

**The distortion of the meaning of bride wealth:
significance for the evolution of living customary law in
southeast Nigeria**

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LIST OF ABBREVIATIONS

All ER	All England Law Report
ALL NLR	All Nigerian Law Report
CB	Chief Baron
ECSLR	East Central State Law Reports
ENLR	Eastern Nigerian Law Report
GLR	Gazette Law Report
HCNLR	High Court of Nigeria Law Report
IMSLR	Imo State of Nigeria Law Report
KB	King's Bench
LHCR	Lagos High Court Report
LLR	Lagos Law Report
LRP & D	Probate Division
LRN	Law Reports of Nigeria
MNLR	Mid-Western Nigeria Law Report
NILR	Nigeria Internet Law Report
NLR	Nigerian Law Report
NMLR	Nigerian Monthly Law Report
NWLR	Nigerian Weekly Law Report
QB	Queens's Bench
SC	Judgment of the Supreme Court of Nigeria
SCNLR	Supreme Court of Nigeria Law Report
UILR	University of Ife Nigeria Law Report
WNLR	Western Nigeria Law Report
WRN	Weekly Reports of Nigeria

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Interpretation Act Cap 192 Laws of the Federation of Nigeria 1990.

Land Use Act Cap 202 LFN. 1990 now Cap L5 LFN. 2004.

Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

Marriage (Validation) Act Cap 219 Laws of the Federation of Nigeria 1990.

Marriage Ordinance, No. 10 of 1863

Marriage Ordinance, No. 95 of 1908.

Marriage Proclamation, No. 1 of 1907 (Laws of the Protectorate of Northern Nigeria 1910).

Marriage Proclamation, No. 10 of 1906.

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Marriage, Divorce and Custody of Children Adoptive By- laws Order 1958.

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Owonyin v Omotosho (1961) 2 SCNLR.

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ABSTRACT

Nigeria's Constitution does not provide for the interaction of the received English law, statutory law, and customary law. Bride wealth, an important aspect of customary law in southeast Nigeria, symbolises the bride's worth to her family, as well as a bond between the bride and groom's families. The changes introduced by colonial rule distorted its meaning to the extent that people disobeyed legislation enacted to curb excessive bride wealth. This disobedience is traceable to socio-economic and cultural factors founded on people's survival needs. This disobedience has great significance for the evolution of living customary law, legal pluralism, and success of development projects in Nigeria. It signifies that development policies should take into consideration the living customary laws of people at the receiving end of development projects. At a broader level, it also signifies participation of local communities in decision-making that affects them. The thesis suggests that implementation of wide-ranging consultations during the law-making process will strengthen democratic institutions in Nigeria.

Chapter one

INTRODUCTION

1.1 Background

Family is important, especially in traditional life. The foundation of a family in traditional society is mostly marriage, whether monogamous or polygamous, depending on the culture. Marriage creates a bond between the respective families of the bride and groom.¹ This is because from ancient times in traditional societies, marriage has been regarded as ‘an alliance between two families, rather than a contract between two individuals’.² It also plays a role in the rights and privileges that accompany marriage. There are several requirements for the validity of marriage in southeast Nigeria, of which bride wealth is the most significant. In light of this, this thesis investigates factors responsible for the change in the meaning of bride wealth and their implication for the interaction of customary law with other laws in Nigeria.

Bride wealth may be defined as the payment made by a groom or his kin to the kin of the bride in order to ratify a marriage.³ The payment of bride wealth often represents friendly relations between the intermarrying families and provides a material pledge that the woman and her children will be well treated.⁴ It also symbolises the bride’s worth to her community, and sometimes serves as recognition of her fecundity and role in the art of creation.⁵ Unfortunately, the meaning of bride

¹ S Rodolfo, ‘Sub-Saharan legal tradition’ in Mauro Bussani and Ugo Mattei (ed) *The Cambridge Companion to Comparative Law* (2012) 316-317.

² VC Uchendu, *The Igbo of Southeast Nigeria* (1965) 50.

³ G Ferraro and S Andreatta, *Cultural Anthropology: An Applied Perspective* (2011) 222-225; C Osondu Ajuzie, *Modern Nigeria Family Law and Practice* (2012).

⁴ The payment of Bride wealth is meant to show that the groom is financially ready to begin and support a family. By offering his own resources, he is now accountable to see the marriage through. It is a test of the honesty and seriousness of the man who was asking for a wife and a token that he plans to make the girl his life partner; See D Okafor- Omalim, *A Nigeria Villager in Two Worlds* (1965) 12th edition at 116; See UC Isiugo-Abanihe, ‘Consequences of Bridewealth Changes on Nuptiality Patterns among the Ibo of Nigeria’ in C Bledsoe & P Gilles (eds.) *Nuptiality in Sub-Saharan Africa: Contemporary Anthropological and Demographic Perspectives* (1994) 74-93; MC Onokah, *Family Law* (2003) 69. It is worth noting that a customary law marriage in southeast Nigeria goes beyond the bride and the groom, as it is believed that the man and his family marries the girl and her family.

⁵ Ibid UC Isiugo-Abanihe.

wealth has changed. In fact, its meaning became so distorted that the former Eastern Nigerian Government adopted legislation to limit its payment.⁶

The scope of the thesis is limited to southeast Nigeria because it is the area where most of the distortion of bride wealth occurred.⁷ This distortion is inseparable from the agrarian foundations in which bride wealth emerged. Ester Boserup explained that in agricultural development where shifting cultivation takes place; most of the work was done by women.⁸ Accordingly, bride wealth was also regarded in some places as a form of compensation to the bride's natal family for the loss of her labour and company.⁹ Bride wealth, as an essential feature of marriage under customary law presents an intriguing problem for the interaction of laws in Nigeria.

1.2 Statement of research problem

Section 3 (a) of the Limitation of Dowry Law restricts the maximum sum payable as bride price to thirty naira. Despite this limitation, astronomical sums are charged by families as bride price. These huge sums are indicative of how the original meaning of bride wealth was distorted. The chief reason for the distortion of the meaning of bride wealth is traceable to the socio-economic conditions introduced by colonialism. When colonialism disrupted the agrarian foundations of economic activities in southeast Nigeria, many families lost their agricultural lands, which was their core means of livelihood.¹⁰ The lands were taken over by the British in furtherance of their economic exploitation of Nigeria. After observing the land tenure system and finding it unsuitable for their goals, the British colonial overlords enacted the Crown Land Ordinance of 1900. By this law, they effectively assumed ownership of all lands and

⁶ See the preamble to the Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

⁷ UC Isiugo-Abanihe, 'Bridewealth, Marriage and Fertility in the East-Central States of Nigeria' (1995) 51.3 & 4 Genus 151-178 at 154-156; KT Kollehlon, 'Ethnicity and Fertility in Nigeria' (2003) 50.3&4 *Biodemography and Social Biology* 201-221 at 205; MO Balonwu *et al*, *Report of the Committee on Bride Price: Eastern Region of Nigeria* (1995). Southeast Nigeria is a geo-political region that comprises of five states. These are Abia, Anambra, Ebonyi, Imo, and Enugu.

⁸ E Boserup *et al*, *Woman's role in economic development* (2013).

⁹ G Ferraro and S Andreatta *supra* note 3; see also AP Anyebe, *Customary Law: The War without Arms* (1985).

¹⁰ CJ Korieh, *The Land Has Changed: history, society and gender in colonial eastern Nigeria* (2010).

gave people mere rights of occupancy over their own land.¹¹ Many Nigerians went to work for the white man in the newly created civil service, while others went to work in the coal mines. Many families were converted to Christianity and sent their children to school. Others lost their lands to big corporations and embraced other means of livelihood. All these social changes led to the introduction of status and social classes in southeast Nigeria, of which women were seriously affected.¹² Under these changed circumstances, bride wealth became distorted and began to be understood as bride price.¹³ People charged high sums to cope with their poverty, or to recover sums they spent in training their daughters in school.¹⁴ Despite the enactment of the Limitation of Dowry Law ('Dowry Law'), the problem still persists. This persistence has significance for legal pluralism in Nigeria, and by implication the success of development projects in Nigeria.

1.3 Methodology

The research problem is best addressed through field work. However, the scope and timeline of the thesis discourages empirical research. Accordingly, solutions to the problem will be reached through identification of the underlying factors associated

¹¹ TO Elias, 'Nigeria's Contribution to Colonial Law' (1951) 33.3/4 *Journal of Comparative Legislation and International Law* 49-55 at 51. For the colonial impact on land tenure in Nigeria, see also VC Uchendu, 'State, Land and Society in Nigeria: A Critical Assessment of Land Use Decree' (1978) 6.2 *Journal of African Studies* 62-74.

¹² M Hollos, 'Migration, Education, and the Status of Women in Southern Nigeria' (1991) 93.4 *American Anthropologist New Series* 852-870 at 852 & 867; See also J Van Allen, 'Aba Riot or Igbo Women's War? Ideology, Stratification and the Invisibility of Women' (1975) 6.1 *Ufahamu: Journal of African Studies* 20-29. See also G Chuku, *Igbo Women and Economic Transformation in SouthEastern Nigeria, 1900-1960* (2005); N Sudarkasa, 'The Status of Women in Indigenous African Societies' (1986) 12.1 *Feminist studies* 91-103; N Sudarkasa, 'Sex Roles, Education and Development in Africa' (1982) 13.3 *Anthropology and Education Quarterly* 279-288 at 281-286; CK Ajaero and PC Onokala, 'The Effects of Rural-Urban Migration on Rural Communities of SouthEastern Nigeria' (2013) *International Journal of Population Research*; CC Robertson, 'Women's Education and Class Formation in Africa 1950-1980' in CC Robertson and I Berger (ed) *Women and Class in Africa* (1986) chapter 6; RN Uchem, *Overcoming Women's Subordination in the Igbo African Culture and in the Catholic Church: Envisioning an Inclusive Theology with Reference to Women* (2001) 46-47; for impact of changes in socio-economic conditions see PE Okeke-Ihejirika, *Negotiating Power and Privilege: Igbo Career Women in Contemporary Nigeria* (2004) vol. 82 at 4-10.

¹³ HA Wieschhoff, 'Divorce Laws and Practices in Modern Ibo Culture' (1941) 26.3 *The Journal of Negro History* 299-324 at 299-301.

¹⁴ Ibid. See also F Anene, 'The Nigerian Woman: creating avenues for educational and political equality through ODEL, a paper presented at the Cambridge International Conference on Internationalisation and Social Justice: The Role of Open, Distance and e-Learning: 26- 33 at 30. SF Wegh, *Between Continuity and Change: Tiv Concept of Tradition and Modernity* (1998).

with bride wealth's distortion. To do this, I systematically review articles, books, and monographs in online and physical libraries. I shall also analyse empirical studies undertaken by research institutes and non-governmental organisations. Examples of these organisations are the Nigerian Institute for Advanced Legal Studies and the Centre for Law and Society at the University of Cape Town. This method would, hopefully, provide a roadmap for further research on the persistence of high sums charged as bride wealth in southeast Nigeria. For fuller understanding of the study's significance, a brief explanation of its key concepts is needed.

1.4 Definition of terms

a) Legal pluralism

Legal pluralism means the interaction of economic, social and legal forces in a 'social field' containing other legal orders.¹⁵ In a simpler way, it means the operation of two or more laws within a given population. According to Woodman, the term, 'a population,' is best for describing legal pluralism because it covers every group – big or small – that observes more than one law, irrespective of whether they share a common ancestry or allegiance to a common leadership.¹⁶

b) Dowry

Dowry is defined as the property or money that is brought by the bride from her father's house to the husband.¹⁷ It is worth noting that Dowry is different from bride wealth because while the former is brought from the woman to the husband, the latter is paid by the kinsmen of the intending suitor to the kinsmen of the wife to be.¹⁸

¹⁵ J Griffiths, 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55 at 3. See also SF Moore, 'Law and Social Change: The Semiautonomous Social Field as an Appropriate Subject of Study,' (1973) 7.4 *Law and Society Review*.

¹⁶ GR Woodman 'Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of land law' in Hanri Mostert and Thomas Bennett (eds.), *Pluralism and Development: studies in access to property in Africa* (2012) at 39.

¹⁷ A Schlegel *et al*, 'Marriage Transactions: Labour, Property, Status' (1988) 90.2 *American Anthropologist* 291- 309 at 299-301; see also J Goody (1973) at 17.

¹⁸ It is worth noting that the Limitation of Dowry Law covers both Dowry and Bride Wealth.

c) *Bride price/Bride wealth*

Bride wealth may be defined as the payment made by a groom or his kin to the kin of the bride in order to ratify a marriage.¹⁹ However, as a result of the commercialisation of bride wealth caused by colonial rule, it began to be referred to as bride price.²⁰ The thesis will in chapter two expand more on the difference between bride wealth and bride price. However for the purpose of this thesis the term, 'bride wealth' will be used because it fits the objectives of this thesis, as seen in the significance of study below.

1.5 Significance of study

Despite the Dowry Law, huge sums are still demanded and paid for as bride price in southeast Nigeria. These sums, which clearly contravene the Dowry Law, are indicative of tension between statutory and customary law in Nigeria. The significance of this tension is three-fold: one, the manner in which bride wealth was distorted reveals a lot about the evolutionary history of living customary law in the face of changing social conditions. Specifically, it suggests that there is a direct link between urbanisation and living customary law. Living customary law may be defined as the norms that regulate local communities in their daily lives, which is different from the views of courts, administrators, and scholars.²¹ It is also different from 'official customary law,' which is the version that is codified in legislation and recorded in textbooks and court precedents.²² Two, the disregard paid to the Dowry Law suggests that the interaction between customary law and state law owes a lot to socio-economic

¹⁹ It also includes the sum total of all that is required of a groom seeking to marry any woman according to tradition of the community involved. G Ferraro and S Andreatta (2011) supra note 3 at 222-225; C Osondu Ajuzie (2012) supra note 3 at 89-90.

²⁰ JU Ogbu, 'African Bride wealth and Women's Status' (1978)5.2 *American Ethnologist* 241-262 [arguing that 'the primary function of bridewealth is the legitimation of marriage and that by legitimating marriage bridewealth payment functions to enhance, not to diminish, the status of African women.']. See also S Johnson, *The History of the Yorubas: From the Earliest Times to the Beginning of the British Protectorate* (1921) 113-115; NA Fadipe, *The Sociology of the Yoruba* (1970) 91, and J Byfield, 'Women, Marriage, Divorce and the Emerging Colonial State in Abeokuta (Nigeria) 1892-1904' (1996) 30.1 *Canadian Journal of African Studies* 32-51.

²¹ I Hamnett, *Chieftainship and Legitimacy: An anthropological study of executive law in Lesotho* (1975) 10; CN Himonga, *Family law in Zambia* (2011) 38-39.

²² CN Himonga supra 21 at 38-39; see also CN Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession' (2005) 82 *Acta Juridica* 83-84.

conditions. Specifically, it suggests that people will not hesitate to disobey state law, which affects their economic well-being. This theory is linked to the full-belly thesis. The full-belly thesis states that ‘a man’s belly must be full before he can indulge in the luxury of worrying about his political freedom.’²³ In other words, laws become meaningless if the basic needs are not met. Three, if people flagrantly disobey state law as part of their reaction to socio-economic changes, then this has serious implications for the interaction of state law and customary law – that is, legal pluralism. Specifically, development policy makers need a re-adjustment of the manner in which they approach and implement policies that touch upon customary law in order not to create resistance to government policies, which will lead to the failure of development projects.²⁴

Finally, it is worth noting that although bride wealth confers respectability and legitimacy to customary law marriages in southeast Nigeria, the distortion of its meaning contributes to violence against women, as well as increase in divorce rate.²⁵

1.6 Research question

The central question the thesis investigates is this: What significance does the distortion of bride wealth in southeast Nigeria have for the evolution of living customary law and legal pluralism in Nigeria? To answer this question, the following sub-questions are explored:

a) How is living customary law situated in Nigeria’s constitutional framework?

²³ R Howard, ‘The Full- Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa’ (1983) 5.4 *Human rights quarterly* 467-490 at 469.

²⁴ F Von Benda- Beckmann, ‘Scape Goat and Magic Charm: Law in Development Theory and Practice’ (1989) 21.28 *The Journal of Legal Pluralism and Unofficial Law* 129-148; RI Meltzer, ‘International Human Rights and Development: Evolving Conceptions and their Application to Relations between the European Community and the African-Caribbean-Pacific States’ in CE Welch Jnr and RI Meltzer (ed) *Human Rights and Development in Africa* (1984) chap 9; Suggestion on development to meet the changes in socio economic conditions see A Adepoju et al, ‘The African Family: An Overview of Changing Forms’ in A Adepoju (ed) *Family, Population and Development in Africa* (1997) 41-59.

²⁵ NG Egbue, ‘Culture Issues, Women’s Human Rights Among the Igbos of Southern Nigeria: An Appraisal of Their Implications to Women Development’ (2005) 1.3 *International Journal of Forum for African Women Educationalist in Nigeria* 214.

b) What factors shape the evolution of living customary law in Nigeria in the context of bride wealth?

c) What is the significance of bride wealth's distortion on legal pluralism in Nigeria?

1.7 Literature review

The socio-economic changes that led to bride wealth's distortion are important for situating their implications for living customary law's evolution and legal pluralism in Nigeria. Goody posits that where there is population pressure with insufficient workforce, it affects the quantity of goods and services rendered.²⁶ Thus, the payment of bride wealth was linked to the compensation of the natal family of the bride for the loss of her labour and company. This payment is sometimes accompanied by the provision of a dowry which is referred to as *Idu Uno* in southeast Nigeria. Dowry is the property or money brought by a wife- to -be to her husband's house.²⁷ It is regarded as one of the customary rites that accompany the marriage ceremony in southeast Nigeria.²⁸ The items that constitute the *Idu Uno* are meant to enable the bride to start a family and cope with the agrarian demands of the economy.

Korieh explains the processes and dynamics of agrarian transformation in southeast Nigeria.²⁹ He shows how colonial transformation of agricultural production

²⁶ J Goody, *Production and Reproduction: A Comparative Study of the Domestic Domain* (1976). See also E Boserup, *The Conditions of Agricultural Growth: The Economics of Agrarian Change under Population Pressure* (2005). According to CC Robertson in *Trouble Showed the Way: Women, Men and Trade in the Nairobi Area 1890-1990* (1997), 'women's labour was/is the basis of survival within and outside of the home'. For the contribution of women in agricultural development especially on cultivation see J Goody et al, 'Inheritance and Women's Labour in Africa' (1973) 43.2 *Africa* 108-121.

²⁷ A Schlegel *et al*, *supra* note 17.

²⁸ Dowry is different from Bride wealth. While dowry is the property the woman that the bride brings to her husband, bride wealth is paid by the groom to the kin of the bride.

²⁹ CJ Korieh, *supra* note 10. For the distortion of people's means of livelihood through agrarian transformation, see CK Meek, *Land Law and Custom in the colonies* (1946); E Colson, 'The Impact of the Colonial Period on the Definition of Land Rights' in V Turner (ed) *Colonialism in Africa 1870-1960 volume three profiles of change: African Society and Colonial Rule* (1971); TJ Basset, 'Introduction: The Land Question and Agricultural Transformation in Sub-Saharan Africa' in TJ Basset and DE Crummey, *Land in African Agrarian Systems* (1993). Also on the distortion of land rights based on changes on socio-economic conditions, see G Feder and R Noronha, 'Land Rights Systems and Agricultural Development in Sub-Saharan Africa,' (1987) 2.2 *World Bank Research Observers* 143-169; PE Peters, 'Inequality and Social Conflict over Land in Africa,' (2004) 4.3 *Journal of Agrarian Change* 269- 314. TA Bejaminsen and C Lund, 'Formalisation and Informalisation of Land and Water Rights in Africa: An Introduction,' in T Bejaminsen and C Lund (ed) *Securing Land Rights in Africa*; PE Peters, 'Challenges in Land Tenure and Law Reform in Africa: Anthropological Contributions'

radically altered people's means of livelihood and gender relations. After examining sixty African societies, JU Ogbu found that the key 'function of bride wealth common to Africa societies is legitimation of marriage, a function that enhances rather than diminishes the status of women in African context.'³⁰ RF Gray explains the economic significance and functions of bride wealth.³¹ After his study of the people of Sonjo, Ganda, Gusii, Thonga and Tiv on bride price he rejected the suggestion of Evans Pritchard on the change of the term from 'bride price' to 'bride wealth'. His argument is that if the transfer of women as wives in Africa is similar to the way other economic commodities are transferred in the same society, then it would be legitimate to accord the same economic term given to transfer of economic commodities to such dealings of wives' transfer. In reply to RF Gray's argument, PH Gulliver argues that 'the mechanics of transfer, the amounts of wealth, the time and nature of transfer and the indigenous concepts and values involved, and the social context within which it all occurs vary exceedingly widely.'³² Accordingly, he suggests that the definition of bride wealth should be 'transfer of wealth (material or otherwise) in direct connection with marriage.' Linking violence against women to the distortion of the meaning of bride wealth in a random sample study of 250 men and women, TG Adegoke believes that 'significant relationships existed between, men's right to control their wives' behaviour, and discipline their wives by force.' According to his findings, bride wealth is synonymous to purchasing a wife, and cultural attitudes towards female chastity and male honour serve to justify violence against women and to exacerbate its

(2009) 37.8 *World Development* 1317-1325; RE Downs and SP Reyna, *Land and society in Contemporary Africa* (1988); also on the implication of economic changes on poverty and livelihood see J Quan, 'Land Tenure, Economic Growth in Sub-Saharan Africa,' in J Quan and C Toulmin (ed) *Evolving Land Rights, Policy and Tenure in Africa* (2000)31-50; CJ Korieh, 'We Have Always Been Farmers': Society and Economy at the Close of the Nineteenth Century' in CJ Korieh (ed) *The Land has Changed* 27-29.

³⁰ JU Ogbu, supra note 20 ; also on the legitimation of marriage as the function of bride wealth see S Nanda et al, 'Cultural Anthropology' 11th edition (2011) 179.

³¹ RF Gray, 'Sonjo Bride- Price and the Question of African 'Women Purchase' (1960) 62.1 *American Anthropologist* 34-57. For change of term from 'bride price' to 'bride wealth' see EE Evans-Pritchard, 'An Alternative Term for 'Bride Price' (1931) 31 *Man* 36- 39. For controversy over bride price and bride wealth see also G Dalton, "'Bride Wealth' vs 'Bride Price'" (1966) 68.3 *American Anthropologist* 732-738.

³² PH Gulliver, 'Bride-Wealth: The Economic vs. The Noneconomic Interpretation' (1961) 63.5 *American Anthropologist* 1098-1100.

consequences.³³ Accordingly, he suggests a need for relevant stakeholders such as the government, community leaders, and non-governmental organisations to mount strategies towards putting an end to violence against women. Jack Goody notes that high bride wealth in Nigeria is as a result of change in ‘modern conditions’.³⁴ After examining the difference between bride wealth and dowry, he concludes that dowry differentiates while bride wealth tends to homogenise. E Torday, in his study of bride wealth, considers it from the point of view of what is important to men, as well as the functions of bride wealth.³⁵ He finds that the payment of bride wealth does not consist of buying and selling of the bride. SC Ifemeje and N Umejiaku deal with the discriminatory cultural practices that are meted out on Igbo women in Nigeria and the legal framework of women’s rights at national, regional and international levels.³⁶ Notably among the obnoxious practices listed in the article is the payment of bride wealth. They linked violence against women with the payment and refund of bride wealth and examined factors that inhibit the eradication of these obnoxious practices. They suggest urgent legislative intervention, creation of educational opportunities, more intensified re-orientation of the police, participation of lawyers and traditional rulers, and also appointment of women in the political sphere of the government. MB Nwoke examines the implication of bride price for women’s rights in Nigeria.³⁷ She posits that bride price should be seen as an instrument that represents the completeness of marriage process and as such should not be seen as the cost of a woman or a means of price-tagging. The study highlights the psychological implication of bride price and suggests the restructuring of the term ‘bride price’ with less derogatory terminology. According to her, it portrays women as commercial products, thereby reducing their pride and dignity. Godpower Okereke argues that economic austerity is a contributing

³³ TG Adegoke et al, ‘Community Norms and Cultural Attitudes and Beliefs Factors Influencing Violence against Women of Reproductive Age in Nigeria,’ (2007) 4.4 *Pakistan Journal of Social Sciences* 490-495.

³⁴ J Goody, ‘Bride wealth and Dowry in Africa and Eurasia’ in J Goody and SJ Tambiah, *Bride wealth and Dowry* (1973) 7.

³⁵ E Torday, ‘Bride Price, Dower or Settlement’ (1929) 29 *Man* 5-8.

³⁶ SC Ifemeje and N Umejiaku, ‘Discriminatory Cultural Practices and Women’s Rights among the Igbos of South East Nigeria: A Critique’ (2014) 25 *Journal of Law, Policy and Globalisation*.

³⁷ MB Nwoke, ‘Bride Price and Implications for Women’s Rights in Nigeria: Psychological Perspective,’ (2009) 7.1 *Gender and Behaviour* 2078-2086.

factor to the distortion of the meaning of bride wealth.³⁸ Furthermore, he argues that the effect of economic changes contributes to violence against women. Accordingly, he calls for abolition of this custom and also suggests laws to guide against other discriminatory cultural practices. IP Enemuo also supports the abolition of the payment of bride wealth since it makes women appear as commodities and reduces their pride and dignity.³⁹ JN Aduba and NG Egbue also support the view of Enemuo.⁴⁰ However, they ignored the fact that the pride of every society is its culture, and so advocating for abolition of an important cultural element such as payment of bride wealth is inimical to culture. None of the reviewed scholars linked the distortion of bride wealth and its significance for the evolution of living customary law, except perhaps MB Ndulo.⁴¹ According to him, the increase in the sums charged as bride wealth is as a result of a distorted customary law. He believes that bride wealth, which is a thing of pride, has become what the colonialist assumed was bride price and is now seen as a tool for domination and exploitation of women.⁴² On the effect of high bride price on marriage stability, S Ngutor *et al* studied the factors that determine high bride price among families.⁴³ They discovered that high bride price affects the stability of marriage through domestic violence, poverty, dehumanisation of women and increased propensity for divorce. They recommend non-state actors to organise advocacy programmes to help stabilise the inflation of bride price; for traditional leaders to create awareness among their subjects, and also for fixed amount to be paid as bride price. BA Rwezaura, in the concluding part of his paper, links the distortion of some

³⁸ GO Okereke, 'Incidence of Physical Spouse Abuse in Nigeria: A Pilot Study' (2002) 18.2 *Institute of African Studies Research Review* 39-51.

³⁹ IP Enemuo, 'Dissolution of Marriage under Customary Law: Need for Reform' (2005) 1.15 *University of Nnamdi Azikiwe Law Journal* cited in SC Ifemeje and N Umejiaku *supra* note 36.

⁴⁰ JN Aduba, 'A critique of some aspects of the law relating to dissolution of marriage' (1991) *Abia State Law Journal* cited in SC Ifemeje and N Umejiaku *supra* note 28; NG Egbue, 'Culture Issues Women's Human Rights among the Igbos of Southern Nigeria: An Appraisal of their Implication to Women's Development,' (2005) 1.3 *International Journal of Forum for African Women Educationalist in Nigeria* cited in SC Ifemeje and N Umejiaku *supra* note 36.

⁴¹ MB Ndulo, 'Changing Nature of Customary Marriage in Zambia' cited in MB Ndulo, *Law in Zambia* (1984) and also in MB Ndulo, 'African Customary Law, Customs and Women's Rights' (2011) 18.1 *Indiana Journal of Global Legal studies* 87-120.

⁴² 'Colonialist' in the context of this study, mean the British.

⁴³ S Ngutor *et al*, 'The Effects of High Bride-Price on Marital Stability' (2013) 17.5 *Journal of Humanities and Social Science* 65-70.

cultural practices especially bride wealth to changes in socio-economic conditions and called for the study of the extent of social change so that appropriate legal regulation can be devised to deal with the change.⁴⁴ Isiugo-Abanihe posits in his demographic study of the impact of high bride wealth among the Igbo people of Nigeria that increased prosperity and socio-cultural forces affect the level of bride wealth. He also states that high bride wealth leads to late marriages. However, he did not deal with the implication of the distortion of bride wealth for development policies and legal pluralism.⁴⁵ B Bigombe *et al* finds that people's flexibility and adaptability to the challenges posed by socio-economic conditions have profound impact on the family structure and decisions.⁴⁶ T Hakansson *et al* outlines how bride wealth system contributes to the perpetuation of socio-economic status, leading to endogamy.⁴⁷ On the escalation of bride wealth, MB Mulder argues that the negotiation of bride wealth is subject to multiple influences and determinants, of which education and poverty are important.⁴⁸ Also in support of BA Rwezaura point of view on the distortion of some cultural practices, Oluwatoyin Ipaye has this to say

The changes which have occurred in traditional family structure have been phenomenal. Explosions in population, rural to urban movements of the populace, wage labour, industrialisation, education, (and) contact with western civilisation, have all impacted on the Nigerian family such that its classic traditional structure in its pure form is probably no longer recognisable.⁴⁹

⁴⁴ BA Rwezaura, 'Traditionalism and Law reform in Africa: Vortrag vor dem Europa- Institut der Universität es Saarlandes Saarbrücken, den 5. Juli (1983).

⁴⁵ UC Isiugo-Abanihe, 'High Bride Wealth and Age at Marriage in Igboland' in J Ebigbola and E van de Walle (eds.), *The Cultural Roots of African Fertility Regimes: Proceedings of the Ife Conference*, February 25- March 1, 1987) at 3-6.

⁴⁶ B Bigombe et al, 'Major Trends Affecting Families in Sub-Saharan Africa' (2004) 12 *Alternativas: Cuadernos de Trabajo Social* 155-194.

⁴⁷ T Hakansson et al, 'Socio-Economic Stratification and Marriage Payments: Elite Marriage and Bride Wealth among the Gusii of Kenya' (ed) MS Chaiken and AK Fleuret (1990) *Social Change and Applied Anthropology: Essays in Honour of DW Brokensha* 166-177.

⁴⁸ MB Mulder, 'Bride Wealth and its Correlates: Quantifying Changes over time' (1995) 36.4 *Current Anthropology* 573-603.

⁴⁹ OA Ipaye, 'The Changing Pattern of Family Structure in Nigeria: Issues, Problems and Strategies for Family Support' in J Eekelaar and T Nhlanpo (eds.) *The Changing Family: International Perspectives on the Family and Family Law* (1998) 33-46.

Ipaye also argues that these changes have negative impacts on women, in that it makes them voiceless.⁵⁰ From investigation thus far, the implication of bride wealth's distortion for development policies and legal pluralism, as well as how to deal with it, seem unaddressed. The proposed research intends to fill this gap in the literature.

1.8 Outline of study

The outline of this thesis is as follows:

Chapter one has introduced the thesis. Specifically, it articulated the research problem, significance, approach to the thesis and scope of the study. It also situated the context of the study in southeast Nigeria.

Chapter two explores understandings of the concepts of bride wealth and legal pluralism. It provides an overview of the meaning of bride wealth. Furthermore, it examines the significance of bride wealth as against the colonial-induced term, 'bride price', and factors that necessitated the distortion of its meaning.

Chapter three discusses the types of legally recognised marriages in Nigeria. It stresses the phenomenon of double marriage and its implications for legal pluralism.

Chapter four argues that legal pluralism in Nigeria is mainly determined by socio-economic forces. It examines the implication of bride wealth's distortion for development policies and legal pluralism.

Chapter five concludes the thesis by providing a synthesis of each chapter and proffering recommendation for the problematic issues discussed.

⁵⁰ Ibid

Chapter Two

CONCEPTUALISATION OF CUSTOMARY LAW, LEGAL PLURALISM, AND BRIDE WEALTH

2.1 Introduction

This chapter discusses the meanings of customary law, legal pluralism, and bride wealth within the context of the thesis' objectives. Since an explanation of these concepts will help in understanding their evolution and significance for legal pluralism in Nigeria, the chapter will begin from there.

2.2 Meaning and nature of customary law

Customary law is a major source of law in Nigeria's legal system.⁵¹ It flows from norms or customs, which play important roles in the lives of the majority of people in Nigeria.⁵² Customs mainly regulate personal matters such as marriage, inheritance and succession. Before examining the meaning of customary law, it is important to examine the point at which customs or norms turn into customary law. Put differently, when does custom become customary law?

Generally in Africa, the determination of what constitutes norms and the point at which these norms become customary law has been greatly influenced by legal positivism. This is because Africa's subjugation in the nineteenth and early twentieth centuries coincided with the dominance of legal positivism in the Western world. As Griffiths put it, positivism holds that 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.'⁵³ Some scholars believe that this positivist mind-set influenced the

⁵¹ See section 16 of the Nigeria Evidence Act 8 Laws of the Federation of Nigeria Cap E18 2004, now Evidence Act 2011; see also A Park, *The Sources of Nigerian Law* (1963). For recognition of customary law as sources of law see the Supreme Court judgment in *Ugo v Obiekwe* (1989) 1 NWLR Pt 99 at 566.

⁵² Sec 2 of the Anambra State Customary Courts Law 1977; Nigerian Institute of Advanced Legal Studies (ed) *Restatement of Customary Law of Nigeria* (2013) Preface; C Mwalimu, *The Nigeria Legal System vol 1 Public Law* (2005) 77; see also MB Ndulo, 'African Customary Laws, Custom and Women's Rights (2011) 18.1 *Indiana Journal of Global Legal Studies* 80.

⁵³ J Griffiths, *supra* note 15 at 3.

British into thinking they were bringing law to lawless peoples.⁵⁴ The question of when norms become customary law may be framed thus: how should what people do (behaviour) be reconciled with what people ought to do (behavioural norms)? After this reconciliation, how and when should the practices of people be regarded as law?

The question of which practices constitute customary law often invokes varying responses. However, these responses have recurring elements, which scholars group into two: repetition of facts (*usus*) and normative or subjective element (*opinio juris*).⁵⁵ While *usus* raises the dilemma of how long certain facts need to be repeated in order to become accepted as law, *opinio juris* requires that a custom, in order to qualify as law, must be commonly believed to be obligatory.⁵⁶ Elias believes that it is only after such rule of conduct has reached an obligatory status that it becomes customary law.⁵⁷ In support, Obi argues that habitual usage equates to custom and eventually becomes customary law.⁵⁸ Although violation of customary law results in punishment, this does not mean that some customs, whose breaches do not attract punishment, are not regarded as obligatory. This is because customs emerged not only from what people practice, but also from their moral and religious beliefs. For example, in many Igbo and Yoruba communities in Nigeria, it is customary for a young person to greet an elder. However, breach of this custom rarely results in punishment. The situation is remarkably altered when a young person insults an elder. Such an action is met with varying punishment such as fines, flogging, and verbal warnings.

Despite the controversial question of what practices constitute customary law, it is fairly settled that the term, ‘custom,’ plays a dual role in this question. Allot has noted that this role is sustaining and constitutive.⁵⁹ Accordingly ‘if a customary norm

⁵⁴ JC Care & JG Zorn, ‘Legislating Pluralism: Statutory “Developments” in Melanesian Customary Law’ (2001) 46.33 *Journal of Legal Pluralism* 49-101 at 50- 52.

⁵⁵ See, for example, MC Okany, *The Role of Customary Courts in Nigeria* (1985) 40-46; A Allot, *New Essays in African Law* (1970) 39, 147.

⁵⁶ AR Hogue, *Origins of the Common Law* (1906) 197.

⁵⁷ TO Elias, ‘The Problem of Reducing Customary Law to Writing’ in AKR Kiralfy (ed.) *British Legal Papers* (1958) 61.

⁵⁸ SNC Obi, *The Ibo Law of Property* (London: Butterworths, 1963) 28-29.

⁵⁹ AN Allott, ‘The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England’ (1977) 21.1 *Journal of African Law* 1-23 at 5.

ceases to be sustained by the habitual practice of the people, it will fall into desuetude or change its legal character.’ It is in the context of this changing character of customary law that the significance of the distortion of bride wealth in southeast Nigeria is examined. But what is customary law?

The term customary law is defined by the Supreme Court of Nigeria in the case of *Oyewumni v Ogunesan* as

The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.⁶⁰

The above definition means that customary law is flexible and unwritten. However, many customs in Nigeria have become codified.⁶¹ Again, customary law increasingly relies on judicial precedents. The customs codified and captured in judicial precedents are regarded as official customary law. In contrast, living customary law refers to the norms that regulate local communities in their daily lives, which is different from the views of courts, administrators, and scholars.⁶² Studies have shown that official customary law is a ‘construction’ of the colonial judiciary and an ‘internal mischaracterization’ of custom by traditional leaders.⁶³ These traditional leaders

⁶⁰ Per Obaseki J.S.C (as he then was) 1990 NWLR Pt 137 at 207; See also MC Okany, *The Role of Customary Courts in Nigeria* (1984) 40-55; TO Elias, *The Nature of African Customary Law* (1956) 55; See Bairamian F.J’s definition of Customary Law in *Owonyin v Omotosho* (1961)2 SCNLR 57.

⁶¹ See, for example, SNC Obi et al, *The Customary Law Manual: A Manual of Customary Laws obtaining in Anambra and Imo States of Nigeria* (1977); Benin Traditional Council (on authority of Oba of Benin), *A Handbook on some Benin Custom and Usages*, and *A Supplement to the Handbook on some Benin Customs and Usages* (Vol 1 & 2, 1996).

⁶² I Hamnett, supra note 21 at 10; CN Himonga, supra note 21 at 38-39; see also CN Himonga, ‘The Advancement of African Women’s Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession’ (2005) 82 *Acta Juridica* 83-84; GR Woodman et al, *Local Law and Globalization: A Comparative Study of Peri-Urban Areas in Benin, Ghana and Tanzania Vol 21* (2004) 37-41.

⁶³ W Ncube, ‘The White Paper on Marriage and Inheritance in Zimbabwe: An Exercise in Superfluity and Mischief’ (1993) 5 *Legal Forum* 10 &12. In south east Nigeria, the process of interpreting customs played the biggest role in customary law’s distortion. As Afigbo put it, the court clerks that acted as interpreters to Warrant Chiefs and District Commissioners were ‘generally, men of ‘little dangerous knowledge.’ See E Afigbo, *The Warrant Chiefs: Indirect Rule in SouthEastern Nigeria: 1891-1929* (1972) 111. The presentation of distorted versions of customary law continued after colonial rule. In *Okanlawon & Ors v Olayanju & Ors* (unreported) Suit No. H05189176 Judgement of Oshogbo High Court of 24 August 1978, Sijuwade, J. rejected oral evidence of Ogbomosho customary law as follows:

offered interpretations of customs to the colonialists that are favourable to their position in order to gain more rights and privileges.⁶⁴ In the words of Armstrong ‘...what the elders and other witnesses gave as evidence of customary law was a distorted and rigid version of customary law designed to express their ideas of what the law should be and not what it really was...’⁶⁵ What this means is that while the traditional authorities had an interest in wielding their authority during the colonial administration, the colonialists, in turn, had an economic interest, which complimented the desires of traditional leaders whose collaboration was needed for the smooth running of the administration.⁶⁶ The power given to these elders contributed to what Mamdani termed ‘decentralized despotism’.⁶⁷ This local despotism is in the sense that any challenge of the chiefly authority could result to a ‘systemic reaction’.⁶⁸

Colonial influence and the misrepresentation of customary law by chiefs contributed to the subjection of customary law to English law. This is evident in the various criteria or validity tests of customary law introduced by the colonialists, which

‘I have no doubt that the 4th D.W. has given a distorted version of the traditional history and embellished the custom of land tenure in Ogbomosho, presumably to suit his own purpose particularly now that he is the reigning Shoun.’

⁶⁴ F Banda, ‘Global Standards: Local Values’ (2003) 17.1 *International Journal of Law, Policy and the Family* 1-27 at 7-8.

⁶⁵ A Armstrong et al, ‘Uncovering Reality: Excavating Women’s Right in African Family Law’ (1993) 7.3 *International Journal of Law, Policy and the Family* 314-369 at 314,324-325

⁶⁶ See F Banda supra note 14 at 8; see also CJ Korieh, ‘The Invisible Farmer? Women, Gender, and Colonial Agricultural Policy in the Igbo Region of Nigeria 1913-1954’ (2001)29 *African Economic History* 117-162 at 117; C Mgbako et al, ‘We Will Still Live: Confronting Stigma and Discrimination against Women Living with HIV/AIDS in Malawi’ (2007) 31.2 *Fordman International Law Journal* 289-342 at 299. The services rendered by the African traditional authorities include collection of taxes, requisitioning labour, provision of military recruits and compulsory crop cultivation see G Padmore, *How Britain Rules Africa* (1969) 315; J Suaret- Canale, ‘The Fouta-Djalon Chieftaincy’ (1968) *University of Ife, Institute of African Studies* 79-97.

⁶⁷ M Mamdani, ‘Decentralized Despotism’ in SB Ortner., NB Dirks and G Eley (eds.) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 37-61 at 52-61. For the

⁶⁸ See the note of G Padmore quoted in M Mamdani, supra note 17 at 53: ‘The chief is the law, subject to only one higher authority, the white official stationed in his state as advisor. The chief hires his own police...he is often the prosecutor and the judge combined and he employs the jailer to hold his victims in custody at his pleasure. No oriental despot ever had greater power than these black tyrants, thanks to the support which they receive from the white officials who quietly keep in the background.’ See also KH Johnsen, *A Conceptualization of the New Urban Masses in Africa – A Critical Discussion of the ‘Lumpenproletariat’* (2010) 24.

have continued till date.⁶⁹ The use of these tests have continued because Nigeria inherited the common law tradition that relies on judicial precedents.⁷⁰ The introduction of these validity tests led to divergent views on whether the application of these tests has been of any benefit in the development of customs. One school of thought is of the opinion that the application of the tests has been of relative benefit in striking down barbarous, unfair and unjust customs.⁷¹ The other school of thought sees it as a scheme by the colonialists to subjugate customary law to English rules since it uses foreign standards to evaluate the customs of the people.⁷² It is thus disputed whether the version of customary law that found its way into the courts is representative of what people do in practice.⁷³ The application of these rigid customary law seems not to take much cognisance of the conditions in which customary law evolved. However, tacit acknowledgement of the need to base judgements on the lived realities of local communities was upheld in the cases of *Lewis v Bankole*,⁷⁴ *Amodu Tijani v Secretary, Southern Nigeria*,⁷⁵ *Cole v Cole*,⁷⁶ and more recently in the case of

⁶⁹ The criteria for the application of customary law include; (1) It must not be repugnant to natural justice, equity and good conscience see the case of *Edet v Essien* (1932) 11 NLR 47; *Chawere v Aihenu* (1935) 12 NLR 4; *Eshugbai Eleko v The Officer Administering the Government of Nigeria* (1928) 6 NILR 19. (2) It must not be incompatible with any written law in force. (3) It must not be incompatible to public policy. However see section 16 to 19 of the Evidence Act of Nigeria 2011. For the constitutional criteria for validity of laws including customary law see chapter four of the Constitution of the Federal Republic of Nigeria 1999. See also sec 1(2), 42 (1) and (2), 40(1) of the Constitution. See *Uke v Iro* (2001) 11 NWLR 196; *Agbai v Okagbue* (1997) 7 NWLR pt 204 at 391; *Anigbogu v Uchejigbo* (2002) 10 NWLR pt 776 at 472.

⁷⁰ See Section 32(1) of the Interpretation Act Cap 192, Laws of the Federation of Nigeria and Lagos 1990; A Oba, 'Lawyers, Legal Education and the Sharia Courts in Nigeria' (2004) 36.49 *Journal of Legal Pluralism and Unofficial Law* 113-161 at 113; TO Elias, *The Nigerian Legal System* (1963) 41.

⁷¹ BC Uweru, 'Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism' (2008) 2.2 *African Research Review* 286-295 at 294- 295; TO Elias, 'Towards a Common Law in Nigeria' in TO Elias (ed) *Law and Social Change in Nigeria* (1972) at 266 (Commemorative Volume on the Tenth Anniversary of the Founding of the Faculty of Law in the University of Lagos, No. 3. Evans Brothers, Limited); FA Ajayi, 'The Interaction of English Law with Customary Law in Western Nigeria' (1960) 4.2 *Journal of African Law* 98-114 at 103.

⁷² C Ogwurike, 'Source and Authority of African Customary Law' (1966) 11 *University of Ghana Law Journal* 11-20 at 14; B Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (2007) 60.

⁷³ C Mwalimu, *The Nigeria Legal System Vol 1 Public Law* (2005)78; see also JM Sarbah, *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold Coast* (1968) Preface xi.

⁷⁴ (1908) 1 N.L.R. 66, per Speed Ag. C.J.

⁷⁵ (1921) 2 A.C. 399, per Viscount Haldane.

⁷⁶ (1898) 1 N.L.R. 15, per Brandford Griffith J.

*Lois Chituru Ukeje & Another v Gladys Ada Ukeje,*⁷⁷ and *Onyibor Anekwe & Another v Mrs Maria Nweke.*⁷⁸ The essence of highlighting the distortion of customary law is because it contributed to the evolution of living customary law with respect to bride wealth. As stated in the preceding paragraph, the norms observed by local communities sometimes differ from official customary law because they are suited to people's contemporary needs. This has significance for legal pluralism in Nigeria.

2.3 Meaning and nature of legal pluralism in Nigeria

As stated in chapter one, legal pluralism may be broadly defined as the interaction of laws in a particular social field or legal system. It emerged from the idea that the state does not have monopoly over law, since some forms of non-state law exist side by side with state law. There are two broad types – strong and weak legal pluralism.⁷⁹ Strong legal pluralism recognises, generally, the equal co-existence of normative orders. Conversely, weak legal pluralism recognises, mainly, only state law, or at best, treats other legal orders as subject to state law. Nigeria's pluralism is somewhere in between strong and weak legal pluralism. It is strong because law in Nigeria is neither completely 'systematic' nor 'uniform.' Also, it is not exclusive to a single institution because of the federal system of government, which gives legislative powers to the 36 states. It is also arguable that Nigerian laws are not really state-made. This is because section 16 of the Evidence Act permits the application of a custom practiced by an ethnic group 'as part of the law governing a particular set of admissible circumstances.'⁸⁰ On the other hand, few will question that customary law in Nigeria is subordinate to the received law and state law. This is because of its restriction to personal matters and special courts, its exclusion from criminal matters, and its subjection to repugnancy criteria. This subordination has interesting significance for legal pluralism in Nigeria, especially the assumptions made about the superiority of

⁷⁷ (Unreported) Suit No. SC.224/2004 Judgement of 14 April 2014.

⁷⁸ (Unreported) 2014 LPELR-22697(SC).

⁷⁹ Griffiths, *supra* note 15 at 8.

⁸⁰ R Zahn, 'Human Rights in the Plural Legal System of Nigeria' (2009) 1 *Edinburgh Student Law Review* 66- 89 at 77.

state law. One of the areas in which this is most evident is the issue of bride wealth, whose meaning is examined below.

2.4 Meaning and nature of bride wealth

The payment of bride wealth has prevailed extensively in most parts of southeast Nigeria. It is one of the grounds on which recognition is accorded to customary marriages. In times past, the payment of bride wealth sometimes took the form of labour or service from the groom to the family of the wife for an agreed period of time.⁸¹ This is termed bride service. An origin of this view may be dated back to the Old Testament where Jacob served his father-in-law to be for a period of fourteen years in order to be given his two wives.⁸² Most times, this labour or service is accompanied by a small cash payment and drinks. However, the economic stratification of the society and other socio-economic changes, has contributed to its change in form, such that the payment has taken the form of cash and other materials.⁸³

The cultural practice of bride wealth has different functions in different societies. However, in recent times, its meaning and significance has been so distorted that there is controversy as to the best term to be given to this practice. Many writers have argued for and against the term ‘bride price,’ on the ground that it originated from the colonial era. Some argue that since the transfer is similar to the transfer of economic commodities, it should be given the same commercial terminology.⁸⁴ Others argue for the original terminology to suit the significance of the practice.⁸⁵ For

⁸¹ G Ferraro et al, *Cultural Anthropology: An Applied Perspective* (2011) 224.

⁸² Genesis 29: 1-29 of New King James Version.

⁸³ LA Obiora, ‘Reconsidering African Customary Law’ (1993) 17.3 *Legal Studies Forum* 217-252 at 230; J Goody, ‘Bride wealth and Dowry in Africa and Eurasia’ in J Goody and SJ Tambiah, *Bride wealth and Dowry* (1973) 7; HF Morris, ‘Review of Development in African Marriage Laws since 1950’ in A Philips and HF Morris (ed) *Marriage Laws in Africa* (1971) 35-59 at 50;.

⁸⁴ RF Gray, ‘Sonjo Bride- Price and the Question of African ‘Women Purchase’ (1960) 62.1 *American Anthropologist* 34-57; Lord Raglan, ‘Bride price’ (1929); ER Leach, *Rethinking Anthropology* (1961) 115-123.

⁸⁵ A Singer, ‘Marriage Payments and Exchange of People’ (1973) 8.1 *Man* 80-92 at 80-81. However Torday suggested an ‘earnest’ as an alternative term in E Torday, ‘Bride Price, Dower or Settlement’ (1929) 29 *Man* 5-8 at 7. See also G Dalton, ‘Bride Wealth’ vs. ‘Bride Price’ (1966) 68.3 *American Anthropologist* 732-738; PH Gulliver, ‘Bride Wealth: The Economic vs. Noneconomic Interpretation’ (1961) 63.5 *American Anthropologist* 1098-1100.

example, Evans-Pritchard suggests that transfers of marriage ‘prestations’ be termed ‘bride wealth’ to express the fact that they perform mostly non-payment functions.⁸⁶ However, others have remained neutral as to the alternative term. Radcliffe-Brown believes that ‘only when we have made a very extensive analysis and classification of all varieties of exchange or payment shall we be able to create a really scientific terminology’ for bride wealth.⁸⁷

Regarding southeast Nigeria, bride wealth is defined in the Limitation of Dowry Law of 1956 as ‘...any gift or payment in money natural produce, brass rods, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of marriage of that person which is intended or has taken place.’⁸⁸ Strictly speaking, however, bride wealth is the payment made by a groom or his kin to the kin of the bride in order to ratify a marriage. It represents a social and economic reciprocity, as well as part of exchanges between the two intermarrying families.⁸⁹ However, to qualify as bride wealth, the payment must meet the following criteria:⁹⁰

- 1) It must be based on agreement between the parties, who specify the amount and time of payment in so far as custom has no provision for it. This means that where custom has no precise rule for the amount and time of payment of bride wealth, it will be guided by agreement between the two intermarrying families. This is because most of the time the amount to be paid as bride wealth is fixed by the customs of the people.⁹¹ As for time, the payment can be made before or after the celebration of marriage. The most important thing is that it must be paid. It must be noted also that the payment of

⁸⁶ EE Evans-Pritchard, ‘An Alternative Term for ‘Bride Price’ (1931) 31 *Man* 36- 39 at 36.

⁸⁷ Radcliffe- Brown ‘Bride Price, Earnest or Indemnity’ (1929) *Man* at 132.

⁸⁸ Section 2 Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963. Even the use of the term ‘dowry’ in the Act shows the ignorance of lawmakers regarding the meaning of bride wealth. This is because dowry is paid by the woman’s family to the man, while bride wealth/price is paid by the man to the woman. See also Sec 2 of the Marriage, Divorce and Custody of Children Adoptive By- laws Order 1958; however in M Fortes, *Marriage in Tribal Societies* (1962) 3 at 10, it was called the ‘prime prestation’ and also ‘sole jural instrument’ for the transfer of marital rights.

⁸⁹ G Ferraro and S Andreatta, *Cultural Anthropology: An Applied Perspective supra note 3 at 222-225*; C Osondu Ajuzie, *Modern Nigeria Family Law and Practice supra note 3*.

⁹⁰ See generally A Jacobson- Widding, *Marriage and Money* (1967) 28 at 40- 51.

⁹¹ C Osondu Ajuzie *supra note 3 at 89-90*.

bride wealth can be waived sometimes, so long as the parties acknowledge that the payment is important for the marriage.⁹² This waiver is not outright, as what is practiced presently by people who still understand the significance of the practice is for the bride's father to take a token out of the whole agreed sum and give back the rest to the daughter's suitor. This shows that he is not selling the daughter but giving her out for marriage and wishes that she be taken care of. The right to waive the payment of bride wealth rest in the hands of the bride's father.

- 2) The transfer of the payment must be obligatory. The Igbos of southeast Nigeria attach value to the payment of bride wealth. It is referred to as *Ugwo isi nwanyi* in Igbo. The payment legitimises and adds respect to the customary law marriage.⁹³ However traditionally, non- payment annuls the customary marriage that has already taken place.⁹⁴ A woman in Igbo land whose bride wealth is not paid and is living with the supposed husband will not be valued in the society. She is seen as cohabiting with the man.⁹⁵ However it is worth noting that bride wealth can be paid in instalment. Hence the first point that it is an agreement between the two families. The payment is so important that it is paid whether the husband is dead or alive; it is a debt that is most of the time paid by the children of that marriage just for recognition and acceptance. Nevertheless, the celebration of statutory law marriage have come to the rescue of the parties of customary law marriage as there is no payment of bride wealth for its validity and recognition.⁹⁶
- 3) The payment must, as a general principle, be returned in the event of divorce.⁹⁷ Being an instrument that legitimises customary law marriage, in the event of divorce it must

⁹² EI Nwogugu, *Family Law in Nigeria* (1974) 52 & 127.

⁹³ Nigerian Institute of Advanced Legal Studies (ed) *Restatement of Customary Law of Nigeria* (2013) 'Restatement of Marriages' 289-295.

⁹⁴ *Ibid* at 268-270.

⁹⁵ See E Goody, 'Separation and Divorce' in M Fortes (ed) *Marriage in Tribal Societies* (1962) 20.

⁹⁶ Statutory law marriages also called marriage under the Act does not require payment of bride wealth, as such spouses who are married under customary law can enter into it without payment of bride wealth. However, non- payment of bride wealth is only problematic under Customary Law. See *Matrimonial Causes Act Cap 220 Laws of the Federation of Nigeria 1990*. There has been argument on whether the customary law marriage is converted to statutory law marriage or it exists side by side with the marriage under the Act.

⁹⁷ See M Fortes (1972) *supra* note 38 at 10; J Goody (1973) *supra* note 33 at 1- 57.

be returned to show dissolution of the marriage. In most cases where the woman intends to remarry and the family cannot refund the bride wealth paid for the first marriage, the suitor for the second marriage may be instructed to refund the bride wealth from what he is to pay.⁹⁸ In the case of *Ossai Okaludo v John Omama*, the appellant brought a suit in a customary court claiming amongst other things a refund of £22 being bride wealth he paid on a woman who was his wife but had divorced him to marry the respondent. The customary court being the court of first instance in this case ordered the respondent to pay £10 out of the claimed sum. On appeal, the court held that bride wealth refundable diminishes according to the duration of the marriage and that the £10 ordered to be paid to the appellant is reasonable.⁹⁹ Also in the case of *Isaac Eze v Augustine Omeke*, the court held that the refund of bride wealth puts to an end all incidents of the customary law marriage and not an order of any court dissolving the marriage.¹⁰⁰ This shows the importance of this instrument in transferring rights. The rights acquired through the payment of bride wealth will be explained under the functions of bride wealth. It must also be noted, as earlier said, that bride wealth can take the form of goods or cash. Especially where the goods are perishable, the tradition in most part of southeast Nigeria is to break a pot or keg of palm wine in front of the woman's compound. This practice is sometimes accompanied with the return of the cash paid. Hence the first point that it depends on the initial agreement and mode of payment. Customary law differs in many societies.

- 4) It must take place before witnesses.¹⁰¹ The witness provides oral evidence that the marriage actually took place.¹⁰² In the case of *Lawal & ors v. Youman & anor*¹⁰³, the

⁹⁸ UC Isiugo-Abanihe, 'Stability of Marital Unions and Fertility in Nigeria' (1998) 30.1 *Journal of Biosocial Science* 33-41 at 36.

⁹⁹ (1960) WNLR 149. See also on the manner in which bride wealth can be returned in the case of *D.O Edebiri v Rosaline Osagie* (1964) MNLR 95; *Chinwe Okpanum v. Okike Okpanum & anor* (1972) 2 ECLSR 561; See also *Omoge v Badejo* (1985) HCCLR 1075.

¹⁰⁰ (1977) 1 ANSLR 136; See also *Lawal-Osula v. Lawal- Osula* (1993) 2 NWLR (Pt. 274) at 158.

¹⁰¹ JM Ekong, *Bride Wealth, Women and Reproduction in Sub-Saharan Africa: A Theoretical Overview* (1992) vol. 48 at 42.

¹⁰² Restatement of Customary Law in Nigeria supra note 2 at 268.

¹⁰³ (1995) WRNLR 155; see also *Abisogun v Abisogun* (1963) 1 ALL NLR 235; *Lydia Adepeju v Isaac Adereti* (1961) WNLR 154; also on the importance of witnesses see *Igbokwe & anor v UCH Board of*

administrators of the estates of the deceased on behalf of the deceased's wives and children as dependants sued the defendants for the death of the deceased in an accident involving two motor vehicles belonging respectively to the two defendants and driven by their drivers. The issue that arose amongst other is whether the widows of the deceased had been married to the deceased according to customary law. The court held that in order to prove that the women who claimed to be widows of the deceased had been married according to customary law, it is not enough to call the alleged wives or relatives of the deceased to say merely that the women had been married in accordance with customary law. The court further stated that the proper method of proving customary law marriage in the absence of a system of registration is to call the person who gave away the woman in marriage or somebody who witnessed the marriage ceremony or someone who was sent to ask for the woman's hand in marriage.

In effect, the payment of bride wealth performs different functions in customary law marriages, which gives it its cultural significance.

2.5 Significance and cultural justification for payment of bride wealth

The significance of the payment of bride wealth can be elucidated from its function in customary law marriages. The functions are outlined below:

The first function is that the payment of bride wealth legitimises the marriage. The payment of bride wealth is an essential instrument for the validity of customary law marriage. Traditionally, once the bride wealth has been paid it secures legal rights for the husband over the domestic and sexual lives of his wife. This implies that an action can be brought in court if there is violation of conjugal rights; so long as it can be proved that the basic requirement for the validity of customary law marriage has been met.¹⁰⁴ The second is that it secures paternity of the children born during the subsistence of the marriage. However the constitution under section 42 has come to the rescue of children born outside wedlock with the non-discriminatory clause.¹⁰⁵ The section states that, 'No citizen of Nigeria shall be subjected to any disability or

Management (1961) WNLR 173; *Agongo v Aseleke & ors* (1967) NMLR 21,22; *Offor v. Ofodu* (1977) 2 IMSLR 483; *Nsirim v. Nsirim* (1995) 9 NWLR (Pt. 418) 144

¹⁰⁴ See JU Ogbu, *supra* note 17 at 246-247.

¹⁰⁵ Section 42 (2) Constitution of the Federal Republic of Nigeria 1999 as amended.

deprivation merely by reason of the circumstances of his birth.’ The third is that it symbolises the bride’s worth to her community. The fourth is that the payment of bride wealth serves as recognition of her fecundity and role in the art of creation. The fifth function is that it provides a level of compensation to her natal family for the loss of her labour and company.¹⁰⁶ The sixth is that it confers respectability on the marriage and to the woman.¹⁰⁷

Bride wealth has become commercialised as a result of people’s adaption to economic and social realities. The significance of its distortion is thus traceable to the socio-economic conditions introduced by colonial rule. A brief exploration of these changes will lay the foundation for the arguments made in this thesis.

2.6 Factors responsible for bride wealth’s distortion

Studies have shown that the distortion of the meaning and significance of bride wealth can be linked firstly to the agrarian transformation in southeast Nigeria and other socio-economic changes.

i) *Agrarian transformation*

The Igbo peoples are one of the largest ethnic groups in Nigeria.¹⁰⁸ The Igbo community is divided into villages, clans and dialect. The political organisation of this group is without the control of kings and chiefs.¹⁰⁹ This is the origin of the popular saying ‘Igbo enwe eze’ (Igbo is devoid of kings). It was an egalitarian society in which disputes were resolved by different associations stretching from the *Umunna*, *Umuada* (which involves the first female born in each family) to village cults and different age grade assemblies. The Igbos are mostly farmers, hence they attach value to agriculture,

¹⁰⁶ G Kanjo, ‘Western Influence on African Marriage and Family: The Case of Malawi’ in T Sono (ed) *African Family and Marriage Under Stress* (1994) 21. See also RJ Wieland, *Will Marriage Work in Today’s World?* (1983).

¹⁰⁷ Restatement of Customary Laws in Nigeria supra note 2 at 289-295. See also CC Robertson, *Trouble Showed the Way: Women, Men and Trade in the Nairobi Area 1890-1990* (1997).

¹⁰⁸ JE Eberegbulam Njoku, *The Igbos of Nigeria: Ancient Rites, Changes and Survival* (1990); NJ Orijji, *Traditions of Igbo Origin: A study of pre-colonial population movements in Africa* (1994).

¹⁰⁹ NJ Orijji, *ibid.*

which is their means of survival and continuity.¹¹⁰ Subsistence farming characterised their agricultural system though others engaged in small-scale commercial agriculture for income. They produced mainly yam as their staple food. Other crops include cocoyam, maize, melon, while palm products are their main cash products.¹¹¹ In all these, land was mainly their asset, as it was seen as a ‘sacred entity’ to be guarded jealously.¹¹² Land is mostly communally owned. It is divided among the members of the community according to their kinship and lineages. It becomes individually owned when it passes to the next generation through inheritance, but it is still controlled by the oldest male in the family. A communal land is not alienable without the community’s approval and this approval is usually gotten from the traditional rulers and elders who are the custodians of the land.¹¹³ This approval by the traditional rulers or elders is not absolute as members of the community or family can still counter it if they have reasonable reason to do so.¹¹⁴ With the coming of the colonialist and their subsequent policies, the agrarian setting in which bride wealth operated began to fade away. Some factors were responsible for this.

The first is the introduction of large-scale agricultural production through cash crops such as cocoa, rubber and oil palm. The other is the speculation of urban land, which led to individual ownership of land.¹¹⁵ The individual land ownership contributed to the concentration of land in few hands, thereby depriving others of

¹¹⁰ CJ Korieh, ‘We Have Always Been Farmers’: Society and Economy at the Close of the Nineteenth Century’ in CJ Korieh (ed) *The Land has Changed* 27-29.

¹¹¹ C Achebe, *Things Fall Apart* (1958) 14, 21-22; G Chuku, *Igbo Women and Economic Transformation in South Eastern Nigeria 1900-1960* (2005) 34-37. In VC Uchendu, *The Igbo of Southeast Nigeria* supra note 2, agriculture is called the ‘Igbo staff of life’.

¹¹² EE Obioha, ‘Change in Tenure Pattern and Customary Land Practices among Igbo Community in SouthEastern Nigeria’ (2008) 10.1 *Anthropologist* 45-53 at 45; see also EE Obioha, ‘Changing Land Reforms and Conflict Over Land in Sub-Saharan Africa’ (2013) 44.3 *Journal of Human Ecology* 207-222 at 208.

¹¹³ EO Arua, and EC Okorji, ‘Multidimensional Analysis of Land Tenure Systems in Eastern Nigeria’ (1997) 2 FAO’S *Journal of Land Reform, Land Settlement and Cooperatives*.

¹¹⁴ AA Dike, ‘Land Tenure System in Igboland’ (1983) 78 *Anthropos* 853-871 at 854- 857.

¹¹⁵ A Dike, supra note 114 at 853.

subsistence opportunities and leading to scarcity of land.¹¹⁶ Many families thus became impoverished.

The second factor is the population pressure on land, with high demand for land for agriculture and industrial purposes.¹¹⁷

The third is the introduction of the Land Use Act in 1978 (Act), which affected farmers. The Act vested the ownership of all land in the urban areas on the Governor of each state and all land in the rural areas on the Local Governments.¹¹⁸ Governors were empowered to revoke rights of occupancy for reasons of ‘overriding public interest’.¹¹⁹ Such reasons included alienation by an occupier without requisite consent or approval from the Governor; a breach of the conditions governing occupancy; or the requirement of the land by Federal, State, or local government for public purposes. Only in the last of these cases would any compensation be given to the holder, and then only for the worth of unexhausted developments on the land and not for the land itself.¹²⁰ In effect the vesting of ownership of these land on the Governor, gives him the right to divest the former owners of the ownership of their land.¹²¹ In the spirit of

¹¹⁶ TC Mbagwu, ‘Land Concentration around a Few Individuals in Igbo-Land of Eastern Nigeria: Its Processes, Scope and Future (1978) 48.2 *Africa: Journal of the International African Institute* 101-115 at 103-110; LM Olayiwola and O Adeleye. ‘Land reform-experience from Nigeria’ (Proceeding of 5th FIG Regional Conference on Promoting Land Administration and Good Governance, 2006). Note however that increased population led to the scrambling of land; see AS Bamire ‘Effects of Tenure and Land use Factors on Food Security among Rural Households in the Dry Savannas of Nigeria’ 10.1 (2010) *African Journal of Food, Agriculture, Nutrition and Development* 1982-2000 at 1982.

¹¹⁷ S Berry, ‘Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land’ (1992) 62.3 *Africa: Journal of the International African Institute* 327-355 at 327; SO Oşoba, ‘The Phenomenon of Labour Migration in the Era of British Colonial Rule: A Neglected Aspect of Nigeria’s Social History’ (1969) 4.4 *Journal of the Historical Society of Nigeria* 515-538 at 524.

¹¹⁸ Section 1 and 2 of the Land Use Act Laws of the Federation of Nigeria (1978). Local governments were empowered to grant customary rights of occupancy to any person or organisation for agricultural, residential and other purposes with the proviso that grants of land for agricultural or grazing purposes should not exceed 500 or 5000 hectares respectively without the consent of the State Governor. The Act also empowered the local government to enter upon, use and occupy for public purposes any land within the area of its jurisdiction and to revoke any customary right of occupancy on any such land also. See section 5 and 6 of the Act.

¹¹⁹ Section 2 (2) (a-c) of the Land Use Act.

¹²⁰ Ibid sec 2 (2) (c).

¹²¹ JA Omotala, ‘Law and Land Rights: Whither Nigeria’ being an inaugural lecture delivered at the University of Lagos on the Wednesday 29th of June 1988 at 8-14. The former owners include the communities, families etc. see also the words of Ogundare J in *Tijani Akinloye v. Chief Oyejide* suit No. HC3/9A/83 of 17/9/8. While the Governor and local governments have legal title to the land, the communities, families have equitable title.

the Act the Governor(s) hold the land in trust for the people who are the beneficiary, but there is silence on accountability of the land held in trust.¹²² The promulgation of this Act contributed to scarcity and inflation of prices for land which in turn affected the lives of most of the Nigerian people.¹²³

The fourth is the introduction of structural adjustment programme (SAP). The removal of subsidies from improved inputs such as fertiliser, seedlings and pesticides greatly affected the level of commodity produced by farmers.¹²⁴

ii) *Education and other socio-economic conditions*

When education was introduced into southeast Nigeria, girls were initially not sent to school because females were the mainstays of the agrarian economy.¹²⁵ When the agrarian settings of the economy were swept away, women were caught in the middle. Parents realised that girls needed to be educated in order to cope with new social realities. The huge sums they spent in education influenced the sums they charged as bride wealth. Apart from education, the influence of Western culture also contributed to the distortion of the meaning and significance of bride wealth. Poverty also played a big role¹²⁶ along with the structure of the public sector, which shrunk the ability of people to cope with economic demands.¹²⁷

¹²² Section 1 of the Act.

¹²³ DF Bryceson, 'The Scramble in Africa: Reorienting Rural Livelihoods' (2002) 30.5 *World Development* 725-739 at 727. For more effect of scarcity of land see A Bongo, 'Determinants of Agricultural and Non-Agricultural Livelihood Strategies in Rural communities: Evidence from Eastern Nigeria (2007) 40.2 *The Journal of Developing Areas* 93-109 at 93-94.

¹²⁴ According to Korieh, this programme contributed to increase in rural poverty and prices of all necessities of life; it also contributed to massive lay-off of workers and increased cost of living see CJ Korieh, 'On the Brink: Agricultural Crisis and Rural Survival in CJ Korieh (ed) *The Land has Changed* supra note 10 at 244. DF Bryceson supra note 123 at 727-728.

¹²⁵ E Egboh, 'The Place of Women in the Ibo Society of South-Eastern Nigeria, from the Earliest Times to the Present' (1973) 23/24. 3/4 *Civilisations* 305- 316 at 313.

¹²⁶ B Bigombe *et al*, supra note 46.

¹²⁷ EA Eregare and AO Afolabi, 'The Effects of Globalization and Deregulation on Nigerian Culture Industries (2009) 21.2 *Journal of Social Science* 145-151 at 148; S Onyeiwu., RI Polimeni and JM Polimeni, 'Distributional Impact of Globalization-induced Migration: Evidence from a Nigerian Village (2008) 20.1 *African Development Review* 115-134.

2.7 Conclusion

The payment of bride wealth in southeast Nigeria is a cultural practice whose meaning and significance was greatly distorted by the changes brought by colonial rule. Its distortion was caused by the disruption of the agrarian conditions from which bride wealth emerged, and its replacement by government jobs and large scale commercial activities. In fact, bride wealth became so popular that it is paid not only in the context of customary law marriage, but also in contemplation of statutory marriage, even though it is not a legal requirement for its (statutory marriage) validity.¹²⁸ As stated in chapter one, people disregarded the law limiting bride wealth. This has great significance for legal pluralism in Nigeria. The next chapter discusses the legal regime of marriage in Nigeria in order to highlight this significance.

¹²⁸ For the legal requirement of statutory marriage see Sec 3 (1) (a-e) of the Matrimonial Causes Act Cap 220 Laws of the Federation of Nigeria 1990. See also TW Bennett, *African Customary Law* (1991) 78.

Chapter Three

LEGAL REGIME OF MARRIAGE IN NIGERIA

3.1 Introduction

Having introduced the concept of bride wealth and the reason for its distortion, this chapter will examine the laws relating to marriage in Nigeria. These are the Marriage Act¹²⁹ and the Matrimonial Causes Act.¹³⁰ The chapter discusses the incidence of double marriages – that is marriage under both customary law and the Marriage Act. It examines the requirements for valid marriages in Nigeria. It also shows the reasons why people engage in double marriages and links this to why people disobey the Limitation of Dowry Law.¹³¹

3.2 Definition of marriage

The term ‘marriage’ refers to an institution that is regulated by the social and religious norms of a given society.¹³² It is considered a sacred institution.¹³³ Presently, there is no universally accepted definition of ‘marriage’, as attempts to generalise this term may amount to ‘denial of marital status to a number of unions.’¹³⁴ The prospect of same-sex marriage has redefined the traditional definition of marriage. Some have

¹²⁹ Marriage Act Cap 115 Laws of the Federation of Nigeria 1958, now Cap 218 Laws of the Federation of Nigeria 1990.

¹³⁰ Matrimonial Causes Act Cap 220 Laws of the Federation of Nigeria 1990, now Cap M7 Laws of the Federation of Nigeria 2004.

¹³¹ Limitation of Dowry Law, Eastern Region Law NO. 23 OF 1956, now Cap 76 Laws of the Eastern Nigeria 1963.

¹³² EI Nwogugu, *supra* note 92 at Introduction xxi-xxii.

¹³³ Per Niki Tobi JSC in the case of *Ezennah v Atta* (2004) 17 WRN 1. Nigerian laws frowns at any contract or act that interferes with the sanctity of marriage; See *Re Fentem* (1950) 2 All ER 1073; *Hermann v Charlesworth* (1905) 2 KB 123; *Shaw v Shaw* (1954) 2 QB 429. *Wild v Harris* (1849) 7 CB 999, 137 ER 395. The bible even recognised its sanctity in Genesis 2:24 when it said that ‘a man shall leave his father and mother, and shall leave with his wife and they shall become one. Paul E. Palmer offers a helpful clarification of the sanctity of marriage when he termed the institution a ‘covenant’. According to him, while covenant engage persons, ordinary contract engage the services of people. Covenant is made to be forever but contracts are made for a stipulated time. See PF Palmer, ‘Christian marriage: Contract or covenant?’ (1972) 33.4 *Theological Studies* 617-665 at 639.

¹³⁴ R Probert, ‘Hyde v Hyde: Defining or Defending Marriage’ (2007) 19 *Child & Family Law Quarterly* 322-336 at 322.

advocated for the definition of marriage to be extended beyond a union between a man and a woman to include one between any two people. Marriage is defined in Jowitt's Dictionary of English Laws as

the voluntary union for life of one man and one woman to the exclusion of all others for the purpose of procreating children entered into in accordance with rules as to consanguinity or affinity of parties and their capacity to enter into and perform the duties of matrimony and in accordance with the rites or formalities required either by ... or the place where the marriage takes place.¹³⁵

This definition has met considerable opposition as it failed to take into account changes in family patterns such as same-sex unions.¹³⁶ However, for the purpose of this thesis, the term, marriage, will be defined as a voluntary union of a man and woman, or a man and more than one woman as husband and wife or wives usually entailing legal obligations of each person to the other.¹³⁷ This is because of the cultural context of the study population and the fact that same sex marriage is prohibited in Nigeria.¹³⁸

3.3 Marriages recognised in Nigeria

There are three types of marriages legally recognised in Nigeria. They are statutory, customary and Islamic marriages. This thesis will be limited to only statutory and customary marriages.

¹³⁵ EW Jowitt *et al*, *Jowitt's Dictionary of English Law* (1977) vol 2 at 1150-1151. See also the definition given by Sir James Wilde in *Hyde v Hyde* (1866) LR 1 P & D 130, 133 as 'the voluntary union for life of one man and one woman to the exclusion of all others.' See F Stroud, *Stroud's Judicial Dictionary of Words and Phrases* (1986) 2 at 1165. D Bell, 'Defining Marriage and Legitimacy' (1997) 38.2 *Cultural Anthropology* 237-253 at 241 defined marriage as 'a relationship between one or more men (male or female) in severalty to one or more women...'

¹³⁶ S Poulter, 'Hyde v Hyde: A reappraisal' (1976) 25.3 *The International and Comparative Law Quarterly* 475-508 at 476-480. The recognition of these changes can also be seen in E Gertsman, *Same Sex Marriage and the Constitution* (2004) 23-24. Though the definition of Jowitt looks convincing, it is worth noting that many country have given legal recognition to other type of marriage like homosexuals, transsexuals, polygamous etc. Though Nigeria have not legally recognised these union, it will amount to violation of right if marriage is seen only as that between a man and a woman. Secondly the definition of Jowitt may not be adequate as many people may not engage in marriage for the purpose of procreation.

¹³⁷ C Mwalimu *supra* note 73 at 442.

¹³⁸ Same Sex Marriage (Prohibition) Act 2013.

3.3.1 *Statutory Marriage*

Statutory marriage is mostly monogamous in nature. According to the Interpretation Act of 1964, a monogamous marriage is ‘a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.’¹³⁹ This type of marriage does not permit the taking of more than one wife during its subsistence. The laws which regulate the celebration and incidents of this type of marriage are found mostly in the Marriage Act¹⁴⁰ and Matrimonial Causes Act.¹⁴¹ This means that this type of marriage is regulated by statute that is passed by the National Assembly.¹⁴²

These statutes came about as a result of colonial rule in Nigeria.¹⁴³ After Lagos was annexed by the British colonialists in 1861, the Marriage Ordinance¹⁴⁴ came into force and was applicable to the settlement of Lagos and its dependencies. It granted licences for marriage. Further was the Registration Ordinance,¹⁴⁵ which deals with the registration and solemnisation of marriage within the settlement of Lagos. The Divorce Ordinance¹⁴⁶ came into existence for Lagos settlement but was repealed in 1877. Before Lagos was separated from the colony of the Gold Coast in 1886, the Marriage Ordinance of 1884¹⁴⁷ was enacted to regulate various matters of solemnisation of marriages. It is worth noting that the ordinances listed above didn’t apply to the protectorates of Southern and Northern Nigeria. They only applied to the Colony of

¹³⁹ Section 18 of the Interpretation Act Cap 192 Laws of the Federation of Nigeria 1990.

¹⁴⁰ Marriage Act supra note 129. This Act makes provision for the celebration of marriage.

¹⁴¹ Matrimonial Causes Act supra note 130. This Act makes provision for matrimonial causes.

¹⁴² See C Mwalimu, supra note 73 at 438-439. By virtue of item 61, second schedule, part 1 of the 1999 constitution of the Federal Republic of Nigeria: the formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto’ was exclusively vested on the Federal legislature under the Exclusive legislative list. In this context, the federal legislature is the National Assembly of Nigeria. See CO Ajuzie, supra note 3 at 115 & 305-306.

¹⁴³ Most law in Nigeria has its root in English as a result of colonial rule.

¹⁴⁴ No.10 of 1863.

¹⁴⁵ No. 21 of 1863.

¹⁴⁶ No. 2 of 1872 and No. 10 of 1873.

¹⁴⁷ No. 14 of 1884.

Lagos. In the rest of what is now known as Nigeria, it was possible to enter into customary law marriage or church marriage in accordance with the church rites. In 1900, the Marriage Proclamation¹⁴⁸ was made to regulate the solemnisation of marriages for the Protectorate of Southern Nigeria. This Proclamation was reversed in 1906 with the fusion of the Lagos Colony and the Protectorate of Southern Nigeria, thus making the 1884 Ordinance applicable to the newly formed entity of Nigeria.¹⁴⁹ However, these laws were not applicable in the Protectorate of Northern Nigeria. In 1907, the Marriage Proclamation¹⁵⁰ was made for the Protectorate of Northern Nigeria. With the amalgamation of the Northern and Southern Protectorates of Nigeria in 1914, marriage laws, among others, were streamlined through the coming into force of the Marriage Ordinance of 1914.¹⁵¹

Just as its counterpart, the Matrimonial Causes Act came to fill the gap created as a result of the need to have uniform Nigerian laws to govern the dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights, and jactitation of marriage.¹⁵² The elements for validity of statutory marriage in Nigeria are examined below.

a) Legal requirements of marriage under the Marriage Act

Marriage under the Marriage Act in Nigeria can only be legally recognised if it conforms to the following criteria:

First, the parties must be of marriageable age. Under the Matrimonial Causes Act, a marriage is void if ‘either of the parties is not of marriageable age.’¹⁵³ Unfortunately, there is no definition of ‘marriageable age’ in the Marriage Act.¹⁵⁴ However, the

¹⁴⁸ No. 20 of 1900 which was amended by No. 22 of 1901, No. 6 of 1902 and No. 3 of 1903.

¹⁴⁹ Marriage proclamation 1906 (No. 10 of 1906) and Marriage Ordinance 1908 (No. 95 of 1908).

¹⁵⁰ No. 1 of 1907 (Laws of the Protectorate of Northern Nigeria 1910, 541).

¹⁵¹ No. 18 of 1914. Which is now replaced by Marriage Act Cap. 115, Laws of the Federation of Nigeria, 1958. See also Marriage (Validation) Act cap 219 Laws of the Federation of Nigeria 1990. See also generally EI Nwogugu.

¹⁵² Section 2(2) (a-f) of the Matrimonial Causes Act.

¹⁵³ Section 3(1) (e) of Matrimonial Causes Act.

¹⁵⁴ The Act only asked for consent of the parents or guardian if either of the party is under the age of twenty-one. Section 18 Marriage Act.

Constitution defines ‘full age’ as the ‘age of eighteen and above’ by stating that a ‘woman who is married shall be deemed of full age.’¹⁵⁵ The Child’s Rights Act prohibits the marriage of a female who is below eighteen.¹⁵⁶ From the foregoing, it appears that there is no uniform age of marriage in Nigerian statutes. Nonetheless in practice, twenty one years has been accepted as the age of marriage.¹⁵⁷ It is an offence punishable with two years’ imprisonment for any person to procure any other person to marry a minor.¹⁵⁸

The second criterion is the consent of the parties. Just as most definitions of marriage provide, marriage must be voluntarily entered into by the parties without duress or fraud.¹⁵⁹ The parties must be of sane mind and capable of understanding the nature of marriage.¹⁶⁰

The third is the consent of the parents. This requirement is mostly needed where ‘either of the parties not being a widow or widower is under the age of twenty-one.’¹⁶¹ It is not a compulsory requirement as absence of parental consent does not vitiate the marriage.¹⁶² There will be no need for parental or guardian’s consent if the parties are over 21 years and have consented.

The fourth criterion is that neither of the parties must be a party to an existing marriage with a third party. Since marriage under the Act is monogamous in nature to the exclusion of others, either of the parties lack the capacity to enter into another statutory or customary law marriage with a person other than the person with whom

¹⁵⁵ Section 29 (4) (a-b). The real intention of the drafts man in subsection 4(b) is in doubt.

¹⁵⁶ Section 21 of the Child’s Right Act 2003.

¹⁵⁷ C Mwalimu supra note 73 at 599.

¹⁵⁸ Section 48 of the Marriage Act. Section 23 (a-d) Child’s Right Act.

¹⁵⁹ Section 3 (d) (i-iii) of the Matrimonial Causes Act.

¹⁶⁰ Ibid sec 3 Matrimonial Causes Act.

¹⁶¹ Section 18 of the Marriage Act.

¹⁶² In the case of *Agbo v Udo* (1947) 18 NLR 152, the court held that the absence of parental consent does not vitiate the marriage. Though the Child’s Right Act prohibits and renders null and void any marriage entered into by a person under the age of 18, the court in the above case still held the marriage of an underage woman valid.

such marriage is had.¹⁶³ If a man is married to several wives under customary law, he still has the capacity to contract a valid statutory marriage with one of his customary law wives, or with a third party so far as he first obtains the dissolution of the other marriages.¹⁶⁴

The fifth is that the parties must not be within the prohibited degrees of consanguinity and affinity. The Matrimonial Causes Act prohibits a marriage where the parties are related to each other either by birth, marriage or blood.¹⁶⁵ An exception is given under section 4 of the Matrimonial Causes Act, which provides that:

- (1) Where two persons who are within the prohibited degrees of affinity wish to marry each other, they may apply in writing to a judge for permission to do so.
- (2) If the Judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought he may, by order, permit the applicants to marry one another.
- (3) Where persons marry in pursuance of permission granted under this section, the validity of their marriage shall not be affected by the fact that they are within the prohibited degrees of affinity.

The judge can only grant this permission with the authority of the President through the Governor of a state.¹⁶⁶ However, what amounts to ‘exceptional circumstances’ is neither defined in the Marriage Act nor the Matrimonial Causes Act. EI Nwogugu gave an illustration of what may amount to exceptional circumstances as in a case of parties who come from a village, live together in a city unaware of the relationship between them, and beget a child.¹⁶⁷

¹⁶³ Section 33(1) Marriage Act. Section 39 of the Marriage Act prescribes punishment for this offence. See also section 370 of the criminal code. See also the cases of *Nnodim v Nnodim* suit No. HOW/29/69 (unreported) decided by Nkemena J of the High Court of Owerri 2 August 1967. *Nwamkpele v Nwamkpele* (1973) 3 UILR84; *Ojo v Ojo* suit No. A/4D/72 (unreported) decided by Umezina J; *Oshodi v Oshodi* (1963) 2 ALL NLR 214-217. *Asiata v Goncallo* (1900) 1NLR 41; *Awobudu v Awobudu & ors* (1979) 2 LRN 339; *Nzegwu v Amobi* (2000) 3 LHCR pt 24 at 56; *Craig v Craig* (1964) LLR 96.

¹⁶⁴ EI Nwogugu supra note 92 at 27. Section 37 of the criminal code provides for the punishment as it amounts to offence of bigamy. Many people still disobey this rule without being punished making a nonsense of this provision.

¹⁶⁵ See section 11(c) of the Marriage Act, section 3(1) (b) of the Matrimonial Causes Act. The prohibited degree of consanguinity and affinity is provided for in the first schedule to the Matrimonial Causes Act.

¹⁶⁶ Section 4(4) of the Matrimonial Causes Act.

¹⁶⁷ EI Nwogugu supra note 92 at 26

The sixth criterion relates to the place for the celebration of the marriage. For a monogamous marriage to be valid, it must be celebrated in either a licenced place of worship by a recognised priest of the church (this is because most monogamous marriages are practiced by Christians) with the doors open, within the hours of 8am to 6pm and in the presence of at least two parties excluding the officiating priest.¹⁶⁸ Or the marriage must take place in a registrar's office, which is mostly referred to as court marriage, and must take place between the hours of 10am and 4pm in the presence of at least two witnesses.¹⁶⁹ Proof of this marriage is by presentation of marriage certificate filed in the registry of marriages.¹⁷⁰

3.3.2 Customary law marriage

Customary law marriage is the type of marriage that is governed by native law and custom.¹⁷¹ As stated in the previous chapter, customary law is among the sources of Nigerian law. Thus, this type of marriage is legally recognised so far as it complies with the native law and custom of the area in question.¹⁷² The legal recognition of customary law marriage can be deduced from the provision of section 35 of the Marriage Act, which states that

any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage, of contracting a valid marriage under the customary law; but, save as aforesaid nothing in this Act shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner apply to marriages so contracted.

¹⁶⁸ Section 21.

¹⁶⁹ Section 27, 28 and 29.

¹⁷⁰ Section 32 Marriage Act. The prescribed form for the certificate is in Form E of the first schedule to the Marriage Act. See also *Anyaegbunam v Anyaegbunam* (1973) 4 SC 121.

¹⁷¹ This native law and custom is mostly that of the bride because the celebration of this marriage takes place in her father's compound. See CO Ajuzie supra note 3 at 78.

¹⁷² Customary law is not expressly mentioned in the Constitution as a source of Nigerian law. However, in Section 280-281, the Constitution created a customary law court for all the states and in item 61, second schedule, part 1 of the 1999 Constitution of the Federal Republic of Nigeria it barred the federal legislature from legislating on any matter that deals with the formation, annulment and dissolution of marriages under Islamic law and Customary law including matrimonial causes relating thereto. Section 16 of the Nigeria Evidence Act 8 Laws of the Federation of Nigeria Cap E18 2004, now Evidence Act 2011; A Park, *The Sources of Nigerian Law* (1963); *Ugo v Obiekwe* (1989) 1 NWLR Pt 99 at 566.

It is worth noting that there is no unified customary law in southeast Nigeria, and indeed in Nigeria.¹⁷³ What is custom and how it becomes customary law has been discussed extensively in chapter two of this thesis.¹⁷⁴ This type of marriage (customary law marriage) is characterised by the fact that it is potentially polygamous in nature.¹⁷⁵ Contrary to Lord Penzance's definition of marriage, customary law marriage in southeast Nigeria is normally a union of the two intermarrying families and not just for the man and woman to the exclusion of others.¹⁷⁶ For a customary law marriage to be valid, it must fulfil the following requirements, of which the most important is bride wealth.

The first is the payment of bride wealth.¹⁷⁷ Although customary law differs from community to community in Nigeria, there are similar trends amongst local communities for the formation and dissolution of marriage of which bride wealth is one.¹⁷⁸

The second is that the parties must be capable of contracting a marriage. Under Section 3 (1) of the Eastern Region's Age of Marriage Law of 1956,¹⁷⁹ the minimum age for which a person can legally marry under customary law is set at sixteen years.

The third is the consent of the parties. The intending parties to the customary law marriage are required to give their consent voluntarily. This, according to the Supreme Court in *Osamwonyi v Osamwonyi*¹⁸⁰ is important for the validity of a customary law marriage.

¹⁷³ Each community in Nigeria has laws (customs) that regulate their activities. Per Niki Tobi JCA (as he then was) in the case of *Muojekwu v Ejikeme* (2000) 5 NWLR (pt 657) 402.

¹⁷⁴ But see the Supreme Court decision in *Agbai v Okagbue* (1991) 7 NWLR (pt 204) 391.

¹⁷⁵ Customary law marriage permits the marriage of more than one wife. However, a man can stay married to one woman, the most important thing is that the marriage is contracted in accordance with the native law and custom of the locality.

¹⁷⁶ SNC Obi, *Modern Family Law in Southern Nigeria* (1966) 156; HA Wieschhoff, *supra* note 13 at 300.

¹⁷⁷ *Abikam v. Anyanwu* (1975) 5 ECSR 305.

¹⁷⁸ MC Onokah (2003) *supra* note at 13.

¹⁷⁹ Cap 6 of the Laws of Eastern Nigeria, 1963. This law is only applicable to the Eastern states in Nigeria and only regulates customary law marriage see section 2 of the above Law.

¹⁸⁰ (1973) NMLR 26.

The fourth is parental consent. In *Okpanum v. Okpanum*,¹⁸¹ the High Court of the former East Central State of Nigeria held that there must be parental consent for there to be a valid customary law marriage. The consent of the parents, especially that of the bride's father, is important largely because of the payment of bride wealth. In southeast Nigeria, it is the father of the bride that collects the bride wealth, but where he is not alive, the eldest male in the family does so on his behalf. Unlike in statutory marriage where parental consent is not really mandatory, a bride in a customary law marriage, even though she has reached the age of majority, is advised to seek the consent of her parents not only for collection of bride wealth also for blessings and actual handing over usually done by the father.

The fifth and last requirement is that parties must not be within the prohibited degrees of consanguinity and affinity. Just as its statutory counterpart, customary law marriage also prohibits marriage between blood related individuals.¹⁸²

3.4 Marriage laws in practice

The provisions of the Marriage Act and Constitution are more imaginary than real in actual practice as people still violate some of their provisions. For instance, there are still cases of child marriage, despite the punishment prescribed in the criminal code. It is also a common trend presently in Nigeria for parties to engage in a customary law marriage and subsequently contract a statutory law marriage with each other. This is because Western and cultural influences such as the Marriage Act has permitted this practice and given validity to such marriage.¹⁸³ Opinion of scholars is divided as to whether the subsequent statutory marriage supersedes, for all intent and purposes, the earlier customary law marriage, or whether the two types of marriages co-exist. This practice is coined by Margaret Onokah as 'double decker marriage'.¹⁸⁴ A detailed

¹⁸¹ (1972) 2 ECCLR 561.

¹⁸² SNC Obi, supra note 61 at 216-219.

¹⁸³ While people still hold on to their cultural beliefs, the influence of education, legal recognition especially in terms of rights that accrue to parties of statutory marriage people now prefer to marry under the Act and according to their native law and custom. See section 35 (1) of the Marriage Act.

¹⁸⁴ MC Onokah supra note 4 at 143.

explanation of a double decker marriage is necessary in order to understand its implication for legal pluralism in Nigeria.

3.5 Incidence of double decker marriage

According to Onokah, double decker marriage ‘... involves the celebration by the same couple, of a marriage under one system and their subsequent marriage under another system.’ This practice is not expressly defined in the Marriage Act but the validity given to this practice in section 33 implies its acceptance in Nigerian legal system.

The practice of double decker marriage in Nigeria means the situation where the same couple go through both customary and statutory marriage. There are several reasons why people engage in double marriages. These include ignorance that customary law marriage is a legally recognised marriage; desire to obtain the legal certainty offered by a marriage certificate;¹⁸⁵ desire to commit a spouse to the marriage, since a statutory marriage is more difficult to dissolve than a customary law marriage; and official purposes such as visas and work permits.¹⁸⁶ Controversy has arisen as to the position of these two marriages. As such there are two schools of thought. One is the conversion school of thought, the other is the co-existence school of thought.

i) 3.5.1 *Conversion school of thought*

The scholars for this school of thought are of the opinion that the subsequent statutory marriage converts the earlier customary law marriage into statutory marriage and that the dissolution of the statutory marriage automatically dissolves the customary law. Professor Sagay states thus:

What however is the effect of a customary marriage, followed by a statutory between the same parties? The weight of the authority is of the view that the customary marriage is converted to into a statutory marriage. In other words, the statutory marriage assimilates the customary marriage, eliminates all its incidents and substitutes its own incidents.¹⁸⁷

¹⁸⁵ No certificates are issued for customary law marriages.

¹⁸⁶ Ibid

¹⁸⁷ Itse Sagay, *Nigerian Family Law* (1999) 831.

In the case of *Teriba v Teriba and Rickett*¹⁸⁸ the court held that the true position is that the customary law is converted by the Act marriage which, in effect, supersedes it. Therefore, if the Act marriage is subsequently dissolved, the customary marriage cannot revive. In support of this school, Nwogugu states:

It is a common practice in Nigeria for parties who intend to contract a statutory marriage to marry first under customary law before the solemnisation of the statutory marriage ... It is uncertain whether the statutory marriage supersedes, for all intents and purposes, the previous customary law marriage, or if the customary law is merely put into abeyance, to revive after the subsequent statutory marriage has come to an end ... the correct position is that a subsequent statutory marriage supersedes a previous customary-law union.¹⁸⁹

It also seems that the Marriage Act supports this theory. It provides in section 46 that a statutory marriage can be contracted after a concluded and subsisting customary law marriage with the same person. In section 47, it prescribes five years imprisonment for anyone who contracts a customary law marriage during the existence of statutory law marriage.

ii) *3.5.2 Co-existence school of thought*

The scholars in this school of thought believe that the two marriages exist independently of each other and, as such, dissolution of one does not mean the dissolution of the other. They must be dissolved separately in the High court and customary court respectively. The court upheld this view in the case of *Akparanta v Akparanta*¹⁹⁰ and *Afonne v Afonne*¹⁹¹. The Supreme Court also held in the case of *Jadesimi v Okotie Eboh*¹⁹² that the status of being married under the Islamic or customary law is well recognised in this country and such marriages should not be accorded any status that is inferior to that of marriage under the Marriage Act. The

¹⁸⁸ Suit no 1/211/67 of 2/769(unreported) Ibadan High Court.

¹⁸⁹ EI Nwogugu supra note 92 at 57-59.

¹⁹⁰ (1972) ECSNLR 779.

¹⁹¹ (1975) ECSNLR 159.

¹⁹² (1996) 2 NWLR 128 at 142.

controversy still persists as the position of the law is unclear. In any case, the incidence of double marriage has implications for legal pluralism in Nigeria.

3.6 Implication of double decker marriage for legal pluralism

The phenomenon of double decker marriage involves the application of both statutory and customary laws at the same time. This often leads to conflict of laws since these marriages are based on different traditions. The conflict manifests in some aspects of marriage such as divorce, inheritance, succession, maintenance, and child custody.

3.6.1 Divorce

The Marriage Act, Matrimonial Causes Act and various customary laws do not have independent provisions for the dissolution of double decker marriage. Under the Marriage Act, the main ground for dissolution of marriage is when the marriage has 'broken down irretrievably'.¹⁹³ This breakdown may be proved under many grounds such as desertion, adultery, failure to consummate the marriage, cruelty, living apart.¹⁹⁴ The term 'irretrievable breakdown,' according to scholars, relies on Western concepts and legal terminology without any domestic contribution.¹⁹⁵ As such, some believe it will be unfair to dissolve customary law based on this criterion. Under customary law marriage, adultery alone does not qualify as a ground for dissolution of marriage at the instance of the wife whereas it can qualify at the instance of the husband.¹⁹⁶ Inability of the woman in customary marriage to give birth can be a ground for dissolution of marriage, whereas it is not in statutory marriage. This is because it is believed that marriage under customary law exists, mainly, for procreation.¹⁹⁷ African societies and

¹⁹³ Section 15 Matrimonial Causes Act.

¹⁹⁴ Section 15 (2) (a-h).

¹⁹⁵ AB Kasumu, *The Matrimonial Causes Decree, 1970: A Critical Analysis* (1971) 2.1 *The Nigerian Journal of Contemporary Law* at 88.

¹⁹⁶ AB Kasumu *supra* note 195 at 209; CU Ilogbune, 'A Critique of the Nigerian Law of Divorce under the Matrimonial Causes Decree 1970' (1970) 14.3 *Journal of African Law* 178-197 at 185.

¹⁹⁷ EN Uzodike, 'A Decade of the Matrimonial Causes Act 1970' (1990) *Nigerian Current Law Review* at 57. LP Mair, *African Marriage and Social Change* (1969) 3. On the importance of children in marriage see M Gluckman, 'Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal' in AR Radcliffe- Brown and CD Forde (eds.) *African Systems of Kinship and Marriage* (1950) 166, 170-200.

indeed southeast Nigeria deal more on farming; as such having many children ensures a continuous flow of labour for the farms.¹⁹⁸ While dissolution of marriage under the Act is judicial, dissolution under customary law is often-times extra judicial.¹⁹⁹ The implication for legal pluralism and evolution of living customary law is that socio-economic forces compel people's choice of law preferences. Thus, in order to obtain the property benefits of marriage conferred by the Act, many Nigerians undergo both customary law and statutory law marriages.²⁰⁰

3.6.2 *Inheritance*

Being a patriarchal society, the male child is given preference in southeast Nigeria. As such, properties devolve from the father to his eldest male child and other male children. The female children only enjoy the benefit of education and bringing up until they are married.²⁰¹ They can only benefit from their father's estate if he transfers it to them while still alive.²⁰² This is not so in statutory marriage.

3.6.3 *Custody of children*

Under customary law, custody of a child is usually granted to the father rather than the mother because it is believed that the child belongs to the father unless where the child is still tender.²⁰³ This is not usually the case in statutory law as the best interest of the child is put into consideration.²⁰⁴

¹⁹⁸ G Kanjo, *supra* note 102 at 22.

¹⁹⁹ When a man sends his wife back to her father's house and bride price returned, it automatically dissolves the marriage.

²⁰⁰ IO Agbede, 'Recognition of Double Marriage in Nigerian Law' (1968) 17(3) *International and Comparative Law Quarterly* 735-743.

²⁰¹ See Hon. Justice ABC Egu, *Imo State Customary Laws and Judicial Pronouncements* (2011) 17. This is usually the case where the man died without a Will.

²⁰² *Ibid.*

²⁰³ UC Isiugo-Abanihe, 'Reproductive Motivation and Family-Size Preferences among Nigerian Men' (1994) 25.3 *Studies in Family Planning* 149-161 at 154.

²⁰⁴ Section 70 and 71 of the Matrimonial Causes Act.

3.6.4 *Maintenance*

Unlike statutory marriage,²⁰⁵ there is generally no maintenance award for a divorced woman under customary law marriage.²⁰⁶ This absence of maintenance compels many people to engage in double marriage in order to safeguard their property interests. In cases of dissolution of marriage by death or divorce, conflict of laws arise.

3.7 **Conclusion**

This chapter has examined the types of marriage and the legal regime of marriage in Nigeria. It found that the practice of double decker marriage in Nigeria often leads to conflict of laws. Most Nigerians engage in double marriage to ensure marital security since customary law is not written. Moreover, no certificate is issued for customary law marriages, which makes people desire the certainty offered by a certificate in statutory marriage. In effect, the increasing resort to double marriage is an indication of people's reaction to the introduction of statutory marriage in Nigeria. Despite the fact that state law – the Marriage Act – discourages double marriage, Nigerians still engage in it. In the same way, many Nigerians in the south east charge high sums as bride wealth despite the fact that state law – the Limitation of Dowry Law – prohibits it. As the next chapter will argue, this shows that legal pluralism in Nigeria is determined mainly by socio-economic forces.

²⁰⁵ That is marriage under the Marriage Act.

²⁰⁶ EI Nwogugu, *supra* note 92 at 216.

Chapter Four

IMPLICATIONS OF BRIDE WEALTH'S DISTORTION ON LEGAL PLURALISM AND DEVELOPMENT PROJECTS

4.1 Introduction

This chapter examines the implications of bride wealth's distortion for legal pluralism and development projects in Nigeria. It starts by situating changes in bride wealth within living customary law. It argues that people's disregard of the Limitation of Dowry Law indicates that legal pluralism is greatly influenced by socio-economic forces, and that this has significant implications for the success of development projects in Nigeria. It concludes by reflecting on the role of law in development.

4.2 Locating bride wealth's distortion within living customary law

Living customary law is widely regarded as the law that 'emerges from what people do,' or 'what people believe they ought to do.'²⁰⁷ What people do may also be regarded as adaptations to social changes. In this light, what people did when colonial rule was introduced in Nigeria is largely responsible for the distortion of the meaning of bride wealth. As stated in chapter one and two of this thesis, people's adaptation to social changes changed the way and manner in which bride wealth was perceived. It is necessary to highlight some of these adaptations to social changes in order to show that the distortion of bride wealth is part of living customary law.

The first, as mentioned earlier, is the introduction of large scale agriculture. The people of southeast Nigeria are known for the production of food crops such as yam, cocoyam, and cassava, which were, and still are dietary staples. The production of these food crops were mainly for internal consumption, while some were for commercial purposes. With the inception of colonial rule, the basis for the production of these dietary staples changed and new kinds of food were introduced.²⁰⁸ Plantations such as coffee, cocoa and rubber were primary elements of the colonial economy; as

²⁰⁷ I Hamnett, *supra* note 21 at 10.

²⁰⁸ CJ Korieh, *supra* note 10 at Introduction.

such, people were forced to produce these foods mainly for commercial purposes.²⁰⁹ The growth of these plantations required large expanse of land. Local people were therefore compelled to give up their lands. To effect this, the British enacted the Crown Land Ordinance of 1900, effectively assuming ownership of all lands.²¹⁰ The policies introduced by colonial rule and the emphasis on large scale agricultural production for export purposes contributed to a shortage of food supply, malnutrition and famine. Elizabeth Isichei reported the destabilising effect of colonial rule on people's agricultural way of life. As she put it: 'since the white men came, our oil does not fetch money. Our kernels do not fetch money. If we take goats or yams to market to sell, court messengers who wear a uniform take all these things from us.'²¹¹ This situation was also worsened by the lack of money to buy the new types of food introduced by colonial rule such as bread and beverages.²¹² Local people therefore began to adjust their attitudes and beliefs in line with the changes made to their way of life by colonial rule. Part of these adjustments was to demand bride wealth in cash instead of in kind.

The second factor that contributed to excessive bride wealth is the high demand for labour and migration. The production of cash crops for commercial purpose required sufficient manpower. People left their villages to work in the coal mines and cocoa plantations, sometimes in poor working conditions without sufficient pay.²¹³ The establishment of the civil service also contributed to migration of people. People moved from rural to urban areas in search of 'white collar jobs'.²¹⁴ Urban living resulted in changes in economic activities and occupation, and in changes in the way

²⁰⁹ CJ Korieh supra note 10; see also J Tosh, 'The Cash-Crop Revolution in Tropical Africa: An Agricultural Reappraisal' (1980) 79-314 *African Affairs* 79-94 at 79-80.

²¹⁰ S Berry supra note 117 at 334-345; see also TO Elias, 'Nigeria's Contribution to Colonial Law' (1951) 33.3/4 *Journal of Comparative Legislation and International Law* 49-55 at 51. For the colonial impact on land tenure in Nigeria, see also V Uchendu supra note 11 at 62-74.

²¹¹ E Isichei, *A History of Nigeria* (1983) 400.

²¹² See CJ Korieh, 'The Second World War, the Rural Economy and Africans' in CJ Korieh, *The Land has Changed History, Society and Gender in Colonial Eastern Nigeria* (2010) at 164.

²¹³ F Toyin, *The dark webs: Perspectives on Colonialism in Africa* (2005) 13; A Hrituleac and J Ulf-Moller Nielsen, 'The Effects of Colonialism on African Economic Development' (a dissertation submitted to the department of Business and Social Sciences Aarhus University 2011) 15.

²¹⁴ It is worth noting that when people lost their lands, they became landless and in order to survive they have to move from place to place to put food on their table. See EE Okpara, 'Rural-Urban Migration and Urban Employment Opportunities in Nigeria' (1986)11.1 *Transactions of the Institute of British Geographers* 67-74 at 67.

people lived. The migration of people, especially the men, had great impact on the family structure. Previously, people lived in close-knit units.²¹⁵ With urban migration, families moved from extended to nuclear families.²¹⁶ This was accompanied by a loss of family bonds and loss of values. The erosion of the extended family contributed to the lack of checks and balances in negotiations for bride wealth. In the writer's village for example, the extended family is heavily involved in negotiations for bride wealth. Some of her uncles and aunts had a say in determining the items that formed part of her bride wealth. There was even disagreement because the kin group had a different set of requirements for brides who are professionals or graduates and brides who are non-graduates. Before colonial rule, there was no differentiation in the status of brides except in issues of wealth and chastity.²¹⁷

The third factor is change of religion. Colonial rule operated side by side with Christianity. Amadiume argued that Christianity is the most successful product of colonial rule in Igbo land and it turned upside down the belief patterns of people. Christianity condemned 'the goddess religion' and shattered 'the focal symbols of women's self-esteem.'²¹⁸ She put it thus:

indigenous customary laws associated with woman-to-woman marriage became confused as a result of its reinterpretation according to cannon law and Christian morality ... As Christianity introduced a male deity, religious beliefs and practices no longer focussed on the female deity, but on a male God, his son, his bishops and priests.²¹⁹

Amadiume's argument finds support in other studies in Igbo land.²²⁰ Significantly, the Christian Bible is male-centred and encourages high bride wealth. For example, Jacob

²¹⁵ Sociologists have classified these societies as 'kin-dominated' and 'multiplex.' See J Barton *et al* *Law in radically different cultures* (1983) 41 & 42.

²¹⁶ AA Mere, 'Contemporary Changes In Igbo Family System' (1976) 6.2 *International Journal of Sociology of the Family* (1976) 155-161; AA Boahen, *African Perspectives on Colonialism* (1989) 1.

²¹⁷ K Okonjo, 'Aspects of Continuity and Change in Mate-Selection among the Igbo West of the River Niger (1992) 23.3 *Journal of Comparative Family Studies* 339-360 at 349.

²¹⁸ I Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (1989) 123.

²¹⁹ Ibid chapter 8: 'The erosion of women's power' at 134.

²²⁰ For example, Achebe's study of the Nsukka area shows that women played active roles in governance as goddesses, priestesses and diviners. See N Achebe *Farmers, Traders, Warriors and Kings: Female Power and Authority in Northern Igboland, 1900-1960* (2005) 53-230.

served his father-in law for 14 years before he could marry his two wives.²²¹ In their attempt to negotiate and adapt to the challenges of changing rural settings posed by disappearing lands, migration, and change of religion, the way and manner in which people perceived some aspects of traditional life was affected, of which the significance and meaning of bride wealth is amongst them.²²²

The fourth factor is the introduction of education. As the society continued to change and develop, education was needed for communication, sustenance and survival. The economic system was not favourable to some and so they could not afford to send their children to school. Those that eventually sent their children, especially their female children, expected to recoup their expenses through high bride wealth. This was especially so in the writer's area of Igbo land. People believe that having spent huge sums of money to send their daughters to school, and their children having acquired an immeasurable asset (education), the payment of bride wealth will help them recover their expenses. Isiugo-Abanihe put it this way:

With increasing education, bride wealth has become compensation to parents for educating their daughters; thus, parents try to recover some of the money spent on a daughter's education by demanding high bride wealth for educated brides.²²³

For example, the amount paid as the author's bride wealth depended on the fact that she graduated from an expensive school and also studied a 'revered' profession.

As stated in chapter one, the sums charged for bride wealth became so excessive that government intervened in a bid to curb it. The result was the Limitation of Dowry Law, which restricted bride wealth payment to £30. This law is a legislative failure because people simply ignored it, preferring to charge whatever sums they felt like.²²⁴ This reaction has significant implication for legal pluralism in Nigeria.

²²¹ King James Version of the Holy Bible, Genesis 29:18-20.

²²² C Korieh, *supra* note 10 at 266-269.

²²³ UC Isiugo-Abanihe, *supra* note 7 at 155.

²²⁴ Adebayo Waheed, *et al* 'Is Bride Price Still Relevant to Marriage?' *Leadership Newspaper* 26 January 2014. Available online at < <http://leadership.ng/news/340830/is-bride-price-still-relevant-to-marriage>> (last accessed 25 August 2014); EN Uzodike, 'Implications and Limits of Parental Rights in Nigeria' (1990) 2 *African Journal of International & Comparative Law* 282- 297 at 282. E Veitch, 'Some Examples of Judicial Law Making in African Legal Systems' (1971) 34.1 *The Modern Law Review* 42-54 at 43-44.

4.3 Implications of bride wealth's distortion on legal pluralism

Legal pluralism can be defined, in line with Gordon Woodman's definition, as the interaction and application of more than one law in a given population.²²⁵ Population is an easier term than social fields in analysing legal pluralism.²²⁶ Gone are the days when communities live in isolation from other communities. These days, they interact with outsiders, especially government officials and other development agents. In Nigeria's case, the laws that interact with each other are mainly the received English law, Islamic law and customary law.²²⁷ Studies have shown that the main purpose of colonial administration was economic exploitation.²²⁸ To do this successfully, the colonialists had to enforce law and order, and this requirement needed laws to regulate the lives of the colonised people. However, when the British arrived in Nigeria, they met an indigenous legal order, which they found impossible to abandon. Thus, they decided to restrict the jurisdiction of their new laws to certain matters, leaving customary law to regulate other matters.²²⁹ This decision had significant consequences on the treatment of customary law.²³⁰ Interestingly, British entry into Nigeria coincided with the dominance of legal positivism in the Western world. As Griffiths put it, positivism holds that 'law is and should be the law of the state, uniform for all

²²⁵ GR Woodman, *supra* note 16 at 39. Also on the definition of legal pluralism see L Pospisil 'Legal Levels and Multiplicity of Legal systems in Human Societies' (1967) 11.1 *Journal of Conflict Resolution* 2-26 at 2-4. See also J Knight and J Ensminger 'Conflict over Changing Social Norms: Bargaining, Ideology and Enforcement' in MC Brinton, and V Nee, (eds.) *The New Institutionalism in Sociology* (2001) at 108-109; NG Schiller, 'Transborder Citizenship: An Outcome of Legal Pluralism within Transnational Social Fields' in F Von Benda-Beckmann et al (ed) *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (2005) 27-29.

²²⁶ GR Woodman defined population as any group, large or small, of people that can be identified by the characteristic such as common ancestry that all members observe, to a certain extent and on some occasions, two or more distinct Laws. *Ibid* 35.

²²⁷ Section 32(1) of the Interpretation Act, Cap 192, Laws of the Federation of Nigeria and Lagos 1990.

²²⁸ M Ocran, 'Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-colonial Africa (2006) 39 *Akron Law Review* 465-482 at 465-466.

²²⁹ GR Woodman, 'Customary Law, State Courts and the Notion of Institutionalisation of Norms in Ghana and Nigeria,' in A Allott & GR Woodman, *People's Law and State Law: the Bellagio Papers* (1985) 143.

²³⁰ W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006) 418-419. For the way indirect rule was employed in Nigeria see M Mamdani, 'Decentralized Despotism' in SB Ortner., NB Dirks and G Eley (eds.) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 37-61. See also AN Allot, 'What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' (1984) 28.1-2 *Journal of African Law* 56-71 at 58.

persons, exclusive of all other law, and administered by a single set of state institutions.²³¹ Legal positivism greatly influenced the manner customary law was subjected to state law. The British subjected customary law to English law, using legislation that enforces in Nigeria the received English law.²³² This subjection did not stop after the end of colonial rule. In effect, the application of customary law in Nigeria is dependent on three criteria:²³³

- a) The custom sought to be applied must not be repugnant to natural justice, equity and good conscience. In *Edet v Essien*,²³⁴ a woman had been betrothed to a man (the plaintiff) from childhood before she married the defendant. She went on to have children for the defendant. The High court granted custody of the children of the marriage to the plaintiff on the ground that having paid her bride wealth when she was still a child, she was legally his wife. The appellate court rejected the decision of the High court in granting custody of the children to the plaintiff and held that such practice, even though supported by customary law, is repugnant to natural justice, equity and good conscience.
- b) The custom must not be incompatible either directly or by implication with any written law in force for the time being.²³⁵ This implies that where there is any rule regulating a particular matter which a provision of customary law contradicts, the customary law will not be applied. The Constitution of the Federal Republic of Nigeria is supreme, and any law which is inconsistent with its provision is to the extent of its inconsistency is void.²³⁶

²³¹ J Griffiths, supra note 15 at 3; See also SE Merry, 'Legal Pluralism' (1988) 22.5 *Law and Society Review* 869-896.

²³² RN Nwabueze, 'Dynamics and Genius of Nigeria's Indigenous Legal Order' (2002) 1 *Indigenous Law Journal* 153-200.

²³³ EA Taiwo, 'Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions- Some Lessons for Nigeria' (2009) 34.1 *Journal for Juridical Science* 89-115; M Mamdani, 'Customary Law: The Theory of Centralized Despotism' in SB Ortner., NB Dirks and G Eley (eds.) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 109-137 at 115.

²³⁴ (1932) 11 NLR 47.

²³⁵ WC Ekow Daniels, 'The Interaction of English Law With Customary Law in West Africa' (1964) 13.2 *International and Comparative Law Quarterly* 574-616.

²³⁶ Section 1(1&3) of the 1999 Constitution as amended.

- c) The custom must not be contrary to public policy. In *Okonkwo v Okagbue*,²³⁷ the court held that a native law and custom that permits a person to marry a deceased person is contrary to public policy.

Studies have shown that the above criteria have impacted on customary law both positively and negatively.²³⁸ These criteria were determined and applied in line with English standards, rather than the standards of Nigerians whose customary law was in question. Customary law was treated as a statement of fact that requires proof.²³⁹ Thus, unless it has been judicially noticed, then it cannot become a question of law.²⁴⁰ The repugnancy clause was seen as an instrument sent on a ‘cleansing’ mission and also as an ‘engine for the imposition of hegemonic foreign culture’.²⁴¹ The interplay of these laws contributes to conflict of laws. This is where the disregard of the Limitation of Dowry Law is significant.

As stated earlier, people disregarded the Dowry Law and carried on their lives as if it does not exist. The disregard people paid to the Dowry Law and other laws²⁴² is evidence that what obtains in Nigeria is the type of legal pluralism Griffiths described as strong legal pluralism. According to Griffiths, a strong legal pluralism implies that not all law is state law and not all law is controlled by state-sponsored institutions. Weak legal pluralism, on the other hand, implies that even though there are different bodies of law for different groups in society, they are backed up by state law and administered by central state institutions.²⁴³ The implication of strong legal

²³⁷(1994) 9 N.W.L.R. [Pt. 368] 301.

²³⁸ EA Taiwo supra note 233 at 91.

²³⁹ The proof can be gotten by calling witnesses who are conversant with the custom in question to give evidence of its certainty, consistency, continuance and peaceable enjoyment. These are mostly the chiefs, traditional rulers. It can also be proved by using authoritative textbooks.

²⁴⁰ Section 18 (3) of the Evidence Act 2011. ES Nwauche, ‘The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana’ (2010) 25 *Tulane European & Civil Law Forum* 37-64 at 43- 46.

²⁴¹ EA Taiwo supra note 233 at 112.

²⁴² See, for example, the Abolition of Osu System Law, Eastern Region Law No. 13 of 1956.

²⁴³ J Griffiths supra note 15 at 5. GR Woodman also divided legal pluralism into deep and state law legal pluralism in GR Woodman, ‘Legal Pluralism and the Search for Justice’ (1996) 40. 2 *Journal of African Law* 152-167 at 157-159

pluralism in the context of this study is that living customary law pays scant regard to theories of law. Rather, it is largely dependent on people's economic needs. The factors that influenced the evolution of bride wealth are evidence of this. Even though this thesis is not in depth enough to make definite conclusions, it can be said that socio-economic forces are the primary determinants of legal pluralism in Nigeria. Drawing inference from Sally Falk Moore, who states that 'the social structure' is composed of many 'semi-autonomous social fields,' the definition and boundaries of which are not given by their organisation, but 'by a processual characteristic' which can generate rules and coerce or induce compliance to them,²⁴⁴ the living customary law of bride wealth clearly is independent of state law in Nigeria. It is a good example of Moore's interaction of norms in a social field.²⁴⁵ What is law according to BZ Tamanaha is determined by the people in the social arena through their common usages, adaptation and reaction to social and economic changes and not by the theorist or social scientist.²⁴⁶ This 'processual characteristic' of legal pluralism seems to be heavily influenced by the economic needs of individuals, an indication that is similar to the full-belly theory. The needs of people greatly influence the way and manner in which they perceive and apply laws as much as social imagination or realities such as 'television, spectator sports, history books, arbitrary authority from high school teachers, newspaper columnist, legal education and films,' posited by Macaulay.²⁴⁷ Accordingly, when state laws fail to meet the immediate needs of the people, living customary law tends to ignore it, making the concerned state law to be redundant. The failure of state laws due to people's reaction to socio-economic forces has implications for development policies and projects. The remainder of this chapter will examine these implications.

²⁴⁴ SF Moore, *Law as Process: An Anthropological Approach* (1978) 57. See also M Galanter, 'Justice in many rooms: Courts, private ordering, and indigenous law' (1981) 13.19 *The Journal of Legal Pluralism and Unofficial Law* 1-47 at 4, 5, 17-27.

²⁴⁵ SF Moore, *supra* note 15 at 720. R Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12 states in his work that when it is inconvenient to use 'case knives' the law has to use a 'pickaxe' as an alternative.

²⁴⁶ BZ Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27.2 *Journal of Law and Society* 296-321 at 314; See also RS Meinen-Dick and R Pradhan, 'Legal Pluralism and Dynamic Property Rights' (2002) *International Food Policy Research Institute* 8-10.

²⁴⁷ S Macaulay, 'Presidential Address: Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports' (1987) 21.2 *Law and Society Review* 185-218 at 185.

4.4 Implications of bride wealth's distortion on development projects

Law and development studies have grown over the last ten years. Despite this growth, there is disagreement as to what this field of study covers. Its scope ranges from analysis of formal institutions to enforcement of contracts, protection of property and legal rights of women and children, and promotion of the rule of law in order to protect investors and improve economic growth in developing nations. It is worth noting, however, that law and development studies have been criticised as neo-imperialistic legal transplants from the global North to the global South (i.e. developed to under-developed world).²⁴⁸ In any case, there are two broad schools of thought in this field. The first is law in development. It is concerned with how legal reforms can promote development goals such as the millennium development goals. Scholars have different views of this, based on their differing perceptions of the role of the state in economic growth and development. One school of thought advocates a strong role for the state using the concept of developmental state. The other frowns at strong state intervention in economic activities, preferring the state's role to be limited to creating an enabling environment for private actors to thrive. The second school of thought is law as development. It sees law reforms and the rule of law as ends in themselves and holds that economic development involves a set of linked freedoms.²⁴⁹ This thesis prefers law as development because it better relates to legal pluralism.

The disregard of state law by customary law has significant implication for development policies and projects. A writer put it thus: 'we must view with profound respect the infinite capacity of the human mind to resist the introduction of useful knowledge *and also change intended to improve their wellbeing*'.²⁵⁰ Virtually all development policies are geared towards change. According to Sen, development

²⁴⁸ DM Trubek and M Galanter, 'Scholars in self-estrangement: Some reflections on the crisis in law and development studies in the United States' (1974) 4 *Wisconsin law review* 1062-1103 at 1062.

²⁴⁹ A Sen, *Development as Freedom* (1999) 3. A Sen and JD Wolfensohn, 'Development: A Coin with Two Sides' *International Herald Tribune* 5 May 1999. Available online at <<http://go.worldbank.org/LZLCXI0NC0>> (last accessed 25 August 2014). EM Burg, 'Law and Development: A Review of the Literature and a Critique of "Scholars in Self-Estrangement"' (1977) 25.3 *American Journal of Comparative Law* 492-530.

²⁵⁰ Thomas Raynesford Lounsbury quoted in D Macarov, *Work and Welfare –The Unholy Alliance* (1980) Vol 99 at 203, cited in F Von Benda-Beckmann, 'Scape-Goat and Magic Charm: Law in Development Theory and Practice' (1989) 21.28 *Journal of Legal Pluralism and Unofficial Law* 129 (italics added).

involves the ‘expansion of the real freedoms that people enjoy’.²⁵¹ Just as freedom is determined by socio-economic factors, so is the success and effectiveness of development policies determined by freedom.²⁵² On why development policies sometimes fail, JK Nyerere, former president of Tanzania, stated as follows:

What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.²⁵³

The disregard paid to the Dowry Law and other laws such as the Osu Caste Law could encourage disdain for the rule of law. People sometimes regard state laws with suspicion because such laws were adopted without properly consulting them to ascertain their basic needs.²⁵⁴ Studies have shown that people will not hesitate to flaunt any rule if it doesn’t improve their welfare.²⁵⁵ This, as stated in chapter one of this thesis, has bearing on the full-belly theory, which states that ‘a man’s belly must be full before he can indulge in the luxury of worrying about his political freedom.’²⁵⁶ The 1976 report of the International Labour Organisation (ILO) also gave credence to the satisfaction of basic needs as the strategy for successful development projects.²⁵⁷ Von Benda-Beckmann, in support of the above, asked: ‘Will joining a state regulated cooperative lead to the improvement of the economic position of the poor? Will social

²⁵¹ A Sen supra note 249 at 3.

²⁵² Ibid Sen at 4.

²⁵³ JK Nyerere, ‘Stability and Change in Africa’ (an Address to the University of Toronto, 1969) 3.

²⁵⁴ F Von Benda-Beckmann, ‘Scape-goat and magic charm: Law in development theory and practice’ (1989) 21.28 *Journal of Legal Pluralism and Unofficial Law* 129-148; See also W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006) 418 – 419; See also CJ Korieh at 265.

²⁵⁵ GR Keeton, ‘The Basic Needs Approach: A Missing Ingredient in Development Theory?’ (1984) 1.3&4 *Development Southern Africa* 276-293 at 276.

²⁵⁶ R Howard, supra note 23 at 69; See also NL Spalding, ‘Relevance of Basic Needs for Political and Economic Development’ (1990) 25.3 *Studies in Comparative International Development* 90-115.

²⁵⁷ Employment, Growth and Basic Needs: A One-World Problem (Geneva, 1976), The International Basic needs Strategy against Chronic Poverty’ Prepared by the ILO International Labour Office and the decisions of the 1976 World Employment Conference at 31-43.

justice be achieved? Will registration of land rights increase legal security?²⁵⁸ The writer adds these questions too: will Dowry law and indeed other state laws bring back the huge sums of money used to train a potential bride in the light of high tuition? Will the Dowry Law and other development polices improve the living condition of people? Will the Dowry Law pay the school fees of other children in the family? Will the Dowry Law enhance economic equality amongst families, seeing that status competition has increased with the changes brought by colonial rule?²⁵⁹ Will agricultural policy bring back the land that has been forcefully taken by the government and wealthy people in the society without compensation?²⁶⁰ An example will illustrate the futility of laws that fail to take into consideration social realities that affect the economic wellbeing of people.

A governor in southeast Nigeria banned children from engaging in street hawking, and introduced free education for every child. Even though this educational policy is a welcome development, it was not well-received since free education has a hidden cost. This cost includes the cost of school uniforms, books, transport and feeding. How would parents cope if they are unemployed or incapable of working? What if hawking is their only means of survival? What if the children who hawk are the only helpers they have? Where such a policy is made by the government without adequate consideration of social realities, it might eventually fail for not satisfying the basic needs of the concerned community. According to F Stewart, fulfilment of basic needs implies that all members of the society are meeting their basic needs at some minimum level.²⁶¹ This means that if everyone is healthy, educated and enjoying a certain level of living standard, then basic needs will be said to have been met. On the other hand, if significant numbers are dying of starvation, then basic needs are not

²⁵⁸F Von Benda- Beckmann supra note 254 at 136.

²⁵⁹ It has been argued that patriarchal colonial policies and their attendant disruptions in the economic system imported hierarchical statuses into Igbo society, which disadvantaged women. As Uchendu put it, 'the church, the city, and politics all created new statuses.' See VC Uchendu, supra note 2 at 92.

²⁶⁰ In Nigeria, the Land Use Act (Cap 202 L.F.N. 1990; Cap L5 L.F.N. 2004) vests all land in the 36 states of the federation in state governors. This piece of legislation causes problems for legal pluralism in Nigeria. See for example RN Nwabueze, 'Alienations under the Land Use Act and express declarations of trust in Nigeria' (2009) 53.1 *Journal of African Law* 59-89.

²⁶¹ F Stewart, 'Basic Needs Strategies, Human Rights, and the Right to Development' (1989)11.3 *Human Rights Quarterly* 347-374 at 351. See also P Streeten, et al, *First Things First: Meeting Basic Needs in Developing Countries* (1981) 3-45.

being met. In effect, food, shelter, education, water, health are the core needs that have to be taken into consideration by state law to avoid failure of development projects.²⁶²

4.5 Conclusion

This chapter has shown that living customary law emerges from what people do. What people do includes their reaction to state law. It is in this context that the evolutionary history of bride wealth should be understood. When colonial rule disrupted the way and manner people lived their lives, the meaning and significance of bride wealth in southeast Nigeria was distorted. People, accordingly, modified their behaviour by charging high bride wealth in order to meet their economic needs. This reaction continued despite the enactment of the Dowry Law meant to curtail high bride wealth. The disregard paid to this law is indicative of the interaction of state law and living customary law in Nigeria. Because the disregard is more of a combination of economic than cultural factors, legal pluralism in Nigeria seems to be influenced by socio-economic forces. This has significance for development policies because it suggests they should have a bottom-up approach in order to succeed. Such an approach will take adequate consideration of people's needs in the drafting, adoption, and implementation of development plans.

²⁶² Article 6, 7, 12, 13 and 14 of the International Covenant on Economic, Social and Cultural Rights 1976. See also J Rawls, *A Theory of Justice* (1971) 335- 338; DM Trubek, 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programmes' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 205-260; P Alston and G Quinn, 'The Nature and Scope of a States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9.2 *Human Rights Quarterly* 156-229; A Sen, *Commodities and Capabilities* (1985); A Sen, 'Development as Capability Expansion' in J Defilippis and S Saegert (eds.) *The Community Reader Development* (2012) 319 -327.

Chapter Five

CONCLUSION

5.1 Recapping the analysis

The key purpose of this thesis was to examine the significance that the distortion of bride wealth in southeast Nigeria holds for the evolution of living customary law and legal pluralism in Nigeria. To achieve this purpose, the thesis explored three sub-questions, as follows:

- a) What is the place of customary law in Nigeria's legal framework?
- b) What is the significance of bride wealth's distortion on legal pluralism in Nigeria?
- c) How is living customary law situated in Nigeria's constitutional framework?

In order to answer these questions, the thesis examined factors responsible for the change in the meaning of bride wealth. It also discussed the implications of these factors for the interaction of customary law with other laws in Nigeria. The thesis argued that the affairs of most Nigerians are regulated by customary law, of which a prominent aspect is marriage. Customary law, however, is not static. It evolves in line with changes in the social conditions of the people whose lives it governs. As people's lives encounter intrusions, they adapt and modify their behaviour to cope with the encountered social realities. This is how living customary is developed. This is also how it is affected by the distortion of the meaning of bride wealth. Prior to colonial rule in Nigeria, the economy of southeast Nigeria was largely agrarian. In this setting, bride wealth served two purposes: the first was as a symbolic legitimation of marriage, which, under customary law, is a union of two families. The second was as an appreciation of the bride's worth, and compensation to her family for the loss of her services. With the coming of colonial rule, the agrarian settings in which bride wealth developed began to disappear due to industrial activities. The agrarian transformation also led to other factors such as migration to urban areas, change of religion, education, and mental orientation. With disappearing farmlands, introduction of migrant labour, Christianity, Western education, and Western attitudes, the meaning of bride wealth

became distorted. It began to be regarded as an avenue of survival, or to recoup expenses incurred in training children in school.

The meaning and significance attached to the payment of bride wealth became so greatly distorted that the former Eastern Nigerian Government adopted legislation to limit its payment. This legislation was ignored. Despite its provision of heavy penalties for defaulters, people still charge what they feel like as bride wealth. The disregard paid to this piece of legislation has significant implication for legal pluralism – which is the interaction of both (written) state laws and other laws (written and unwritten) such as customary law. It shows that what obtains in Nigeria is what Griffiths termed ‘strong legal pluralism.’²⁶³ This strong legal pluralism strongly suggests that socio- economic forces are the primary determinants of legal pluralism. This finding is supported by the phenomenon of double marriage in Nigeria. The Marriage Act makes it clear that one cannot be married under both the Act and customary law. Just like the prohibition of excessive bride price law, people disregard this law by engaging in double marriage. This peculiar interaction of laws in Nigeria suggests that the manner in which bride wealth was distorted and the incidence of double marriage is tied to the evolutionary history of living customary law in the face of changing social conditions. In other words, despite elaborate laws or the threat of sanctions, people’s actions will be guided by the full-belly thesis. However, detailed empirical work is needed to test this tentative finding for the important argument below.

This thesis argued that the disregard of state laws by customary law has significant implication for development policies and projects. If people are guided by the law of survival rather than the letters of state law, then development planners need to focus more on living customary law before launching development projects. Moreover, if laws are persistently disobeyed, the rule of law will become a laughing stock, leading to possible constitutional impunity. The significance for legal pluralism is that local communities should be involved in the adoption and implementation of laws. Sadly, Nigerian law makes little provisions for such involvement. In effect, laws and projects of the Nigerian state such as the Structural Adjustment Programme, the Land Use Act of 1978, the Abolition of the Osu Caste System Law, and the Limitation of Dowry Law, have not always met their goals because the living customary laws of

²⁶³ J Griffiths, *supra* note 15.

the concerned communities were not taken into consideration. Unsurprisingly, the reaction and response of people to these laws have not always been in consonance with the expected goals of these laws.

5.2 Going Forward

As stated in the concluding findings, empirical research is needed to definitively ascertain the factors responsible for disregard of state law. The recommendations made here are premised on the uncertainty of the non-empirical findings of the thesis. These recommendations are tailored to suit the objectives of the thesis, as follows:

a) What is the place of customary law in Nigeria's legal framework? The place of customary law seems to be uncertain. Although it is clearly subjected to statutory law and the anti-discrimination clauses of the 1999 Constitution, there are no clear rules guiding the interaction of the received English law (statutory law) with customary law. Although the Constitution provides for customary law courts, it has no provision for the applicability of customary law. Indeed, the position seems to be one of confusion. The Marriage Act excludes the application of customary law, whereas people marry under both the Act and customary law, leading to conflict of laws. On its part, the repugnancy clause in the Evidence Act subjects the application of customary law to criteria that is not based on the Constitution. An amendment is therefore needed to the Constitution to provide for the application of customary law in Nigeria.

b) What factors shape the evolution of living customary law in Nigeria in the context of bride wealth? These factors appear to be social, cultural and religious factors. Research is needed (whether private or government-funded) to ascertain these factors. The reason for this research is given in (c) below.

c) What is the significance of bride wealth's distortion for legal pluralism in Nigeria? As stated in 5.1, the interaction of laws in Nigeria seems to be more influenced by socio-economic factors than it is by the pure letters of the law. Accordingly, policy makers need to factor in people's living customary law in their decision making. Currently, Nigeria has no concrete legal provisions mandating lawmakers to make wide-ranging consultations before the adoption of laws. Legislation to this effect is

necessary in order to promote the success of development projects and promote obedience to the rule of law.

In conclusion, bride wealth symbolises the bride's worth to her community, as well as a bond between the bride and groom's families. Colonialism distorted its meaning to the extent that people disobeyed state laws made to curb excessive bride wealth. As shown in this thesis, this disobedience could be traced to socio-economic and cultural factors founded on a hierarchy of needs. This hierarchy of needs is important for the success of development projects. It then behoves on development policy makers to ascertain the immediate or basic needs of the people at the receiving end of development projects. This could be achieved by participation of local communities in decision-making that affects them. This, in essence, means that a bottom-up approach should be used in the adoption and implementation of laws in Nigeria. At a broader level, it also means that democratic institutions in Nigeria will be strengthened by wide-ranging consultations in the adoption of laws.

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