the statutory rights of parties to a general law marriage on the one hand and traditional obligations was brought out in the case of Dawodu v. Dawodu[62]. The divorced wife in this case had been awarded maintenance for herself and the child of the marriage. She subsequently came back to court and sought an increase in the amount awarded.

Lump sum payments and property settlement orders are options that are available to the courts. And, as we have observed in Chapter Seven, they are designed to ensure that the parties are free to continue with their new lives. Periodical payments are, or may be, affected by fluctuations in the economic positions of both the payer and the payee. Moreover, the choice between lump sums and periodical payments are very important in Nigeria because of the enormous problems of enforcing periodical payment orders in a country where communication is unreliable and records of the movement of persons from area to area and from job to job is non-existent. Often beneficiaries of orders for periodical payments of maintenance have to resort to the courts to seek help and this entails enormous costs which such parties can ill

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61 See supra, note 20.

62 See supra, not 21.

afford. The end result in such cases is that instead of the decree of divorce bringing an end to an unhappy marriage, the problems of enforcement of the orders for maintenance often ensures continuous suffering and ill-feeling between the parties. The main reason for this, which emerged from an examination of the cases from Lagos and Borno, seemed to be the general dislike of maintaining divorced wives in Nigeria.

The provision that courts should make any order for maintenance as they think proper but at the same time to consider the means, conduct, earning capacity of the parties as well as any other relevant circumstances has left the basic question on post-divorce maintenance still unanswered - and that is should maintenance be paid to a divorced wife at all, and if so, on what basis should such a payment be made? According to Thomson J. in Akinsemoyin, the criteria would be "the inability of the woman to fend for herself owing to ill health or mental infirmity or an over-powering barrage of adverse circumstances, leading to abject impoverishment". In other words the needs [63] of the divorced wife should determine whether she is entitled to maintenance or not. But this seems to suggest that the woman's contribution in the home has no relevance whatsoever and the case of Doyle v. Doyle,[64] cited in the previous Chapter would not be applied in Nigeria. Yet the bulk of the Nigerian cases do not seem to reflect this view. And, furthermore, since both parties are now equally entitled to maintenance, it means that an impoverished

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63 See Eekelaar, J.M. (1979), "Some Principles of Financial and Property Adjustment on Divorce", 95 Law Quarterly Review 253.

64 158 N.Y.S. 2d. 909 at 912 (1957).

ex-husband has the right to seek maintenance from his ex-wife - a situation that is yet to come before the courts. There are still numerous cases of working women with substantial means of their own being awarded maintenance. Udo Udoma, in Coker's case felt that "a wife ought not to be left destitute for having divorced her husband on justifiable grounds". This presupposes that maintenance payment is determined by degree of blame or fault of the wife in the divorce. If she was guilty of adultery for instance, and that had led to the breakup of the marriage, then despite the fact that she is destitute, no maintenance should be paid to her. This ignores the nature of faultless divorce that the Matrimonial Causes Act had brought in under section 70(3). It is a fact that cases do exist, such as Irinoye v. Irinoye[65] and Oseni v. Oseni[66] where the marriages were dissolved on the basis of the wife's adultery and subsequently the wife's claim for maintenance was rejected. On the other hand there are cases, such as Akpabot v. Akpabot and D'Almeida v.D'Almeida,[67], where maintenance awards were made to the wife despite the fact that her adultery was responsible for breakdown of the marriage. In the latter case, the award was made despite the woman's casual attitude to marriage (she had had three marriages and the longest had lasted two years).

The Nigerian Matrimonial Causes Act, 1970 only imposes on the courts the duty to make "such order as it thinks proper" having regard to their means, earning capacity, conduct and other

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65 Case No. HD/60/71, Lagos High Court, (unreported).

66 Case No. HD/2/72, Lagos High Court, (unreported).

67 Case No. WD/47/72, Lagos High Court, (unreported).

relevant circumstances. Despite the obvious differences in the two societies, some Nigerian Courts seem to regard the aim of an award of maintenance in Nigeria as the same as in England. For instance in the Akpabot case the wife was used to the services of a housemaid during the marriage, and in order to ensure that she maintains her standard of living, an award was made for her to employ a housemaid.

(v) Case studies from Borno State

We have noted in Chapter Three that very few matrimonial causes involving Borno indigenes married under the general law come to court. As the following cases show, the few cases that do come to court, involve either expatriates or Nigerians from the Southern States who are living in Borno State. The reasons for this includes the relatively small number of Borno persons marrying under the general law; the combining of general law marriages with Customary marriages (and therefore Customary rules being applied to general law marriages), and the exorbitant costs involved in taking a case to a High Court (all general law matrimonial causes must be heard by the High Court, and unless a litigant is well-off, he or she cannot possibly hope to successfully conduct a case on the meagre amount that may be made available to him or her by friends and relatives).

The first case we consider here is that of Fry v. Wade[68]. The parties to this case were both British expatriates living and working in Maiduguri, the Borno State Capital. The parties were married under the Nigerian Marriage Act, 1914, in 1976 at Kano,

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68 Case No. M/109/86. Maiduguri High Court 2, Ikeotuony J. presiding, 1986, (unreported).

Kano State. The wife brought a petition for divorce based on irretrievable breakdown of the marriage and further sought an order for maintenance pending the disposal of the proceedings under section 70(2) of the Matrimonial Causes Act, 1970. In dealing with the maintenance issue, the court considered the fact that the wife was earning 1,080 Naira per month while her husband was earning 1,000 Naira, as well as the fact that the parties were living together in Official Quarters, the rent bill, the electricity bill and the salary of the house boy were all being met from the earnings of the husband, and held that she was not in need since she was earning 'good salary'. Therefore her application for maintenance was rejected.

The case of Mary Yamta v.Bulus Yamta[69] involved two indigenes from Borno State from Biu Local Government area. The parties had been married for five years without any children. In 1980, the husband, Bulus, had taken a second wife under Customary Law in order that she may be able to bear him children. Mary sued him for divorce based on adultery and intolerable behaviour and she also sought a permanent maintenance order against her husband. The court dissolved the marriage and ordered Bulus to pay 120 Naira per month to Mary, as post-divorce maintenance. Bulus made the payment for one year but then in 1982 he stopped. In all that time Mary had not remarried. Mary went back to court and Bulus claimed that since the order was made, his circumstances had changed and he cited the fact that his new wife had given birth, inflation had risen, he had not been promoted

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69 CAse No. M/910/82 Maiduguri High Court, Justice Adajun, 1982 (unreported).

while Mary had been promoted, and he had obtained a car loan which had a monthly repayment of 150 Naira. All this had left him with a take home pay of about 300 Naira as opposed to the 650 Naira that he used to earn. He therefore claimed that he could not afford to maintain the payment to Mary as well. The court set aside its previous order in favour of Mary under the provision of section 73(2) of the Matrimonial Causes Act, 1970. The court was heavily influenced by the fact that Mary remained single after the divorce and was living with her parents, while Bulus had a new family to cater for and therefore the new circumstances were such that the old order for maintenance could not be sustained any longer.

In Justina Sule v. Audu Sule[70] Justina, the wife brought a case for restitution of conjugal rights against her husband, Sule, who had thrown her out of the matrimonial home and was living with another woman. Tina went back home to her parents with the two children of the marriage and was being cared for by her parents. She stayed for a year at her parents home before instituting the proceedings. She further claimed maintenance pending the completion of the proceedings, back-dated to the day that she was thrown out of the matrimonial home. Sule worked as an electrician and had a monthly salary of 450 Naira. The court granted Justina's claim for maintenance and fixed the amount at 120 Naira per month but did not back-date the award as she had wanted. The decision of the Nigerian Supreme Court in Meme v.

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70 Case No. M/8/81, Maiduguri High Court, Justice Adefila, 1982 (unreported).

Meme[71] to the effect that the court cannot award alimony pendente lite from a date anterior to the institution of the proceedings was cited as being in accordance with the provision of section 70(2) which is concerned with maintenance "pending the disposal of proceedings". To make an order as the one requested by Justina would have amounted to an unbearable economic hardship for Audu Sule and might have resulted in non-payment and the added hassle of trying to enforce it. The interesting point in this case is the fact that Justina had kept the children, and was quite aware of her rights enough to pursue them in court. Most women in her position in Borno State, irrespective of the marriage type, would have either remarried and forgotten about the former husband or refused to have anything from a man that had driven them out of the matrimonial home in favour of another woman out of pride or self esteem.

Therefore the general law rules, particularly as it affects parties from less sophisticated or Westernised areas of Nigeria, have to be applied with local conditions in mind. Apart from the relative scarcity of general law cases in Borno State compared to the Southern States for instance, the few cases that we've just examined do not reveal any particular trait to distinguish them from cases from other parts of Nigeria. Most of the claims for maintenance, in fact all of the cases that one has examined here, emanate from wives or divorced women. This is not surprising because of the relative economic weakness of women vis-a-vis men, and the traditional reluctance of men seeking support from women. And although Udo Udoma J. (as he then was) had called for the

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71 [1965] 1 All N.L.R. 231.

formulation of uniquely Nigerian rules on post-divorce maintenance in Giwa v. Giwa, no evidence, as yet, of such a development has been shown by the cases we've just examined.

2. Customary Law

(i) Maintenance during marriage

Customary law throughout Nigeria generally places the responsibility of providing sustenance as well as shelter for the family on the husband. The husband is therefore solely responsible for providing his wife or wives with the necessities of life such as food, clothing and shelter. His responsibility in this regard also extends to the provision of medical attention or medication for the wife in time of illness, as well as the necessary items needed to successfully see the wife or wives through pregnancy. Thus when a wife is pregnant, it is the duty of the husband to provide her not only with the usual food items but also with any other item that her pregnancy may have induced her to want. Moreover, on successful delivery of the child, the husband must provide all the special food items that the mother may require, such as cow legs, chickens, hot pepper soups and other traditional foodstuffs. The husband must also ensure that the child's naming ceremony is conducted properly by providing all the items required for it. And, as we have briefly observed in Chapter Five, the primary responsibility of the husband to provide the family with food, shelter, and clothing may, and is often (particularly in the predominantly Muslim Northern States), met in several ways. A husband may provide only the main staple diet of the family, such as rice, guinea corn, millet, maize or cassava flour, together with condiments for making the

traditional sauce, such as spinach, okro, baobab leaves, sorrel etc. Or alternatively he may provide his wife or wives with plots of land to cultivate these crops, or pay them monthly, weekly, or occasional house keeping money. The particular mode of providing the food items depends on the means as well as the status of the husband and his family within the community. A chief, for instance, would not be personally engaged in providing these items to his large household, rather, certain servants or officials would be given the specific duty to ensure that the chief's household is always adequately supplied with these items.[72]

As regards the provision of shelter, as stated in Chapter Seven, it is the duty of the husband to provide his wife or wives with a separate room or hut, or even a house of her own, if he can afford it. If the husband has several wives, each wife is entitled to her own room but the actual size or quality may vary according to the seniority of the wives, the first wife being the senior wife and therefore having first choice. Most traditional polygamous households have the senior wife as the most influential and her duties may include the sharing out of whatever the husband may have provided for the household. Sometimes the weekly or monthly household allowance may be given to the senior wife to distribute among her other co-wives.

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72 See Obi, S.N.C., 1966, *Modern Family Law in Southern Nigeria*, London: Sweet and Maxwell, pp. 245-246; Anyebe, A.P., 1985, *Customary Law: the War Without Arms*, Fourth Dimension, Ensign, p. 87; Cohen, R., 1967, *The Kanuri of Borno*, Holt, Rinehart and Winston: New York, pp. 46-52; and generally, Elias, T.O., 1972, *The Nature of African Customary Law*: Manchester University Press.

Quarrels often arise between co-wives and when they do, it is the responsibility of the husband to settle them.

The provision of clothing for the wife or wives under Customary Law also follows the same pattern as the provision of food and shelter. It is the duty of the husband to provide his wives with clothing material of adequate standard for at least once a year. The usual clothing materials included in this are 'wrapper' material (six yards), head tie, blouse, shoes, and jewellery. These are often provided by the husband during the annual traditional festivals such as harvests or the celebration of the two Muslim festivals of the Eid-el-Fitr (post-Ramadan feast), or the Eid-al-Adha (celebrated at the end of the Hajj to Mecca), as well as during the celebration of Christmas. Failure to provide any of these items, i.e. food, shelter or clothing, by the husband often results in matrimonial disputes that may end in divorce. But whether these components of maintenance during marriage are provided or not, the legal duty to provide them are on the husband even if his wife or wives have separate income of their own. For the pre-requisite for the Customary marriage is that the husband must be in a position to provide his wife, and any children that she might bear, with these necessities of life.

The duty to maintain the wife or wives under Customary Law has been made into statutory duties in some parts of the Northern States. For instance under section 8(2)(c) of the Native Authority (Declaration of Borgn Native Marriage Law and Custom) Order, 1961, and the Native Authority (Declaration of Idoma Native Marriage Law and Custom Order, 1964, section 7(2)(c), the wife's right to maintenance by her husband has been specified to

include the provision of food, clothing and housing at a standard commensurate with the husband's means. But the Bin Declaration of 1964, goes as far as to include the provision of reasonable assistance for the wife's family if they are in need.[73] In the days gone by, this "reasonable assistance" to the wife's family would include helping them on the farm or with any other activity that forms their main occupation. This was due to the fact that bride-price mostly consisted of the provision of farm labour for his in-laws. Today, with money replacing labour as bride-price, such assistance may be in money or any other item or service. However, as to whether these services for the wife's parent are so important to the continued existence of the marriage that they may be justicible, it is not clear. If they are justiciable, then on the failure of the husband to assist her family, the wife would most likely seek a divorce based on such a ground. But the Biu Declaration does not provide for such a ground for divorce.

(ii) Post-divorce Maintenance

A husband's customary duty to maintain his wife is limited to the period during which the parties are living together as husband and wife. If the parties are living apart due to no fault of their own, then the duty to maintain the wife still exists. But if the parties are living apart as a result of a dispute, the duty to maintain the wife is suspended for the duration of the separation. It is immaterial whose fault had caused the separation. But, as stated above, if the separation is brought about by the wife's pregnancy (it is a Common Customary

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73 See section 7(2)(c) and (d) of the Native Authority (Declaration of Biu Native Law and Custom) Order, 1964 N.A.L.N. 9 of 1964.

practice for pregnant wives, especially if it is their first pregnancy, to go back home to their parents for the delivery) then the husband is still bound to maintain his wife. If he is about to set out on a long journey which would last for months or years, he must provide his wife with the necessities of life that would last for the duration of the journey. Similarly, if the parties were separated at a time that the wife was nursing a young child, and she takes the child with her, the husband is responsible for the maintenance of the child and if he fails to maintain the child, the wife has a right to claim a refund of the expenses that she might have incurred in maintaining the child. Divorce terminates the link between husband and wife and therefore a divorced wife has no right to claim maintenance from her husband.

(iii) Case Studies on Customary Maintenance

The first case comes from Gude Area Court in Mubi area of Gongola State, and it involved members of the Nzanyi ethnic group. The case was A'i Dumo v.Halidu Kwaccan[74] The wife brought a case to the Gude Area Court against her husband for lack of maintenance, and sought the maintenance or alternatively a divorce from him. She claimed that her husband, who was a farmer, had never fed nor clothed her for three years. She said that she survived in that time by going out of the matrimonial home and fending for herself, (but she did not elaborate exactly how she did that), and that whenever she came back to the matrimonial home her husband beat her mercilessly. The husband denied all this and claimed that he had allocated a piece of land

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[74] Case No. 8/69, Gude Area Court, Mubi (unreported).

to his wife to cultivate for food crops but she was so lazy that she never did any work. But the court held in favour of the wife and dissolved the marriage according to Nzanyi custom.

Under Nzanyi Customary Law, the duty of the husband to maintain his wife suffices if he gives her a piece of land to cultivate. And in this case the husband did just that, yet the court held that he had neglected his wife. It seems that the wife had cited lack of maintenance because that was the only ground that she could use to get a divorce. And this seemed to have been confirmed by the statement of the judge that since the wife does not love her husband anymore she should refund the bride-price to him and get divorced.

A similar case arose in Cuto Sale v. Musa Pakika[75] from Maiha Area Court. The plaintiff in this case had claimed that her husband had left her for two years without maintenance, and now that he had re-appeared, she wanted the husband to divorce her and to reimburse her for all the expenses that she had incurred during his absence. She said that she was pregnant when her husband left her and that the child was born in his absence. She claimed to have survived on the help of her husband's relatives as well as on loans from a neighbour. The husband claimed that the maintenance provided by his relatives to his wife was quite sufficient and therefore she had no cause to borrow money. He enumerated the fact that his father bore the responsibility for the naming ceremony of the child (which amounted to N507.55K), that his brothers alternately provided her

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75 Case No. 337/78, Maiha Area Court, Mubi (unreported).

with a sack of corn each month (estimated total cost of N480.00K). The court held that the maintenance given to the wife by the husband's relatives was quite sufficient for her needs and therefore her petition for divorce failed. But the court ordered the husband to pay her 100 Naira towards repayment of her loan.

The decision that the husband should pay his wife's debt seems to have been made more on the English Common Law principle that a deserted wife can pledge her husband's credit for goods supplied. However, in this case, the nature of the goods purchased by the wife with the loan was not identified and so it was never ascertained whether the goods were necessities for life or luxuries. Here Customary Law seems to have been created by the court. The normal or usual solution for a deserted wife, including wives seeking divorce, under Nzanyi Customary Law is for the wife to return home to her parents. In this case the wife did not return home to her parents and thus raised a serious doubt on her claim that she had been deserted by her husband. Furthermore, the fact that the husband's relatives continued to care for her and the child would also indicate that her husband's absence was not desertion.

Again the Customary rule that a wife who is in desertion loses her right to maintenance was not followed in a case involving members of the Hausa Community living in Maiduguri. This was *Ibrahim* v. Zara[76]. Zara had sued her husband in the Gwange Area Court and claimed 799 Naira for lack of maintenance. The gist of the case was that she had a misunderstanding with her

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[76] Case No. BUAC/CVA/126/84, Borno Upper Area Court, 1984 (unreported).

husband and, according to custom, went back home to her parents and expected her husband to come and plead for her return but he did not. She consequently spent 70 days at her parent's home and was being maintained by them. Then she sued her husband in the Gwange Area Court and claimed 799 Naira (being the cost of the maintenance for 70 days), 6 yards of 'Wrapper' material, and a shawl. She said that she still loved her husband but he must bring these items together with the money before she would return to him. The Lower Court found in her favour and ordered Ibrahim to pay or else his marriage would be dissolved. Ibrahim appealed to the Upper Area Court but the Court upheld the decision of the Lower Court on the basis that since the parties were still man and wife, the duty to maintain the wife was still on the husband. The end result of this case was that a few days after the verdict, Ibrahim ordered Zara out of his house and gave her a divorce, and claimed 1000 Naira as bride-price refund.

Under the normal rules of Customary Law, if Zara had been sent back home by her husband as a result of the dispute between the parties, it is understood that his obligation to maintain her, as long as she was not pregnant, is suspended. If the parties are reconciled, the duty to maintain the wife is revived. There is no question of refunding the cost of maintenance that the wife's parents might have expended on her. For they too have a responsibility towards the well-being of their daughter. But unlike the responsibility of the husband to the maintenance of the wife (which stops after divorce) the parents responsibility remains intact as long as they are alive. Marriage of their daughter temporarily relieves them of this duty. Therefore if

their daughter runs back to them following a quarrel with her husband or she had been divorced, they cannot refuse to maintain her.

Among the Hill Dwelling Guduf Community of Gwoza, the ultimate responsibility for the maintenance of the family lies on the husband. This is normally effected by the division of labour between the husband, his wives, and their grown-up children. Farm land is shared between the husband and his wives. Each wife must help the husband on his farm on five days a week. The remaining two days of the week she may use on her own farm to cultivate her own crops. The provision of a plot to the wife is essential because it is recognised that the husband cannot meet all his wives needs. Therefore the proceeds of their farms belong essentially to them and they can sell any surplus that the family does not consume, and buy other property with it. The produce of the husband's farm is always kept in a separate granary and used during the dry season when food is scarce and the wives produce might have been exhausted. Grown up children either help their parents on the farm or herd any livestock that the entire family might have. The purchase of clothes for the family as well as special meal items such as meat, rice or anything else that the family does not produce is made by the husband.

It is in the light of these rules that we now examine the case of Tallatu Ali v. Talle Yerima[77] which came before the Gwoza Area Court in 1986. Tallatu sued her husband for divorce based

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[77] Case No. 19/201/86, Gwoza Area Court.

on lack of maintenance. She alleged that her husband, who was a cattle dealer, often left her alone with two young children without the means of support when he goes to the Southern States to sell cattle. Consequently she had to sell her livestock in order to feed and clothe herself and her children. She called witnesses who attested to her claim. Talle on the other hand insisted that he had provided his wife with a plot of land to cultivate for food, and that he always bought her clothes to wear once a year. He further claimed that he always made sure that she had enough to buy food before he left on his cattle trading journeys. The court established that Talle did, or was in the habit of, providing Tallatu with enough money to sustain her while he was away and that he often instructed his senior brother to look after her as well. In all the years that Talle had been travelling on business, Tallatu had never complained of lack of maintenance either to her parents or to Talle's senior brother. The court held that Talle was not guilty of neglecting her. But then she revealed the true reasons for her complaint and that was the fear that her husband was about to marry another wife. Tallatu was thus ordered to return to her husband.

In all these cases of maintenance, it is always the wife that needs support or complains against her husband for lack of support. The inferior economic position of women within the family ensures that they remain dependent on their husbands. And on divorce, their need for support, which may even be greater especially if they have no relative to depend on, is catered for neither by their ex-husbands, nor by the state.

3. Islamic Law

(i) Maintenance during marriage

Maintenance is known as Al-Nafaqah in Arabic, and it means the provision of the necessities of life, such as food, shelter, clothing and medical care to one's wife or wives and children. The duty of providing maintenance to the family is incumbent on the husband and he is obliged to provide maintenance for his wife or wives even if they are wealthier than himself.[78] For Islam lays down duties for both husband and wife during marriage and the wife's rights become the husband's duties towards her and vice versa. One of the wife's rights is to be maintained by her husband at a standard commensurate with her status. As we have observed in Chapter Three, the Holy Qur'an and the Sunnah of the Prophet have made it mandatory for Muslim men to treat their wives kindly during marriage or to release them from their marital obligation with kindness. This means that men must cater for their wives by providing them with adequate maintenance. Thus the power to dissolve a marriage by talaq has been specifically given to men so that they may follow the Qur'amic injunction on the matter if it transpires that they cannot maintain their wives properly. Muslim wives too, particularly under Maliki Law, have been given the power to seek the dissolution of their marriages based on lack of maintenance.

A Muslim wife's right to maintenance therefore is derived from the authority of the Qur'an, the Sunnah of the Prophet and

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78 The Holy Qur'an, Surah 17 V.32.

79 Qur'an 2:23607, 33:49.

the Consensus of Muslim Jurists. A Muslim man is responsible for the maintenance of his wives whether they are rich or poor, Muslims or non-Muslims (Christians and Jews). This religious duty is justiciable. A wife is entitled to maintenance by virtue of the fact that she is married to her husband and is confined to his household.[80] Maintenance in Islam is not a matter of calculation in which the wife provides services in return for it. It is based on the unique nature of the Islamic Marriage - the essence of which is compassion which the wife is entitled to receive as much as she gives. Both parties must be compassionate to one another even though the husband is primarily responsible for the security and well-being of his wife. Consequently the husband is enjoined by the Qur'an to meet the financial and emotional needs of the family in a generous and charitable manner. For the role of the husband in an Islamic marriage evolves around the principle that it is his solemn duty to God to treat his wife with kindness, honour, and patience; to keep her honourably or to free her honourably; and to cause her no harm nor grief whatsoever.[81] The role of the wife on the other hand is summarised by the Qur'anic provision (which we had considered in Chapter Five) that women have rights and duties even though men are a degree above them.[82] As we have observed in Chapters Four and Five, this provision is normally read in conjunction with another Qur'anic passage,[83] which provides that men are

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80 Qur'an Surah 2 v.233; 65: 6-7.

81 Qur'an 2:229-232; 4:19.

82 Qur'an 2:228.

83 Qur'an 4:34.

protectors of women and managers of their affairs because God has made them so. Pious and righteous Muslim women should therefore accept their position within the family without any question.

The components of maintenance under Islamic Law, just as under traditional Customary Law, are made up of the provision of shelter, food, clothes and general care. Under shelter, a Muslim woman is entitled to a home or room of her own. The family unit may be patrilocal, matrilocal, or bilocal; still the responsibility is on the husband to provide it for his wife. The wife's lodge must be adequate for her needs and she must not be forced to share it with co-wives or with relatives of the husband if she does not want to do so. For the responsibility to provide shelter for her does not entitle him to impose upon her any disagreeable arrangements. The Qur'an states:[84]

> "Lodge them where you are lodging, according to your means, and do not press them, so as to straighten their circumstances ... Let the man of plenty expend out of his plenty. As for him whose provision is stinted, let him expend of what God has given him. God charges no one beyond his means ..."

A wife is also entitled to be fed and clothed as well as being cared for in the manner that she had been accustomed prior to the marriage. That is why Islam insists on Kafa'a or equality between the parties before the marriage. For a poor man would not be in a position to maintain a wealthy woman. Therefore no matter how much they love each other, this religious requirement is designed to protect the welfare of the woman throughout marriage, and this may not be met if parties marry solely on the basis of love. In this regard, if the wife had been used to

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[84] Qur'an 65: 5-6.

having a maid to do her domestic chores for her before the marriage, then it is the duty of the husband to provide her with one.[85] The Prophet himself had been reported to have said that the best Muslim man is one who is the best husband. He had called on all Muslims to take good care of their wives and to be kind towards them.[86]

(ii) Post-divorce Maintenance

Unlike traditional Customary Law, Islamic Law recognises post-divorce maintenance of a wife but under certain conditions only. The Qur'an states that husbands who divorce their wives should "Let the women live in *iddah* in the same style as you live, according to your means: trouble them not so that you make things difficult for them. And if they are pregnant, then spend your substance on them until they deliver; and if they suckle your child, give them compense ..."[87] This means that the maintenance obligation is considered to be so important that it continues during the compulsory waiting period (*iddah*) that follows a divorce. If the woman was not pregnant, the *iddah* lasts for three months but if she was pregnant, it lasts for the duration of the pregnancy. Even after the birth of the child, the father of the child, (the former husband of the woman) has the legal duty to ensure that the child is properly nursed either by its natural mother through breast feeding or through the provision of milk and other baby foods at his own expense. The

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85 Qur'an 2: 233; 17:29.

86 See Vesy-Fitzgerald, S., *Muhammadam law: An Abridgement*, London: Oxford Univ. Press, p.43.

87 Qur'an 4:16.

duty to maintain the child means that if the mother is still nursing the child after divorce, the father of the child has the obligation to support the child through its mother.

The woman whose divorce has been initiated and pronounced by the husband is entitled to maintenance during the waiting period. She has the right to remain in occupation of the home, room or lodging that she had been allocated prior to the divorce. The husband cannot expel her from the home unless she had been found guilty of committing an indecent act. The husband must also continue to feed and clothe her for the duration of *iddah*.[88] Under Maliki Law, these duties of the husband to his divorced wife must take place during the *iddah* if the marriage had been consummated and the divorce had not been an irrevocable one. An irrevocably divorced wife has no right to maintenance during the *iddah* even if the marriage had been consummated. A pregnant woman on the other hand is entitled to maintenance during the *iddah* period whether she had been irrevocably divorced or not. A woman that had obtained a *khul* divorce from her husband has no right to be maintained during the *iddah* unless she was pregnant at the time of the divorce. Similarly, a woman that has been divorced from her husband by the procedure of *Li'an* can not subsequently claim maintenance from her former husband at any time even if she was pregnant at the time of the divorce. For Li'an constitutes an irrevocable divorce. Furthermore, as stated earlier, a Maliki woman observing the *iddah* of mourning of her husband is not entitled to maintenance from his estate, but she

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88 Qur'an 65: 1-6.

is entitled to remain in occupation of his house during the *iddah* period. Even if the house was a rented one, and her husband had paid the rent in advance, she is entitled to remain in it during the *iddah* period. A woman is not allowed to claim maintenance arrears under Maliki Law. All these Qur'anic provisions as well as the Sunnah of the Prophet on post-divorce maintenance is summarised by the Qur'an thus:

> "O Prophet, when you divorce women, divorce them at their prescribed periods, and count accurately their prescribed periods; and fear Allah your Lord: and turn them not out of their house, nor shall they themselves leave, except in case they are guilty of some open lewdness. These are limits set by Allah."[89]

(iii) Case Studies from Borno State

Alhaji Inuwa Driver v. Hajjia Aishatu.[90] Hajjia Aishatu was the senior of the three wives of Alhaji Inuwa Driver, and she sued him for divorce based on lack of maintenance in the Gwange Area Court in Maiduguri. According to her, her husband left her with the other co-wives and went to Chad Republic in search of wealth. But later, he sent for the two younger wives to join him and they promptly followed him. She was left alone in the rented family home without food nor clothing and she had to pay the rent (which amounted to 800 Naira) herself. She said that she stayed in the house alone for one year and one month without support from her husband. Eventually she took the matter to the court. The court gave the husband a period of one month to come forward and state his case but he did not. Therefore the marriage was

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89 Qur'an 65:1.

90 Case No. BURC/CVA/18/87, Borno Upper Area Court, 1987, (unreported); see also Halina Alhaji Yahya v. Alhaji Yahya [1980] 1 Sh. L.R. 19, from Jos in Plateau State.

dissolved by the court based on lack of maintenance. Her husband appealed. It was held that the lower court's decision was in order.

In this case the court followed the principle that maintenance alone, without the companionship and support of the husband is not sufficient. Moreover the husband seemed to have deliberately chosen his two younger wives and left the senior wife alone. The alleged maintenance that the husband claimed to have sent was sent while the three wives were all together. But after the two younger wives were summoned by the husband, no maintenance was sent for the remaining wife for over a year. There was no question of compensating Hajjia Aisha for the amount she had expended in maintaining herself because arrears of maintenance are not generally permitted in Islam.

Arrears of maintenance however, were ordered in the case of Umara Falmatami v. Ya Kaltum,[91], a complicated case that went before several courts in Maiduguri. Ya Kaltum took her husband to the Maiduguri Area Court sought divorce based on lack of maintenance. She claimed that her husband never fed nor clothed her during the two years of marriage, and that she had spend more than 2,000 Naira of her own money on maintaining herself. Her husband, however, denied all her claims. Yet the court found in her favour and dissolved the marriage. Umara appealed to the Upper Area Court II where the decision of the Lower Court was quashed on the ground that the case was not properly heard in accordance with Islamic Law. The parties were referred to

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91 Case No. BUAC/CVA/146/86, Borno Upper Area Court, 1986, (unreported).

Gamborn Area Court which also found in favour of Ya Kaltum and terminated the marriage. But Umara appealed to the Sharia Court of Appeal which promptly sent the case to another court, Yerwa Area Court I for proper hearing. The latter court held that Umara was guilty of neglecting his wife and therefore ordered him to pay her 1,590 Naira, three wrappers, three six-yard pieces of wrapper (Turmi) and three large shawls, commonly called Lappaiya. The 1,590 Naira figure was according to the court, the balance between the amount that Umara spent on Hajjia Ya Kaltum and the amount that she spent on maintaining herself. However, Ya Kaltum later felt sorry for her husband and reduced the cash compensation from 1,590 to 500 Naira plus the clothing material. Umara refused to pay and appealed to the Upper Area Court I, the instant court, which upheld the Lower Court's judgement.

This case differs from the previous one in that the husband was made to reimburse his wife for all the expenses that she had incurred in maintaining herself. As a result, the husband, who had undertaken to maintain his wife properly henceforth, was faced with the problem of meeting the costs of past maintenance as well as future maintenance. It is this type of economic pressure that often results in men divorcing their wives unilaterally rather than being saddled with commitments that they cannot possibly meet. In this case however, it is not clear whether the parties eventually separated or not. The court advised the wife to come back to it if the husband refuses to pay, and the case would be reviewed.

All these cases show the nature of the problem that confronts women who depend on their husbands for all their needs.

If a man fails to live up to his responsibility towards his wife, the wife's chances of obtaining a remedy may depend on whether she had stayed in the home or not as well as on whether she had been divorced or not.

The courts decisions on these matters, despite minor differences are based on the Islamic rules which do not fit the local customary rules on divorce and maintenance. The Islamic rule that divorced wives must be maintained during the *iddah* period and also allowed to stay on in the matrimonial home does not work in practice due to several reasons. First of all the divorce might have been caused by quarrels between co-wives in a polygamous household. In such cases it would be difficult, if not impossible, for the divorced woman (the loser) to remain in the hostile environment and watch her remaining co-wife. The husband who might have divorced his wife after a severe quarrel would not be willing to maintain or retain her in his home for a period of three months. Secondly, the divorced woman, herself, would prefer to get as far away from the matrimonial home as possible after an acrimonious divorce and seek remarriage. Thirdly, a revocable divorce may normally be revoked after the parties have been reconciled, and as we've seen in Chapter Three, reconciliation normally commences when the woman goes back home to her parents. Therefore if she were to remain in the matrimonial home, her parents would not be aware, or even if they were aware, they would not believe, that there was something wrong with the marriage. Finally, the total dependence of married Muslim women on their husbands for maintenance, as well as the fact that such maintenance is linked to the continuance of

the marriage, means that a *talaq*_issued to a wife signifies to the wife that her husband is not only relieving himself of the union but also of all his obligations towards her. Therefore she would invariably, in the Northern States, feel obliged to move out of the matrimonial home even if she had not been specifically ordered to do so by her husband. With the added pressure of having to pay a *khulli* or a refund of the bride-price, divorced women seem to be much more concerned with severing the marital ties completely and finding new husbands (thus, new providers) than dwelling on their maintenance rights during *iddah* period. It is when young children are to be catered for, or the expenses of a pregnancy has to be met that divorced women, whose ex-husbands are reluctant or refuse to pay maintenance, resort to the courts or the Social Welfare offices for help.

Maintenance under Islamic Law, both during and after the breakdown of marriage, is governed by strict Islamic rules. The main feature of these rules is that maintenance is linked to the existence of the marital ties (that is as long as the marriage is intact, the duty to maintain the wife is on the husband) and the possibility of reconciliation. Parties are enjoined to part amicably, that is why talaq has been formulated in such a way that there is always the possibility of reconciliation. And since the onus of maintenance is always on the husband, the woman's right to maintenance ceases when she had been divorced and finished her iddah, or when she has deserted the matrimonial home. However, in Borno State and many of the Northern States, the provision that divorced wives must be maintained during the

iddah as well as allowed to remain within the matrimonial home during the iddah has been replaced by Customary practice.

Question 29 **Where did you stay after the divorce?**

Response

	Gen. Law		Customary Law		Islamic Law	
	M	F	M	F	M	F
Parents' home	10	32	16	43	18	46
Own home	25	7	20	3	20	2
RentedAccommodation	15	11	14	4	12	2
TOTAL	50	50	50	50	50	50

Question 30 **How did you support yourself after the divorce?**

Response

	Gen. Law		Customary Law		Islamic Law	
	M	F	M	F	M	F
Self-employment	48	14	50	10	50	8
Former spouse	0	2	0	0	0	0
New partner	0	11	0	19	0	23
Parents	2	20	0	25	0	17
Charity	0	0	0	0	0	0
Prostitution	0	3	0	5	0	2
TOTAL	50	50	50	50	50	50

Question 31 **Did you support your former wife or husband after the divorce?**

Response

	Gen. Law		Customary Law		Islamic Law	
	M	F	M	F	M	F
Yes	8	0	0	0	3	0
No	42	50	50	50	47	50

Response to Questions 49-52

Questions		49	50	51	52	49	50	51	52	49	50	51	52
Agree	M	.0	35	0	41	0	50	0	0	0	50	2
	F	0	35	0	15	0	50	0	0	0	50	0	0
Dis-	M	50	15	50	9	50	0	50	50	50	0	50	48
Agree	F	50	15	50	35	50	0	50	50	50	0	50	50

General Law | Customary Law | Islamic Law

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4. Interview response on Maintenance

The three hundred persons interviewed in Borno State were also asked question on post-divorce maintenance as well as their opinions on what maintenance (both during and after marriage) should be. Questions 29 to 33 were specifically meant to show whether post-divorce maintenance of spouses is a common practice or not in Borno State, and if it is, which family type are primarily affect by it. Thus question 29 was meant to reveal whether divorce affects the rights of the parties to the occupation of the matrimonial home or not, and if it does, who among the parties, is adversely affected by it. We have stated earlier that Customary Law in general does not provide for post-divorce maintenance, nor allows the divorced wife (except where she has grown up children or remarries within the family) to remain in the matrimonial home after divorce, while Islamic Law restricts post-divorce maintenance to the iddah period, and the general law makes it a discretionary matter to be determined by the courts. Therefore these questions were meant to reveal whether persons in Borno are aware of these rules in the first place, and if so, whether they adhere to them in practice.

The interviewees were then asked to indicate their views on a number of hypothetical questions on maintenance both during and after marriage. The questions (49-52) were also meant to find out whether there exists any divergent views between the sexes or between the family types, as well as to see whether modern economic conditions and influences have affected the traditional rules on maintenance or not. It must be noted that although question 49 did not mention support, the actual putting of the question during the interviews included the words "and be supported by him" after the words "husbands home". As in the previous chapters, the interviewees were categorised into males and females, General Law, Customary Law and Islamic Law, and were conducted in Maiduguri, Bui and Gwoza.

All the three hundred persons interviewed responded to question 29 but is was revealed that all the males were not directly affected by divorce in terms of a change in accommodation. This is shown by the types of accommodation that the men stayed in after the divorce, i.e. own home, parents' home and rented accommodation. As we've observed in Chapter Six, these types of accommodation were invariably provided by the husband and not only because it is traditionally the responsibility of the husband alone to provide the matrimonial home but also due to the fact that it is men who are economically capable of doing so. Thus 43 per cent of the entire number of men interviewed remained in the matrimonial home which they owned; 27.3 per cent remained in the matrimonial home which was rented; and 29.3 remained in the matrimonial home which was owned by their parents (a substantial number of young men in the urban

areas start married life either in their parents' home or in rented accommodation, while in the rural areas, where land is plentiful, most young men build their own homes before marriage). In any case if one combines the figures for homes owned by the husband and those rented by him, the result is that 70.3 per cent of the divorced males were not affected by accommodation change. As for the remaining 29.3 per cent who stayed in their parents' home, it was not clear whether they had moved into them after the divorce or it was their matrimonial home prior to the divorce. Nevertheless in view of the fact that a substantial number of people remain with their wives in their parents' home, it can be taken that a substantial portion of the latter group must have been living in their parents' home prior to the divorce. This would therefore present an overwhelming picture of men in Borno State remaining in their matrimonial home after divorce while the divorced women move out of the matrimonial home. And this too would seem to agree with our earlier finding that most divorces in Borno, and other Northern States, are effected by the wife moving out or being thrown out of the matrimonial home. But before we can definitely say that this is so, we must first examine the response of the women to question 27.

Eighty per cent of the women interviewed indicated that they went back home to their parents' home after the divorce; 11 per cent moved to rented accommodation; and 8 per cent either remained in their own home or moved to a home owned by them after the divorce. In most cases here, therefore, the women had to move out of the matrimonial home. This contrasts sharply with the men who stayed put on divorce. And the practice did not show

any significant variation between those divorced under the general law, Customary Law or Islamic Law. The only significant difference being that while 4.6 per cent of the women that were divorced under the general law remained in their own homes, only 2 and 1.3 per cent of those divorced under Customary and Islamic Law respectively did so. Again this could be due to the fact that generally women married under the general law are economically better off than their counterparts under Customary or Islamic Law and therefore are in a better position to acquire their own homes.

The response to question 30 also seems to reinforce the great difference that exists in Borno State in the effect of divorce over men and women. We have earlier noted that both Islamic Law, general law and Customary Law puts the responsibility of maintenance during marriage on the husband. This means that most married women in Borno depend on their husband for most of their needs apart from the few educated women that go out to work. Question 30 was therefore designed to discover how divorced persons generally support themselves. We had observed in Chapter Five that some women resorted to prostitution, but it must be emphasised that those women, specifically chosen from Maiduguri simply because they are prostitutes, are not included as respondents to this question.

Here 96 per cent of all the men indicated that they depended on their employment after the divorce. The remaining 4 per cent (all under the general law) indicated that they depended on their parents. The response of the women however showed a wide spread of sources of post-divorce support. The most popular source of

post-divorce support for women was parents (41.3 per cent), followed by new partner (35.3 per cent), prostitution (6.6 per cent), and former spouse (1.3 per cent). The striking feature here is that only 1.3 per cent of the women (2 out of 150) indicated that they benefited from maintenance from their former husbands, and both of them were divorced under the general law. Women's dependence on parents cut across all the marriage types, while dependence on charity too was consistent in that no one had indicated that they did so. Thus question 30 seems to have tallied with the findings of question 29 to the effect that men in Borno depend entirely on their own efforts and remain in their matrimonial homes on divorce while divorced women invariably move out of the matrimonial home and depend either on parents, new partner or on self-employment.

As for question 31 which specifically asked whether post divorce support was ever given by the interviewee to his or her former spouse, the response was again overwhelmingly evident that post-divorce support is an exception rather than the rule in Borno. Only 7.3 per cent of those interviewed indicated that they had supported their ex-spouses, but all of them were males. Out of this number, 5.3 per cent (8 out of 150) were men that were divorced under the general law and the remaining 2 per cent (3 out of 150) were Muslim men. No woman supported her ex-husband, and the 8 men that did so under the general law had been ordered by a court while the 3 Muslim men did so because their divorced wives were pregnant. In the case of the latter group, the maintenance ceased after the birth of the children (the end

of the *iddah*) while in the former case, the maintenance varied from three months to a year.

The economic dependence of most married women on their husbands means that they are not in a position to maintain their husbands during marriage, let alone during divorce. Thus all the women were unanimous in their response to question 31 to the effect that none of them supported or was ordered by a court to support her ex-husband. The men themselves would find it demeaning to ask for support from an ex-wife. Moreover, the general practice of the refund of bride-price on divorce is incompatible with the concept of post-divorce support. For it would be absurd to expect a man who had demanded his bride-price to be refunded by his former spouse, or a woman that had refunded the bride-price, to turn round and pay or receive maintenance from the former spouse. The present position in Borno State is that most communities regard divorce as ending all support obligations between the parties - it is only in the exceptional cases of women being divorced while pregnant or educated women seeking support under the general law that post-divorce maintenance may be paid. And even in these latter cases the payment is often for a short period. Women themselves seem to prefer a clean break so as to remarry and start afresh.

The interviewees were then asked to indicate their opinions on a number of statements (questions 49-52) which were also related to maintenance during and after marriage and residence within the matrimonial home. This was meant to reveal whether the interviewees were first of all aware of the rules governing

these matters, and secondly whether they were happy with the rules as they are or would like a change.

Here all those interviewed disagreed with the statement of question 49 to the effect that divorced wives should be allowed to remain in their matrimonial home and be maintained by their ex-husbands until they remarry. If women were dissatisfied with the present practice of divorced women being thrown out of the matrimonial home or required to leave, they would have agreed with this statement. But the matter is not one of pure economic needs; rather, custom requires a divorced woman to move out of the matrimonial home quickly and to refund the bride-price so that she can marry again. If she were to remain in the matrimonial home and depend on her ex-husband, apart from the fact that it would hinder her remarriage prospects, it would cause enormous problems between co-wives and force the man to maintain a woman that has ceased to be his wife.

As for the statement that the husband must bear the responsibility for supporting his family financially at all times (question 50), it was meant to reveal whether the Borno Society has developed to such an extent that the practice of sharing family responsibility (as is the case in Western industrialised societies where both partners go out to work) has gained acceptance or not. The response was that persons married under Customary Law or Islamic Law were overwhelmingly in favour of the husband being responsible for all his family's needs at all times, while those married under the general law were divided in their opinion. 70 per cent of the latter group were in favour of making the husband the sole provider for his family, while 30 per cent were not in favour. The 70 per cent that were in favour were all females, while the 30 per cent that were against it were all males. The females went on to disagree with statement 52 which states that family support should be shared equally between husband and wife, while the men were mostly (82 per cent) in favour of family responsibility being shared. Customary and Islamic Law interviewees were all in favour of retaining the husband as the provider for the family. Therefore the formal general law provision that the husband is responsible for maintaining the family and that both parties are equally liable for the maintenance of the other after divorce does not seem to have found favour among men in Borno State. Husbands are still regarded, under all family types, as the main providers for their families and that such responsibility, particularly towards a spouse, should cease on divorce.

Summary

As it is today, in Borno, general law provisions have been ignored in favour of customary ones, and so there doesn't seem to be a desire to change the laws. Moreover, the relative economic standing of men and women, who are married under the general law, are far closer than under Customary or Islamic marriages. And so when there is a divorce, the wives are far less likely to need support. And when they do need support, they can afford to go to the High Court and claim it.

Customary Law does not generally provide for post-divorce maintenance unless the divorced wife is pregnant or nursing a young child. In such cases the husband may be under an obligation to maintain the child by providing sustenance to the former wife. In most cases, as we will examine in the next chapter, a divorced woman nursing a young child would prefer to hand over the child to its putative father so that she may be free to remarry, or the father may insist on taking the child (as in the social welfare case of Fatime v. Ali) away from its mother so that he (the father) may not indirectly support the ex-wife. Divorced women in most cases have no alternative, under Customary Law in Borno, than to return home to their parents for food and shelter. Women that have no parents to return home to or are afraid of returning home to their parents often move into the impersonal urban areas and engage in petty trading or prostitution in order to survive. If a woman is lucky enough to have a suitor interested in her after the divorce, she may end up remarrying almost immediately after the divorce (as long as the previous husband's bride-price had been refunded). Customary Law

does not provide for a married woman to maintain her husband nor for a divorced woman to maintain her former husband. It only allows a woman to seek divorce based on lack of maintenance by her husband. And in all the Customary communities in Borno, there are no cases of post-divorce maintenance of wives or husbands. This means that, as in the case of the general law, a divorced Customary Law wife may be faced with severe hardship, unless she has a family to fall back on or her own property or income.

Islamic Law has detailed rules on maintenance during and after marriage, but in practice in Borno, such rules are mostly ignored. It is only when matters come to court that the Islamic rules are applied. As a result, women are generally thrown out of the matrimonial home (as under Customary Law) on divorce instead of being allowed to remain in it for the duration of the *iddah*. Again the reason for this seems to be twofold: the influence of the Customary Law, and the economic dependence of wives on their husbands. The similarity of the treatment of women after divorce under Islamic and Customary Laws in Borno is such that there is no distinct way of differentiation unless the matter comes to court.

The social welfare offices that are increasingly involved in maintenance dispute settlement, particularly in the urban areas seem to be applying principles which are neither Islamic, Customary, nor general law. Their solutions are based purely on the needs of the divorced or deserted wife, and children. Future Nigerian Law in this field should either give the social welfare

officers the legal power to enforce their decisions or ensure that legal norms reflect the practice of social welfare offices.

CHAPTER NINE

Conclusion

The consequences of family breakdown on family members in Nigeria, as we have seen from the case studies from Borno, include both emotional and economic hardship. That is on breakdown of the family, the immediate problem facing a family member that might have relied on the marital relationship for all his or her needs become acute. The extent of the needs is predicated on the economic interdependence that the particular family might have had before the breakdown as well as the actual constitution of the family. Thus if the family members depended on the earnings of the husband or family head, at breakdown it means that the non-earning family member has to find alternative means of supporting himself or herself. As the majority of women depend on their husbands, this means that on divorce they have to find some other person or persons to cater for them.

Emotional hardship is illustrated by the separation of the parents, particularly the mother, from the children and the problems of having to fight for custody in a court. The need for women to remarry soon after divorce also places a great deal of suffering on those that cannot secure a new husband..

The continued survival of the extended family support system ensures that divorced women and children normally have other members of the family to fall back on. This is particularly so in the rural areas where the traditional close family still survives. Moreover, the absence of a social welfare system in Nigeria means that most people have no alternative means of

support other than their own efforts or the help of their family members. The number of persons in a particular family (whether there is only the husband and wife or there are other wives and children as well as other relatives of the parties) may also affect the extent of the economic hardship that may follow the breakdown. The divorce of a dependent housewife in a polygamous household means that the resources of the family have to be shared between fewer persons.

As we have observed in previous Chapters, the consequences of family breakdown in Nigeria, as illustrated by the various examples from Borno, are mainly economic even though there are legal consequences too. It seems that the economic consequences are far more important than the legal ones. For most persons are ignorant of the legal consequences in any case. However, these consequences are so linked together that it is better to consider them together. This is because the consequences of family breakdown are determined both by the economic standing of the parties and the legal rules that govern family relationships. This Chapter summarises the findings of the research under the following sub-headings before dealing with suggestions for improvement of the situation. First, the low status of women in the family as a whole is reiterated in terms of its effects on their needs following divorce; second, the effect of legal pluralism on family breakdown, if any; third, the effect of urbanisation on the importance of close extended family relations; fourth, the absence of social welfare on the needs of family members that have no extended family support, particularly in custody cases, is reconsidered.

1. Women and family relations

The economic consequences of family breakdown manifests themselves in the need for housing and general maintenance. In this regard, and due to the nature of the family in Nigeria and Borno in particular, the needs of the husband and the wife may be quite different and often are. The wife has to leave the matrimonial home on divorce while the husband, who normally owns the matrimonial home in any case, has no need to move. The wife, if she had been a dependent housewife, has to find means of feeding herself, while the husband is seldom affected.

The general power structure within the home is such that the woman is generally at a disadvantage when her marriage breaks down. This is not only in the case of her economic needs but also in the case of her rights. A man pays bride-price on account of marriage to a woman, and the woman must leave her parents home and go and live with her husband at his house or any other accommodation that he might have secured. During the marriage, the responsibility for the feeding, clothing, and general well-being of the woman is on the husband. The woman, in most of the communities in Borno, has no right to engage in any other activity, economic or otherwise, without her husband's consent. Her primary duty is to bear children for her husband and to generally keep the home for him while he goes out to earn the main income for the whole family. This further accentuates the dependence of the woman on her husband and makes it even more difficult for her to cope following a divorce without depending on her parents or other relation, or resorting to prostitution.

Apart from the general law marriage law, which does not permit unilateral divorce in any case, the traditional marriage system in Borno allows only the husband the right to terminate his marriage unilaterally. This means that there is in effect, no security of family life for the woman. For she may be divorced and turned out of the matrimonial home at any moment, and if she happens to be unfortunate enough to have no other relative to cater for her then she faces the daunting task of surviving in a society that has no state support system.

A divorced woman's right to the custody of her children may be recognised in theory (especially under the formal law) but in practice her general economic inferiority vis-a-vis her husband means that she is denied custody or given custody only for a limited time. This has been found to be the case among all the ethnic groups in Borno and it transcends religious differences as well. Moreover even if she has custody, the responsibility for maintenance of the children lies with their father.

Women are further burdened with the need to refund the bride-price on divorce and in the majority of cases it is difficult for them to refund the bride-price without the help of another family member or a new suitor. And the problem of payment and refund of bride-price may often affect the relationship of the husband and wife itself. For there are still numerous cases of women being married off against their wishes simply because their parents may have accepted a large amount of bride-price from a rich suitor of their daughter. Despite the attempt of the state to limit the bad effects of this practice through legislation, as in the case of the Limitation of Dowry Laws and

the rule that payment of bride -price is not a requirement for the formation of a general law marriage, people in Borno and other parts of Nigeria still insist on the traditional practice of demanding bride-price for the marriage of their daughters. The disparity between the rich and the poor is so great that bride-price is often seen as a means getting out of poverty. Even in the case of Islamic marriages, we find that the payment of bride-price has been combined with the payment of the Islamic dower; and we also find that on breakdown of an Islamic marriage a woman is made to refund both the customary bride-price and the Islamic dower. Thus instead of the Islamic dower performing its function of making the woman economically independent of her former husband, the burden of having to refund it makes it difficult for her cope after divorce.

There is also a general tendency for husbands to consider property acquired by their wives during coverture as belonging to them (the husbands). This is partly due to the general economic weakness of women and partly due to customary practices whereby generally matrimonial property is considered to belong to the husband. For instance both the Bura and the Gwoza people consider all property acquired by a wife as belonging to her husband and therefore on divorce she must hand it over to him, or on his death, his heirs are entitled to take all the property. Even her right to remain in occupation of the matrimonial home on the death of her husband depends on whether she has grown up children in the home or not. Therefore a divorced woman has to comply with all these rules unless her husband is kind enough to have waived all his claims. And since marital breakdown is normally

preceded by a disagreement of some sort between the parties, the extended family members normally try to reconcile the parties and if the reconciliation fails because of the woman's intransigence, then the husband normally insists on the refund of his bride-price. These points and many more cover all family types in Borno especially where the matter never comes to court.

With no post-divorce support from ex-husbands, nor a social security system to cater for their needs, together with the requirement that women must refund bride-price on divorce, it is not surprising to find that the economic and social consequences of divorce are much more traumatic for women than men. Re-marriage seems to be the only solution to divorced, hitherto dependent women, who have no means of earning a living and are not prepared to prostitute themselves. Even the post-divorce support that divorced women's families provide for them may be constrained by the needs of the other members of the family, particularly at a time of harsh economic conditions. Moreover, a divorced woman, whether she was responsible for the divorce or not, may be blamed for her predicament in a society that values women highly as wives and mothers. In order to escape the economic hardship and the social stigma attached to being single, many women in Borno State, particularly among the illiterate urban and rural communities, rush into marriages with any man that comes along without considering whether the man is in a position to adequately maintain them. The situation is further exacerbated by the formal legal difference in the traditional and modern requirements of what constitutes support or maintenance. Prior to colonialism, a husband would have met the duty to

maintain his wife or wives by simply providing them with plots of land to cultivate. Today however, women's needs go far beyond these basic needs and most of their requirements, such as expensive clothes, cannot be met by simply allocating a plot of land for them to cultivate. Furthermore, the rural - urban drift that has taken place since independence means that there are numerous women in the urban areas whose needs cannot be met by farming. For there are no farming facilities in the urban areas. Thus the responsibility for maintenance falls back on the husband and if he fails to meet this responsibility, the end result, as we have observed in the case of Borno, is domestic quarrels that often lead to family breakdown.

Therefore the inferior position of women vis-a-vis men in the family in Borno has a direct bearing on their continued suffering following the breakdown of their families. Their suffering continues despite the existence of formal laws for their protection because these formal laws are concerned with the symptoms rather than the causes of the suffering. And the causes of the suffering lie with the social system which is patriarchal.

The women,s liberation movements that exist in Nigeria, such as the "Women in Nigeria" movement, the "Muslim Women,s Association", and many others are irrelevant to the needs of the majority of women in the country. This is due to the fact that these organisations are based on their western counterparts, and the social conditions in the western countries are very different from those facing Nigerian women. The women who suffer most from the oppressive patriarchal relations within the family are illiterate and live in the rural areas. Their concern is

basically that of food, shelter, clothing, and the provision of adequate health care facilities for themselves and their children rather than the desire to be equal to men as is the case in most of the western women liberation movements.

2. Diversity of Family Types

One of the hypothesis of this Thesis was to determine whether differences in family types have any significant effect on the consequences of family breakdown or not. And we have noted that in Borno, just as in most of the Northern States, there are Islamic, customary, and general law family types. These family types differ legally and therefore one may expect the effects of family breakdown to differ from one family type to another. This is particularly so where the formal laws of these family types on, for instance, property rights, rights to custody of children, maintenance rights etc. following divorce were to be strictly applied, then no doubt there would be a difference between the effects of family breakdown on members of one family type and another. For this to happen, it means that all the cases of family disputes that may occur must be settled in the state institutions of family dispute settlement and in accordance with the statutory rules governing each family type. But, as we have observed in Chapter Three, this is not the case in Borno State. The influence of traditional practices are still so strong that even those married under the general law tend to apply customary rules to such marriages. As a result, particularly in Biu area where the majority of those married under the general law are to be found, the general law rules on the procedure for family dispute settlement as well as the effects of the breakdown on the

rights of family members are ignored altogether and the traditional law applied instead. People regard general law marriages in the area as purely customary law marriages that have been blessed in court. This explains why most of the matrimonial cases of those married under the general law that comes to court in the State involve expatriates or Nigerians from the Southern States.

The Islamic family type too is governed by detailed rules on family relations and therefore all family disputes should be settled in accordance with the rules whether the disputes come to court or not. This is because all Muslims are supposed to live by the tenets of Islam. But here too, the influence of custom has made the application of the rules, out of court, purely customary matter. It is when the disputes come to court that a Muslim family member may benefit from the Islamic rules on post-divorce maintenance for instance.

Customary families also may be governed by statutory rules as regards their relationships. This is particularly so in areas like Biu where the traditional custom has been codified. But due to the fact that custom in itself is not static but changes with time, most of the provisions in the codified statutes, such as the limitation of bride-price to 60 Naira, are out of date and often ignored. Therefore the formal distinction between a customary family, Islamic family and a general law family in Borno exist only on paper.

Legal pluralism in the family system in Borno has little or no effect on the consequences that family members may face on the

breakdown of their families. All members of broken families face the initial problem of readjustment following the breakdown. New accommodation, especially for the woman, may have to be found; property claims, including the refund of the bride-price, have to be settled; any dispute as to the custody and care of the children has to be settled; and maintenance claims may also have to be settled. The only difference that these claims may have, especially if the matter comes to court are the legal basis for the claims. And since, as we have observed, most of these claims are settled out of court and in accordance with custom, it means that the customary rules which maintain the patriarchal dominance over women and children still continue irrespective of the family type.

The traditional customary family in Borno (that is one that is not Islamic, Christian, or general law based) is found largely among the hill dwellers of Gwoza and some communities in Biu. Here the patriarchal dominance of family relations, which is a feature of all the family types in Borno, is very much in evidence and it shows itself both in the relationship of the parties during the marriage and after breakdown of the marriage. Thus among the all the ethnic groups in the area, the woman has no right to terminate her marriage unilaterally nor to contract herself into marriage without the intervention of men. If she decides to run away from her husband for good and to form an association with another man, she faces the problem of being taken to court for the refund of the bride-price and the possibility that her children may be taken away from her by the legal husband. If she decides to go to court for divorce, she

faces the problem of finance as well as the bad reputation that would bring to her and her family in the community.

The customary courts, and the various declarations of traditional customary law on marriage and divorce uphold the traditional power structure within the home by applying the rules on family breakdown. The family disputant that decides to go to court might have lost faith in the traditional dispute settlement process. Yet the courts follow the traditional rules for dispute settlement, and the end result is that the disputant may end up with a solution that is not different from the one provided by the non-state institution.

3. Effects of Urbanisation

The rural-urban drift that started with the advent of colonialism throughout Nigeria was accelerated after Independence. In Borno, this is illustrated by the rapid growth of such towns as Maiduguri, Biu, Bama, Potiskum and Geidam. Such rapid changes in the constitution of the rural-urban population is bound to have an effect on the relationship of family members towards each other.

In the rural areas of Borno, the family is still largely an extended one. That is family compounds still have several generations of the family living together and under the leadership of a patriarch. The combined efforts of the family members ensures that no family is left unsupported. Daughters are usually married off to another family in the same village or in another village, but the family link that they have with all members of their extended family still survives. This illustrated

by the practice of married women returning to their parents' home to deliver their first baby or when they are divorced. Children are cared for communally in an extended family compound, and therefore even if a woman is divorced her children will still have persons to care for them. Even if a woman returns home to her parents with her children, her parents or any other family member may look after them. Thus she may not be hindered from remarrying.

In the urban areas, due to the nature of life, the emphasis is more on the nuclear or conjugal family - the husband and wife or wives and their immediate children. This does not mean that the extended family relationship have been abandoned. The high cost of living in the urban areas ensures that urban families remain small and largely conjugal. The urban family still maintains its links with the extended family members who may still be based in the rural areas especially during important occasions, such as the marriage of a member. Moreover, the rural based extended family still forms the bedrock for the support of all family members wherever they may be. This point is still very important, particularly for a woman, in Borno and it covers all family types. A divorced urban-based woman with no independent means of support may have to return to her rural-based extended family members. Children of a broken urban-based family may have to be taken to their extended family compound in the rural areas.

The state encourages the continued survival of this traditional family set up through its recognition and codification of the traditional family rules. The state benefits from the continued survival of the traditional support system

because it is not capable of, or willing to, bear the burden of caring for the victims of family breakdown. As a result, it is still the duty of all family members in Borno and other parts of Nigeria to care for all members of their families that may be in need.

Nevertheless,urbanisation in Borno has had the effect of reducing the role of the extended family in the settlement of disputes. As a result we find that conjugal family members in the urban areas tend to go to the state institutions of dispute settlement such as the Police and the Social Welfare Offices,who seem to apply neither formal law nor customary procedures but their own principles of mediation and arbitration, instead of the courts.

The consequences of family breakdown for a dependent family member in the urban areas is much worse than it is in the rural areas. First of all, all the amenities in the urban areas cost money and a person with no regular income would find it extremely difficult to survive. And since most housewives in Borno are dependent on their husbands, it means that their predicament following divorce is much worse. And if the divorced woman has children to care for as well, the problem is made that much harder. That is why we have observed numerous cases of divorced or abandoned women with children turning to the Social Welfare Offices in desperation for help. Furthermore, the incidence of prostitution in the urban areas is a symptom of the nature of the hardship that women face.

Another symptom of the consequences of family breakdown in the urban areas is illustrated by the numerous cases of children roaming the streets begging for food or doing menial jobs in order to survive instead of going to school. Parents of such children may be so economically disadvantaged that they may be forced to send their children out to beg for food. And when the family has broken down, the plight of children is made even worse. If these children were in the rural areas, then they would certainly be under the care and control of family members. Borno, being a predominantly Muslim State, makes the matter worse by the general practice of "Almajirai" under which young children are left with "Mallams" for Islamic education. Unfortunately the "Mallams" do not feed or house the children. They are expected, as a form of moral training, to go out and beg for food.

4. State Support

As stated earlier, there is no social welfare provision for the needy in Nigeria. Therefore the primary responsibility for the care of needy family members lies with their family members. If there are no extended family members or they are not willing to help, then the needy family member is left to his or her own devices.

The only state assistance that is available is in the form of tax relief and tax allowances for children, wives and dependent aged relative. But these are of no value whatsoever for a needy family member that has no job. Moreover, the rules as to who is entitled to such assistance are so restrictive that a divorced woman cannot receive them. Furthermore the maximum number of children that a man may claim child allowance for is

restricted to four. This means that in Borno,s polygamous society where most men have more than one wife and several children, the assistance is ineffective. The fact that most women are dependent housewives and most people are subsistence farmers means that few people benefit from the state assistance in any case.

5. Suggestions

The present inadequate position of the laws governing the problems that the family faces on breakdown, has to be tackled by clearly identifying the true nature of the problem from the unique nature of the Nigerian society and secondly considering the examples or experiences of other countries with similar problems.

We have seen in this thesis that the family in Nigeria is still dominated by the extended family support system. Even the marriage of members is still determined, to a large extent, by the wishes of the majority of the extended family. The influence of the family permeates all marriage types. Thus whether a person is to marry under the general law, traditional or customary law, or Islamic law, his or her family still has a say in the choice of partner.

The legal system is still not uniform. Customary courts hear customary matrimonial causes; Islamic courts hear Islamic marriage matrimonial causes; and the High courts hears general law matrimonial causes. All these legal systems have their own rules on what constitutes a marriage as well as the consequences of family breakdown. However, as we have noted in the case of Borno State, resort to courts for the settlement of family

disputes is not compulsory. Parties may decide whether to go to court or to any of the non-state institutions for the settlement of their dispute. This applies even to the case of those married under the general law which does not approve of extra-judicial divorce.

The various declarations of customary family law in Nigeria have taken place in several selected areas but not throughout the nation. Despite the similarity between the declared customs there has never been a comprehensive effort at compiling and unifying them. The declarations seem to have been enacted as a means of satisfying political demands for the preservation of certain customary laws. As a result although the problems associated with family breakdown throughout Nigeria are similar, the rules applicable to them are still as diverse as the customary laws themselves. Therefore, for any solution to be effective, it has to be offered on a national basis.

Other countries with similar diversity in family structure, such as Tanzania, Eritrea, and Mozambique, have offered their own solution to the general problems of the family. The Tanzanian Law of Marriage Act, 1971, provided a solution based on the recognition of all the family types as being equal in the country. Thus the then existing laws on marriage, matrimonial property, divorce and custody of children, which were to be found under traditional, Islamic and general law, were unified. The new law permitted persons to marry in accordance with their traditions and religions, but the consequences of such marriages were to be governed by the new law. Extra-judicial divorce was abolished and women were given more power to choose their own

partners and to own and dispose of property than hitherto (Rwezaura and Wanitzek, 1988).[1]

In Eritrea, the solution was far more drastic than in Tanzania. Under the Eritrean Marriage Law, 1977, (applicable to the liberation army) traditional marriages were abolished altogether. Traditional marriage in Eritrea was characterised by payment of bride-price, forced or arranged marriages, and the general supremacy of men over women in all aspect of family life. A situation that is similar, if not identical to the one in Borno today. The 1977 law emphasised free choice in marriage, monogamy, equal rights of both sexes in marriage, and the protection of the rights of women and children However the laws for the civilian population were much more circumspect although reforms enacted there took into account the existing circumstances of the community. (Silkin, 1989, 148).[2]

In Mozambique the solution to the problem was based on the Constitutional guarantee of the rights of the individual. Article 26 of the Constitution of Mozambique declares that citizens have the same rights irrespective of sex, race, ethnicity, wealth, education or social position. As a result, all the traditional courts were replaced by one state court system which operates in terms of popular justice. As in the case of Nigeria, people are free to marry and to generally conduct their family relations in

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[1] See "Family Law Reform in Tanzania: A Socio-legal Report" by Rwezaura, B.A. and Ulrike Wanitzek, International Journal of Law and the Family 2, (1988) 1-26

[2] See Silkin, T, "Women can only be free when the power of kin groups is smashed": New Marriage Laws and Social Change in the Liberated Zones of Eritrea", International Journal of Sociology of Law, 1989, 17, 147-163.

accordance with their own customs or religions. But in Mozambique, once parties go to the state courts for the settlement of their disputes, then they know that their customary or religious rules will not be applied. Rather, the state courts apply a uniform code of popular justice. In the words of Welsh, Dagnino, and Sachs:

> Families may make their own arrangements without going to the registry or the court: Catholics may regard their marriages as indissoluble; Muslims may marry and divorce according to the Koran; people may continue to follow the patrilineal or matrilineal family arrangements of their forefathers. The state does not interfere. It does not recognise, but it tolerates. The court does not intervene on its own initiative, but only when one of the parties invokes its aid. Then the court will apply the uniform state norms..." [3]

Among all these three countries it is only Tanzania that has similar conditions to Nigeria. Both Mozambique and Eritrea are Marxist states and their solutions to the problems are based on their Marxist revolution. And since Nigeria is not a Marxist state, then the Eritrean and Mozambiquan solution cannot be adopted for Nigeria.

It can be argued that since the various Constitutions that Nigeria has had since independence provide for equality for all citizens in all walks of life, then Nigeria should adopt the Mozambiquan and Tanzanian examples and introduce one state court system for all marriage types. Under such a system, the religious and customary rules could be replaced by uniformly applicable rules based on the needs of the parties that come before the courts. The new rules could be designed solely to meet such

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[3] See " Transforming Family Law: New Directions in Mozambique" by Gita Honwana Welsh, Francesca Dagnino, and Albia Sachs, Journal of Southern African Studies, Vol. 12 No.1 October 1985.

problems as custody of children, post-divorce maintenance, property rights and the vexed problem of the refund of the bride-price. The state law may only be made effective to those parties that seek it. This would go some way in allaying the fears of Muslims who may object to a centralised and secular state law on the family on the ground that it is contrary to Islam.

For the above solution to work in Nigeria, it must be based on systematic reorientation of the people's outlook as to the rights and responsibilities of individuals within the home. A starting point for this would be to make the registration of all marriages a compulsory matter. Ward heads, Village heads, Imams, and Church Ministers can easily be made into the registering authorities throughout the country. Once a marriage has been registered, then it is easier to solve the problems that often arise as to paternity suits and the responsibility for the maintenance of a wife. Moreover, the registration exercise in itself would benefit the state if a registration fee were to be charged.

The payment of bride-price must be abolished altogether. For as of now the payment seems to work against the interests of women. Property rights must be strengthened by ensuring that each spouse is entitled to his or her property when the marriage breaks down. The Islamic rules on the maintenance of divorced women for the duration of their iddah period, as well as the rule that they must remain in their matrimonial homes until the end of the period must also be strictly implemented. As for the right to the custody of the children of a marriage, since the interests of the children is the paramount consideration, it must be

determined by the current economic position of the parents of the children. In Nigeria, as of now, the majority of custody disputes are resolved in favour of the husband due not only to his superior economic standing but also to the traditional linkage of bride-price with the right to the children. But in future, with the abolition of bride-price, the claim for custody of children of a marriage must be based solely on the ability of the claimant to provide for the children.

Since there doesn't seem to be a possibility of making the responsibility for family support equal for man and wife in Nigeria, due to the inherent difference in the economic standing of man and wife, any future solution to the problems of family breakdown should be geared towards ensuring that the husband's obligation to maintain his family are strictly enforced. Provisions already exist for this for general law marriages, but it is often the case in Nigeria that statutory provisions are seldom effective without a concerted effort in enforcing them.

The rapid social, political and economic changes that have taken place in Nigeria since independence do not seem to have altered the general position of women in the family nor to have met their needs on the breakdown of marriage. Rather, their position is worse. This is because the changes have raised their expectations but have not fulfilled them. General inflation has made it fashionable for exorbitant amounts to be demanded for bride-price which has to be refunded by the divorced women. And an unemployed and dependent housewife may be faced with the daunting task of having to refund thousands of Naira. Although the extended family support system is still there, its

effectiveness in supporting its members are severely restricted by the general economic hardship that has made life intolerable for all since the collapse in the oil market.

The legal reforms that have been introduced since independence, particularly those concerning customary and Islamic marriages such as the Area Courts Law, 1968, have emphasised the formal legal procedures rather than the problems of family breakdown. It is still left to the parties to sort out any dispute they might have on maintenance, custody of children and property rights. Parties only resort to the state institutions for the settlement of disputes when they have failed to come to an agreement themselves.

Formal legal provisions on their own, without a corresponding restructuring of the economic system as well as the traditional power structure within the home, cannot bring about an effective solution to the problem in Borno or any other part of Nigeria. As stated earlier, this can only be done by the state either assuming the responsibility for supporting families in need through the provision of social welfare, or establishing of new family courts which would cater solely for family disputes on such issues as maintenance, child custody and maintenance, and property rights after the breakdown of marriage. Such courts should have jurisdiction on all family types. If this cannot be done at a national level then each State of the Federation should be encouraged, through financial and other support, to set up such courts throughout their local government areas. By so doing, it would be possible to respect and preserve local customs, traditions, as well as religions, and at the same time supplement

them with the new aim of ensuring that the interests of women and children, who invariably are the losers at family breakdown, are protected after divorce.

This research has shown, through the response of the interviewees in particular, that women in Borno suffer most when their marriage breaks down. It also shows that women would like a change in the status quo so that they would not have to refund bride-price; nor be thrown out of the matrimonial home at a short notice; nor be deprived of their property by their husbands; and above all they would like their contributions towards their families recognised rather than continue to be regarded as an expendable commodity.

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A P P E N D I X A

QUESTIONAIRES ON FAMILY BREAKDOWN IN NIGERIA

I N T R O D U C T I O N

This set of questionaires is part of a study of the legal and financial conscequences of divorce and family breakdown in Nigeria and in Borno State in particular which is being conducted by me as part of my Ph.D. researh at the University of Warwick, England. The purpose of the researh is to attempt to discover the legal and soiological changes that have taken pla ce and are taking place in the rights of spouses and their children to maintenance during marriage and after the termination of the marriage by death or by divorce. The research will also observe the changes, if any, in the rights of parties to a marriage to the custody of their children, as well as the settlement of the ownership of any property that the parties might have had during the marriage. The study covers both Islamic Law, Customary Law, and the General Law in Nigeria in general and in Borno State in particular. Your o-operation, as a Nigerian, will not only be greatly appreciated but will contribute enormously to the accuracy of the research and to its assessment of the present state of the law as well as its future development in Nigeria.

The Questionare asks for certain factual information about marriage, divorce, property rights, and maintenance during and after marriage. There are no right or

wrong answers to the questions, but in order that the research reflects the true situation in a balanced and objective manner, it is essential that your answers are well thought out. Your answers will be treated in the strictest of confidence and therefore you must not write your name on the Questionaire.

Thank you very much for your co-operation.

Yours Faithfully,

Hamidu B. Usman,

School of Law,

University of Warwick.

A P P E N D I X B
Q U E S T I O N A I R E

1. Age .....

2. Sex .....

3. Occupation .....

4. Religion .....

5. Marital Status.....

6. If single, have you ever been married?

Yes No

7. Which of the following types of marriage did you enter into? (You may tick more than one)

Customary marriage Islamic marriage

Church marriage Court marriage

8. Which of the following types of marriage ceremonies did you have for the marriage? (You may tick more than one)

Customary ceremony Islamic Ceremony

Church ceremony

9. Was bride-price paid for the marriage?

Yes No

10. If yes, how much was paid as bride-price?

.....

11. Have you ever had more than one wife or co-wife at the same time?

Yes No

12. If yes, how many? .....

13. Were they all married under the same type of law or custom?

Yes No

14. If yes, what type of law or custom was it?

.....

15. How many children do you have?....

16. Where did you live when you were married?

a. Your own home
b. Your wife's home
c. Your husband's home
d. Your Wife's parents' home
e. Your husband's parents' home
f. Rented accommodation

17. Which of the following schools or colleges did you attend? (You may tick more than one)

a. Qur'anic School
b. Primary School
c. Secondary School
d. College of Higher Education
e. University
f. Other .....

18. Who provides the main income for your family?

a. You
b. Your husband
c. Your wife or wives
d. Both marriage partners
e. Your parents
f. Other.....

19. Have you ever been divorced? Yes No

20. If yes, what was the reason for the divorce?

.....

21. Were you separated from your former husband or wife before the divorce?

Yes No

22. If yes, for how long were you separated?

.....

23. How did you support yourself during the separation?.....

24. If divorced, which of the following types of divorce was it?

a. Customary (Unilateral)

b. Customary (Court)

c. Islamic (Talaq)

d. Islamic (Khulla)

e. Islamic (Court)

f. General law

25. Were there attempts to reconcile you before the divorce?

Yes No

26. If yes, who conducted the reconciliation attempt? .....

27. Did you refund or receive a refund of the bride-price after the divorce?

Yes No

28. If yes, how much of the bride-price did you receive or refund, and why? .....
.....
.....

29. Where did you stay after the divorce?
.....
.....

30. How did you support yourself (for food,clothes and other expenses) after the divorce?
(You may tick more than one)

a. Self- employment
b. Former husband or wife
c. New partner
d. Parents
e. Charity
f. Other .....

31. Did you have to support your former wife or husband after the divorce?

Yes No

32. If yes, who ordered you to support your former husband or wife? .....

33. For how long did you support or was supported by your former husband or wife?.....
.....

34. Was there any settlement of property between you and your former husband or wife?

Yes No

35. If yes, what was the property and how was it settled? .....
.....

36. With whom did the children stay after the divorce? .....

37. Did you want the children to stay with you?

Yes No

38. If yes, did you succeed in having them?

Yes No

39. If no, why didn't you succeed? .....

.....

40. Did you contribute to the financial support of the children after the divorce?

Yes No

41. Apart from custody, was there any other arrangement concerning the children?

Yes No

42. Who, among the following, do you think has the right to the custody of a child after a divorce?

a. Father

b. Mother

c. Both Father and Mother

43. What are the main reasons for giving custody of a child to his father? (You may tick more than one)

a. The sex of the child

b. The age of the child

c. Payment of bride-price

d. What is best for the child

e. The customs of the parties

f. Any other.....

44. What are the main reasons for giving custody of a child to his mother? (You may tick more than one)

a. The sex of the child

b. The age of the child

c. Payment of bride-price

d. What is best for the child

e. The customs of the parties

f. Any other.....

45. How satisfied were you with the custody arrangements for the children after the divorce?

a. Wholly satisfied

b. Partly satisfied

c. Not satisfied

46. Since the divorce, how often have you been seeing your children?

a. Once a week
b. Once a month
c. Annually
d. All the time
e. Not at all

Please indicate your opinion on the following statements by ticking one of the answers.

47. At divorce, husband and wife should share all their property equally.

a. I agree
b. I disagree

48. At divorce, each party should take only the property that belongs to him or her.

a. I agree
b. I disagree

49. At divorce a woman should be allowed to remain in her former husband's home until she remarries.

a. I agree

b. I disagree

50. The duty to support the family financially must always be on the husband alone.

a. I agree

b. I disagree

51. The duty to support the family financially must always be on the wife alone.

a. I agree

b. I disagree

52. The duty to support the family financially must equally be on both the husband and wife

a. I agree

b. I disagree