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WOMEN'S RIGHTS IN SOME ASPECTS OF MATRIMONIAL JURISPRUDENCE UNDER ISLAMIC FAMILY LAW IN NIGERIA: NEED FOR REFORM

INTRODUCTION

Marriage is a very pervasive social institution[1]. Yet, as with other aspects of social life, there is great variation in family and marriage patterns across diverse cultures and religions. What counts as marriage, its connection with kindred issues, whom and how many one is permitted to marry, how spouses are selected, the connections between marriage and sexuality, whether and how marriage can be dissolved, all these differ widely. In spite of these differences, the fundamental necessity of the family and marriage structure cannot be gainsaid. As the basic unit of the social edifice, the family and its proximate cause, the marriage system, must be endowed with certain characteristic features such as care, love, respect, unity, endurance, permanence, freedom, dialogue, and the like. All the contemporary attempts to redefine the concept of marriage would succeed or fail in accordance with how they preserve the primary marks of the nuptial and family bond. This paper is particularly concerned with the examination of some aspects of matrimonial jurisprudence under Islamic law. The study intends to specifically consider the issues of marriage consent, polygyny, and dissolution of marriage in Islam. The choice of these aspects is informed by their effects on women's rights and dignity, and the volatile and varied nature of the practices across many an Islamic enclave. The study is however narrowed down to their implications on women's rights in Nigerian Islamic law regime. Suggestions and recommendations as panacea to the observed anomaly would capitulate the discourse.

ANALYSES OF THE ASPECTS

Marriage Consent

Some Islamic studies demonstrate the agreement between Islamic jurists that seeking of the consent of the girl before she is given in marriage is recommended and always necessary. It is claimed that nowhere does the Koran or the hadith speak with approval of coercive authority. In fact, it was shown that Muhammad gave certain girls forced into marriage by their parents option to revoke the marriage[2] at their majority. Hence, many are the hadiths depicting Muhammad's insistence on the consent of the female in marriage[3]. In spite of this, the sharia dogma that had persisted in many jurisdictions on the basis of the jurisprudential ruling of Imam Malik to the effect that the male guardian, in the exercise of the power of *ijbar*, may give her away in marriage without her consent irrespective of her age. The 1984 case of *Kekurah vs. Matthew*[4] is quite illustrative. In the instant case, Mr. Matthew is the father of a girl called Keturah. He was a Christian in Tiwugu in Niger state. Before Keturah reached puberty, she had been betrothed to a Muslim called Mohammed Jiya. When she reached the age of

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[1] There is no society that has no practice of family life. See A. Giddens, *Sociology*, Polity Press, Oxford, 1993, p.156.

[2] Centre for Islamic Legal Studies (CILS), *Promoting Women's Rights through Sharia in Northern Nigeria*, British Council: Department for International Development, 2005, p.11.

[3] (Uwais, "A Search for Decency and Human Dignity: Women's Right under Islamic Law" in *Vanguard*, Sept 3, 2004, p.26. Reported in D. Byang, *Sharia in Nigeria: a Christian Perspective*, Jos: Challenge Publishers 1998, pp.10-12.

maturity, Mohammed made moves to marry Keturah. She refused on the grounds that as a Christian, she would not marry a Muslim in keeping with the biblical injunction of 2 Corinthians 6: 14-18[5]. But because her father, Mr. Matthew, was bent on giving her away to Mohammed, she filed a suit against him in Area Court at Bida. The court ruled in favour of her father, that he had the right to give her away in marriage to any man of his choice. It was the Sharia personal law that was applied in judging the case. On appeal to the Upper Area Court at Bida, the decision of the lower court was overruled. However, in subsequent appeal by the father to the Sharia Court of Appeal in Minna, the verdict of the court of first instance was returned thus denying Keturah the marriage consent that should belong to her as a fundamental right. It was only by extra-judicial circumstances that Keturah later married another Christian of her own choice.

From the above facts, it is crystal-clear that even though Mr. Matthew professed to be a Christian, he was largely a Muslim at heart insisting as he did to exercise his power of *ijbar* under Sharia personal law. In the considered view of this researcher, this practical Muslim denial of the female marital consent tantamount to an infringement on the female's right to freedom of thought, conscience and religion as enshrined in section 38 of the Constitution. This is particularly true as consent has to do with thought and conscience, which are often molded by one's religion. Therefore, in *Keturah* as in many other cases where Sharia personal law was applied, females were often denied of their inalienable rights to self-determination in marital life. This idea of forced marriage consequent upon the power of *Ijba* is often justified on the principle that public morality and the individual's own integrity take priority over personal freedom when they come into conflict[6]. Clearly, under section 3 (1) (d) (i) (ii) (iii) of the Matrimonial Causes Act, 1970[7], a marriage is void if the consent of either of the parties is not a real consent.

Yet, the phenomenon of Muslim girl-child early marriages in Nigeria is derogation from the necessity of consent for the purpose of marriage. There is no doubt that under Sharia compliant jurisdictions as in Northern Nigeria, many young girls are married off from ages between 7 and 16 years. The notion that marriage to a girl-child is permissible stems from the fact that Prophet Mohammed is believed to have married a girl of tender years, Aisha, and his second wife Umm Rumann, a fact which Muslims regard as part of the practices of the Prophet which constitute an important aspect of the Sunna[8].

It also goes without saying that apart from the consequent emasculation of the girl-child's educational opportunities in contravention of section 18 of the Constitution of the Federal Republic of Nigeria 1999, practice of girl-child marriages is often dangerous to the psycho-somatic health of the child. In addition to being mentally unprepared to take on the onerous duties that attach to the matrimonial caring, the child bride has no knowledge of family planning and is under pressure to become pregnant immediately. Again, many of these unfortunate child brides are prone to the horrible VVF (vesico-vaginal fistula) condition not only because of the relatively immature size of their pelvis, but also because of the lack of adequate nutrition and basic health care at the actual time of delivery. The continued practice of this would be inconsistent with section 17 (3) (d) of the Constitution which enjoins adequate medical and health conditions and facilities for all persons.

[5] The New Jerusalem Bible, Standard Edition, Darton, Longman and Todd, London, 1985.

[6] C.E.S, *Op.cit*., p.10.

[7] Now cap M7, Laws of the Federation of Nigeria 2004.

[8] Sunna is one of the primary sources of Islamic law. The other which of course supersedes it is the Qur'an. Sunna represents the traditions of Prophet Muhammad and consists in what the Prophet did, what He said, and what was approved by Him.

Polygyny

Polygyny is a very volatile issue in practical Islam. Theoretically, the primary sources of Islamic law permit polygamy up to the forth wife on the condition that they all be treated justly; otherwise monogamy is also allowed. Qur'an 4: 3 states:

> If ye fear that ye shall not be able to deal justly with the orphans marry women of your choice two or three or four; but if ye fear that ye shall not be able to deal justly with them, then only one or a captive that your right hands possess. That will be more suitable to prevent you from doing injustice.

Hadiths are replete however where Prophet Muhammad disapproved of Polygyny. For instance, Bukhari 7: 157 reports:

> I heard Allah's Apostle who was on the pulpit saying, "Banu Hisham bin Al-Mughira have requested me to allow them to marry their daughter to Ali bin Abu Talib, but I don't give permission, and will not give permission unless Ali bin Abu-Talib divorces my daughter in order to marry their daughter, because Fatima is a part of my body, and I hate what she hates to see, and what hurts her hurts me.

From the above report, it is clear that once injustice from the part of the husband is suspected, then the permission for polygamy is kept at bay and gives way for monogamy. Although it is arguable that the Prophet refused the permission on filial basis. Fatima being his daughter, yet the denial of permission to Abu-Taleb is a clear indication that injustice can vitiate Islamic practice of polygyny. In fact, Imam argues that "the Quran permits polygyny and does not require it"[9]. In the same vein, Abdallati[10] notes that polygamy is a result of a conditional permission and not an article of faith or a matter of necessity. Accordingly, this "permission is an exception to the ordinary course. It is the last resort, the final attempt to solve some social and moral problems, and to deal with inevitable difficulties... it is an emergency measure to which sense it must be confined"[11]. Thus, conditions are specified which must be fulfilled if polygamy is to occur. Adballati records these conditions[12]: The second or the third wife, if ever taken, enjoys the same rights and privileges as the first one. She is fully entitled to whatever is due to the first one. Equality between the wives in treatment, provisions and kindness is a prerequisite of polygamy and a condition that must be fulfilled by anyone who maintains more than one wife. This equality depends largely on the inner conscience of the individual concerned. Some Islamic jurists and scholars like Yusuf Ali believe these conditions cannot be fulfilled. It is on this ground that these scholars and jurists advocate a ban against polygamy in favour of monogamy[13]. It is further agued that on the basis of Qur'an 24: 32-33, monogamy or outright celibacy is enjoined. The suras state:

> And marry those among you who are single, and those who are fit among your male slaves and your female slaves.... And let

[9] A. Imam, A., *Women, Muslim Laws and Human Rights in Nigeria*, 2003. Retrieved on 3/04/10 from http://www.wilconcenter.org/index.cfm?
[10] H. Abdallati, *Islam in Focus*. Great Britain: Richard Clay (The Chaucer Press) Ltd., 1985, p.166.
[11] *Ibid.*
[12] *Ibid.*
[13] Imam, *Op.cit.*n.p.

> those who cannot find a match keep chaste, until Allah makes them free from want out of His grace...

The interpretation of the first limb (sura 32) goes for monogamy since as polyandry is not allowed in Islam, the expression "male slaves" and, *a fortiori*, female slaves in sura 32 are applicable in issues only of monogamy. In the following limb which is sura 33, the word 'chast' that refers to those who cannot find a match can only be a synonym of 'celibacy'. It can be noted that the Koranic passage permitting polygamy was revealed only after the battle of Uhud in which many Muslims were killed, leaving widows and orphans from whom due care was incumbent upon the Muslim survivors. Marriage became one way of protecting these widows and orphans[14].

Be that as it may, Islamic attitude to polygamy varies from country to country. In Tunisia, erstwhile South Yemen, and Turkey, polygamy is banned, or at best allowed only on very stringent conditions that must be validated by the court. While Turkey's reason is purely on secular grounds, Tunisia and South Yemen anchor their jurisprudence on Koran 4:3 which refers to one-wife best model as the law aims for the recommended best position for the people to follow. In Pakistan and Bangladesh *vide* the Muslim Family Law Ordinance (section 6) and Dissolution of Muslim Marriages Act, respectively, polygamy without certified permission of the Arbitration Council can be dissolved or is a valid ground for divorce at the instance of the existing wife. In Malaysia, the Islamic family law of most states prefers monogamy. The permission for polygamy is based on strict conditions defined as just and necessary. These conditions include insanity or barrenness of the wife, viability of the economic status of the husband to support additional family, ability of the husband to treat all wives equally, the consent of the existing wife, and so on. This Malaysian position is similar to what obtains in Guinea wherein there is a statute of monogamy in the *Code de la Famille* which provides that unless a woman is infertile or has an infectious illness, a man cannot take another wife. The legal framework in general is quite elegant. At the time of the fist marriage, the husband is required to state whether he will be monogamous or how many wives (up to 4) he intends to take. The reasoning is for the wife to make a choice about whether or not she will enter into a marriage that may be polygamous. However in practice in many cases, the husband refuses to choose thereby leaving an opening for polygamy, and the option to consent or not becomes the only available asset to the woman[15].

However, the Nigerian Islam creates a different scenario. Although there are no clearly spelt out laws restraining or encouraging polygamy (except that 4 should be the maximum), there is not only a fierce insistence that polygamy is allowed by immutable law, but men often go further to say that they must marry polygamously in order to be like the Prophet. Acting as if polygamy is a duty, Muslims in Nigeria entertain a general belief that polygamy is the matrimonial model ordained by Allah. The Nigerian picture reflects the Sudan position where in the law fails to give the wife the right to divorce when her husband takes another wife. In fact, in Sudan, the family law expressly states the rights of men to polygamous marriages. These situations in Nigeria constitute unpalatable haven for women's rights violation within the Muslim family stratum. Although there are instances of judicial upholding of the principle of equal material treatment between wives as in the case

[14] Abdallati, *Op. cit.* p.167; Imam, *Op. cit.*, n.p.
[15] Imam, A.M., Fijali, M. & Akilu-Atta, H. (Compilers), *Women's Rights in Muslim Laws: A Resource Document*. Lagos: BAOBAB for Women's Human Rights, 2005, pp. 39-41.

of *Falmata Kundali v. Awana Zarami*[16] in Maiduguri. Yet, the prevailing norm is quite different. The Nigerian structure is only a little different from Sudan and Gambian, where issues of ill-treatment among co-wives are not justiceable, on account of dearth of legislation. This is the direct opposite of the Pakistan practice where unequal treatment is a ground for dissolution of marriage or of the Egyptian position wherein the woman can seek divorce even if issues of inequity is not stated initially in the marriage contract[17].

A valid marriage establishes certain essential rights and responsibilities on spouses. We advocate that Muslims in Nigeria should imitate many sharia practicing jurisdictions today in which marriages are registered with the marriage contract reduced into writing. This practice affords the wife the opportunity to document her preferences in a legal document with terms that could be enforced if the need arises. According to this, women have been known to stipulate conditions in their contract such as monogamy, separate accommodation in the event of polygyny, the right to work, the right to invoke a divorce where the marriage becomes unbearable for the woman, all of which are legitimate and considered enforceable in the Sharia courts. This is highly needed in Nigeria where Muslim women have been the victims of many injustices within the institution of marriage.

Again, the question of Islamic polygyny needs to be reappraised. The Sharia permits polygyny when Qur'an says to men: "...marry women of your choice, two, three or four...."[18] But the verse quickly adds: "...but if you feel you may not be able to deal justly with them, then only one..." The obvious implication of these verses is that they do not confer an unrestrained licence to men to take to polygamy. Yet many women suffer untold hardships at the hands of their husband consequent upon the formation of polygamous family. It should therefore be appropriate for a regulatory law to be passed that controls and checks abuses of the *Quranic* permission. Such a law should take care of the circumstance and capacity in which subsequent wives are to be taken by men. It should also stipulate the liability of a husband at the event of breach of terms and obligations of the marriage contract.

Besides, a Family Code which could assist a Muslim woman to assert her rights against whom the woman should have a right of action on grounds of lack of maintenance is quite germane. This is needed because for a man to be able to retain the advantages envisaged for him as head of the family by the letter of the law, he should adhere to the spirit of supporting and maintaining the women in the letter as well as in the true essence. Furthermore, the rampant phenomenon of child marriages in Muslim enclave *inter alia* should be prohibited in codified form. This is to ensure that the girl-child is given the opportunity to educate and prepare herself for the onerous responsibilities that marriage entails. This will also protect her from the vagaries of childbirth and the attendant health implications.

Finally, the issue of unilateral divorce by husbands should be looked into. It is suggested that Islamic legal system in Nigeria should join the several Sharia implementing jurisdictions in the world today which prohibit divorce outside the court of law. The unilateral right of men has obviously been abused in many instances. Therefore, judicial control of divorce is needed to ensure that all divorces are for justifiable reasons. This act is no doubt justified under the doctrine of *maslahah* (public welfare) or the doctrine of *hisbah* (the state to be seen as encouraging good and discouraging evil). Nigerian Muslims should too consider the

[16] Case No. 23/94, Kaga Area Court 1.
[17] Imam *et al*, *Op.cit.*, pp. 42-43.
[18] Qur'an 4:3. See *The Holy Qur'an: Arabic Text, Translation and Commentary*, Revised Edition, by Maulana Muhammad Ali, Ahmadiyyah Anjuman Ishi a Islam, Lahore, Pakistan, 1951.

practice in countries like Morocco, Syria, Algeria and Iran where the courts are empowered to order the husband for compensation where divorce (talaq) is for no just cause. In Pakistan, divorce only takes effect ninety days after it has been reported to an Arbitration Council, which seeks to reconcile the couple[19].

The Muslims in Nigeria should be courageous enough to effect the above reforms and more since they are still within the ambient of Sharia 'personal law' which constitutes the confines of the jurisdiction of the Sharia courts as provided for in section 262 (2) and 277 (2) of the Constitution.

Dissolution of Marriages

Dissolution of marriages is allowed under the sharia as it is under the Nigerian *Matrimonial Causes Act, 1970*[20]. There is however a major difference between the two provisions. By virtue of section 15 (1) of the latter law, either of the parties to a marriage can initiate proceedings for dissolution of marriage under relevant facts enunciated in sub-section 2 thereof. But under the sharia, men only are given the right to unilaterally invoke divorce, an act that clearly violates section 42 of the constitution, which prohibits discrimination on the basis of sex. Thus, divorce in Islam could be invoked in various ways: by *talaq* (unilateral repudiation by husband), by *khul* (a discharge by the husband at his wife's request), by *mubara'ah* (mutual agreement), and by *faskh* (judicial order). In all these ways, experience shows that men have an upper hand. It has been argued that men are granted this right and advantage most probably because at the inception of marriage and within the family construct, the man pays the dower, maintains and supports the woman who is thus expected to act more cautiously in times of crisis[21].

However, from experience, even in respect of the attempted invocation of *khul* by the woman following unbearable hardship experienced in the duration of a marriage, the husband has been known to withhold his consent as continued punishment. In some occasions, unless the woman pays the husband an agreed sum of money called the *khulil*, the divorce will not take place as decided in the unreported case of *Kachalla v. Kachalla*[22]. Hence, women have thus been placed in a precarious and unfair situation by a strict, self-centred adherence to the letter of the *Quranic* law without regard for the spirit of treating the wife in kindness and with equity. This unilateral right to divorce vested only on husbands with its attendant ill-treatment to wives at the event of irretrievable breakdown of marriage is inconsistent with humane treatment and right to liberty as guaranteed by sections 34 and 35 of the Constitution. This is true as unreasonable withholding of consent to divorce by the husband is equal to the denial of the wife's right to liberty.

It may equally be helpful to consider the divorce practices in some other Islamic polities. The peculiarities depend on the nature of the form of divorce. That is to say, differences exist along the lines of whether the dissolution of marriage is by *talaq, mubarah*, delegation, *khul, faskh*, and so on. Hence, although there is Quranic provision that grants only men unilateral right of divorce, in all Muslim communities, *talaq* is considered a right of men. However, some countries have legislated a variety of procedures which nonetheless varies on the extent of enforcement thereof. In Nigeria, unilateral repudiation by the husband with no

[19] Imam *et al*, *Op.cit.*, p.52.
[20] See footnote no. 6.
[21] M. Uwais, *Op.cit.*, p.26.
[22] Suit No. F C A / K / 85 / 82 (Court of Appeal, Kaduna.

necessity for discussion or reasonable offence on the part of the wife is the most common form of divorce in Muslim communities, obviously due to its informal character[23]. Thus, the manner in which *talaq* has been practised adversely affects the protected right of the victims. The most common abuses include pronouncing the *talaq* at prohibited times, threatening the wife with *talaq* for frivolous reasons such as her insistence on her right of maintenance, and pronouncement of the first, second and third *talaqs* in one sitting. It is to be noted that in Qur'an 2: 129, "talaq is only permissible twice". The third pronouncement means that remarriage between the parties is impossible unless the wife has married another man and got divorced from him. The first and second ones are revocable and allow the parties the possibility of reconciliation. Again, *talaq* is not to be pronounced while the wife is undergoing menstruation or when not in a state of fresh purity. In Nigeria too, it is virtually unknown for women to negotiate a delegated power of divorce, which practice as part of marriage contract is common in India, Pakistan and Egypt[24]. Similarly, in spite of the fact that Muslim women in Nigeria can benefit from divorce by mutual agreement (*mubarah*) or by payment by the wife to the husband (*khul*), yet they are still victims of their husbands who demand huge *mahr* or *khul* in order to make it impossible for the women to enjoy their right of divorce at the event of dissatisfaction with the marriage (*Fatimatu Hussein v. Mahum*[25].

To circumvent these difficulties, the position in Iran, Malaysia, Tunisia, Indonesia, Pakistan and Bangladesh may be adopted in Nigerian Islamic divorce law. In these countries, the marriage contract contains a number of conditions which if violated can enable one seek for divorce in court. In Bangladesh, the Dissolution of Muslim Marriage Act provides certain grounds for divorce. They include "cruelty, desertion, non-maintenance, impotence, inequitable treatment with co-wives, insanity, imprisonment, leprosy and STDs, and any other grounds recognized under Muslim law"[26]. It is therefore strongly suggested that rather than allow dissolution of marriage by *khul* or *talaq* with the attendant difficulties that go with them in disfavour of the wife, let all Islamic divorce in Nigeria go the way of *faskh* based, as it were, on judicial interpretation of the relevant family legislations that need to be enacted. Greater justice is more likely to be achieved through this means such as happened in the case of *Haja Kaka v. Zama Bukna*[27] in Borno State. In this case, the marriage was dissolved at the instance of the wife on the grounds that her consent was not sought before the marriage was consummated.

SUGGESTIONS AND RECOMMENDATIONS

In order to improve the lot of Muslim women whose human rights are constantly put in jeopardy, there is a genuine need for the rise of activists who will confront the forces that trample upon the dignity of women in the name of religion and its laws. These activists will among other things, work out a more feminist interpretation of the Islamic texts with a view to changing the vision of women in Islam. International associations and non-governmental organizations should be formed for more effective united front against male chauvinism. This must however be accompanied by proper education and creation of awareness on the part of women themselves who often are oblivious of their fundamental rights.

There is an urgent need to cultivate the attitude of respect for women's right and see to it that women are allowed access to justice system. But one greatest

[23] CILS, *Op.cit.*, pp.4-5; Imam *et al, Op.cit.*, p.48.
[24] Imam *et al, Op. cit.*, p.49.
[25] Suit No. BOS/SCA/CV/ISN 1993.
[26] Imam *et al, Op.cit.*, p.54.
[27] BOS/ SCA/ CVI 81/ 91.

obstacle to this is poverty and illiteracy. It is therefore suggested that cultural and psychological barriers to access to justice should be removed. There should also be a review and adoption of macro-economic policies and development strategies that address the needs and efforts of women in poverty. Laws and administrative practices should also be revised to ensure women's equal rights and access to economic resources. It may also be necessary to promote the use of public interest litigation by advocacy groups, and paralegal schemes offering legal aid and advice to poor citizens like women who out of poverty may not be able to afford legal representation. This need may also be assuaged by encouraging the use of alternative dispute resolution methods such as mediation, conciliation and arbitration in the resolution of some family and commercial disputes.

Sharia and Islam generally are in urgent need of modernization and reform. Socio-historical change and evolutionary spirit make it inevitable for Sharia Islam to read the 'signs of the time'. Pursuant to this, Islam needs to reform its laws in line with the modern needs. An Egyptian writer and Judge, Muhammed Saidel-Ashnawi had since 1978 advised his fellow Muslims on Sharia. He claims that Sharia is more a spirit than a letter, a programme of social change aimed at progress and liberation, not at preserving the *status-quo*[28]. According to him, at the time of Prophet Muhammad, laws were made with regard to the circumstances of those times. Today, different circumstances call for different legislations. For instance, at the time of the prophet, people knew one another and could lend money and share benefits without interest. In today's anonymous world, interest is a new way of sharing benefits and of compensating for inflation. It could be remembered that usury was formerly condemned by many religions including Christianity. But today modern developments have made them to re-examine their stands.

Islam has always claimed that Sharia is a divine law and hence immutable. But the extent of this divine origin of Sharia has been an object of controversy among scholars. It does seem that apart from the injunctions of the Koran and the Sunna, all other laws and interpretations made by Muslim jurists can rightly be described as merely human. It is this that gives rise to different schools of Muslim jurisprudence. Therefore, if Sharia laws emanated from the social needs of the time, nothing prevents the modern day Islam from reinterpreting Islamic laws along democratic principles. It is either Islam does so or it faces the incident of being relegated as a religion of anachronisms. It is perhaps to avoid this that the Shi'ite sect still practises *ijithad* (personal reasoning) which was believed by Sunnic schools (traditional Islam) to have been closed since the 10th Century[29]. It may then be necessary for Nigerian Muslims to resurrect that legal flexibility rather than give blind obedience to an archaic law that seems to have today become inhuman.

[28] H.A. Adigun, "The Rights of Muslims in Nigeria to Sharia" in *German Alumni News Letter*, vol. 7, Sept. 2000, p.26.
[29] *Ibid*