

Topical Issues In The Nigerian Law:

A Book of Readings



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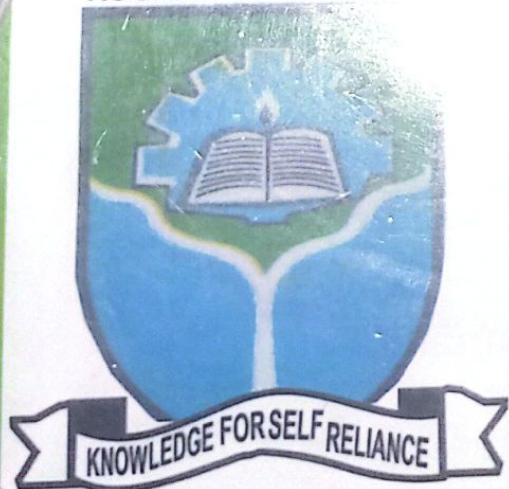
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CHAPTER FORTY-SIX
LEGAL CONSEQUENCE OF ON PLURALITY
OF WIFE UNDER THE SHAR'AH VIS-A-VIS
SECTIONS 38 AND 40 OF NIGERIAN 1999
CONSTITUTION.

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Summary of the Chapter

Generally, marriage is recognized all over the world and it creates status between the parties to it. Such Status may give rise to some incident, such as in matrimonial causes, claim as widow or widower, inheritance e.t.c. Marriage can be monogamous or polygamous, it is the recognition given to such marriage that could validly give effect to the incidents arising therefrom. This chapter examines the right of a person to enter into marriage contract under the 1999 Constitution of the Federal Republic of Nigeria (as amended) and also the Shar'iah and whether that right extends to pluralization of marriage/wife or not. The paper also discusses the effect of pluralization of marriage/wife under the two laws, its validity or otherwise and whether a Muslim can hide under the provisions of the 1999 Constitution to engage on plurality of marriage/wife against the provisions of Shar'iah.

Introduction

Marriage regulates man's passion, fulfill mutual harmony of emotions, provide cooperation between opposite sex, creates the units of society called the family, affords tranquility, peace and ease of body and mind most importantly it facilitates orderly and organized continuity of man's progeny.¹

¹Ambali, *The Practice of Muslim Family Law in Nigeria* (3rd ed. Princeton & Associates

Both under the Shariah and the 1999 Constitution (as amended), a person has the right to marry if he/she is capable of doing so provided that all the conditions associated with marriage in the society where the marriage is to be solemnized are fulfilled.

Unlike the 1999 Constitution (as amended), under the Shari'ah, Marriage becomes Mandub (i.e. Laudable act) for a Muslim man who guarantees his full control over his carnal desires, guarantees his financial capacity to pay the dowry and fulfill the obligations of marriage. In this circumstance marriage becomes Mandub which attracts reward and attracts no punishment if the marriage is not contracted.² But where a Muslim cannot fulfill the conditions identified in the preceding paragraph, marriage becomes Wajib (obligatory) for him/her.³ Under the 1999 Constitution (as amended), these conditions are not stated although, similar guidelines may be found under the Marriage Act or Matrimonial Causes ACT.

Definition of Marriage

Marriage has been defined as the formal union of a man and a woman by which they are or become husband and wife.⁴ Marriage as also been defined by Lord Penzance as: "*The voluntary union for life of one man and one woman to the exclusion of all others*"⁵

The definition given above by Lord Penzance excludes polygamous marriage and other unions which do not conform with monogamous marriage. However, under the Shari'ah, both monogamous and polygamous marriages are allowed with certain conditions.

The word Zawj is an Arabic word which is used in the Holy Qur'an as a "pair" or "mate" but in usage, it connotes marriage.⁶

Publishing Co. Ltd. 2014) P 189

Ibid

Oxford Dictionary of Current English 4th ed., p.555

Hyde v. Hyde (1866) L.R. 1 P.D. 130 at 133

Abdul-Rahman, I.D. *Shari'ah: The Islamic Law*, (Ta Ha Publishers, 1984), p. 115

Marriage has also been described by the Interpretation Act as follows:

A marriage which is recognized 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

The definition given above also limits the connotation of marriage to union of a man and a woman (Monogamous Marriage) which is not applicable to the Institution of Marriage under the Shar'iah. Under the English Law, marriage is governed by the provisions of the Marriage Act⁷ and Matrimonial Causes Act⁸ which were enacted pursuant to the provisions of the constitution.¹⁰

Legal Framework For Marriage Under The Shari'ah

The legal framework for marriage under the Shari'ah can be found in the Holy Qur'an and Sunnah of the Holy Prophet Muhammad (Peace and Blessings of Allah be Upon Him).

And among His signs is this that He created for you mates from among yourselves, that you may dwell (live) in tranquility with them, and He has put love and mercy in between your hearts. Undoubtedly in there are signs for those who reflect¹¹ And Allah has made for you your mates of your own nature and made for you, out of them sons and daughters, and grandchildren, and provide for your substance of the best¹²

⁷ Cap. 123, Laws of the Federation of Nigeria, 2004

⁸ Cap. M6, Laws of the Federation of Nigeria 2004

⁹ Cap. M7, Laws of the Federation of Nigeria, 2004

¹⁰ Section 315, 1999 Constitution of the Federal Republic of Nigeria

¹¹ Q30 21

¹² Q16 72

The Prophet was reported to have said:

O you Youngman, whoever is able to marry should marry for that will help him to lower his gaze and guard his modesty¹⁴

Marriage is my tradition; whoever keeps away therefrom is not from amongst me¹⁴

According to the Matrimonial Causes Act, marriage includes a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law.¹⁵

It is to be noted that the intendment of the Law makers while enacting Matrimonial Causes Act is not to interfere with the right of a Muslim Man to practice polygamous if he so desires and by extension, the Interpretation Act does not preclude any person from marrying more than one wife if the person does not contract marriage under English Law. This is also in consonance with the provisions of the 1999 Constitution (as amended).

The constitution provides:-

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.¹⁶

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interest.¹⁷

¹⁴ Sahih al-Bukhari. See also Muhammad Ali (ND), A Manual of Hadith, the Ahmadiyya Anjuman Ishaat, Lahore.

¹⁵ Ibid.

¹⁶ Section 69, Matrimonial Causes Act, Cap. M7, Laws of the Federation of Nigeria, 2004.

¹⁷ Section 38 (1), 1999 Constitution of the Federal Republic of Nigeria (as amended).

¹⁸ Section 40, 1999 Constitution of the Federal Republic of Nigeria (as amended).

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¹³ Sahih al Bukhari. See also Muhammad Ali (ND), A Manual of Hadith, the Ahmadiyya Anjuman Ishaat, Lahore.

¹⁴ Ibid

¹⁵ Section 69, Matrimonial Causes Act, Cap. M17, Laws of the Federation of Nigeria, 2004.

¹⁶ Section 38 (1), 1999 Constitution of the Federal Republic of Nigeria (as amended).

¹⁷ Section 40, 1999 Constitution of the Federal Republic of Nigeria (as amended).

A careful perusal of the above two provisions of the constitution shows that every citizen of Nigeria has the right to associate with other persons and at the same time he has the right to profess and practice any religion of his own choice without any interference from anybody. The question now is,

Can a person exercise his right under the above two provisions of the constitution to practice plurality of wife or can a Muslim Man hide under Qur'an Q30:21, Q16:72 and the traditions of the prophet (P.B.U.H.) to marry more than four wives? Find the appropriate answer as you read through this paper.

Plurality of Wife

Plurality of wife is not the same with polygamy under the Shari'ah because polygamy under the Shari'ah means marrying more than one wife but not more than four wives at a time, whereas, plurality of wife means marrying more than one wife and not limited to four wives at a time. The former is allowed Islam while the later is forbidden out rightly.

The practice of marrying more than one wife has been in existence since time immemorial among different peoples all over the world. Before the advent of Islam, the Arabians were polygamous and they practiced pluralism. In Jewish and Christian religious scriptures, one finds that polygamy was an accepted way of life.¹⁸ Going by the definition of marriage given by Lord Penzance, Oxford Dictionary and the Interpretation Act, neither polygamy nor plurality of wife is allowed under English Law, no wonder, Muslim marriage and marriage conducted under customary law are excluded from marriage recognized by Matrimonial Causes Act.¹⁹ Since is now clear beyond per adventure that English Law does not permit both polygamous marriage or plurality of wife, it is necessary to

¹⁸Supra footnote 6, p.144.

¹⁹Supra footnote 15.

examine the provisions of Shari'ah and the 1999 Constitution (as amended) to know the extent in which a man can exercise his right to marry more than one wife.

Sections 38 (1) and 40 of the 1999 Constitution (as amended) are very clear enough and it is trite law that where the words of a status are clear and unambiguous, they should be accorded their plain and literal meaning. In the case of *INEC v.P.D.P.*, Coomasie, J.C.A. held inter-alia that:

*It is well settled that in construing and interpreting the words of the Decree or any other statute, grammatical and plain meaning be accorded them provided the language used is clear and unambiguous. Consequently it is not the business of the court to bring in, chip in or even interpose any language and or words which tend to alter or change the intention and meaning of statutory provisions.*²⁰

Under section 38 (1) of the 1999 Constitution (as amended), a person is entitled to practice his culture/ custom, thought, belief and religion while under S.40 of the same constitution, he is entitled to associate with "other persons"

Therefore, a Yoruba man can exercise his constitutional right to marry as many wives as possible under Yoruba native law and custom in a society where such native law and custom recognizes plurality of wife without interruption from any person. A problem may arise where such a Yoruba man is a Muslim because Islam, although endorses polygamy, forbids plurality of wife.

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²⁰ (1991) 11 NWLR (Pt 626) 174 at 195 paras B-C. See also *Adetayo v. Ademola* (2010) 169 at 198 paras B-D & 205 paras B-D. *Kotove v. Saraki* (1994) 7 NWLR (Pt 357) 414 at 460-461 paras G-C. *Qatar v. Govt. of Kwara State* (2007) 4 NWLR (Pt 1024) 375 at 408 paras B-C.

Shehu (Ismail) Tijani

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A Yoruba man who is a Muslim cannot be allowed to claim that he is exercising his constitutional right under sections 38 (1) and 40 of the 1999 Constitution (as amended) to marry more than four wives even though he contracts the marriage under his Yoruba native law and custom that allows plurality of wife because with the advent of Islam, plurality of wife has metamorphosised to polygamy with restriction to four wives at a time subject to certain conditions that must be fulfilled. Allah says in the Holy Qur'an:

*If you fear that you shall not be able to deal justly with the orphans, marry the woman of your choice, two or three or four. But if you fear that you shall not be able to deal justly with them, then only one.*²¹

The above provision of the Holy Qur'an is the law that approves polygamous marriage in Islam with stringent condition. The verse refers to justice as the cardinal principle to be complied with by any Muslim man that wishes to practise polygamy. The verse was revealed after the Battle of Uhud when the Muslim Communities were left with many orphans and widows and some captives of wars.²² The treatment was to be governed the principles of greatest humanity and equality. It is recommended that if someone wants to take or marry more than one wife, he should have enough financial capacity to look after the needs of the additional wives and he must do equal justice to them. Each wife should be treated equally in fulfilling their conjugal and other rights.²³

²¹ Q43

²² Supra, footnote6, p 145

²³ Ibid

If a man feels that he will not be able to treat the wives with equality and justice as required by the law or that he does not have the means to support them, he should restrict himself to marrying only one wife. That is the requirement and/or condition stipulated by Allah.

It was reported that Ghaylan bin Salamah accepted Islam and had ten (10) wives then. The Prophet (P.B.U.H.) said unto him: keep four out of them and made the others free.²⁴

Likewise, Abu Daud was reported to have said from Harith bin Qays: *"I accepted Islam and I had eight wives. I mentioned it to the prophet. He advised: "select" four out of them."*²⁵

The conditions under which a Muslim can be allowed to marry four wives are as follows:

- i. When the wife is suffering from a serious disease like paralysis, epilepsy or contagious disease.
- ii. When the wife is proved barren and after the medical examination the experts have given their opinion that she is not capable of bearing a child.
- iii. When she is of unsound mind.
- iv. When the wife has reached an old age and has become weak and infirm and cannot look after the house and the property of the husband.
- v. When the husband finds out that the wife has a bad character and she cannot be reformed.
- vi. When the wife has moved away from the husband's house and has become disobedient and the husband finds it difficult to reform her.
- vii. When men are killed during the war and a large number of woman are left behind, polygamy can provide best solution.

²⁴Ibid. See also Muwatta of Imam Malik

²⁵Ibid. p.146

viii. Where a man feels that ordinarily, he can not do without a second wife in order to satisfy his natural desire which is very strong and when he has enough means to support her, he should take another wife.

It follows therefore that Islam allows both polygamous and monogamous marriage but definitely not plurality of wife (i.e. marrying more than four wives). This establishes the firm fact a Muslim cannot hide under sections 38 (1) and 40 of the 1999 Constitution (as amended) to marry more than four wives no matter the tribe he may belong to because being a Muslim, his entire life shall be governed by the provisions of Shari'ah discernible from the Holy Qur'an, the Hadith of the Prophet (P.B.U.H.) the Ijma and the Qiyas.

Once a person becomes Muslim, he accepts the entire rules and regulations governing the religion of Islam and he must live his life in that direction without having recourse to any native law or custom or any other law that does not conform to the provisions of Qur'an and Sunnah of the Prophet.

When a Muslim brings an action in court of law to seek relief that he be allowed to practice plurality of wife under sections 38(1) and 40 of the 1999 constitutions, his action cannot succeed because it has been held times without number by the Superior Courts of record that once a person belongs to particular association he /she is bound by the constitution of that association until and unless he/she denounces his/her membership. Qur'an is the supreme constitution of Islam and its provisions have binding force on all Muslims world wide. See the cases of *Ambrose Anigbogu V. Silas Uchejigbo*;²⁶ *Agbai V. Okogbue*²⁷ and *Omaliko V. Awachie*.²⁸ A man who has four wives has exhausted his right to marry more wives under the Shari'iah.

²⁶ (2002) 10 NWLR (pt. 776) 488 paras A-C.

²⁷ (1991) 9-10 S.C.N. 149 at 69

²⁸ (2002) 12 NWLR (PT. 780) 1

Any purported additional wife (s) after the fourth wife is illegal with far reaching legal implication. The additional wife(s) is/are not recognized by the Shari'ah.

Conclusion

The priority Islamic Law accords the contract of marriage is due to the significant role it plays in the civilization. It regulates the satisfactions of human nature of lust and establishes the basic units of human race called the family.

Any Muslim who marries more than one wife is required by Shari'ah to treat them equally in all manner be it feeding, shelter, clothing, and even in sexual responsibility. If one is unable to treat them equally then he must not marry more than one wife.

Recommendations

It is hereby recommended as follow:

- Since it is settled that a man has no power to treat his co-wives equally no matter how much he strives to do so,³² it is recommended that marrying more than one wife should not be based on financial ability alone but also on piety. A man who marries more than one wife should have enough financial capacity to look after the needs of the additional wives.
- Whoever intends to practice polygamous marriage should not marry more than four wives at a time as laid down by the Shari'ah, hence, plurality of wife is unknown to Islam.