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Bigamy in a Polygamous Society: A Critical Appraisal of the Law of Bigamy in Nigeria

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Abstract

This paper examined bigamy in a polygamous society and its law in Nigeria. It revealed that traditionally, Nigeria is a polygamous society and in that light the offence of bigamy was not known. It revealed again that the offence was imported into Nigeria as a received English Law. It reviewed further that upon declaration of a marriage to be bigamous, its implication is that the marriage is void and of no effect. The paper observed that even though a marriage is declared to be void by reason of bigamy the children born to the marriage before the declaration of bigamy by the court are legitimate children and are therefore not affected by the declaration.

Key words: Bigamy, Polygamous Society, Critical Appraisal.

1 Introduction

The hallmark of every serious crime is that it involves conduct which is anti-social - something which offends the moral consciousness of society[3]. Bigamy is usually classified as an offence against public morals. Judging from the punishment prescribed for it - imprisonment for seven years - bigamy is among the more serious offences in the Nigerian Criminal Code. Yet it is very rarely prosecuted[4]. Traditionally, Nigeria is a polygamous society; it is lawful for a man to have several wives at the same time provided he marries under customary law. in the eyes of the law there is nothing immoral or anti-social about this. Indeed a good majority of Nigerian marriages are either actually or potentially polygamous. However, because of the dual system of marriages co-existing in Nigeria, viz, customary (polygamous) and statutory (monogamous), bigamy and allied offences may be committed in certain circumstances by the mere fact of having two wives at the same time. That this situation should exist in a polygamous society raises the question what is the purpose of creating these offences and prescribing severe punishments for them. In Nigeria, it is not antisocial for a man to have several wives. A man wishing to marry more than one wife may lawfully do so under native laws and customs which recognises polygamous marriage. But because we do not live solely by the laws and customs of our forefathers, it is an offence in certain circumstances to take more than one wife[5]. Accordingly, section 370 of the Criminal Code[6] provides that any person who having a husband or wife living , marries in any case in which such marriage is void by reason of its taking place during the life of such husband and wife is guilty of a felony and is liable to imprisonment for seven years.

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[3] See Okonkwo C.O :Bigamy in a polygamous society :*The Nigeria Juridical Review* Vol 1976 p 76.
[4] Ibid.
[5] Okonkwo C.O. *Criminal Law In Nigeria*, (2nd ed)Ibadan, Specrum Books , 2010 p.284.
[6] Cap c 38 laws of the federation of Nigeria 2004 hereinafter

The question that may arise is what the purpose of this branch of law is. If a man may lawfully take two wives under one form of marriage what is the punishment for doing the same thing under another form of marriage?

1. Nature of the Offences

The offence of bigamy was not known to customary criminal law because the institution of polygamy was recognised and practised in the country. The offence was imported into Nigeria from England in the colonial days and it is contained in s. 370 of the Criminal Code which provides as follows:

Any person who, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony, and is liable to imprisonment for seven years.

Although adopted from the English law, this provision differs in one fundamental respect from section 57 of the Offences Against the Person Act, 1861 (U.K.) which contains the offence of bigamy in the extra requirement that the second marriage shall be void "by reason of its taking place during the life of such husband or wife." This requirement is necessitated by the fact that there is a dual system of marriage in the country and its significance is discussed below. The Marriage Act contains two other offences which are similar to bigamy. Section 47 of the Act provides that any person who while married under customary law, marries another person under the Act is guilty of an offence punishable with imprisonment for five years. Section 48 covers the reverse situation. It prescribes the same punishment for any person who having contracted a marriage under the Act, marries another person under customary law during the continuance of the first marriage.

"Section 35 of the Marriage Act provides that no person whose marriage is soleninised under it is capable of contracting a marriage under native law or custom. A person who did so would be liable to conviction under section 48 of the Act whether the other party to the marriage was alive or not at the time of the subsequent marriage by native law or custom but, if that party was alive he would not be liable under section 48 because the celebration of the marriage under native law or custom would not be capable of conferring the status of husband and wife on the parties. The Act imposes the obligation of monogamy on those who marry under it.

This interpretation of the joint effect of sections 35 and 48 of the Marriage Act is obviously wrong. Section 35 provides that a person who marries under the Act "shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law." It does not impose a perpetual obligation of monogamy on such a person. The obligation lasts only as long as the marriage lasts. Death dissolves a statutory marriage and thereafter the surviving spouse is free to revert to polygamy according to his personal law. In addition, section 48 specifically requires that the customary marriage must take place "during the continuance of" the statutory marriage. Therefore, no offence is committed if that marriage was not subsisting at the time of the customary marriage. It follows from this, contrary to Gledhill's view, that if the other party to the statutory marriage was alive at the time of the customary marriage i.e. the marriage was subsisting, an offence is committed under the section. The fact that the second marriage could not confer the status of husband and wife on the parties is irrelevant.

A question that arises is whether sections 47 and 48 of the Marriage Act also create the offence of bigamy. If so why do the punishments provided in them differ from the punishment stipulated in s. 370 of the Criminal Code? The first question arose from decision in *State v. Ezeagbo Nweke*.[7] The accused was married to A under customary law when she (the accused) was a young girl. She later married B under customary law without the first marriage being dissolved. While the two marriages were subsisting she married C under the Marriage Act in 1950 and had lived with him for twenty years when the charge of bigamy was brought against her. There were four counts in all. The first count alleged bigamy under s. 370 Criminal code , the second count was under s. 47 of the Marriage Act , the third count was for making a false declaration in an affidavit of marriage contrary to s. 41 of the Marriage Act; and the fourth count charged her with going through a ceremony of marriage with C knowing it to be void on the ground of its taking place during the lifetime of A contrary to s. 46 of the Marriage Act. When the prosecution closed its case, defence counsel submitted that there was no case to answer on all the counts.

[7] Charge No. O/IIC/1971 (High Court, Onitsha—unreported). See also, Okonkwo C.O :Bigamy in a polygamous society :*The Nigeria Juridical Review* Vol 1976 p 76.

On the first count he submitted that for a charge of bigamy to succeed all the alleged marriages must be marriages under the Marriage Act. The prosecutor on the other hand contended that s. 370 Criminal Code has nothing to do with the Marriage. Act at all and that once a person is validly married and goes through a second marriage which is void (by reason of its taking place during the subsistence of the first marriage) the offence is committed. The trial judge ruled that no case had been made out for the accused to answer on count one. He said:

I am inclined to agree with [defence counsel] that in order to be offence under section 370 CC the marriages must be those under the Marriage Act and not under native law and custom; for there are provisions in the Marriage Act making it an offence for anyone contracting marriage by native law when already married by the Act, see section 48 and anyone contracting marriage under the Act when already married by native law, see section 47. 1 do not think that this is a case of bigamy.[8]

It is submitted with respect that this conclusion is not consistent with the express provision in s. 370 Criminal Code . This is not surprising in view of the fact that the problem was not fully examined. Sections 33 and 35 of the Marriage Act cover two situations under which a second marriage is void by reason of the fact that a party to it is already lawfully married. Under s. 33, if a person is married under customary law and during the subsistence of this marriage he marries another person under the Act, the second marriage is void. And under s. 35, a marriage under customary law by a person already married under the Act is void. It follows that in *State v. Ezeagbo Nweke* [9]the woman's marriage to C under the Act while married to A under customary law was void (s. 33). The facts therefore fell within the language of s. 370 CC because she, having a husband living, had married in circumstances in which such marriage was void by reason of its taking place during the life of her first husband. It is thought that the expression "in any case" in s. 370 CC is intended to cover the two forms of marriage recognised as lawful in Nigeria. In R v. Princewill[10] a case of statutory marriage followed by customary marriage, Reed J. (as he then was) interpreting the provision in s. 370 of the Criminal Code as follows:

There must be two 'marriages' to create the offence and the first question is whether both marriages must be monogamous. The words 'husband', 'wife' and 'marriage' are nowhere defined. The first marriage must in my view, for reasons which I shall give, be monogamous so that the words 'husband' and 'wife' must mean husband and wife in a monogamous marriage.

He examined the position under the Indian Penal Code and continued

However after considering the authorities I interpret section 370 of the Criminal Code as follows: There must be a husband and wife living and one of them must 'marry' so that this second 'marriage' is 'void by reason of its taking place during the life of such husband and wife.' If the first marriage was polygamous the second marriage could not be void because it, the second marriage, took place during the life of the husband and wife. Therefore the first marriage must be a monogamous marriage 'good and valid in law' as defined by section 34 of the Marriage Ordinance. (now Act) [11]

According to this interpretation, a statutory marriage followed by a customary marriage is bigamy under s. 370 Criminal Code but a customary marriage which is followed by a statutory marriage is not.[12] On the face of it this conclusion sounds convincing. A person who contracts a statutory marriage is bound by law to practice monogamy. He cannot therefore lawfully contract a second marriage during the subsistence of the first marriage. If he did so, the second marriage would be void by reason of its taking place during the life of the former husband or wife. But a person who contracts a customary marriage is not so bound. He can lawfully practice polygamy. If he therefore marries a second wife during the subsistence of his first marriage, his second marriage cannot be said to be void because it took place during the subsistence of his first marriage for both by his personal law and the nature of his first marriage he can lawfully practice polygamy. With respect, however, this interpretation is questionable. The view that "if the first marriage was polygamous the second marriage could not be void" takes a very narrow view of the provision in s. 33(1) of the Marriage Act which renders void a statutory marriage contracted by a person who at the time of such marriage was married to another person under customary law.

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[8] The prosecution conceded that no case was made out in respect of count 3 and the trial therefore proceeded in respect of counts 2 and 4.

[99] Supra.

[10] 1963 N.N.L.R. 54.

[11] At pp. 55-56.

[12] For the view "that a breach of section 35 of the Marriage Ordinance should not result in a conviction for bigamy under s.370 of the Criminal Code".see also Okonkwo C.O. op.cit.

There is no doubt that if the two marriages take place under customary law the second is not void and no offence is committed. But where the second marriage is statutory the Act renders it void (s. 33). Why? The reason, surely, must be because it took place during the life of a former wife. A person who undertakes to practice monogamy must not have another wife. If he already had one, even under customary law, his purported statutory marriage to a second woman would be void because it took place during the life of a former wife. Were it otherwise, he would lawfully have two wives even though committed, by his second marriage to practice monogamy. The facts therefore fall within s. 370 of the Criminal Code. Section 57 of the Offences Against the Person Act 1861 which creates the offence of bigamy in England merely provides that:

Whosoever, being married, shall marry any other person during the life of the former husband or wife…

In a monogamous society these words are apt to cover every case of bigamy. But in a society like Nigeria which recognises both polygamy and monogamy they are obviously inappropriate because a person is being married, may lawfully marry another person during the life of the former husband or wife provided the two marriages are under customary law. It was necessary therefore to provide that the offence is committed if a person being married marries again "in any case" in which the second marriage is void by reason of its taking place during the life of the former husband or wife. It therefore covers cases of statutory marriage followed by a customary marriage,[13] cases of customary marriage followed by statutory marriage[14] and cases in which both marriages are statutory marriages.[15] The questions that might be asked at this stage are these. If all the three cases mentioned above constitute bigamy under s. 370 of the Criminal Code and are punishable with imprisonment for seven years why are the first two cases specifically provided for in sections 47 and 48 of the Marriage Act and are punishable with imprisonment for five years only? Does the disparity in punishment not indicate that the first two cases constitute less serious crimes than the third thus showing that they cannot all constitute bigamy under s. 370 Criminal Code?

One point that is clear is that all the three cases are covered by the language of s. 370 of the Criminal Code and therefore constitute the offence of bigamy as defined in that section. The repetition of the offences in sections 47 and 48 of the Marriage Act with less severe punishments may be accounted for as follows: The Marriage Act was introduced into Nigeria in 1884. Being a statute dealing with marriage only, it contained, inter alia, provisions regulating the inter-relationship between monogamous and polygamous marriages. It did not purport to deal with the offence of bigamy exhaustively hence sections 47 and 48 do not contain defences such as seven years absence etc. In 1904 the Criminal Code was introduced into Nigeria to deal solely with crimes. In relation to bigamy it was not just enough to import the English law on the subject because our circumstances were not the same. We have a dual system of marriage. Any definition of bigamy must reflect this fact. It was therefore necessary to define the offence in s. 370 of the Criminal Code in language which covers cases in which the two marriages are statutory and cases which fall within sections 47 and 48 of the Marriage Act and the same punishment was prescribed for them though without repealing the two sections. However, considering the rationale of bigamy which is discussed below, it seems clear that the third case deserves a heavier punishment than the first two cases. The view has been put forward that bigamy is committed under s. 370 [16] only if the second marriage is void by reason of its taking place during the subsistence of the first marriage as required by the section and that if it is void for any other reason e.g. incapacity arising from consanguinity, it is not bigamy in Nigeria. The author[17] of this view states that:

…the offence of bigamy is not committed by undergoing any marriage ceremony but a ceremony which is capable of producing a valid marriage, save, for the subsistence of the first marriage.

[13] Rendered void by s. 35 of the Marriage Act.

[14] Rendered void by s. 35 of the Marriage Act.

[15] Section 3(1) of the Matrimonial Causes Decree 1971.

[16] Of the Criminal Code

[17] M. C. Marasinghe supra fn. 6 at pp. 73-74.

He thinks that if the facts of the English case *R v. Allen*[18] occurred in Nigeria, the accused would have been acquitted under the Code (Allen was convicted of bigamy for contracting a second marriage with his niece - a relationship prohibited by law). This view seems however to be merely academic. If H being unmarried and lacking capacity to do so, marries W, the marriage is void only on the ground of incapacity.

Given the same situation except that H has contracted a previous marriage which is subsisting, his second marriage (within the prohibited degree) is void for two reasons i.e. incapacity arising from consanguinity and the subsistence of a previous marriage. If H is charged with bigamy the prosecution need not mention the first incapacity. It can rely solely on the fact that the second marriage was void because it took place during the subsistence of the first marriage. It seems then that in every case in which a second bigamous marriage is void for other incapacity, it would also be void by reason of its taking place during the subsistence of the first marriage thereby sustaining a charge of bigamy. What matters is that the accused has undergone a ceremony capable of producing a valid marriage.[19]

1. The Rationale of Bigamy

In early times in England, bigamy was merely an ecclesiastical offence. Through the influence of the clergy it became a statutory offence [20] It was first made a felony by an Act of 1603.[21] The preamble of this Act states that:

For as much as divers evil disposed persons being married, run out of one county into another, or into places where they are not known, and there become to be married, having another husband or wife living, to the great dishonour of God, and the utter undoing of divers honest men's children and others.

These surely are not convincing reasons for punishing bigamy. Glanville Williams describes the second reason as a "make-weight" for "it is difficult to see how the mere celebration of a void ceremony can 'undo' children.[22] As to the first reason, if bigamy merely involved a "dishonour of God" it would seem that there was no need for statutory intervention. Because the offence is not confined to cases which involve anti-social consequences, e.g. where deception is practiced on the woman, it is difficult to find a justifiable reason for creating the offence and punishing it so heavily. If H and W find life with each other intolerable and decide to live apart, then if W finds a paramour with whom she cohabits and who decides to accord respectability to their relationship by undergoing a ceremony of marriage with her, she commits bigamy though society is in no way injured. On the other hand, if they lived together without undergoing any ceremony of marriage no offence is committed though from a Christian point of view the cohabitation is immoral. Therefore, what in effect seems to be forbidden and punished by the law of bigamy is not, for example, the fact of a married man putting away his wife and cohabiting with another woman but the mere undergoing of a ceremony of marriage by both of them. This conclusion finds some support in a dictum of Cockburn C.J., in R v. Allen'[23] that bigamy "involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows to be applied only to a legitimate union, to a marriage at best but colour- able and fictitious, and which may be made and too often is made, the means of the most cruel and wicked deception."Kenny also states that the reason for punishing bigamy is "the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony".[24]

Today, Christian marriages may be performed in a marriage registry and hardly any solemnity attaches to the ceremony, nor need the Registrar be a clergyman. Even where the bigamous marriage takes place in a Church thus involving "the prostitution of a solemn ceremony" it is questionable whether such conduct should not more properly be regulated by a lesser offence dealing with abuse of marriage process instead of bigamy for which the penalty is imprisonment for seven years. In the Nigerian context this rationale of bigamy scarcely holds good. Bigamy cannot constitute an "outrage on public decency and morals" in a society in which polygamy is lawful. Neither can there be "prostitution of a solemn ceremony" where the second marriage is a customary marriage.

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[18] (1872) L.R. I CCR. 367.

[19] See Brett & McLean, Criminal Law and Procedure of Lagos etc. para. 1980.

[20] See Bartholomew: "The Origins and Development of the Law of Bigamy" (1958) 74 L.Q.R. 259.

[21] Jac. 1 C. 12.

[22] "Language and the Law" (1945) 61 L.Q.R. 71 p. 76 fn. 14.

[23] (1872) L.R. 1 CCR 367 pp. 374-5.

[24] Outlines of Criminal Law, 15 ed. p. 361.

Even if the first marriage is a customary marriage and the second is a statutory marriage celebrated in a Church, there is no prostitution of the solemn ceremony because the Church recognises only the statutory marriage as valid and the customary marriage as invalid. It seems clear from the foregoing that except in a case where deception is practised on a party to a bigamous marriage the offence as at present constituted does not involve any anti-social consequences worth punishing with a long term of imprisonment.

1. The Non-Prosecution of Bigamy in Nigeria

In England there are many reported and unreported cases of bigamy. In a society which practices only monogamy, this is not surprising. It might be easy to detect and prove the commission of the offence. in Nigeria there are only two reported[25] and one unreported[26] prosecutions for bigamy known to the writer. Does this then mean that the commission of this offence is very rare? It is thought not. Why are there then very few prosecutions?
Taylor C.J. the then chief Judge of Lagos state stated as follows:

. . .past experience on the Bench in the Western State as well as in the Federal Capital of Lagos has shown the reluctance of the authorities to prosecute for this offence of bigamy in spite of the fact that I have from the Bench sent proceedings relating to such offence to the authorities for further action. In all such cases no steps have been taken.[27]

The reasons for non-prosecution can be suggested as follows: Firstly, although the offence of bigamy exists in the statute book its existence is unknown to most people. This is because polygamy is lawful and is extensively practiced in the country. If A can lawfully have two wives at the same time how can B be said to commit an offence if he also has two wives at the same time. The fact that both of A's marriages are under customary law and that both (or one) of B's are under the Act is irrelevant to the thinking of the average person on this matter. Even to those who know of the existence of this offence it is thought not to involve any anti-social consequences worth bothering about. Usually in a case of bigamy in Nigeria, the person whose feelings are hurt is one of the wives. Most women, however, concede the traditional rights of their husbands to take a second wife if he wishes and they readily reconcile themselves to the new situation. In the few cases where the second marriage might be resented the woman leaves the matrimonial home without resorting to the courts except for claims such as maintenance etc. The result of all these factors is that generally there are hardly any complaints of bigamy from the public.

Secondly there is the difficulty of proving the commission of the offence. Where both marriages are statutory marriages the difficulty is not as great as in the case where one of the marriages is a customary marriage - and this is the most frequent kind of bigamy. In the former case however, the prosecution must prove the celebration of the first marriage, that it was a valid marriage, that the other spouse was alive at the time of the second marriage and that the first marriage bad not been dissolved or declared void by a competent court at the time of the second marriage. Accordingly in R v. Inyang[28] where the prosecution charged the accused with bigamy and the only evidence against him consisted of (a) the production of the marriage certificate relating to the first alleged marriage and (b) proof of the celebration of the second marriage, it was held that no case had been made out for the accused person to answer. "In particular, no other evidence was offered to prove the essential fact of the subsistence of the first marriage at the date of the second ceremony."

Quite difficult to prove are cases in which one marriage is statutory and the other is customary. In such circumstances if the husband and his two wives are living happily together, it would surely be impossible to obtain any or enough evidence to prove the offence. Neither the customary law wife nor her relations would be prepared to give evidence of the customary law marriage which is the more difficult marriage to prove. In the Eastern States there is a limitation on the amount of dowry payable. Therefore even if the relations are prepared to give such evidence they might have to show that they were paid some dowry. In many cases the amount of dowry which they would admit would exceed the limit of sixty naira, thus disclosing the commission of an offence under the Limitation of Dowry Law 1956. This will of course make them reluctant to come forward and testify.

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[25] *R. v. Inyang* (1931) 10 N.L.R. 33; R v. Princewell 1963 N.N.L.R. 54.

[26] State v. Ezeagbo Nweke, supra.

[27] *Jaundoo v. Khayam*, Suit No. WD/1 1/71 (unreported).

[28] (1931) 10 N.L.R. 33.

Sometimes an important witness for the prosecution might be one of the wives[29] and the circumstances might be such that she herself is a party to the offence as where, for example, being the second wife. She underwent the second marriage with full knowledge of the subsistence of the first marriage.[30] In these circumstances she might be reluctant to testify. Thirdly there is the reluctance of the authorities to prosecute for an obscure and harmless offence which runs counter to the popular practice and tradition of the people.

1. Effect of A Child Born Out Of Bigamy

Bigamy does not have any effect on a child in Nigeria by reason of the provision of Section 42 (2) of the 1999 Constitution as amended. The Section provides thus: "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth". On the issue of presumption of legitimacy under Section 147 of the Evidence Act, the Court of Appeal established in **Ogbole v. Onah[31]** that:

"Under Section 147 of the Evidence Act, as long as marriage between a husband and a wife lasted, there is a presumption that a child conceived and born during its continuance is legitimate".

The Evidence Act did not use the word valid marriage. So a child born during the subsistence of a marriage remains a legitimate child and inhered with the right to inherit property. The court went further to held that, in law, where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary is proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. One issue germane to the implication of child born before the declaration of nullity of marriage by reason of bigamy is that he or she is considered to be legitimate by virtue of Section 147 of our Evidence Act and Section 42 (2) of the 1999 Constitution.

6. Concluding Remarks

An allegation that a man got married to a woman under the Marriage Act when his marriage to another woman under native law and custom was still subsisting is an allegation of commission of a criminal offence of bigamy which has to be proved beyond reasonable doubt. The implication is that a person who contracts a statutory marriage is bound by law to practice monogamy. However, there is no far reaching consequence on the children born during the pendency of the marriage prior to its declaration by court as bigamy. The Constitution clearly states that no person shall be discriminated against merely by the reason of the circumstances of his birth.

[29] Under s. 180of the Evidence Act a wife of a Christian marriage is a competent and compellable witness against her husband on a charge of bigamy. But it might be like dragging an unwilling horse to water to get her to incriminate her husband.

[30] Under s. 40 of the Marriage Act it is an offence punishable with imprisonment for five years for an unmarried person to go through a ceremony of marriage under the Act with a person whom he or she knows to be married to another person.

[31] Ogbole v. Onah (1990) INWLR pt 126, at 358 - 359