

Who owns a child? Conflict of culture and human right in the dissolution of customary law marriage in Nigeria

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Abstract

Using a descriptive design, this study examined the award of child custody in 15 cases of divorce between 2002 and 2016 in a customary court in Southwest Nigeria. Most of the cases were initiated by women on grounds of the negligence of children and wife and domestic violence. Despite this, the custody of children was awarded to the men in almost all cases. The findings of this study provide useful evidence to guide intervention and reform of customary and family laws to ensure greater gender equality in the award of child custody in customary courts in Nigeria.

Keywords: Child custody, Divorce, Marriage, Nigeria, Customary court

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Introduction

Before colonization, the African marriage process was purely based on customs and traditions. With the advent of colonial rule, the process of marriage became influenced by Christian and Islamic religious precepts and modern law (Antoine, 2007; Locoh, 2002; Otite, 1990). Thus, marriage in most African countries including Nigeria has become a lengthy process that begins with traditional marriage rites and culminates in a religious or civil wedding. In Nigeria, a marriage is considered legal if it is celebrated under the statutory law or customary and sharia law (Etomi, Asia, & Rotimi Williams' Chambers, 2019; Nwogugu, 2014; Oni, 2015). The statutory marriage is based on the country's family law and dissolution of such marriage is regulated by the Matrimonial Causes Act. A marriage celebrated under the sharia or customary law is dissolved following the tenets of Islam and the marriage traditions and customs of the different ethnic groups and communities in Nigeria, respectively. The statutory marriage is monogamous but marriage under the customs and traditions or the sharia permits polygyny.

Nigeria operates a four-tier legal system with an apex supreme court, the court of appeal, high court, and the magistrate court. Also, the fourth tier of the legal system is the customary and the sharia court. The customary court operates according to the customs of the locality of its jurisdiction and the sharia court which is predominant in the Northern regions of Nigeria and operates according to Islamic matrimonial laws. Dissolution of a marriage contracted under customs and traditions takes place in a customary court and the procedures are not as stringent as that under the Matrimonial Causes Act but there must be a formal act by the party who wants to dissolve the union and a refund of the bride price by the family of the woman before the divorce is granted. Refunding the bride price is the only requirement for divorce under customary marriage and it is compulsory (Oni, 2015). Marriage in Nigeria is considered a union of two families; thus, an effort is usually made by the families to reconcile couples in a conflictual union. Divorce is only sought in a court when reconciliation fails. The only ground for divorce in Nigeria according to Section 15(2(a-h) of the Matrimonial Causes Act is an allegation and proof by the party seeking a divorce that the marriage has broken down irretrievably (Etomi et al., 2019). Most of the facts and situations to prove this are fault-based such as adultery, desertion, and lack of consummation of the marriage among others. It could also be non-fault-based such as when a couple has lived apart for a continuous period of at least two years before the filing of the petition and the parties do not object to the dissolution of the marriage (Etomi et al., 2019).

Under the Nigerian Matrimonial Causes Act, the custody of children after divorce may be joint or to one party with a visitation right to the other. Also, the award of custody is not a punishment for the party who is guilty of the matrimonial offense. Award of child custody in Nigeria is determined by several factors as stipulated in the Matrimonial Causes Act and Child Rights Act but the primary consideration is the interest and welfare of the children (Etomi et al., 2019; Owolabi, 2016). The key factors that are considered include an emotional attachment to a particular parent; the degree of familiarity and wishes

of the child; adequacy of facilities (educational, social, emotional, etc.); respective incomes of the parties; if one of the parties lives with a third party; the age of the child; the sex of the child (custody of the female child is usually given to the mother and male children to the father); opportunities for a proper upbringing; and conduct of the parties (Etomi et al., 2019).

Award of custody in a customary court follows these general rules but the custom of the particular ethnic group or community about children is a major consideration (Uzodike, 1990). In Southwest Nigeria among the Yoruba, as in many patriarchal communities in Nigeria, women do not "own" children; their sexuality is owned and controlled by the partner who pays her bride price (Izugbara, 2004; Omobowale, 2018). Women bear and rear children but they belong to their fathers. Thus, the custody of children is the customary right of the man. This study is a descriptive investigation of divorce granted under the customary law with a particular focus on the culture of "who owns a child" vis-a-vis the rights of women and children. The rights of a child and woman have been documented under different global, regional, and national treaties and conventions such as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on the Rights and Welfare of the Child (ACRWC), the United Nations Convention of the Rights of the Child (CRC), African Union Gender Policy, and Sustainable Development Goal 5 which aims to achieve gender equality and empower all women and girls. However, scholarly analysis of child custody in the context of these treaties has been dominant in the more developed countries (Boyd, 2004; Jeffries, 2016; Nielsen, 2018; Reynaert, Bouverne-de-Bie, & Vandeveldde, 2009). A few studies exist on the dissolution of customary marriage, child custody in Nigeria, and case reports of marriage dissolution and child custody under the customary law (Omobowale, 2018; Oni, 2015; Oniha, 2017; Owasanoye, 2005). To the best of our knowledge, there is little or no systematic investigation of the award of child custody after the dissolution of a marital union in customary courts in Nigeria as it upholds or violates child and women's right. Given the widely

documented effect of divorce on children's wellbeing (Amato, 2000; Fomby & Cherlin, 2007; Leopold, 2018), the findings of this study would provide useful evidence to guide interventions and reforms of discriminatory family and customary laws on the award of child custody in Nigeria, and other countries that have plural legal systems with elements of the traditionalist models of guardianship and physical custody of children after divorce (Raday, 2019). Although male prerogative has been withdrawn in secular family laws in many countries, customary and religious laws that disadvantage women in custody negotiation and award, and weak enforcement of financial payments from the non-custodial parent are still prevalent in many contexts (Ijaiya & Ijaiya, 2018; Möller, 2016; Raday, 2019)

Method

A descriptive design was adopted because of the small sample size of 15 cases of divorce, and the research objective of describing child custody award (Babbie & Mouton, 2001). The data were obtained in October 2017 through case extraction from one customary court in Ekiti State, Southwest Nigeria. Ekiti State is one of the thirty-six states Nigeria, with an estimated population of 3.2 million (National Bureau of Statistics (NBS), 2018). The dominant ethnic group in Ekiti State is Yoruba of Ekiti origin and they have similar marriage traditions and customs. The median age at first marriage for women age 25-49 years in Ekiti State is 21.5 and 29 for men age 30-49 years; and the total fertility rate is 4.6 lower than the national average of 5.3 (National Population Commission (NPC) [Nigeria] and ICF, 2019). Most women are economically active. Previous reports show that women of Yoruba ethnic origin are economically active and contribute substantially to household expenditure (Akorede, 2010; Staveren & Ode bode, 2007). Using a questionnaire, data were extracted from 15 cases that had clear and complete records, out of 21 cases of divorce filed in the court from 2002 and 2016. Data were collected on the socio-demographic

profile of the couples, the duration of their union, number of children by sex, number of a previous marital union, reasons for divorce, and award of custody among others.

Analytical Approach

The data were entered into Microsoft Excel and analysed. Descriptive analysis was conducted using frequencies, mean with standard deviation, to describe the couples' characteristics. . Initiation and the reasons for divorce, and award of custody were analysed thematically and presented in narratives. Award of custody was presented using three themes: sole custody to the man, joint custody, and sole custody to the woman.

Ethical Issues

This study did not involve human subjects directly. It was a case extraction from court records. The permission to conduct this study was sought from the authorities in charge of the court and they approved the study. To ensure anonymity and confidentiality, all direct and indirect identifiers to the court and the persons involved in the divorce cases were excluded from this study.

Results

Characteristics of the couples

The characteristics of the couples are presented in Table 1. The couples were all of Yoruba ethnic origin. All of them were in their first union except for couple#4 where the man had been married twice before the current union. The age range of the women was 25-46, with a mean and standard deviation of 34.7 ± 5.2 . The men were aged 25-65 years old, with a mean age of 43.3 ± 7.9 . The age gap between spouses was calculated for each couple. All the men were older than their wives and the gap was between 1-10 years. The exception was couple#4 where the age gap was 38 years. All the couples attained at least a primary education but men in each couple were more educated except in a few cases, and in one case, both attained higher education. Couples of similar religions were in the majority particularly Christians.

All the couples reported being engaged in different types of work. The women were farmers, petty traders, hairstylists, teachers (primary school), civil servants (working for the government), and one student. The men were engaged in civil service, farming, trading, teaching (primary school), commercial vehicle driving, panel beating, and one retired. The duration of union ranged from 1 to 22 years and most of the couples had married for 10-22 years and only the couple with 38 years age gap married for 1 year. Most of the women married between age 18 years and 26 years whereas the mean age at marriage for the men was 29 ± 10.7 . All the couples except one had children.

Initiation and reasons for divorce

Of the 15 cases, 12 (80%) were initiated by the wife, and divorce was granted in all but two cases (Table 1). The reasons for seeking divorce were different for women and men. Neglect of wife and children's welfare, poverty, and domestic violence were the common reasons for seeking divorce by women whereas insubordination, adultery and uncaring attitude to children and the man were common reasons among men. The specific reasons for each case, who filed for divorce and who got the custody of children are presented in the next section.

(Table 1 here)

Child custody

Out of the 15 cases, there was no case of child custody in three, one couple had no children, and in two, the case was resolved. Although the welfare of the children seems to have been considered in the award of child custody, the overriding influence of the culture of "the man owns children, not the woman" is obvious in all the cases. In all the cases where the divorce was granted, the custody of the children was granted to the man, when it was granted the woman, it was temporary.

Sole custody to the man

In half of the 12 cases where child custody was involved, sole custody of the children was given to the man. In couple#3, the primary reason for divorce was lack of care for the children and wife and constant fighting, and the custody of their 4 children (eldest is 16 years) was given to the man. Couple#5 had four children and the eldest was 18 years old and the custody of all the children was given to the man. The divorce was granted on the grounds of lack of proper care for the children and the woman and frequent fighting as alleged by the wife. Couple #7 had four children and the eldest was 16 years old. The wife filed for divorce on allegations of lack of proper care for her and the children, frequent fighting and disrespect; custody of the children was awarded to the father. Couple#8 was a case of no rest of mind, desertion, and frequent fighting filed by the wife. The custody of their 6 children was awarded to the father. Couple#10 was a case of no rest of mind, desertion, frequent fighting, and lack of care for the wife and children as filed by the wife. The custody of their 6 children was awarded to the man. Divorce case for couple#13 was filed by the husband on allegation of uncaring attitude to him and the children and fighting his parents with charms. The custody of their 5 children was granted to the man.

Joint custody

Joint custody was granted in five cases but in four of the five cases, the custody of the child who is awarded to the woman was temporary because the said child is either underage or the man has no income. In couple #1, the woman filed for divorce and her reason was frequent fighting, no rest of mind, and a threat to her life with charms. The couple had two children and the eldest was 8 years old. The custody of the younger child was given to her until the child is of age to join the father. In couple #2, the reason for divorce which was filed by the wife was no rest of mind, provocation, and frequent fighting. The custody of their 3 children (eldest 8 years old) was awarded to the woman temporarily because the man has no income. Couple#6 was a case of frequent beating and disrespect for the woman's parents as filed by the woman. They had two children (eldest 6 years old); the custody of the eldest was given to the man and the younger child would stay with her mother for two years before the father takes on her custody;

the man would pay N2500 (US\$6.94) per month for the welfare of the child with the woman. In couple#9, the wife filed for divorce on account of frequent fighting and lack of proper care for her and the children. They had two children and the eldest was 4 years. The custody of the eldest who has been living with the man was granted to him while the younger child was awarded to the woman and the man would give her ₦1000 every month for the child. In couple#12, the wife alleged frequent fighting and lack of proper care for the children. The custody of their 3 children (oldest was 11 years old) was awarded to the man but the youngest would live with the woman until age 18 years.

Sole custody to the woman

Sole custody to the woman was granted in only one of the 12 cases. In couple#14, the husband alleged adultery and disobedience against his wife, divorce was granted on those grounds and the custody of their four children was given to the wife who has been living with the children until they are of legal age (18 years) to decide on their own. The man will give the woman ₦5000 (US\$ 13.89) per child every month.

Discussion of the findings

This study described divorce and the award of child custody in a customary court in Nigeria in relation to women's right of custody to a child. The characteristics of couples such as spousal age gap, a gap in educational attainment, duration of the union, and a difference in cultural orientation such as religious belief among other individual and couple-level factors have been associated with divorce in many previous studies (Amato & Previti, 2003; Kalmijn & Poortman, 2006). Although the current analysis is descriptive, there are indications to support these past studies. Eighty percent of the divorce cases were filed by the woman, supporting previous studies in other countries (Askarshahi et al., 2019; Kalmijn & Poortman, 2006; Law et al., 2019). This finding indicates a need for further systematic inquiry into the gendered nature of divorce, particularly why a disproportionate percentage of women seek divorce compared to men. Pertinent questions may include whether the marriage market dynamics and process

of marriage is male-oriented and dominated and whether women have more expectations of an ideal union than men.

Contrary to findings in more developed societies such as Hong Kong where most divorce petitions were granted on no-fault grounds (Law et al., 2019), all the divorce cases in this analysis were petitioned based on reasons that revolve around financial deprivation, behavior, and domestic violence. Despite changing sex roles occasioned by modernism, the reasons for divorce in this study exemplifies the persistent dominance of patriarchal norms about heterosexual marital union where the male is the idolized breadwinner and the wife is a homemaker. With increasing opportunities for education and the concomitant need for self-fulfillment, more and more women in Nigeria engage in income-generating activities outside the home. The expanding pool of economically active women has continued to be highly necessary with the prolonged economic downturn in the country which makes a single income from a male insufficient to meet the rising standard of needs of couples and their children in many homes. However, the traditional expectation of males to supply all the family needs and women to be subjugated to the man under all circumstances remains. This is evident in the variation between male and female reasons for divorce. The males who petitioned for divorce anchored their case on insubordination, adultery, and uncaring attitude to husband and children; these are indications of the patriarchal norm of an ideal wife as a submissive woman who should also be a homemaker. The women sought divorce when the male fails as the idolized breadwinner. This is in spite of the fact that all the women worked, indicating a dominance or slow to change notion of a man as the sole provider. Other women filed for divorce on the grounds of domestic violence. This is suggestive of nascent disapproval of the patriarchal norm that accepts wife beating as a disciplinary measure to correct a woman and should not be a reason to seek separation or divorce by the woman (Aderinto, Nwokocha, Bankole, & Obameata, 2006; Bowman, 2002; Oluremi, 2015). Domestic violence is still a problem in Nigeria, about 31% of Nigerian women age 15-49 years have experienced physical violence, however, attitude towards it has continued

to decline. The percentage of women and men who agree that wife beating is justified has continued to decrease over time in Nigeria, from 43% in 2008 to 28% in 2018 for women, and from 30% to 21% for men (National Population Commission (NPC) [Nigeria] and ICF, 2019). None of the women mentioned adultery as a reason. This is probably because women are expected to tolerate male infidelity whereas it remains a taboo for women, indicative of double standard in sexual morality inherent in patriarchy where men define the culture of sexual practices and sanctions against deviance (Ntoimo & Isiugo-Abanihe, 2013; Walby, 1989).

Irrespective of the facts and situations that led to the divorce, the custody of the children was granted to the man in almost all the cases. This is contrary to the finding in other countries such as the USA, Hong Kong, and Spain where mother sole custody and shared custody is more prevalent (Cancian, Meyer, Brown, & Cook, 2014; Fernandez-Rasines, 2017). A striking observation is that custody was awarded to the man even when the ground for the divorce is proved to be a lack of proper care by the man for the children. In other words, the overriding fact of the child's interest and welfare as stated in the country's Matrimonial Causes Act and the Child Rights Act is secondary under the customary law because a man "owns" the child. Although motherhood is revered and said to empower a woman in the Yoruba culture (Makinde, 2004), a woman's right to custody of a child is limited to as long as she is in a union. Evidence from the cases indicates that the key factors that should determine who gets the custody of children after divorce were either totally not considered or partially considered. This constitutes an infringement on the right of women to their children as in other discriminatory social norms of inheritance against women in Nigeria, and tacit encouragement of child abuse and neglect (Olusegun & Idowu, 2016; Onouha, 2007; Owolabi, 2016). Also, not prioritizing child welfare and women's right to a child in the award of child custody after divorce is detrimental to the personal growth and development of a child. A previous study in sub-Saharan Africa shows that residence with a father alone is detrimental to children's nutritional

status (Banda, Ntoimo, & Olamijuwon, 2017). Documented evidence in a Swedish study shows that shared custody after divorce is protective of children's emotional wellbeing (Turunen, 2017).

A limitation of this study is that the analysis is based on cases extracted from one court. A larger number of cases may provide a wider spectrum of reasons for divorce and judgments on child custody. Also, a country-wide study will enable comparison between cultures. Nigeria has over 250 ethnic groups with distinct cultures. Also, the variables we analyzed were limited to what was recorded in the case files. However, this analysis is one of the few studies in Nigeria that examine divorce and child custody in relation to child's and woman's rights. Although the study is descriptive, the findings provide a baseline for further research on divorce and child custody in Nigeria.

Also, the results of this study contribute to the body of existing knowledge on change and continuity in family, and how they influence human rights. The study provides useful insight into aspects of family law that reinforce discrimination against women. The Sustainable Development Goal 5 underscores the elimination of all discrimination against women and girls as a basic human right. Thus, this study contributes useful insights for programmes and policy reformation to achieve SDG 5 in Nigeria and other countries.

Conclusion

Culture is made for man and should not be upheld to the detriment of human welfare. The welfare of children should be prioritized in the award of child custody after divorce. The woman has equal, if not more right to a child, thus, her right to live with her children should be given the deserved attention in all judgments on child custody after divorce. Therefore, the government should develop strategic plans to regulate the implementation of child custody rules in customary courts to ensure greater gender equality in the application of family and customary laws in Nigeria.

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Declaration of interest

The authors have no interest to declare

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Data availability

The data supporting the results is available on request from the corresponding author.

About the Authors

The lead author, Lorretta Favour Chizomam is a Sociologist/Demographer. She obtained her PhD in Demography and Population Studies from the University of Ibadan, Nigeria in 2012, and was a Fogarty International Centre postdoctoral fellow at the Demography and Population Studies Programme, University of Witwatersrand, South Africa in 2014. Currently, she is a Senior Lecturer in the Department of Demography and Social Statistics, at the Federal University Oye-Ekiti, Nigeria. She is a highly motivated and result-oriented researcher whose goal is to contribute to family demography, singlehood research, maternal, child and adolescent health in Africa. She has published many articles, and book chapters, and has participated in many research projects, conferences and invited lectures. This paper is a part of her research on divorce and women's right in Nigeria. She conceptualised this study, designed the methodology, analysed the data, wrote the paper and proof-read the final draft.

Favour Chukwunonyerem Ntoimo is a third-year Law student in the Faculty of Law, Enugu Campus, University of Nigeria, Nsukka, Nigeria. She has a strong interest in family law and arbitration. She

conducted the literature search for this study, participated in writing aspects of the paper, and proof-read the final draft.

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Table 1: Profile of the couples and divorce

Couple #	Age W/H	Spousal age gap	Education W/H	Religion	Occupation W/H	Age at marriage W/H	Duration of union(year)	No of children M/F	Initiation of divorce	Divorce granted
1	30/42	12	Primary/secondary	Both Christian	Farmer/civil servant	22/34	8	1/1	Woman	Yes
2	35/42	7	Higher/secondary	Both Christian	Student/civil servant	26/33	9	2/1	Woman	Yes
3	35/39	4	Primary/Primary	Both Muslim	Trader/Driver	18/22	17	1/3	Woman	Yes
4	27/65	38	Primary/Secondary	Both Christian	Trader/Retired	26/64	1	0	Woman	Yes
5	38/44	6	Secondary/Primary	Christian/Muslim	Civil servant/farmer	19/25	19	2/2	Woman	Yes
6	25/29	4	Primary/Primary	Both Christian	Hair Dresser/Driver	14/18	11	0/2	Woman	Yes
7	35/39	4	Primary/Primary	Both Muslim	Trader/Driver	18/22	17	1/3	Woman	Yes
8	35/45	10	Primary/Secondary	Both Christian	Trader/Primary school teacher	14/24	21	1/5	Woman	Yes
9	30/35	5	Primary/Primary	Not stated	Farmer/Panel Beater	24/29	6	1/1	Woman	Yes
10	36/45	9	Primary/Higher	Both Christian	Trader/Primary school teacher	15/24	21	1/5	Woman	Yes
11	33/40	7	Secondary/Primary	Christian/unstated	Nursing apprentice/Farmer	22/29	11	2/0	Woman	No
12	38/43	5	Secondary/Secondary	Both Christian	Primary school teacher/Trader	26/31	12	1/2	Woman	Yes
13	40/46	6	Secondary/Higher	Christian/Muslim	Primary school teacher/Primary school teacher	18/24	22	2/3	Man	Yes

14	46/5 1	5	Higher/Higher	Both Christian	Civil servant/civil servant	25/30	21	2/2	Man	Yes
15	37/4 5	8	Primary/Primary	Traditionalist/Chris tian	Trader/farmer	21/29	20	4/2	Man	No

Note: W is wife, H is husband. Where applicable, the characteristic to the left refers to the wife whereas the right is for the husband. E.g. secondary/primary means wife attained secondary and husband primary education. Number of children M is male child, and F is female child.