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Judicial Activism and the Constitutional Imperative: Addressing the Issue of Spousal Privilege Under the Nigerian Evidence Act

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Abstract

Rules of evidence are applied in all trial proceedings in Nigeria and the Evidence Act 2011 is the principal statute that regulates the procedure of trials in the country. Under the Evidence Act, spouses are granted a form of privilege with regards to communications carried out during their marriage and, in a criminal trial, one spouse cannot be compelled to testify against the other spouse in most circumstances. This paper analyses this privilege and the non-compellability under the Evidence Act and examines why these are only extended to a select class of spouses instead of all spouses. The concept of marriage in Nigeria is addressed in-depth and juxtaposed against marriage under common law. The issue of judicial activism and the enforcement of fundamental rights are also considered and evaluated to determine the best approach which might bring greater equality and fairness to criminal trials in Nigeria.

Keywords: compellability, discrimination, judicial activism, marriage, privilege.

I. Introduction

The twin concerns of competence and compellability have been integral concepts that have arisen and dominated trials and procedures of evidence almost since the

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inception of trials. In jurisdictions all over the world, requirements and conditions have been laid down with regard to the conduct of trials by the prosecution or plaintiffs on the one hand and the defence on the other. There are rules of evidence which dictate the privilege that is applicable to various parties to a suit and the shield that might be available to an accused person in criminal proceedings. The yardstick placed by the Nigerian Evidence Act 2011[1] for the trigger of the protection of spousal privilege will be addressed.

Marriage is an institution that is generally recognised as bestowing some duties and benefits on the parties who are legally married. The status granted to spouses is one which various jurisdictions recognise and this often forms the bedrock of trust and dependency between spouses. Many jurisdictions acknowledge the need and desirability of spouses being able to communicate freely and frankly with each other and have extended a form of privilege to communications made between spouses. According to Mr. Justice McLean in *Stein v Bowman*,[2] "to break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence".[3]

By virtue of the provisions of the Evidence Act, it is clear that Nigeria recognises the importance of privilege being attached to the communications between husband and wife. However, the same Act has routinely restricted the benefits of this privilege to only a select class of spouses. Thus, a colossal hurdle appears to have been routinely placed in the path of other classes of married persons not recognised by the Evidence Act. These other classes of spouses have been left open by the Evidence Act to having spousal communications which have been carried out during the subsistence of their marriage exposed to the public. This article shall seek to excavate the intention for what appears to be a blockade of an unacknowledged group of married individuals. The ultimate intention of this article is to shed more light on certain provisions of the Evidence Act and proffer solutions and recommendations to ensure that, where possible, there is consistency, uniformity, equality and fairness in the provisions of the Evidence Act as well as in the manner litigants are treated in proceedings before requisite courts of law which are bound to follow the provisions of the Evidence Act in Nigeria.

II. Competence and Compellability of Spouses Under the Nigerian Evidence Act 2011 and Under Common Law

When analysing and examining trials, it is clear that litigation often involves a lot of legal and factual manoeuvrings on the part of the parties, their counsels,

1 Hereinafter referred to as 'The Evidence Act'.

2 38 US 209.

3 ibid 223.

and the trial judge. Judicial proceedings in courts in Nigeria are governed by the Evidence Act 2011.[4] The Evidence Act contains rules and procedures governing facts, witnesses and the taking and giving of evidence in court/judicial proceedings in Nigeria.

Under Nigerian law, the baseline and default position are that anyone can be a competent witness. In the law of evidence, competence has been defined as "the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice".[5] The presumption of competence may be displaced by a court on various grounds provided by the governing statute. Thus, according to Section 175(1) of the Evidence Act:

> "All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".

From the foregoing, it is clear that it is the court which is adjudicating over each trial that is empowered to determine whether any witness is not competent to testify before it. In the absence of the court declaring a witness as not competent to testify, such witness is deemed competent to testify before the court. Furthermore, Section 178[6] states that in all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses and Section 179[7] goes on to provide that in criminal cases, the defendant, his wife or her husband, or any person jointly charged with such defendant and tried at the same time, and the wife or husband of the person so jointly charged, is competent to testify. Therefore, it is clear that spouses of accused persons are competent witnesses at all times.

It is imperative to understand, however, that the fact of a witness being competent is quite different to the determination of whether such a witness is compellable to testify before a court. A compellable witness is a "witness who may lawfully be required to give evidence and who may be punished for contempt of court for refusal".[8] Compellability can be defined as the capability to coerce an

4 The Evidence Act 2011 governs both civil and criminal proceedings in all courts in Nigeria apart from civil proceedings in Area Courts, Customary Courts, Sharia Courts of Appeal and Customary Courts of Appeal of all States and the Federal Capital Territory. Section 256 of the Evidence Act 2011.

5 Henry Campbell Black, *Black's Law Dictionary* (4th edn., West Publishing 1968) 355.

6 Evidence Act 2011.

7 ibid.

8 Oxford Reference, 'Overview: Compellable Witness' <www.oxfordreference.com/view/10.1093/oi/authority.20110803095628763> accessed on 17/05/2021.

individual to do what he ought to or obliged to do.[9] This work shall focus on the issue of the compellability of spouses in judicial proceedings and any privilege that might accrue to spouses when it comes to giving testimonies in court proceedings.

Section 182 of the Evidence Act[10] sets out the provisions relating to the compellability of spouses and states as follows,

> "(1) When a person is charged –
>
> (a) with an offence under sections 217, 218, 219, 221, 222, 223, 224, 225, 226, 231, 300, 301, 340, 341, 357 to 362, 369, 370, or 371 of the Criminal Code;
>
> (b) subject to section 36 of the Criminal Code with an offence against the property of his wife or her husband; or
>
> (c) with inflicting violence on his wife or her husband, the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of the person charged.
>
> (2) When a person is charged with an offence other than one of those mentioned in subsection (1) of this section. the husband or wife of such person is a competent and compellable witness but only upon the application of the person charged.
>
> (3) Nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage or a wife compellable to disclose any communication made to her by her husband during the marriage".

By virtue of the provisions of Section 182(2) a husband or wife of an accused person is not a competent or compellable witness except in instances where the accused person makes an application for such spouse to testify.[11] This is also the position under common law. In *R v Mount*,[12] three men were convicted of breaking into a shop and one of the witnesses for the prosecution had been the wife of one of the convicted men. The conviction of the men was quashed on appeal

[9] B.E. Ewulum and Obinna Mbanugo, 'Competence and Compellability Under the Evidence Act of Nigeria' (2017) 2(1) *SAJMS* 1. Available online at <www.nigerianlawguru.com/articles/practice%20and%20procedure/COMPETENCE%20AND%20COMPELLABILITY%20UNDER%20THE%20NIGERIAN%20EVIDENCE%20ACT.pdf> accessed 17/05/2021.

[10] Evidence Act (n 6).

[11] This applies to all offences not mentioned in Section 182(1) of the Evidence Act 2011.

[12] [1934] 24 Cr. App. R. 135.

as it was held that the wife of an accused was not a competent or compellable witness against the accused persons. The wife would have been a compellable and competent witness for the prosecution and against the co-accused of her husband if the husband had entered his plea and been convicted (or acquitted) prior to his wife testifying as a witness. In *Leach v R*,[13] Lord Atkinson said that the principle of not compelling a spouse to testify against their partner was 'deep seated' in the common law. Furthermore, in *Hoskyn v Metropilitan Police Commissioner*,[14] Lord Wilberforce stated,

> "a wife is in principle not a competent witness on a criminal charge against her husband. This is because of the identity of interest between husband and wife and because to allow her to give evidence would give rise to discord and to perjury and would be, to ordinary people, repugnant".[15]

Sections 182(1)(b) and (c) and 182(3) of the Evidence Act is a codification of the common law rule as set out in the case of *Stein v Bowman*[16] which is to the effect that, "the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse".[17] Mr. Justice McLean gave the reason for the rule when he stated:

> "This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to

[13] [1912] AC 305 at 311.
[14] [1979] AC 474.
[15] ibid.
[16] 38 US 209.
[17] Per McLean J at 222. Also Section 187 of the Evidence Act 2011, which provides, "No husband or wife shall be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married nor shall he or she be permitted to disclose any such communication, unless the person who made it or that person's representative in interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for an offence specified in section 182 (1) of this Act".

destroy the best solace of human existence".[18]

Thus, it is clear that the sanctity of marriage and the unity of spouses and the family is one which the law recognises, respects, and seeks to protect. Within the sacred institution of marriage, the law and courts are loathe to foist a situation of discord between a married couple.

The issue of the compellability or otherwise of the spouse of an accused person is one which has the potential of adversely affecting the defence of such an accused person, as where the spouse of the accused can be compelled to give evidence, hitherto confidential information that might have been divulged by the accused to his or her spouse might become admissible in court to the detriment of the accused. In the case of *Ayo v The State*,[19] the court held that the spouse of an accused person is not a competent or compellable witness for the prosecution unless upon the application of the accused person. The court further made it clear that the section of the Evidence Act under consideration was not talking about the consent of the accused person being obtained but that the spouse of the accused person can only testify for the prosecution upon the *application* of the accused. Thus, the accused person must apply to the court to have his/her wife or husband testify as a witness on behalf of the prosecution.

III. "Marriage": What Does the Evidence Act 2011 Mean by This Term?

Having addressed the issue of the competence and compellability of spouses in Section II of this work and due to the high stakes that might be involved, it is imperative to understand the concept of marriage and the twin terms of 'husband' and 'wife' within the ambit of the Evidence Act. Ordinarily, it would be easy to presume that the terms 'husband' and 'wife' mean a man and a woman who have gone through a valid marriage ceremony and union. According to the Legal Dictionary, the terms 'husband' and 'wife' mean "a man and woman who are legally married to one another and are thereby given by law specific rights and duties resulting from that relationship".[20] The status of a husband or a wife only becomes activated by virtue of the man and woman entering into a marriage. Black's Law Dictionary defines 'husband and wife' as "one of the great domestic relationships; being that of a man and woman lawfully joined in marriage, by

[18] *Stein v Bowman* (n 2) 223.

[19] [2010] All FWLR (Pt. 530) 1377.

[20] The Free Dictionary, 'Legal Dictionary' <https://legal-dictionary.thefreedictionary.com/Husband+and+wife> accessed on 19/05/2021.

which, at common law, the legal existence of a wife is incorporated with that of her husband".[21]

It therefore is obvious that marriage is the key institution of reference when seeking to understand the twin concepts of 'husband and wife' and Black's Law Dictionary states that marriage is the

> "[…] civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex".[22]

In the case of *Davis v Davis*,[23] marriage was denoted as "[…] the act, ceremony, or formal proceeding by which persons take each other for husband and wife". The Nigerian Interpretation Act 1964 defines a "Monogamous marriage" as meaning "a 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 continuance of the marriage".[24] Whilst the Interpretation Act restricts it definition of a marriage to only monogamous marriages, there are other types of marriages applicable and recognised in Nigeria.[25] The Evidence Act acknowledges the existence of customary and Islamic marriages.[26] Under Section 166, it states:

> "When in any proceeding whether civil or criminal, there is a question as to whether a man or woman is the husband or wife under Islamic or Customary law, of a party to the proceeding, the court shall, unless the contrary is proved, presume the existence of a valid and subsisting marriage between the two persons where evidence is given to the satisfaction of the court of cohabitation as husband and wife by such man and woman".

The Supreme Court also acknowledged the existence of customary and Islamic marriages in the case of *Jadesimi v Okotie-Eboh*.[27] Furthermore, the Evidence Act explicitly states its yardstick for determining who a husband and a wife is and

[21] Black (n 5) 875.
[22] ibid 1123.
[23] (1934) 119 Conn. 194, 175 A. 574-575.
[24] Section 18 of the Interpretation Act 1964.
[25] These are customary and Islamic marriages.
[26] Section 258(1) of the Evidence Act.
[27] (1996) 2 NWLR Part 128 at 142-148.

gives its legislative nod and acknowledgement only to marriages prescribed in its interpretation section Section 258(1), which states:

> "In this Act 'wife' and 'husband' mean respectively the wife and husband of *a marriage validly contracted under the Marriage Act, or under Islamic law or a Customary law applicable in Nigeria, and includes any marriage recognised as valid under the Marriage Act* (emphasis added)".

By the foregoing provision of the Evidence Act, it is incontrovertible that any other provisions within the Act which refers to the terms 'husband' and 'wife' intend to cover any husband and/or wife of a marriage which has been validly conducted under Nigerian Islamic or Customary Law or a marriage conducted under the Marriage Act. There are some schools of thought which hold that the Evidence Act when referring to 'husband' and 'wife' does not mean or apply to husbands and wives of customary or Islamic marriages.[28] However, whilst this opinion might have been applicable and held true under the old repealed Evidence Act,[29] it does not hold true today under the current Evidence Act 2011 as is seen by Section 258(1) of the Act.

Having established that the provisions of the Evidence Act apply to spouses of both Nigerian customary and Islamic marriages, marriages under the Marriage Act[30] have to be examined in other to determine the spouses who can take refuge under the provisions of Section 182(2) and (3) of the Evidence Act 2011. The Marriage Act sets out all marriages considered as valid under the Act. Consequently, Sections 34 and 35 of the Marriage Act state as follows:

> "34. All marriages celebrated under this Act shall be good and valid in law to all intents and purposes.
>
> 35. Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted

[28] Ewulum and Mbanugo (n 9) 6.

[29] Chapter E14 Laws of the Federation of Nigeria 2004. It should be clarified and understood that under the old Evidence Act, Section 162 stipulated that communications between spouses of polygamous marriages were not privileged and spouses of such marriages were competent and compellable for both the prosecution and defendant. However, communications of spouses under an Islamic marriage (even though polygamous in nature) were privileged by virtue of the proviso to Section 162 of that same Act.

[30] Chapter M6 Laws of the Federation of Nigeria 2004.

> under or in accordance with any customary law, or in any manner apply to marriages so contracted".

The Marriage Act by virtue of the foregoing provisions explicitly acknowledges the validity of all marriages which have been contracted under the Act and does not seek to invalidate any marriage contacted under native law and custom/customary law. The provisions of Section 35 of the Act show that the Act deduces that there might be people who will purport to contract a marriage under customary law whilst already being to another party married under the Act. Section 33(1) of the Marriage Act expressly prohibits the aforesaid scenario when it states that "no marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person with whom such marriage is had". Therefore, while there is an acknowledgment of the existence of customary marriages[31] by the Marriage Act, the Act does not seek to invalidate or seek to dispute the validation of any marriage celebrated under customary law. In addition to the foregoing, the Marriage Act, recognises the validity of foreign marriages. It must however be pointed out that it is not all foreign marriages that the Marriage Act recognises as valid marriages. By virtue of the provisions of Section 49 of the Marriage Act, the foreign marriages the Act recognises as valid a specific niche of marriages as it states, marriages

> "[…] between parties one of whom is a citizen of Nigeria, if it is contracted in a country outside Nigeria before a marriage officer in his office, shall be as valid in law as if it had been contracted in Nigeria before a registrar in the registrar's office".

Boosting and complementing the provisions of Section 49 of the Act, Sections 50-52 of the Marriage Act provide as follows:

> "50. For the purposes of this Act, every Nigerian diplomatic or consular officer of the rank of Secretary or above shall be regarded as a marriage officer in the country to which he is accredited.
>
> 51. The office used by a marriage officer for the performance of his diplomatic or consular duties shall be regarded as the marriage officer's office for the purposes of this Act.

[31] Traditionally, Islamic marriages were deemed a form of customary marriage or marriage under customary law. S. M. Olokooba, 'Analysis of Legal Issues Involved in the Termination of "Double-Decker" Marriage Under Nigeria Law' (2007-2010) Nigerian Current Law Review 196. Available at: <www.nials-nigeria.org/pub/NCLR7.pdf> accessed on 20/05/2021.

> 52. Subject to the modifications specified in section 53 this Act shall apply in relation to a marriage contracted before a marriage officer as nearly as may be as it applies in relation to a marriage contracted before a registrar".

Thus, the Marriage Act expressly recognises the validity of only two types of statutory marriages, *viz*, marriages conducted under the Act in Nigeria and only foreign marriages conducted by a diplomatic or consular officer in his office as dictated by Sections 49-52 of the Act.

With regard to this paper and the subject-matter under consideration, the significance of the recognition of validity of marriages under the Marriage Act is magnified by the weight the Evidence Act has placed on the Marriage Act by partly tying its definition of 'husband' and 'wife' to the marriages contracted under the Marriage Act or marriages recognised as valid under the Marriage Act. As stated above, the Evidence Act also recognises marriages conducted under Nigerian Customary law and Nigerian Islamic law. Thus, going by the combined readings of the requisite provisions of the Evidence Act and the Marriage Act, the only types of husbands and wives recognised under the Evidence Act are the husbands and wives of marriages contracted under one of four headings/categories:

i. Marriage contracted in Nigeria under the provisions of the Marriage Act;

ii. Foreign marriages carried out pursuant to Sections 49-52 of the Marriage Act;

iii. Marriages contracted under Customary Law applicable in Nigeria; and

iv. Marriages contracted under Islamic Law applicable in Nigeria.

Therefore, if a husband or wife does not fall under any of the four categories of marriages mentioned above, such a spouse cannot take refuge under the provisions of Section 182(2) and (3) of the Evidence Act with regards to the privilege afforded on the compellability of persons as witnesses. The implication of the foregoing is that anyone who has validly and legally contracted a marriage in any jurisdiction outside Nigeria (and who did not do so in line with the provisions of Sections 49-52 of the Nigerian Marriage Act) will not have their marriage recognised as valid under the Evidence Act in Nigeria. These include spouses who have contracted valid monogamous marriages (whether Christian or statutory) in

foreign countries and couples who have contracted valid polygamous marriages (via the local/customary and/or Islamic law) in foreign jurisdictions. It must be emphasised that the only type of foreign marriage which the Marriage Act affords any validation is one in which at least one of the parties is a Nigerian citizen.[32]

IV. What Next?

The manifest absurdity brought on by the provisions of the Evidence Act with regard to the compellability of a spouse coupled by the classes of spouses whom those provisions cover, as examined in-depth in Sections II and III above, is heightened by the fact that we live in times wherein the world/planet is considered as a global village and the routine migration which was common in the 20th century is even more so in the 21st century, with millions of Nigerian citizens scattered around the globe.[33] These provisions mean that a plethora of Nigerian citizens (and other foreigners) who have validly and legally got married in other jurisdictions are left out in the cold and can have their spouses compelled to give evidence against them before Nigerian courts on the sole ground that their marriages are not recognised as valid under the Nigerian Evidence Act and correspondingly their communications with their husbands or wives [as the case may be], during the marriage, is not recognised as privileged under the Evidence Act (because they are not the category of husband or wife prescribed under the Act).

There are many Nigerian citizens domiciled in Nigeria who elect to celebrate or contract their marriages in other jurisdictions. Also, as specified above, there are numerous Nigerian citizens who are resident in other jurisdictions and who choose to celebrate their marriages in those foreign jurisdictions. Furthermore, there are foreigners who have celebrated their marriages in other foreign jurisdictions but for one reason or the other either choose to reside in Nigeria or to conduct their business in Nigeria. These classes of people have the validity of their marriage negated under the Evidence Act. The sheer legislative sophistry wrought by the provisions of the Evidence Act which implicitly deny recognition to the validity of foreign marriages (this includes foreign Islamic and foreign customary marriages which are legal, valid and binding in the jurisdiction where those marriages were

[32] Section 49 of the Marriage Act.

[33] Sharkdam Wapmuk, Oluwatooni Akinkuotu and Vincent Ibonye, 'The Nigerian Diaspora and National Development: Contributions, Challenges, and Lessons from Other Countries' (2014) Kritika Kultura 292-342, 295. Available at: <www.researchgate.net/publication/265569685_THE_NIGERIAN_DIASPORA_AND_NATIONAL_DEVELOPMENT_CONTRIBUTIONS_CHALLENGES_AND_LESSONS_FROM_OTHER_COUNTRIES> accessed on 21/05/2021. See also, Andrew S. Nevin et. al., 'Strength from Abroad: The Economic Power of Nigeria's Diaspora' (2019) PricewaterhouseCoopers 2, 5. Available at: <www.pwc.com/ng/en/pdf/the-economic-power-of-nigerias-diaspora.pdf> accessed on 21/05/2021.

contracted or celebrated as well as foreign monogamous/statutory marriages) shows an unbridled bias which cannot be defended on any logical ground and this stance adopted by the Act is one deserving of robust condemnation.

It should be highlighted that though the Marriage Act restricts its recognition to the validity certain marriages celebrated pursuant to the Act, the Matrimonial Causes Act[34] is not so encumbered. It implicitly acknowledges the validity of marriages contracted or celebrated within foreign countries so long as the said marriage complied with the requirements for the celebration of marriages in that jurisdiction. Thus, Section 3(1)[35] of the Matrimonial Causes Act states:

> "Subject to the provisions of this section, a marriage that takes place after the commencement of this Act is void in any of the following cases but not otherwise, that is to say, where –
>
> (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
>
> (b) the parties are within the prohibited degrees of consanguinity or, subject to section 4 of this Act, of affinity;
>
> (c) *the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnisation of marriages* (emphasis added)".

Traditionally under common law, recognition of the validity of marriages were made using conflict of laws rules, and the principal applicable rule was the *lex loci celebrationis*.[36] This principle regards the law of the place of celebration of a marriage. In private international law, this law governs such questions as the

[34] Chapter M7 Laws of the Federation of Nigeria 2004.

[35] Of interest here are the provisions of Section 3(1)(c) of the Matrimonial Causes Act.

[36] There were other conflict principles applied as well, when necessary, e.g. the *Lex Domicili* and the *Lex Fori* rules. For the purpose of the issue under determination here, the *Lex Loci Celebrationis* principle is endorsed simply for the determination of the validity of the marriage with regards to whether it has met the requirements of the governing law of the country wherein it is celebrated or contracted. It is of course acknowledged that with regards to marriages of same sex couples/spouses, Nigerian law expressly prohibits such marriages and explicitly bars any recognition of such marriages as valid within Nigeria. This is in line with the provisions of the Same Sex Marriage (Prohibition) Act 2013 (Particularly of reference here are the provisions of Sections 1-3 of the Act). This is a different issue than that of the acknowledgment only of some classes of marriages under the Evidence Act.

formalities required for a marriage.[37] In *Cmvchund v Barker*,[38] Lord Hardwicke stated, "[…] so in matrimonial cases, they are to be determined according to the ceremonies of marriage in the country where it was solemnised". In *Scrimshire v Scrimshire*,[39] the *lex loci celebrationis* rule was extensively examined and discussed.[40] In that case, two English minors got married in France, but did not strictly observe the requirements of the laws of France. When the issue of the validity of the marriage arose, it was argued that the marriage should be determined according to English law on the basis that the parties were English subjects and domiciled in England. This position was rejected by the court which took the position that under English law, "[...] English marriages are to be deemed good or bad according to the law of the place where they are made".[41] Sir Edward Simpson, who was the judge in the case affirmed that it was the French law which was to be applied in that case when he stated,

> "It is the law of this country [England] to take notice of the laws of France, or of any foreign country, in determining upon marriages of this kind. The question being in substance this – whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law".[42]

The Matrimonial Causes Act through its provisions of Section 3(1)(c) has adopted the *lex loci celebrationis* principle in a plain attempt to ensure that the courts are vested with powers and the jurisdiction to adjudicate over marital matters and determine marriages where necessary, especially when a party or both parties are domiciled in Nigeria and are seeking a resolution of some marital issues before Nigerian courts. And historically, Nigeria being a common law country has applied rules of common law in its judicial determination at various levels.[43] Numerous

[37] Oxford Reference, 'Overview: Lex Loci Celebrationis' <www.oxfordreference.com/view/10.1093/oi/authority.20110803100103412> accessed on 21/05/2021.

[38] [1744] 1 Atk. 22, 50.

[39] [1752] 2 Hag. Con. 393.

[40] Hamid Tahenni, *Conflict of Law Rules in Marriage: An Approach Based on the Co-ordination of the Relevant Policy Considerations*, (Ph.D. Thesis, University of Glasgow 1995) 14. Available at: <http://theses.gla.ac.uk/5009/1/1995TahenniPhd.pdf> accessed on 22/05/2021.

[41] *Scrimshire v Scrimshire* (n 40) 402.

[42] ibid 407-408.

[43] Efe Etomi and Elvis Asia, 'Family Law in Nigeria: Overview – Marriages' (01 October 2020) Thomson Reuters Practical Law. Available at: <https://uk.practicallaw.thomsonreuters.com/6-613-4665?transitionType=Default&contextData=(sc.Default)&firstPage=true> assessed on 22/05/2021.

conflict of law principles have been therefore applied by Nigerian courts through the ages. The *lex loci celebrationis* rule is thus applicable in Nigeria.

The Evidence Act 2011 is predominantly a modification of the old Evidence Act (Cap M14 LFN 2004), however there are significant differences in some of the provisions of the new Act, with the introduction of new provisions and concepts and the jettisoning of other provisions from the old Act. One of the new provisions within the current Evidence Act is the recognition of the validity of marriages contracted under Nigerian customary law. A significant reason for overhauling the old Act and embarking on the enactment of a new Evidence Act was because the old Act had become inadequate to deal with emerging and new procedures of evidence which were integral for the proper dispensation of justice in the 21st Century.

Many jurisdictions have overhauled their legislations and procedures as exigencies demand and require. For example, in the United Kingdom, the question of the validity of marriages is one that has been germane to the determination of numerous immigration applications. The case of *Kareem v Secretary of State for the Home Department*[44] is one of the cases arising from an immigration application which turned on the recognition of the validity of a foreign (proxy) marriage by a different sovereign State. This case concerned a Nigerian national whose Dutch citizen 'wife' was working in the UK. He contended that they married by proxy in Nigeria but neither of them attended the ceremony. It was said that their marriage was held in accordance with customary law. A marriage certificate was issued when the local customary court subsequently registered the ceremony. The claim was supported by numerous documents but the decision-maker was unconvinced that Kareem was married as claimed.[45]

In the circumstances, the appellate court determined that "[…] the legal system of the nationality of the Union citizen must itself govern whether a marriage has been contracted".[46] The decision turned on the fact that the decision-maker did not believe that there was a marriage contracted despite being provided with a marriage certificate, an order and an affidavit. Thus, the decision maker decided to ignore the *lex loci celebrationis* approach and instead apply the rationale of the recognition of the marriage by Kareem's spouse's home country of the Netherlands. A few years later, a different track was taken in the case of *Awuku v*

[44] This case is also referred to as *Kareem (Proxy Marriages – EU Law)* [2014] UKUT 24 (IAC).

[45] Asad Ali Khan, 'Overruling Kareem: Proxy Marriages and Recognition under European Union Law (02 January 2017) *United Kingdom Immigration Law Blog*. Available at: <https://asadakhan.wordpress.com/2017/01/02/overruling-kareem-proxy-marriages-and-recognition-under-europe-an-union-law/> accessed on 22/05/2021.

[46] *Kareem* (n 45), para 18. Available at: <www.bailii.org/uk/cases/UKUT/IAC/2014/%5B2014%5D_UKUT_24_iac.html> accessed on 22/05/2021.

Secretary of State for the Home Department,[47] which had facts which were similar to those in the *Kareem* case and wherein the appellate court held that marriage by proxy would be treated as valid in England if recognised by the local law of the place it is contracted. The adjudicating judge, Lloyd Jones, LJ., held that,

> "CMG Ockelton, Judge McKee, Deputy Judge McCarthy had been wrong in Kareem to create a new rule of private international law requiring reference to the law of the member state of the EU national in order to determine the marital status of a spouse or partner for the purposes of Directive 2004/38/EC".[48]

As has been stated above, it is routine for new rules and procedures be adopted from time to time as virtually every jurisdiction deems it expedient to adapt and amend their laws, regulations, rules etc. to address current times and needs and to provide more effective regulation and justice. There is no rational reason why the Evidence Act 2011, failed to address the archaic recognition of marriage provisions it inherited from its predecessors and instead adopt the stance taken by the Matrimonial Causes Act, which is a legislation that dates back to 1970. There was more than ample opportunity to adjust its validity of marriage stance as was done with the new recognition of the validity of marriages conducted under Nigerian Customary Law.

Obviously, under the rules of statutory interpretation, it could be successfully argued that it was never the intention of the framers of the Evidence Act to extend recognition to all foreign marriages whether or not they are valid in the jurisdiction they were celebrated in and neither was it their intention to bestow any privileges under the Act upon foreign spouses. This undoubtedly would be an argument which employs in the first instance, the literal interpretation of statutory construction to give the interpretation of the provisions of the Evidence Act their literal meaning. In addition, there will be the use of the *Expressio Unius Est Exclusio Alterius* rule of statutory interpretation which translates as, "the expression of one thing is the exclusion of the other".[49] This rule advocates that "when one or more things of a class are expressly mentioned others of the same class are excluded".[50]

[47] [2017] EWCA Civ 178.

[48] Asad Ali Khan, 'Lex Loci Celebrationis and Proxy Marriage in English Law' (15 April 2017) *United Kingdom Immigration Law Blog*. Available at: <https://asadakhan.wordpress.com/2017/04/15/lex-loci-celebrationis-and-proxy-marriage-in-english-law/> accessed on 22/05/2021.

[49] Duhaime.org, 'Duhaime's Law Dictionary: Expressio Unius Est Exclusio Alterius Definition' <www.duhaime.org/LegalDictionary/E/ExpressioUniusEstExclusioAlterius.aspx> accessed on 22/05/2021.

[50] Merriam-Webster, 'Dictionary: Expressio Unius Est Exclusio Alterius <www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius> accessed on 22/05/2021.

The case of *R v Inhabitants of Sedgley*,[51] illustrates the judicial application of the *Expressio Unius Est Exclusio Alterius* rule. In this case, the court decided that a levy which was applicable and issued on the occupiers of "lands, houses and coal mines" pursuant to the 1601 Poor Relief Act could not be applied on the owners or occupiers of other types of mine. Nigerian courts have also employed the *Expressio Unius Est Exclusio Alterius* rule of interpretation in a raft of cases. These cases include *Bello Musa Magaji v Alhaji Ishola Are Ogele*[52] and *Ehuwa v O.S.I.E.C.*[53] Thus, an argument along these lines could be validly made with regards to the exclusion of other types of marriages by the Evidence Act restricting its recognition only to marriages contracted under Nigerian Islamic law or Nigerian customary law and statutory marriages under the provisions of the Marriage Act referred to in Section 258(1) of the Evidence Act. It must however be said that while the foregoing might be a tenable argument, it does not come across as rational because the Evidence Act and the provisions thereunder relating to husbands and wives are not in danger of losing their veracity and effect if those provisions and clauses are extended to all spouses, whether local to Nigeria or foreign, so long as the fact and existence of their marriage can be validly and adequately proven.

V. A Way Forward?

From the discussion in Section IV above, it is clear that courts bear a duty to adjudicate matters in line with extant statutes and to primarily interpret statutes using their plain unambiguous meanings. Whilst this is the base position taken in the interpretation of statutes, courts are not only courts of law, but of justice and they do have the inherent power to adjudicate over matters and interpret statutory provisions in a manner that will negate injustice and ensure that justice is served.

Courts are often faced with situations in which they have to decide between applying the strict letter of the law or refusing to apply a specific piece of legislation because it is null and void on account of its contravention with the Constitution or because it will be unjust to uphold and apply such legislation. When a court finds itself at such a crossroad, it is within the power of such court to – where justice calls for it – engage in some judicial activism.

Judicial activism is advocated here because a strict reliance on the literal interpretation of the Evidence Act if applied by the courts in instances of spousal privilege will not only be discriminatory, but might result in substantial injustice. Judicial activism can be stated to be the exercise of judicial review or decision by a court or judge(es) in which the court/judge is unafraid of striking down and

[51] [1831] 2 B & Ald 65.
[52] 3PLR/2012/16 (CA); or [2012] LPELR-9476 (CA).
[53] [2006] 18 NWLR (Pt. 1012) 544 at 568-569.

invalidating legislative or executive actions or departing from judicial precedent[54] especially when dealing with constitutional or statutory interpretation. Black's Law Dictionary's definition of judicial activism is, "judicial philosophy which motives judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate Judges".[55] In addition, the Merriam-Webster Dictionary defines judicial activism as, "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent".

Some people perceive judicial activism in a pejorative manner. Such views consider any action by the judiciary which is not in strict compliance of traditional roles as overreaching and an encroachment by the judiciary of the rightful roles of the legislative or executive arms of government. It is sometimes argued that judicial activism goes much further than blurring the lines between the separation of powers of the three arms of government, but indeed involves a usurpation of some of the powers of either the legislative or executive arms by the judiciary.[56] However, it must be pointed out that there is a difference between judicial activism and judicial overreach. Judicial overreach comes into play when the judiciary has overextended itself past its judicial mandate and trespasses into the jurisdiction or mandate of another arm of government. It has been stated that there is a thin line of division between judicial activism and judicial overreach. Whilst judicial activism is said to imply the exertion by the judiciary of its powers to herald justice and is usually utilised for the benefit of the society, judicial overreach is when the judiciary exercises its power in a manner that is blatantly beyond the remit of its scope of authority and boundary. There is no disputing that there are different views and different interpretations of what judicial activism is. However, for the purpose advanced here, it is viewed as a catalyst for change from the slavish monotonous dogged adherence to skewed or lopsided legislation and a reinforcement of the fundamental rights of people in Nigeria.

According to Lord Macmillan in *Donoghue v Stevenson*,[57] "the criterion of judgment must adjust and adapt itself to the changing circumstances of life".[58]

[54] Kermit Roosevelt, 'Judicial Activism' (*Britannica Encyclopedia: Law*) <www.britannica.com/topic/judicial-activism> accessed on 25/05/2021.

[55] Henry Campbell Black et al., *Black's Law Dictionary* (6th edn., Centennial Edition 1891-1991, West Publishing 1998) 984.

[56] Ibrahim Imam et al., 'Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition' (2011) 1(2) African Journal of Law and Criminology 50-51.

[57] [1932] AC 562 (HL).

[58] ibid 619.

This opinion was cited by Lord Denning with aplomb in his dissenting opinion in the case of *Candler v Crane, Christmas & Co.*,[59] when he stated:

> "Let me first be destructive and destroy the submissions put forward by Mr. Foster. His first submission was that a duty to be careful in making statements arose only out of a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases, no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. *This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of Ashby v White,*[60] *Pasley v Freeman,*[61] *and Donoghue v Stevenson you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed* (emphasis added)".

Whilst the *Candler* case was with regards to an action for economic loss resulting from negligent misstatement, it shows the trajectory taken by judges audacious enough to deviate from the stringent and narrow path of legislative interpretation or the application of rules and procedure. Furthermore, approximately thirteen years later, the English House of Lords in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*,[62] gave their judicial nod to the dissenting judgement of Lord Denning in the *Candler* case and thus a new course was charted. That was a sublime manifestation of the power of judicial activism in action and the change it can usher in with regard to ensuring that the hands of the courts are not fettered inordinately by the requirement of strict adherence to *stare decisis*, rules or procedure.

In Nigeria, the courts have been known to engage in judicial activism and when they have done so (particularly when the court's decision goes against the grain of legislative or executive action), they have on occasion faced a backlash or a barrage of criticisms.[63] However, judicial activism by Nigerian courts have on many occasions provided a panacea for beleaguered individuals and bodies

[59] [1951] 2 KB 164 (CA).
[60] [1703] 2 Ld. Raym. 938.
[61] [1789] 3 Term Rep. 51.
[62] [1964] AC 465.
[63] Ibrahim Imam (n 57) 51.

who have struggled under the yoke of unconstitutional or ambiguous legislation or even oppressive administrative orders. In the case of *National Union of Electricity Enterprises v Bureau of Public Enterprises*,[64] the Nigerian Supreme Court dismissed the notion that the National Industrial Court of Nigeria had been elevated to the rank of a superior court of record by virtue of the Trade Disputes (Amendment) Act of 1992 and the National Industrial Court Act of 2006. The court unequivocally held that without an amendment of the provisions of Section 6(3) and (5) of the Constitution of the Federal Republic of Nigeria 1999, the National Industrial Court was not a superior court and was inferior in status to the High Courts. The Supreme Court stated,

> "It means therefore, that by Decree 47 of 1992 arrogating to the National Industrial Court a Superior Court of record as has been contended by the appellants does not by that token make the said National Industrial Court a Court of Superior record without due regard to amendment of the provisions of Sections 6(3) and (5) of the 1999 Constitution which has listed the only Superior Courts of record recognized and known to the 1999 Constitution and the list does not include the National Industrial Court; until the Constitution is amended, it remains a subordinate court to the High Court".[65]

The intervention of several courts by their refusal to bow to the legislative arm of government and correspondingly repudiating the purported exclusive jurisdiction of the National Industrial Court or its promotion to the rank of superior court by three different legislations over three decades,[66] was a herculean task compared to simply bestowing recognition of the new elevated status on the National Industrial Court and acknowledging its new exclusive jurisdiction in trade disputes and employment matters. But difficult or otherwise, the courts stuck to their guns and invalidated any provisions that were in conflict with the Constitution. The National Assembly had to step up and finally amend the Nigerian Constitution to ensure that the National Industrial Court was elevated to a superior court and given exclusive jurisdiction over labour matters via the Third Alteration Act 2010, instead of continuing to attempt to do so through another

[64] [2010] 3 SCM. 165 - 167.

[65] Per Chukwuma-Eneh, JSC.

[66] The first legislation was in 1976 with the Trade Disputes Act, then came the Trade Disputes (Amendment) Act in 1992 and then the National Industrial Court Act of 2006.

regular Act or legislation.[67] The Nigerian courts have engaged in judicial activism almost since the independence of Nigeria as a sovereign State and have given decisions that have bucked the *status quo* in a plethora of cases, including, *Western Steel Workers Ltd v Iron and Steel Workers Union of Nigeria (No. 2)*,[68] *Akintola v Adegbenro*[69] and *Arthur Nwankwo v The State*.[70]

The powers vested in the courts in Nigeria mean that they can *suo motu* raise (if neither party in a case does) the issue of the constitutionality of the provisions of the Nigerian Evidence Act that restrict the spousal privilege availed by the Act to a select married section of the Nigerian populace. In Nigeria, a court has the powers to raise an issue *suo motu* where the justice of the case demands it. In *Angadi v PDP & Others*,[71] the Supreme Court stated:

> "The issue of whether the trial Court below was right in considering processes which they had not been addressed on processes filed before it. This Court has held particularly in *Gbagbarigha v Toruemi* (2013) 6 NWLR (Pt.1350) 289 at 310, paragraphs C-G as follows: 'When a Judge raises an issue on his own motion, or raises an issue not in contemplation of the parties; or an issue not before the Court, the Court is said to have raised the issue *suo motu*".[72]

The court in *Angadi* stated further that when an issue is raised *suo motu* the parties should be heard before a decision is reached on the issue. The court however provided the exceptions to the rule requiring parties to be heard in instances where the court had raised an issue *suo motu*. The exceptions are: "(1) when the issue relates to the Court's own jurisdiction; (2) when both parties are not aware or ignored a statute which may have bearing on the case; or (3) when on the face of the record serious questions of the fairness of the proceedings is evident".[73]

The raising of the constitutional issue might be done by the court because the provisions of the Evidence Act (via its restriction of marriage to Nigerian Islamic or customary law and the adoption of the validity of marriage yardstick

[67] Alero E. Akeredolu and David Eyongndi, 'The Exclusivity of the Jurisdiction of the National Industrial Court Under the Nigerian Constitution Third Alteration Act and Selected Statutes: Any Usurpation?' (2019). Available at: <www.researchgate.net/publication/339335455_THE_EXCLUSIVITY_OF_THE_JURISDICTION_OF_THE_NATIONAL_INDUSTRIAL_COURT_UNDER_THE_NIGERIAN_CONSTITUTION_THIRD_ALTERATION_ACT_AND_SELECTED_STATUTES_ANY_USURPATION> accessed on 26/05/2021.

[68] [1987] 1 NWLR (Part 49) 284-303.

[69] [1963] 3 WLR 63 (PC).

[70] [1985] 6 NCLR. 228.

[71] [2018] LPELR-44375 (SC).

[72] Per Bage JSC, 30-31, paras D-E.

[73] ibid.

set out by the Nigerian Marriage Act) is discriminatory. In constitutional law, discrimination is

> "[t]he effect of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found".[74]

Chapter IV of the Nigerian Constitution enshrines the fundamental rights guaranteed by the Constitution and under that chapter, Section 42 deals with a person's right to freedom from discrimination and provides that a Nigerian citizen belonging to any community, ethnicity, sex, religion, place of origin or political opinion shall not be subjected either expressly by or in the practical application of any law in force in Nigeria, or any executive or administrative action of the government to disabilities or restrictions to which other citizens of Nigeria are not made subject to or be accorded any privilege or advantage which is not accorded to other Nigerian citizens.

Upon going through the provisions of Section 42 of the Constitution, it is evident to any reader that intendment and application of Section 42 of the Constitution are exact and unambiguous. The constitution enshrines the right of every Nigerian citizen to be free from discrimination whether it be in the form of *any law* in force in Nigeria or as a result of any *executive* or *administrative action*. Any law or executive/administrative action that places impediments which discriminate against any citizen or group of citizens which other citizens or groups are not subject to is illegal and unconstitutional.

Section 1(1) of the Constitution proclaims the supremacy of the Constitution over all persons and authorities in Nigeria. Section 1(3) of the Constitution goes further and states, "If any other Law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other Law shall to the extent of the inconsistency be void". The supremacy of the Constitution over all other laws in Nigeria is well settled and the courts have upheld this constitutional supremacy by striking down provisions of laws which have contravened the Constitution and this can be observed from the decisions in the cases of *Inspector General of Police v All Nigeria Peoples Party*[75] and *Inakoju & Ors. v Adeleke & Ors*.[76] Furthermore, the case of *Attorney-General of Lagos State v Attorney-General of the Federation*,[77] which deals with the constitutionality of an executive/administrative action carried out in contravention

[74] Black (n 5) 553.
[75] (2007) 18 NWLR (Pt.1066) 457.
[76] (2007) 4 NWLR (Pt. 1035) 403.
[77] (2004) 18 NWLR (PT.904) 1.

of explicit constitutional provisions, shows how the courts have ruled with regard to the issue of the supremacy of the constitution over such actions. In this case, the Supreme Court of Nigeria sitting in its original jurisdictional capacity on a dispute instituted before it by Lagos State against the Federal Government of Nigeria, ruled that the actions of the president in which he withheld the federal allocation payable to Lagos state were in contravention of the provisions of Section 162(5) of the Constitution and were therefore unconstitutional, null and void.

From the foregoing, it is clear that any Nigerian court, when presented with a case in which the spouse of an accused person on trial is being compelled to testify because they are not shielded by the provisions of Section 182(2) or (3) of the Evidence Act, can raise the issue of the constitutionality of those provisions as they discriminate against some Nigerian citizens which is prohibited by the Constitution, the apex statutory instrument and *grundnorm* of the land, or raise the issue of a serious question of the fairness of the proceeding before it.

In addition to a court *suo motu* raising the fairness or constitutionality of the provisions of Section 182(2) and (3) of the Evidence Act, any person who feels he/she been discriminated against can raise that issue or apply to a high court[78] to enforce his/her constitutionally guaranteed fundamental right.[79] There have been a plethora of cases in which actions have been filed by people seeking for the enforcement of their fundamental rights which have been contravened.[80] It is imperative to point out here that there is a snag that could be pointed out. This snag is the fact that the prohibition of discrimination provision under Section 42(1) of the Constitution as a fundamental right is only guaranteed to Nigerian citizens and thus, persons who are non-Nigerian citizens – even if they are long-term residents – are not within the contemplation of that provision from the wordings of that section. This means that with the high level of movement and migration in the 21st Century, a considerable amount of people are in jeopardy of being negatively impacted by the provisions of the Evidence Act referred to above. However, such persons might succeed in raising, before the court, the issue of the fairness of the provisions of Section 182(2) and (3) of the Evidence Act and getting the court to invalidate those provisions on that ground.

Another option which could do away with the problem posed by the aforementioned discriminatory provision of the Evidence Act is for the Nigerian National Assembly to exercise its powers under Section 4 of the Constitution and amend the provision of Section 258(1) of the Act which restricts the definition of a husband and wife to a husband and wife of a marriage contracted under the

[78] Either a Federal High Court or the High Court of a state in Nigeria.

[79] Section 46(1) & (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[80] E.g. *Emmanuel Ejiogu Onuhikemi v Smridu Nigeria Limited* (Suit NICN/LA/265/2015), wherein the Plaintiff's action was for discrimination (among other claims).

Marriage Act or under Nigerian Islamic or customary law. The amendment by the National Assembly should define the terms husband and wife as the husband and wife of a marriage validly contracted under the laws of the place where the marriage was celebrated. This amendment will cure the mischief and injustice worked under the Evidence Act and will negate any need for judicial activism on the part of any court or even do away with the necessity for any person seeking to enforce his/her fundamental right against discrimination or even challenging the justice and fairness of offending provisions. This seems the progressive and less disruptive track to follow, as it will equiponderate the rights of all married persons who have validly entered into their marriage, irrespective of the place their marriage was contracted and thus discriminate against no spouse.

VI. Conclusion

The importance of the Evidence Act in Nigerian litigation cannot be overemphasised as it is the primary legislation that governs the taking of evidence in criminal proceedings in all the courts in Nigeria and civil proceedings in magistrate courts and most superior courts of record in the country.[81] It is therefore crucial that the legislation that dictates the rules to be followed in judicial proceedings must be logical, fair and unbiased.

The provisions of Section 182(2) and (3) of the Evidence Act, which deny some married people the benefit of a privileged protection on their marital communications and having their spouses cocooned by non-compellability, are discriminatory as they currently stand whilst linked to the interpretation section[82] of the Act (which is also tied to the Marriage Act). The status quo under the Evidence Act 2011 has revealed that there is a need to overhaul the provisions of the Act which have been shown to be discriminatory against some married people and usher in an era of fairness and equality. As has been recommended above, the easiest and fastest way to ensure equality would be for the National Assembly to amend the provisions of the Evidence Act which defines what a husband and a wife is. Until that is done, judicial activism, raising a serious question of the fairness of the trial and the enforcement of their fundamental right from discrimination might be the available options open to those persons who stand accused of a crime and who are adversely affected by the privilege and compellability provisions of the Evidence Act.

[81] By virtue of Section 256(1) of the Evidence Act.
[82] Section 258(1) of the Evidence Act.