A "WOMAN TO WOMAN" MARRIAGE AND THE REPUGNANCY CLAUSE: A CASE OF PUTTING NEW WINE INTO OLD BOTTLES*

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> The principle of the doctrine of repugnancy as at present applied by the Nigerian Courts in some cases have (sic) often done violence to prevailing and established customs of the people. It is therefore recommended that in cases where certain customs conflict, the doctrine of repugnancy should be applied in such a way as to ensure conformity with the accepted norms and the social ethics of the community.

This is paragraph four of the Communique issued at the end of the Workshop on Indigenous African Law held at the University of Nigeria, Nsukka on August 7-9, 1974. To what extent have our judges adhered to the spirit of this communique?

In Joshua C. Egwu v Eugene Meribe[1] (for himself and as representing his family) the plaintiff claimed from the defendant a declaration of title to a piece of land known as "Uzo Ama Awom," situate at Ekenobizi, Umuopara, Umuahia, N200.00 general damages for trespass, and an injunction restraining the defendants, their servants, agents, or workmen from further entering, interfering, or dealing with the land in any manner whatever. It was undisputed that the land in question originally belonged to Nwanyiakoli, who was one of the wives of Chief Cheghekwu Egwu, and that the plaintiff was a direct son of the late Chief, whereas the defendant and all the other children of Meribe were the grand-children of Chief Cheghekwu Egwu.

Nwanyiakoli was one of the several wives of Chief Cheghewu Egwu and because she was barren she married Nwanyiocha, her niece, for Chief Egwu according to the custom of her people. Later Nwanyiocha had children for Chief Egwu, the eldest of whom was the plaintiff. The plaintiff admitted that Nwanyiocha is his mother, and that Nwanyiakoli had married her, lived with her, and regarded him as her son. Nwanyiakoli died in 1937, and after the plaintiff had performed the burial rites, he inherited all her property including the parcel of land in dispute. Plaintiff claimed that he had farmed the land from her death until 1971, when the defendants trespassed on it.

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The defendant argued that after the death of Chief Egwu, Meribe, as the eldest surviving son, had inherited Nwanyiakoli under native law and custom, that they had lived together as husband and wife, and that they had farmed the land in dispute. When Nwanyiakoli died it was Meribe, not the plaintiff, who had performed the customary burial ceremonies and inherited her property (including the land in dispute), and on the death of Meribe, the property devolved on his children, the defendants.

Aniagolu, J., held as follows:

1. It is the custom of the parties that if a woman has no issue she can marry another woman for her husband and any issue from the marriage would be regarded as issue of the barren woman for the purpose of inheritance in the distribution of estates.

2. Nwanyiakoli "married Nwanyiocha for Cheghekwu Egwu, treated the plaintiff as her own son, and the arrangement was in accord with the native law and custom of the area.

3. The facts disclosed in evidence did not show that Nwanyiakoli married Nwanyiocha for herself - a fact naturally impossible - but rather for her husband, and that the word "married" in that context is merely colloquial, the proper thing to say being that she "procured"[2] Nwanyiocha for Chief Cheghekwu to marry. There was no suggestion in evidence that there was anything immoral in the transaction.

4. The land in dispute had been in the possession of Nwanyiakoli during her lifetime, and after her death it was inherited by the plaintiff who had been farming it ever since.

The defendant appealed to the Supreme Court[3], which held:

1. Where there is proof that a custom permits marriage of a woman to another woman, such custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act,[4] and ought not to be upheld by the Court.

2. The facts must, however, be closely examined to find out the true nature of the "woman to woman" marriage. Where, as in this case, a barren wife had procured another woman for her husband to marry, such arrangement is not caught by the proviso to section 14(3).

3. In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a "woman to woman" marriage. Where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of Section 14(3) of the Evidence Act and ought not to be upheld by the Court.

It is proposed in this case comment to look at the rationale of the Supreme Court's decision. It is the custom in Umuahia, and in fact in many Ibo communities of both Imo and Anambra States, that if a woman has no issue, and can afford it, she can marry another woman for her husband, and any issue of such woman would be regarded as issue of the barren woman for the purpose of representation in respect of estates and inheritance. It is the barren woman who pays the dowry.[5] She marries another woman for her husband and does not, in the language of the Supreme Court, "procure" the woman for the husband. There is nothing intrinsically immoral, or indecent in this custom. That a matter is biologically impossible does not mean that a "woman to woman" marriage is not the accepted custom of the people, or that the custom is contrary to law. It is in the light of the foregoing norms of the people of Umuahia that one is disturbed by the pronouncement of the Supreme Court in this case.[6]

It is clear that this statement of the law was not necessary for the decision of this case, but is nevertheless strong dictum. Coming, as it did, from the highest court in the country, it is entitled to respect from the lower courts. Even so, it is humbly submitted, it does not represent the law. In Nigeria there are two systems of marriage recognised by the law: marriages contracted under the Marriage Act[7], and marriages contracted under customary law. The former is monogamous and answers the description of being "a union of a man and a woman thereby creating the status of husband and wife". The latter might not fit into the Supreme Court's definition "of one of the essential requirements for a valid marriage" yet it creates in law the status of husband and wife. In Eugene Meribe v Joshua C. Egwu, the marriages between Chief Cheghekwu Egwu and each of his several wives, including Nwanyiakoli, were customary law unions and each created in law the status of husband and wife. It would be idle to state the contrary.

Secondly, in the instant case, the Supreme Court failed to distinguish between the concept of status and the incidents attaching to status, the former being governed by the lex domicilii, whilst the latter is governed by the lex actus.[8] The status created by a man to woman marriage, by a "woman to woman"

marriage, (where there is evidence that it obtains in any society) even the status of celibacy, -- all are matters governed by the lex domicilii, but whether children of a "woman to woman" marriage or of "man to woman" marriage, can succeed to property on intestacy will fall to be decided by the lex actus, and in the case of immovable by the lex situs, here Ekenobizi, Umuopara, Umuahia. It is humbly submitted that, on the evidence in the lower court, it was proved that in Umuopara, Umuahia, a barren woman can marry a woman for her husband with the sole purpose of raising issues[9] who will preserve the line of inheritance of the barren woman.

Thirdly, there is nothing inherently or intrinsically immoral or indecent in this custom of a "woman to woman" marriage. The courts are not, it is humbly submitted, custodians of the morals of the people. Furthermore, the courts cannot effectively impose their own standards of morality on the people. To say, therefore, that the law governing any decent society could abhor and express its indignation at a "woman to woman" marriage begs the question. Justice Akinola Aguda, apprehensive of the violence done to established customs by our courts, has said:

> We are trying to build a Nigerian nation, not a pseudo-European nation. It is our duty to preserve our culture and if a particular custom is one unacceptable to the generality of the people it is the duty of the State to alter it. But no government which can call itself democratic should attempt to impose on a people an any custom which is totally unacceptable to the generality of the poeple.[10]

Furthermore, it is a little curious that the courts which, as early as 1923, had upheld the customary rules relating to "widow inheritance"[11] -- a custom which Western standards would have been branded "indecent," "pagan", or a jumble of tribal beliefs[12] -- could, in 1976, state that the law governing any decent society should abhor and express its indignation at a "woman to woman" marriage.

The supreme court's decision in Meribe's case is an unhappy one. It is a retrograde step in the attitude of the court toward a liberal interpretation of the repugnancy clause as far as it concerns customary rules and institutions. It is sad that these pronouncements stem from a court now manned by indigenous judges. It might be pertinent to remind all those whose duty it is to recognise and enforce customary law and who have the privilege of interpreting the customs of the people against the background of the repugnancy rules, of the following:[13]

> It is observed with satisfaction that almost all our courts are now manned by indigenous judges and magistrates, even though the bulk of these were trained mainly in English Law. It is however recommended that these officers of the various courts should be enjoined to

> adopt a dynamic approach in their interpretation of the received English laws, whether statutory or case law, and should refrain wherever possible from interpretations which do not accord with the local concept of law and justice.

It is pertinent to remember the exact words of the repugnancy clause. The clause has been employed by the courts from colonial days to the present as a controlling factor in the application of customary law. Sometimes it has been used by the courts to disallow objectionable features of customary law; at the worst it is used as a blund instrument to strike down any customary rule.[14] Public policy in the repugnancy clause is a nebulous term but one imagines that it encompasses any rule of customary law the enforcement of which will be contrary to the morals of the particular society in which it is operating, not those of some utopian society. Such repugnancy rules have been used by the courts to bar slavery, marriage without consent, and other invasions of personal freedom. But certainly there is no justification for the courts to strike down a concept--"woman to woman" marriage--which cannot readily be equated to any status known to Western cultures, and which they do not understand. Finally, morality and justice are abstract conceptions only related to a given society.[15] Standards of Nigeria in 1976 simply do not resemble the monogamous standards of Western society. Fifteen years ago A. N. Allott wrote:

> The Judge who is himself a citizen of the country whose customary laws are under examination will naturally tend to feel less shock at African institutions than the outsider, however sympathetic, who was born and reared in an entirely different milieu.[16]

Allott will be dismayed to notice, in 1976, that indigenous judges, trained abroad, are more readily disposed to strike down customary rules as repugnant to natural justice, equity and good conscience than were the outsiders. He will also notice that our judges are not broad-minded when applying the repugnancy clauses to local customs and institutions. He will learn to his disappointment that even the admonition of a fellow judge in Southern Rhodesia[17] as to what should guide the courts while exercising judicial discretion in the application of the repugnancy clause is not adhered to by indigenous judges. One must ask the question: "Whose conscience"? Is it the conscience of our colonial overlords--now perpetuated by our indigenous judges influenced by their background and their monogamous outlook, or the conscience of our people in the context of our society and our polygamous outlook?[18] A judicial pronouncement that does violence to the norms of the society, or which is honored more in the breach than in the observance, deserves no place in our law reports.

In conclusion it is urged:

1. That the Nigerian courts should enforce as law customary rules which are not intrinsically or inherently immoral and whose application will not shock the conscience of the society whose customary law is in question. There is nothing immoral about the custom in the Ibo societies of Anambra and Imo States of a barren woman marrying another woman for her husband for the purpose of rearing children who will inherit the property of the barren woman or her husband, if either dies intestate.

2. The courts should be more broadminded than they have been. They should distinguish the concept of status from the incidents of that status. If the local law recognises a "woman to woman" marriage, and the incidents of such status are sought to be enforced, it is not the place of the law to invoke the repugnancy test to exclude the application of such customary rules.

3. Nigerian courts should recognise that there are two forms of marriage recognised as valid under Nigerian Law: marriages under the Act and customary law marriages. There is no inherently greater virtue in one or the other. To accord monogamous marriage a higher status and recognise more rights as attaching to it than to customary law marriages, or even to impose a concept drawn from western cultures on customary law institutions, is to put new wine into old bottles.

4. Now that many of our judges and magistrates are indigenous, the task of a liberal application of the repugnancy rules should be an easy one.

FOOTNOTES

[1]High Court Suit No. HU/36/71, Umuahia, 3 June 1974, Aniagolu, J. (unreported).

[2]"Procure" means obtain by care or effort, acquire or bring about. See Concise Oxford Dictionary (5th ed.).

[3](1976) 3 S.C. 23.

[4]Sec. 14(3) of the Evidence Act, (1958) provides:

> "where a custom cannot be established as one judicially noticed, it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons of the class of persons concerned in the particular area regarded the alleged custom as binding upon them: Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law <u>if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience</u>." (underlining mine). See also s. 14(3) of Evidence Law, (1963) Laws of Eastern Nigeria.

[5]Obi (1966:157); Meek (1970:275).

[6]See also Lord Penzance's definition in <u>Hyde v Hyde</u> (1866 L.R. 1 P & D. 130, 133) that marriage is ....."the voluntary union for life of one man and one woman to the exclusion of all others." See also the Interpretation Act, s.18 (No. 1 of 1964), which defines a monogamous marriage as "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 subsistence of the marriage".

[7]<u>Laws of the Federation</u>, Cap. 115 (1958).

[8]Cheshire (1970:439); Graveson (1969:234 ff.)

[9]Chief J. O. Ekwurike, plaintiff's expert witness before the Umuahia High Court in the instant case, gave uncontracted testimony that "It is the custom in our place that if a woman has no issue she can marry another woman for her husband; any issue from the said married woman would be regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance." See also Alice Akaba Ugboma & Anor v George Olisa Ugboma & Anor. (Ontisha High Court No. 0/122/73, 28 September 1973), where Oputa, J., accepted the Ogbaru custom that (i) each wife of a polygamous

family, together with her children, make up a unit within that family (usokwu); (ii) that the surviving members of this unit inherit a deceased member's property where the deceased member dies feme sole and without issue; (iii) that the eldest son, (Di-Okpala) inherits and controls the property belonging to the father at death, but not that belonging to his wives or their children.

[10]Aguda (1973:73).

[11]Widow inheritance is a customary law doctrine which state that on the death of a husband, a woman is married to a member of her deceased husband's family or to a stranger of her choice but with the consent of her deceased husband's family, which marriage raises issue to the name of the deceased husband. Of course, no son inherits his own mother. See Obi (1966:381).

[12]In re Estate of Agboruje, 19 N.L.R. 38 (Ames, J.).

[13]Emphasis added. This is paragraph 7 of the Communique issued by the Workshop on Indigenous African Law. See also the opinion of Justice Nwokedi in Emmanuel Ilioka & Anor. v Simon Ibe (High Court Suit No. NO/32/73, Okigwe, 27 July, 1974, unpublished), in which he adopted the spirit of this communique and held that if a customary law marriage has not been dissolved and dowry refunded, any child born to the woman, fathered by any man, would be given to the care and custody of the man whose dowry had not yet been refunded. Cf. Edet v Essien, 11 N.L.R. 47 (1932).

[14]Allott (1960:8FF.).

[15]See Gwaobin Kilimo v Kisunda bin Ifuti, I.T.L.R. 403 (1938), (Wilson, J.)

[16]Allott (1960:197).

[17]"Whatever these words (repugnant to natural justice and morality) may mean, I consider that they should only apply to such customs as inherently impress us with some abhorence or are obviously immoral in their incidence." Tabitha Chiduka v Chidano (1922). S.R. 55, 56 (Tredgolu, S.T.).

[18]Agu (1975:251).

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RESUME

Dans l'affaire Joshua Egwu v Eugene Meribe, 3 S.C. 23 (1976), la Cour Supreme du Nigeria a conclu que le mariage entre femmes fut une coutume pratique au Nigeria mais qu'il ne s'insere pas aux concepts juridiques occidentaux. La solution qui consiste a dire qu'une telle coutume est contraire a la justice naturelle, a l'equite et a la bonne conscience, et qu' elle ne devrait donc pas etre reconnue par les tribunaux, ignore le fond du probleme, car cette forme du mariage se pratique depuis tres longtemps au Nigeria. Cette solution indique aussi aux magistrats nigeriens, presque tous formes en occident, que les tribunaux ne peuvent pas jouer le role de gardiens de la moralite publique.