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Consummation of Marriage in Nigeria: Changing Legal Narratives in the 21st Century

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Abstract:

Prior to the massive influx of the various inventions and scientific innovations which accompanied the 21st century, legal principles were made and interpreted according to the understanding of concepts in their very basic and simplest forms. One of those concepts is consummation of marriage. Consummation of marriage in Family Law before now entailed the very basic act of sexual intercourse. However, in recent times, it may be said to entail much more, following the magnitude of scientific influence on it. This work identifies the nouveau scientific dimensions of consummation and analyses them vis-a-vis the existing legal principles.

Keywords: marriage, consummation and legal narratives

1. Introduction

In recent years, many questions have emerged as to the real meaning of consummation of marriage in law. While it is settled that consummation involves erection and penetration, there are unanswered questions as to what constitutes penetration. Must it necessarily be the penetration of the genitals?

Around the globe, many countries have readily legalized marriages between homosexuals and transgender couples. In such marriages, is consummation of marriage possible?

In Nigeria, new practices have started gaining grounds and are not (perhaps, yet) prohibited by law-alternative/artificial insemination topping the list. Can such be practiced in a marriage without the consummation of that marriage? With the emergence sex dolls, acquisition use and practice of which Nigerian law has not prohibited lends its own complex to the issue of consummation of marriage under Nigerian family law. Where a man operates a male sex doll to have sex with his wife on the wedding night, will that marriage be said to have been consummated?

The foregoing and more are the questions which have emerged out of the attempt to fully and correctly define consummation of marriage in the light of 21st century practices. However, it is necessary to state at this point that the concept of consummation of marriage in family law and legal studies is guided by the law - decided cases, statutes, opinions of renowned jurists, among other legal authorities. This work takes a detour into the provisions of the law, not only in Nigeria but globally, as it concerns consummation of marriage.

2. Consummation of Marriage

The general definition of consummation is the act of making a marriage complete by having sex. Narrowing it down to the confines of legal studies, Black's Law Dictionary¹ succinctly defines consummation thus: "...to bring to completion, especially to make (a marriage) complete by having sexual intercourse... the first post marital act of sexual intercourse between a husband and a wife."² In essence, a marriage is consummated with the first sexual relationship the couple engage in. The yardstick of complete consummation is as set by the law. The foregoing definitions of consummation evince the fact that for sexual intercourse to be called consummation, it must be done after marriage. It is therefore safe to say that sexual relations between a man and a woman before their marriage cannot consummate the subsequent marriage between them. So, where a couple have had bouts of sex before they are married, the law will not accord that marriage the status of consummation until the first sex they have inside the marriage.

In Nigeria, the incapacity of a spouse to consummate a marriage can constitute a ground for nullity of the marriage. Moreover, the willful and persistent refusal of a party to a marriage to consummate the marriage is proof that the marriage has broken

¹ Black's Law Dictionary (9th ed.) (2009), West Publications. USA

² Ibid. at pg 359

down irretrievably and as such can be dissolved. As it stands therefore, consummation is germane to the institution of marriage.

Basically, consummation is the very first intercourse between a husband and wife after marriage. Lushington in *D v A*³ opine that for there to be consummation there must exist "ordinary and complete intercourse". He added, "Where sexual relations are partial or imperfect, there will be no consummation."

3. What Exactly Constitutes Ordinary and Complete Sexual Intercourse?

Stroud's Judicial Dictionary of Words and Phrases⁴ extensively defines consummation by including the constituents of "real" intercourse and what may not be regarded as sexual intercourse in Law. It states: "The word 'consummation' denotes coitus, and not coitus which may result in conception. But the practice of coitus interruptus prevents any real intercourse and so consummation..." However, the law has moved away from such insinuations and it has since been held that erection and penetration are sufficient to consummate a marriage even though there has been no emission..." A contrary opinion will insinuate that sexual intercourse must culminate in emission into the woman for the purpose of conception. Following that opinion would mean that consummation is for the purpose of conception. Nigerian law does not subscribe to that and showcases that in various ways. Under the Matrimonial Causes Act⁵, one cannot nullify or dissolve a marriage because the partner is infertile. Nullity is permitted where the party cannot consummate by having sexual intercourse. Where a party can consummate but cannot make babies, the law will not lend itself a ladder to be climbed for the destruction of that marriage. The definition by Stroud's Judicial Dictionary aptly excludes the necessity of conception (and emission, by implication) for sexual intercourse to be regarded as consummation. This is in contrast with the decision of the court in *Grimes v Grimes*⁶, Finnemore J held that coitus interruptus was no vera copula: consummation required "emission" within one's wife. Two days later though, Wilmer J in *White v White*⁷ deemed ejaculation not to be a prerequisite of consummation. To this end, sterility cannot be regarded as incapacity to consummate.⁸

Also, it can be gleaned from Stroud's that the practice of coitus interruptus⁹ is not willful and persistent refusal to consummate a marriage. In *Baxter v. Baxter*¹⁰, it was held that a marriage is consummated where the couple uses contraceptives or other mechanical forms of contraception. This decision is in tandem with the decision in *White v. White*¹¹ where the court held that a marriage is consummated where there is coitus interruptus or where the husband is incapable of ejaculation. Stroud's also gives two elements of consummation -erection and penetration only.

3.3. Penetration

Traditionally, penetration is the entrance of the penis into the vagina. LawDictionary.com¹² defines it as a term used in criminal law, and denoting (in cases of alleged rape) the insertion of the male part into the female parts to however slight an extent; and by which insertion the offense is complete without proof of emission.

However, Black's Law Dictionary¹³ encapsulates more aspects of penetration which by implication added a slight change to the traditional and old meaning of penetration. According to Black's, penetration is "the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice."¹⁴

It can be deduced from the above definition that penetration may not necessarily include the penis and the vagina. It is penetration, for example, when a man inserts his finger into the vagina of a woman.

3.2. Erection

Oxford Advance Learner's Dictionary¹⁵ defines erection thus: "If a man has an erection, his penis is hard and stands up because he is sexually excited." This means that erection involves the penis. Putting the elements of penetration and erection together, consummation takes place when an erected penis is inserted into the vagina or 'any other bodily orifice' of the other party.

This is complemented by the decision of the court in *Pettway v. Vose*¹⁶ where it was stated that "sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of another person's body, but emission of semen is not required."

³ (1845) 1 Rob 279,163 ER 1039

⁴ Stroud's Dictionary of Words and Phrases (2006) Sweet&Maxwell. London

⁵Chapter 220, Laws of the Federation of Nigeria 1990

⁶ [1948] p.323

⁷ [1948] p.330

⁸ L v. L (1922) 38 TLR 697

⁹ Coitus interruptus is the practice of withdrawing the penis from the vagina so that the sperm does not get into the vagina. It can also be referred to as withdrawal method of contraception.

¹⁰ (1948) AC 274, overruling *Cowen v. Cowen* (1946) pg. 36(CA) cited in *Nwogugu E.I* (2014) Family Law in Nigeria (3rd Ed.) HEBN Publishers plc. Ibadan.

¹¹ *Supra*.

¹² <http://thelawdictionary.org/penetration/>

¹³ *op.cit*.

¹⁴ at pg.1248

¹⁵ Oxford Advanced Learner's Dictionary (Eighth ed.) (2010) Oxford University Press. UK. At pg 495

¹⁶ 921 F. Supp. 61,62 (D.R.I 1996)

Erection is as important as penetration. This is why an impotent man cannot consummate a marriage because he cannot achieve an erection. From the above erection and penetration are two major elements of consummation. Whether they must occur contemporaneously is another question. Is it possible to arrogate consummation properties to a sexual intercourse which only involves the penetration of fingers or other objects into the female genitalia? If the element of erection must always precede penetration, then only the penetration of penis will accord consummation status to sexual intercourse. Except it can be proven that some other objects can gain erection. Here, sex dolls come to mind. Sex dolls are robots imputed with artificial intelligence. They can simulate erotic feelings and can also gain erection by artificial means. It does appear then that they can produce the two elements of sexual intercourse, to wit, erection and penetration. Will it then be appropriate to say that the use of sex dolls for sexual intercourse minded and perpetrated by the husband will amount to consummation?

4. 21st Century Scientific Innovations vis-a-vis Consummation of Marriage

The legal meaning of consummation is constant. Any development as regards it must not be inconsistent with the established meaning of consummation of marriage in law. In recent years, developments like artificial insemination, use of contraceptives and the legality of homosexual and transgender marriages including sex dolls have sprung up¹⁷. It is necessary therefore to check their level of discrepancy with the existing meaning of consummation. Much has been said about the sex doll technology above.

4.1. Artificial/Alternative Reproductive Therapy (Ai)

The whole idea of artificial/alternative (hereinafter referred to as artificial insemination) centres on reproduction without the meeting of the penis and the vagina. To this end, there is no sex, but there is reproduction. There are four types of artificial insemination:

- Intrauterine Insemination (IUI)
- Intrauterine tub peritoneal insemination (IUTPI)
- Intracervical insemination (ICI)
- Intratubal insemination (ITI)

Normally, the sperm used is from the male partner, unless the male is infertile or there is no male involved. In these cases, a sperm donation is used. If a donor is being used, the sample will be donated to a sperm bank, quarantined, and the donor is tested for any transmittable diseases. IUI is most likely to succeed if it takes place just after ovulation. The sperm is kept frozen and is thawed out before any preparation is made. A chemical known as cryoprotectant is added to the sample. This helps both the freezing and thawing of the sperm. If the semen comes from the male partner, the couple will provide a sample. This can be obtained using:

- Masturbation
- A collection condom, in which semen is collected during sexual intercourse
- Surgical sperm aspiration, when the sperm is removed directly from the male reproductive tract
- Vibratory or electric stimulation, when the male cannot ejaculate in the usual way.

Once the sperm sample has been collected, it is "washed" to remove any elements that could interfere with the fertilization. After a semen sample has been prepared, it is ready for artificial insemination.

During IUI, the sperm is put directly into the uterus with a fine catheter. The vagina walls are kept open using an instrument known as a speculum. The catheter enters the uterus through the cervix, and the sperm is pushed through the catheter. For best results, IUI is normally carried out just after the woman has ovulated. This is when she is most fertile, as the eggs have just been produced.¹⁸

Erection may be present in the process but penetration is absent. Therefore, a marriage cannot be consummated by artificial insemination. Although the procedure of AI involves the penetration of medical tools, the tools cannot be said to have gained erection. It will still amount not count for consummation even where the wife is involved in the act of masturbation which produced the semen for insemination.

If, for example, a man and his wife had never had sex but have produced a child already, the marriage has still not been consummated. The innocent party can still file a petition for nullity or dissolution of the marriage in accordance with **Sections 5(1)(a) and 15(2)(a)** of the Matrimonial Causes Act, respectively.

4.2. Use of Contraceptives or Other Mechanical forms of Contraception

A contraceptive is a drug, device or practice used to prevent a woman from becoming pregnant.¹⁹ Contraception can be done using different methods among which are:

¹⁷ Bull & Anor. v. Hall & Anor. [2012] 2 AllER at 1017

¹⁸ <http://www.medicalnewstoday.com/articles/217986.php>

¹⁹ Oxford Advanced Learner's Dictionary op.cit. at p.316

- Oral Contraception: this involves the oral intake of drugs to prevent pregnancy; the intake of contraceptive pills.
- Use of Contraceptive sheaths: The use of condoms to prevent pregnancy. Both male and female condoms, diaphragm and cervical sponges.
- Mechanical Contraceptive Techniques: This involves the practice of withdrawal-the withdrawal of the penis from the vagina during sex before ejaculation. This is also called coitus interruptus; among others like hormonal contraception.
- The use of contraceptives does not prevent erection and penetration. For condoms, there is only a prevention of the flow of semen into the vagina. For a marriage to be consummated, emission is not necessary.
- The practice of coitus interruptus has been argued to be partial sex. However, inasmuch as it is 'partial' sex, there is erection and penetration. This was the issue in the case of *D v A*²⁰ where, after hearing that the respondent's vagina was an "impervious cul de sac incapable of expansion" to allow penetration to a depth greater than two inches, Dr Lushington declared D's and A's marriage void.
- It was held in *R v R (otherwise F)*²¹ that a marriage is consummated where there is coitus interruptus or where the husband is incapable of ejaculation.
- And, bizarrely, in *Snowman v Snowman*²², despite the petitioner's pregnancy by her husband, consummation had not taken place because penetration had not occurred. With Latinate delicacy, Bateson J in *Snowman* found that "fecundation [had] taken place ab extra".²³

4.3. Homosexual and Transsexual Marriages

Marriages between homosexuals and transsexuals (otherwise called trans genders) have been legalised especially by Western countries like the USA, England, Scotland, among others. In Nigeria, it is prohibited by virtue of the Same Sex (Prohibition) Act²⁴. By Section 1(1) of the Act, the conclusion of any marriage contractor civil union in Nigeria between persons of the same sex is prohibited and will not give rise to the benefits of a valid marriage. Section 5(1) makes the solemnization of same sex marriage an offence punishable on conviction by 14years imprisonment. A lesser period of 10years imprisonment is prescribed for the registration or operation of gay clubs or societies and for aiding or abetting any prohibited acts.²⁵

However same sex marriage is not prohibited in some countries. The legislation to allow same-sex marriage in England and Wales was passed by the Parliament of the United Kingdom in July 2013 and came into force on 13 March 2014, and the first same-sex marriages took place on 29 March 2014. Legislation to allow same-sex marriage in Scotland was passed by the Scottish Parliament in February 2014 and took effect on 16 December 2014. The first same-sex marriage ceremonies occurred on 16 December 2014 for same-sex couples previously in civil partnerships. The first same-sex marriage ceremonies for couples not in a civil partnership occurred on 31 December 2014.²⁶

It has been argued that the local Marriage Act like similar legislations in Europe and the USA, did not explicitly prescribe for marriage between person of the opposite sex. In response, it has been countered that universally, the understanding which underpinned marriage legislations is that only persons of the opposite sex are involved.²⁷

As already established in this work, marriage is consummated by erection and penetration of the penis into the vagina or any other bodily orifice. That is to say that oral, anal, and even nasal sex²⁸ can constitute consummation of a same-sex marriage. In essence, a same-sex marriage can be consummated. This, of course, is only possible with male partners. For female partners, there can be no consummation of marriage. However, The US Law on same-sex marriage, excludes the necessity of consummation in a same-sex marriage.

There is a little discrepancy with transgender couples because either or both of them have undergone a surgery to change genitals. For example, a (former) woman can marry a woman. So, in this case where erection and penetration are possible, a marriage can be consummated.

5. Conclusion

Generally, consummation in marriage had been made possible only in the 'normal' marriages and through the 'ordinary' sexual intercourse. However, when the meaning of consummation is placed side-by-side with some new developments which accompanied the 21st century, this work establishes the fact that consummation is still possible in some cases and impossible in some other cases like the process of alternative insemination. It is necessary therefore, to interpret the term 'consummation' in this light.

20 supra.

21 (1952) 1 AllER 1194

22[1934] P 186

23 <http://www.solicitorsjournal.com/blog/case-point-consummation-legal-oddity>

24passed May 2013.

25 Nwogugu E.I op.cit.

26 <http://www.wikipedia.org/legislation-to-allow-same-sex-marriage>

27 Nwogugu E.I op.cit

28 Penile penetration into the nostrils.

6. References

- i. Black's Law Dictionary (9th.Ed.) (Usa: West Publishers (2009) Pp 359 &1248
- ii. Nwogugu E.I Family Law In Nigeria (3rd Ed.)(Ibadan: Hebn Publishers (2014)
- iii. Oxford Advanced Learners Dictionary (8th Ed.) (Uk: Oxford University Press(2010) , Pp. 495 &316
- iv. Stroud's Judicial Dictionary Of Words And Phrases (London: Sweet&Maxwell (2006)
- v. Amechi E. E. A, The Legal Status Of Foreign Women Married To Nigerians ()
- vi. Ambali M. A, Practice Of Muslim Family Law (Lagos:Princeton Publishing Co. (2013), Pp. 263-264
- vii. Osondu A. C., Modern Nigerian Family Law And Practice (Lagos: Printable Publishing Company, (2012)