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Dissertation

"Alimony and Child Support Obligations in Law: The Law in a Somewhat Head-on Collision with Tradition — Nigeria as a Case Study"

verfasst von

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Wien, 2014

Studienkennzahl lt. Studienblatt:	A 083 101
Dissertationsgebiet lt. Studienblatt:	Rechtswissenschaften
Betreuer:	Ao. Univ.-Prof. Dr. René Kuppe

ACKNOWLEDGEMENTS

I would like to thank my dissertation supervisor, ao. Univ.-Prof. Dr. René Kuppe, for his erudite contributions by way of observations and suggestions, and for equipping me with scholastic material. Also worthy of my sincere thanks are: Emer. o. Univ.-Prof. Dr. Richard Potz, Hon.-Prof. Dr. Brigitte Schinkele and ao. Univ.-Prof. Mag. Dr. Stefan Schima, all of the Department of Legal Philosophy, Law of Religion and Culture, for their many useful and thought-provoking conversations that helped to shape this dissertation. I am also grateful to Univ.-Prof. Mag. Dr. Helmut Ofner, LL.M., and Univ.-Prof. Dr. Manfred Nowak, LL.M., both of Department of European, International and Comparative Law, for their supervisory assistance. Others are: Ao. Univ.-Prof. MMag Michaela Windisch-Graetz, Mag. Helmut Sax, Mr Schmidt Roland and all members of staff at the university too numerous to mention here. To you all my friends too, you have all been sources of inspiration to me, so I say thank you. And finally, I cannot forget to say very special thanks to my family for the unwavering support and prayers and, of course, my darling wife, Queen Izuhunwa Asemota, for her understanding and perseverance even at times of persistent difficulties and, above all, for her love that knows no bounds.

For my two beloved daughters

Eniro (aka Iyobor)

and

Efe (aka Owen)

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ABBREVIATIONS/ACRONYMS

<i>ACHPR</i>	<i>African Charter on Human and People's Rights</i>
<i>ACRWC</i>	<i>African Charter on the Rights and Welfare of the Child</i>
<i>ACtHPR</i>	<i>African Court on Human and Peoples' Rights</i>
<i>ADR</i>	<i>Alternative Dispute Resolution</i>
<i>ACHR</i>	<i>American Convention on Human Rights</i>
<i>AU</i>	<i>African Union</i>
<i>CAT</i>	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
<i>CDHRI</i>	<i>Cairo Declaration on Human Rights in Islam</i>
<i>CEDAW</i>	<i>Convention on the Elimination of all forms of Discrimination Against Women</i>
<i>CRA</i>	<i>Child Rights Act 2003</i>
<i>CRC</i>	<i>United Nations Convention on the Rights of the Child</i>
<i>DFID</i>	<i>Department for International Development</i>
<i>ECHR</i>	<i>European Convention on Human Rights</i>
<i>ECtHR</i>	<i>European Court of Human Rights</i>
<i>FGM</i>	<i>Female Genital Mutilation</i>
<i>IACtHR</i>	<i>Inter-America Court of Human Rights</i>
<i>ICCPR</i>	<i>International Covenant on Civil and Political Rights</i>
<i>ICESCR</i>	<i>International Covenant on Economic, Social and Cultural Rights</i>
<i>OAU</i>	<i>Organisation of African Unity</i>
<i>OIC</i>	<i>Organisation of Islamic Conference</i>
<i>UDHR</i>	<i>Universal Declaration of Human Rights</i>
<i>UNICEF</i>	<i>United National Children's Fund</i>
<i>UNPFA</i>	<i>United Nations Population Fund</i>
<i>VAW</i>	<i>Violence against Women</i>
<i>WHO</i>	<i>World Health Organisation</i>

Chapter 1

INTRODUCTION

The country, “Nigeria”, was once described as a “mere geographical expression”,¹ and therefore, the amalgamation of the northern and southern protectorates by which it was created by the British colonialists, was regarded “a mistake of 1914”.² Such unequivocal scepticism and overt denial of nationhood on the part of some of the founding fathers were (and still are) the eroding blights of the very existence of the Nigerian state. And with the emergence of a nation after that amalgamation and because of the plurality of norms that predated the coming into existence of the country, it became crucial for the colonialists to determine which type of administrative system best suited the so-called “mere geographical expression”. And as no one legal norm could be regarded as inferior to the other, it was subsequently decided that there should be plurality of legal orders. Accordingly, Fredrick Lugard, the first Governor-General of the Country, states in his book, *"Dual Mandate in British Tropical Africa"*, the need (and as one of the British government's foreign policy initiatives) to ensure that traditions of the then native peoples were given serious consideration in all its transactions because it was believed that such strategy would help in no small measure in promoting the peoples' welfare and happiness.³ And this was what they did.

With such postulation, it became necessary to work towards the application of the various “traditions” in the form of customary law alongside the received English law, thereby establishing multiple legal systems in Nigeria.⁴ And understandably, only such expression of shrewd irony by the Britons could have put what later became their clandestine political manoeuvring machine on a pedestal towards achieving their paramount aim.

¹ An excerpt from a 1947 statement credited to Chief Obafemi Awolowo who was one of the foremost Nigerian politicians and Premier of Western Region of Nigeria, as quoted by Crawford Young in “Impossible Necessity of Nigeria: the Struggle for Nationhood”, available online at: <<http://www.foreignaffairs.com/articles>>

² A phrase coined out of a statement credited to the then Premier of Northern Region of Nigeria and Sardauna of Sokoto, Sir, Alhaji Ahmadu Bello.

³ See Frederick Lugard, *"The Dual Mandate in British Tropical Africa"* (1926), available online at: <<http://www.fafich.ufmg.br/luarnaut/Lugard-dual%20mandate.pdf>>

⁴ This was provided for by the Supreme Court Ordinance No. 6 1914 as long as any such customary law intended to be applied in any matter passed the "Repugnancy Test".

However, the aftermath of applying the tenets of those numberless traditions gradually positioned the Nigerian state on a verge of political and legal pluralisms and in the long run, its component units – the citizens – were inadvertently dragged into a somewhat confrontational turmoil in addition to various other vices that still engulf it to this day. And thus, what fell within the confines of the so-called law for some inhabitants of a particular community became crime, or something in between, for some others even within the same community and the central framework for regulating the scope of application of the piecemeal norms –the constitution – became evidently weakened. And therefore, the vulnerable groups – women and children – equally became significantly affected.

That tradition is an integral part of the family unit or that it protects it, is a platitude that is constantly not contextualized. But when members of a family unit, particularly, women and children, suffer abuse in the form of oppression, neglect, discrimination and other harmful traditional practices due to the ensuing conflict of norms, it becomes imperative that the root causes are traced, examined and addressed. And to do this, an approach or methodology by which to go about it must be devised.

Employing human rights-based approach, this thesis takes a fervent look at alimony and child support payment obligations in the context of obstinate harmful traditional practices that have defied the application of other related legal norms as an inducement to draw attention to these challenges, with a view to curtailing the excesses of some of them, while, at the same time, streamlining them for optimal benefit of all.

Evidently, these traditions are subsumed under the concept of customary law and those who propagate them are usually the only beneficiaries. For example, this assertion can be inferred from the British “indirect rule” system by which many traditional rulers were empowered. Knight⁵ writes that in an effort to strengthen colonial control over these areas (meaning Africa, particularly, Botswana, Tanzania and Mozambique) chiefs were often times made into puppets of the colonial state and forced to enact colonial policies against their communities’ best interests. And similarly, almost all (if not all) traditional institutions in Nigeria are headed by chiefs or traditional rulers, as they are often called, and they enjoy very robust pecuniary advantages. Even though some knew from the inception that they were being used

⁵ Knight R. S (2010) “Statutory Recognition of Customary Land Rights in Africa, An Investigation into Best Practices for Lawmaking and Implementation”, available online at: <<http://www.fao.org/docrep/013/i1945e/i1945e00.pdf>> Accessed 20.02.2013 p.22

as stooges during the colonial era, those who were willing to cooperate with the British were enthroned and given considerable powers, no matter how small their territory. But when standing chiefs refused to co-operate, new chiefs were appointed by colonial governments, regardless of any authentic claim of representation by the people they were expected to govern. Knight further emphasizes that in some instances, colonial courts responsible for adjudicating “native law” distorted it by filtering its norms through European legal concepts. She reiterates that while this system had the appearance of maintaining traditional “African ways”, in reality the chiefs’ powers and the “customs” being enforced were subject to the definition and detailed control of the colonial administration. And accordingly, at the lowest level of the colonial administrative structures, traditional rulers were included through a policy of indirect rule while at the top level, the Legislative Council, traditional rulers were also included through their participation in early political parties.

Such mediation and filtering of the customary law by the colonial administration, for examples, according to Cousins (2007:300), transformed custom by overly emphasizing the group-based nature of land rights, redefining women’s rights as secondary and subordinate to the rights of men, and eroding “mechanisms that constrained the power of traditional leaders and kept them responsive to rights holders, these being replaced by a requirement for ‘upward accountability’ to the state, creating opportunities for abuse of power and corruption”.⁶ And as a result of this foundation, the proponents of traditional institutions with clandestine intent to continue in the enjoyment of the supply of scarce resources have never relented in ensuring that such opportunities persist.

Even if one decides not to cast a semblance of slur on tradition and deals extensively with its virtues, its discriminatory principles and practices are not negligible burdens to the entire Nigerian social structures as they appear to have become so apparent over time that the sanctity of the very traditional values are not only threatened but ruined. And therefore, discrimination which, in effect, means oppression, is now the watch-word.

Perhaps it is useful at this juncture to state that “tradition” is “a belief, custom or way of doing something that has existed for a long time among a particular group of people”.⁷ It is also

⁶ See generally, Knight R. S (2010) “Statutory Recognition of Customary Land Rights in Africa, An Investigation into Best Practices for Lawmaking and Implementation Available online at: <<http://www.fao.org/docrep/013/i1945e/i1945e00.pdf>> Accessed 20.02.2013 p.23

⁷ Oxford Advanced Learner’s Dictionary, (2005) OUP.

variously referred to as customary law, native law and custom, culture, etc. Equally, customary law is defined by Black's Law Dictionary as "a law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws". The Supreme Court of Nigeria also provided a definition of Customary law viz: *"...any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway"*.⁸ It is believed to emanate in small scale, possibly from family setting or group of individuals, and may subsequently spread over time, until entire community has accepted it. It is not declared or enacted, but grows or develops through time.⁹ The date when it first came into full effect can usually be assigned only within broad limits.¹⁰ Even though tradition has the tendency to gradually grow, its origin is usually difficult to trace. As Fuller¹¹ rightly observes, "though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author; there is no person or defined human agency we can praise or blame for its being good or bad. "There is no authoritative verbal declaration of the terms of the custom; it expresses itself not in a succession of words, but in a course of conduct."

When compared to law, one finds that they both have very many similarities in contents and character. In fact, both can be referred to as legal orders which may be understood as the norms, rules and institutions formed by a society or group of people to ensure social stability.¹² Both describe what is right and how to act, and what is wrong and how not to act; and the remedies for and consequences of such actions.¹³ The only difference one readily finds is that whilst tradition's scope of authority and application may be limited to a particular group of people, law, on the other hand, may be decreed, pronounced or passed by means of primary or secondary legislation to generally regulate some activities, a people or a country. Hence law is simply described as a system of rules; the whole system of rules that everyone in a country or society must obey.¹⁴

⁸ See Judgement of the Supreme Court of Nigeria in *Zaidan v Mohssen* (1973) Available online at: http://64.50.180.197/dbsight/search.do?indexName=lawpavilion_ipad&templateName=search_ipad&q=court%3A%22Supreme+Court%22&start=19800. Accessed 26.06.2014

⁹ See Lon L Fuller, *Anatomy of the law* 71 (1968).

¹⁰ *Ibid*

¹¹ See Lon L Fuller, *Anatomy of the law* 71 (1968).

¹² See ICHRP "When Legal Words Overlap: Human Rights, State and Non-State Law" (2009:2).

¹³ *Ibid*

¹⁴ See Oxford Advanced Learner's Dictionary (OUP 2005)

The critical aspect of tradition's existence that necessitated this very critical discourse is the fact that it usually collides with other legal norms, particularly human rights. For example, commenting on the debate on the Statement on Human Rights submitted to the United Nations by the American Anthropological Association (AAA) in 1947, Engel¹⁵ observes that "culture" (a variant of customary law or tradition) and human rights have largely been seen as oppositional. She opines that "to be for human rights would be to oppose the acceptance of cultural practices that might conflict with one's interpretation of human rights' norm."¹⁶ To support an acceptance of conflicting cultural practices would be to oppose human rights,¹⁷ she concludes. These conflicts are incessant and have resulted in a lot of crises which have in turn degenerated to loss of lives and property. In Nigeria today, there are customary law, Sharia law and the other pieces of primary and secondary legislation in operation and all of these now compete for supremacy, thereby creating the avoidable points of legal collision critiqued in this dissertation.

Accordingly, 'Alimony' and 'Child Support' payment obligations are regulated not only by Acts of parliament, but also by the pre-existing traditions and customs in the form of customary law or Sharia law. The topical issues to be critiqued in this work centre not only on how these traditional or customary law rules violate the rights of people, but also on how they conflicts with and invariably impede the application of both domestic law and ratified international treaties and conventions; consequent upon which women are divorced with relative ease, leaving them to fend for themselves without any preparation.¹⁸ This study therefore traces customary law concept (including Sharia law) from its beginning through to its inclusion in the Nigerian legal system. It also takes a hard look at how customary law (which I refer to as tradition) has hindered the application of both domestic and international law regimes, particularly those relating to alimony and child support payments. It discusses the pluralistic nature of the Nigerian legal system and how it all started. This therefore means that a bit of Nigeria's political history will be examined so as to identify the sources of the norms that make up the country's legal system: those that are indigenous and those that are foreign or borrowed. Concretely, this thesis identifies customary law, Sharia law and English

¹⁵ Engel Karen "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 – 1999" (2001).

¹⁶ Engel Karen "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 – 1999" (2001).

¹⁷ Engel Karen "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 – 1999" (2001).

¹⁸ See Adamu, F. L., Ahmad, A. and Sada, I.N. (2005) 'Promoting Women's Rights Through Sharia Northern Nigeria' A publication by the Centre for Islamic Legal Studies of Ahmadu Bello University, Zaria. Available online at: <http://www.ungei.org/resources/files/dfid_promoting_womens_rights.pdf>.

law (common law) as the three legal systems that have brought about the issue of legal pluralism in the country and goes on to discuss the conflicts that have resulted, as well as the challenges the nation faces in pulling all of the systems together using one consolidated legal system. The thesis shall be concluded by attempting to proffer some model solutions gleaned from exploring other legal and political cultures believed to have better or effective mechanisms for enacting and enforcing Alimony and Child Support payments which is hoped would help to eradicate or reduce the prevalent child neglect and gender inequality in Nigeria.

Research Methodology

To carry out this work, various research methods shall be engaged. And because of the topical nature of the matters to be examined in this work, or because their effects negatively dovetail into prevalent incessant national crises, major part of the information used shall be drawn from secondary sources. Much information shall be gathered particularly from documents containing general administrative procedures and case law system. News report on Nigeria by electronic and print media as well as reports by Civil Society groups, NGOs, international community, etc., shall also be of great importance. These shall be in form of:

- the Nigerian Constitution
- relevant statutory instruments from Nigeria;
- Nigerian National Gazettes
- relevant statutory instruments from other legal systems
- relevant sections of the body of case law
- relevant newspaper and journals
- observations/reports documented by Civil Society Groups/NGOs
- International legal documents (treaties, conventions, case law, reports, etc.)

However, those from primary sources shall be mainly compilations of the author's experiences by way of personal and practical observations on some of the issues.

Research Questions

The major research issues that this project seeks to critique are:

- How can the enforcement of alimony and child support obligations be used in law to address issues of unrestrained traditional practices in Nigeria?
- How do human rights violations by way of child neglect on the one hand, and gender inequality in the form of denial of the rights of women on the other hand, culminate in inadvertent polarization in social class and invariably put one in continual unfair dominant position over the other?
- How does the lack of proper application of domestic law on the subjects amount to violation of relevant sections of international treaties and conventions, particularly, with regard to the Convention on the Rights of the Child (CRC) and the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW)

Attempt shall be made to examine these research issues and other matters that are incidental to them in this dissertation. It must however be mentioned that they may not be analysed in the way and manner they are structured above as some of them may be entwined with some other topical issues to the effect that doing so may put some sort of restriction on the extent to which the related matters are identified and dealt with.

Research Approach

The most profound proviso of a legal system is that its norms must be applied to practical issues without *fear or favour* and without discrimination on grounds of race, sex, colour, religious affiliation, etc. And therefore, while the concepts of “rule of law” and “access to justice” may be propagated concertedly on theoretical basis by policy makers and others in authority, they may be pragmatically ineffective in a country like Nigeria. This is particularly so because its pluralistic legal systems are ordered in a way that appears as though the rules of the supposedly “*subordinate*” systems (“*subordinate*” as constitutionally provided for) are allowed or acquiesced to not only conflict with those of the one with “*superior*” jurisdiction,

but also to infringe on the rights of the child and the framework for protecting gender equality.

Accordingly, it is hereby submitted that, with the plural legal systems operational in Nigeria, protecting the rights of the child, as well as ensuring that women are neither discriminated against nor relegated to the background in the name of tradition, the extraordinary approach to reach much further would be to entrench strong doctrines of human rights. And I therefore intend to look at the whole issue using human right based approach.

Relevance of Research

In anticipation of conflicts of legal norms in Nigeria, a hierarchy of laws was formulated, and thus the constitution, from which other forms of law (should) derive their authority, was drafted, instituted and given primacy over all other forms of law. Quite clearly, every juristic system is composed of competing norms, but the specific aims to be achieved must be such that benefit the generality of the populace rather than privileged few. To ensure that some norms are subordinate to a specific set of norms therefore, the hierarchical order in which the norms are structured must be logically premeditated so that the leading element in the form of a constitution, not only steers the whole system, but also acts as a catalyst that sustains other legal norms. And in order that the intents and purposes of such constitution are not also compromised or undermined, all citizens and institutions must comply with that constitution. Accordingly, section 1 of the 1999 Constitution (as amended) provides that:

“(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

(2).The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

(3) 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”¹⁹

¹⁹ Section 1 of the 1999 Constitution as published by Asset Recovery Knowledge Centre and available online at <<http://www.assetrecovery.org/kc/node/f85cace8-6e8d-11dd-9b9d-b7c0585fc33c.1>>

Conversely, the supposedly subordinate legal provisions in form of customary law (including Sharia law) are now being applied in such a way that they compete with the constitution for primacy. And as such, anarchy of some sort is loosed upon the Nigerian polity.

This thesis therefore reveals those areas of law (domestic and international) that have long been infringed upon as a result of the application of customary law alongside other forms of law in Nigeria. It seeks to provide legal researchers and other actors, particularly, human rights campaigners and policy makers, with the necessary tools that will enable them to evaluate whether a plural legal system that includes a somewhat anachronistic rules of customary law is worthwhile in advancing pragmatic access to justice. And because through the application of those harsh rules of customary law, untold hardship has been unleashed on too many people for too long, this topic is therefore of invaluable importance in drawing attention to that fact. By doing so, the formulation of a workable framework – a semblance of a one-size-fits-all structure that incorporates those areas of customary law that reflect contemporary life style and de-emphasizes the anachronistic provisions – can be enhanced. It is also an essential research tool for human rights advocates who sometimes find themselves at legal crossroads, particularly when matters regulated by a multiplicity of legal rules are to be resolved and there is confusion as to which of the existing rules is most appropriate for reaching a considerate verdict.

Motivation

The inspiration to write this thesis did not come as an opportunity or by accident; rather, it was driven by a passion that was prompted by the reminiscences of true-life experiences. Accordingly, because I come from a “class-conscious” nation that has long been ravaged by many years of colonialism, ethnic conflicts, uncompromising religious practices and numberless obstinate traditions that culminated in plural legal norms that have often been selectively applied to favour some people, I have since been induced to be curious about some issues. And when one is curious, prying into things becomes inevitable, as one then begins to wonder why some things are the way they are and how they began. Such questions usually lead to the search for the causal connections between some actions and the resultant reactions.

Poverty, hunger and destitution are all products of poor governance and I have had my own share of all of that, having suffered neglect as a child, albeit not directly by my parents, but rather as a result of the subsistence of certain native law and customs which, *prima facie*, amounted to rights deprivation that were beyond my parents' control. It was against this background that my search for solutions to the plaguing problems began. And I therefore made it my utmost resolve to contribute my own quota in bringing about the much needed capacity building and empowerment of the vulnerable groups through information dissemination, particularly within the academia. My intention therefore is to harness some of my experiences and those of other people that can be ascribed to failure of human rights protection mechanisms through research findings for intellectual development and policy implementation. This dissertation is therefore designed to highlight some of those traditions, culture or customary practices which undermine the proper implementation of instruments that guarantee human rights to everyone, while also finding ways of adapting the suitable elements contained therein for the good of all.

CHAPTER 2

ALIMONY AND CHILD SUPPORT PAYMENTS: WHAT ARE THEY?

In this chapter, I intend to look at who, in the eye of the law, is a child, after which I shall attempt to find out the meanings of *child support and alimony payments*, as defined by some legal instruments. I have chosen to start this chapter this way because I believe it is necessary to first identify these words and phrases in order that they can be put in the context of this thesis and thereafter, I shall reconcile them with how they are seen or regarded in the Nigerian society. There will also be some analyses of closely related subject matters. It is also important that the readers are made aware that, although these elements, “*child, child support and alimony*”, form part of the title of this thesis, but they are not the nucleus of the critique. This may seem rather odd, but the author is of the view that the functions of the mechanisms (legal, administrative or otherwise) for protecting the rights of the vulnerable groups are hindered by certain elements. Whether these elements emanate from law, tradition or mere socio-cultural practices, their effects can be very devastating and indeed, they have resulted in child neglect and denial of women’s rights.

Accordingly, alimony and child support payments, now known variously as “spousal support”, “maintenance” or “Financial Provision”,²⁰ are almost unheard of in Nigeria where, in marriage, the decision of the man is most times “dogmatic”. When a marriage breaks down irretrievably and there are children in the family, the man, unquestionably, decides alone what he wants to do with the children of the family: keep them and send their mother away or send them away along with their mother with little or no arrangement for their upkeep and without any form of financial settlement for their mother. Whichever is the case, the woman is then left to fend for the children all alone while, at the same time, trying to rebuild her own shattered life from the scratch. As for the man, he probably goes on to take a younger woman for a wife.

This behaviour is commonplace, and is usually backed by some uncompromising religious practices and obstinate traditions in the form of customary law. This results in high rates of

²⁰ To avoid mistaking one for the other, ‘Alimony’ and ‘Child Support’, instead of ‘*maintenance*’ shall be used throughout this work, unless in circumstances where ‘*maintenance*’ is used in materials cited.

child neglect and denial of women's rights. It also encourages polygyny²¹ and exacerbates poverty in a country. Perhaps, it more appropriate to say that tradition is only being employed here as camouflage to perpetrate some clandestine agenda that benefits only the male gender.

It is a known fact that tradition is a belief system or a way of doing something that has existed amongst a group of people for a long time. It usually emanates in small scale, particularly, from family setting, and may subsequently spread until an entire community may have accepted it. It must however be stated here that tradition is not law but it can exist alongside law if its rules are applied within the confines of the law in that community. It can also be elevated to the status of law if generally accepted by a majority in a democratic setting or when decreed by a King or Queen in a monarchical government.

In Nigeria, tradition (in the form of customary law) is now at par with other forms of law in terms of ranking, except that the Acts of Parliament can be used to alter the application of any customary law provision that fails the *repugnancy* and other tests²². Its re-inclusion in Nigeria's criminal justice system at the inception of democracy in 1999 has become controversially '*notorious*' that it forms the major basis for discussion in this thesis. More so because in some northern states of the country, Sharia law rules, which originally had the status of customary law in the Independence Constitution of 1960, are now being applied in cases such as rape, theft, murder, etc in very worrisome manner.

The adoption of tripartite legal systems in Nigeria (otherwise known to mainly academics as *legal pluralism*) has led to incessant clashes of cultures between the proponents of so-called "traditional values" in the form of customary law (including Sharia law) and those of contemporary legal norms which stem from seemingly comprehensive democratic processes and rule of law.²³ These clashes have aroused great enthusiasm in critical legal thinking as they apparently undermine the full protection of individual rights, particularly the rights of the child and those of his mother. To put it mildly, throughout Nigeria, the legal authority accorded customary law is seen by many civilized and educated people as a distortion to the established legal order, so much so that the mechanisms for the protection of women and

²¹ The condition or practice of having more than one wife at the same time (see Black's Law Dictionary)

²² This has only been done in few cases as the court seems to have been very cautious about this, probably to prevent being seen as altering nature of customary law.

²³ Since the beginning of the 1980s there have been many religion or tradition based crises (e.g. "*Maitasine*", "*Boko Haram*", "*Kalakatu*"), all of which resulted in the killing and displacement of very many citizens with property worth millions of Naira destroyed. When I first hinted about Boko Haram movement, its activities had not reached such alarming proportion that now cause international outrage and condemnation.

children provided by the state, whether in the form of legislation, judicial interpretation or administrative practices, now appear to be only a show of nominal commitment to the cause.²⁴ And as a result of this nominal commitment, children and women continue to suffer in the hands of those that propagate such anachronistic laws whose application mainly favours those that support their continuous existence. This attitude is clearly traceable to the existence of tripartite legal systems in Nigeria, which, in other words, is generally referred to as “*legal pluralism*”.

For some people in specialised fields other than law, sociology and anthropology, and history and perhaps journalism (albeit minimally), that phrase may seem a mere conceptual analysis of an abstract notion that should be allowed to putrefy in the abyss of anachronism. In this thesis, this author revisits these tripartite systems like some archaeological discovery dug up for reasons of its indomitable character and contemporary effects on the Nigerian polity, particularly as it appears to distort the thorough functioning of mechanisms for the eradication of child neglect, inequality that results in denial of women’s rights, and it subsequently leads to impoverishment in that consequential order.

It is unarguable that legal rules articulate and seek to achieve certain objectives. But whether those objectives will generally be considered right or wrong will depend on the interpretative analysis accorded them in all fronts. And in order to fully appreciate the rationale behind such rules, certain coherent reasoning must be expressly provided and made to be understood by those directly affected by such rules. And such individuals or group directly affected must also be identified. Therefore, in order to comprehend the essence of this discussion, I think it is appropriate to, first of all, identify those that are mostly affected by that phenomenon; after which the process of finding the appropriate solutions can then begin. That way, we will be addressing the problems directly from its root cause; hence I would like to start by determining who is a child, as provided for by existing legal norms – domestic and international.

Who is a child?

The word, ‘child’, is defined variously as there is no universally accepted legal definition for it, even though some international legal instruments have given it a definition, other than that

²⁴ I shall be discussing this in more details as the work progresses

given to it ordinarily by various domestic instruments. While in common usage (including dictionary definition), a child may be regarded as a young person who is not yet an adult, the term has been used by legal provisions as persons under the age of 14, under the age of 16 and sometimes under the age of 18. Each case depends on its context and on the statute governing it.²⁵ For instance, in the English law from which the Nigerian law was developed, a child under the age of 10 is *doli incapax* (i.e. incapable of committing a crime) pursuant to section 50 of the English *Children and Young Persons Act 1933*. And also, apart from the constitutional provisions, Nigeria has a number of statutory offences created for the protection of the child and which have also defined the word ‘child’ differently. For example, the Criminal Code defines a child for the purpose of ascertaining the level of maturity in order that his capacity to commit an offence can be determined. Section 30 of the Code, for example, stipulates that *‘a person under the age of seven years is not criminally responsible for any act or omission’* and *‘a person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission’*.²⁶

Below is a summary of some of the legal provisions with contradictory guidelines as to what age a child should be regarded as a child.

1. Art 2 Children and Young Persons Act of Eastern Nigeria: a person under 14 years
2. Section 2 (1) Children and Young Persons Law, Cap. 38 Law of Bendel State 1976: a person under the age of 14 years
3. Immigration Act: a person under 16 years
4. Matrimonial Causes Act: under 21 years
5. Child Rights Act 2003²⁷: under 18 years
6. Art. 50 Penal Code (Northern States): 7 and 12 years
7. Section 138 Sharia Penal Code (Zamfara State): Age of valid consent in “gross indecency” case: 15 years

²⁵ See generally, the Oxford Dictionary of Law

²⁶ Criminal Code Act, Chapter 77, L.F.N 1990, available at: <<http://www.refworld.org/pdfid/49997ade1a.pdf>>

²⁷ This Act has yet to be fully enacted into law across the country because the 1999 Constitution in section 12 provides that before such provision can have force of law, at least, majority of the states in Nigeria must ratify it.

8. the 1999 Constitution: any married woman is regarded as a person of ‘full age’ in lieu of the required 18 years of age for the purpose of qualifying for the renunciation of her Nigerian citizenship.

Olubor J ²⁸ (as he then was), writing about the conflict of State and Federal legal provisions relating to who is a child, also asserts that Nigeria has two conflicting definitions of the child – one saying that the child is a person under the age of fourteen and the other saying that the child is a person under the age of eighteen years. He emphasizes that it should be noted that one definition is by a state law while the other is by a federal law and that in our system of government; the federal law which has a national application is superior to a state law that is applicable only in the state concerned.

It is also worth mentioning that some statutory provisions are sometimes gender sensitive in that in certain instances, a particular case may be treated differently from the other, depending on whether it concerns a male child or a female child. That is to say that in order to make out an offence, as well as determine its gravity, the sex of the victim and or the offender is one of the determining factors. For example, chapter 21 of the Criminal Code, which relates to morality and indecency, expressly provides under section 216 that any person who unlawfully and indecently deals with a *boy* under the age of 14 is guilty of felony and is liable to imprisonment for 7 years; whereas, section 218 stipulates that any person who has unlawful carnal knowledge of a *girl* under the age of 13 years is guilty of felony and is liable to imprisonment for life, with or without whipping. There is also no clear-cut definition of a child under customary law as the norms which make up customary law in Nigeria vary from one ethnic group to another or from one region to another.

In the absence of a generally accepted domestic definition therefore, it would be illogical to choose one particular age in preference to the other. Consequently, for the purpose of this work, I think it is proper to adopt the definition of “child” as prescribed by two relevant international legal instruments to which Nigeria is a signatory, namely:

- 1) The United Nations Convention on the Rights of the Child 1989 (hereafter CRC); a
- 2) African Charter on the Rights and Welfare of the Child 1990 (hereafter ACRWC).

²⁸ Olubor J. O. “The Legal Rights of the Vulnerable Groups Vis-a-vis Customary Practices”, being a Teaching Material Delivered at a refresher course for Judges and Kadis held 23 – 27 March 2009, at the National Institute Abuja, Nigeria

Article 1 of the CRC stipulates that a child means any person below 18 years of age. Article 2 of ACRWC stipulates that a child also means every human being below the age of 18 years. It must however be stressed that Austria is also a signatory to the CRC. Therefore, both countries are under obligation to carry out their duty in terms of the international legal instruments. And their commitments by virtue of the Vienna Convention on the Law of Treaties 1969 (hereafter the Vienna Convention), which Nigeria and Austria ratified on 31 July 1969 and 30 April 1979 respectively, must be fulfilled in “good faith”.

What is Child Support?

This simply means an amount the absent parent (i.e. one who does not live with the child concerned) must pay (as a contribution) towards the upkeep of his or her qualifying child to a parent with care (i.e. one with whom the child lives) or a person in whose favour a residence order is made. This usually happens in situations where the father of a child does not live with the mother of the child. I shall expatiate on this later.

What is Alimony?

As I earlier mentioned, “alimony” is variously referred to as spousal support, financial provision or simply, “*maintenance*”. Therefore, to differentiate them from each other and for clarity purposes, “alimony” and “child support” will be mainly used throughout this thesis.

Accordingly, alimony means an allowance payable by a man to his wife or former wife pending or after a legal separation or divorce.²⁹ It is important to note that most previous legal texts used the word “*man*” as opposed to “*person*” or “*spouse*” that is now being used by modern statutory instruments as a result of the seemingly gradual elimination of ‘*patriarchy*’ of old. This was because the man was then the “bread winner” while the woman was the homemaker”. It was therefore more convenient to award any form of payment order in favour of the woman. Things have now changed. In order to meet today’s standards of legal texts and interpretation therefore, the phrase “*payable by a man to his wife or former wife*” is taken to mean “*payable by one spouse to the other*”.

²⁹ See Oxford Dictionary of Law

This position is also demonstrated in section 33b of the Austria's Act Governing the Employment of Foreign Nationals (§33b Ausländerbeschäftigungsgesetz (AuslBG)), which provides that:

"Where this Federal Act uses only the male designation in referring to natural persons, such designation shall apply equally to women and men".

Except the issue is specifically addressed to women, in which case, the Act under the same section, provides that:

"Whenever the designation refers to a specific natural person, the gender-specific form shall be used".

The reason for this change (and in some cases purposive interpretation) is attributable to the fact that women of today are no longer mere “homemakers” that they were in the time past. In fact some women now earn higher wages than their male counterparts. Consequently, as the law is known to mostly go after the person with the *deeper pocket*, there are now cases in which women are ordered to pay alimony to men, and if such men are also granted custody of the children, payment of child support will also be made through them to the concerned children. It is also important to note that, before the court makes such award, regard must be had to all circumstances of the case, i.e. the court must consider it appropriate to make such payment order against the woman instead of the man. What this means therefore is that the legal pendulum now swings either way. However, such case law is yet to be fully developed in Nigeria.

In making a payment order, as I mentioned above, the court takes several elements into consideration, e.g.

- (a) the financial status of both spouses and the contributions made by each to the home, whether in cash or otherwise;
- (b) the length of the marriage;
- (c) health conditions of the parties;
- (d) original intentions of the parties;

- (e) promises made by the parties to each other to which either may have relied on to his or her detriment, with view to allowing the *promisor* to be *estopped* by the doctrine of estoppels in equity, etc.

In Austria generally, Alimony and Child Support also exist under similar circumstances, both in theory and in practice.³⁰ However, it is important to stress that the notion of alimony and child support payment obligations (Alimente und Unterhalt) in the Austrian legal system appears somehow confusing as they seem to be used interchangeably. According to one internet homepage on legal matters, “Die Geldmarie”, the term “alimony” is used mostly in Austria when it comes to child support payments in the form of a cash payment.³¹ Conversely, such obligations, in reality, mean little or nothing to the average Nigerian living in Nigeria, although they exist in relevant law documents.³²

I would like to point out that the rights of a child and those of his mother can only properly be understood within the context of human rights. And against this background, efforts shall be made to put the arguments in this thesis in the contexts of human rights – promotion, protection and violation. However, there are clear indications that in Nigeria, the protection and promotion of the rights in question have been and are being impeded to a large extent by the application of customary law (including Sharia law) which I refer to, in the title of this thesis, as tradition.

³⁰ See §140 (2) ABGB or Parent & Child Amendment Act 2001

³¹ “Alimente – Kindesunterhalt” Available at: Geldmarie <<http://www.geldmarie.at/beihilfen/alimente.html>> Accessed 19.03.2013.

³² See general discussion of these under marriage, divorce and succession, later in the thesis

Chapter 3

NATURE AND EVOLUTION OF NIGERIAN LEGAL AND POLITICAL SYSTEMS

Having briefly introduced and identified, in the preceding chapter, the subjects of alimony and child support payments and the situations under which one qualifies for them, perhaps a look at the country's history will assist us in understanding their complexities. And because alimony and child support payments are uncommon in Nigeria, a little knowledge of its history may help us to understand why the introduction of a legal system (i.e. one that supports such payments) which does not embrace customary law (i.e. one that prohibits such payments) usually meets with strong opposition. And truly, this explains, in part, the development of legal pluralism in the country.

Nigeria: the historical Origin

Nigeria as a political unit came into being in 1914 when the then British colonialists brought together the north and south of the land in a process now known in local parlance as the '*amalgamation of the northern and southern protectorates*'.³³ It was administered as a unitary state up till 1954 from the capital city of Lagos. Although there was a quasi-federal constitution established in 1951, it was not until 1954 that the unitary government with its multi-ethnicity became a Federal government still under the British rule. It was this constitution that gave rise to political pluralism in Nigeria.

What is pluralism? The subject of pluralism has been variously defined or analysed by numberless Anthropologists and legal commentators. For example, Twining,³⁴ in his own right, argues that pluralism is used in many contexts and tends to be bandied about rather loosely. He looks at the concept by first identifying its components, viz: "Plural", which, according to him, "means more than one, applied to persons or objects". He links that with "pluralist" which, after briskly looking at other applications, he argues "can mean diverse or varied". And from the viewpoint of ethics, he agrees that it is typically contrasted with monism and that in that sense, pluralism is a normative concept referring to a theory or

³³ See Article 4 Nigeria Protectorate Order in Council, 1913; See also amalgamation of protectorates for more details.

³⁴ See William Twining's "Normative and Legal Pluralism: A Global Perspective" A paper he presented at the Seventh Annual Herbert L. Bernstein Memorial Lecture in International and Comparative Law April 7, 2009

system that recognises more than one ultimate substance or principle. He further emphasizes that, on the other hand, there is “brief pluralism”, which according to him, refers to a situation in which different cosmologies or belief systems coexist. He concludes this analysis by drawing on the dictionary definition of the word ‘legal pluralism’, which he opines is the special meaning of “pluralism”. But obviously, that is the context in which this thesis is being coured. Therefore, a look at the Nigerian legal systems, their implication and their challenges tells us that the concept of legal pluralism has its sources in the pre-existing state of affairs before Nigeria came into existence. And for those who have very little knowledge of the political history of Nigeria, the subject of pluralism may raise a range of empirical questions, some of which may lead to the unscrambling of some seemingly very sinister practices which are misguidedly equated with social, legal, moral and religious norms that are dealt with on a daily basis.

Legal System

The Federal Republic of Nigeria, as it is known today, is made up of 36 States and a Federal Capital Territory, which is its headquarters, located in Abuja. Constitutionally, Nigeria has three different legal systems operating simultaneously, and these are civil, customary and Sharia. While customary law and Sharia law are enforced traditionally (i.e. by and amongst local people) and in their respective courts,³⁵ the civil law is applied only in the conventional courts in Nigeria.

The Nigerian legal system is derived from the English Common Law system brought to Nigeria during the colonial era. This colonial rule brought with it the systems of Common Law, equity and statutes applicable at a particular date in England. This English legal system has a very strong influence on the Nigerian legal system and it forms a substantial part of Nigerian law. There is detailed analysis of this and is thoroughly done by Yemisi Dina et al viz:

Sources of Nigerian law

Nigerian law comes from various sources, and these are:

³⁵ Except where cases are referred from Customary Appeal Court to the Court of Appeal or the Supreme Court.

- the constitution;
- legislation;
- received English law;
- customary law;
- Islamic law; and
- Judicial precedents (case law).

The Nigerian multiple legal system dates back to the mid 19th century.

But the federal nature of the Nigerian political structure brought about by the 1979 Constitution and which is modelled after the American presidential system, is such that it has three arms of government, namely:

- the Legislature;
- the Executive; and
- the Judiciary

Constitution

The current constitution is the 1999 Constitution which came into effect on May 29, 1999. It stands as the legal template for the distribution of legislative powers between the various organs of government. And this legislative power share is contained in both the Exclusive Legislative List and the Concurrent Legislative List as provided for under the constitution.

Legislation (Statutes)

The main source of law in Nigeria is through legislation. And this is done mainly by the Legislature which makes statute law in accordance with the constitution. Statute law is the body of laws (i.e. written law as opposed to customary law) set down by a legislature or sometimes by other governing authorities, such as the executive branch of government, in response to a perceived need to clarify the functioning of government, improve civil order, to codify existing law, or for individual or corporate bodies.

English Law

The body of English law, as applicable in Nigeria, comprises the common law, equity and statutory instruments which were in force in England before 1st of January, 1900. This also includes other pieces of legislation which could be regarded as subsidiary statutes with colonial taste, enacted on particular matters and made to extend to Nigeria before independence of 1960 and which have not yet been repealed.

Despite the influence of English Law however, the Nigerian legal system is very complex because of legal pluralism. I shall discuss this in more details later in the text.

Customary Law

The Nigerian Customary law is the indigenous law that applies to the members of the different ethnic groups in the country. Each of these ethnic groups, usually referred to as "tribe", has its own distinctive customary law that regulates the way and manner the locals relate with each other.

Customary law mainly operates in matters relating to family, such as marriage, divorce, childcare, inheritance, etc. It varies from place to place, depending on the tribe. Even within an ethnic group, instances of differences in aspects of customary law can be found. For example, the marriage customs and inheritance rules of Edo people in the then Midwestern Region of Nigeria are different from those of the Yoruba of the South Western Nigeria from which Midwestern Region was carved out. Beyond this, the customary values and systems of various Yoruba sub-ethnic groups are bound to be different even if they are in the same State.³⁶ And because customary law is not written or codified, it is uncertain. One major characteristic of customary law is the fact that it tends to adapt to or accommodate new changes and social activities (albeit gradually).

Sharia Law

³⁶ See Yemisi Dina, et al "A Guide To Nigerian Legal Information". Available online at: <<http://www.nyulawglobal.org/globalex/nigeria.htm>>

Sharia law is a clearly articulated law that is believed to be more than just law. Its principles are well laid out in such a way that it regulates every aspect of the lives of those who practise Islamic religion. It is therefore a system that is based on the religion of Islam. The text and application of this system of law is based on the Holy Koran and the teachings of Prophet Muhammad.³⁷ However, this system has been criticized by many legal scholars as obsolete, discriminatory, draconian and is therefore regarded as fundamentally flawed.

Before the Jihad led by an Islamic scholar named Usman Dan Fodio reached the shores of northern Nigeria in about 1804, it is generally believed that the Islamization of present day Nigeria had already started. Fodio established Islamic rule which made the northern region an Islamic state known as "Sokoto Caliphate". According to Brendan Koerner,³⁸ the religion arrived in the northern region around 11th century, via traders from North Africa.³⁹ While Islam remained the religion of 'court and commerce' for centuries, the ordinary citizens, particularly those in the rural areas, continued to practice polytheistic or animistic faiths with elements of Islam blended in. The Caliphate adopted Sharia as the law of the land and many locals converted to *Sufi* branch of Islam.⁴⁰

As will be seen later, when the Penal Code Law was promulgated in 1959, it abrogated the criminal jurisdiction of the Native Courts. And it remained so until Nigeria finally returned to democracy in 1999. And the hitherto personal scope of application of Sharia law was again extended to criminal law – a public law jurisdiction – on October 27 1999 following the election of Ahmed Sani as Governor of Zamfara state. The Sharia law came into force on 27th January 2000.

Sharia law is applied in mainly northern part of the country where the population of Muslims is high. Even though the scope of operation of Sharia law in the "Independence Constitution" was originally limited to "personal matters", the operation of Sharia law has since been widened from personal law jurisdiction to criminal law, and there are currently twelve states in the northern part of the country where Sharia is being applied. The harshness of the law is such that it prescribes punishment like amputation, stoning of a person to death, etc., for

³⁷ See Yemisi Dina, et al "A Guide To Nigerian Legal Information". Available online at: <http://www.nyulawglobal.org/globalex/nigeria.htm>

³⁸ See Brendan Koerner, available at: Slate

³⁹ http://www.slate.com/articles/news_and_politics/explainer/2003/08/how_did_sharia_get_to_nigeria.html

⁴⁰ Ibid

certain offences. And at the time of writing this thesis, however, the Supreme Court of Nigeria had not had the possibility to make pronouncements as to whether or not such harsh penalties are constitutional.

Judicial precedents and hierarchy of courts in Nigeria

Judicial precedent, by its very nature, is based on the doctrine of *stare decisis*. It is a common law system under which the legal reasoning or grounds in previously decided cases are used to reach similar verdict in a case at hand if the facts and merits are considered similar. It must however be emphasized that only the *ratio decidendi* (ground for judicial decision) that will be binding on lower courts under the system of judicial precedent. Such is the situation in the Nigerian *case law* system having once been a British Colony.

The courts established in the Federal Republic of Nigeria pursuant to section 6 subsection (1) of the 1999 Constitution of Nigeria are:

- The Supreme Court
- The Appeal Court
- The Federal High Court
- High Court of States
- Sharia Court of Appeal of the Federal Capital Territory, Abuja
- Sharia Court of Appeal of States
- The Customary Court of Appeal of the Federal Capital Territory, Abuja
- Customary Court of Appeal of States

These courts (above) are the superior courts in the country. Although each state of the federation has the constitutional authority to establish other (inferior) courts, any such court can only have subordinate jurisdiction in respective matters. The status of the judges who preside in such courts notwithstanding, any decision reached in any of the inferior courts can only be subordinate to those of the other courts established by the constitution.

Presently, the Supreme Court of Nigeria is the highest court in the Nigeria. In 1963 it was made to take the position previously occupied by the Judicial Committee of the Privy Council to which all appeals lay. And in 1976, the Court of Appeal was established to hear appeals

from all high courts across the nation. Even though it is a single court, the Appeal Court is located in various judicial divisions of the country and is bound by the decisions of the Supreme Court as well as its own decisions. All courts of coordinate and subordinate jurisdiction to the high court are bound by the decisions of the Appeal Court by way of judicial precedent.

Unfortunately, as we shall see later, considering the amount of confusion caused by the application of the three legal systems in the country, it is difficult to say that the doctrine of judicial precedents does apply rigidly to customary court, area court and the Sharia court in Nigeria.

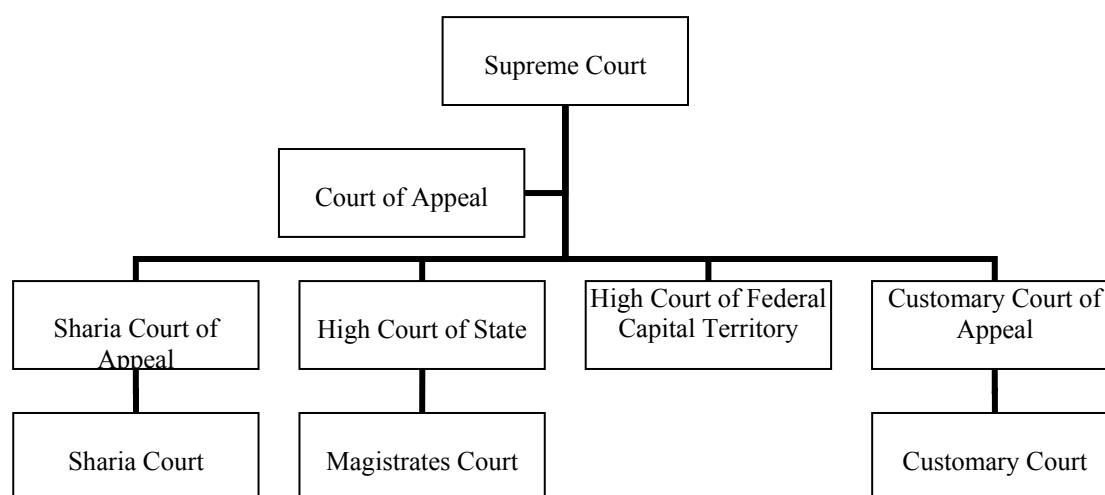


Fig. 1 Illustration of hierarchy and structure of courts in the Nigerian legal system

As can be seen in the diagram above, despite Nigeria's political federalism, the federal and the state court systems are structured in such a way that there is very limited ground on which to assert that each state has its own distinct legal system. And the federal and the state court structures come together at the level of the Court of Appeal (Yemisi Dina, et al). There are instances where some special tribunals (.e.g. Election Appeal Tribunal) may be regarded as court of coordinate jurisdiction with the Appeal Court as it is however not quite clear whether there lies an appeal from such courts to the Appeal Court or directly to the Supreme Court.

The High Court of any State is the highest court of the State concerned, except a judicial division of the Appeal Court is located there. The High Court is the court of second instance in, for example, cases from magistrate court, district/area court, or other courts of subordinate

jurisdiction from which appeals lie to it, except in high profile cases in which it has the jurisdiction of a court of first instance.

The 1999 Constitution expressly provides for the establishment of higher Sharia and Customary Courts in the capital city of the country, Abuja.⁴¹ And the constitution also empowers any state desiring to establish such courts to do so.⁴² In this regard therefore, sections 260 and 265 of the constitution used the words “shall be”. This means that the constitution intends the establishment of both Sharia and Customary Courts of Appeal as an obligation in the FCT, Abuja. However, the obligation ascribed to the phrase, “shall be”, seems to be negated by an antithetical phrase in the sentence, i.e. “any state that requires it”, and this therefore makes it more a matter of choice than an obligation at the state level.⁴³

If anyone was wondering why *pluralism* has been such a relevant phenomenon in legal discourse in a country like Nigeria, it should be clear from the above analysis. And we have seen how useful it is to acknowledge the fact that Nigeria’s multi-ethnic, multi-faith and multi-lingual nature could not but cause it to wallow in a conundrum in the form of a concept like legal pluralism; and hence its political and legal systems are made synonymous with terminologies like “tripartite legal system”⁴⁴ “asymmetrical federalism”, or more concretely, “legal pluralism”.⁴⁵ However, such analysis may appear too superficial or possibly too academic to be taken just as provided. Perhaps a more practical approach; such that emphasizes the real situation as it is on the ground may be more helpful in appreciating its workings.

Quite clearly, legal pluralism, in relation to a state, according to Kallen, is a condition in which the political, cultural or social systems are constituted from a multiplicity of autonomous but interdependent groups.⁴⁶ Twining⁴⁷ also writes that Pluralism is a central

⁴¹ Sections 260 (1) and (265 (1) of the 1999 Constitution stipulate that there shall be a Sharia Court of Appeal and a Customary Court of Appeal of the Federal Capital Territory, Abuja.

⁴² Sections 275 (1) and (280 (1) state that there shall be for any State that requires it a Sharia Court and Customary Courts of Appeal respectively for that State [emphasis added]

⁴³ See ss. 275 and 280 of the 1999 Constitution of the Federal Republic of Nigeria

⁴⁴ This is derived from the fact that Nigeria operates a system characterised by three sources of law: the normal Acts of Parliament (coupled with doctrine of equity), Sharia law and customary law.

⁴⁵ Asymmetrical federalism because at the beginning of British rule, the established native courts operational in northern Nigeria, which though applied some Islamic rules, were equated with (and therefore subsumed in) Customary law regime and therefore regarded as same. This runs concurrently with the received English law. See detailed discussion by Onokah, M.C. “Family Law (2003)”.

⁴⁶ Kallen H. Cited by Onokah, M.C. Family Law (2003) p 3

⁴⁷ William Twining: “Normative and Legal Pluralism: A Global Perspective” A paper he presented at the Seventh Annual Herbert L. Bernstein Memorial Lecture in International and Comparative Law April 7, 2009

concept in studies of diffusion or transplantation of law and opines that it is pervasive in all multicultural societies, which in today's world, according to him, means most societies. Onokah⁴⁸ in her own right, notes that political pluralism embraces federalism, which itself denotes a system which provides for the existence of a central government for the whole country and autonomous regional governments for the divisions of the entire country. It is therefore used in the context of a society like Nigeria because it represents a system in which peoples of diverse ethnic, religious, racial or social groups maintain an autonomous participation within the common society, in the development of their traditional, cultural or special interests.⁴⁹ Against this background, federalism was adopted in Nigeria purposely to accommodate the diversity of peoples and to forestall the anticipatory conflicts that might arise from multiplicity of religions and traditional values. And also because, with federalism, each of the groups would be free from interference or control by the others, to govern itself in matters of local concern, leaving matters of common interest to be managed centrally, and those which were of both local and national concern to be managed concurrently.⁵⁰

⁴⁸ Onokah, M.C. *Family Law* (2003) p-3

⁴⁹ See generally, Kallen, H.M. "*Cultural Pluralism and the American Ideal*", Philadelphia (1956) and Glazer, N. *American Judaism*, (1957), p-8) as cited by Onokah M.C. *Family Law* (2003) p-3

⁵⁰ Nwabueze B.O. "*Federalism in Nigeria under the Presidential Constitution*" (1983) as cited by Onokah M.C. 2003, p - 4

Chapter 4

BEGINNING OF MULTIPLE LEGAL SYSTEMS IN NIGERIA

The beginning of plural legal systems in Nigeria, as can be seen from my on-going analysis, is traceable to several legal, political, historical and geographical fronts, particularly:

1. Diverse legal cultures: legislation, customary law, and Sharia law;
2. Sharing of legislative powers between **Federal** and **State** legislatures with the former legislating, for example, on Statutory Marriages and the latter on customary and Sharia law marriages (perhaps it is more accurate to say that the latter regulates customary and Sharia law rules on customary marriages); and
3. Political history expressed through amalgamation of the northern and southern protectorates to regions that were given large measures of legal autonomy; the presence of which are still traceable with regard to legal arrangements in spite of the fact that those regions have since been further divided into several States (currently 36) and local governments.

As I have previously narrated, prior to the arrival of the British, Nigeria was made up of several settlements, each of which had its own distinct legal and administrative systems. It all started with the establishment of trade partnership with the indigenous peoples in areas like Benin Kingdom (Edo), Lagos, Brass, Bonny, Calabar, etc. And in order to regulate the trading activities between themselves and the local merchants, the British appointed Consuls. And for this reason, consular courts were established. The jurisdiction of the consular courts later extended to Cameroon and Dahomey, now Republic of Benin (do not confuse with “Benin City” which used to be a Kingdom, but now capital of Edo State in Nigeria). The first consul was appointed in 1849. As time passed by, Lagos was ceded to the British and later became a British colony.

Under the "Government of West Africa" which was created by the British in 1866, appeals from courts in settlements like Sierra Leon, Gold Coast, Gambia and Lagos were made to lie

to the West Africa Court of Appeal. The Judicial Committee of the Privy Council in England was then the highest court to which all appeals lay.

Southern Protectorate

In 1876 the Supreme Court of Lagos was established as a Supreme Court of Record pursuant to the Supreme Court Ordinance, No. 4 of 1876 with jurisdiction and power similar to those of Her Majesty's High Court of Justice in England.⁵¹ The court was empowered to administer the common law, the doctrines of equity and statutes of general application in force in England as at July 24, 1874.⁵²

In relation to customary law, it was made clear by a provision in the Supreme Court Ordinance No. 4 1876 which applied to the aforementioned territories that as long as any customary law was not "...repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial legislature",⁵³ nothing shall deprive any person the benefit of such custom. As Yakubu points out, the pre-existing local law or customary law was preserved by the British they did not want to do away with them⁵⁴ All that was required of these laws was to ensure that they passed the repugnancy test.

At the time the Oil Rivers protectorate, comprising Benin, Bonny, Brass, New Calabar and Opobo, was formally inaugurated in 1891, up till 1893 when it was extended and renamed Niger Coast protectorate, there were mainly indigenous courts in existence, though not established by any statute.⁵⁵

⁵¹ This historical analysis is generally taken from Yakubu J.A. "*Colonialism, Customary Law & Post-Colonial State in Africa: The Case of Nigeria*". Available online at:

<<http://www.nigerianlawguru.com/articles/?P=articles&T=customary law and procedure&L=customary>> Accessed 28.06.2014

⁵² Ibid

⁵³ See Victor Essien "Researching Ghanaian Law", available online at Globa Lex:

<http://www.nyulawglobal.org/globalex/ghana.htm> (Accessed 28.06.2014). See also This historical analysis is generally taken from Yakubu J.A. "*Colonialism, Customary Law & Post-Colonial State in Africa: The Case of Nigeria*". Available online at: <<http://www.nigerianlawguru.com/articles/?P=articles&T=customary law and procedure&L=customary>> Accessed 28.06.2014

⁵⁴ See Yakubu J.A. "*Colonialism, Customary Law & Post-Colonial State in Africa: The Case of Nigeria*". Available online at: <<http://www.nigerianlawguru.com/articles/?P=articles&T=customary law and procedure&L=customary>> Accessed 28.06.2014

⁵⁵ Ibid

And consequently, with the unification of Southern Protectorate and the colony and Protectorate of Lagos in 1906, the Protectorate of Southern Nigeria was established.

Northern Protectorate

The model of the Protectorate formation in the northern area of the now Nigeria was such that it originated from the activities of the British firms that traded around the banks of "River Niger". And by 1886 these firms had organised themselves into a form of alliance, and this alliance later received a Royal Charter that was named "The National African Company" which was later changed to "The Royal Niger Company". The effect of the Charter was such that it granted the company the power to administer some form of justice within the territories where the company had its operations. According to Yakubu, the company was in existence until its charter was revoked in 1899.⁵⁶ And with that revocation, the British established in its place the Northern Nigeria Order in Council in the same year.⁵⁷ By 1900 the Protectorate of Northern Nigeria had been established. Subsequently, a Supreme Court, provincial courts and a cantonments court were established pursuant to Protectorate Courts Proclamation of 1900.⁵⁸

The subsistence of the application of customary law in Nigeria after the introduction of the British-styled legal system can largely be attributed to the mode of British foreign policy in dealing with native tradition and custom for reasons of the attendant multiplicity of pre-existing norms. Hence Frederick D. Lugard, the first Governor-General of Nigeria, when he assumed duty in 1914 and faced by the contemplation as to how best to govern the somewhat complex area, decided to place very high on his agenda the system of *indirect rule*.

Yakubu affirms that the adoption of the *indirect rule* system gave credence and recognition to the pre-existing system of customary law to which the indigenous people were already accustomed and had thus accepted as their own way of dispensing justice.⁵⁹

⁵⁶ See generally Yakubu J.A. "*Colonialism, Customary Law & Post-Colonial State in Africa: The Case of Nigeria*". Available online at: <[http://www.nigerianlawguru.com/articles/?P=articles&T=customary law and procedure&L=customary](http://www.nigerianlawguru.com/articles/?P=articles&T=customary%20law%20and%20procedure&L=customary)> Accessed 28.06.2014

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ For details see generally Yakubu J.A. "*Colonialism, Customary Law & Post-Colonial State in Africa: The Case of Nigeria*" Available online at: <[http://www.nigerianlawguru.com/articles/?P=articles&T=customary law and procedure&L=customary](http://www.nigerianlawguru.com/articles/?P=articles&T=customary%20law%20and%20procedure&L=customary)> Accessed 28.06.2014

The birth of Nigeria

With the amalgamation of the northern and southern Protectorates on January 1 1914, the coming into being of the country now known today as Nigeria was realized. However, by virtue of the Constitution Order in Council 1954, Nigeria became a Federation with a Federal Constitution with effect from October 1, 1954.⁶⁰ And the Federation was divided into Western, Eastern and Northern regions, with a Federal territory of Lagos. And because of the pre-existing traditions and customs of the people in each of the areas, they thought it wise that in the Western and Eastern Regions, Customary Courts should be established. And for the same reasons, the Northern Region also established Native Courts. It is however very important to note here that as a result to the promulgation of the Penal Code Law in 1959, the criminal jurisdiction of the Native Courts was expunge.⁶¹

When in 1960 Nigeria became what seemed an independent state,⁶² it started off with a parliamentary system of government. And in 1963 (three years later), it became a republic. It must however be mentioned that the Independence Constitution adopted the pre-existing *pluralist* political structure, and when it became a federal republic in 1963, the Federal Republic Constitution also did not abrogate the pre-existing *pluralism*, instead it extended the pluralism by creating an additional region – Mid-Western Region – out of the existing Western Region.

In 1966 there was a military *coup de'tat* by which the civilian government was overthrown, and the constitution suspended by virtue of Constitution (Suspension and Modification) Decree No. 1 and a military regime was installed. This Decree also suspended the parliamentary system of government contained in the 1963 Constitution. However, the then Head of State, Major-General J.T.U. Aguiyi-Ironsi soon became unpopular with the people because, on May 24th 1966, he attempted to abrogate political pluralism and to re-establish a potentially *monistic* society.⁶³ This caused discontent among the people and led to another

⁶⁰ See generally Yakubu J.A. “*Colonialism, Customary Law & Post-Colonial State in Africa: The Case of Nigeria*” Available online at: <[http://www.nigerianlawguru.com/articles/?P=articles&T=customary law and procedure&L=customary](http://www.nigerianlawguru.com/articles/?P=articles&T=customary%20law%20and%20procedure&L=customary)> Accessed 28.06.2014

⁶¹ Ibid

⁶² It seemed an independent state because it could not be regarded as truly independent if the Queen of England was still the Head of State, represented by a Governor-General at the federal level and a Governor in each of the regions.

⁶³ See unification decree (No. 30) cited by Onokah, M.C (2003) p-5.

coup in which Aguiyi-Ironsi himself was killed and the then Lieutenant Colonel Yakubu Gowon took over and restored political pluralism again.

As a result of political apprehension and the consequent killings, the Eastern Region led by Lieutenant Colonel Emeka Udumegwu Ojukwu attempted to secede from the rest of the country and to form its own independent state of Democratic Republic of Biafra on 30 May 1967. The Federal Military Government did not consent to such move. And in the power struggle that ensued, the nation was thrown into civil war. Furthermore, the end of the war which was realised on a mutual agreement of '*no victor, no vanquished*'⁶⁴ in January 1970 brought about the Military Government accentuating the pluralism of the political structure by breaking up all the regions into twelve autonomous states.⁶⁵

Without going into details as to how states were created from time to time, let us quickly re-examine the issue of pluralism and how political pluralism gave rise to legislative pluralism, with a view to determining which side of the legislative divide (federal or state) the rights of the child fall. This is because the pre-1954 enactment might have both federal and regional elements, in which case such clarity will determine which legislature would be deemed to have enacted it. And it is also essential that this legislative divide, which is still functional in the Nigerian legal system to this day, is clearly understood with respect to the application of Sharia and customary laws, in order that there is no ambiguity as to who should amend or repeal any such law when necessary.

Until 1951, the Nigerian legislative system was monistic. In that same year a quasi-federal constitution, which gave limited legislative powers to the regions, was established. While the central legislature had powers to legislate on all subjects, the regional legislatures had power to legislate, among other specified subjects, on matters relating to marriages. But, with the advent of the 1954 constitution, the Federal Territory of Lagos and each of the regions were empowered to make laws.⁶⁶ Matters in respect of which the federal legislatures can legislate have since then been contained in the *Exclusive Legislative List*, while those on which both the regional and the federal legislatures may legislate are contained in the *Concurrent Legislative List*.

⁶⁴ With this agreement, both parties were to resume the hitherto "one Nigeria" status as though the war never took place.

⁶⁵ Autonomous in the sense that all states, though partly controlled by the Federal authority in functions listed in the Exclusive legislative list, are independent of each other and has its own legislature, executive and judiciary.

⁶⁶ Onokah, M.C *Family Law* (2003) p7.

As Onokah (2003:8) observes, regarding matrimonial matters, Item 23 of the Exclusive Legislative List vests in the federal legislature exclusive power to make laws in matters relating to all marriages, with the exception of marriages under Moslem or customary law.

However, the Concurrent List does not contain anything that relates to marriage. In this regard, it therefore follows that the power to legislate on issues relating to marriage is ‘residual’, and therefore lies with the regions (now states).⁶⁷ The guidelines for determining whose responsibility it is, stipulate that:

*[A]ll existing laws relating to matters outside the Exclusive and Concurrent Legislative Lists are deemed to have been enacted by the regional legislature*⁶⁸

In 1967 the country was divided into twelve states, each with power to make laws on matters relating to family, this was in addition to the Supreme Military Council (SMC) at the federal level. It must however be mentioned that during military regime the constitution is usually suspended and in its place, decrees are promulgated. In the exercise of its exclusive legislative power, the SMC promulgated the first Nigeria Matrimonial Causes Law.⁶⁹ This Act is in everyway similar to the English *Matrimonial Causes Act*.

As many as there were *coups* and *counter-coups* between 1960s and 1980s, were there also bizarre political tensions unleashed on Nigeria. By virtue of s. 1 of the States (Creation and Transitional Provisions) Decree, 1976, Nigeria then functioned with a total of twenty legislatures inclusive of the Supreme Military Council (SMC) at the Federal level.

However, the year 1979 is worth mentioning here in that there was a turning point that altered the course of Nigerian polity and extended the constitutional history with the enactment of what became known as The “Presidential Constitution” which took effect on 1st October of that year. Under that constitution, the exclusive legislative power hitherto exercised by the SMC, vested in the National Assembly with bi-cameral legislative chamber –Senate and a House of Representatives– at the federal level, whereas at the state level there was a single

⁶⁷ See Preface to the Laws of the Federation of Nigeria and Lagos, 1958 p viii as Cited by Onokah, (2003) M.C. Family Law

⁶⁸ See the Concurrent Legislation (Designation of Federal Ordinances) Order 1959

⁶⁹ See Matrimonial Causes Decree (now Act) 1970

legislature –the *House of Assembly* for each State. Both the National Assembly and the State Houses of Assembly had powers to legislate on any matter contained in the Concurrent List. In the event of a conflict between the enactment of the Federal and State Legislature, the latter would be void to the extent of the conflict. The National Assembly was vested with the power hitherto exercised by the Supreme Military Council under Item 23 to make laws relating to marriages unless they were contracted under customary or Islamic laws.

Sadly enough, the 31st December 1983 *coup* once again suspended the 1979 Constitution by virtue of the Constitution (Suspension and Modification) Decree No. 1 of 1984. And as a result of the military take over, everything reverted back to decree promulgation for which the preceding Nigerian military dictators were known. There were however several other coups until 1999⁷⁰ when the ruling military junta at the time, under much pressure from all fronts, local and international, decided to hand over power to civilians, and a retired army General, Olusegun Obasanjo, was elected civilian president. However, the electoral process by which he came to power was unanimously adjudged by observers, civil society groups and the international community to have been generally marred by election malpractices and therefore fundamentally flawed. It was shortly before this election, that the 1999 Constitution was hurriedly drafted by a constituent assembly that was equally hurriedly hand-picked by the military government of General Abdulsalami Abubakar and handed over to the civilian government. This is the most recent constitution and has also been regarded as fundamentally flawed by civil society groups and legal academics alike and much agitation is again on redrafting of a new constitution as it is generally believed that no amendment can resolve the legal absurdities it characterises.

⁷⁰ These coups were headed by army Generals viz: Muhammadu Buhari: 1983; Ibrahim Badamosi Babangida: 1985; Sani Abacha: 1993.

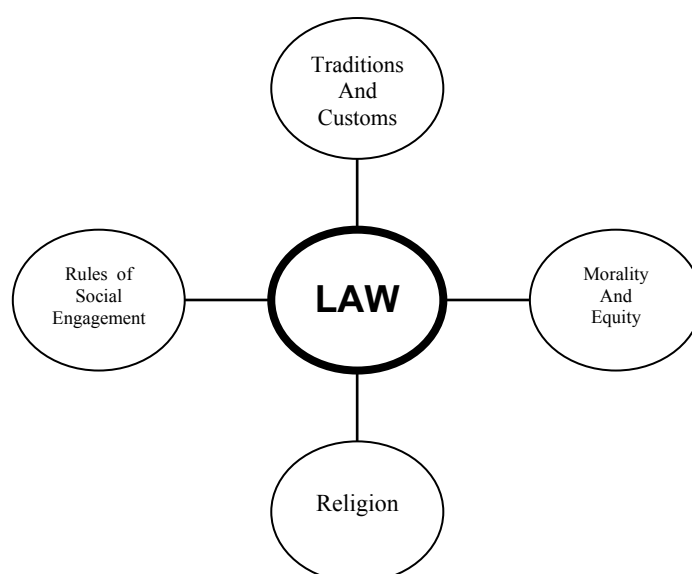
Chapter 5

RELATIONSHIP BETWEEN LAW AND TRADITION

This chapter is probably going to be the shortest chapter in this thesis because I intend to examine only what amounts to law and tradition and the connection between them. I do not intend to merge this topic with other topics because law and tradition and the connecting links between them shall be woven into various other segments of the whole thesis and I think it is therefore imperative that this chapter stands alone.

I have included this chapter so as to expatiate on the fact that, although law and tradition (tradition in this case means customary law) are interrelated, but they do constantly conflict. This is because rules in customary law for example are substantially drawn from morals, ethnics and religion, whereas modern law, on the other hand, is more likely to be drawn from peoples' day to day activities than from morals, ethics and religion, and it is therefore more susceptible to constant changes. Furthermore, while law can be amended if it becomes necessary to do so, customary law (excluding Sharia law, which is precluded from evolving) can only change on its own through a process of evolution and this is rather slow.

Accordingly, in any discussion on what amounts to law or tradition, it is imperative to also look at why and how laws are made in any given society; by whom, and for whom. In a bid to



do all of these, one ends up tracing them from their origin, i.e. from social norms until they find their way into what may then be regarded as law. Truly, one finds that there is an existing

fundamental interdependence and or connection between these elements. And as a result of this interdependence, the distinction between them seems blurred. And this is mainly because of the similarities between them. What happens therefore is that some find their way into law and others not. And those that find their way first into what is accepted as law may then be used to regulate the others through a process of interpretation. Through that interpretation or legislation also, they are accorded the status of law or allowed to remain as mere traditions without legal force. Accordingly, one would consider that tradition be accorded only its merits while law (which is higher in hierarchy or norms) should also be made to occupy its dominant position. But alas, they are in constant clash and therefore desirous of this discourse!

With regard to Nigerian legal system that is under analysis in this study, it is important to stress, for example, that, apart from statutes and the general English law (from which part of the Nigerian law was developed), it has as part of its components, a body of *case law* system which embodies the general doctrine of equity and common law. And this is used to complement the law. As equity, morality, custom, religion and the law (i.e. statute law in this context) are woven into the English legal system, so also are these elements present in the Nigerian legal system. And they all revolve around what is right or wrong; what must be done or not to be done, based on the principles of fairness, which equity stands for.

I must however quickly emphasize here that the scope of this thesis does not per se cover the full treatise of the genesis of tradition or custom, morality, equity, etc. or how they find their way into law. Therefore, the author is only concerned with those areas of law which are relevant to the subject matter. And these are areas pertaining to the protection of the child's rights and his mother's, as well as the factors militating against such framework in Nigeria.

Let me, at this point, examine the aforementioned elements in turn and explain how interwoven they are with each other and, particularly, how they fit into this whole discussion.

Religion and law

To say that religion and law are interrelated is the bottom line of any such pronouncement. While religion could be regarded as a phase amongst many in modern law formation

processes, law itself could be regarded as a major position of the *desired state of law*. Even law is also usually in liquid form, which therefore means that it can be changed from stage to stage at the instance of the people as at when the need arises. Law is that element which binds the members of the community together in their adherence to recognised values and standards.⁷¹ These values and standards are prescribed or proscribed by belief systems which, in my opinion, are inherently entrenched in religion or what can be likened to religion. Law also consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions.⁷² Quite clearly, a society is made up of people and religion is practised by people. And therefore the role of religion in creating and solving current social, moral and ethnic issues within a society, which can also be likened to regulation of behaviours, cannot be over-emphasized. Reviewing a book, “Law and Religion”, edited by Gad Barzilai, Martin Edelman⁷³ writes that the relationship between religion and law is famously complex. He notes that religious values constitute central elements of societal values that shape the rules, principles and institutions governing society. He concludes that institutional policies affect those underlying societal values by reinforcing and entrenching societal beliefs or seeking to change them.

However, what appears to be the major challenge with using religion as a basis for deciding what amounts to law stems from the fact that religion deals mainly with spiritual realm – a stance that is incapable of being substantiated in the physical realm. Accordingly, exploring the usual interactions, for example, amongst Muslims, Christians, atheists and those practising other numerous not-so-popular religions, one discovers that all of their positions whether or not defined by their beliefs, are interrelated, but there has to be a kind of meeting point for all sides, which is the position of law.

Equity

Equity is the name given to the set of legal principles in jurisdictions following the English common law tradition, which supplements strict rules of law where their application would operate harshly. It places much emphasis on fairness and flexibility. In law, as is the practice

⁷¹ Shaw, M.N. “International Law” (2003) p- 1

⁷² Ibid

⁷³ See generally, Martin Edelman (2007) on Gad Barzilai (ed). “Law and Religion” available at: <<http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/barzilai0807.htm>> Accessed 14.03.2013.

in Nigeria, decisions are made by reference to legal doctrines or statutes while the doctrine of equity is meant to supplement the law as derived from the English common law tradition. It must be stressed that from the 17th century onwards, equity in England was rapidly consolidated into a system of precedents much like common law, thereby becoming an embodiment of the law.⁷⁴ This has since been introduced and incorporated into law in Nigeria.

Morality

Moral or morality (from Latin *moralitas* "manner, character, proper behaviour") means a code of conduct held to be authoritative in matters of right and wrong. Morals are created and defined by society, philosophy, religion, or individual conscience. It is regarded in a universal sense as an ideal code of conduct, one which would be chosen in preference to alternatives by all "rational" people, under specified conditions.⁷⁵

Morality is strongly relevant here in that the concept of human rights is closely allied with ethics and morality⁷⁶ and it stems partly from beliefs (including religious doctrines), be it Islam, Christianity, Buddhism, Judaism, Paganism, etc. This is because our innate 'yardstick' for measuring what is right or wrong is also partly premised on our belief system – whether consciously or subconsciously – which is then handed down from one generation to another until it becomes the tradition of the people. And from this status it may be made into law. There is however, a school of jurisprudence known as legal positivism whose central insistence is that there is no necessary connection between law and morality. But on the other hand, this same school is also of the view that law is in practice influenced by popular morality. Nevertheless, there is another school of jurisprudence, known as *Natural law* jurisprudence, which believes that some laws are much higher in hierarchy than others, and many believe these to be the status of human rights.⁷⁷ Well, I do not however intend to deal with details of any of the presumptive arguments which have been put across by ancient philosophers, theorists and legal commentators.

⁷⁴ See generally Wikipedia online at [http://en.wikipedia.org/wiki/Equity_\(law\)](http://en.wikipedia.org/wiki/Equity_(law))

⁷⁵ Ibid

⁷⁶ See Shaw (2003) p 248

⁷⁷ Fenwick (2002) p-10

Customs

In law, custom can be described as the established patterns of behaviour that can be objectively verified within a particular social setting.⁷⁸ It is a practice that has been followed in a particular locality in such circumstances that it is to be accepted as part of the law of that locality. Therefore, customary law (as it is in Nigeria) is the indigenous law that stems from such circumstances and applies to the members of the different ethnic groups.⁷⁹ With regard to Nigeria, customary law is predominantly important in matters relating to marriages, divorce, guardianship, custody of children, etc. To lay claim to a particular rule as being part of a custom within a particular community, the claimant must prove that the rule in question has been, and accepted as a general rule for a long time.⁸⁰ And it must be reasonable in nature and continuously followed.⁸¹

Accordingly, in any society certain rules of behaviour emerge and prescribe what is permitted and what is not.⁸² Such rules develop almost subconsciously within the group and are maintained by the members of the group by social pressures and with the aid of various other more tangible implements.⁸³ Accordingly, customary law exists where a certain legal practice is observed by members of that society and where the relevant actors consider it to be the law.⁸⁴ Such rules are respected by all concerned and believed to be equally binding on all, in that the recognition of such behavioural rules is for their mutual benefit. This theory seems to lend its support to the doctrine of 'mutual benefit and burden' as articulated by the English case of *Halsall v Brizell*⁸⁵ so that if a person enjoys the benefit of the use of something s/he must accept the burden of contributing to its upkeep. This was also established in another English case of *Rhone v Stephens*⁸⁶ where it was made clear by the House of Lords in the UK that for the principle of 'benefit and burden' to operate there must be, as in the *Halsall* case

⁷⁸ See Wikipedia online at: [http://en.wikipedia.org/wiki/Custom_\(law\)](http://en.wikipedia.org/wiki/Custom_(law))

⁷⁹ Oxford Dictionary of Law

⁸⁰ See decisions in the Nigerian cases of *Obi v Obijindu* (1996) 1 N.W.L.R. 240 and *Agbabiaka v Saibu* (1998) 10 N. W. L. R. 534

⁸¹ See Oxford Dictionary of Law

⁸² Shaw (2003) p 68

⁸³ Ibid p 68

⁸⁴ See Ben Bruce's *The Enterprise of Law*, available from Laissez Fair Books as extracted by Mark Sulkowski M. available online at: www.jim.com/custom.htm

⁸⁵ (1957) Ch 169

⁸⁶ (1994) 2 All ER 65

(above), a clear reciprocity between the enjoyment of a particular benefit and the correlative burden in the sense of using, a private road and contributing to its upkeep.

This, in my opinion, seems to be the basis of customary law and possibly law in general, as practised in certain countries of the world. Otherwise, how else can one explain the underlying reciprocities which are accorded both the recognition of the duty to obey such law and of the enforcement in a customary system where, in some cases, there are neither strong individuals nor institutions to ensure that such code of conducts or standards is adhered to? Alternatively, if a minority coercively imposes law from above, then that law will require in it much more force to maintain social order than is required when law develops from the bottom through mutual recognition and acceptance.⁸⁷

The only difference between law and customs is that the latter are not, at least in the early stages, written down or codified.⁸⁸ The possibility of surviving the passage of time is due to what Shaw refers to as ‘the historical legitimacy’. But as the community develops, it will modernise its code of behaviour by the creation of legal machinery, such as courts and legislature, which are then given the mandate to repeal or amend the old and out-of-date laws while making new ones that meet the requirements of modern times.⁸⁹

To this end, because custom is a core element of tradition, it therefore follows that it will not be inappropriate to use the words *customary law* in place of *tradition*. And also, it goes without doubt that, if something is customary to a people or a society, it becomes the tradition of the people. In addition, if a good law in any democratic society is based on the principle of mutual benefit and burden, it thus follows that customs, which make up the tradition of the people, can be said to be the genesis, as well as part and parcel of law. Eventually, the rules that facilitate good interaction between the people are selected and made into what is then regarded as the law, while with time, bad decisions are amended, ignored or repealed. However, along with the so-called bad decisions, some rules are deliberately ignored, either to favour some highly placed individuals or merely to avoid certain general commitments, even to the detriment of others. This seems to be the case with customary and Sharia laws in

⁸⁷ Ben Bruce’s *The Enterprise of Law*, available from Laissez Fair Books as extracted by Mark Sulkowski M. available online at: www.jim.com/custom.htm

⁸⁸ Shaw 2003 p68

⁸⁹ See R Unger, *law in modern Society*, London 1976 as cited by Shaw (2003) p-68

Nigeria, which, though agreed by many advocates to be ferocious and draconian, but still they subsist in modern times.

Chapter 6

ALIMONY AND CHILD SUPPORT PAYMENTS

(Critical Appraisal)

This chapter seeks to review both Alimony and child support payments as they stand and how they are regarded within the Nigerian society. To start with, I think it is very helpful to emphasize here that, although the concepts of “alimony” and “child support” payments are the motivating factors behind the writing of this thesis, a great portion of this chapter will be concentrated on the elements responsible for the non-development of coherent framework that reflects not only contemporary good standards in governance, but also a nation’s obligation under international law. In the same vein, it must be noted that fulfilling the latter is not merely for compliance’s sake alone, it is also aimed at attaining better standard of life for the citizenry which invariably can only be realized through the former. And these are traditions, custom, religions and all other practices incidental to them. This is because the concept of alimony and child support payments is frowned at by a substantial number of people (women inclusive) in Nigeria, and as a result, very little case law exists in that regard. And because most family matters are regulated under Sharia and Customary laws, there are practically very few statutory instruments in those regards also, and most issues fall mainly within the ambit of Matrimonial Causes Act L.F.N. 1990 (MCA), Marriage Act L.F.N. 1990 (MA) at the Federal level and a few complementary statutes enacted at the State level.

With the almost non-existence of alimony payment obligation in Nigeria, there is still so much acrimony even at the prospect of such mechanism being properly enforced. A research in that direction usually reveals case law that is so old that its tenets do not fit into modern day legal wrangling that arises from most families; let alone other forms of relationships. For example, in reaction to Agamz’ article “Alimony” and Maintenance During Divorce Under Nigerian Law”, a Nigerian reader who goes simply by the name, Chike, made a rather passionate response that tends to display revolt of some sort against the prospect of alimony payment obligation being ordered against him, and it runs thus:

If we look at legal history, we find out that the law of domestic relations proceeds on the basis that women are the weaker party in a marriage relationship. It also proceeds on

the unspoken basis that by providing sexual service, the woman has discharged her responsibilities in the relationship. Accordingly, the entire law of domestic relationship, while it ostensibly sets out to protect women, in reality entrenches reverse discrimination against men. Maintenance of a male spouse should not be an exception. It should apply on the same common basis as maintenance of a female spouse. To argue otherwise would be to sustain discrimination against men solely on grounds of gender. However, to expect any revolutionary change from the courts would be too ambitious. Male judges, like most men, are crippled by Oedipus complex. It would have been gratifying if the female judges compensate by being similarly crippled by Electra complex. Incidentally they are not. So the discrimination against men continues⁹⁰

General grounds for alimony and child support petition

There are two major grounds provided by the MCA on which parties to a marriage can petition for either alimony and/or child support payments (maintenance), and these are: (1) divorce and (2) judicial separation.

Divorce, in practical terms, means dissolution of the marriage that has irretrievably broken down, and at the instance of a petitioner, if all requirements are met, the petitioner may be granted alimony or if there are children in the family, they may be awarded maintenance in the form of child support payments. But this is dependent mainly on who has been granted custody of the children. It is very important to note that it is not in all cases that the petitioner gets the custody of the children as such orders do not follow who brought the petition. In fact, before reaching decision as to who should be granted the custody of the children, regard must be had to all circumstances of the case. Issues such as, educational background, financial stability, mental state, etc., of either the father or the mother are considered very carefully. Most important is the welfare of the children.

Under the decree of judicial separation, either of the parties to the marriage is relieved of the obligation to continue to cohabit with the other party to the marriage but not of alimony or child support obligations. If one party lives apart from the other, s/he may be granted financial relief in the form of alimony or child support payment if all the legal required elements are

⁹⁰ See Mz Agams online at: <<http://mzagams.wordpress.com/2012/02/04/alimony-and-maintenance-during-divorce-under-nigerian-law/>> Accessed 04.03.2013

present. Whether the parties were in agreement as to the separation or not, the court will decide based on all circumstances of the separation. The grant of decree of judicial separation does not change the fact that the marriage still subsists and that all other rights and obligations of the parties regarding the marriage, remain unchanged.

Another very important point to note is that when a party to a marriage dies intestate, the property of such deceased party shall devolve as if that party had been survived by the other party to the marriage; notwithstanding the fact that they were living apart pursuant to the terms of the decree of judicial separation earlier granted.

In any divorce proceedings whereby there are children in the marriage, even though decree nisi⁹¹ had earlier been granted, such decree cannot become absolute; unless the court, by order, is satisfied that proper arrangement has been made for the general wellbeing and education of the children.⁹² However, there are special circumstances where decree nisi becomes absolute even without the court satisfying itself that those arrangements have been made.⁹³ It is very important to mention here that although marriage, under the MCA, includes a purported marriage that is void, it does not include one entered into according to Muslim rites (in this case Sharia) or other customary law.⁹⁴ Gladly enough however, this limitation does not affect children born outside the marriage, whether or not legitimated by a marriage. This is because when a man concedes to being the father of a particular child, it does not matter whether the child was born in the course of a marriage celebrated under Act, Sharia or Customary marriage. The child will simply be regarded as a child of the family.

But the *bone of contention* here is the fact that most of the marriages conducted in Nigeria are still done under Sharia and Customary laws. This therefore means that parties to this number of marriages (particularly women and children) can be said to be without proper (or should I say complete) legal protection.

⁹¹ There are two forms of decree in respect of matrimonial causes, and these are: decree nisi and decree absolute. When the former is granted, it means that it is in the process of being dissolved; but after waiting for a statutory period and none of the parties to the marriage indicates a change of heart by way of reconciliation, then the latter decree may be granted.

⁹² See section 57 MCA

⁹³ See section 57(1) (b)

⁹⁴ See section 69 MCA

Alimony and child support payments

With regard to alimony, the provisions contained in the Nigerian MCA do not include the word, ‘alimony’; instead the Act uses the word ‘maintenance’ to describe it. However, this does not in anyway preclude any affected individual from relying on its protection. The legal principles governing assessment and determination of alimony also apply to assessment and determination of maintenance and the courts have so held in a number of cases.⁹⁵ By this statement and for clarity of purpose, ‘alimony’ represents payment made for the benefit of the spouse while ‘maintenance’ denotes payment order for the benefit of the child, which, in other words, means ‘child support’ payment even though the court and or the statute may use the word “maintenance” to describe both cases. For example, as Agamz⁹⁶ rightly points out, under Part IV of the MCA, a court can make an order for maintenance in favour of ‘a party to the marriage or children of the marriage’, suggesting that maintenance order could potentially be made in favour of the male spouse, in which case a mother could be ordered to pay maintenance for the children in custody of the father ⁹⁷ In addition to maintenance order, Nigerian courts also have discretionary powers to make orders for settlement of property of the parties to a marriage as the court considers just and equitable.⁹⁸ In that regard, the capability of the concerned party to meet such demand is usually considered by the court.⁹⁹

It follows from this statutory provision that it is possible for a woman to claim “maintenance” money (which also means ‘alimony’) from the husband if she meets all legal requirements relating to the matter under the Act in much the same way a man can make the same claim against his wife if all requirements are met. The Act uses the word ‘party’ which in logical terms, could mean a man or a woman. The grounds for the contemporary neutral position with regard to gender when making a claim can be ascribed to the changes in legal texts which, as I earlier mentioned, have been brought about by changes in economic and social status of the modern woman. Quite sadly however, these provisions are in favour of only women who celebrate or celebrated the so-called Act marriage and this form of marriage is mostly celebrated by the rich, the educated and the well informed. But this group only represents a

⁹⁵ See generally Agams M. Z. “Alimony and Maintenance During Divorce Under Nigerian Law” Available online at: <http://mzagams.wordpress.com/>

⁹⁶ Ibid

⁹⁷ See generally Agams M.Z “Alimony and Maintenance During Divorce Under Nigerian Law” Available online at: <http://mzagams.wordpress.com/>

⁹⁸ Ibid

⁹⁹ See section 70(1) Matrimonial Causes Act Chapter 220, Laws of the Federation of Nigeria 1990. Available online at: < <http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm>> Accessed 26.06.2014

small portion of the number of marriages celebrated in the country. Although there is a gradual shift to modernity as a result of the fact that people are getting more and more educated, but this happens at a very slow pace.

How much can a court award as alimony and child support?

There is no clear-cut framework for awarding any form of alimony or child support payment in Nigeria. As a result of that, the court has a very wide margin of discretion to award any amount it deems fit.¹⁰⁰ And in doing this, regard must be had to all circumstances of the case and of the particular parties concerned. The Act expressly stipulates that, in making an order for maintenance, the court must ensure that it takes into account all "relevant circumstances" of the case, as well as the conduct and economic status of the parties concerned. The decision, especially with regard to property settlement, must also be reached on the basis that it is "just and equitable".

With regard to maintenance for grown-up children who have reached the age of twenty-one years of age, the Act also makes it mandatory for such children to be catered for under special circumstances, only when there is justification for such resolution, although no particular circumstance is mentioned.¹⁰¹

The party to whom the payment order is directed may be instructed to make the payments in various sums: it may be weekly, monthly, yearly or such other periodic arrangement that the court thinks fit. The party may also be ordered to make lump sum payment. In all of these arrangements however, the welfare of the child is paramount.

Custody of children

When a marriage breaks down irretrievably, the issue of the welfare of the children of the marriage becomes paramount. Allied to this are also issues of the child's education, clothing,

¹⁰⁰ Section 70(2) Matrimonial Causes Act Chapter 220, Laws of the Federation of Nigeria 1990. Available online at: < <http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm>> Accessed 26.06.2014

¹⁰¹ Section 70(4) Matrimonial Causes Act Chapter 220, Laws of the Federation of Nigeria 1990. Available online at: < <http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm>> Accessed 26.06.2014

feeding, pocket money, etc. The issue of who should be awarded the custody of the child also becomes a major concern.

Under customary law (excluding Sharia), the custody of the children is not debatable; it is the man's, unless the child concerned is a toddler, in which case the man may relinquish such right to the mother. Even in such case, it will be expected that such toddler will be returned to the father at a certain (specified) age. Under the Act however, only the court has authority to grant the custody of the child as it deems fit. The court has a wide margin of discretion to award such custody to the father or the mother taking into consideration all circumstances of the case, including particularly the welfare of the child which is regarded as paramount in all considerations.¹⁰²

Pursuant to section 71 (3), MCA, the court may decide to award the custody of the child to any person who is not a party to the marriage if, in its opinion, it is necessary to do so for the benefit of the child concerned.

While the provisions of the Matrimonial Causes Act and Marriage Act may appear to be in order, it must also be said that these Acts only regulate the so-called Act marriages. Majority of the marriages celebrated under the Act in Nigeria are also celebrated under either Sharia law or customary law.

A LOOK AT THE AUSTRIAN LEGAL CULTURE

Someone once said that in order to ascertain that a person is tall or short, there should be a second or third person to compare him with. And a Researcher also once said that the easiest definition of the word "research" is: "search and search again". Accordingly, I want to quickly have a look at the Austrian legal culture so as to glean some legal methodologies for comparative analysis. It is hoped that any findings derived from such quest may be of good use in the development of the body of laws that regulate customary law and thus help to set aright the long-standing confusion in the status quo in the Nigerian legal system.

¹⁰² See section 71(1) Matrimonial Causes Act Chapter 220, Laws of the Federation of Nigeria 1990. Available online at: < <http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm> > Accessed 26.06.2014

There is no legal system or instrument devoid of flaw in the world and no law is (or should be) static. Therefore, in order to effectively regulate acts and omissions of the ever evolving peoples and their life styles, all legal systems and provisions should (or must) be subject to reform, amendment or repeal, if necessary.

First and foremost, I want to have a swift look at Austria's political system, after which I shall link it with its legal system, vis-à-vis the general overview of its framework for the protection of the child as well as the mother by way of child support and alimony payments.

Austria is a multi-party federation with a parliamentary system of government. The party with the highest number of seats forms the government of the day while the leader of that party becomes the Chancellor (*Bundeskanzler*). The Presidential election is however conducted separately. As it is not a presidential system of government, which makes the president a non-executive president, the role of the office of the President (*Bundespräsident*) is restricted. Therefore, the Bundeskanzler and his cabinet ministers decide the political direction of the country. All laws (statutes) emanate from the people through legislation and they are based on the provisions of the constitution; parts of which emanate from the ECHR and/or influenced by the principles of some international conventions, treaties and agreements.

In relation to international law, for example, Article 9 of the constitution of Austria clearly provides that-

(1) The generally recognized rules of international law are regarded as integral parts of federal law.

(2) Legislation or a treaty requiring sanction in accordance with Article 50 (1) can transfer specific federal competencies to intergovernmental organizations and their authorities and can within the framework of international law regulate the activity of foreign states' agents inside Austria as well as the activity of Austrian agents abroad.

With regard to the implementation of international instruments in Austria, the wording of the Austrian constitution above demonstrates the monist viewpoint, except that the Austrian Constitutional law is categorised differently in status and in hierarchical order. This means that the application of international legal instruments such as CRC, CEDAW and other

relevant international treaty obligations can easily become parts of its domestic law and can be enforced in its courts. The European Court of Human Rights' case law system provides that the ECHR, which is the human rights template in many European countries that are members of the Council of Europe, lays down in *Al-Adsani v UK* that the ECHR should be interpreted as far as possible in harmony with other principles of international law.¹⁰³

While the Nigerian Matrimonial Causes Act provides no clear-cut specification as to what amount should be paid in the form of child support payments, the Austrian law is very clear on that. Consequently, perhaps it is safe to say that positive moves have been made towards ensuring that all matters relating to the general wellbeing of the child are resolved in Austria. One of such moves is the enactment of the Parent and Child Amendment Act (*Kindschaftsrechts- Änderungsgesetz (KindRÄG)*) 2001. This was probably to complement the CRC which it ratified in 1992. Under section 144 of the above Act, parents must take care of and educate their minor child, manage his possessions, and represent him in all other affairs; and the obligations of care and education and the management of possessions include legal representation in those areas.¹⁰⁴ And in response to the provisions of the CRC also, the child under the Act (KindRÄG) has right of audience in court proceedings, if the matter concerns his or her welfare. And also, Minors are heard by a guardianship court, or the Youth Welfare Authority (*Jugendamt*).

Generally, matrimonial causes and other matters related thereto are regulated under various instruments, notably: the General Civil Code (*Allgemeine Bürgerliches Gesetzbuch (ABGB)*) – a catalogue of legal provisions comprising Family law (*Familienrecht*), Child Act (*Kindesrecht*), etc. that dates back to year 1811. And all of these instruments are subject to amendment. The Family Law covers a wide range of matrimonial causes in Austria, particularly with respect to marriage, divorce, parental responsibility and other related matters. Under this law, the rights and obligations of both the father and mother of a child are generally the same, unless otherwise provided by law.¹⁰⁵

As provided for under ABGB, while it is not a problem if the parents of a child live in the same household with the child and the child is well catered for, it is however, a complex issue

¹⁰³ Judgement of 21 November 2001 paragraph 60

¹⁰⁴ See Dittrich & Tades (2007) “Das Bürgerliches Gesetzbuch (ABGB 2007)” as translated into English by Yale University.

¹⁰⁵ §137 Abs. 3 ABGB

if one parent lives apart from the home where the child lives. In such situation, that other partner living separate from the child must have to contribute to the upkeep of the child in the form of Child Support payment. This usually happens in the case of divorce or judicial separation.¹⁰⁶

Determination of maintenance ("Unterhalt")

The determination of financial obligations is an important aspect of child maintenance irrespective of whether it takes place in a court or agency-based system.¹⁰⁷ And the courts are mainly responsible for determining the formal child maintenance obligations in Austria. Skinner and Davidson declare that, for married parents who are divorcing, in all 14 countries that were studied, with the exception of Germany and Norway, decisions concerning (the adequacy, in a particular national context, of) child maintenance obligations will be a factor considered in the granting of a divorce.¹⁰⁸ This generally seems a European thing. For example, the outcome of a research to illustrate the prevalence of single parenthood in 14 countries which was funded by Department of Work and Pensions UK in year 2000 was that, half of the countries studied did not take the incomes of parents with care (usually the mother) into account when calculating the amount of child maintenance. On the contrary, the non-resident parents' (usually the fathers') incomes and expenses formed an important part of the calculation. This system may appear discriminatory but it is quite commendable because, in addition to financial contribution, the amount of time and other moral contributions which the parent with care puts into a child's up-bringing cannot be quantified in terms of money.

In Austria, parents are under obligation to take proper care of their children. Accordingly, children can make child support claim against their parents.¹⁰⁹ There is no difference as to whether or not the child is a legitimate child.¹¹⁰ That is to say that every Austrian child can make claim against their legal parents for their livelihood. The scope of this dissertation does not extend to a situation whereby a particular biological parent of a child disowns the child for whatever reason or where they are the biological parents but not a legal parents.

¹⁰⁶ Ibid

¹⁰⁷ Skinner and Davidson (2009) p38

¹⁰⁸ See Skinner and Davidson (2009) p 37

¹⁰⁹ See Paragraph 140 Abs. 1 ABGB

¹¹⁰ See Loderbauer (2004) p 23, see also §166 ABGB

The Austria's General Civil Code also provides that in determining the parents' level of financial responsibility towards the child, regard must be had to two fundamental elements: (a) the parents' financial position and (b) the needs of the child or children concerned. In certain instances these said obligations may also be passed on to the grandparents of the child.¹¹¹

The obligation is regarded as being fulfilled if the parents live in the same household with the child and all the needs of the child (such as food, shelter, clothing, school materials, pocket money, etc.) are met. However, if a parent lives separately from the child (i.e. if s/he does not live with the child concerned in the same household), the non-resident parent's contribution to the upkeep of his or her qualifying child must be made to the child in the form of cash payment, possibly via the parent with care (i.e. one with whom the child lives) or a person in whose favour a residence order is made. This is dependent on the age of the child. However, if both parents are living apart from the child, i.e. in a situation whereby a child lives in a *Welfare home for children*, both parents must make financial contribution for the upkeep of the child via the legally designated authority. And unlike Nigeria where it is the courts that use their discretionary power to reach a verdict as to the amount to be paid by the absent parent for the upkeep of a child, in Austria, such financial obligations are clearly set out in documents that are accessible by everyone.

There are two types of maintenance provisions: Natural and Cash requirements.

- a) **Natural requirements:** e.g. pocket money, gifts etc. –these may be provided by the absent parent out of his own volition as the provision of these does not exempt the affected parent from obligation (b). According to Loderbauer (2004:23), there may come a time however, when the enforcement of this *Natural* fraction of maintenance may be considered. This may be due to the fact that certain payments for e.g. rent and accompanying costs, clothes and other bodily care have to be made.
- b) **Cash requirements:** This becomes necessary, as I earlier mentioned, when one of the parents lives apart from the one in custody of the child. The absent parent is under obligation to make certain payments in the form of child support payment. These are clearly set out in documents accessible by everyone and the payments are based on age

¹¹¹ §141 ABGB

groups of the children and they are strictly enforced by the courts or other designated authorities.

Overview of child support payment calculation in Austria¹¹²

Age in years	Percentage in monthly income
0 – 6	16 Percent of monthly net income
6 – 10	18 Percent of monthly net income
10 – 15	20 Percent of monthly net income
Above 15	22 Percent of monthly net income

For additional dependants, the following deductions are made

For additional child under 10 years of age	1 Percent
For every additional child above 10 years of age	2 Percent
According to each spouse's own net income	Between 0 – 3 Percent

It is important to note however that the parent that has the custody of the child is regarded as having fulfilled his or her obligation by virtue of the fact that s/he lives with and caters for the

¹¹² Figures as quantified by Recht Einfach, available online at: <<http://www.rechteinfach.at>> Accessed 11.07.2011. See also HELP.GV.AT available at: <<https://www.help.gv.at/Portal.Node/hlpd/public/content/49/Seite.490530.html#allg>>

child. It is only the absent parent, i.e. the one who does not live in the same household with the child that has to make the child support payment. If the parent under obligation to make the above payment has other children for whom the same payment is to be made, then, using the calculation above, for every such additional child under 10 years old 1% will be deducted. For every such additional child above the age of 10, two percent will be deducted.

From moral point of view, all parents owe it as a duty to cater for their children and vice versa all through lifetime, as long as it is possible to do so. Legally however, it is an obligation on parents to cater for their children as long as they (the children) are within the specified age and the law enforces it very strictly in Austria. Such payment is only made till the children are able to cater for themselves (as legally provided for). Usually when a child reaches the age of 18 s/he is considered an adult and therefore, the control of the parents over him or her stops. The child support payment does not automatically stop when s/he turns 18 as regard must be had to other circumstances of the child's situation, such as when the child is considered physically challenged or if s/he is still studying or is in a vocational education or other forms of apprenticeship. The completion of any of these educational/vocational training courses usually puts a stop to such payments. It is useful to note that in practice, the payment may continue if the child cannot secure a job immediately after his or her education, irrespective of whether s/he worked briefly and started studying again.

It is useful to note that although the child's income reduces the amount that the parents are expected to pay as maintenance, student support entitlements from the state, student aid, child welfare benefit, family allowance, money from holiday/work placements, etc, do not count as sources of income for the purpose of reducing the parent maintenance obligation. There is also a possibility of mutual agreement between the parents as to the amount to be paid being reached. In such circumstance, the consent of the concerned child may be sought.

In all of these however, it is the spouse or the child to whom the agreed sum is to be paid that is usually the "whistle blower" as to whether or not the obligation is being fulfilled. If the receiving person refuses to let the state know of the non-payment of the specified amount, chances are that the state will never intervene, except in very special case whereby the person against whom the payment order has been made is instructed to make such payments directly to the state's account. This happens only in exceptional cases.

Social welfare benefit

There are a number of social welfare benefits provided by the state and all Austrian parents, children and other citizens in Austria are entitled to claim. There are also benefits which a number of nationals of other countries who live in Austria are entitled to claim. I must however state here that many of these benefits either do not exist in other countries or are subsumed under other forms of benefit so that comparative analysis is almost impossible as this would only create some sort of confusion. To avoid such confusion therefore, I shall name some of these benefits in their original language – German. I must also state that while some of these benefits are enjoyed nation-wide, others are available only in some states (Länder) in the country.

1. Maternity leave allowance (Karenzgeld)
2. Family support (Familienbeihilfe)
3. Kinderbetreuungsgeld
4. Kinderzuschuss
5. Housing benefit (Wohnbeihilfe)
6. Student aid (Studentbeihilfe)
7. Alleinverdienebeitrag
8. Pflegegeld
9. Aufrechter

Primary Healthcare

There is general primary healthcare for everyone, including women and children, in Austria. There exists a general healthcare fund to which all workers and businessmen and women contribute. The amount of contribution to be made is determined by the average income of every individual.

Education

Education in Austria is compulsory up to Junior Secondary (Middle) school level. This means that it is a right on the part of the child as it is an obligation on the part of both the state and the parents that all children of such school ages are educated to the level required by law. Pursuant to KindRÄG 2001 however, the legal obligation owed by parents to their child ends when the child reaches the age of eighteen, except in some special cases such as when the child is in school beyond that age or when s/he is physically challenged, in which case, the state provides additional support to such family.

Social welfare housing

One very important aspect of the social services enjoyed by citizens in Austria is the social welfare housing. According to Matznetter, Austria has repeatedly and consistently been classified as the ideal type of a conservative and familialistic welfare regime and as a paradigm case of corporatism.¹¹³ In the capital of Austria, Vienna, the municipal authority provides subsidised housing for citizens and other specified categories of persons living in it. The other constituent states (Länder) also do the same. Families with children and young adults, particularly female youths, enjoy priority status in terms of speed of allocation.

Family protection against domestic violence and abuse

Violence comes in various forms and it happens everywhere. Every person residing in Austria is therefore protected against any form of violence; whether in public or private places. In this section, I am only going to concern myself with violence in the home, otherwise known as “domestic violence”.

Domestic violence can be described as a pattern of abusive behaviour by one partner against another in a marriage or in some other forms of relationship. It is variously referred to as “spousal abuse”, “family violence”, etc. There is a legal framework in the form of “Protection against Domestic Violence Act”, put in place for the protection of the family in Austria. As

¹¹³ Walter Matznetter Social Housing Policy in a Conservative Welfare State: Austria as an Example.

Haller,¹¹⁴ rightly points out, “the Act is not a single law, its provisions are laid down in the Civil Code, the Enforcement Code and the Security Police Act” This mechanism is particularly aimed at eradicating the menace of domestic violence in the whole of the country.

Domestic violence arises from various disputes, particularly between husband and wife and between parents and their children. And these may be in the form of trading of strong words, to threat of physical violence from which it may later escalate to actual battering. Others forms of violence in the home are rape (including conjugal rape), child abuse (including sex abuse or assault), and other dangerous acts that may cause apprehension of immediate physical violence.

There are various means by which victims of domestic violence can be protected in Austria and support service centres are provided by governmental and non-governmental institutions. There are also a number of penal or corrective measures laid down in the form of framework to be meted out to offenders, and the court enforces them to the letter. In some cases, the offending party may be evicted from the home and barred from returning for up to 2 weeks. This eviction and barring order may even be extended to a sort of temporary interim injunction (*einstweilige Verfügung*) in the form of civil court order by applying to a competent court, depending on the level of threat posed by the offender.¹¹⁵ If this is granted, the restrictive order can then be extended to 4 weeks. This eviction order can be imposed on anyone irrespective of whether or not s/he owns the apartment or house.

There are other offences against the person which amount to violence that are prohibited by other related Acts. For example there are offences that amount to bodily or grievous body harm punishable by either a fine or a committal to prison. These offences fall within the ambit of Austrian Penal Code (Strafgesetzbuch (StGB)) and they are categorised as bodily harm and grievous bodily harm.¹¹⁶ It is also noteworthy that, in the case of threat of violence, if the threat is termed “dangerous”, the offender is punishable with prison term of up to 1 year.¹¹⁷

¹¹⁴ Haller B (2005) “The Austrian Legislation Against Domestic Violence” Available online at: http://www.ikf.ac.at/english/austrian_legislation_against_domestic_violence.pdf

¹¹⁵ See § 38a Security Police Act (Sicherheitspolizeigesetz (SPG § 38a). See also §§ 382 (b) and (e) Executionsordnung (EO)

¹¹⁶ See §§ 83 and 84 Penal Code (StGB)

¹¹⁷ See § 107 Penal Code (StGB) StGB

Another crime that is regarded as very serious in the Austrian criminal justice system is rape, and it is punishable by up to 10 years imprisonment.¹¹⁸ It is also a punishable offence to have sexual relationship with a minor.¹¹⁹ The same goes for spousal rape as the compulsion to have sexual intercourse or other sexual conducts within marriage is prohibited and therefore amounts to rape. And if the victim dies or is impregnated as a result of the act, the prison term may be up to 15 years. Quite clearly, apart from being an act that debases the victim, rape can also have serious psychological consequences.

Conversely, in the Nigeria legal system, it is quite different. Even though those offences are as demeaning, there seems to be some sort of acquiescence on the part of the State with regard to the rate at which they are perpetuated across the country.¹²⁰ For example, apart from the customary law provisions that appear to encourage such act, under sections 47 to 51 of the Nigerian Matrimonial Causes Act, the court still can make a decree of restitution of *conjugal rights* in favour of one spouse against the other.¹²¹ As Onuoha¹²² rightly points out, conjugal rights simply mean legal rights which husband and wife enjoy from each other by virtue of the marriage. These include cohabitation, sexual intercourse, home keeping, maintenance protections, etc.

¹¹⁸ §§ 201 and 202 Penal Code (StGB)

¹¹⁹ §§ 206 and 207 Penal Code (StGB)

¹²⁰ I shall discuss this in more details in the course of the thesis

¹²¹ These rights are more likely to be invoked by men than women, hence their subsistence.

¹²² See Onuoha V “Family Law II” (legal literature in the form of Handout prepared for law students of Open University in Nigeria) p 7

Chapter 7

RIGHTS – WHAT ARE THEY?

Having earlier discussed the relationship between law and tradition in the foregoing chapters, it is imperative to have a look at the meaning of the word ‘right’ in order to reconcile it with those elements examined in law and tradition, so as to finally put them in the context of child protection and gender equality as fundamental human rights. More so because the rights of the child are as important as those protected under the non-discrimination instruments, particularly ones that arise from alimony.

Right can be a title to or an interest in any property; any other interest or privilege recognised and protected by law; freedom to exercise any power conferred by law. These also include human right which is the freedom to which every human being is entitled.¹²³ And it is derived from the Latin word *rectus* which means correct, straight, right as opposed to wrong.¹²⁴

Although right, as with democracy, means different thing to different people, and at different times. This is because the understanding of what is right or wrong varies from person to person, and therefore, our individual interpretations usually conflict. It is sometimes suggested that some rights [human rights in this context] are so fundamental that they form part of *natural law*, but most of them are best regarded as forming part of treaty law. Accordingly, people lay claims to either deserving it or owning it at any given point in time, based on their individual understanding of it.

Everywhere we go, we hear people say: “it is my right”; “I have the right to do this or that”, or that “my right has been violated”. Shaw writes that the question as to what is meant by a right is itself controversial and the subject of jurisprudential debate.¹²⁵ He asserts that some rights are intended as immediately enforceable binding commitments while others merely as specifying a possible future pattern of behaviour.¹²⁶

¹²³ Oxford Dictionary of Law

¹²⁴ See Oshio (2002) p 3

¹²⁵ Shaw (2003) p 247

¹²⁶ Ibid P247

Accordingly, the protection of some rights can be argued to be founded on traditions created out of socio-cultural norms.¹²⁷ Some rights are turned into enforceable law and others not. This is true to the extent that when a people live together and each owns some form of property, in order to live in harmony and have the feeling that they and their property are safe and secure within the particular community, they knowingly or unknowingly, create norms reflecting right or wrong which eventually make up the people's tradition. And when a significant number of them become aware of these norms, they begin to protect them, and laws, within which rights are premised, are thus created. But whether these rights will be protected or respected by the generality of the people is a different matter altogether. Hence Shaw declares, in relation to human rights, for instance, that the concept of rights is closely allied with ethics and morality. He goes on to say that those rights that reflect the values of a community will be those with the most chance of successful implementation.¹²⁸ Shaw's assertion here is true to a very large extent. For example, there are 30 human rights listed in the Universal Declaration of Human Rights document, but unfortunately, not all of them are implemented or enforced around the world. Even where they are enforced, sometimes public policy or interests or administrative practices are used to suppress their proper application.

Nevertheless, from the various interpretations of what amounts to a right, it can be argued that while some rights are created others are not. This means that some rights are natural. Accordingly, human rights are believed by many activists as absolute rights or should be accorded such status.¹²⁹ However, absoluteness of rights is based on human interpretation of what is a right and what is not, and also on certain other elements that need to be taken into consideration in order that the enjoyment of those rights does not extend to a position whereby other people's rights are infringed. And these vary from place to place.

While some rights are derived from contractual agreements, others are state obligations. Simply put, some rights are conferred by one person or a group of persons on another, or vice versa, while some are conferred by the state. That is to say that some fall within the ambit of private law while some fall under public law. Although there is the belief by human rights activists, that some rights (e.g. human rights) are neither private nor public but simply inherently owned by all by virtue of being human persons. To this view, the author lends his

¹²⁷ See discussions under relationship between law and tradition

¹²⁸ Ibid

¹²⁹ See the comments of The Coalition for the Defence of Human Rights on Draft Human Rights Act in Australia. It is strongly held by these people that human rights cannot be created but can only be protected by law

support without reservation. For example, all human beings, irrespective of their race, sex, colour or belief, are equal, even though they may be unequal in size or social status. Even if certain legal provisions (as it was in some countries in the past) declare them unequal on prejudiced grounds, it still does not change the fact that all are equal. For example, if my friend in his own free will, allows me to drive his car everyday, he has conferred a right on me. That is the right to drive his car. Such right is not absolute. This is because he may decide to withdraw that right anytime. The withdrawal of such right will not amount to injustice. Therefore I can not sue for the right to continue to drive the car. It therefore means that such right is not legal but can only be moral right, mostly rendered so as to foster friendly relationships or reciprocal good neighbourliness. On the other hand, as citizens of Austria, the state, for example, confers on all adults the right to vote if they are of specified age and are registered. However, if this author were not a citizen of Austria and had not registered, he would not be able to enforce the right to vote in Austria. Therefore preventing him from voting would not amount to violation of his rights and therefore he cannot sue. This means that that right is hinged on two elements: (1) must be of certain status – *Austrian citizen* – and (2) perform certain act – *register* – in order to qualify for the right to vote. However, the right to vote is classified as human right as provided for under Article 21 of the Universal Declaration of Human Rights.

Furthermore, certain rights are believed to be rights inherently and innately owned by humankind. These types of rights cannot be created by man as they are not mere concessions granted to people, and thus are not man made. However, laws are made, whether in the form of treaties, conventions, declarations or constitutional provisions, in order to facilitate their enforcement as they are owned by humankind simply by being a member of human species.¹³⁰ For instance, if this author is committed to prison without trial by an independent court or tribunal, that will amount to a violation of his right to fair trial¹³¹ and relying on regional human rights protection mechanism –the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR) made possible by and within the jurisdiction of the Council of Europe, he may sue the authority concerned. And if in the course of the investigation it is also revealed that the author was committed to more years imprisonment in comparison to others on grounds of

¹³⁰ See e.g. the comments of The Coalition for the Defence of Human Rights on Draft Human Rights Act in Australia

¹³¹ See e.g. Article 6 of the European Convention on Human Rights and other international human rights instruments

race, colour, creed, religion, sex, etc. the state would not only be found to have violated his right to fair trial, but would also have infringed the author's fundamental right not to be discriminated against, as he is humanly equal in every sense to others under the same human rights protection mechanism and other non-discrimination treaties. And also, every individual employer who, for instance, refuses to give employment to a particular person on any of the grounds I have just mentioned, will be in violation of the person's rights.¹³²

The emergence of rights

Shaw¹³³ declares that rights can be seen as emanating from various sources, whether religion or the nature of man or the nature of society. He draws conclusions from what he termed "The Natural Law" view or by virtue of the natural rights movement, which is that certain rights exist as a result of a higher law than positive or man made law. Such a higher law constitutes a universal and absolute set of principles governing all human beings in time and space.

The liberal conception of right is believed to owe its origin to the earlier propositions of John Locke who, in his early writings, imagined an actual social contract between individuals and the state at the setting up of civil society in which citizens, in order to secure the protection of their property, handed over certain powers (most important of which was a monopoly of coercive force) to the government in return for the guarantee of certain rights to lives, liberties and estates.¹³⁴ Dworkin also derives rights from the assertion that the state owes a duty to treat all citizens with equal concern and respect. Dworkin's theory, which is mostly concerned with the justification of the protection of the *unpopular* or minority rights or those whose exercise may on occasion threaten the overall well being of the community, can be likened to the rights of the child in modern society as they are being promoted today by campaigners and commentators. This is because the rights of the child have tended to be classified by nations of the world as the not-too-important-rights. And as a result, they have been put at risk.

Because the rights of the child also form the concept of human rights, I therefore intend to treat it within that context, except that they are only being recently asserted having been

¹³² See for example Articles 6 & 14 ECHR and Articles 55 in conjunction with 56 of the UN Charter; see also Universal Declaration of Human Rights Arts 7, 10, 11

¹³³ Shaw (2003) p248

¹³⁴ See general discussion by Fenwick, H, *Civil Liberties and Human Rights*, 2002 pp 6-7

neglected for such a long time probably due to lack of awareness. Arat (2008) ¹³⁵ writes that human rights ideology became a mobilizing force in its own name during the 2nd half of the last century, after the establishment of the United Nations and several regional inter-governmental organisations that issued declarations and treaties, articulating human rights, their value and need for protection. The textual sources of human rights Ideology are many documents issued with the purpose of devising states' obligations.¹³⁶ However, the three documents, namely: Universal Declaration of Human rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are commonly referred to as the International Bill of Rights (IBR), constitute the foundation.¹³⁷ Prior to the period emphasized by Arat however, there are others who believe that history of rights or human rights concept is bound up with the revolutionary movements of the eighteenth century, most notable being the American and the French.¹³⁸ Both revolutions sought their justification in the concept of natural law which was believed to be higher than man made law. For example, the French Declaration of the Rights of Man (1793) stipulates that because they are human rights they are higher than mere law. The essence of it lies in the connotation that "Any law which violates the inalienable rights of man is essentially unjust and tyrannical; it is not law at all ...Any institution which does not suppose the people good, and the magistrate corruptible, is evil"

Generally, the rise of nationalism in the nineteenth century and the quest for written constitution as a result of which basic rights became the norms can also be regarded as contributory factors to the agitation for, and the emergence and development of human rights. And prior to these, the aftermath of issues like:

- War (e.g. with intent to subjugate and occupy other people's territory);
- colonisation – an egocentric trend from which so many countries, particularly in the continent of Africa, have yet to economically and or politically recover; and
- Slavery – the height of "man's inhumanity to man", which characterised the "ferocious past" which initiated the prolonged campaigns on virtually all inhuman activities;

also played significant part in the struggle.

¹³⁵ See generally Arat (2008) p913

¹³⁶ Ibid

¹³⁷ Ibid 913–914

¹³⁸ Spencer & Spencer *Human rights (Nutshells)* (2001) p2

Accordingly, there were campaigns centred on abolition of slavery; attempts to set down international rules of conduct of wars; decolonisation of much of the world; as well as movements for the abolition of death penalty, especially in Europe. Taking a cue from United States and France, many countries decided to incorporate basic rights in their constitution.

The major historical event that can be regarded as having engineered a turning point in world polity with regard to human rights was the abolition of slavery. Before then, especially in the nineteenth century, the positivist's doctrine of state sovereignty was the order of the day. Virtually all matters that could be classified as human right issues today were at that stage regarded as within the internal sphere of national jurisdiction. The only exceptions to this, Shaw (2003:252) reiterates, were matters related to piracy *jure gentium* (by the law of nations) and slavery. With regard to slavery, treaties were entered into so as to bring about its abolition and so were efforts made in the area of humanitarian intervention in times of hostilities. These were however not clearly defined.

At the turn of the century however, the establishment of the League of Nations in 1919 was also a land mark in the initiation of basic rights campaign. There were concerns about treatment of the sick and wounded soldiers and prisoners of war. As provided for by Article 22 of the Covenant of the League, mandate systems were guaranteed to peoples in ex-enemy colonies that were yet unable to face the "strenuous conditions of the modern world". The mandate power was obliged to guarantee freedom of conscience and religion and a Permanent Mandate Commission was created to examine the reports the mandatory authorities had undertaken to make.¹³⁹

Despite the legislation, constitutional drafting and reforms made to reflect the furtherance of basic rights, coupled with the efforts of the League of Nations, such as the 1919 peace agreement with Eastern European and the Balkan states which required that petition be referred to the League, perhaps the most single momentum that clearly brought about human rights thinking was provided by the Second World War. The devastating impact of the war led to a fervent search for a lasting solution and this culminated in the establishment of the United Nations (UN). And this subsequently brought about the Nuremburg trials conducted in order to bring the Nazis and the Fascists to justice, as well as to ensure that leaders of sovereign governments were brought to account for various violations of human rights. This was also

¹³⁹ See generally Shaw (2003) p252

the reason why the UN adopted the 1948 Universal Declaration of Human Rights (UDHR) (1948)¹⁴⁰

Although there are various regional and international instruments to which many nation states are signatories and or have ratified, but let me mention some that pertain to the topic of this thesis and how they affect matters that are (or should be) of interest to Nigeria. Examples are:

- The European Convention on Human Rights and Fundamental Freedoms, known as European Convention on Human Rights (ECHR), adopted by the Council of Europe in 1950 and which is enforced by the European Court of Human Rights (ECtHR);
- International Covenant on Civil and Political Rights (1966) (ICCPR) adopted by the UN to give legal effects to rights and duties embodied in the Universal Declaration, which is monitored by the UN human rights committee; and
- the International Covenant on Economic, Social and Cultural Rights (ICESCR) which contains the rights to work, social security, food, clothing and housing.

With regards to this last instrument above, I must stress that the only duty which is strictly made obligatory on participating states is the provision of free primary education; while states are requested to work hard to implement the other rights based on availability of resources. In Europe however, economic and social rights are protected by procedures established in the European Social Charter adopted in 1961, which was intended to complement the European Convention on Human Rights. However, there are other international human right instruments, such as the "Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment", the "Convention on the Elimination of all Forms of Discrimination against Women", and of course, the "Convention on the Rights of the Child".

I would like to quickly point out here that, by adhering to the agreements, all nation states that have acceded to or ratified any of these international treaties, commit themselves to protect the rights contained therein by their own laws and procedures. However, their pragmatic application is a different matter altogether. A declaration only sets out a common standard of achievement for all peoples and all nations, but it does not have the force of law, it provides a yardstick by which the conduct of states and their governments can be judged. It is only when

¹⁴⁰ See, for example, the Preamble to the Universal Declaration of Human Rights (1948). Available online at: <<http://www.un.org/en/documents/udhr/>>

a state fails in its obligation, that international supervision becomes necessary.¹⁴¹ For example, the UDHR spells out most of the main rights that must be protected but it is not binding in international law. There are however two international covenants which bind all signatory parties that have ratified them, and these are: ICCPR and ICESCR. The UN has since set up a Commission on Human Rights with power to discuss gross violations of human rights but not to investigate individual complaints. However, the Human Rights Committee set up in 1977 has power to hear complaints from individuals, under certain circumstances about alleged breaches of the 1966 ICCPR

In relation to the rights of the child and the mother, it will be incorrect to say that during the prolonged campaign for human rights, no mention was made of such rights. The issue of children in armed conflicts was one of the earliest concerns of international child law.¹⁴² Nevertheless, while it is historically believed that the rights of children, for example, appeared as far back as 1825, some scholars consider that the founder of *Save the Children Fund*, Eglantyne Jebb (1876 - 1928), is -one of the founding pioneers of the movement that brought about a strong agitation for the rights of children.¹⁴³

Incensed by the death of millions of children and women and the sufferings in the aftermath of the First World War, Ms Jebb became instrumental to the drafting of the Geneva Declaration on the Rights of the Child which was formally adopted by the League of Nations in the year 1924. There is no questioning the fact that the Geneva Declaration marked the beginning of serious attention to the right of the child as it had been prompted mainly by concern for children affected by the armed conflict in the Balkans.

When the United Nations came into being in 1945, one of the problems it was confronted with was again that of the rights of the child. The lobbying efforts directed at children became so intense in 1946 that the first step taken by the UN was the creation of UNICEF in that same year. The initial mandate of UNICEF was the provision of relief assistance to children affected by the World War II. And in line with the Geneva Declaration of 1959, the UN General Assembly adopted the Declaration on the Rights of the Child.

¹⁴¹ Spencer & Spencer (2001) p3

¹⁴² Buck, T. "International Child Law" (2005) p 73

¹⁴³ Ayua & Okagbue (ed.) (1996) p3

Although the Declaration affirmed a strong desire on the part of the international community to bring an end to the sufferings of children, they were only statements of principle and not binding documents.¹⁴⁴ During the preparations for the International Year of the Child in 1978, which was planned to coincide with the 20th anniversary of the Declaration on the rights of the Child, Poland proposed that the event should be marked by a treaty giving the force of law to children's rights. As a follow up in 1979, the working group set up by the UN Commission on Human Rights at the request of the General Assembly drafted a Convention. And ten years later, (i.e. 1989) the convention so drafted became what is today known as the United Nations Convention on the Rights of the Child (hereafter CRC). This Convention, adopted November 20 1989, secured the fastest ratification of any human rights instrument in the history of the United Nations and has since become the most widely ratified Convention in history.

It must however be noted here that states that have not ratified a treaty will not be bound by its terms in international law.¹⁴⁵

The use of treaties as a primary means of international law making has been so widespread that there was a need for an authoritative statement of the principles and formalities of treaty making. This was achieved in a treaty in the form of *Vienna Convention on the Law of Treaties 1969*. To some extent, this treaty reflected and codified existing international customary law, in particular, the basic international law principle that treaties bind the parties to them and therefore their provisions must be performed "in good faith".

Finally, in order to draw my analysis of rights (what they are; and what mechanisms there are for promoting and protecting them) to a close, I would like to succinctly emphasize the present state of human rights in the world today.

Perhaps one of the few analyses of rights that identified the core areas of the subject of human rights and are able to clearly put them in perspective for easy understanding and assimilation, are contained in Nickel's paper, simply titled: "Human Rights"¹⁴⁶. In it, Nickel rightly emphasizes that the Universal Declaration of Human Rights can be divided into six or more

¹⁴⁴ Ayua & Okagbue (Edited) (1996) p 4

¹⁴⁵ And at time of writing, USA was the only country that had not ratified the CRC and was therefore not bound by its provisions. This was particularly so because Somalia had re-committed itself to ratifying the convention and South Sudan had also indicated its willingness to do same

¹⁴⁶ See details by James Nickel "Human Right" *First published Fri Feb 7, 2003; substantive revision Tue Aug 24, 2010*,

families viz: 1) security rights that protect people against crimes such as murder, massacre, torture, and rape; 2) due process rights that protect against abuses of the legal system such as imprisonment without trial, secret trials, and excessive punishments; 3) liberty rights that guarantee freedoms in areas such as belief, expression, association, assembly, and movement; 4) political rights that protect the liberty to participate in politics through actions such as communicating, assembling, protesting, voting, and serving in public office; 5) equality rights that guarantee equal citizenship, equality before the law, and non-discrimination; and 6) social (or “welfare”) rights that require provision of education to all children and protections against severe poverty and starvation. He concludes by adding group rights to the family; although he rightly acknowledges that group rights is not included in the Universal Declaration document, but stresses that subsequent treaties do, and reiterates therefore that group rights include protections of ethnic groups against genocide and the ownership by countries of their national territories and resources.

Despite the universality of human rights and their principles however, different cultural norms place universal human rights in relation to their cultural context, hence leading to ‘soft’ universalism or ‘soft’ relativism.¹⁴⁷ It is submitted therefore that whether or not some rights are protected by law does not in any way make the particular right any less a right, but it is evident that in order to enforce a right, such right and all its enforcement mechanisms must be backed by law.

¹⁴⁷ Anton Bösl and Joseph Diescho (2009) “Human Rights in Africa, Legal Perspectives on their Protection and Promotion”. Available online at: Konrad A-denauer Stiftung
<<http://www.kas.de/namibia/en/publications/16347/>> Accessed 16.03.2013

Chapter 8

HUMAN RIGHTS IN NIGERIA

It is one thing to ratify or accede to any international legal instrument, but it is another to implement or enforce its provisions in practical sense. Against this background, there are equally legal mechanisms or instruments put in place to ensure that State Parties comply. For example, “State Monitoring” process usually carried out by designated Committees is legally backed by the Vienna Convention on the Law of Treaties, 1969 which requires that State Parties comply with their obligations as set out in the respective instruments in good faith. This treaty entered into force 27 July 1980, and it says:

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*)”.¹⁴⁸

And also, under customary international law, nations can be bound by certain ethics which may not be law per se but are regarded as moral code to which Nation States must adhere. Customary international law is something done as a general practice –not because it is expedient or convenient, but because it is considered to be law, out of a sense of legal requirement (*opinio juris*). This is regarded as one of the sources of international law as stipulated under Article 38 of the Statutes of International Court of Justice.

Fundamental rights

Let me start by looking at this whole episode of fundamental rights in the form of human rights from the Nigerian perspective. It is quite clear that for some Nigerians, the protection of human rights in the face of injustice in the country might be a morally justifiable necessity, but for others, particularly those benefiting from the lack of such mechanism, it is a threat to Africa’s “value system” which is believed to be founded on tradition and its institutions, no matter how obsolete.

¹⁴⁸ Article 26 of the Vienna Convention; see also general rule of interpretation under Article 31 of the same treaty

Looking at it from an international perspective as previously discussed and focusing on highly topical issues such as discrimination, child neglect, torture, arbitrary imprisonment, and general denial of women's rights, one cannot but be compelled to highlight the controversies and complexities surrounding the application of this essential concept. And also, looking at the philosophical, moral and legal justifications for the demand for protection of fundamental rights in addition to the historical origins of human rights and how they are formed into law today, it seems quite odd that Nigeria, with so much diversity in culture, language and religion, still finds it hard to discharge its duties under international law.

It can be seen that the concept of human rights in Nigeria is still looked upon with disdain. Although there are numerous statutory and constitutional provisions, as well as mechanisms emanating from ratified international treaties for addressing the various right issues, but the application of these legal instruments still leaves much to be desired, in that it seems almost "practically" non-existent. It must be remembered that international human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts in order to promote and protect human rights and fundamental freedoms of individuals or groups. In this connection therefore, all inconsistent legislative, administrative and individual practices within Nigeria's jurisdiction ought to be deemphasized.

As is the general practice in many democratic nations with constitutions, laws are made in accordance with the constitutional provisions and applied as such. Otherwise, such laws may become susceptible to a declaration of unconstitutionality by a competent court at the instance of a concerned party with *locus standi*. In Nigeria, this might not have been the practice in the past due to successive military regimes, but with the return to democratic rule and the reinstatement of a constitution and other ratified external legal instruments in form of international treaties or agreements, such has now become a common phenomenon (albeit minimally).¹⁴⁹ And accordingly, one of the most visible forms of legal globalisation at the end of the twentieth century has been the adoption of human rights standards in emerging constitutional democracies.¹⁵⁰ Nigerian legal system is no exception. Therefore, the protection of fundamental rights which is a part of ideal governance in Nigeria is a constitutional obligation. It is therefore useful, at this juncture, to highlight the salient parts of Nigeria's most recent constitution – the 1999 Constitution – which deals extensively with the protection of fundamental rights in the country's legal and political systems. It stipulates that all

¹⁴⁹ See for example section 13 of Nigeria's 1999 Constitution

¹⁵⁰ See Cram, (2009) The Cambridge Law Journal Vol. 68 p 118

Nigerians, irrespective of sex, age, religious affiliation, etc., are equal before the law and by implication, it generally prohibits discrimination in any form against anyone.¹⁵¹ These general fundamental rights are contained in chapter IV of the constitution;¹⁵² some of which are: the right to: life (s.33); dignity of human person (s.34); personal liberty (s.35); fair hearing (s.36); privacy and family life (s.37); freedom of thought, conscience and religion (s.38); freedom of expression (s.39); freedom of Association (s.40); freedom of movement (s.41); freedom from discrimination (s.42); the rights to acquire and own immovable property (s.43); the right against compulsory acquisition of one's property without compensation (s.44).

International law within the Nigerian legal system

Nigeria has ratified so many international treaties and agreements and, in some cases, their optional Protocols which are binding (or supposed to be binding) on Nigeria either wholly or partly (depending on whether any reservation has been placed on the particular instrument). They could be relied upon by affected Nigerians within the Nigerian justice system. The following are few examples:

Regional

- African Charter on Human and People's Rights (1981))
- African Charter on the Rights and Welfare of the Child (1990).

Global/United Nations

- Charter of the United Nations (1945)¹⁵³
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- United Nations Convention on the rights of the Child (1989)

¹⁵¹ Sections 17 (2) (a) and 42 of the 1999 Constitution

¹⁵² Sections 33 – 46 1999 Constitution of the Federal Republic of Nigeria

¹⁵³ As amended 1965, 1968 and 1973

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Vienna Convention on the Law of Treaties (1969)

There are also non-binding declarations which also help to complement other useful and legally binding tools in the promotion and protection of rights. And the two relevant ones that readily come to mind at this point are:

- The Universal Declaration of Human Rights (1948); and
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981)

The United Nations (UN) was formed in 1945 in the aftermath of the Second World War. It was generally the belief that if the fundamental human rights of all citizens of the states concerned were entrenched in the law and were duly observed and protected there would not have been such “barbarous acts which have outraged the conscience of mankind” as articulated in the preamble to the UDHR, and replicated in other similar international treaties.

Nigeria has been a member of the United Nations since 7 October 1960 and is therefore committed (or should be committed) to the furtherance of the content of its Charter. The preamble of it stipulates (inter alia) its commitment viz:

"...to save the succeeding generations from the scourge of war...and to reaffirm faith in fundamental human rights, in the dignity and worth of the human Person, in the equal rights of men and women of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained..." (omissions and restructuring done by the author) ¹⁵⁴

Nigeria acceded to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on the same date (29 July 1993). Having acceded to the various aforementioned international human rights instruments, it is incumbent upon Nigeria, as with all other State Parties with similar status, to fulfil all

¹⁵⁴ See United Nations' website, available online at: <<http://www.un.org/en/documents/charter/preamble.shtml>>

obligations, particularly to have respect for and protect human rights. The obligation to respect human rights means that States must not interfere with the people's enjoyment of guaranteed rights and also, in order to ensure that rights of individuals and groups are protected, abuses of these rights must be guaranteed. Therefore the government must take positive action in facilitating the full enjoyment of all basic rights.

However, efforts to establish, promote and protect such civil and political and other fundamental rights and institutions have always been met with stiff opposition.

And from this, emanate unending socio-political conflicts. Among the numerous socio-political and economic crises undermining Nigeria's emerging democracy has been the non-implementation or non-enforcement of so many international treaties.

Nigeria signed the CRC 26 January 1990 and ratified it 19 April 1991. It signed the CEDAW 23 April 1984 and ratified it 13 June 1985. ICCPR and ICESCR were both acceded to on the same date –29 July 1993. All documents appear to have been signed without any form of reservation. And if there was any reservation, it was however, not published on the OHCHR's Webpage at the time the Webpage was accessed.¹⁵⁵

Nevertheless, the non-application of the various international legal instruments is believed by many to be due largely to the subsisting obstinate traditions in the form of Sharia and customary laws as these add to the already compounded political tension in the country. For example, Akande ¹⁵⁶ writes that “the Constitution” provides for Sharia courts of appeal and for customary-law courts of appeal, thus establishing a tripartite system of justice. Akande further notes that “although this system seeks to accommodate Nigeria's ethnic and religious diversity, it does raise problems for national unity, judicial uniformity, and equity in the administration of civil and criminal justice.”

In ensuring the “best interest of the child” which is a principal feature of many of the international treaties on both the rights of the child and of women, State Parties are to ensure that all legislative and administrative practices are aligned with the set aims and objectives.

¹⁵⁵ See Nigeria's status in international law with respect to treaty ratification as at 13 April 2009 available online at <http://www2.ohchr.org/english/law/>

¹⁵⁶ Akande, J “*The Legal Order and the Administration of Federal and State Courts*” Available at: <http://publius.oxfordjournals.org/cgi/content/abstract/21/4/61>

With regards to who is a child, the African Charter on the Rights and Welfare of the Child provides that "a child means every human being below the age of 18 years". And on the issue of traditional and religious interests (i.e. in the event that they clash with the provisions contained therein), the Charter further states that:

*“Any custom, tradition, or cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged”*¹⁵⁷

And that –

*“[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status” (emphasis added).*¹⁵⁸

It is clear from the above provisions of the African Charter that every child is guaranteed the enjoyment of the rights contained therein, irrespective of any contrary requirements which may be obligatory under the doctrines of the parents’ or guardians’ tradition, religion, etc.

These provisions – Articles 1 (3) and 3 – of this Charter are particularly important because the challenges that hinder the implementation of most of the fundamental rights instruments in Nigeria emanate mainly from tradition and religion. But on the other hand, the 1999 Constitution of Nigeria presents unfavourable conditions which, when applied to the letter, will also undermine the fulfilment of Nigeria’s obligations under international law. For example, the constitution says that any law that is inconsistent with its (the constitution’s) provisions is, to the extent of the inconsistency, void.¹⁵⁹ This is the part where legal experts have had unwavering legal wrangling. This is because it is sometimes in the nature of any international agreement to do otherwise to every domestic provision that runs contrary to ratified bilateral or multilateral agreements, unless the concerned State Parties have placed

¹⁵⁷ Article 1 (3) African Charter on the Rights and Welfare of the Child, Sandy Ghandhi (2008) "International Human Rights Documents (6th Edition) (2008) p 429

¹⁵⁸ Article 3 African Charter on the Rights and Welfare of the Child, Sandy Ghandhi (2008) "International Human Rights Documents (6th Edition) (2008) p 429

¹⁵⁹ See section 1 (3) See also section 12 of Nigeria’s 1999 Constitution

some reservations with regard to certain requirements on the particular agreement at the time they ratified it.

Furthermore, Nigeria, under the African Charter on Human and People's Rights, is also under obligation to ensure that all its citizens are guaranteed, among other things, equality of all before the law, as well as recognized rights and duties and freedoms enshrined therein without any form of discrimination.

At the global level, Nigeria, having also ratified the CRC is under obligation to also apply all its provisions to the letter. For example, this instrument, like the 1990 African charter, prohibits the use of custom, tradition, religion, etc. as excuses to deny children their rights under international law.¹⁶⁰ And any form of discrimination on any of the specified grounds is also prohibited under the same instrument.¹⁶¹ And also, all forms of discriminatory practices, whether by State Party or by individuals within a State Party's jurisdiction, are also prohibited under CEDAW, and women are therefore equal to men in every sense.

However, apart from the practice of customs and traditions which seems to distort the application of international law, the tenor of the constitution of the Federal Republic of Nigeria 1999 does not help matter as mentioned above. It holds that mere accession to a convention does not in itself confer on the treaty a binding force of law in Nigeria unless and until it is ratified by a majority of all the Houses of Assembly in the Federation.¹⁶² This constitutional provision with regard to the impact of international instruments on domestic law was reaffirmed by the Supreme Court of Nigeria in the case of *Abacha v Fawehinmi*.

Furthermore, it is important to know that failure to implement an international instrument on the grounds that a national law, which, of course, includes the constitutional law, precludes such implementation, as can be gleaned from section 12 of the 1999 Constitution of Nigeria, invariably amounts to a breach in international law by virtue of Article 27 of the Vienna Convention 1969.

¹⁶⁰ See article 2 of Convention on the Rights of the Child 1989

¹⁶¹ Ibid

¹⁶² See section 12 of 1999 Constitution of Nigeria. This statutory provision was reaffirmed by the Supreme Court in its decision in the case of *Abacha v Fawehinmi* (2000) 6 NWLR Part 660

Let me reiterate however, that one of the ways by which a treaty can be ratified is to incorporate the particular treaty into domestic law. But the choice of method to be used is the State's. However, it is one thing to complete the process of ratification, but it is another to implement the provisions of the relevant instrument. While ratification implies that the ratifying party accepts that legal consequences should flow between it and other ratifying parties to the convention, implementation connotes the actual application of the provisions of the instrument within the municipal legal process of the ratifying state. In the case of Nigeria, ratification requires not only the enactment of a treaty provisions into its domestic law, but it also requires the review of all affected pre-existing domestic laws which may, by reasons of that ratification, become obsolete. This review is necessary so as to give practical effect to the provisions of the ratified international treaty.

In accordance with the above mentioned provisions, coupled with the decision of the Nigerian Supreme Court in the *Abacha* case, it can be seen, as I earlier mentioned, that Nigeria's fate, with regard to non-implementation of the ratified international law, (i.e. for not re-aligning its pre-existing discriminatory and obsolete laws, vis-à-vis, the customary and Sharia laws, to reflect international legal order) appears critical, and such failure may, prima facie, amount to a fundamental breach.

Implementing international instruments in the case of Nigeria will mean reforming or abolishing both Sharia and Customary laws. Otherwise, how else can the state cope with such laws that are characterised by many conflicting provisions? It must be remembered here that, while customary law proponents are resolute on their standpoint, it is also the general belief of the intractable Sharia law adherents that it (Sharia law) is not subject to reform, as it is regarded as law handed down to man by Allah. And therefore, it cannot be reformed by human. Moreover, the *Abacha* case has thus established that once the provisions of an international instrument are incorporated into domestic law as demonstrated above, they become binding and Nigerian courts must give effect to them like all other laws falling within the jurisdiction of the courts in Nigeria.

The Court's position with regard to the provisions of Articles 27 and 46(1) of the Vienna Convention on the Law of treaties 1969 which prohibits state reliance on its domestic law in

order to circumvent international obligation, was however not clarified, although that was not raised as a point at issue.¹⁶³

In order to complement the African Charter on the Rights and Welfare of the Child and the CRC, the Federal Legislature (National Assembly) in Nigeria has drafted the Child Rights Act 2003. This legislation (among other things) provides for the establishment of family courts which will operate at the High Court and Magistrate court levels. The courts so established shall be vested with the jurisdiction to hear all cases in which legal right, power, duty, liability, privilege, interest, obligation or claim, in respect of a child, is in issue, or in any criminal proceedings relating to any offence committed by a child or individuals against a child. But this has raised some legal questions with regard to their competence and jurisdiction, as the operations of such courts seem to clash with those of Sharia and Customary courts'. Obviously this confusion originates from primacy or hierarchy of legal norms between those of Sharia law and Statute; and Customary and Statutes. If and whenever this legislation is allowed to take its roots, chances are that both Sharia law and customary law courts may be headed for abolition. But I doubt whether this would be the case as there were cases in the past where some provisions of customary law clashed with sections of certain statutory instrument and instead of using such opportunity to adjudicate on the illegality of such customary law tenets, the controversy was circumvented by invoking "procedural rules".¹⁶⁴

The problem with enforcing rights in Nigeria

In Nigeria, there is no doubt that efforts to promote rights and institutions are always met with stiff opposition from which socio-political conflicts constantly generate. And the fault lines with regard to the numerous socio-political and economic crises undermining Nigeria's emerging and delicate democratic regime seem to run directly to the non-implementation or non-enforcement of so many international treaty obligations. Quite clearly, apart from the non-binding Universal Declaration of Human Right of 1948, the United Nations Convention

¹⁶³ Article 27 provides that a party may not invoke the provisions of its internal laws as a justification for its failure to carry out an international agreement. See also Article 46 (1) which provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent.

¹⁶⁴ See for example *Mojekwu v Mojekwu* 1997 7 NWLR 283; see also *Mojekwu v Iwuchukwu* (2004) Suit No. SC:11/2000

on the Rights of the Child (CRC) 1989 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 guarantee specific rights which every ratifying State is under obligation to implement. And these happen to be some of the international treaties which Nigeria has ratified. Excuses given for the non-implementation of these instruments are usually based on the fact that Nigeria's domestic law controls such implementation and therefore such move must be in accordance with the relevant domestic provision.¹⁶⁵ And the non-application, as has been articulated in various discussion programmes across the nation, is generally believed to be due largely to the subsisting obstinate traditions in the form of Sharia and customary laws which have brought about *legal pluralism* in the country. Many proponents of customary law (including Sharia) often declare that any law which seeks to oust or alter their way of life is unacceptable. And such attitude does not conform with the tenets of the Vienna Convention on the Law of Treaties 1969.

Having signed the aforementioned international treaties, it is imperative to implement them accordingly as I earlier mentioned. Failure to do so is a violation of international law. The Office of the High Commissioner for Human Rights, in its publication regarding treaties which it refers to as "the core international human rights treaties" also states that "...when a country ratifies one of these treaties (referring to treaties which included CRC, CEDAW, ICCPR, ICESCR etc.), it [the ratifying state] assumes a legal obligation to implement the rights recognised in that treaty'. (Emphasis mine)¹⁶⁶

Some relevant international treaties which have, *prima facie*, been seriously undermined in this part of the world and which necessitated this study include:

- African Charter on the Rights and Welfare of the Child (ACRWC) 1999;
- African Charter on Human and Peoples' Rights (ACHPR);
- United Nations Convention on the Rights of the Child (CRC) 1989
- Convention on the Elimination of All Forms of Discrimination against Women 1989
- International Covenant on Civil and Political Rights (ICCPR) 1966; and
- International Covenant on Economic, Social and Cultural Rights 1966

¹⁶⁵ See the decision of the Supreme Court of Nigeria in the case of *Abacha v Fawehinmi* where it was stated that an international treaty does not alter the law of Nigeria if such treaty has not been incorporated into its domestic law.

¹⁶⁶ See Office of the High Commissioner on Human Rights at available at: www.ohchr.org/english/countries/ratification/index.htm

In spite of the provisions of these international legal instruments to which Nigeria is a party, we have witnessed in recent times, for example, an alarming growth in the implementation of the Sharia Penal Codes in the northern parts of Nigeria— Penal Codes — which legal experts regard as not only draconian, but equally discriminatory and fundamentally flawed in several respects.¹⁶⁷ Same applies to the continuous application of customary law, especially, in the southern part of the country. Even judges have, on several occasions, been criticised on the ground that they are being influenced by the tenets of customary law in their adjudication. For instance, Bamgbose writes that there were occasions when courts disregarded the provisions of the statutes and shifted to the side of customs in their decisions on issues of marriage, inheritance or widowhood.¹⁶⁸

Thus, the political complications and the legal uncertainties introduced by this whole thing have brought much agitation for a change among a number of well-meaning Nigerians. It is strongly believed that the whole system, including the current constitution, urgently calls for a total reform. Many blame the complex nature of the Nigerian state on the diversity of its religious and cultural values, with customary and Sharia laws regarded as having the most devastating effect, both in theory and in practice.¹⁶⁹ For example, Onuoha, writing on the issue of inheritance under customary law, asserts that it ‘breeds conflict and acrimony among heirs and discriminates among beneficiaries’.¹⁷⁰ He emphasizes that ‘while some [beneficiaries] are accorded rights of inheritance, others are not’.¹⁷¹ He concludes that ‘customary law fails the repugnancy doctrine test’ as required under the Supreme Court Ordinance No. 6 of 1914, and also ‘the international conventions against discrimination’.

The customary law which I refer to here as “tradition” is the local customary law in Nigeria, and should not be mistaken for customary international law or other laws that exist in other democratic cultures.

¹⁶⁷ For example, Manfred Nowak, then the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment when he undertook a visit to Nigeria from 4 to 10 March 2007 notes in his report submitted to the Human Rights Council that corporal punishment, such as caning, and including Sharia Penal Code punishments of the northern states (i.e. amputation, flogging and stoning to death), remain lawful in Nigeria. He recalls that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Under international law, they are not lawful sanctions and violate the international human rights treaties to which Nigeria is a party.

¹⁶⁸ See generally, Bamgbose, O. online at: http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/customary%20law/Oluyemisi%20Bamgbose.htm

¹⁶⁹ See Olateru-Olagbegi, B. & Afolabi, B.A. “*Actual Women Situation in Nigeria*” published by WiLDAF/FeDDAF online at http://www.wildaf-ao.org/fr/print.php3?id_article=46

¹⁷⁰ Onuoha, R. A. ‘*Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue*’

¹⁷¹ Onuoha, R. A. ‘*Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue*’

Custom in contemporary western society such as Austria, for example, is somehow a thing of only nostalgic value and thus less important. But in international law, custom may be regarded as being of great value as a result of the lack of centralised legal system. However, that is not what is under contemplation here and is therefore outside the scope of this thesis, although I do make reference to it when necessary.

Chapter 9

STATE SOVEREIGNTY VERSUS INTERNATIONAL TREATIES AND CONVENTIONS ON THE PROTECTION OF RIGHTS – THE CRITIQUE

In this chapter I shall attempt to critique state reliance on the notion of “state sovereignty” as it affects international treaty obligation. I intend to argue within the context of this dissertation how states (particularly Nigeria) cannot invoke their domestic law, which is the basis for the reliance on state sovereignty, to rebut their obligation under international law. Indeed, this notion has been used by many nations as excuse for failing in their duty to the international community and their own citizens.

The issue of national sovereignty conflicting with or hindering State’s willingness or ability to comply with international treaty obligations has been a topic for debate for such a long time and many legal commentators and academics have voiced their opinions in that regard. One of the issues constantly raised has been the promotion and protection of human rights principles as set forth in the UN Charter, which, by implication, suggests that all State Parties to the UN are (or should be) under obligation to comply with. It is particularly contentious because conversely, the Charter of the same UN under Article 2(7) emphasizes on the principle of non-intervention in domestic affairs. Nowak (2003:33) in his seemingly carefully thought through analysis of the scheme of things with regard to the problem with ‘*promoting human rights*’ while on the other hand encouraging the principle of ‘*non-intervention in domestic affairs*’, illustrates this with the atrocities of the Nazi holocaust which served as eye opener with regard to whether international community should intervene in relations between states and their citizens. Undoubtedly, the heights of the desire for the promotion and protection of human rights at the domestic and international levels is best ascribed to, and amplified by this sad occurrence. He emphasizes, in relation to the principle of *non-interference*, even in the face of human rights abuses, how this played out in reality during the Cold War, to the effect that the so-called “advisory services” were admissible with the consent of the state concerned, but the same was not true for measures of international human rights protection, which were not to be imposed against the will of the government

concerned.¹⁷² Furthermore, he draws on the authority of the decision of the European Court of Human Rights in a case in which an individual relied on Article 10 ECHR (freedom of expression) which includes freedom to impart information without interference from the state, to challenge successfully; Austria's broadcasting monopoly which the complainant believed was a breach of that provision. However, Nowak asserts that, apart from treaty obligations, the dogma of state sovereignty has gradually lost ground since the late 1960s.¹⁷³

It is quite challenging to explain the fact that Nigeria has ratified many treaties, particularly those I mentioned earlier, yet many of its citizens are unable to enjoy the protection which the instruments guarantee, and courts seldom apply them within its judicial system. Although it could be argued that so many nations of the world do not also fulfil their international treaty obligations, but I am particularly concerned with the prospect of Nigeria embracing access to justice and rule of law as prescribed by the international community. And because such is one of the reasons for ratifying international law, it is proper that much emphasis is placed on fulfilment of such obligations rather than contemplating on those nations that fail to comply.

One contentious issue plaguing the Nigerian polity with regard to compliance with international law arises from the fact that while Nigeria, on the one hand, has given its consent to be bound by international law provisions as required under sections of the Vienna Convention on the Law of Treaties, 1969,¹⁷⁴ on the other hand, Nigeria's 1999 Constitution with regard to any law that may be inconsistent with it, that the constitution shall prevail and that other inconsistent law shall be void to the extent of its inconsistency.¹⁷⁵ This, by implication, includes international law.

In most legal systems, many areas of law are inter-dependent. In other words, every new law is enacted with the pre-existing ones in mind. Ideally, conflicts with other legal provisions and overlaps are generally avoided. Sometimes, a new legislation may be introduced in the form of amendment to fill in any lacuna in the pre-existing ones or may even be redrafted as substantive law. But what I find very difficult to comprehend, for example, is the fact that Nigeria is a signatory to the UDHR and knows that the document's provisions have been made legally binding in the two subsequent International Covenants: ICESCR and ICCPR.

¹⁷² See Nowak (2003) p 33

¹⁷³ See Nowak (2003) p 33

¹⁷⁴ Vienna Convention 1969 Article 26

¹⁷⁵ See section 1(3), Constitution of the Federal Republic of Nigeria 1999. Available online at: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

These provisions also reflect in UDHR's regional counterparts – the ACHPR – in much the same way as the global CRC's. And to some extent, the CEDAW's elements are contained in the African regional instrument, – the ACRWC.

Under all of these documents, Nigeria is obligated to promote and protect the rights set forth in them. For example, in addition to specifying that a child means every human being below the age of 18 years,¹⁷⁶ ACRWC prohibits under –

- Article 1 (3) – inconsistent custom, tradition and religious practice, etc.;
- Article 3 – discrimination on grounds of sex;
- Article 17(2) (a) – torture or inhuman or degrading treatment or punishment on an imprisoned child; and
- Article 21 (2) – child marriage and the betrothal of girls and boys.

Conversely, Nigeria is a member of the Organization of Islamic Conference (OIC) and has been since 1986.¹⁷⁷ By implication, Nigeria has not only given its consent to be bound by the provisions set forth in its Charter, but also consented to subsequent instruments to which the OIC may accede, unless there is a reservation in that regard. Accordingly, the members of the OIC made the Cairo Declaration of Human Rights in Islam (CDHRI) as its own answer to the call for universal protection of human rights. But consequently, this declaration apparently has, to a certain extent, adverse or counter effects on the application of the provisions of the Universal Declaration of 1948, as elaborated in the two subsequent binding Covenants, as well as the CRC, CEDAW, ACHPR and ACRWC, which Nigeria has also ratified.

For example, while the UDHR provides for the right to marry and found a family without limitation due to race, nationality or religion,¹⁷⁸ the CDHRI also guarantees such rights but, by implication, such rights may be restricted on grounds of religion.¹⁷⁹ Therefore, the Cairo Declaration guarantees men and women the right to marry, while it prohibits “restrictions stemming from race, colour or nationality”, but deliberately omitted “religion” as a basis for such restriction. With this provision, it follows therefore that marriage can be restricted on

¹⁷⁶ Article 2 ACRWC and Article 1 of CRC

¹⁷⁷ See membership list online available at: http://www.oic-oci.org/member_states.asp

¹⁷⁸ See Article 16 UDHR 1948. Available online at:

<<http://www.ohchr.org/EN/UDHR/Documents/60UDHR/bookleten.pdf>>

¹⁷⁹ See Article 5(a) Cairo Declaration of Human Rights in Islam 1990. Available online at: University of Minnesota Human Rights Library < <http://www1.umn.edu/humanrts/instree/cairodeclaration.html>>

religious grounds –apparently Islam, in the form of Sharia law. Sharia law does restrict marriage on the basis of religion, since Sharia prohibits a Muslim woman from marrying a non-Muslim man, but permits a Muslim man to marry a non- Muslim woman. Obviously, as the man is the dominant figure in a Muslim family, the woman is at the man’s whims. This is not in conformity with the principle of “non-discrimination” as set out in many of the international human rights instruments and is also particularly contrary to the rights set forth in the Convention on the Elimination of All Forms of Discrimination against Women.

It is also disappointing that the CDHRI does not guarantee all rights to women as clearly spelt out in the Universal Declaration. For example, when the United Nations adopted the UDHR in 1948, and this strongly proclaimed the recognition of "dignity" as well as "rights" because it believed that all human beings, irrespective of their origin, belong to one human family and that only such understanding could bring justice and peace to the world.¹⁸⁰ And the UDHR expressly provides for the recognition of both “dignity” and “rights” of men and women in that all human beings are born free and equal in dignity and rights.¹⁸¹ However, the CDHRI only provides that a “woman is equal to a man in dignity” and that she “has rights to enjoy...” But it does not provide for equal rights in general. The CDHRI does not guarantee freedom of religion as it is not mentioned anywhere in the document.

And also, we have witnessed, for example, the growth in the implementation of Sharia Criminal Penal Code in northern parts of Nigeria. These are Penal Codes based on the teachings of Islam and which legal experts regard as not only draconian, but also discriminatory and fundamentally flawed in several respects. This is why it is startling that the CDHRI expressly provides that Sharia law is the only basis for ascertaining what amounts to crime and what punitive measures to authorize.¹⁸²

Although there is no indication that the contents of the CDHRI and its resultant activities have led to the growth of Sharia law in the northern parts of Nigeria, but neither can it be proven too that they have not influenced the thinking of the Sharia proponents. One thing is sure: such provisions, no matter how ineffective they might appear, can undermine the

¹⁸⁰ See Preamble to the UDHR 1948 Available online at:
<<http://www.ohchr.org/EN/UDHR/Documents/60UDHR/bookleten.pdf>>

¹⁸¹ Article 1 UDHR 1948

¹⁸² See Article 19 CDHRI 1990

implementation of the global human rights instruments which, apparently, Nigeria has yet to come to terms with.

It must however be pointed out that as much as the Federal authority in Nigeria may want to tackle the problem of Sharia head-on by emphasizing that Nigeria, being a secular state,¹⁸³ cannot condone such divisive legal order, there are so many proponents who hold such legal order in very high esteem. On the other hand, it could be argued that the federal government, by implication, encourages the application of such ferocious laws. For example, the 1999 constitution expressly provides for the establishment of Sharia court of Appeal. And also, while the federal government of Nigeria is talking tough on secularism on the one hand, on the other hand, it is obvious that it is not doing anything about its membership of the Organisation of Islamic Conference (OIC) –a religious organisation based on the religion Islam. And this has caused a number of heated debates among citizens and legal scholars in the country. To many advocates of secularism, it did not come as a surprise when one Dr Ibrahim Datti Ahmed, in a news briefing, was consequently reported as saying that:

*“Any law that seeks to give equal rights to male and female children in inheritance, seeks to give an illegitimate child the same rights as the legitimate one, and establish a court (family court) that ousts the jurisdiction of sharia courts on all matters affecting children, is unacceptable to Muslims”*¹⁸⁴

This protest statement was made to warn the Federal National Assembly against a policy initiative in which it sought to impose the Child Rights Act 2003 (Nigerian federal government’s legislation to complement the provision of the African Charter) on all the State Houses of Assembly in Nigeria. This goes to show the challenges a multi-faith society such as Nigeria usually faces when implementing any international agreement that may seem to alter or clash with the religious and customary system that the local people may have already got used to. Dr. Ahmed argued that such legal instrument ‘will demolish the very basis and essence of the Sharia and [their] Islamic culture’. He therefore called on all fellow Muslims

¹⁸³ Under section 10 of the 1999 Constitution, it is forbidden for any State to adopt any religion as State Religion. This is available online at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>

¹⁸⁴ Protest statement by Dr Ibrahim Datti Ahmed, President of Supreme Council for Sharia in Nigeria (SCSN), in reaction to the Nigerian Federal Government’s call for the implementation of the Child Rights Act 2003, reported 22/08/2005 available online at <http://allafrica.com/stories/200508230090.html> (accessed 16/02/2008)

and Islamic organizations to take appropriate steps in their states to prevent this from happening’

Such statements, whether or not couched in firm words, can however send very strong signal to any government; especially one that is wary of terrorism and general political tension, and can actually undermine security arrangement in a country.¹⁸⁵

Furthermore, while reviewing earlier statement made by Bello to buttress his support for the continued Sharia application, Ladan¹⁸⁶ asserts that the State must review aspect of Sharia continuously, emphasizing aspects of it, which have become important and shelve, for the time being, the aspects that have, due to changing circumstances, become less important. He reiterates that the State, as the authority with the ability to evaluate the conditions of society from all perspectives, is permitted to ignore the letter of the law in favour of the spirit if the occasion so demands. He affirms that it is only in this way that the fundamental objectives of the Sharia can be realized. Ladan’s ardent support for extreme application of Sharia law can be inferred from his assertion that:

“...land is directly related to the defence of Islam, making it illegal for the Islamic urban centres to be allocated to those who have no interest of Islam at heart”.

The above excerpt, when taken in conjunction with other parts of Ladan’s affirmation, is capable of placing any critical legal thinker in two minds. The reason is simple: the whole of Nigeria belongs to Nigerians, irrespective of their religious affiliation. After all, before Usman Dan Fodio arrived in Sokoto area, the natives were not Muslims at all and up till today, not every citizen of Nigeria living in Sokoto and its environs practises Islamic religion. It follows therefore that to refer to Sokoto as Islamic land is not only rationally incorrect; it is historically and legally flawed. Sokoto neither belong to Islam nor to any other religion whatsoever.¹⁸⁷ I stand to be corrected!

¹⁸⁵ And true to my prediction, when I started writing this dissertation, the “Boko Haram” Movement in Nigeria had not developed to such wide scale as it is presently; and I predicted that such statement could trigger some form of uprising!

¹⁸⁶ Ladan, M.T. “The Development and Application of Sharia in Northern Nigeria: Issues and Challenges”, Available online at: <http://library.fes.de/pdf-files/bueros/nigeria/50282.pdf> Accessed 22.02.2013

¹⁸⁷ See section 10 of Nigerian Constitution 1999, which precludes the government from adopting any religion as State religion. Available online at: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

Lessons from Europe

In Europe, the mechanisms for the protection of the rights of the child and the family in general seem to have attained greater heights in terms of implementation of national and international legal instruments in those regards, than in the continent of Africa. For example, several international instruments derived from foreign agreements have impacted on the European nation's legal systems so much so that it is now arguable to say that each of the nations' legal systems still stands on its own (i.e. without the influence of international law, supposedly foreign to each of them). This is evident from the existing case law systems of the European Court of Human Rights and the European Court of Justice.

As a result, in the case of EU, legal matters between individuals (Horizontal direct effect) in each of the Member States, as well as between the Member States and their citizens (Vertical direct effect) are resolved in line with guidelines laid down by these EU instruments. And also, the Member State themselves are not left out as cases between each other are decided, based on the traditions of the EU *new legal order*.

Consequently, the remainder of the Austrian legal system, for instance, will ultimately go the way of the EU instruments, as well as all the other external legal instruments it has ratified and implemented. It is only a matter of time. Austria's accession to the European Union in 1995 plays a significant role with regard to its observance of these said external legal instruments. The Austrian legal system is, as a result of that accession, highly influenced by the EU legal system, for example, to the effect that even its political, economic and social arrangements are now controlled either partly or wholly through ensuring that it transposes certain EU Directives into its domestic legal system. And some of the most important mechanisms for ensuring Member States' fulfilment of their obligations under the European Union law are addressed in its case law system. There are direct and indirect methods of doing so. And if the requirements for direct effect of certain provisions are missing, indirect reliance has also been made possible to the effect that if, for example, a Member State fails to transpose a Community Directive into its domestic legal system, that State may be held liable for any loss suffered by the particular individual. That is to say that any area which the case law systems and other provisions cannot or have not covered may be captured by the principles of indirect reliance.

In addition to the variations made to Member States' domestic law by the earlier European Community law cases such as, *Van Gend en Loos* (Case 26/62) 1963; *Costa v E.N.E.L.* (Case 6/64) 1964, *Simmenthal* (Case 106/77) 1978, *Factortame* (Case 213/89) 1990, etc., the case of *Fracovich v Italy*, (Case C –6/90) signalled the possibility of indirect reliance on Community law. And in the case, the European Court of Justice (ECJ) clearly stated that:

“...the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the treaty”¹⁸⁸

This *Fracovich* principle of state liability established by the ECJ in 1991 stands as part of the most important developments within the Union's legal system which has not only helped to ensure Member States' compliance with their obligations, but also that any individual who suffers losses as a result of non-compliance with the EU law, is duly compensated.

In the case, the ECJ relied on its case law on supremacy and direct effect and, in particular, the principle of effectiveness by which the prevention of individual constitutional rights must be ensured through the inseparability of rights and remedies. This case arose from the Defendant State's infringement of Articles 189(3) and 5, now 249(3) and 10 respectively, with regard to its failure to transpose into national law a European Union Directive. Although the reliance on the direct effect of the Directive was unsuccessful because the Directive did not make it clear as to whether the State should be vicariously liable for the debts owed by a liquidated firm to its former employees, but cleverly, the ECJ was also asked whether there was State liability in damages arising out of the particular state's failure to implement the Directive. To this, the ECJ's decision was in the affirmative.

Consequent upon this decision, coupled with other cases decided in like manner therefore, Member States, including Austria, are bound to decide similar cases within their own legal system so that individuals are able to rely on the provisions of the Directive or any other Directives with similar character. It is useful to stress that for a right to damages to arise however, three requirements must be met viz: the result required by the Directive must confer rights on the party concerned; the contents of the rights must be clearly identifiable by

¹⁸⁸ See summary of *Fracovich v Italy*, (Case C –6/90) by EUR-Lex available online at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0006&from=EN>>

reference the Directive, and also, the breach of the obligation by the Member State must have been the cause of the loss or damage suffered by the concerned individual or group.¹⁸⁹

Apart from failure to implement a Directive, the *Francovich* decision is also capable of being extended to cover any failure of a Member State to observe Community law – breach of provisions of the Treaty, Regulations or Directives, whether directly effective or not. The principle laid down in *Francovich* for example, was also applied in one of the earliest somewhat similar cases in Austria: *Köbler v Republik Österreich* (Case C – 224/01 (2003) 3 CMLR 28).

Köbler was a professor who had lectured in various Member States' universities (including Austria's) for 15 years. On the basis of the length of service, when considered in aggregate, should earn him the legal entitlement to salary increment in accordance with Austrian law. His application for such increment was however rejected because the legislation makes the grant of that increment conditional on 15 years of service in Austrian universities only. But Mr Köbler claimed that the Austrian authority had discriminated against him by failing to grant his application and that such discrimination was contrary to the principle of freedom of movement for workers. The Austria's *Verwaltungsgerichtshof* (Supreme Administrative Court) referred questions to the ECJ.

Without bothering ourselves with the details of the points of reference made by the Austrian court to the ECJ, it was however held that a Member State's failure to transpose a Community law into its domestic legal system amounts to a breach of Community law irrespective of whether the breach which gave rise to the damage suffered by the individual is attributable to the legislature, the judiciary or the executive arm of the government. The principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound to comply with the rules laid down by Community law which directly govern the situation of individuals.¹⁹⁰

¹⁸⁹ For the development of the States' liability for non-implementation of Community Directive as articulated in the *Francovich* case, see also *Brasserie du Pêcheur v Germany* and English case of *R v Secretary of State for Transport ex parte Factortame Ltd and Others* (Joined Cases C –45 and 48/93) in which the ECJ made a slight but very significant modification to the conditions laid down in the *Francovich* case.

¹⁹⁰ See also the decisions in an action against Italy for failure to fulfil its obligations in Case C – 129/00 *Commission v Italy*; and a reference from the Netherlands for preliminary ruling in Case C –453/00 *Kühne v Heitz*.

To sum it all up, let me quickly draw attention to one of the European Council Directives buttress position of Europe with regard to democracy, liberty, human rights, rule of law and fundamental freedoms.

In that document, the European Council emphasizes its commitments to ensuring that all that the peoples of Europe dear are respected and sustained. It draws on Article 6 of the Treaty on European Union to highlights the principles on which the European Union is founded. Obviously, all of the values of the Member States of the Union as reflected in the constitutions are contained in the document as it is only by so-doing that the wishes of the people through democratic means are fulfilled.¹⁹¹

One human rights document that has achieved much in Europe in terms of rights protection and therefore worthy of emulation is the Convention for the Protection of Human Rights and Fundamental Freedoms (popularly called European Convention on Human Rights (ECHR)) which was initiated by the Council of Europe. This Convention seems to have been modelled in the light of the American declaration of independence of 1776.

Although the human rights practice of the authors of the American concept could, by today's standard, be seen as deficient in that the whole essence of the American Independence pivoted around the impression that all men were equal and, as such, be treated as same. Hence the authors and founding fathers declared that:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness".¹⁹²

But on the other hand and sadly too, it is obvious that their intents and purposes were short-lived by the fact that among the authors were wealthy slave-owners whose property included hundreds of human beings, whose liberty and even life were at their mercy.¹⁹³

¹⁹¹ Council Directive 2000/78 EC of 27 November 2000 establishing a framework for equal treatment in employment and occupation, available online at EUR-Lex, *Official Journal L 303* , 02/12/2000 P. 0016 - 0022, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>> Accessed 24.06.2014

¹⁹² Excerpt from USA's Declaration of Independence by Charters of Freedom, available online at:

<http://www.archives.gov/exhibits/charters/declaration_transcript.html>

¹⁹³ See Spencer & Spencer (2001) p 1

However, Europe's version of the instrument that ensures promotion and protection of those "unalienable rights", liberty and other fundamental freedoms, is of a different dimension. This is partly because Europe was undeniably one of the principal theatres of the Second World War, following which it was felt there was great need for European political, social and economic unity. I guess it was perceived that in order to realize these objectives it would be proper to encourage the adoption of a uniform convention to protect human rights and fundamental freedoms.

And consequently, in 1949, the Council of Europe was established and the Convention on Human Rights was ratified by Member States in 1951, coming into force in 1953.¹⁹⁴ This is now the template for measuring what amounts to rights violation within Europe.

Accordingly, the ECHR, including its court's (European Court of Human Rights (ECtHR)) case law system seems to be Europe's regional equivalent of the ICCPR, and it complements the UN Human rights Committee which has power to hear complaints of individual breaches of human rights, except that the ECHR predates the ICCPR. Many European nations that are signatories to the ECHR have also ratified other international treaty agreements and are very much concerned about complying with them as many of the rights and freedoms guaranteed under them are also present in the ECHR document. And because the violation of many of the provisions of most international treaties would almost invariably amount to a violation of not only the ECHR, but also their own domestic constitutions, most Member States would rather comply. Compliance has reached much further and is particularly undemanding because most of the provisions of the ECHR are adaptations of principles that are enshrined in the domestic legal systems of many European nations. Same goes for the European Union law.

¹⁹⁴ Barnett, H *Constitutional & Administrative Law* (2002) p596

Chapter 10

HUMAN RIGHTS IN AFRICA AND THEIR IMPACTS ON NIGERIA

The continent of Africa in general is known to have been the hub of human rights violations. Some believe that this was as a result of incessant power struggles which were brought on it, firstly, by slave trade and later by colonialism; both of which put powers in the hands of known crooked local kings and half-educated elite that were capable of being used as stooges in order to perpetrate political and economic manoeuvrings by slave drivers and the colonialists. Reverend Tutu¹⁹⁵ writes that human rights as a legal concept and codification of human dignity were late to arrive in Africa. He emphasizes that its evolution on this continent is to be seen against the background of the dynamic development of human rights within the United Nations system and that of international law, although the impetus of this evolution is owed to the struggles within African states in the colonial and post-independence eras. History has it too that the influx of colonialists brought with it various systems of rule that were not only alien to the continent of Africa, but which apparently served only the interests of the invaders. Most prominent of these was the indirect rule system that forcefully took power away from the erstwhile local kings that were once revered so greatly by the people in most African kingdoms and gave it to the ruthless, cunning and half-educated elite amongst them. And also, in order to perpetuate their (colonialists') self-seeking expansionist policies, heterogeneous communities with large expanse of lands were forcefully merged together and formed into various nations currently inhabited by various ethnic groups. And because they have truly been ravaged by those years of slavery and colonialism, the result has been one of political confusion which translates into incessant ethnic conflicts, abject poverty, corruption, uncompromising religious practices, obstinate traditions and other grave human rights violations, all rolled up into one.

In spite of all of the above however, many nations within the continent of Africa have, in theory, manageably put in place some human rights protection mechanisms and many have also ratified (or acceded to) many global or regional human rights instruments. According to

¹⁹⁵ See Forward written by the Reverend Desmond M. Tutu on Anton Bösl and Joseph Diescho (ed) "Human Rights in Africa, Legal Perspectives on their Protection and Promotion". Available online at: KonradA-denauer Stiftung <<http://www.kas.de/namibia/en/publications/16347/>>Accessed 16.03.2013

Bösl and Diescho,¹⁹⁶ the United Nations System, international law and the African Union have certainly all contributed to the establishment of a human rights system in Africa, which has positively and indispensably influenced the advancement of human rights and of justice. However, some of the promises made about such rights being guaranteed under global, continental, regional and national legal instruments have remained unfulfilled.

In enumerating Africa's human rights mechanisms and institutions therefore, regard must be had to one of the major forums by which the idea to establish human rights protection mechanisms was strengthened. This was tagged "the International Conference on Assistance to African Children" and it was convened by the OAU. During this time a Declaration on the Children in Dakar, Senegal in 1992, as a follow up to the 1990 World Summit on Survival, Protection and Development of Children was adopted. It is however worth mentioning that, prior to this, the Assembly of Heads of State and Government adopted a Declaration on the Rights and Welfare of the African Child at its 16th Ordinary Session in 1979.

The major rights protection instruments in Africa today are:

1. The African Charter on Human and Peoples' Rights;
2. The African Charter on the Rights and Welfare of the Child;
3. The Declaration of Principles on Freedom of Expression in Africa;
4. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights;
5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;
6. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa;
7. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;
8. The African Charter and the Protection of Refugees through Communications before the African Commission; and
9. The AU Convention on Preventing and Combating Corruption.

¹⁹⁶ Anton Bösl and Joseph Diescho (2009) "Human Rights in Africa, Legal Perspectives on their Protection and Promotion". Available online at: Konrad A-denauer Stiftung <<http://www.kas.de/namibia/en/publications/16347/>> Accessed 16.03.2013.

During the 1992 Conference however, each member nation presented for discussion its National Programmes of Action which were designed to achieve specific priority needs in the areas like health, nutrition, education, water and environmental sanitation. The conference adopted what it referred to as the *Dakar Consensus*. The consensus was that action for Africa's women and children must be part of a broader accelerated programme of development and poverty alleviation. And furthermore the Dakar Consensus so adopted enjoined the African countries and their donor partners, including international financial institutions, to jointly commit themselves to incorporate the goals of child survival, development and protection in their bilateral and multilateral consultative processes and development programmes.

Although it is generally believed by some that while none of these initiatives add anything new to the UN Convention, nevertheless, they are of important symbolic effect to the extent that they demonstrate the commitment of the international community and in particular, the African region, to the fundamental rights protection, especially the rights of the child.¹⁹⁷

In addition to the commitment of the OAU (now Africa Union (AU)) to the protection of the child, it is imperative to note that the welfare of the child has been recognised by law (statutory law in this context) in Nigeria since 1943 when the Children and Young Persons Ordinance was first enacted. And in 1979 the protection of Children was specifically entrenched in the Nigerian Constitution of that year. As for the mother, it is evident from Nigeria's 1999 Constitution that all Nigerians, irrespective of sex, age, religious affiliation, etc., are equal before the law. For example, Section 42 subsection (2) stipulates that:

"No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth".¹⁹⁸

The above provision, by implication, demands that discrimination in any form against anyone be prohibited, at least, in theory.

¹⁹⁷ See for example, Ayua (ed.) *'The Rights of the Child in Nigeria'* (1996) p7

¹⁹⁸ Section 42 Constitution of Nigeria 1999, available online at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>

Human rights abuses in parts of Africa

Niger

Human rights abuses in Niger include: alleged extrajudicial killings; use of excessive force by police and security forces; poor jail and prison conditions; arbitrary arrest and detention; prolonged pre-trial detention; executive interference in the judiciary; forcible dispersal of demonstrators; interference with press freedoms; official corruption; societal discrimination and violence against women and children; female genital mutilation (FGM); trafficking in persons; the practice of slavery by some groups; and forced child labour.¹⁹⁹

Sudan

In Sudan, there have been issues and rumours of ethnic cleansing in Darfur, modern day slavery, use of child soldiers in ethnic conflicts and other abuses in conflict settings, such as rape, sectarian killings and destruction of property. There have also been reports of wanton arrests of human rights defenders.

On ethnic cleansing which is regarded as human rights violation, reports by Global Ministries News Archives have it that in early 2003, two African organizations from the Fur, Masalit, and Zaghawa (African) ethnic groups protested government policies which they said kept them in chronic poverty. The source also notes that “liberation movements,” branded as “rebels,” especially sought protection from the economic interests of Arab nomads (Janjaweed, Janjawid or Jingawit), who maintain their own militia. Assisted by the government in Khartoum, the Janjaweed, responded by striking out at African “civilians,” including women and children. Villages were burned, women raped, and crops destroyed, the source confirms.²⁰⁰ The Human Rights Watch, in this respect, demanded in 2008 that the Sudanese government should immediately account for the hundreds of men and women and that the government should also bring to justice those responsible for the torture and mistreatment of detainees.²⁰¹

¹⁹⁹ Report by United States Department of States, Bureau of Democracy, Human Rights, and Labor 2006. Available online at: <<http://www.state.gov/j/drl/rls/hrrpt/2006/78750.htm>> Accessed 16.03.2013

²⁰⁰ “Ethnic Cleansing” in Darfur: Background Information” Available at: Global Ministries News Archives, <http://gbgm-umc.org/global_news/full_article.cfm?articleid=2583> Accessed 16.03.2013

²⁰¹ “Sudan: Account for Civilians Arrested Khartoum” Human Rights Watch, Available at: <<http://www.hrw.org/en/news/2008/06/16/sudan-account-civilians-arrested-khartoum>> Accessed 16.03.2013

Regarding the use of child soldiers, the BBC interviewed the spokesperson of a group of human rights associations that came together under one body, named “Coalition to Stop the Use of Child Soldiers”, Mr Mungoven, who established that Sudan is "one of the worst child soldier problems in the world". More than 10,000 children are fighting on the government side or for rebel groups in southern Sudan, he said.²⁰²

On slavery, Wikipedia²⁰³ reports that some organizations, in particular Christian Solidarity Worldwide and related organizations, argue that enslavement exists in Sudan and is encouraged by the Sudanese government. Furthermore, unconfirmed source reports that from 23–26 October, Sudanese government troops attacked villages near the southern town of Aweil, killing 93 men and enslaving 85 women and children and on 2 November, the Sudanese military attacked villages near the town of Nyamlell, carrying off another 113 women and children.

South Africa

Although the Republic of South Africa is regarded as having a liberal constitution, there have been reports of violations of various human rights in the country. Of particular concern is the issue of police brutality which still displays some elements of malice arising from apartheid regime that is purported to have been eliminated. One of such incidences was reported by Freedom of Expression Institute 18th September 2012. According to the Institute in its publication captioned, “Police Violate Julius Malema’s Rights”, the police in the North West set a dangerous, if not illegal precedent, in preventing Julius Malema from addressing striking miners gathered at a stadium in Marikana. It emphasizes that the police summarily stopped Malema from entering the stadium where workers were gathered and then proceeded to escort him by car out of the district. The Institute concludes that “the polices’ actions are a serious violation not only of Malema’s intrinsic right to speak and express himself, but also of the workers’ rights to associate with Malema”. The U.S. Department of State also published in 2010 that there were reports by NGOs and local media of police use of excessive force against suspects and detainees, which resulted in deaths and injuries; vigilante and mob violence; abuse

²⁰² (BBC News Online “Child soldiers in the firing line”. Available at: <http://news.bbc.co.uk/2/hi/1266534.stm>> Accessed 16.03.2013

²⁰³ “Human Rights in Sudan”, Available at: <http://en.wikipedia.org/wiki/Human_rights_in_Sudan> Accessed 16.03.2013

of prisoners, including beatings and rape and severe overcrowding of prisons; lengthy delays in trials and prolonged pre-trial detention; forcible dispersal of demonstrations; pervasive violence against women and children and societal discrimination against women, persons with disabilities and the lesbian, gay, bisexual, and transgender (LGBT) community; trafficking in persons; violence resulting from racial and ethnic tensions and conflicts with foreigners; and child labour, including forced child labour and child prostitution.²⁰⁴

Egypt

In Egypt there have many negative reports of violations of various human rights, particularly as an aftermath of the fall of the previous president, Hosni Mubarak. It is not as if the human rights situation in the troubled country was better during Mubarak's regime, but with the "Arab Spring" which started off in Tunisia and quickly spread across to Egypt and other countries, such as, Yemen, Bahrain, Syria, Libya, etc., many of the long suppressed human rights atrocities wrought in those countries by their dictatorial leaders were brought to the fore. According to Amnesty International (AI),²⁰⁵ the January 25 uprising that led to the resignation of President Hosni Mubarak did not come out of nowhere. For decades, Egyptians activists and civil society leaders had protested the widespread use of torture and other ill-treatment; grossly unfair trials of civilians before military and emergency courts; restrictions on the peaceful exercise of the rights to freedom of expression, association and assembly. Other issues included legal and other discrimination against members of religious and ethnic minorities; arrests and prosecutions of people for their actual or alleged sexual orientation; and the maltreatment of refugees, asylum-seekers and migrants through the use of excessive, including lethal force. As a result of NGO's constant reportage on human rights concerns which were broadcast across the entire world, the new government in Egypt has sought to restrict NGO's activities in order to prevent the fate that befell Mubarak from repeating itself. One of the controversial strategies employed by Egypt's Ministry of Insurance and Social Affairs is the prevention of NGO's from sourcing funds from external donors without permission, and directive was communicated to all known NGOs in the country. According to Amnesty International, "In a letter to the NGO, the Egyptian Organization for Human Rights, Egypt's Ministry of Insurance and Social Affairs

²⁰⁴ "2009 Human Rights Report: South Africa" Available at: U.S. Department of State <<http://www.state.gov/j/drl/rls/hrrpt/2009/af/135977.htm>> Accessed 16.03.2013

²⁰⁵ "Egypt Human Rights" Available at: Amnesty International <<http://www.amnestyusa.org/our-work/countries/middle-east-and-north-africa/Egypt>> Accessed 17.03.2013

stated that no “local entity” is permitted to engage with “international entities” in any way without the permission of the “security bodies”, referring to instructions issued by the Prime Minister.

AI emphasizes that it (AI) had obtained a copy of the letter in which it was directed that no organisation should work with other “international entities” – a phrase which the AI believes was too vague for clarity and could only amount to pure restriction on the work of all NGOs. The AI believed that such vague language, by implication, could mean that they were being prevented from dealing with other international human rights organisations, including the UN. “NGOs in Egypt already face staggering restrictions, but this instruction is a new low,” said Hassiba Hadj Sahraoui, Amnesty International’s Deputy Director for the Middle East and North Africa.²⁰⁶

From the look of things, human rights situation in Egypt seems to be worsening. According to “Russia Today (RT)” – a TV network – “the Freedom and Justice party holds a majority in parliament, and is known for its conservative Islamic values. These include having women work from the home as a good wife and mother and dress in the traditional headscarf. A Muslim Brotherhood ideal would be for Egypt to be under Sharia law, but they say they will not implement it unless the people of Egypt want it. “The Women“, RT further reports, “say they would be better off under the rule of Mubarak since rights are being taken away...instead of more being given.” Parliament is also discussing proposals to reduce the marriage age for a girl to 14 and a custody law that will give children over eight to fathers. *"I think it's a disastrous Parliament; how this can represent a society?"* said Dalia Abdel Hamid, the gender officer at the Egyptian Initiative for Human Rights. *"After the revolution everyone wanted to be represented and to have their voices heard but ... women are just being marginalized by all the parties."*

Paradoxically, it has also been reported that one of the female MPs, Muslim Brotherhood’s Azza Al Jarf, is controversially working to reverse the 2008 ban on female genital mutilation. According to her, women should be able to make their own choices with regards to their body. RT also reported that the military, which was sent to protect the revolution after Mubarak left

²⁰⁶ See “Egypt hits ‘new low’ on NGO restrictions” Available at: Amnesty International <<http://www.amnestyusa.org/news/news-item/egypt-hits-new-low-on-ngo-restrictions>> Accessed 17.03.2013.

power, arrested female activists and sent them for virginity tests. A doctor, who inserted his finger into the females to verify their virginity, was sued and acquitted in March.²⁰⁷

In their editorial introduction on a book “Human Rights in Africa, Legal Perspectives on their Protection and Promotion” (2009), Bösl and Diescho affirm that despite the shortcomings and inherent problems with regard to human rights situation, in the field of international human rights law, African legal instruments have been trailblazers. Most significantly, the African Charter has incorporated the three categories/generations of human rights in one instrument, emphasising their indivisibility.²⁰⁸

It could be argued that all of the human rights concerns and the contents of the ensuing regulatory mechanisms have permeated the thinking faculties of the Nigerian policy makers; hence generally, the Constitution of the Federal Republic of Nigeria 1999 guarantees certain fundamental rights to every person including children. These fundamental rights are contained in chapter IV of the constitution.²⁰⁹ However, out of the sections containing the said fundamental rights, s.45 provides that violation of sections 37, 38, 39, 40 and 41 of the constitution shall not be regarded as having invalidated any law if the infringement is such that it is reasonably justifiable in a democratic society. Nigeria signed up to the United Nations Convention on the Rights of the Child (hereafter CRC) in 1990 and ratified it 1991 without reservations and the African Charter on the Rights and Welfare of the Child in 2001. Furthermore, it signed the CEDAW in 1984 and ratified it in 1985; also without reservations. By signing on to these international treaties, it has agreed to be bound by their provisions and Nigeria is therefore under obligation to abide by them.

It must be remembered that Nigeria was once a British colony as discussed earlier. It follows therefore that the common law tradition which prevails in most (if not all) former British colonies is also incorporated into the Nigerian legal system. And this partly embodies some international experience of charters and bills of rights perceived in contemporary English law. For example, the ECHR was treated as a template for the constitutions of all such former colonies and they have since embraced human rights legislation and built up case law system on the basis of its application. It must however be noted that UK did not legislate to make the

²⁰⁷ See generally, “Egyptian women fear fewer rights, more harassment after elections“. Available at: RT (7th June 2012) <<http://rt.com/news/gloom-future-egypt-women-284/>> Accessed 17.03.2013.

²⁰⁸ Available at: Konrad A-denauer Stiftung <<http://www.kas.de/namibia/en/publications/16347/>> Accessed 16.03.2013.

²⁰⁹ Sections 33 – 46 Constitution of the Federal Republic of Nigeria 1999.

provisions of the ECHR part of its own domestic law²¹⁰ despite the fact that the UK was actually instrumental in the drafting of the Convention.

Accordingly, since Nigeria has signed onto all the instruments I have mentioned above, it is important that Nigeria ratifies (if it has not already done so) and implement all of them, thereby putting into effect their provisions for the benefit of its citizens.

On the other hand, under section 12 of the constitution, any foreign treaty or agreement in the form of international law must first of all be enacted into law by majority of all the States in Nigeria by a process of ratification. Otherwise, a bill for the implementation of such international law or agreement cannot be presented to the President for assent.²¹¹

Article 27 of the Vienna Convention on the Law of Treaties 1969 also lays down that in so far as treaties are concerned, a party may not invoke the provisions of its internal laws as a justification for its failure to carry out an international agreement. Furthermore, Article 46 (1) provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent. In consonance with these provisions, one finds that Article 13 of the Draft Declaration on the Rights and Duties of States 1949 provides that every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

This was one of the provisions considered by the International Court of Justice (ICJ) when reaching a decision in *Cameroon v Nigeria*, a case which concerned an agreement between the two states, known as the Maroua Declaration of 1975. In the case, Nigeria argued that the Declaration signed by the two Heads of States was not valid as it had not been ratified. In its decision, the ICJ, while referring to Article 7(1) of the Vienna Convention 1969, pointed out that the calibre of persons who signed the agreement was very high so as to be regarded as full representatives of their respective countries and also that the violation could not be such that is 'manifest and concern a rule of fundamental importance', pursuant to Article 46(1) of the Vienna Convention 1969.

²¹⁰ Until Human Rights Act 1998 was enacted.

²¹¹ See section 12 Constitution of Nigeria 1999, available online at: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

It has been demonstrated by the ICJ in some cases that international law has primacy over domestic law, even though in practice most nations do not accord it that status in cases in which they are likely to be found in breach. Many believe that the sovereignty of nations would be downplayed if it were so. The supremacy of international law over domestic law was also emphasized by the ICJ in the *Applicability of the Obligation to Arbitrate case*²¹² and in the *Lockerbie case*²¹³ where judge Shahabuddeen pointed out that inability under domestic law to act was no defence to non-compliance with international obligation.

Accordingly, Nigeria has however taken some steps to realise the aims and objectives of the CRC. Among these steps are: the setting up of the National Child Welfare Committee in 1991 to formulate a framework for implementing the goals of the World Summit for children; enactment of Child Rights Act 2003 to supplement both the CRC and the African Charter, etc. However, these efforts seem to have encountered many shortcomings, notably the implementation of the Child Rights Act 2003 (CRA 2003) which was first drafted in 1993, only to be adopted in 2003 (ten years after). Nigeria, under its own constitution, is obligated to uphold its '*foreign policy objectives*' by having '*respect for international law and treaty obligations*'.²¹⁴

With regards to women however, (apart from female children), not much seems to have been achieved in alleviating their suffering, especially in the area of discrimination as some discriminatory laws still exist. Although discriminatory practices are prohibited in some law documents, but the pragmatic application of such legislation so as to address the situation on the ground is a different matter altogether. Whereas Statutes and the Constitution prohibit discrimination against women, the customary and Sharia laws propagate it despite the fact that the backbone of Human Rights Ideology embedded in the International Bill of Rights is anti-discrimination.²¹⁵ There are practical evidences that help to buttress the hitherto "mere presumptions" that customary law does not provide for the protection of women and children.

In the early stages of Nigeria's "independent" legal system, there were instances whereby formal courts clearly gave judicial notice to some ferocious and discriminatory customary

²¹² See ICJ Reports, 1988, pp12, 34; 82, ILR, pp. 225, 252

²¹³ ICJ Reports 1992, pp. 3, 32; 94ILR, pp 478, 515

²¹⁴ Section 19 (d) of the Nigerian Constitution 1999 states that the respect for international law and treaty obligations shall be part of its foreign policy objectives

²¹⁵ See Zehra (2008) p 915

practices, especially in Igbo land.²¹⁶ It is pleasing to note however, that we are beginning to see some gradual changes in the attitude of judges and, indeed, the overall justice system, towards embracing human and fundamental rights protection. For instance, the judgments in cases such as *Okonkwo v Okagbwe* (1994), *Mojekwu v. Mojekwu* (1997), *Ukeje v. Ukeje and Anor*²¹⁷ are some of the indications of such positive moves.

In all the three cases above, the judges condemned all such repugnant and discriminatory practices which precluded a woman from inheriting from either her deceased husband or parents. Four years after the *Mojekwu* (1997) case however, the Court of Appeal sitting at Port Harcourt in the case of *Uke v Iro* (2001), reiterated that the Constitution protects all rights of all sexes and no law or custom should seek to relegate women to the position of second class and thereby depriving them their inalienable and constitutionally guaranteed rights and that where such laws exist, they are fit for the garbage and must be disposed of. But when the *Mojekwu* case finally reached the Supreme Court in the year 2004, the matter was twisted to the effect that the victory in that case was achieved only on the basis of which of the two contested customs: “Kola Tenancy” and “Ili-Ekpe”, was applicable in the case. Although the Supreme Court found the former custom (Kola Tenancy) applicable, but it neither declared the latter custom “repugnant to natural justice, equity and good conscience”, nor did it state whether it violated human rights law.

It is important to remind ourselves here that Nigeria operates a three-tier government system (as narrated above): Federal, State and Local governments –

- At the Federal level there is a bi-cameral legislature: the House of Representatives and the Senate as the Federal legislative arm, while the President and his Ministers occupy the Executive arm;
- At the State level, the House of Assembly plays the legislative role while the State Governor and his Commissioners occupy the State Executive arm; and
- There is also a third level – the Local Government Council level. At this level, the Executive arm comprises office of the Chairman of the Council and those of the

²¹⁶ See the judgement in *Ilboma v. Ibeneme* (1963)

²¹⁷ (2001) FWLR pt 109 p1588

Counsellors with Portfolios, as well as other Counsellors'. They all act in one capacity or another in making local bylaws to regulate, especially, maintenance of local schools, buildings, parks, allocation of market stalls, waste management and disposal, collection of rates and other levies, etc.

It is also noteworthy that in each of those aforementioned levels, there are very many organs responsible for making some pieces of “delegated legislation”.

With regards to these organs of government, it must be emphasized that, constitutionally, the post of a Minister at the Federal level, and Commissioners at the State level, are by appointment. And these are done by the President and confirmed by the federal legislature (National Assembly) and by the state Governor and confirmed by the State legislature (House of Assembly) respectively. However, all legislative offices at the three levels are filled through electoral processes.

Considering the complication in the power distribution from top to bottom, it is obvious therefore that, before any rule or principle of international law can have effect within Nigerian domestic jurisdiction, it must be expressly transformed into its municipal law by the use of the appropriate constitutional machinery in all 36 constituent states pursuant to the constitution. And as is also constitutionally provided for, all states of the federation have autonomous power, their own legislative system, constitution, and are equal in every political sense to each other. This means that until a particular state enacts a convention into its own domestic law by a process of re-enactment, depending on the nature of the legal instrument, that particular state will not be bound by that law, irrespective of whether or not that law was ratified by the federal authority, especially if the law falls outside the legislative list on which the federal authority has power to legislate.²¹⁸ Hence no court can prosecute violators of any of the rights within the states that have not re-enacted a particular instrument.

Having said all that, I think it is proper to also draw attention to the constituent states' effort in bringing about the much expected mechanisms for the protection of citizens' rights in their respective jurisdictions. Apart from the “Child rights Act 2003” and the “Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003” (amended in 2005 and renamed: “Trafficking in Persons Prohibition (Amendment) Law Enforcement and

²¹⁸ See Section 12 of the 1999 Constitution of the Federal Republic of Nigeria; c/f Article 46 (1) Vienna Convention 1969 and

Administration Act 2005” – Federal legislation – which some states have re-enacted in their various jurisdictions pursuant to the constitution, the following state legislations have also been put in place:

- Ebonyi State Law No. 010 (2001) on the Abolition of Harmful Traditional Practices Against Children and Women;
- Edo State Female Genital Mutilation (Prohibition) Law 2002;
- Edo State Criminal Code Amendment Law 2000;
- Bauchi State Hawking by Children (Prohibition) Edict of 1985 CAP 58;
- Cross River State Girl Child Marriages and Female Circumcision (Prohibition) Law 2000

In its 54th session, the UN Committee’s concluding observation of Nigeria, as deduced from documented evidence in the form of the State Party’s “3rd and 4th reports” and which were adopted 11th June 2010, made some significant points. While it praised Nigeria, inter alia, for the enactment of the pieces of legislation I have mentioned above, the Committee regrets the lack of up-to-date information on measures taken by the State party to prevent and eliminate harmful traditional practices, including progress in the implementation of its earlier recommendations (CRC/C/15/Add.257, paras. 54-58).

Although the situation seemed to have comparatively improved, but in practical terms the level of improvement is considerably too low to be acknowledged. However, perhaps one should be delighted that the situation has not worsened.

Chapter 11

FAMILY PROTECTION: THE LAW AND THE OPPOSING TRADITION AND CUSTOMS

In this chapter, I shall be discussing practical availability or (non-availability) of mechanisms for the protection of the family as opposed to mere theoretical existence of legislation and other instruments found on paper. These include a more specific discussion of some problems militating against existing framework, as well as the reasons why such problems subsist.

Family means a group of people connected by blood, marriage or adoption. It may include unmarried couples living as husband and wife in permanent and stable relationships. Some customs of some tribes in Nigeria also do extend strong family ties and privileges to what could be regarded as extended family members in the western world. In fact these members are as important within the family as members of a nuclear family and they enjoy almost equal rights and privileges. This idea of extended family units also means an extension of the family problems. Indisputably, the overwhelming problem with regard to family protection in Nigeria today still lies with the traditional practices which obviously are inimical to the proper use of other pieces of legislation put in place to protect the home front. These traditional practices, in the form of customary law, stem from belief, values systems and religion that are regarded as sacrosanct. For instance, it is obvious that in Nigeria, religion and family are two central factors in both the current conflict and the construction of individual and communal identity.²¹⁹ Thus, the potential effects of Sharia and other religious jurisprudence in the area of family law represent, in the eyes of some, a threat to national democracy.²²⁰

Generally speaking, the Nigerian family law falls within the ambit of private law and is enforceable as such. Traditionally, it focuses mainly on marriage and divorce. In the main, it could be said that it is under it that men and women automatically acquire legal rights, for example, to be provided with maintenance and to succeed to property against their partners and other relatives.²²¹ Based on this understanding, it is incumbent on the state to regulate its

²¹⁹ See Green, C. "Religion, Family Law, and Recognition of Identity in Nigeria". Available online at: <<http://www.law.emory.edu/fileadmin/journals/eilr/25/25.2/Green.pdf>>

²²⁰ Ibid

²²¹ Cretney et al, *Principles of Family Law* (2003) p1

affairs as something of private contractual agreement whose liability lies mainly in remedy rather than in punitive measures. Although if any member of the family breaches other forms of law within the family unit, such as Penal or Criminal law, by committing the crime of assault and battery or other more serious crimes like rape and homicide, such person may be tried summarily or on indictment under the applicable penal law. This, of course, is dependent on the severity of the offence. There may also be remedy in the form of *mandatory injunction*, *prohibitory injunction*, as well as *specific performance* as in normal legally binding contract between two or more parties. There is also the doctrine of estoppel (equitable or promissory) which may offer the *promisee* some form of remedy against the *promisor*.

As a result of the fact that family matters fall under the ambit of private law in Nigeria, their regulation is therefore divided between customary law (including Sharia) and statute law. Accordingly, marital concerns arising out of Act marriages are regulated by statutes (i.e. under Matrimonial Causes Act 1970 LFN 1990 and Marriage Act, LFN 1990), while those of traditional marriages (*native law and custom*) are regulated by Sharia and customary law rules. Where it appears that a customary law has been violated or that the particular customary law rule in question is repugnant to the rules of natural justice, equity and good conscience, such matters are settled in their respective courts. And appeals may go to Customary or Sharia Court of Appeal. And if unresolved there, appeal may lie from Customary Court of Appeal or the Sharia Court of Appeal to the Court of Appeal, which is where all marriage issues on appeal are resolved, irrespective of the type of marriage. After this point, appeals then lie to the Supreme Court which is the highest Appellate Court in the country.²²²

What is required in order to make successful use of any well articulated legislation is the establishment of other enabling interdependent mechanisms. These range from competent institutions, skilled personnel, adequate funding, as well as infrastructure to ease the practical application of the general framework. It is relatively imperative that the aforementioned elements are adequately provided for in order to achieve the desired objectives.

Against this background, I would like to draw attention to the part played by the traditional institutions in relation to general family management, with emphasis on gender relations.

²²² See section 233 Constitution of the Federal Republic of Nigeria 1999

TRADITIONAL INSTITUTIONS IN NIGERIA AND THEIR INFLUENCES

The traditional institutions responsible for non-availability of proper legal framework for family protection, particularly with regard to women and children in Nigeria, seem somehow cast in stone. For example, there are still some strong traditional institutions and highly placed kings whose monarchical influences still exude overwhelming hold on so many people. Their services are engaged to project the institutions under which the proponents of customary practices propagate their clandestine ideology by which women and the poor are oppressed, even although in some cases, the kings may not be aware of some atrocities. Prominent among these traditional rulers are: the Sultan of Sokoto, the Oba of Benin, the Obong of Calabar, the Alaafin of Oyo, the Ooni of Ife, etc.

Benin (the erstwhile Kingdom)

Traditional institution in Benin is a solid establishment. Its defacto place in the scheme of power politics in Nigeria is so strongly entrenched that any government; be it democratic, monarchical, or dictatorship, that does not recognise it is not only bound to fail but the persons behind it will forever be subjects of ridicule in that part of the country. To put it simply, it is important to know that the history of Benin customary institution with regard to Nigeria is such that cannot be ignored. It predates the coming of the Europeans and or the slave traders, and was so meticulously structured that there is very little distinction between it and modern democratic systems. Even though it (the kingdom) was at the time yet to have any form of contact with the Europeans, surprisingly, its system, though monarchical, resembled the present English political system. There were, (apart from the *Oba* who was then like the chief executive) higher and lower houses of chiefs which were doing the job of deliberating on matters affecting the people as does the present day parliament, albeit that the chiefs were not democratically elected. The *Oba* was the only one responsible for conferring chieftaincy titles as well as designating chiefs for various specific functions. All chiefs would sit, deliberate and feed back to the *Oba*, whose decision, like the royal assent in the UK, would be final. For instance, land tenure was regarded as held in the name of the *Oba*, and up till now, all documents relating to land acquisition in Benin must be signed by the *Oba* of Benin or his representatives before a Certificate of Occupancy can be issued by the State Governor's office.

In this centuries-old customary system, succession to a deceased intestate estate is based on primogeniture. That is to say that the first son succeeds to his father estate to the exclusion of all the other children of the family. However, it will be the responsibility of that first son to take care of the needs of all the other children till they are of age. Under certain circumstances, the first grand child (*Eye n'odion*) may be entitled to a very large share of a deceased's intestate estate too. This is because the latter's responsibility, under certain circumstances, such as during the deceased's funeral ceremony, may be enormous. For example, in some families, the grand son or daughter may be required to provide almost all that are required of the first son during parts of the burial rites (*Ise oton*). This can still be the case even in a system whereby a deceased's intestate property devolves by primogeniture.

However, this custom which hitherto only provided for the first son has now evolved. One must not also forget to mention that, as with statute law, the Benin customary law also evolves to reflect modern social engagements, except that certain practices which need to be de-emphasized are still in place. For example, succession to (or distribution of) a deceased's intestate estate in most Benin families is now done according to the number of wives (*Urho*) with surviving children who survive him. Although the first son still takes the largest chunk of the estate, but the remainder is distributed in descending order, with each wife and her surviving children representing one unit (*Urho*). However, this has always brought enmity between the children and the widows as I mentioned earlier in the text.

Yoruba

The evolution of customary law is not peculiar to Benin. In Yoruba community, the traditional rule to deal with a situation where a man has died intestate leaving a number of wives and children, is to divide his property into as many portions as he had wives, and distribute it accordingly.²²³ This custom, known as *Idi-Igi*, appears to have given rise to numerous disputes, and in order to avoid the expenses and delays of litigation, there evolved an alternative custom known as *Ori-Ojori*, whereby, if the head of the family so directed, the property could be divided into as many parts as the deceased had children.²²⁴ However, there are debates as to whether or not a wife who did not bear any child for her deceased husband

²²³ See Okany, M.C. "The Role Of Customary Courts In Nigeria" p41

²²⁴ Okany, M.C. "The Role Of Customary Courts In Nigeria" p-41

should be allowed to have a share of the estate. Although as a result of the evolution in the customary law in Benin for example, a wife whose children died before the husband may be considered only on compassionate grounds. This happens only when it is believed that she did not have a hand in the death of the children either through witchcraft or by committing what may be regarded as abomination which may have resulted in their death.

In spite of the wide scope of family units in the African setting, it is sad that, of these units, the woman is the most disadvantaged in the entire struggle. In Benin, for instance, it is generally said that a woman does not inherit '*Eben*' (*Okhuo iri Eben vbe Ukhu*). *Eben* is an ancient Benin sword which is now a kind of symbol of authority possessed by every man conferred with a chieftaincy title in Benin and can mostly be seen brandished by chiefs during traditional festivals at the palace of the Oba or at any other traditional ceremonies. And because this discriminatory practice is backed by customary law, it is therefore enforceable in the customary court.

Another typical example in this regard is membership of Benin Traditional Council –a council of traditional rulers. To put this custom in practical perspective, a woman is never conferred with a chieftaincy title in Benin and therefore cannot be a member of the Benin Traditional Council. The implication of this discriminatory act therefore, is that, if a chief dies without a surviving child or he is survived by only female child or children, at the instance of the *Oba* (king), his *hereditary chieftaincy title*, that would usually be transferred to his first son, may be extinguished or may devolve to the next surviving most senior of his brothers or the oldest of his patrilineal nephews, if there are no surviving brothers. This is so because he (the deceased) would be regarded as having been survived by no qualified child for the title he left behind. It is still so to this day.

The systems are however different among the Yoruba and the Urhobos. In those areas, so many women are known to have been conferred with chieftaincy titles and they are said to be performing relatively well in their respective traditional roles. It is noteworthy however that the conferment of chieftaincy title in such areas is generally not perceived in good light in Benin. In fact, it is seen as *proliferation of traditional titles*. And truly, some tourists or visiting rich individuals who have shown some level of affluence and other highly placed foreign government officials have on several occasions been conferred with chieftaincy titles in such areas.

Conferment of titles on such category of people does not take place in Benin, as it is often said that “*Aiye oriovbe mu igie; oriovbe gharie omu igiere rie*”. Meaning: ‘you do not confer a title on a stranger, because when he leaves, he takes the title with him’. What this statement means literally is that, in order to be conferred with a title in Benin, the prospective person must really merit it. Apart from being a man of good character, he must not have only lived in Benin for a long time, but he must be seen to have embraced the culture of the local people in thoughts and in deed, as well as excelled in a particular or several socio-economic activities beneficial to the indigenous people – directly or indirectly. These requirements are however comparable to those required of immigrants in order to obtain the citizenship in most democratic nations.

Some chieftaincy titles are more respected than others, depending on where it was conferred, as this goes a long way in determining the amount of power and authority the recipient exudes. While, for example, among the Ibos of Eastern Nigeria, chieftaincy titles are conferred on people by the *Igwe* in every little city, village or clan, it is only the *Oba of Benin* who has exclusive power to confer chieftaincy title in the Kingdom of Benin. Any person conferred with a chieftaincy title, no matter how powerful or highly placed, does not have the power to further confer any title on others, unless he is given the mandate to do so by the *Oba*. And this authority has never been challenged. This makes him (the *Oba*) much more powerful among Benin people, in terms of reverence, than the *Igwe* among the *Ibos*. For example, a chief from one part of the regions that make up the old Benin Kingdom is regarded and respected in another, and he can perform the duty of a chief within the confines of the kingdom as a whole. The reason is that every chief is regarded as a representative of the *Oba*.

Igbo (Ibo)

In the Eastern part of Nigeria on the other hand, the authority of an Ibo king is not so strong. No particular king possesses the power to control a very wide area in Ibo land as does, for example, the Alaafin of Oyo or the *Oba of Benin*. For example, if an Ibo king (*Igwe*, *Obi* or *Eze*, as they are variously called) leaves his domain or clan and goes to another, chances are that he may only be regarded as junior in the hierarchy of royals to the *Igwe* or *Eze* in that other area. The degree of reverence he is accorded will be dependent on either his personal

status in the society in general or the size of his clan or village and may, in some cases, be based only on mutual respect for each other, rather than on monarchical hierarchy. The main reason for this is because there is usually some kind of cross-border rivalries between them as some villages or clans may feel some sense of superiority over others. This behaviour is due largely to the fact that historically, the Ibos did not have kings and chiefs. What existed was what was known as “*Ozo title*”. Chieftaincy title only existed among the Yoruba of Western Nigeria, emanating from the old Oyo Empire and among the Edo people in the ancient Benin Kingdom. History has it that even the now inhabitants of some parts of the now Delta and Anambra States, such as Asaba, Onitsha, etc. originated from Benin Kingdom. The present day inhabitants are descendant of the early settlers who themselves were descendant of families escaping the constant wars and as well as warriors sent to wage war against external invaders but decided to settle in the area at the end of the war. Others were those banished from the Kingdom and who took with them the glamour and affluence associated with chieftaincy titles. And it has remained so to this day. Title such as *Iyase* (a popular and powerful Benin title) is also conferred in Asaba and its environs. It is also being rumoured that even the “*Owelle of Onitsha*”, a chieftaincy title which was conferred on and enjoyed by the late Dr Chief Nnamdi Azikiwe, the first Nigerian president, was an adulterated form of *Owere* which is a shortened form of *Odion owere* (or Odionwere) (meaning “the elderly head”) in Benin Kingdom. The difference here is that, in Benin, it is a non-hereditary, non-stipendiary designation automatically given to the oldest man in a village, clan or street, by reasons of his being the oldest man. This title may also be conferred on the first man to build a house on a particular street or area. But surprisingly, traditional institutions are very strong in Ibo land and the people hold onto them very dearly. But because of the multiplicity in what amounts to a custom of a people, there are equally differences in the norms that make up the customary law of a particular area.

In the North, apart from the *Sultan of Sokoto* who is regarded as the overall spiritual leader of all Moslems in the country, there are so many other traditional rulers; most prominent of whom are the *Emirs*, who play the role of *Royal Fathers*. These *royal fathers* also have subordinates. And these subordinates are vested with delegated authority to carry out certain functions which are associated with the traditional institutions they represent, and the control they exercise over the local people is rewarded by the state in the form of stipends. In order to ensure the smooth running of their institutions, they are given delegated authority to make

their own rules; some of which do conflict with others due to the fact that they emanate from various uncoordinated sources.

Apart from the discrimination associated with the conferment of chieftaincy titles and other policies in that regard, the somewhat piecemeal norms from different ethnic areas (representing local legal provisions) with which all chiefs operate are not codified and are not harmonised. This makes it difficult for anyone to be reliably informed as to what amounts to customary law in a particular area in order that the violation of such law may be avoided. Nevertheless, it should also be noted that the power and authority that go with these titles make such institutions very significant and therefore worth fighting for. Most importantly, some of these titles are *stipendiary*. This means that they attract some huge emoluments from the state as the holders of such titles are given some kind of ‘non-aligned traditional portfolios’ in the local government councils as they are regarded as traditional rulers. In Edo State, for instance, their modus operandi is regulated by the Ministry of Local Government and Chieftaincy Affairs in collaboration with the State Local Government Councils. In addition to being responsible for all chieftaincy matters affecting Traditional Rulers/Clan Heads throughout the State, the functions of the former with regard to chieftaincy matters as published in its website include:

- facilitating approvals by the State Executive Council of the appointments of Traditional Ruler in the different Local Government Areas of the state;
- keeping register of all traditional and honorary chiefs in various clans, and issuing of Certificate of Registration; and
- convening and servicing periodical meetings of Traditional Rulers with the Governor.

Constitutional duties of Local Governments Councils

In order to put in context the adversarial effects of the discriminatory practices of traditional institutions, it is proper to highlight some functions of the Local Government Councils. Although the Councils are not directly controlled by the traditional institutions, but the appointments of the officials who oversee and determine how the Local Government Councils

function, are highly influenced by Councils of Traditional Rulers in every State. It is true that each local government has a Chairman and a number of Councillors who are directly elected by the local people, but any one that does not demonstrate allegiance to the Council of Traditional Rulers, is bound to fail either in election or during term of office.

The following is a summary of relevant functions of Local Government Councils pursuant to the provisions of the Nigerian Constitution 1999:

1. Making recommendations to the State Commission on economic planning;
2. Collection of rates;
3. Establishment, maintenance and regulation of slaughter houses, markets;
4. Construction and maintenance of roads, streets and street lightings, drains and other public highways, parks and gardens;
5. Naming of roads and streets;
6. Registration of all births, deaths and marriages;
7. Control and regulation of shops and kiosks, restaurants, bakeries and other places for sale of food to the public, sale of liquor;
8. To collaborate with the State Government in matters relating to the provision and maintenance of primary, adult and vocational education;
9. The development of agricultural and natural resources; and
10. The provision and maintenance of health services and such other functions as may be conferred on it by the House of Assembly of the State.

For example, in matters relating to the allocation of local market stalls, the decisions of the members of the Council of Traditional Rulers are also taken very seriously. Even if a chief does not receive any stipend from the state (there are so many non-stipendiary titles), the royal accolade, as well as the pecuniary advantage he enjoys, surpasses or equals any monetary benefits.

As will be observed in more details later in the text with regard to solemnization, annulment and dissolution of marriages, the National Assembly (Federal) can legislate on such matters as contained in the Exclusive Legislative List and selected issues in the Concurrent Legislative List as constitutionally provided for. These are marriages other than marriages under Moslem

law or under customary law and other matrimonial causes relating thereto.²²⁵ That is to say that the Exclusive Legislative List, as the name implies, is exclusively for the National Assembly (Federal). And the Concurrent Legislative List contains issues on which both federal and state can legislate, as specified. What this simply means is that the federal authority has no power to legislate on marriages contracted outside of its constitutional mandate and therefore all matters (including disputes) relating thereto are outside the ambit of the federal legislature. It must however be stressed here that, even the Concurrent Legislative List which contains matters on which both the federal and state governments can legislate, does not, with regard to customary marriages, confer the power to legislate on the National Assembly (federal government). Such power is therefore considered to fall under the ‘residual power’ – a category on which only the state can legislate. Elaigwu²²⁶ writes that all matters not identified in the exclusive federal, concurrent, and the local government lists come under the jurisdiction of the States. These residual powers are in fact extensive. They include, among others, health services, rural development, and social welfare. However, there has been much controversy as to whether the state assembly or the federal national assembly has the jurisdiction to legislate on the residual power. Nwauche²²⁷ writes that the nature of a concurrent list inevitably leads to controversy over the extent of the powers of the federal and state governments over matters listed therein. With regard to the content of section 4(5) relating to legislative powers sharing, Nwauche further emphasizes that a facial reading of this provision would seem to indicate that even the National Assembly can make laws over matters that are neither in the Exclusive Legislative List nor in the Concurrent Legislative List, and therefore fall under the residual list. This interpretation, Nwauche opines, appears doubtful, as it negates the structure of powers in the 1999 Constitution. When federal and state legislation exist and cover the same field, it is the Constitution that should guide a determination as to whether the federal legislation is enabled by the provisions of the Constitution. If the legislation concerns an area that is not within the competence of the federal government, it cannot be right that the legislation enacted by the National Assembly supersedes legislation made by a State House of Assembly, Nwauche concludes.

²²⁵ See Schedule to the 1954 Constitution

²²⁶ Elaigwu, J. I. “The Federal Republic of Nigeria”. Available online at: http://www.forumfed.org/libdocs/Global_Dialogue/Book_2/BK2-C08-ng-Elaigwu-en.htm Viewed 11.11.2011

²²⁷ Nwauche E. Available online at: <http://web.up.ac.za/sitefiles/file/47/15338/Nigeria.pdf> Accessed 09.02.2013

What this means is that all marital issues arising from Sharia and customary law marriages and others related matters can only be settled using the provisions of Sharia and customary laws, albeit matters on appeal to the Appeal Court. However, all marriages contracted under the Act (Matrimonial Causes Act 1970 and Marriage Act) are contained in the Exclusive Legislative List, and it therefore follows that the federal government has control over issues relating thereto. This creates room for inconsistency as there is no uniformity in customary law. Accordingly, as long as the federal government does not have control over family matters arising out of Sharia/Customary law marriages, except where cases are referred from Sharia or Customary Court of Appeal to the Appeal Court, its powers will remain legally restricted.

It is however important to mention here that in the southern part of Nigeria, many marriages are contracted under customary law, while many are contracted under Sharia law in the north. Usually, Act Marriages (i.e. marriages conducted under the Marriage Act and Matrimonial Causes Act 1970) are more common in the South. It is also worth mentioning here that, there is a system which so many authors on family law in Nigeria refer to as "double deck marriage" (d.d.m.). This is a system whereby a couple, having celebrated the Act marriage, further goes ahead to marry again under either Sharia/customary law or vice versa.

Under such circumstances, it becomes contentious as to which legal order should be used in settlement of any differences between the parties to the marriage in the event of a dispute or divorce.

In a survey conducted at the instance of Onokah in anticipation of writing a book on family law in Nigeria, the findings showed that, out of the 430 married persons investigated for illustration purposes, 55.8% (i.e. 240) celebrated the so-called d.d.m. And it was also revealed that about the same percentage of couples believed that customary law marriage was preferable to the Act marriage, in that the former creates an avenue for families of both parties to socialize and be part of the union, as opposed to the latter whereby people are asked during the solemnisation ceremony "*to speak now or forever keep quiet*".

Maintenance under customary law

As I mentioned earlier in the text, there are three types of marriage: Customary law marriage, Sharia law marriage and statutory marriage (Act marriage). Unlike the wife married under the Act, who may, on desertion, separation or divorce, apply to the court for one form of settlement or another, the customary law wife does not have any form of rights for maintenance should she separate from her husband, irrespective of whose fault it was that resulted in the separation or breakdown of the marriage.

The husband does not have a duty under customary law to maintain the woman during their separation. As all ties with the wife are then severed, maintenance is usually regarded as a form of punishment without justification on the husband. Conversely, it is also almost unheard of and therefore unprecedented for a man in Nigeria, whether married under customary law, Sharia law or even under the Act, to get maintenance order against his wife. With regard to maintenance order for men, Onokah decries the somewhat customary-law-influenced approach of the court in reaching decisions on matters arising out of statutory cases and calls for a unified family law justice system.²²⁸ This is demonstrated in the Lagos High Court case of *Ejimbe v Ejimbe*,²²⁹ in which the respondent husband sought maintenance for himself and his five children against his wife, but the court dismissed his claim and instead made an order against him for the maintenance of his children.

Because the two systems of marriage (Act and Customary including Sharia) and their respective incidents co-exist independent of each other, the customary law wife cannot take advantage of the benefits which exist under the Act. In the case of *Adekeye v Yinka*,²³⁰ the plaintiff divorced her husband and claimed maintenance for herself and her only child. With regard to the claim for maintenance for her upkeep, the court held that such claim must fail on the ground that it was contrary to native law and custom. The court also declared that payment of such allowance was also against natural justice, as the divorced woman would be at liberty to remarry another man immediately the marriage was dissolved in the court and that it would then be the duty of the new husband to maintain her.

²²⁸ See Onokah, M.C *Family Law* (2003) p 251

²²⁹ Suit N0. WD/59/85 of 3/3 1989 (Unreported) Lagos High Court as cited by Onokah (2003) p251

²³⁰ Suit No. M559/76 of 5/11/76 (unreported) Customary Court Mapo, Ibadan, cited by Onokah, M.C. p237

It must however be mentioned that even the women married under the Act are not in much better position than the customary law wives when it comes to awarding maintenance claims. This is demonstrated in the case of *Coker v Coker* where Udo-Udoma J, in his judgement speech stated that:

*It is almost unprecedented in this country for a wife having divorced her husband to turn round and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appears to me to be foreign to the African conception of marriage and divorce. A situation like the present cries aloud for distinct Nigerian rule.*²³¹

The non-availability of (or the non-provision by the state for) maintenance for the customary law wife seems to be what is referred to in the above statement as the ‘*distinct Nigerian rule*’. And as if to reaffirm this anomaly, the Matrimonial Causes Act 1970, specifically provides for the maintenance of a wife married under the Act, but unfortunately, it does not provide for the customary law wife. And since so many marriages are solemnised the Nigerian traditional way, one would expect that customary law marriages which are peculiar to Nigeria and its peoples, would be protected by the so-call ‘*distinct Nigerian rule*’. But alas! Even the maintenance provisions made for the Act marriage still leaves much to be desired within the Nigerian polity.

For instance, in his paper “*An Examination of Matrimonial Causes Decree 1970*” presented at a conference at the University of Lagos 5 June 1970, T. A. Aguda, J, states in relation to maintenance order that:

This may be understandable in England, but in this country [Nigeria] it appears extremely harsh to the man except in exceptional circumstances. Here again one must bear in mind our own custom and even current practice. In England and other European countries, it is the custom for the woman to take to her husband substantial articles of wealth as dowry on their wedding. But here in Nigeria the opposite is the case...The dowry may run into hundreds of pounds, and the man, generally speaking in addition to the dowry pays for the entire wedding ceremony. It is also well known that by and large the Nigerian woman married under the Act

²³¹ Suit No. WD/19/61 of 7/1/1963 (unreported) Lagos High Court

is very much (aware of) the benefits to be derived from such a status, but is in most cases unwilling to face its responsibilities. Her ties to her father's family are almost unbreakable so that where she works and earns a substantial sum of money, her first financial obligation is to herself, the next is to her parents and brothers and sisters and lastly to her own home. In the circumstances, it is my considered opinion that the obligation to maintain a wife must end with a decree of dissolution or nullity of that marriage, except in exceptional circumstances the proof of which must lie to the woman – in this regard section 70 of the Decree needs some amendment. [Emphasis mine] ²³²

This statement was re-echoed by some Judges, one of whom was Thompson J, who, in delivering his judgement in the case of *Akinsemoyin v Akinsemoyin*, stated:

...we have merely inherited a statutory provision based on the customs of the people of England, which are not only unknown in this country but is in contradiction to our own. The English who receive Dowry from his wife's family has got a pecuniary benefit from the marriage part of which the law (requires) him to return on the dissolution of the union. The Nigerian man is not so blessed. He pays donation proper nuptias [sic]... Anthropologists call it bride price. Now it will be ridiculous and indeed unreasonable to expect a man who has gone into all that expense in order to get married to be overburdened with maintenance for the woman unless there are exceptional circumstances warranting it (emphasis added). ²³³

Although it is said that customary law does not provide judicial machinery for the protection of the wife, but it is also generally believed that this appears to be so because most women, due to lack of education or fear of being regarded as deviating from the age-long tradition of the people, do not go to court to claim maintenance for themselves under customary law. Therefore actions for maintenance are rarely brought before the court.

There are however, certain instances where a man may be required to maintain his wife under customary law; even in such instances, it is a matter of choice and it is dependent on the principle of '*mutual benefit and burden*' which, in other words, means that the man will only

²³² See Onokah, M.C. p247

²³³ (1971) N.M.L.R. 272

comply if he stands to derive some benefits from doing so. One of such instances, for example, is when it happens that the wife was pregnant with the man's child when the separation took place or if she is nursing the man's baby. In such situation, should the man fail in his duty to maintain the woman, he may incur financial liabilities which must be discharged before he can be allowed to claim custody of the child. This is usually enforced by the family of the woman.

Furthermore, if one considers the statements of the judges above, one finds that even if women do bring their maintenance claims before the court: be it customary, Sharia or statutory, chances are that such cases may be thrown out for lack of merit. The reason, as I earlier mentioned, is (arguably) attributable to the fact that most judges who preside on proceedings relating to family/marital affairs, such as custody of a child, succession, maintenance claim or gender relations, are generally influenced by customary law reasoning. The decision in *Adesubokan v Yinusa*,²³⁴ among others, helps to buttress this assertion.

In the case, the testator, who lived and died a Moslem of Maliki School, was born in Kwara State but raised in Lagos where his parents resided for a long period. All his surviving children were also Moslems. Subsequently he moved to Zaria where he lived until he died. Before his death, he made a will which was established to have been correctly drafted and was agreed to have met all legal requirements. The will in question was made under the Wills Act, 1837 by which he bequeathed to his eldest son a cash sum of about 10 Naira (Nigerian currency) while he gave two other of his children one plot of land each. He also bequeathed to these latter two children the residual estate and a third plot. The validity of the will, though correctly made under the Wills Act 1837, was however challenged by the first son of the deceased testator on the ground that it was not only discriminatory but also contravened Moslem law.

Under Moslem law, as can be seen in the case of *Adesubokan v Yinusa*, a testator must give equal shares to all his male children. In reaching a decision, the presiding judge gave consideration to the wording of section 34 of the High Court Law of Northern Nigeria and decided that the Moslem law was not repugnant to natural justice, equity and good conscience. Although he affirmed that rules of Moslem law are incompatible with s. 34 (1) of the High court Law of Northern Nigeria, he was of the view that the situation was saved by

²³⁴ *Adesubokan v Yinusa* (1971) NNLR 77; (1971) 1 All NLR 225

the last sentence of the subsection which stipulates that “*nothing in this law shall deprive any person of the benefit of such native law and custom*”.

Taking this statement into account, the learned judge concluded that the statute law, “the Wills Act” shall not deprive the plaintiff the benefit of Moslem law.

On appeal however, the Appeal Court observed that the judge at the court of first instance misinterpreted the wording of s. 34 (1), saying it meant the direct opposite of the meaning which the judge ascribed to it.

The Appeal Court therefore threw more light on the true meaning of s.34 (1) and asserted thus:

*“...we are of the view that this subsection could only mean the exact opposite of the construction placed on it by the learned judge. In other words, it means that nothing in the High Court Law shall deprive any person of the benefit of any native law or custom including Moslem law which is not incompatible directly or by implication with any law for the time being in force, and in the present case the Wills Act, 1837...”*²³⁵

It can be seen that the Moslem law which the judge applied at the lower court was such that could deprive all Moslems the right to exercise their testamentary powers provided for under the Wills Act. The Supreme Court therefore found that such limitation invoked by the plaintiff did not bind the testator and concluded that when a Moslem exercised his testamentary powers under the Wills Act, he was not bound by the limitations imposed by Moslem law.

Generally speaking, if the plaintiff had succeeded in the suit, there would have been some kind of “floodgate”, with every bequest made under the Wills Act being challenged on such grounds as in the above case. This would have defeated the purpose which the making of Wills is meant to serve.

²³⁵ Adesubokan v Yinusa (1971) NNLR 77; (1971) 1 All NLR 225

All the same, it is true that if a single choice is to be made between two ills, one will certainly be made in preference to the other. Therefore, although it is intriguing that a party to this case did challenge the validity of legal testamentary disposition which appeared discriminatory, but it is even more disparaging that the plaintiff sought to rely on the provisions of a native (inferior) law which has often been criticised for its discriminatory nature. In addition, this case demonstrates how the male Muslims would react if all the discriminatory provisions contained in Sharia law were to the disadvantage of the male Muslims. It is an established fact that the provisions of Sharia law favour the male Moslems to the detriment of the female ones.

UN Committee's report on Nigeria's implementation of CEDAW

In its 41st session held in July 2008, the UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) expressed deep concern over the fact that Nigeria was yet to implement in full the provisions of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The CEDAW Committee criticised the National Assembly for its failure to enact a law that would empower CEDAW to be enforceable before national courts. It also frowned at the rejection by the National Assembly of the 2005 draft Bill on the full domestication of the Convention. In relation to the tripartite legal system (i.e. statutes, customary and Sharia laws), it was agreed that this was responsible for contradictions and inconsistencies in marriage and family law (divorce, custody of children, inheritance, etc.). The CEDAW Committee thus urged Nigeria *'to intensify its efforts to ensure the passage of the draft bill on domestication of the Convention'* and called for its full implementation in a *"consistent and coherent manner across its territory"*.²³⁶

The CEDAW Committee also criticised the fact that the constitution provides for the possibility of immigrant women married to Nigerian men to acquire the Nigerian Citizenship, whereas it precludes immigrant men from acquiring same status by virtue of the fact that they are married to Nigerian women. The Committee also drew particular attention to discriminatory provisions in the Penal Code and the Labour Act. The Committee therefore

²³⁶ See fidh.org online available at <http://www.fidh.org/spip.php?article5787> (Accessed 14/11/2009)

called for a thorough review of all discriminatory laws and for a concrete timetable to be set for their reform.²³⁷

The Committee also expressed serious concern about the persistence of entrenched harmful traditional and cultural norms and practices, calling on Nigeria to take immediate measures to eliminate such practices, including adopting the necessary legislation. For example, a law is required to criminalise female genital mutilation (FGM), a practice which remains widespread in some areas of the country. More generally, Nigeria must address the continuing prevalence of violence against women, including domestic violence. The Committee called on Nigeria to urgently enact legislation criminalising all forms of violence against women, ensure that victims of violence have access to immediate means of redress and protection and perpetrators prosecuted and punished. Deep concerns were raised about the extent of trafficking in women and children which remains prevalent despite the adoption of the Trafficking in Persons Law Enforcement and Administration Act in 2003. The Committee therefore urged the Government to implement this law and to take all necessary measures to prevent human trafficking while ensuring that its offenders are not only prosecuted and punished but victims are provided some forms of reparation.²³⁸

²³⁷ Ibid

²³⁸ See fidh.org at: <<http://www.fidh.org/spip.php?article5787>>

Chapter 12

FAMILY, RELATIONSHIPS AND SHARIA LAW – THE CRITIQUE

With regard to issues regarding family protection I have raised in the preceding chapters, the situation under Sharia law does not seem to be any different. So many people complain about the Sharia position in respect of general legal protection for all, more specifically the lack of proper legal framework for the protection of the female child, as well as its discriminatory principles against females of all ages.

However, there are various offences contained in the Holy Koran which affect mostly children and women and which have attracted much attention from the international community. The ones that are more pronounced and can easily be called to mind are: the offences of-

- unlawful sexual intercourse (*Zina*);
- theft (*sariqa*);
- robbery (*hiraba*);
- drinking of alcohol (*shrub al-khamr*); and
- false accusation of unlawful sexual intercourse (*qadf*).

In most academic and legal debates, it is generally held that Sharia law, for example, imposes second class status on particularly women and that, apart from its unconstitutional nature,²³⁹ it is not compatible with contemporary world, and therefore does not meet the requirements of human rights instruments which prohibit discrimination as well as guarantee fundamental freedom to every individual.

Unlawful sexual intercourse or sex outside of marriage is a criminal offence (*Zina*) under Sharia. With the introduction of the Sharia criminal justice system in Nigeria, a number of cases of women accused of adultery with no other proof except pregnancy have been brought before the Sharia courts. These cases have raised considerable controversy as the reliance on pregnancy as sufficient proof of *Zina* seems lopsided. There is very strong argument that

²³⁹ See section 10 of the 1999 Constitution of Nigeria which prohibits “state religion”

since it is only women who are biologically capable of bearing and delivering children, it is only woman that can be found guilty of *Zina* on those grounds, while the male partners escape punishment.

Let me put this in a more logical perspective with the help of a hypothetical case of rape which is truly reflective of Sharia's position on matters relating to women.

A woman accuses a man of raping her. In Sharia, that accusation alone amounts to a confession to having had an '*unlawful sexual intercourse*' – a crime for which she (the victim) must be punished. The man denies the allegation. The onus is now on the woman to prove not only that indeed unlawful sexual intercourse did take place (although such confession is enough evidence), but also that she did not consent to it. To do this, she needs to provide witnesses which must be either four males or eight females. And if she is only able to provide three male or six female witnesses, she has not substantiated her allegation. This, by implication, means she is regarded as having committed an act of defamation or false accusation (*qadhf*). This is also an offence which attracts additional punishment of eighty lashes under Sharia law. In such case, the victim becomes the culprit in the defamation case. But if she becomes pregnant as a result of the rape, an offence of *zina* - a more severe one - will have also been proved. And in countries where these Sharia law principles are strictly applied, Sharia law prescribes death penalty by stoning on women for committing the offence of '*unlawful sexual intercourse*', *zina* (i.e. pre-marital sex). Some of such cases in Nigeria concerned the following women:

- 1) Amina Lawal;
- 2) Safiya Tungartudu Hussein; and
- 3) Bariya Ibrahim Magazu

1. Ms Amina Lawal, a divorced woman from very poor background, was charged with committing an offence of *Zina* under Sharia law on the ground that she had a child out of wedlock, which they say amounted to having had an *unlawful sexual intercourse*. The fact that she was pregnant, coupled with her confession, was regarded as enough evidence in the affirmative, and in 2002 a lower Sharia court in Bakori, Katsina state sentenced her to death by stoning. Ms Lawal was not given any legal representation and was not even advised as to her right to engage the services of a lawyer. The Upper Sharia Court in Funtua upheld the

lower court's death sentence passed on Ms Lawal. But when Amina Lawal's lawyers raised arguments about the infringements of her rights under the Nigerian constitution, the judge said he was not bound by the constitution, but only by Sharia. It was also argued that the trial was marred by procedural irregularities even under Sharia, one of which was the fact that as the principles of Sharia provide the possibility for a defendant to withdraw a confession; Ms Lawal ought to have been granted such right. But this was denied Ms Lawal by the judge. The surprising part of the trial was the fact that Mr. Yahaya Abubakar, the man with whom she was alleged to have committed the adultery, denied ever having any sexual relationship with her and was discharged for lack of evidence. However, as a result of much international pressure and numerous Appeals from around the world, the Katsina State *Sharia* Court of Appeals finally overturned the conviction of Ms Lawal in a four to one decision on September 25, 2003.

2. Safiya Tungartudu Hussein's case which occurred in 2001 was similar to Ms Lawal's case. Ms Hussein, a divorced woman in her thirties was found guilty of zina and sentenced to death by stoning by an Upper Sharia Court in Gwadabawa in Sokoto state in October 2001. She was not given any legal representation during the trial and the evidence required to reach a verdict was on the basis of the fact that she was pregnant and also on grounds of her confession. However, it took the efforts of some NGOs who fought spiritedly to successfully appeal against that decision.

The death sentence was however overturned. But it is important to note that the quashing of the death sentence was only on grounds of non-compliance with due process rather than on merits of the case. The four judges who heard the appeal declared that the Penal Code could not be applied retroactively, in that the legislation, "the Sharia Penal Code and Criminal Procedure Code" under which Ms Hussein was convicted came into force in January 2001 whereas the offence for which she was charged was committed in December 2000. There were however other procedural improprieties, such as the failure to properly inform Ms Hussein of the offence committed, her right to legal representation and the non-provision of same. It was also observed that the lower court also failed to consider the fact that she (Ms Lawal) withdrew the confession which was part of the confirmatory evidence that formed the basis for the death sentence. And as usual, Abubakar Yakubu, the man who was alleged to have been responsible for the pregnancy denied the offence and the charge against him was dismissed and he discharged for want of credible evidence.

3. An unmarried teenager, named Bariya Ibrahim Magazu, whose actual age was speculated to be between thirteen and seventeen years, got pregnant and was found guilty of *Zina* in 2001. In her confessional statement she alleged that three men gang-raped her. She was then sentenced to one hundred and eighty lashes (i.e. 180 strokes of the cane). This penalty of 180 lashes was to be executed at least 40 days after she had had the baby. Ms Magazu however withdrew the allegation of having been gang-raped by the three men, apparently to reduce the sentence because the men denied the allegation and were discharged, as usual, for want of evidence. If Ms Magazu did not withdraw the allegation, she would have had to provide at least four male witnesses or eight female witnesses to testify that she did not consent to the sexual intercourse that resulted in the pregnancy, without which her confessional statement and the pregnancy would invariably remain in evidence of the commission of *Zina* punishable by 100 lashes, but her accusation would amount to defamation (*qadhif*) which attracts additional 80 lashes. To be in such situation is comparable to being *between the devil and the deep blue sea*. Canada's High Commissioner to Nigeria, Ian Ferguson, had asked Nigeria's foreign ministry to intercede in what the Canadian government called "an appalling case." The High Commissioner and human rights organizations such as Amnesty International charged that the flogging would break the U.N. Convention against Torture, the U.N. Convention on the Rights of the Child, and the Covenant for the Elimination of Discrimination against Women. However, all their pleas and suggestions fell on deaf ears. The sentence was however executed in public on 22 January 2001, even before the expiration of the forty days following the delivery of her baby, contrary to the stipulation of the Sharia Penal Code Law.

What the above cases demonstrate can be summarised thus:

- (a) rape victims may never be able to prove their case in their own favour, as (obviously) most rape offences are committed in the absence of witnesses;
- (b) if pregnancy results from any sexual relationship, be it consensual or through rape, it is only the woman, as I earlier mentioned, that will be found guilty on such grounds, because it is only a woman that can biologically conceive and bear a child, which is a clear proof of having had sexual relationship with a man (albeit in circumstances of Assisted Reproduction like IVF);

- (c) a woman is not regarded as a complete human being (i.e. she is only the half of a man), otherwise how else can one explain the Sharia provisions which stipulate that, in order to prove that rape has been committed, *four male witnesses* or *eight female witnesses* must be called? See, for example, the Penal Codes of Niger, Kano, and Kebbi states which specify that men's testimony will be worth more than that of women.
- (d) With regard to Magazu, it could have been a case of either rape or consensual sex. If she was raped, as was reliably gathered revealed, then it would be wrong in any good law to convict the victim for what she had no control over and therefore could not have prevented. On the other hand, if she consented to it, her consent would have amounted to invalid consent, by virtue of the state's (i.e. Zamfara state's) Sharia Penal Code, which provides that: "*A consent is not such a consent as is intended by any section of this Shari'ah Penal Code, if the consent is given:- ... (c) by a person who is under eighteen years of age or (sic) has not attained puberty*" (Emphasis mine).²⁴⁰ With regard to puberty however, that is not a good basis for assessing maturity in that the age at which human being reach puberty varies from person to person.

In Ms Lawal's case, the statement by the judge that he was not bound by the constitution raised concerns that Sharia penalties infringes upon the citizens' rights as provided for by the constitution—a legal framework upon which the Nigerian state is built. The problem with such statement is that it came from a judge who is a citizen of Nigeria and supposedly learned and versed in law. I doubt if he gave any thought to the fact that the Sharia court in which he made the statement was established based on the provisions of the same constitution (i.e. if Sharia has any legal authority to the extent that it is practised in the first place) and with the state's fund. If the judge had studied constitutional law thoroughly as is (or should be) expected of all such judges, he would have thought of the supremacy of the of 1999 Constitution of Nigeria, the provisions of which bind every citizen and authority in the country. That is to say that himself and the Sharia law that he practices are bound by the constitution. It follows therefore that, if a section of Sharia law is inconsistent with the constitution, such section is void. And accordingly, his adjudication, which obviously can never be in compliance with the provisions of the constitution as a result of the inconsistency, no matter how articulated, would only amount to nullity.

²⁴⁰ Section 38 (c) Shari'ah Penal Code Law 2000 of Zamfara State of Nigeria which came into force on 27 January 2000

With regard to pregnancy as proof of having had sexual intercourse ((b) above), there are four schools of law that are regarded as valid by Nigerian Muslims. But the Maliki School which is the officially recognised school by the courts, (arguably) accepts pregnancy as sufficient proof in establishing the offence of *Zina*.

Quraishi, a highly published law scholar who has written extensively on the topics of Islam and Sharia law application, opines that even though the offence of zina is punishable under Sharia, she argues that, with the high standard of proving that such offence had taken place, it is almost impossible to get a conviction. She emphasizes that if, for example, those who alleged that zina had been committed are unable to provide the required four witnesses, they themselves will have committed offence of false allegation and are punished accordingly. And because many of the women accused of committing zina usually allege that they were raped, it becomes cumbersome to disprove such allegation. This is because it is difficult, if not impossible, to find four adult as witnesses in the scene of rape. The only zina that can easily be prosecuted is based on the offender's confessional statement. Even then, that confession must be ascertained to have been made without any form of duress.²⁴¹

Inconsistencies in Sharia law application

There are however, other sides to the above argument. According to Imam, all four main Sunni schools that exist today were formed through the personal allegiance of legal scholars or jurists to the founders from whom each school took its name: Hanafi, Maliki, Shafi'i and Hanbali.²⁴² Each school had its own specific circumstances of origin.²⁴³ As if to substantiate Imam's submission, Akintola (2003: 6–7) in his analysis of Sharia, which he regards as “a bridge between the protagonists and the antagonists of Shari'ah”, also declares that there are four sources of Islamic legislation. And these, he emphasizes, emanate from the Holy Koran, the *Sunnah* (i.e. sayings, practices and tacit approvals of Prophet Muhammad), the *Ijma* (i.e.

²⁴¹ For more on this, see Asifa Quraishi, "Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism", Islamic Law and Law of the Muslim World Paper No. 08-30; Univ. of Wisconsin Legal Studies Research Paper No. 1059. Available online at: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140204##> Accessed 01.03.2013

²⁴² Imam, A "Women, Muslim Laws & Human Rights in Nigeria". Available online at: Woodrow Wilson International Center for Scholars <<http://www.wilsoncenter.org/sites/default/files/nigeria.pdf>>

²⁴³ Imam, A "Women, Muslim Laws & Human Rights in Nigeria". Available online at: Woodrow Wilson International Center for Scholars <<http://www.wilsoncenter.org/sites/default/files/nigeria.pdf>>

consensus (sic) of opinions of learned scholars of Islam), and *Qiyas* (i.e. analogical reasoning, also called *Ijtihad* or individual discretion).

The four schools, as also articulated by Akintola (2003: 7), are

- the Hanafi school, founded in Iraq by the Basra-born Abu Hahifah al Nu man Ibn Thabit (700 – 769 C.E.);
- the Maliki school, founded in Madinah by Imam Abu Abdulahi Malik Ibn Anas (713 – 795 C.E.);
- the Shafi'i school, founded by the Qurayshite Imam Abu Abdullahi Muhammad bin Abbas Ash- Shafi'i (767 – 820) C.E.); and
- the Hanbali school which was founded by the Baghdad-based Imam Abu Abdullahi Ahmad Ibn Hanbali (780 – 855 C.E.).²⁴⁴

Imam further stresses that Hanafis and Malikis represent legal jurisprudence as practised in Kufa (present day Iraq) and Arabian city of Medina respectively.²⁴⁵ These two schools, following Abu Hanifa and Al-Shafi, developed precisely out of a controversy in jurisprudence (i.e. human reasoning over law).²⁴⁶ In his own right, Akintola (2003:7) also writes, in the affirmative, that “apart from the Glorious *Qur'an* (Koran), the *Sunnah*, the *Ijma'* and the *Qiyas*, other legislative dynamics in Islam include *istihsan* (preferences), *maslahah* (public interest) and *istihab* (presumption of continuity).”

²⁴⁴ See Quraishi, A. (2008) "Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism". Available online at: Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140204###> Accessed 01.02.2013

²⁴⁵ Imam, A "Women, Muslim Laws & Human Rights in Nigeria". Available online at: Woodrow Wilson International Center for Scholars <<http://www.wilsoncenter.org/sites/default/files/nigeria.pdf>>

²⁴⁶ Imam, A "Women, Muslim Laws & Human Rights in Nigeria". Available online at: Woodrow Wilson International Center for Scholars <<http://www.wilsoncenter.org/sites/default/files/nigeria.pdf>>

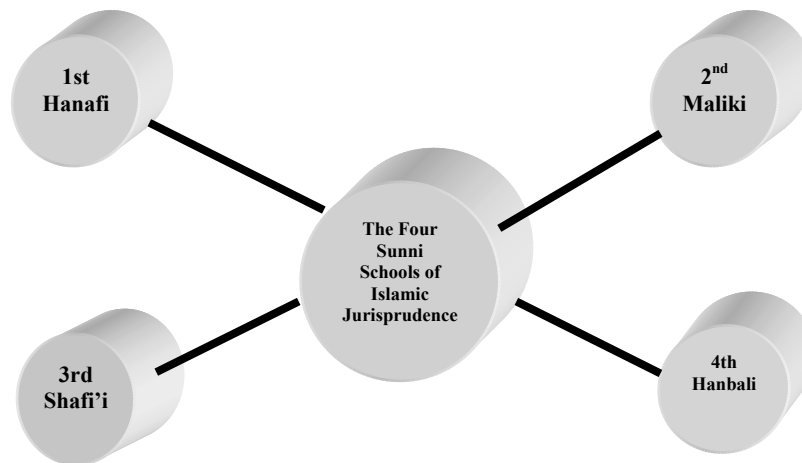


Figure above shows the four schools of Islamic jurisprudence; each with related but different interpretations

With the above analysis and the corresponding assertions, it is clear that Sharia law has various interpretations. And if that be the case, it follows therefore that the legal reasoning ascribed to it by a particular individual can only be one of the many existing interpretations, each of which might have, at the time, been influenced merely by prejudice, bias, sheer ignorance, philosophical or ideological inclination, etc.

What is surprising however is that there are discrepancies in interpretations and reasoning which create rooms for so much uncertainty and manipulation that are so glaring but yet are either not noticed or deliberately ignored by clerics. Well, it is however not unusual for people to be generally beclouded by innately entrenched inordinate religious or philosophical inclination. Especially when it has to do with a supreme deity that one is obligated to dogmatically follow but must not question.

Regarding the pluralistic doctrines of the various schools of Islamic jurisprudence in the topic of *Zina*, Asifa Quraishi, a university professor who is an expert in Sharia law, declares that while only the Maliki school accepts circumstantial evidence like unwed pregnancy as proof of *zina*, all other schools recognize the Quranic "four eyewitnesses" as evidence, unless this can be rebutted by a claim of rape which must be proved.²⁴⁷

²⁴⁷ See Asifa Quraishi, "Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism", *Islamic Law and Law of the Muslim World* Paper No. 08-30; Univ. of Wisconsin Legal Studies Research Paper No. 1059. Available online at: Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140204##> Accessed 01.03.2013

It is generally the belief of the unquestioning adherents that there is only one Sharia law. Whether this is interpreted in a million ways is of no consequence as far as they are concerned. The somewhat strict attributes of Sharia and the resultant sycophantic followership creates the disproportional position in legal reasoning and therefore, what the relatively few knowledgeable adherents provide as the position of things is regarded as the only way, and either no one is versed enough to offer an opposing viewpoint or too afraid to oppose the status quo for fear of being labelled an apostate.

Still using the offence of zina to buttress her standpoint in relation to the discrepancies in Sharia interpretation, Quraishi argues that there is –

*“...a difference of opinion between the schools in the evidentiary rules in fiqh, namely, what is required to prove the crime of zina. Significant to how this all plays out in today’s Muslim-majority countries, the Maliki school dominates in Africa, so the Maliki thinking on zina evidence is relevant in the Nigeria adultery cases in a different way than it is in Pakistan, where there is a majority Hanafi population”.*²⁴⁸

The rigid state of Sharia law

It has often been said that Sharia law is an anachronistic legal order, which, going by contemporary standards of legal norms, needs to evolve with the people, otherwise, it would not be accepted in a secular state such as Nigeria. According to Komolafe,²⁴⁹ an analyst of Sharia law, there is always a conflict of civilisations whenever Sharia is established in a secular State. He declares strongly that Sharia, as an exclusive set of Islamic laws, is not and cannot be made adequately compatible with any known law or political system outside Islam. He observes that Muslims believe it (Sharia) is divinely revealed – making it the absolute law that supersedes all laws. He further opines that Muslims who strictly (not partially) follow the teachings of the Koran know that the West and Islam have

²⁴⁸Asifa Quraishi, "Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism", Islamic Law and Law of the Muslim World Paper No. 08-30; Univ. of Wisconsin Legal Studies Research Paper No. 1059. Available online at: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140204##> Accessed 01.03.2013

²⁴⁹“Re: The Effect of Religion on the Political Process.” Available online at: <<http://nigeriaworld.com/articles/2009/dec/010.html>> (Accessed 08/01/2010)

been diametrically opposed to each other's existence from time immemorial. Therefore, Nigeria as a secular State and with Western civilization as part of her socio-economic and political composition, will definitely be at odds with Sharia. Islam is much more than a religion; it is a complete civilization that includes government (Caliphate), jurisprudence (Sharia law) and war (jihad). The Western Governments talk of separation of religion and State; whereas, there is nothing like that in Islamic theocracy, the religion of Islam and government are unquestionably one, he concludes.

Contrary to this popular conviction that, as Sharia law is not man-made, it is therefore not subject to reform or amendment, the preceding analyses seem to have put to rest such reasoning. Imam's assertion below is also a clear articulation of the fact that Sharia law, like statute law with elements of equity and judicial activism can be reviewed, amended or in some extreme cases, some of its sections can be abolished. Otherwise how else can one explain that its amendment is prohibited, yet each school has variations as clearly analysed by Imam. And in addition to the above-mentioned schools, there are also Shia schools of law of which the most prominent is the Ithna Ashari²⁵⁰.

Imam declares that it is often said that the differences between the schools are minor, but in fact there can be wide diversity, even in the areas pertaining to women's rights. She notes for instance, that neither women nor men require marriage guardians in Hanafi law — a huge difference from the Maliki School, where fathers have the right to determine the husband of their daughters.

In Maliki law, women have a right to divorce on demand, which will be upheld by courts in Nigeria, regardless of her husband's consent—this is not so in other schools of Muslim laws. She also asserts that only in the dominant view of the Maliki School is pregnancy outside marriage accepted as evidence of *Zina* (unlawful sexual intercourse). She notes that while the majority of Muslim jurists accept contraceptive use and abortion up to 40 days, a minority do not. Even within given schools of Muslim law there may be divergences about women's rights and capacity to act as witness, judge or leader, with some accepting women's capacity in all three, and others being more restrictive, she declares. These and other diversities are certainly not minor, but have profound implications for women's lives and choices.

²⁵⁰ Re: The Effect of Religion on the Political Process." Available online at: <http://nigeriaworld.com/articles/2009/dec/010.html> (Accessed 08/01/2010)

Within schools themselves, there can also be variations. For instance, not all Maliki adherents view pregnancy as sufficient evidence of *Zina*. In view of the importance of this issue and the lack of consensus on it, there is a need for Nigerian scholars (*Ulama*) to come up with the most appropriate and just ruling for our situation.²⁵¹ A typical example here is the issue of polygamy — the marriage of a man to more than one wife. Obviously, the Koran permits polygamy, but it does not require it. The Holy Koran specifies certain conditions that must be met if a Muslim must be engaged in polygamy. The one that readily comes to mind is that if a man decides to marry more than one wife, he (the man) must love all his wives equally. This requirement, in my opinion, seems unrealistic and I am sure that many rational human beings will agree with me on this.

Contrary to concerted claim by many Sharia proponents, some of the discriminatory sections of Sharia demonstrate lack of protection and respect for the female gender, but strengthen male supremacy that contradicts section 42 of the 1999 Constitution of Federal Republic of Nigeria, and the tenets of ratified and domesticated international law instruments.²⁵² For instance, Article 3 of the African Charter on Human and Peoples' Rights provides that: '*Every individual shall be equal before the law*'²⁵³ and that '*Every individual shall be entitled to equal protection of the law*'.²⁵⁴

On the other hand, there are people who are of the view that Sharia law is a perfect law and that it is only being misinterpreted by unqualified people. And also, it is important to point out that not all Muslims are in support of the application of those harsh penalties. While the Christians reject harsh punishments based on religious law by percentages of nearly 90% across the board, but significant majorities of Muslims also disapprove of such Sharia-based punishments as whipping and the cutting off of hands for crimes of theft and robbery (54%), stoning of people who commit adultery (60%), and the death penalty for “apostates” who leave the Muslim religion (65%).²⁵⁵ Akinyode-Afolabi also writes in relation to Safiya Tungartudu Hussein's case, that "democratically minded Muslim activists also adjudged the

²⁵¹ Centre For Islamic Studies, Ahmadu Bello University, Zaria

²⁵² See *Abacha v Fawehinmi (2000) 6 NWLR Part 660*

²⁵³ See document "African Charter on Human and Peoples' Rights" available online at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

²⁵⁴ Ibid

²⁵⁵ See Green, M.C. "Religion, Family Law and Recognition of Identity in Nigeria" (2011) p. 957)

pronouncement as a misapplication of Sharia law, as a result of ignorance on the part of the women, the judge and those that supported the sentence".²⁵⁶

Against this background, Akiyode-Afolabi draws attention to parts of the Koran which clearly establish gender inequalities, particularly the idea "*quwama*" which gives men the unquestionable authority over women, as well as the relegation of women to private spheres of life.²⁵⁷ She observes the concept of *quwama* as provided for under chapter 4:34 and reiterates that this *Surah* deals with several issues regarding family law, especially marriage, repudiation and inheritance.²⁵⁸ Logically, her arguments make more sense, for instance, with regard to the incontestable fact that *polyandry* (the feminine equivalent of polygamy or polygyny) is forbidden for women, while polygamy is allowed for men.²⁵⁹ This assertion only helps to complement what so many published materials have been saying on the issue of wearing of veil (*Hijab*) prescribed for Muslim women but not for the men. Some are even asked to be completely covered up (i.e. from head to toes) as this is regarded as sign of modesty; an image which, obviously, only the women, but never the men, are expected to portray. One is forced to ask: is it only the women that must appear modest? Why not the men? The question as to whether or not the men are modest in appearance, as is required of the women, can be unambiguously answered judging from their sparkling-white robes and spotless turban which they strategically positioned on their own heads.

As I earlier mentioned, Sharia law is regarded by its proponents as perfect law handed down to man by Allah. It is therefore not subject to amendment or repeal. But considering the discrepancies highlighted above, coupled with the fact that there is no provision for amendment or repeal, it will be interesting to know how any legal scholar who is versed in, and practises Sharia law, can reconcile its rigidity with the tenets of modern human rights law provisions.

It is also important to mention here that, apart from the discriminatory element contained in Sharia law, there are also very harsh provisions for male offenders. For example, in September 2003 a man named Jibrin Babaji from very poor background, confessed to having had sodomy with three teenagers under the age of eighteen and was sentenced to death in

²⁵⁶ AKINYODE-AFOLABI, A. "Democracy, Women's Rights and Sharia Law in Nigeria", Available at: Pambazuka New -Pan-African Voices for Freedom and Justice <<http://www.pambazuka.org/en/issue/96>>

²⁵⁷ See AKINYODE-AFOLABI, A. "Democracy, Women's Rights and Sharia Law in Nigeria", Available at: Pambazuka New -Pan-African Voices for Freedom and Justice <<http://www.pambazuka.org/en/issue/96>>

²⁵⁸ AKINYODE-AFOLABI, A. "Democracy, Women's Rights and Sharia Law in Nigeria", Available at: Pambazuka New -Pan-African Voices for Freedom and Justice <<http://www.pambazuka.org/en/issue/96>>

²⁵⁹ See The Holy Koran Chapter 004:003.

Kogi, Bauchi state, while the children were sentenced to six strokes of the cane because it was revealed that they consented to it. According to Human Right Watch, one of the children was flogged immediately while the other two who were not present in court appealed against the sentence.

This judgement may seem justified because it tends to demonstrate the government's commitment to the fulfilment of the international law regimes by punishing Mr Babaji for sexually abusing Minors, but the barbaric application of such law also calls its legality to question. It does not make sense to apply a particular law in violation of other laws.

According to Human Rights Watch, the case against Jibrin Babaji was initiated by relatives of the children; they reported Jibrin Babaji to the *hisbah*, who then handed him over to the police. It is not as if he was caught in the act by the police. It is not known whether he confessed to the *hisbah* or the police, but on the basis of numerous other testimonies of confessions extracted under torture, a conviction on the basis of such a confession alone could not be adjudged safe. It is however not uncommon for a rich person in Nigeria to walk up to the nearby police station, demand for a specific number of police officers, with whom he goes and have someone (obviously a poor person with whom he might have had some misunderstanding), arrested and kept in detention as long as he pleases – without charge and without option of bail.

As with the other cases I mentioned earlier, Mr. Babaji did not have legal representation or access to legal advice before or during his trial by the lower Sharia court. The trial was completed within a day and, as in other trials in lower Sharia courts, he was convicted by a single judge. Through the efforts of a human rights organization, lawyers then intervened on Babaji's behalf and filed an appeal at the upper Sharia court. After various attempts by a couple of hisbah who constantly besieged the Upper Sharia court's premises, apparently, to stop the appeal from taking place, on March 9, 2004, the upper Sharia court finally acquitted Jibrin Babaji on the grounds that he had not been given a fair trial. Among other procedural irregularities, the court noted that his right to legal defence had not been respected.

Child protection under Customary law/Sharia Law

With regard to child protection under Sharia law, while many legal scholars and other human

rights activists express deep concern over the non-availability of legal protection for the child and the mother under Sharia law, its proponents declare that there is a stipulation under Sharia that the father must provide for his children's maintenance, including funds for their education. Some regret however that it has been observed that only few men voluntarily provide such maintenance after divorce and also that in rare cases where they decide to provide support, husbands give far less than what will adequately cater for the maintenance needs of the children.²⁶⁰

In the reports of a project sponsored by the British Council, the Department for International Development (DFID) and the Centre for Islamic Legal Studies of the Ahmadu Bello University Zaria, Nigeria, Adamu F.L. et al affirm that:

“Sharia makes it the duty of the father to provide maintenance and education for his children. In fact Sharia insists that the father must pay for a nanny or domestic help to cater for his children where such services are needed. According to the Law (i.e. Islamic Law), the divorced mother is entitled to be paid specifically for suckling the child of a husband who divorces her. Allah says:

‘. . . and if they [divorced wives] suckle your offspring, give them their recompense. And take mutual counsel together, according to what is just and reasonable. And if you find yourselves in difficulties, let another woman suckle the child on the father's behalf.’ (Qur'an 65:6)

Regarding male oppression of women generally, Adamu, F.L. et al reaffirm that:

“The exclusion of women from decision-making is a common practice in many societies across the world. It occurs at different levels of society: family, community and government. At the family level, for example, in many cases, women are hardly consulted for decision-making, especially if they are in an extended family situation. Decisions that may affect the children may be taken by their husbands in consultation with the male relatives in the family. Similarly, at community level, women are hardly consulted on issues that affect the

²⁶⁰ See Adamu, F. L., Ahmad, A. and Sada, I.N. (2005) *Promoting Women's Rights Through Sharia Northern Nigeria* A publication by the Centre for Islamic Legal Studies of Ahmadu Bello University, Zaria. Available online at: <http://www.ungei.org/resources/files/dfid_promoting_womens_rights.pdf> Accessed 08.12.2011

community. It is felt that husbands provide enough representation for the family and there is therefore no necessity to hear the wives' views concerning community matters. Furthermore, women are hardly involved or represented in community institutions and organs where decisions that affect the community are taken. Reasons for the exclusion are very much linked to the perceived psychological deficiencies of women.”²⁶¹

With regard to customary law, it is important to note here that the customary law generally prescribes that a child belongs to the man, whether the mother is married to him or not. This, again, varies from place to place. In the East of Nigeria, the custom even prescribes that, as long as the woman is married to the man, irrespective of whether or not the man had sexual intercourse that may have resulted in the birth of a child, the child belongs to the man to whom she is married. The only requirement in such instance therefore, is that the man must have paid the *bride price*, which is regarded as the *marriage symbol*²⁶² to the family of the woman. It is accepted in customary law that the woman is actually married, not only to the husband, but also to the entire members of the man's family. Hence it is customary in some ethnic groups that if the man dies the wife can be inherited by any surviving son (excluding the concerned wife's own son) or brother of the deceased husband. And provided the *bride price* has not been returned to the family of the deceased husband, she remains a wife in that family. Against this background, it is clear that although the man is under a duty to protect the child of the family, the enforcement of such obligation does not usually arise as the child is normally forced to remain with the father at the instance of the latter when a marriage breaks down irretrievably or when separation takes place. But whether the child will be well taken care of is subject to debate. However, in some cases where the woman is accused of abominable offence, such as *witchcraft*, and the children are alleged to have been “contaminated”, they may be despised and evicted from the home along with their mother so as to prevent them from contaminating other children in the family or neighbourhood. Such cases are rarely brought before customary courts and some local judges are even believed to sometimes avoid adjudicating on such cases, probably for fear of spiritual reprisals from unseen forces or the people themselves. And sadly enough, women and children are usually the ones accused of witchcraft and never the men.

²⁶¹ Adamu, F. L., Ahmad, A. and Sada, I.N. (2005) ‘*Promoting Women's Rights Through Sharia Northern Nigeria*’ A publication by the Centre for Islamic Legal Studies of Ahmadu Bello University, Zaria. Available online at: <http://www.ungei.org/resources/files/dfid_promoting_womens_rights.pdf> Accessed 08.12.2011

²⁶² See discussion on “bride Price” under customary law marriage

In Akwa Ibom State, it was recently reported²⁶³ that some individuals and religious leaders were abusing or even killing children under the guise of exorcising them of demons. The report compared the gruesome acts to the widespread barbaric killing of twin children regarded as 'evil' which occurred in the Eastern Nigeria during the pre-colonial era. It was further reported that the vast majority of people in that region, 'including commissioners, legislators, policy makers, police and social welfare teams, and even ordinary persons believe that children can be witches' and therefore, such children should be killed. Some people also generally believe that certain illnesses are caused by witchcraft.

Consequent upon these superstitious practices, the Akwa Ibom State decided to enact the Child Rights Act into law amid cynicism and fracas.²⁶⁴ The report has it that only 24 out of 36 states in Nigeria had enacted the Child Rights Act 2003 into law in their respective states. Section 12 of the 1999 Constitution of Nigeria however, provides that a bill "shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation".²⁶⁵ The wording of the constitution seems to be ambiguous here, in that it is not clear whether the "majority" referred to means two thirds majority, in which case a total number of 24 will be required, or simple majority of 51% against 49%, in which case, at least a minimum of 19 out of 36 states will suffice.

However, in accordance with this 'Child Rights law passed by the Akwa Ibom State House of Assembly, 'anyone involved in any form of torture, trial by ordeal or inhuman treatment of a child, purportedly to cure, purge or exorcise such a child of witchcraft would be liable to 10 years imprisonment without an option of fine.²⁶⁶ As a result, a special family court was also established to try offenders without delay.²⁶⁷

Nevertheless, it is still not clear how all of the statutory laws so far enacted for the protection of the child and his or her mother can operate effectively with the customary law also in force. There will always be clashes!

²⁶³See "*The Akwa Ibom Debacle on Child Rights*" Available at: <www.ngrguardiannews.com>. Accessed 22.12.2008

²⁶⁴ Ibid

²⁶⁵ See section 12 of the Nigerian Constitution 1999, available online at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>

²⁶⁶ Ibid

²⁶⁷ Ibid

The legal protection of the child under customary law in Nigeria, other than the moral obligations which every parent is believed to owe to his or her children, is critical as moral obligations are not enforceable in the court of law. In addition to this, Alemika²⁶⁸ writes that there is a severe lack of financial resources allocated to the protection and promotion of children's rights in Nigeria. He opines that consequently, the mechanisms for protection and promotion of children remain weak, uncoordinated and not even in line with Nigeria's obligations under the international instruments such as Rights of the Child, the African Charter on the Rights and Welfare of the Child and the UN Convention on the Elimination of all Forms of Discrimination against Women.

It is also well demonstrated by those in the helm of affairs that the CRC, the CRA and other related international instruments for bringing about equality and protection of all before the law, are a threat to Islam and the general practice of Sharia law, especially in the northern part of the country. Khalid²⁶⁹ also writes that "the Muslim- dominated Northern Nigeria mounted fierce opposition against the law since, according to them; a number of its provisions are violently opposed to their culture and religion". And apart from the strong worded message from the president of Supreme Council of Sharia in Nigera, one Ibrahim Shuaibu, who writes for THISDAY Online Magazine, also once quoted the then Speaker of Kano State House of Assembly, Abdulaziz Garba Gafasa, as saying that the Child Rights Act is against the interest of the North.

According to the report, Gafasa argued that the CRA 2003 was unacceptable on the ground that the traditional setting of North and their religion were thus put under attacked by the Act and that "...the elders and religious leaders were not consulted for their advice and guidance". This part of his argument seems to be concerned about the "means" to the "end" rather than the "end"; which is the protection of the child. Although it is usually advisable to follow due process, but it is astonishing to note that such highly placed person – a speaker of a law-making body – would refer to a piece of legislation that was duly passed in a bicameral national legislative arm of the country, as being against the interest of the North. It is important to also emphasize here that the Northern region of the federation has better representation in the National Assembly (i.e. House of Reps and Senate) than the South

²⁶⁸ See the report prepared by Alemika E.E.O. et al on the implementation of CRC in Nigeria for the Committee on the Rights of the Child in Nigeria in its 38th Session held in Geneva 2005

²⁶⁹ Khalid, S. "Law and Values in Society: An Examination of Muslim's Response to "Child's Right Act" in Nigeria". Available online at: http://www.allacademic.com/meta/p_mla_apa_research_citation/1/8/1/7/6/p181762_index.html (Accessed 23.04.2010)

region. Every federal Act must be passed by two thirds majority in both the Senate and the House of Representatives, before the president's assent. At time of writing, there were 109 electoral sits in the Senate and 360 in the House of Representatives. While members of Senate are elected based of equality of States with each having 3 Senators, except the Federal Capital Territory, Abuja, with one Senator, election to the House of Representatives is based on population. There are more states in the northern part of the country than in the southern part, and it is also believed that more people practice Islamic religion than Christianity in the country. This means that there may never be poor or inadequate representation of the northern region at any stage of the passing of a Bill at the national level.

However, there is a House of Assembly in each state of the federation with power to legislate on matters that are contained in the Concurrent Legislative List. All members in each House are elected with each representing a constituency within the State. And as provided for under the Exclusive Legislative List of the Constitution, before any national legislation can become law at the state levels, such piece of legislation must be re-enacted by the state House of Assembly of the state concerned. It is in this capacity that Sharia law proponents like Gafasa can be very intractable.

Illegitimate and adopted children

One contention which has always confronted my sense of reasoning is the fact that on the one hand, some of the proponents of Sharia are very quick at expressing their detestation of any law that seems to superimpose itself on Sharia principles, but on the other hand, they are unable or unwilling to come up with a workable strategy for reconciling human rights law which provides for the 'equality of everyone before the law,' and which they themselves openly proclaim, with those provisions of Sharia which are discriminatory against women, illegitimate and adopted children especially in inheritance.²⁷⁰

The positions of illegitimate and adopted children in Nigeria differ, as customs relating to circumstances of their birth vary from place to place, depending on the family or ethnic group concerned. Adoption of children is more of Western culture than African and, is therefore,

²⁷⁰ See Protest statement by Dr Ibrahim Datti Ahmed, President of Supreme Council for Sharia in Nigeria (SCSN), in response to the Nigerian Federal Government's call for the implementation of the Child Rights Act 2003, reported 22/08/2005 available Online at <http://allafrica.com/stories/200508230090.html> (accessed 16/02/2008)

rare in Nigeria. Accordingly, the right of an adopted child is inferior to that of the legitimate child of the blood.²⁷¹ The same goes for illegitimate children. A child born out of wedlock is regarded as illegitimate child while a child born in marriage is regarded as legitimate child. Pursuant to relevant sections of the Matrimonial Causes Act 1970 (MCA), a child born out of wedlock whose paternity has been acknowledged by his natural father is as legitimate as one born in wedlock when it comes to succession rights.

The position of statute law also differs. For instance, with regard to who is a ‘child of the family’ with view to ascertaining who to consider when making order for *maintenance*, *custody* and *settlements*, the MCA provides for legitimate, illegitimate, adopted and all other children raised in the home as children of the family.²⁷²

Although in making provisions for matrimonial causes arising out of marriages contracted under the Act, the MCA specifically exclude marriages entered into according to Muslim rites or other customary law. But this exclusion does not seem to extend to children emanating from these latter marriages. It follows therefore that children who are born into families regulated by Sharia or customary law regimes are still protected by the law. Such inference can be drawn from section 42 (2) of the 1999 Constitution of Nigeria which expressly prohibits discrimination based on the circumstances of a person's birth."²⁷³ The phrase: “by reason of the circumstances of his birth”, implies that all citizens –male, female, able bodied and physically challenged- have the same rights. In other words, once a child is born as a citizen of Nigeria, s/he automatically acquires all rights and privileges enjoyed by every Nigerian citizen without any form of discrimination. This means also that when a child is adopted in accordance with the relevant statutory provisions, s/he becomes a member of the family into which s/he is adopted and thus acquires all rights and privileges enjoyed by the native born Nigerian child. This equality of all without regard to the *circumstances* of birth of anyone was what apparently infuriated some proponents of Sharia, such as *Dr Ibrahim Datti Ahmed* and *Honourable Abdulaziz Garba Gafasa* that I mentioned earlier. The duo were the president of Supreme Council for Sharia in Nigeria (SCSN) and the Speaker of Kano State

²⁷¹ Onuoha (2008) R.A. “*Discriminatory Property Inheritance under Customary Law in Nigeria: NGO to the Rescue*”

²⁷² See section 69, Matrimonial Causes Act Chapter 220 L.F.N 1990, available online at: <<http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm>>

²⁷³ Constitution of Nigeria 1999, available online at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>

House of Assembly respectively, when they called for non-implementation of the Child Rights Act 2003, saying it did not represent all that the Sharia law stood for.

The Maliki School of Muslim law applicable in Nigeria prescribes that, a testator may only dispose of part of his estate by will.²⁷⁴ Those principles were actually applied by a lower court in the case of *Adesunboka v Yinusa*.²⁷⁵ It held that a Muslim testator could only bequeath one-third of his estate to persons other than those who would traditionally be his heirs. The remaining two-thirds would devolve on his traditional heirs. Unfortunately, adopted and illegitimate children do not fall within the ambit of these traditional heirs under reference and would therefore be discriminated against if such laws were allowed to take their cause. Even in a “Nuncupative” disposition, Ezeilo writes that there is indeed no requirement of writing, signing and witnessing as required by statute law.²⁷⁶ This puts such testamentary disposition at risk of being manipulated.

However, when the case on appeal finally reached the Supreme Court, it was overturned on the grounds that upholding such a practice would deprive a testator his testamentary rights as provided for under the Wills Act.²⁷⁷ However, in the absence of a will or if the will is in writing but does not comply with the requirements of the Wills Act, it would be treated as valid under customary law.

Issues relating to education

Nigeria is regarded as one of the least literate countries in the world and these indexes show women in the majority. Over two-thirds of the world's 793 million illiterate adults are found in only eight countries (Bangladesh, China, Egypt, Ethiopia, India, Indonesia, Nigeria, and Pakistan). Out of all the illiterate adults in the world, two-thirds are women; extremely low literacy rates are concentrated in three regions (the Arab states, South and West Asia, and

²⁷⁴ Ezeilo “*Laws and Practices Relating to Womens’ (sic) Inheritance Rights In Nigeria: An Overview*” available online at: <http://www.wacolnigeria.org/lawandpractices.doc>. (Accessed 24/09/2008)

²⁷⁵ [1968] N.N.L.R. 79.

²⁷⁶ See Ezeilo “*Laws and Practices Relating to Womens’ [sic] Inheritance Rights In Nigeria: An Overview*” available online at <http://www.wacolnigeria.org/lawandpractices.doc>. (Accessed 24/09/2008)

²⁷⁷ See *Adesunboka v Yinusa* (1971) where the Supreme Court held that when a Moslem exercised his testamentary powers under the Wills Act, he was not bound by the limitations imposed by Moslem law.

Sub-Saharan Africa), where around one-third of the men and half of all women are illiterate.²⁷⁸

Theoretically, education is supposedly a top government priority in Nigeria. However there are obvious concerns amongst citizens whether such assertions (constitutionally obligated or not) can be established in practice. Quite clearly, the Nigerian Constitution also guarantees equal opportunity to all citizens at with regard to education and the government is obligated to make it a matter of policy²⁷⁹ so that that the problem of illiteracy will be drastically reduced, if not completely eliminated.²⁸⁰ Conversely, the application of these constitutional provisions is, in practice, a different matter altogether.

In some parts of Nigeria, particularly in the north, educating female children, for example, is seen as waste of scarce resources and therefore undesirable. It is often argued that educated girls tend to be disrespectful and are no longer amenable to discipline imposed by their husbands. However, a study carried out by the Institute of Advance Legal Studies revealed that 71% of parents frowned at the idea of gender differentiation in children's enjoyment of their rights.²⁸¹ The same survey conducted on educated citizens also reaffirmed this submission and declared that education per se does not determine the level of a person's unruly or disrespectful behaviour. This percentage of respondents blamed such attitudes on lack of moral training rather than on education. I wish there would be a general consensus on this standpoint.

The problem of poor standard or lack of education in Nigeria translates into irrational decision making on the part of the policy makers as well. In other words, as a result of the fact that many of those in the helm of affairs are semi-illiterate, they are not able to prioritize their people's needs using a well-structured scale of preference. They would prefer to invest more on what Nigerians, in local parlance, refer to as "*white elephant*" projects than on qualitative education which is a priority need.

²⁷⁸ The figures from the report represent a mixture of data collected by the CIA World Book and available online at: <http://en.wikipedia.org/wiki/List_of_countries_by_literacy_rate#List>

²⁷⁹ See section 18 (1) of 1999 Constitution of the Federal Republic of Nigeria, available online at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>

²⁸⁰ Ibid Section 18 (3)

²⁸¹ Ayua & Okagbue (1996) p 33

And apart from the problem emanating from poor leadership, there are several other issues that militate against human capital development in Nigeria, especially in the education sector. One of such issues is religious crisis. This presumption has however been refuted severally by highly placed Muslims in the country, saying that although such crises were politically motivated, but perpetrated in the name of Islamic religion. Although many of the crises may have actually been politically motivated, but certainly, there are also cultural and religious underpinnings to the decline or non-acceptance of western styled education in some parts of the country.²⁸²

But no matter how they are constituted, such methods bring about negative outcomes in order that the uneducated remain perpetually illiterate and thus unable to make rational decisions. And this makes the poor masses continuously dependent on those they believe have been “ordained by God” to lead. These cultural and religious sentiments are promoted by feudal lords as a means of perpetuating the cycle of ignorance which leaves them in control.²⁸³ The most recent of such religious crises is the recent uprising named, “*Boko Haram*”.

Effect of religious crises on illiteracy eradication campaign

While many people, in collaboration with the government, strive to give their children the best they can afford in terms of education, others are strictly against such moves. And in order to push their ideology through, no matter how infamous it is, various notorious methods are used. These may range from clandestine killings, to general uprising; during which time innocent citizens including women and children are openly massacred in broad daylight; including the ones they call their own. Most recent (towards the end of the year 2009) of such crises is one named “Boko Haram” which occurred in Bauchi State and has now spread to other places like Plateau State, Kano State, Yobe State, Bauchi, Gombe State, Kaduna State, Sokoto State and Borno State. Even as I write, the Nigerian Government, headed by Goodluck Ebele Jonathan, has declared *state of emergency* in three States in the north, namely: Nasarawa, Yobe and Borno, so as to quash the activities of the Boko Haram sect which is reported to have set up terrorist camps in those States.

²⁸² See Ayua and Okagbue (1996) p 54

²⁸³ Ayua and Okagbue (1996) p 54

What is *Boko haram*? Observers have it that the slogan is an Islamic religious connotation representing a ban on western education. With the uprising, the perpetrators seek to undermine Nigeria's efforts to eradicate illiteracy in the country. Eyewitnesses who have monitored the uprising and similar ones in the not too distant past, have it that "Boko Haram" combines *haram*, a borrowed Arabic word, meaning "forbidden by Islamic law", with *boko*, a Hausa word which, according to *Modern Hausa-English Dictionary*, means: Western education...or... Adulteration, fraud, tricks." Boko is also a corrupt form of "Book" which was brought about as a result of the fact that when western education was introduced to the north of Nigeria in the past, the local people could not properly pronounce the word, "Book" or Book School, instead they corrupted it to "Boko". Adamu,²⁸⁴ another trenchant observer, traces the emergence of this unwholesome incident from the colonial era and narrates at length how the name Boko Haram came to be. According to him, after the arrival of the colonial masters and setting up of western schools which used Books, the ordinary Hausa called those attending such schools *Yan Makarantan Book*, meaning students of the "book school", which was later pronounced "Boko". The word, book, is something not generally accepted. In the north of Nigeria, there were two types of school: the *makarantan Allo* (Koranic school where *slates* were used for writing and reading before taking to paper) and Boko schools. Almost everything that came along with the colonial masters was seen as foreign and thus rejected; the one that received the highest rejection was western education due to the way it was propagated then and the introduction of missionary schools that incorporated Christian religion teaching in their schools."

Boko Haram uprising has claimed incredible number of lives, injured many and destroyed property. And apart from the human and material losses, the Boko Haram crisis also succeeded in stimulating religious fundamentalism which has in turn created an atmosphere that undermines not only educational system, but also security arrangements, in the form of terrorism in the country. And in the end, those who were already beginning to embrace education and modern civilization have now been brought back into a world of illiteracy, ignorance, barbarism and diabolical beliefs.

Constitutionally, education falls within the legislative competence of both federal and state governments.²⁸⁵ There is no statutory obligation on the parents to educate children outside the

²⁸⁴ See Adamu, S. U. "We Are All Boko Haram By Dr. Tilde: Is Boko Halal?"

Available online at: <http://www.gamji.com/article8000/NEWS8803.htm>. Accessed 15/04/2010

²⁸⁵ See both the Exclusive and Concurrent Legislative Lists in the 1999 Constitution of Nigeria

old Western region. The customary, traditional and cultural or moral education provided by parents in the process of child-upbringing is not only inadequate, it cannot compete favourably with the much needed (so-called) formal western education, especially in the context of the need to benefit from the development and advancement of technology in other cultures.²⁸⁶

With regard to such parents that may not want to educate their female children, on the ground that western education makes them less submissive to their husbands and gives them equal rights with the men, the decision of the court in *Archbishop Olubunmi Okogie v Attorney General of Lagos State*²⁸⁷ does not seem to help matter in that the court's assertion in the case is that there must be a statutory provision compelling the state to educate citizens in order for such provision to be mandatory.²⁸⁸ Sharia law is however believed by some of its proponents to be higher in hierarchy than any man-made law. The court however based its decision as to whether or not, pursuant to the constitution, the government should provide free education at all levels, on the part of section 18 (3) of the constitution which says: "...as and when practicable...", as well as on section 6 (6) (c) which stipulates that:

*"The judicial powers vested in accordance with the foregoing provisions of this section-shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution"*²⁸⁹

Although the provisions of the constitution may seem to have been correctly applied here by the court, but Ayua and Okagbue²⁹⁰ believe that such decision is a set back to the realisation of the objectives set out in Chapter II of the constitution.²⁹¹ They however regret that the strategies for implementing the policies on education have thus been made dependent on socio-economic considerations which almost always confine education to the background.

²⁸⁶ See generally Ayua & Okagbue, *The Rights Of the Child in Nigeria* (1996) p 46

²⁸⁷ (1981) 2 NCLR 337

²⁸⁸ Ibid p 47

²⁸⁹ Constitution of Nigeria 1999, available online at: <<http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm>>

²⁹⁰ Ayua and Okgbye (1996) "*The Rights Of the Child in Nigeria*"

²⁹¹ See generally Ayua & Okagbue, *The Rights Of the Child in Nigeria* (1996) p 47

However, it is sometimes argued by some people in government that the State cannot not be held responsible for the high illiteracy rate as they claim to have established enough schools to accommodate basically all its citizens. It could equally be counter-argued that the establishment of schools alone cannot eradicate illiteracy. In addition to building of schools, there are other inherent factors to be taken into consideration before it can be conveniently claimed that an educational environment has been established, and some of these are:

- a. the location of the schools;
- b. its distance from home;
- c. availability of transport to and from the school location;
- d. facilities in the schools;
- e. adequate human and material resources; and
- f. fees etc.

Unfortunately, in majority of public schools, most of these facilities are not readily available; even where they are available; they are either non-functional or outdated.

Inadequacy of enlightenment campaign on the benefits of education

There is yet another crucial problem which is mainly attributable to illiteracy; this is the issue of awareness. A lot of people do not have adequate information regarding education and its benefits. Ideally, one cannot but lend support to the submission of Douglas and Walsh (2009) with regard to Child protection intervention in Australia, that, for parents to meaningfully participate in the child protection intervention process, they must be sufficiently informed as to the nature of the process, as well as their responsibilities and entitlements within that process.²⁹² Accordingly, there is a great need to embark on massive campaign so as to enlighten the people on the advantage of educating their children and wards. This is mainly because the people themselves are not educated and therefore, they cannot make informed decision as to the benefit of having one's child educated.

The government does not make adequate efforts to ensure that all children of school age are brought to places where they can be registered and educated. And also, so many parents and

²⁹² Douglas, H. and Walsh, T. (2009) “*Mother And The Child Protection System*” p 215

others in *loco parentis* are not made aware of the fact that educating their children and wards is an obligation from which there is no exemption, as opposed to one of choice. It must however be stressed that many of those who have been responsible for the subsistence of customary and Sharia legal systems, in spite of their ferocious nature, are either uneducated or half-educated and are therefore unaware of the consequences of depriving their children and wards the basic education.

Early marriage and child betrothal

Another issue to contend with is early marriage. There are various statutory provisions with conflicting age specifications as to the right marriageable age in Nigeria. These discrepancies in legislation, as with customary and Sharia law, have only compounded issues of early marriage. For example, section 18 Marriage Act provides that:

*If either party to an intended marriage, not being a Consent widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party, must be produced annexed to such affidavit as aforesaid before a licence can be granted or a certificate issued.*²⁹³

And also, section 2 of the received English *Children and Young Persons Act 1933*, re-enacted in Eastern, Western and Northern regions (hereafter CYPA) stipulates that a person under the age of fourteen years is a child, while a *young person* means a person who has attained the age of fourteen years and is under the age of seventeen years. However, the Child Rights Act 2003 provides that a child is a person under the age of 18 years. This is also the age prescribed by the CRC, and this international instrument has been ratified by so many nations of the world, including Nigeria. The regional document, “African Charter on the Rights and Welfare of the Child” also provides under Article 21 that:

“Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age

²⁹³ Section 18 Marriage Act, available online at: < <http://www.nigeria-law.org/Marriage%20Act.htm>>

*of marriage to be 18 years and make registration of all marriages in an official registry compulsory.*²⁹⁴

Due to inconsistencies in legislation occasioned by diverse cultures in regard to the definition of a child, coupled with the absence of any uniform stipulation of minimum age for marriage before the adoption of the Child Rights Act 2003 (CRA), so many early marriages took place, (and are still taking place) without regard to age. It is evident that whether or not there is a specified age limit for marriage, in many cases, marriages conducted early are more of a means to preserve chastity than anything else. Some ethnic groups believe that a girl child must be a virgin by the time she is given out in marriage. Otherwise she would be seen as having brought shame upon her family. There are instances whereby the family into which the girl is to be married may demand that all gifts, whether in cash or in kind, which they may have given to the girl's family be refunded, if it is discovered that the girl lost her virginity before getting to her husband's house. Some of these gifts might have been given intermittently over a long period of time and therefore too many for the girl's family to easily refund or may be too little to easily remember.

As I earlier mentioned, section 18 of the Marriage Act allows persons under the age of 21 to get married, provided parental consent is sought and given. The federal authorities have however sought to make 18 the minimum age of marriage, not only in law, but also in practice. This move, albeit in theory, can be implied from the fact that Nigeria has ratified the CRC, African Charter on the Rights and Welfare of the Child and has also enacted the Child Rights Act. It follows therefore that the age of 21 years stipulated by the Marriage Act has become obsolete and no longer a good law. So also are all other domestic laws (statutory or administrative) which stipulate age that is not in consonance with the provisions of CRC 1989. Therefore the right age would be 18, as contained in those legal documents which Nigeria has ratified.

Child betrothal is one other practice that is prevalent in some states in Nigeria. In the rural areas and among the uneducated, rich and influential people. This belief or attitude is one of the major covert reasons why some men, majority of whom are already married, take children as young as twelve for a wife. Sadly, when the "child brides" are taken to their husband's house, majority of such children happily agree to live with such men, as they are thought of as

²⁹⁴ African Charter on the Rights and Welfare of the Child, available online at: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/africa/afchild.htm>>

uncles. This betrothal may seem despicable, but for most poor and uneducated parents, it is just a way of protecting their female children against “wayward lifestyle” prevalent in the urban centres which they regard as *immoral communities*. And therefore the age of the child is no barrier. In fact, according to them, the younger they are, the better for their husbands, as that only goes to make it more likely that they will be virgins by the time they arrive at their purported matrimonial homes.

Conflicting ages of marriage

The age of marriage is still a highly controversial issue and varies from place to place. In the Southern States the age of marriage varies and it is usually between 16 and 18 years. Nevertheless, customary positions on the issue differ and important parts of the population are still not aware of the negative effects early marriages can have for the girls.²⁹⁵ In most cases, it limits the opportunities for girls to accede to education, putting them in a disadvantaged position.²⁹⁶ Indeed, 36 million Nigerian women and girls are not educated.²⁹⁷ The adverse effect of such early marriage is what is more worrisome as medical experts have often advised that such decisions can be detrimental to girl’s physical, mental and emotional health, some of which result in large number of cases of *vesico-vaginal fistula*, (VVF) - a condition caused by giving birth when the cervix is not well developed. It occurs because the pelvic bones have had insufficient time to develop to cope with child-birth. Corrective operations often require the consent of the spouse (i.e. the husband), and more often than not, the sufferers are abandoned or divorced by their husbands and ostracized by their communities because such occurrences are believed to be a course from the gods so as to punish them for the abomination which the affected women are believed to have committed.

Unconfirmed sources argue that 22% of all Nigerian teenage girls had at least one unwanted pregnancy. Abortion in Nigeria is governed by two different laws. In the predominantly Muslim states of Northern Nigeria which comprise about half the population of the country, the Penal Code Law No. 18 of 1959 is in effect. In the southern part of the country, which is largely Christian in religion, the Criminal Code of 1916 is in effect. For many girls, this situation is

²⁹⁵ See the report prepared by Alemika, E.E.O. et al on the implementation of CRC in Nigeria for the Committee on the Rights of the Child in Nigeria in its 38th Session held in Geneva 2005.

²⁹⁶ Ibid

²⁹⁷ Ibid

disastrous because it leads to severe discrimination within their own community. Alemika et al, in their report,²⁹⁸ assert that, apart from the fact that early marriage deprives girls of their right to have control over their body and reproductive health, it also puts them in a position of complete dependency on their husband.

On the other hand, with Sharia law being regarded by some of its proponents as articulate on matters of child protection, one would expect that the position would be clearly defined and uniform, but alas! In the North West, 14 years is the age of marriage, whereas in the North Central part, the age of marriage is between the 2nd and 3rd menstruation. The effect of this can best be explained with the following example:

Today, the first language which one starts speaking from childhood is referred to as *mother tongue*. This is because most children are taught their first language by their own mother or by whoever plays the role of a mother. This is irrespective of the influence of the language of instruction in schools. For example, when a woman (e.g. native born Austrian) gets married to an immigrant husband (i.e. from a non-German speaking country), and they have a child, such child is more likely to speak German as his/her first language than the father's language. On the other hand, if an immigrant mother (i.e. from non-German speaking country) gets married to a native born Austrian husband, and a child is born in Austria, chances are that the child will start to speak first the mother's language and later the father's as he or she grows older. That is to say that the child's "mother tongue" depends on the mother's choice of language for the child at early age.

Generally speaking, in those areas where a substantial amount of girls are victims (or prospective victims) of early marriage, chances are that this will, over time, result in high illiteracy rates among female children who will later in life become illiterate mothers. And because mothers are always the first teachers, they will therefore be ill-equipped to perform that function of educating their children which will result in such children being illiterate.

Lack of family protection and the adverse consequences

Undoubtedly, social security and protection for the family are values that are sacrosanct. The

²⁹⁸ See the report prepared by Alemika, E.E.O. et al on the implementation of CRC in Nigeria for the Committee on the Rights of the Child in Nigeria in its 38th Session held in Geneva 2005

absence of these values, for example, exposes the entire family fabric to various undue adversities.

Historically, particularly in sub-Saharan Africa, there were strong family institutions in the form of extended family units that were built on morals and principles of “benefit and burden” and they functioned perfectly. In fact, this extended family system has for generations been the basis for the sustenance of society; offering material, social and emotional support for its members in times of need and crisis. Over the years, however, this institution has been affected by demographic and socio-economic transformations that have continued to take place in the region and therefore, the causal connections between poor family protection (or none at all) and countless depravities that are prevalent in Nigeria today, can be traced without much effort.

That family circumstances are today characterised by economic difficulties that tend to set a somewhat chain of events in which the responses to some difficulties create new problems that aggravate the original difficulties in motion, is unarguable. The fact is that economic setbacks have direct effect on family units; causing fragility and unbearable poverty. It has also been proven, for example, that there are spill-over effects of strict adherence to the discriminatory and cruel sections of both Sharia and customary laws, particularly, those regarded as harmful traditional practices as these culminate in illiteracy, indigence, underdevelopment and economic dependence.

Poverty in the family: What Customary law has to do with it

A child that is well catered for usually possesses the right attitudes and the required skills to deal with substantial amount of challenges posed by today’s world of economic competition. To be endowed with all the attributes, a child requires good parenting; and this includes, good education; not necessarily university education, but considerable level of awareness. Education is a key to career success and economic self-sufficiency. Poverty is part of the consequences of lack of education. For example, the home background of pupils is the most important factor influencing educational outcomes.²⁹⁹ Poverty is strongly correlated with a

²⁹⁹ Servaas van der Berg, "Education and Poverty", available online at:
<http://www.iiep.unesco.org/fileadmin/user_upload/Info_Services_Publications/pdf/2009/EdPol10.pdf>

range of other home background variables, including parental educational attainment, thus it is difficult to separate the effects of limited resources from other home background factors.³⁰⁰

How best can one define poverty? Poverty, in its simplest definition, means the lack of basic necessities of life. These range from food, shelter, clothing, to good drinking water. Poverty, destitution, indigence, scarcity – these are words suggestive of lack. Whether this lack is defined by scarce financial resources, basic food basket or both, the key element is simply deprivation which is also a synonym of the others. Poverty may also be considered in terms of the World Bank's Purchasing Power Parity (PPP) index, which defines it as the proportion of those living on less than US\$1 per day poverty line. The UN Committee on Social, Economic and Cultural Rights defines poverty as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. I like to quickly add here however that poverty is not simply the lack of financial resources as inadequate education can also be considered a form of poverty. But in any given society, these elements are dependent upon the availability or non-availability of strong capacity building and the enabling platform needed for a person to operate efficiently.

There are various reasons to believe that one of the root causes of poverty in a country like Nigeria is family neglect. Although some people may like to believe otherwise, but basically, a society that lacks the much needed manpower or one that is endowed with mainly persons who have had to contend with all forms of social ills in their formative years as a result of neglect will always suffer economic, political and financial lack – right or wrong. The best legacy to give to a child is good parental upbringing and education. A child that has these two assets can survive any adversarial encounters. "As education reduces poverty in a number of ways", so also does it bring social benefits that improve the situation of the poor, such as lower fertility, improved health care of children, and greater participation of women in the labour market."³⁰¹

³⁰⁰ Servaas van der Berg, "Education and Poverty", available online at: <
http://www.iiep.unesco.org/fileadmin/user_upload/Info_Services_Publications/pdf/2009/EdPol10.pdf>
index p. II

³⁰¹ Servaas van der Berg, "Education and Poverty", available online at: <
http://www.iiep.unesco.org/fileadmin/user_upload/Info_Services_Publications/pdf/2009/EdPol10.pdf>

Poverty clouds in various segments of human endeavours and this is replicated in various guises. Such characteristics are not any different in Nigeria. In fact, it exacerbates the resultant high illiteracy rates, malnutrition, infant mortality, maternal mortality, poor sanitation and the ensuing widespread diseases. It reduces sense of reasoning and lifespan. Other indicators point to general deprivation, powerlessness, social exclusion, mental breakdown and vulnerability to crime and other social vices.

Although customary law is applied in the southern part of Nigeria while Sharia law is applied mainly in the north, the level of poverty is considered higher in the Sharia States (north) than in the South of Nigeria. According statistics³⁰² there are strong margins of polarization in wealth distribution as a result of which there is poor level of socio-economic wellbeing of the people in specific areas of the country. With the clear relationships between high illiteracy rates and poverty, the need for the governments to step up efforts in the enlightenment of the people with regard to the role of education in poverty alleviation cannot be over-emphasized.

Kale, in his report, defines poverty in categories: absolute, relative and subjective. In all of these, the Northern areas of the Nigeria, particularly the Sharia practising State are recorded as having the highest illiteracy rates as well as having the highest in poverty rate. Kale, who defined absolute poverty in terms of minimal requirements necessary to afford minimal standards of food, clothing, healthcare and shelter; reports that, using this measure, in 2004, 54.7% of Nigerians were living in poverty but however concludes that this figure increased to 60% in 2010. He further reports that among the geo-political zones into which Nigeria had been divided, the North-West and North-East recorded the highest rates which he put at 70% and 69% respectively, while the South-West had the least – 49%. At the State level, Sokoto State had the highest –81.2% and Niger State had the least –33.8% during the period under review. Using the Dollar-per-day measure, Kale also writes that 51.6% of Nigerians were living below US\$1 per day in 2004 and that this increased to 61.2% in 2010. The North-West geo-political zone recorded the highest percentage at 70.4%, while the South-West geo-political zone had the least – 50.1%. Sokoto had had the highest rate among States –81.9%, while Niger had the least –33.9%.

³⁰² See the Nigeria Poverty Profile 2010 Report as presented at a press briefing by Dr Yemi Kale, the Statistician-General/CEO National Bureau of Statistics Nigeria. Available online at: <<http://resourcedat.com/resources/The-Nigerian-Poverty-Profile1.pdf>> Accessed 16.02.2013

If Kale's report above is considered accurate as presented, then there is strong reason to lend support to the supposition that there is a causal connection between education and poverty. It is widely agreed that the relationship between poverty and education operates in two contrasting directions: poor people are often unable to obtain access to adequate education, and without adequate education, people are often constrained to a life of poverty.

Regarding Nigeria's educational/professional sector, Adamu,³⁰³ citing Yusuf (1999) writes that the north is said to have only 10% of engineers; 15% of professors; 10% of architects; 25% of lawyers; 8% of bank executives and less than 2% of insurance practitioners in the country. She reiterates that the UNDP reports that "A ranking of the Nigerian states by HDI³⁰⁴ puts, for example, the Edo and Delta states (formerly Bendel state) on top with HDI of 0.66 while Borno has HDI of 0.15. She emphasizes that were Edo and Delta states constituted into a separate sovereign country, their 'nation' will rank 90 in the world – relatively high among the medium level human development countries – while Borno as a separate polity would rank lower than any other country in the world. The states with low HDI are concentrated in the North, Adamu concludes. In her comparative analysis on gender, she notes that the condition of women is worse compared to that of the men in the North West region. She cites UNICEF (2001) study reports that a maternal mortality ratio is 6 times higher in the North-West zone than in the South West. Similarly very few women deliver in health centres in the North West (6%) in striking contrast with the South West that has 67%. She returns to the educational sector here again and reaffirms that although the literacy rate is very low in the north compared to the south, there is large gender gap in that sector, she emphasizes. Also citing Muhammed, Adamu, Abba, (2000), she declares, for instance, that while 76% of adults in Imo state were literate, only 2.7% of adults in Sokoto was, and the situation is worse for girls and women with just 17.7% secondary school enrolment for girls. She further cites the reports of UNICEF which by today's standards, seem not to have changed. According the report (UNICEF, 2001:280), "women's advancement has been constrained by poverty, illiteracy and the weight of traditional discriminatory attitudes about women's status, rights

³⁰³ For details see Adamu, F.L. "The Dynamics of Gender and Poverty under Shariah Legal Systems in Zamfara and Sokoto States". Available online at: <http://web.uct.ac.za/org/gwsafrica/african%20feminist%20thinkers/adamu/adamu%20publication8.htm> Accessed 18.02.2012

³⁰⁴ HDI (Human Development Index) is a composite statistic of life expectancy, education, and income indices to rank countries into four tiers of human development. HDI is a comparative measure of life expectancy, literacy, education, and standards of living for countries worldwide. It is a standard means of measuring well-being. It is used to distinguish whether the country is a developed, developing, or underdeveloped country and also to measure the impact of economic policies on quality of life (See generally Wikipedia.org, available at: http://en.wikipedia.org/wiki/Human_Development_Index Accessed 21.02.2013

and responsibilities”, she concludes.³⁰⁵ Education is a fundamental human right: Every girl or boy in every country is entitled to it.³⁰⁶

UNICEF in its information package also writes that: “Education is a fundamental human right: Every child is entitled to it. It is critical to our development as individuals and as societies, and it helps pave the way to a successful and productive future. When we ensure that children have access to a rights-based, quality education that is rooted in gender equality, we create a ripple effect of opportunity that impacts generations to come.”³⁰⁷

Coincidentally, most poor people in Nigeria are illiterate and as a result of this fact, they find life in modern world unbearable. This probably explains why majority of them prefer the archaic way of living which they are used to. And that way of living is regulated by customary law which is the legal provision under which those who perpetrate the discriminatory and repugnant acts, in the name of tradition, usually hide. In fact child neglect which, in other words, may also mean child abuse comes in various forms. There are four major categories of child abuse: neglect, physical abuse, psychological or emotional abuse, and sexual abuse.³⁰⁸ Child neglect is a form of child maltreatment which, in other words, is the failure to provide basic physical health care, supervision, nutrition, emotional nurturing, education or safe housing.³⁰⁹ In fact, child neglect is regarded as the most common form of abuse. It has been revealed that children who suffer from neglect face a number of immediate and long term consequences. They are likely to experience delayed physical and mental growth, endure language deficits, and suffer from neurological impairments. They will likely exhibit behavioural problems and poor social skills, suffer from low academic achievement, experience extended poverty or unemployment, and face chronic illnesses or early death.³¹⁰ Its characteristics make the affected children vulnerable to very many social vices, such as: child trafficking, child prostitution and child pornography and paedophilia; drug trafficking; thievery, early marriage, etc. In the same vein, women who are subjected to obstinate traditional practices in the name of customary law, in addition to other forms of domestic

³⁰⁵ Adamu, F.L. “The Dynamics of Gender and Poverty under Shariah Legal Systems in Zamfara and Sokoto States”. Available online at: <<http://web.uct.ac.za/org/gwsafrica/african%20feminist%20thinkers/adamu/adamu%20publication8.htm>> Accessed 18.02.2012.

³⁰⁶ See Article 26 (1) of the Universal Declaration of Human Rights

³⁰⁷ UNICEF-Basic Education & Gender Equality, Available at: <<http://rconline.undg.org/wp-content/uploads/2011/11/RC-induction-UNICEF-Information-Package.pdf>> Accessed 11.03.2013

³⁰⁸ Wikipedia.org available online at: http://en.wikipedia.org/wiki/Child_abuse> Accessed 27.02.2013.

³⁰⁹ Ibid

³¹⁰ See generally “Facts about Child Neglect”. Online publication by Washington State Department of Social and Health Services, Available online at: <<http://www.dshs.wa.gov/pdf/ca/NeglectFact.pdf>>. Accessed 03.03.2013

violence, face the same fate as neglected children. It must however be noted that this form of abuse is not the only one out of the four that I have mentioned; it only means that child neglect, being the commonest, can be as ruinous as the rest forms of abuse.

On the other hand, women forced into marriage or given out in marriage at very early age on traditional grounds usually lack both the skills and the mental capacity to manage their home efficiently. Obviously, the children of the family are part of the home front. If through judicial separation from her husband, divorce, widowhood, or polygamy-induced single parenthood, a woman is faced by the challenge of maintaining her family, the financial settlements by way of alimony will go a long way in alleviating some potential hardships. And early marriage distorts a woman's quest for educational and optimal economic empowerment. Therefore, they are indirectly forced to occupy home economy which usually grounds to a halt in the event of divorce or separation.

The low participation of Muslim women particularly in leadership roles has generally been attributed to Islam and the politicisation of gender in the Muslim societies.³¹¹ The causes of the politicisation can be traced historically to the relationship of state to religion and the Islamic expression of gender in Hausa society.³¹² Adamu observes that the nature and type of political class that emerged after independence to date as demonstrated by the current Sharia expansion perfected the relationship between state and Islam in the North. She notes that it is therefore argued elsewhere that the relationship between states and Islam in Hausa society and its consequence on the dominance of religio-political elite in defining what is 'Islamic' is a major barrier to the achievement of women's leadership in North West zone³¹³. Therefore, a major consequence of political discrimination against women is economic deprivation which, in other words, means lack. This puts the men in perpetual control of scarce resources that invariably reduce the women to the whims of the men.

³¹¹ Adamu (2003) F.L. "The Dynamics of Gender and Poverty under Shariah Legal Systems in Zamfara and Sokoto States". Available online at:
<<http://web.uct.ac.za/org/gwsafrica/african%20feminist%20thinkers/adamu/adamu%20publication8.htm>>
Accessed 18.02.2012

³¹² Adamu (2003) F.L. "The Dynamics of Gender and Poverty under Shariah Legal Systems in Zamfara and Sokoto States". Available online at:
<<http://web.uct.ac.za/org/gwsafrica/african%20feminist%20thinkers/adamu/adamu%20publication8.htm>>
Accessed 18.02.2012

³¹³ (Adamu, 2003) F.L. "The Dynamics of Gender and Poverty under Shariah Legal Systems in Zamfara and Sokoto States". Available online at:
<<http://web.uct.ac.za/org/gwsafrica/african%20feminist%20thinkers/adamu/adamu%20publication8.htm>>
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Chapter 13

MARRIAGE

NIGERIA

In this chapter I shall be discussing the various forms of marriage celebrated in Nigeria with a view to understanding the implication of each type, especially with regard to the legal rights and duties associated with each in the context of the topic of this write-up. However, as this thesis is not about marriages *per se*, its scope shall therefore be limited to those areas relevant to this work.

Generally, the institution of marriage, as commonly practised in countries of the world where same sex marriage has yet to be granted legal force, is the voluntary union between a man and a woman. It is the state in which a man and a woman are formally united for the purpose of living together (usually in order to procreate children) and with certain legal rights and obligations towards each other.³¹⁴ As same sex marriage has yet to be legally allowed in Nigeria, it follows therefore that marriage can only be contracted legally between a male and a female who possess appropriate legal capacity to do so and who comply fully with all formal requirements.³¹⁵

There are various ways of contracting marriage in Nigeria and these are constitutionally provided for. In general, a marriage is either monogamous or polygamous. The former is a marriage that is recognised by the law of the place where it is contracted and it is the voluntary union of a man and a woman to the exclusion of all others during the continuance of the marriage. This is similar to the marriage celebrated in England. In Nigeria it is regulated principally by the Marriage Act and Matrimonial Causes Act. In respect of the polygamous marriage, it is (or potentially is) a voluntary union for life of one man with one or several women. Polygamous marriage is regulated by customary law institution (including Sharia). Under Sharia however, a man may marry up to four wives at a time. In doing that, there is a provision under the Islamic law (Sharia) that the man must not only be able to love

³¹⁴ See Oxford English Dictionary

³¹⁵ See section 27 Marriage Act L.F.N 1990.

all his wives equally, but must also be able to provide for them adequately. Some other religious texts even go further to stipulate that each wife must be provided with separate accommodation.

TYPES OF MARRIAGE

- A. Marriage under the Act (Statute)
- B. Customary law marriage (including marriage under Sharia)
- C. Church marriage (usually celebrated in church premises); and
- D. One referred to as “double deck” marriage (this involves a situation whereby a couple, after having celebrated marriage under the Act, further goes ahead to marry again under either Sharia/customary law or vice versa).

A. MARRIAGE UNDER ACT

This type of marriage is regulated by statutes, such as Marriage Act, Matrimonial Causes Act, etc. If a “man and a woman” –key requirement, as same sex marriage is prohibited– intend to get married under statute, there are places established for that purpose. This can be done either at a Marriage Registry or in a licensed public place of worship. If the marriage is conducted in a place other than the registry, there is official procedure that must be observed. In following this procedure, certain requirements must be fulfilled in order for such marriage to be valid in law. Under the Marriage Act, for instance, parties wishing to be married may do so if, in the opinion of the Registrar in the district where the marriage is to take place, there is no legal reason why the parties should be precluded from doing so. Such persons may be married before a Registrar at the Marriage Registry or in a church licensed for celebration of marriages. In both cases all requirements must be satisfied. Failure to observe all stipulated requirements may result in the marriage being void, voidable or nullified.³¹⁶

³¹⁶ See Celebration of Marriage under section 21- 29 Marriage Act; Preliminaries to Marriage in sections 7 – 17 and 18 – 20 for Consent to Marriage

Formalities of marriage

Some of the requirements that must be fulfilled in order for an Act marriage to be regarded as valid are as follows:

- Notice of marriage must be given to the registrar
- Parties to the marriage must be 21 years old (implied) or parental consent sought if under that age, unless s/he is a widow or widower
- Rules on prohibited degrees of kindred and affinity must be complied with
- Parties to the marriage must consent to it
- Place must be marriage registry or licensed place of worship

1. Notice of marriage

Whenever a man and a woman desire to marry, one of the parties to the intended marriage shall sign and give to the registrar of the district in which the marriage is intended to take place a notice.³¹⁷ Upon the receipt of this notice, a certificate is usually issued by the registrar as authorisation for the persons to go ahead with the celebration of the marriage. That is if all other requirements, such as exemplified below, are met.

2. Age of persons to be married

In relation to age, the Marriage Act does not particularly specify minimum age for marriage. It however requires an approval in the form of a written consent from the parents (or someone in *loco parentis*) of the celebrants, in the case of marriage involving a minor (i.e. below 21 years old), before such marriage can be conducted.³¹⁸ Consequently, “whoever...shall marry or assist or procure any other person to marry a minor under the age of twenty-one years, not being a widow or widower, shall be liable to imprisonment for two years”.³¹⁹ Impliedly, the minimum age for marriage is twenty-one years. The exceptions to this, as can be seen, are: (a) if the minor is a widow or widower (b) a written consent to such marriage has been obtained.

³¹⁷ Section 7 Marriage Act L.F.N. 1990

³¹⁸ See also section 11(1) (b) Marriage Act L.F.N. 1990 for minimum age

³¹⁹ Section 48 Marriage Act L.F.N. 1990

Nevertheless, this provision to obtain consent in place of age limit prerequisite has been criticised on the grounds that it creates room for irrational parents who are proponents of early marriage based on religion, tradition or other grounds, to perpetrate the hideous crime of child betrothal; a system by which children, some of whom are barely 8 years old, are given out in marriage against the will of the girls themselves. Some are even too young to understand the intricacies of marriage when such decisions are made by their uncompromising parents. At times some of these female children are married off to older men in order to settle long overdue debts owed to the creditor by the parents of the girl child. On the other hand, it must be noted that non-compliance with age requirement is one of the grounds for declaring a marriage void under the Matrimonial Causes Act.³²⁰ It is also not clear whether the new Child Rights Act 2003, which stipulates that a child means every human being below the age of 18 years, amends the provisions of the much earlier Marriage Act with regard to “marriageable age”.

As I earlier mentioned, the Child Rights Act 2003, which is part of the process of ratification of the CRC and ACRWC, is yet to be enacted in all the states of Nigeria. It is important to note that there is a constitutional provision to the effect that unless a particular state re-enacts an international legal instrument ratified by the federal Government, that particular state will not be bound by that legislation (unless one is able to rebut this domestic law by the use of the relevant sections of the Vienna Convention on the Law of Treaty 1969 to which I earlier referred in the text).

3. Kindred and affinity

The Oxford dictionary defines “kindred” simply as “a person’s relative(s)” and “affinity” as “relationship (especially by marriage) other than blood-relationship.” The Marriage Act does not give any legal definition to “kindred and affinity”. And it does not also specify what degrees of kindred and affinity is prohibited in marriage, but it does provide in section 11(1) (c) that, in an affidavit which must have been sworn before a registrar, or before an administrative officer or before a recognised minister of religion, it should be ascertained that there is no “impediment of kindred or affinity, or any other lawful hindrance to the marriage”.

³²⁰ Section 3 (1) (e) Matrimonial Causes Act L.F.N. 1990

Subsection (3) also provides that “the person taking such affidavit shall explain to the person making the same what are the prohibited degrees of kindred or affinity, and the penalties which may be incurred under sections 42 and 43 of this Act, and if he wilfully fails to make such explanation, he shall be liable to imprisonment for two years”. Whoever performs or witnesses as marriage officer any marriage ceremony knowing that he is not qualified to do so, or does so without having first settled all relevant matters required by law; and whoever wilfully fails to fill out an appropriate certificate and transmit same to registrar of marriages, knowing he is under a duty to do so, is liable under sections 42 and 43 of the Marriage Act, to prison terms of five and two years respectively.

On the other hand, the Matrimonial Causes Act which is a more recent statute, does not use the term “kindred or affinity”, instead it talks of “consanguinity or affinity”. And as there seems to be no difference in meaning between the two terms, I shall accept one as meaning the other and may use them interchangeably.

4. Prohibited degrees of consanguinity and affinity

Under the First Schedule to the Matrimonial Causes Act 1970 regarding prohibited degrees of consanguinity and affinity, it is provided that marriage of a man is prohibited if the woman is, or has been his – (a) father’s wife (b) Grandfather’s wife.³²¹ And in respect of a woman, the Act also provides that marriage of a woman is prohibited if the man is, or has been her (a) Husband’s son (b) Husband’s son’s son.

There is however a leeway or an exception to these requirements. Under the MCA (i.e. in exceptional cases), where two persons intending to marry fall within the prohibited degrees of affinity, they have the possibility of obtaining a permission from a judge.³²² And if the judge thinks it is necessary under the circumstance, approval may be granted. It is however my earnest opinion that the justification for the granting of such permission can be considered reasonable ONLY in circumstances where the marriage or the circumstance that led to it was entered into by the concerned parties consensually. I must however mention here that the statutory prohibition placed on the degrees of consanguinity and affinity (i.e. relationships by marriage) under the MCA and Marriage Act is quite important in that it helps to draw attention to the conflict between such statutory provisions and certain customary law

³²¹ See section 3 Matrimonial Causes Act L.F.N 1990

³²² See 4 (2) Matrimonial Causes Act

provisions which stipulate that a woman whose husband has passed on is under obligation to be married off to any surviving brother or son (if any) of the deceased husband, at the instance of the latter or of the family of the deceased husband.

Whether the phrase "...if the woman...has been..." can or cannot be regarded as meaning "was once", is subject to judicial interpretation. If taken textually, the statute does not seem to forbid such marriage, as long as the previous marriage is agreed to have been terminated on the demise of one of the parties to the marriage. On the other hand, it must be borne in mind that the statutes do not regulate customary affairs, other than when the case is brought before a in superior court, and as such, it raises the issue of "repugnancy to natural justice, equity and good conscience".

5. Consent

Consent in this context is of two types. In the first instance, we must remind ourselves of the fact that many statutes today define marriage as a voluntary union of one man and one woman to the exclusion of all others. What this definition tells us is that marriage must be "voluntary"; that is to say that it must be "consensual". In other words, the decision between the parties to contract the marriage must have been reached without any form of duress or deceit.³²³ Another Consent that becomes a necessity arises if either of the persons intending to marry is less than twenty-one.

This type of consent is required to be obtained from the appropriate person³²⁴ In the wording of the Marriage Act, "if either party to an intended marriage, not being a Consent widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party, must be produced and annexed to such affidavit as aforesaid before a licence can be granted or a certificate issued".³²⁵

As I earlier pointed out, the influence of customary law on Act marriage with regard to male dominance can be seen in the wording of this Act, in that the mother of a party to a marriage

³²³ See generally section 3 (1) (d) MCA LFN 1990

³²⁴ See section 11(1) (b) Marriage Act LFN 1990

³²⁵ Section 18 Marriage Act LFN 1990

is allowed to give the required consent only if the father is “dead or of unsound mind or absent from Nigeria”. The message here clearly demonstrates the superiority of male over female gender. That is to say that the man comes first, and that it is only when the man is unavailable that the woman is free to decide.

It is important to point out that marriages conducted by virtue of the Act are monogamous marriages. And having successfully celebrated a marriage under the Act it becomes forbidden to contract any further marriage with a third party, whether under Sharia or Customary law, as long as the marriage subsists.³²⁶ On the other hand neither Sharia nor Customary law prohibits a man from contracting another marriage even though the man may be unwilling to do so. Only the woman is so prohibited whether under the Act, Sharia, or Customary law. This is why it is said that customary marriage is potentially polygamous; whereas polyandry is forbidden under the same law.

6. Place

With regard to the place where marriage can be celebrated, apart from the marriage registry, the Marriage Act provides that any such place must be licensed and the officiating officer or minister must be qualified to conduct marriages. A number of churches have conducted Act marriages in this manner. If a church building is licensed as a place for the celebration of marriages, the rule is that all intending couples must be given some sort of counselling so as to enlighten them of the legal implication of what they are intending to do. The officer who performs marriages at the particular place must be qualified to witness marriages. The law also provides that any marriage celebrated in defiance of applicable requirements may not only be invalidated but may also impose prison sentence on any person who wilfully performs or witnesses a marriage as officer. Section 6 of the Marriage Act provides that a Minister may license a public place of worship for the purpose of celebrating marriages. As for the marriage registry, the law provides that there shall be a place for the celebration of marriages in every district and from time to time a fit and proper person shall be appointed as Principal Registrar to that effect.

³²⁶ Section 47 of the Marriage Act provides that “Whoever, having contracted marriage under this Act, ...during the continuance of such marriage contracts a marriage in accordance with customary law, shall be liable to imprisonment for five years”.

B. CUSTOMARY LAW MARRIAGE

The celebration of customary law marriage in Nigeria varies from place to place and it is commonly called “native law and custom”. Unlike marriage under the Act, it is dependent on the ethnic group, community or families concerned. There are however some similarities between them. The major characteristics of customary law are that:

1. it is unwritten;
2. it is able to evolve so as to adapt to societal changes;
3. it varies from one community to another; and
4. it must be a mirror of accepted usage in the area where it is applied

According to Onokah (2003:80), unlike the Marriage Act under which the subsistence of a marriage –customary or statutory – precludes the party concerned from contracting a further marriage with any other person under it, customary law does not preclude a man married under it from celebrating a subsequent Customary or Act marriage with another woman.

These characteristics are however different compared to Sharia law; which is why some Muslim Clerics and adherents refuse to accept Sharia law as a customary law. Major argument put forward is usually based on the fact that Sharia law is written but customary law is not.

Nevertheless, let me start by discussing the customary law marriage as practised in the southern part of Nigeria. Even then, I shall only be discussing those prevalent in some ethnic groups in the south of Nigeria. “South” in this sense, comprises west, east and south-south of Nigeria. I shall, from time to time, also be bringing into the discussion of customary law marriage, issues related to marriages regulated by Sharia (Islamic) law in the north of Nigeria so as to highlight the similarity in them, with regard to oppression, discrimination and display of anachronistic tendencies.

PRELIMINARIES TO CUSTOMARY LAW MARRIAGE

The preliminaries to the Act marriage is mainly concerned with age (or consent of parents if under age and not a widow or widower) and consent of the parties intending to be married, as well as the place where the marriage is to be conducted. But on under customary law, the method is slightly different as some additional rules and regulations apply, viz:

1. Inquiries
2. Age
3. Match-making/betrothal
4. Consent
5. Introduction
6. Payment of bride price/marriage celebration

1. Inquiries

Before a customary law marriage is contemplated there is a traditional starting point. In most cases, the man meets the woman and they start “dating” each other in much the same way as it is done under Act (statutory) marriage. During this period the man ‘unofficially’ introduces the girl to his family. If the parents (especially the mother) agree that she has “wife” qualities, and the man himself tells his parents of his intention to marry her, then his parents will begin a process of inquiry about the girl. This whole process of unofficial introduction is again repeated in the girl’s family about the man. This time the girl introduces the man (unofficially) to her own family so as to assess whether he too has the required qualities of a good husband.

Between the unofficial and official introductions, both families of the man and the woman will do some personality checks on each other’s family backgrounds, whereby some other important issues relating to the marriage are raised and some questions asked.

Of primary importance is the issue of prohibited degrees of consanguinity. While the people of Benin, for example, prohibit marriage between persons related by blood as far as can be traced, this rule is however relaxed with regard to affinity in some of the areas occupied by

the Edo speaking people. For example, in some families in Esan (Ishan), although this may not be the general practice of the entire Esan community, a man is allowed to marry his late father's or brother's wife. On the other hand, in the case of *Igbinoba v Igumedia*,³²⁷ it was held that a man who had sexual relationship with his mother-in-law automatically lost his right to his wife so that the father of his wife would be at liberty to give her to another man in marriage. The difference here is that in this latter case, the woman's husband was still alive. Furthermore, a Benin man lacks the capacity to marry his wife's sister.³²⁸ The same applies in Yoruba communities.

In Igboland (Iboland), a man is allowed to marry his deceased father's or brother's wife. In fact, this is rather a right on the part of the man and an obligation on the part of the woman. The reason is that the woman is married to the entire family of her husband. Therefore if the husband dies, she may be transferred to the most qualified male in the deceased husband's family, if the man so desires.

Generally speaking, customary laws of the different communities regard marriage between parties in these degrees of consanguinity as incestuous and it is generally believed that such relationships may result in sterility and infant mortality.³²⁹

Other issues like the level of education and occupation of the intending spouses and their family history are discussed. Also very important is the issue of health. In most families, issues of psychiatric illness, epilepsy, leprosy and other communicable diseases are regarded as very fundamental and are therefore determining factors as to whether or not a marriage between such families can hold. One other issue that is also of major concern in families that are very traditional, (or should I say diabolical) relates to witchcraft. Such families usually want to ascertain whether or not the family from/or into which their child is to be married has at one time or another been accused of witchcraft.

In the Ibo community, this prior inquiry is of particular importance because this is when the issue as to whether or not any of the intending couple is an "Osu", can be cleared. This is because Ibos are regarded as a class-conscious people. They have a caste system which classifies the people into those regarded as *Nwadiani* which is an upper class of free-born and

³²⁷ Minor Court for the District of Benin City, 18/09/1900

³²⁸ See Onokah (2003) p 77

³²⁹ See generally Onokah (2003) p 76

land owners; and the lower class – Osu – regarded as the descendants of slaves. What this means is that the Nwadiani family hardly allows their son or daughter to marry from/into the Osu family. Osus are said to have been used in human sacrifices in the time past and this seems to have formed the mindset of the so-called free-born over time and as such they are still opposed to any Osu marrying their son or daughter, as it is generally believed that marrying an Osu brings ill-luck.

I must however state here that although the Osus are no longer slaves but they are discriminated against on the ground that they are descendants of slaves. This so-called free-born or Nwadiani comprises three groups viz:

- the free-born, regarded as those whose lineage are traceable to the founders of a segment of the community;
- the Omoru whose ancestors came from elsewhere and later settled and became co-founder of parts of the community and whose descendants are accepted as full members of the village or town because of their freeborn status in their places of origin; and
- the descendants of the autonomous groups who lived in the area before the founders of the state arrived and incorporated them into the structure of the community, which they established.

However, the caste system is no longer as pronounced as it used to be but one can still feel its pinch as some “traditionalists” still insist on knowing the status of intending couples before marriage. Although this caste system is now generally believed to be historical, but the descendants of these castes have inherited their ancestors' classes and are still somehow stratified in accordance with those unwritten customary laws.

It is at this occasion that any member of both families who is against the marriage, now speaks up.

In the northern part of Nigeria, inhabited by the Hausas (made up of tribes such as Fulani, Gwari, Nupe, Gambari, Koma, Margi, Mumuye, Mumbake, Munshi, Amgula, Yergurn, Rukuba, Lungu, etc.) who are predominantly Muslims, marriage takes various forms. Let me quickly add here that some of these tribes do not regard themselves as Hausas, rather, they

think of themselves as autonomous peoples; and that their being classified as Hausa sub-tribes is considered a historical and political error.

Nevertheless, while enquiries are made so as to ascertain customary degrees of consanguinity and affinity both in the Act or customary marriage in the southern part of the country, among the Hausas, a man may marry his late brother's wife or his late wife's sister. Cousin Marriage known as *auren zumunta*, whereby a man or woman may marry anyone from a second cousin onward is also practised. There is also the possibility of what is described as "marriage by exchange". In such circumstances, a man may give his sister or daughter to a friend for a wife in exchange for a wife for himself from that friend. There is also marriage by purchase (women are regarded as transferable property); by abduction or by "capture," in most cases with the girl's consent; and by elopement.

Generally, all of the above tribes attach great importance to premarital chastity. And as I earlier mentioned, a Hausa husband who discovers that the girl he has married is not a virgin will proclaim her a shame to the entire town by breaking a pot outside his house. Among most Fulani, and other Hausa sub-tribes, custom forbids sexual intercourse between young people who are betrothed. Much of this information is revealed during prior inquiries.

Based on the results of these inquiries therefore, the parties can then form their opinion with regard to the marriage. And if all is well on both sides, the process of 'official introduction' is commenced. The family of the man goes to the woman's to officially announce their son's intention to have the other's daughter's hand in marriage. This process of official announcement is only a formality as the both families would have known of their son's and daughter's intentions to marry each other before the date of this official announcement. If the results of the inquiries are found to be negative (using their own interpretation of negativity) the marriage may not be allowed to take place, depending on the seriousness of the negative results. And if the partners decide to go ahead with the marriage irrespective of the findings, the parents may refuse to give their consent or blessing. However, if all requirements under statute are met, such marriage can be celebrated under the Act where such consent is not a requirement.

There are instances where the process of unofficial introduction is not necessary. For example, when a girl child is betrothed to another family to be married by a particular, or any,

man in that other family, there is no need for such introduction. This is because from the day the child is betrothed to the man or his family, she is regarded as the man's wife. Some children are even betrothed the very day they are born. And in such situation, what is left is just the celebration of the marriage proper. There are also instances whereby some female children are given out in marriage as settlement for outstanding debts; in which case there is no need for consent on the part of the family of the child being given away.

2. Age

In marriage under native law and custom, the age is not an essential element. This is because the physical features of the intending spouses are the main determining factors. For a girl, once pubic hair starts to appear on her private area and her breasts begin to protrude, these are signs that she is ready for marriage. This practice is widely criticised in that one does not require a scientific evidence to prove that human beings reach puberty at different ages. For example, while some girls may reach puberty at the age of sixteen others may reach it at thirteen or earlier.

For the man however, what is mostly important is his economic independence. This is usually determined either by the type of work he does or the size of his farm. It is important that there is general consensus that he can earn a living from whatever he does, as well as being able to take care of his immediate family. And in some cases the parents may also decide to look for a wife for their son when they believe that he is of age and is well behaved.

3. Match-making and betrothal

Under customary law the coming together of the male and female for the purpose of marriage is not always decided on the basis of consent of the concerned parties alone, and age may not matter. Traditionally, some marriages may be pre-arranged by parents, uncles, aunts or others who are in *loco parentis*, by a method of match-making or by betrothal. The former method is particularly common amongst the rich. It is a system whereby a girl and a boy are coerced into marrying each against their will. Such practice, also common in Act marriages, is used by some families mainly to create a bond of some sort between each other in order to safeguard

the families' wealth. This is because, more often than not, the families of both parties are wealthy. The same applies to child betrothal – a system whereby a child (usually a girl child) is given out in marriage whether or not she consents to it. Most of the times, it happens when the girl is too young to form her own opinion as to the implication of marriage. This is usually done at an early stage of a girl's life so as to ensure that she does not lose her virginity before marriage. I have witnessed a number of very bizarre exercises where parents would insert an egg into their daughters' vagina to determine their virginity. This used to be a common occurrence in the past. There are actually instances where girls are sent back by their husbands on discovering that they are no longer virgins. In such situation, the affected husband may demand a refund of the bride price paid on the girl. When this happens, the girl will be regarded as having brought shame upon her family– a blow from which her entire family may never be able to recover. It must however be stressed that this requirement to be a virgin before marriage under the customary law of some ethnic regions is only applicable to women. Among Idoma people of Benue State in the Middle Belt, with diverse subgroups (some of whom are Adors, Otupas, Ofokanus, Owukpas, Apas, etc.) for example, it is ideal that the bride is a virgin. If not, the bride will be made to undergo certain traditional rites in order to cleanse her of previous *immoralities*.

4. Consent

As I mentioned earlier, the issue of consent in customary law marriage varies from place to place. Even within the same ethnic group, there are distinctions with respect to consent. There are two types of consent: 1) consent by the parents or families of the spouses to be, and 2) consent by the intending spouses themselves. With regard to the former, the usual rule is that a girl child must seek the consent of the parents (usually the father or any senior male in the family) or those in *loco parentis*, for that marriage to be valid in customary law. In the case of *Adisatu Awero v Olajida Ishola* (1962),³³⁰ it was held that a customary law marriage which did not receive the consent of the parents of the girl is invalid. It does not matter whether the girl has attained the age of 21 years of age, in which case her parents' consent would, under the Act, not be a necessary element, if one were to go by the stipulations of the relevant statutes. This requirement for parental consent was once given judicial recognition in an earlier case of *Savage and MacFoy* (1909). And in the case of *Dura Oande v Yomekaa*

³³⁰ Case No. B/229/62

Agoii,³³¹ a more recent case, the High Court in Benue State declared that no marriage is valid under Tiv customary law (an ethnic group which inhabits an area regarded as “the Middle Belt” because it is located between the north and south of Nigeria), unless the father or the person acting in *loco parentis* consents.

The person most qualified to give this consent is the one that is also qualified to receive the bride price. Otherwise the consent would be termed invalid, and so also would the bride price. And therefore, any marriage contracted on the basis of such wrongful consent, as well as the wrongly obtained bride price, would be termed as invalid in customary law and therefore disregarded.

This requirement is not very essential in respect of the bridegroom. And many have criticized this practice as being discriminatory and practically the same as propagating the doctrine of male superiority. With regard to the consent of the intending spouse on the other hand, there is divergence of requirements in accordance with the ethnic group concerned. Although it is often said that customary law marriage cannot be regarded as valid if the marriage was conducted without the consent of either the bride or the bridegroom, but there have been instances where such consent was undermined. Although such marriages are hardly brought before the court, but the truth of the matter is that most aggrieved persons do not challenge the legality of such marriage for fear of reprisals from the husband, the two families and the society at large. In the case of *Osamwwonyi v Osamwonyi*³³² a husband petitioned that his purported statutory marriage to his wife, Mercy, was a nullity on the ground that before the said marriage took place, Mercy was already married to one Mr. Guobadia under Benin native law and custom. But his wife successfully contested this claim, arguing that her said marriage to Mr. Guobadia could not have been a valid marriage on the ground that her father did not seek her consent before or after he (the father) accepted the “bride-price” from Mr. Guobadia. The Supreme Court held that under Benin native law and custom, a father could not give out his daughter in marriage without having first sought her consent.

In spite of this, however, I personally witnessed some marriages in the past that were conducted by parents without the consent of their daughters that were being married off. They were eventually bundled and delivered to their imposed husbands’ homes. And all that each of the girls could do at the time was to run back to their parents, who would again send them

³³¹ Suit No. GBB/32A/1981 as cited by Onokah 2003 p 86

³³² (1973) N.M.I.R.25

back to their husbands. They did that repeatedly until they were tired and resigned themselves to what seemed like their fate. And truly, the last time I saw these women, they already had children for their imposed husbands. It might seem heart-rending, but it is true!

5. Introduction

“Introduction” is a customary practice whereby the family of the man formally introduces itself to the family of the woman and also formally asks the girl’s hand in marriage. At this stage the process of vetting would have been completed and both families would have unofficially given their consent. Otherwise, there would be no formal introduction. The introduction stage creates a forum for members of both families to intimate and share ideas as to what is expected of mostly the man’s family and how best to conduct the marriage. Most importantly, if the answers to the questions as to whether the woman is willing to marry the man and if the family consents to it, are in the affirmative, then the man’s family is advised on the issue of “bride price” and other traditional accompaniments. Some families are known to have a list of required items. And these items are expected to be presented to the woman’s family on the day of the marriage.

If everything goes well at the introduction stage, then a date convenient for both families will be set for the marriage proper.

6. Payment of bride price/marriage celebration

On the day of the marriage, in addition to the various marriage rites, the family of the man will be asked to pay a certain amount of money to the bride’s family. This money is what is regarded variously as “bride-price”, “child-price”, “marriage-cattle”, “marriage-payment”, “bride-wealth” or “dowry”. Some legal experts prefer to call it “exchange of marriage symbol” as opposed to “bride price” which arguably tends to signify the notion of the “sale” or “purchase” of the woman in question.³³³ It must however be mentioned here that the so-called bride-price is not necessarily given in cash; it may be given by other means, so long as it is money’s worth. Although in some ethnic groups it is only done as a symbol. For example,

³³³ See Onokah (2003) p 91

the Eastern Region Legislature passed the Limitation of Dowry Law which defined “dowry” as “any gift or payment, in money, natural produce, brass rods, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of the marriage of that person which is intended or has taken place”.

The exchange of the so-called dowry, bride price or marriage symbol is a very significant part of customary law marriage. Without it, such marriage is regarded as null. And any intimate relationship which might as a result exist between the parties is regarded as concubine.³³⁴ The receipt of the marriage symbol by the bride’s parents or guardian is not an indication of “sale” or “purchase” of their daughter, rather it is a confirmation that their prior consents (which are essential to the validity of the marriage) were obtained.³³⁵

As a result of the immense significance of marriage symbol, a woman can only be given out in marriage once in her life time in Benin. It is therefore uncommon for a man to divorce his wife and demand a refund of the dowry paid on her. Although it is not forbidden, but the usual practice is that the man simply returns the woman to her family for whatever reason and says that she ceases to be his wife from that day on. The reason for not asking for a refund of the “bride price” can be ascribed to the fact that the total sum involved is usually too insignificant to be a matter for debate. However, tradition demands under such circumstance that the woman remains the man’s wife even if she goes on to re-marry another man. If that happens, and the first husband eventually dies, the woman will, in principle, perform the usual traditional funeral rites, as though she were the deceased’s wife, even though she was no longer living with the man before he passed on.

This practice has however become obsolete in Benin region; the reason being that the payment of bride price in contemporary times is more of figurative indication of the man’s willingness to be bound by marital obligation to the woman and her family rather than of economic consideration. This assertion can be proved on the basis of the actual amount involved, as I mentioned above. Although the ceremony is usually characterised by heated haggling; during which time the family of the suitor may be asked to pay certain amount of money (usually very huge), but the suitor’s family will usually decline and then make its offer. But this is only to add colour to the ceremony. When both families have finally reached an agreement with regard to the bride price, irrespective of the amount, the girl’s family will

³³⁴ Ibid p 93

³³⁵ Ibid p92

take out the exact amount that custom demands and the rest is given back to the suitor's family with words of admonition thus: "our daughter is not for sale, so please use the rest of the money to take of her for us".

For example, a bride price in Benin is a paltry twenty-four Naira or less (about 24 Cent). If one considered that the outright selling off of a bride was an acceptable enterprise, one would be insane to think that any right-thinking and well-meaning parents would bring up their daughter, see her through primary, secondary, and in some cases, university education, and in the end offer her for sale at the rate of 24 Naira. This is why some prefer to call it "marriage symbol", which is actually what it is. Its symbolic importance or significance is more of a mere tradition than anything else.

However, this custom varies from place to place. Contrary to the idea of the payment being regarded as a symbol, there are communities where this custom of "marriage symbol" seems to reflect the name "bride price" because of the huge amount they ask prospective suitors to pay before they are allowed to marry their daughter. There were times when certain communities, particularly in the Eastern Region, demanded bride price that was so high that it prevented young men and women from getting married early in life because they could not afford it. In such circumstances, the woman would have to support the man in paying her own bride price. At times the woman would pay the whole amount outright if she was desperately in need of a husband and/or was economically better placed than the man she intended to marry. Obviously this would remain a secret between the man and the woman. She would willingly pay the agreed price if she believed she had found her "Mr Right" and could not stand a chance of letting him slip away. If this was not done, chances were that such a woman might never find a husband; at least, not the one that she truly loved. The other alternative available to her under such condition would be to settle for a much older man, possibly in a polygamous household (i.e. a man that is probably already married to other women). In which case she may end up being a mere Mistress.

Generally speaking, once a bride-price is given and accepted, it is assumed that a valid customary law marriage has taken place. There are instances whereby the parents accept the bride-price without first obtaining the consent of the bride herself, and this, according to case law in some communities, is not a valid marriage. Therefore, even though bride-price is an essential part of customary law marriage, it is not the only determining factor. It is however

important to note that so many women pride themselves on the fact that a bride-price was given before they were given away in marriage. Otherwise, such marriage would be regarded as not different from ordinary intimate relationship which only makes the woman a mere Mistress or live-in-lover. According to Onokah, the responses from couples investigated in the course of writing her book show that those who married under customary law did so in order to ensure that bride-price was given to their family, despite the fact that some of them would eventually go on to contract Act marriage.

As I earlier mentioned, in the Ibo community, once a woman's bride-price has been paid, any child that comes through her belongs to the man who paid it, irrespective of whether or not the man is the biological father of the child. This assertion seems to be supported by The Customary Law Manual³³⁶ and it provides that "Bride-price is an essential requirement for marriage". And that "agreement on it is a condition precedent for contracting a valid marriage and so no marriage can take place unless and until bride-price is fixed and agreed upon." Sometimes marriage may be cancelled and postponed for reasons of non-payment of full bride price or if during the negotiations very serious arguments ensued.

C. CHURCH MARRIAGE

Church marriage, as with customary law marriage, also varies in Nigeria. And it is dependent on the church denomination. There are so many churches in Nigeria: some are extremely huge in terms of membership, whereas others are relatively small. Irrespective of the size, they all have some sort of autonomy and enjoy the dividends of independence. It is however not uncommon to find branches of the very large ones operating in a manner tantamount to a conglomerate. Some have even gone multinational, as their branches can be found in nearly all the continents of the world.

Nevertheless, legal marriages can be contracted in churches and there are statutory provisions to that effect. For example, the Marriage Act provides that the Minister may license any place of public worship to be a place for the celebration of marriages, and this must be published in the Federal Gazette.³³⁷ However, with regard to their operations in Nigeria, it must be noted that unless any marriage contracted in a church complies with the relevant statute; such

³³⁶ 1977 p 238 paragraph 305

³³⁷ Section 6 (1) Marriage Act L.F.N. 1990

marriage may not have any legal force. And because most churches do not emphasize much on parental consent (a key element under native law and custom), such marriages are not valid under statute, neither are they regarded as valid under customary law.

D. DOUBLE DECK MARRIAGE

There is no legal definition for this type of marriage. The name, “double deck marriage” (d.d.m) is only a phrase coined by legal academics because this is the term (or phrase) that best describes its character. In fact, it is a system of marriage whereby the couple having first contracted Customary law marriage, later goes ahead to marry again under statute, or vice versa.

This type of marriage is commonly practised across all social strata and many marriages are performed in this manner. And they are contracted for different reasons. Whilst the customary law marriage is celebrated so as to ensure that the couple is culturally accepted by their people, the Act marriage is contracted mostly by the educated and rich for reasons of marital financial security. For example, if a couple contracts Act marriage without the customary law marriage, the common belief among the natives is that the couple are mere cohabitants. As I earlier mentioned, whilst the women married under customary law find it difficult to claim ancillary relief and other entitlements in the event of breakdown of the marriage, those married under the Act are entitled to claim (albeit in theory), and there are statutory provisions to that effect.

The question then arises as to which takes pre-eminence in the event of dissolution of the marriage. It must be noted that the non-codification of customary marriage law among the regime of federal legislations induces some Nigerians to look at it as mere conventional ceremony and the Act marriage as one with legal force.³³⁸ And this presumption seems to be supported by the statement that "some refer to as 'traditional engagement' while others simply refer to it as solemnization of customary marriage"³³⁹ However, the truth still remains that the customary law marriage is potentially polygamous and as a result most women prefer to contract the Act marriage before or after the customary law marriage for reasons of marital security which is not unrelated to finance. This is why one of my friends - a colleague in the

³³⁸ See Onokah, p 148

³³⁹ Per Uwais CJN in *Jadesimi v Okotie-Eboh* (1996)

business of legal advisory services, constantly says that “marriage is a financial institution”.

It must however be noted that in contracting a d.d.m., there is need to ensure that all preliminaries of both types of marriage are complied with. For example, it appears that a man who intends to contract Act marriage with his late father's wife may be precluded from doing so pursuant to the MCA 1970. This is because the MCA provides that "marriage of a man is prohibited if the woman is, or has been his father's wife".³⁴⁰ Although under customary law in Igbo community, a man is allowed to take over his deceased father's wife (except his own mother) if he so chooses.

Statutory offences and penalties

As much as marriage is celebrated and enjoyed by parties to it, offences can be committed either in it or prior to it, whether the offences are prescribed by constitutional, statutory and administrative laws or by customary and Sharia laws.

In respect of Act marriages, the Marriage Act³⁴¹ prohibits specific abnormalities. And in addition to degree of affinity and consanguinity that I already mentioned above, the Act prescribes certain punitive measures for the following relevant offences in the run-up to a marriage ceremony:

1. Contracting marriage with a person known to be already married to another;
2. False declaration of relevant material facts for the purpose of marriage; (like in the case of some customary marriages whereby a minor is given out in marriage under the pretext that the man is the little girl's uncle);
3. Contracting marriage under the Act when already married to another under customary law;
4. Performing or witnessing a marriage involving a minor when the required consent has not been obtained.

³⁴⁰ First Schedule to Matrimonial Causes Act 1970

³⁴¹ See sections 39 – 48 Matrimonial Causes Act 1970

Marriage offences and penalties under customary law

Under customary law there is no catalogue of penal measures. However, there are two common obligations in customary law marriage and if not fulfilled, the laid down penalties are just as stringent as those for non-compliance with statutory provisions in relation to Act Marriage. And these are Consent (i.e. parental consent; and in some communities the consent of the girl is also compulsory) and payment of Bride price.

While relevant statutes specify committal to prison in respect of some offences for any defaulting person depending on the severity of the offence with regard to Act Marriage, the customary law of some communities is just as severe in their own rights, albeit in different forms. For example, some provide that any child born during such a relationship belongs to either the family of the woman or to the man who eventually pays “Bride price” on the woman. In some instances, though not in every community, once a woman has a child out of wedlock, the child will never belong to the biological father even if he eventually marries the mother of the child. In some situations the matter as to whether or not that child is a legitimate child of such a man does not usually arise until the issue of “seniority” with regard to succession, such as hereditary chieftaincy title, or some other family assets which devolve only by primogeniture, arises. This latter rule has however been relaxed in many communities because of its insensitive nature, but not in the case of conferment of hereditary chieftaincy title.

A QUICK LOOK AT AUSTRIA

Marriage in Austria is monogamous and every marriage must be conducted at the marriage registry (*Standesamt*) or any other place designated for the celebration of marriages in the presence of at least two witnesses and must be documented. The Austrian General Civil Law Book (*Allgemeines bürgerliches Gesetzbuch*, JGS 946 (ABGB)) defines marriage as a contract between two persons of different sexes for the purposes of living together for life, procreating children and with certain legal rights and obligations towards each other.³⁴² Although marriages may be celebrated in churches, Mosques, Jewish Synagogues, and other

³⁴² See section 44 ABGB (in German language)

religious institutions, but such marriages can be regarded as valid only if they are contracted as voluntary civil marriage at the marriage registry, or other legally designated places, whether before or after such religious marriage celebration. Confessional (non-civil) marriages are not considered legally binding by the authorities.³⁴³ The procedural rules for contracting a marriage are contained in sections 15 and 17 Ehegesetz, dRGB1 1938 I 807 (EheG), as well as section 47 Personenstandsgesetz, BGBl 1983/60 (PStG). It is only after the legally contracted marriage celebration that a couple can be regarded as having contracted a valid marriage.

Matrimonial causes in Austria are not as complicated as they are in Nigeria. This is because while there are three forms of law regulating marriage in Nigeria, all marriages in Austria must be conducted by a registrar at the register office or designated place, if they are to have the force of law, as I earlier mentioned.

Marriages are entered into mostly by adults and they are equally voluntary. The KindRÄG 2001 provides that before any male and female are allowed to contract a marriage, both persons must have reached the age of 18 years as at the time of celebrating the marriage. However, there are situations whereby either or both of the intending couple are under marriageable age of 18 years (i.e. between 16 and 18).³⁴⁴ That is to say that they are not legally independent adult.³⁴⁵ Under such circumstances, the registrar will demand a declaration of marriage-ability issued by a court with valid confirmation of validity. In addition, the registrar will demand a written parental consent by parents or legal guardians; and if a trustee has been appointed, his or her written approval or a relevant court decision.³⁴⁶ If all requirements are met the marriage itself usually does not take more than fifteen minutes.

I must however mention here that, as polygamy is forbidden in Austria,³⁴⁷ any previously married person wishing to get married again must ensure that the previous marriage has been legally dissolved. In that regard, s/he must provide proof of decree of divorce or nullification of previous marriages granted by a competent court and in the case of a person who is a widow or widower, a certificate of death confirming the death of his/her previous spouse must be presented.

³⁴³ Help online. Available at: <http://www.help.gv.at/Content.Node/142/Seite.1420000.html#General>

³⁴⁴ See Child Rights (Amendment) Act 2001 (KindRÄG 2001) See also Marriage Act (EheG § 1 Abs 1)

³⁴⁵ See <http://www.help.gv.at/Content.Node/142/Seite.1420000.html#General>

³⁴⁶ Ibid

³⁴⁷ Pursuant to § 24 EheG, any marriage contracted with a third person during the subsistence of a valid marriage amounts to nullity. See also § 8 EheG

Chapter 14

DIVORCE, NULLITY, WILLS AND PROBATE

In this chapter, attempt shall be made to examine the implications of divorce, nullity and related matters in Austria and Nigeria. I shall also be looking at property settlements, as well as testamentary disposition of property by will in Nigeria ONLY. And of particular interest in that regard is the intestate distribution of the family estate under statute, customary law and Sharia law on the demise of a spouse. This area is evidently contentious as a result of Nigeria's tripartite legal systems. Let me reiterate here however that the distribution of property in Austria – testate or intestate – does not fall within the scope of this thesis.

NGERIA

Divorce under statute

Divorce proceedings in Nigerian courts are not as commonplace as they are in the western world; not because divorces do not occur at all, but because they are hardly brought before the court. Even when such cases are heard in court, they are seldom reported in the Dailies, except in the law gazettes which are documented for case law purposes. The reason can be ascribed to the fact that most women prefer to walk away quietly, even if, *prima facie*, they stand to win; rather than going to court. In fact bringing such cases before a court usually reduces the women to objects of ridicule. Women who have done it (usually among the educated) are shunned by families, friends and peers within the community. Such act is commonly regarded as *washing of one's dirty linen outside*. Whether the marriage was contracted under the Act, Customary law or Sharia, chances are that the woman hardly wins. Although so many women have had matrimonial proceedings decided in their favour, but many of such adjudications are rarely implemented. What happens in such situation is that the woman is then left to carry out the execution of the court's order on her own. Truly, she can only successfully achieve any meaningful result by means of "self-help", which, in most cases, is invariably illegal and dangerous. And if that be the case, the question would then be:

why take such cases to court at all? And such cases are usually as time-consuming as they are costly.

However, there are various grounds open to a party to a marriage to petition for dissolution of his or her marriage under the Matrimonial Causes Act.³⁴⁸ In granting a decree for dissolution of marriage based on each of the grounds however, regard must be had to all circumstances of each case as there are various elements to be considered before reaching a conclusion.

Nullity/void marriage under statute

Nullity means the termination of a marriage considered to have been characterised by pre-existing defect at the time of contracting the marriage or short period afterwards. A marriage may be annulled in the sense that it is void, i.e. it was never in the eyes of the law a valid marriage.³⁴⁹ What this means is that the so-called couple were actually mere co-habitants. There are also situations whereby a marriage may be voidable until it is set aside by a court's decree of annulment. Therefore the effect of a decree of nullity will depend upon whether the marriage has been declared to be void or voidable.³⁵⁰

Void marriage

There are various grounds for declaring a marriage null and void and these are contained in the MCA LFN 1990. The most relevant is that pertaining to bigamy, that is a situation whereby a party to an existing marriage contracts a further marriage with another person other than the one with whom s/he is legally married. If a party is mistaken as to the nature of the marriage or when a party did not consent or consented under duress.

Judicial separation

On certain grounds a party to a marriage may bring before a competent court a petition for

³⁴⁸ See section 15 Matrimonial Causes Act L.F.N 1990

³⁴⁹ Ibid

³⁵⁰ Section 34

decree of judicial separation against his/her spouse.³⁵¹ A party to such marriage may be relieved of the obligation to cohabit with his/her estranged partner under this decree. It does not however relieve the parties of all other marital rights and obligations extant in a marriage relationship nor does it affect the marriage itself.³⁵²

Ancillary relief under statute

The issue of ancillary relief arises after the irretrievable breakdown of a marriage or in the event of an order of judicial separation being made by a competent court. This issue is critically topical as it intertwines other marital issues. This is because when a marriage breaks down, or the couple is considering judicial separation, so many issues come into play. Apart from issues, such as who (i.e. between the husband and the wife) should retain the occupation of the family home, if there are children in the family, their welfare will also be a problem with much financial implication to contend with. However, the welfare of the children is usually of paramount concern and any contrary decision in that regard can only amount to superfluous judicial activism; except in situations where either partners has other children that must also be considered.

Problems can also arise with regard to financial up-keep of either of the parties to the marriage. And such order is generally made against the richer of the two, taking into account various elements.

In making the ancillary relief order however, the usual starting point is the consideration that the policy of the law is to put all economically valuable assets of the spouses at the disposal of the court.³⁵³ The issue as to who gets the custody of the children, combined up with the assurance that they (the children) will be well taken care of, becomes the next point to ponder. And this is dependent on the satisfaction of the court with regard to those economically valuable assets and their legal ownership. In this regard, the court usually has a very wide margin of discretion in making orders for the welfare of the children; and then of the wife.

³⁵¹ See sections 39, 15(2) and 16(1) Matrimonial Causes Act L.F.N. 1990.

³⁵² Section 41

³⁵³ S. M. Cretney, et al, *Principles of Family Law*, p 33

Nevertheless, that ancillary relief orders are more commonly made in favour of wives than husbands does no more than reflect economic and social realities in relation to income generation, asset acquisition and child care.³⁵⁴ And it is an undisputable fact that, on the average, the husband has more economic advantage over the wife in most homes, no matter how little.

If, in the opinion of the court, the grounds specified by the Act³⁵⁵ with regard to the making of ancillary relief are present, and all other circumstances that justify the making of such an order for the benefit of the parties concerned have been considered, the following orders may be made:

1. Maintenance: as provided for under MCA, after having considered the circumstances of any matter relating to divorce or judicial separation, the court has discretionary power to make decision as it deems fit with regard to who gets what from the family's wealth. And in doing this, it must take the means, earning capacity and conduct of the parties into consideration.³⁵⁶

This order may be made for the benefit of either of the parties to the marriage and the children of the marriage who are not yet over 21 years old. There are however some exceptional cases that may require that that age limit be stretched over 21, if in the opinion of the court, this is necessary in the particular case.³⁵⁷

2. Property settlement: With regard to property belonging to both or either of the parties to the marriage, the court may order, as it thinks just and equitable, the settlement of any property legally held by either of the parties to the marriage, whether in possession or reversion, for the benefit of the disadvantaged party and or the children.³⁵⁸

3. Education and Welfare of the child: In order to guarantee the proper upbringing of the children of the marriage, the Act lays down that their education, guardianship and custody are

³⁵⁴ S. M. Cretney, et al, *Principles of Family Law*, p 332

³⁵⁵ Matrimonial Causes Act L.F.N 1990

³⁵⁶ See section 70(1) Matrimonial Causes Act, L.F.N. 1990, available online at: <<http://www.nigeria-law.org/Matrimonial%20Causes%20Act.htm>>

³⁵⁷ See section 70 (1) Matrimonial Causes Act 1970

³⁵⁸ See section 72 (1) Matrimonial Causes Act 1970

paramount and therefore, the court gives credence to such provisions as it thinks proper.³⁵⁹

In making all of the above orders however, the Act emphasizes that regard must be had to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

AUSTRIA

Divorce/Nullity

Once a valid marriage has been contracted in Austria, the dissolution of such marriage can only be possible by order of a competent court.³⁶⁰ Dissolution of marriage takes two major forms in Austria:

- 1) what the Marriage Act (EheG) refers to as **Verschuldensscheidung**,³⁶¹ which is fault-based; and
- 2) dissolution on **other grounds** (which include divorce by mutual consent (eilvernehmliche Scheidung)).

There are various reasons for which dissolution of marriage can be brought before a court in Austria. Apart from death which automatically dissolves a marriage, dissolution of marriage may be granted on various grounds ranging from sickness, domestic violence, abandonment, as well as on grounds of nullity (*Nichtigkeit*). Issues like infidelity (Ehebruch), adultery (Seitensprung), unreasonable or baseless jealousy (Grundlose Eifersucht), general marital misconduct (Eheverfehlung), etc., are serious grounds for bringing a divorce petition before a court. Klaar³⁶² writes that the breach of duty, with regard to common financial contribution for the management of the home front is serious and frequent marital misconduct for fault-based divorce petition may lead to divorce being granted. In many of the cases however, what is imperative is that the marriage has broken down irretrievably, and that both or either of the parties to the marriage finds it impossible to continue to live together.

³⁵⁹ Section 71(1) Matrimonial Causes Act 1970

³⁶⁰ See Hinteregger (2004) p 83

³⁶¹ See §§ 47 – 48 alt EheG and §49 EheG

³⁶² Klaar H. “*Scheidungs-Ratgeber für Frauen*” (2010) p. 33

With regard to nullity however, any marriage falling within such category will be regarded as void *ab initio*.³⁶³ That is to say that the marriage never existed from day one. A marriage can be regarded a nullity or voidable as the case may be, if it is considered under the law to have been contracted between persons who, for example, are within the prohibited degrees of consanguinity or affinity, such as between persons related by blood (legitimate and illegitimate)³⁶⁴; when either of the persons was already married and the marriages still subsist;³⁶⁵ if any of the parties was unconscious or in a condition considered unfit for marriage;³⁶⁶ if the marriage was performed under duress;³⁶⁷ if the marriage was celebrated with one of the parties absent at the venue of marriage, etc. without any acceptable ground for such absence. In respect of the latter case however, such marriage will be deemed valid if the absent party subsequently consents to the marriage.³⁶⁸

Divorce in Austria is a common phenomenon. For example, statistics has it that in the year 2000, a total of 19,552 marriages were dissolved.³⁶⁹ When compared with the previous year, there was a sharp increase; with an average of 43.09 in every 100 marriages ending in divorce. Out of this sum total however, 17,420 were dissolved on grounds of mutual understanding (*einvernehmliche Scheidung*) pursuant to § 55a EheG. As a result of this dissolution of marriage, a total number of 18, 044 children were affected.

However, I am not so concerned about the details of how marriage is contracted in Austria because only one form of marriage is recognized and legal, rather, I am more concerned with what happens after marriage has irretrievably broken down; who takes care of the children that emanated from the wedlock as well as the fate of the parties to the marriage, particularly the wife.

In divorces that are done based on mutual consent (*einvernehmliche Scheidung*), some of the most important issues to consider are:

³⁶³ § 20 EheG provides that all marriage cases falling within the ambit of §§ 21 – 25 EheG are considered void

³⁶⁴ § 25 EheG in conjunction with § 6 EheG

³⁶⁵ § 24EheG (such act, under Austrian Criminal Law, is regarded as bigamy (Mehrfach Ehe) and is punishable accordingly (see § 192 StGB)

³⁶⁶ § 22 Abs. 1 EheG

³⁶⁷ Such marriage is voidable under § 39 Abs 1 EheG. However, § 39 Abs 2 provides that although the married may have been performed under duress, but it shall become valid if the party who alleged to have been under duress subsequently consents to the marriage

³⁶⁸ See, among other provisions, §§ 17, 20 – 25, 33 EheG

³⁶⁹ See generally Hinteregger, (2004) p 84

- Who has “parental responsibility” or who takes custody of the children (Obsorge)?
- Where will the main abode of the children be, in the event that both parents are granted custody of them (Hauptsächliche Aufenthalt der Kinder)?
- Kindesunterhalts - which of the parents is to pay the other the Maintenance (child support)?
- Spousal Maintenance in the form of Financial Relief (Ehegattenunterhalt)
- What arrangement has been made with regard to visitation rights for the absent parent (i.e. so that s/he may have access to the children on a fixed or regular basis)?
- And how will the family assets and liabilities, in the form of property (Teilung der ehelichen Vermögen und Schulden), be shared? These may include premium bonds, shares, pension contributions, mortgages, money in bank accounts, intellectual property rights (choses in action), unpaid loans, etc.
- Who bears the costs (legal and court’s)? It must be stressed that an unchallenged divorce petition (i.e. by mutual consent) is far more cost-effective than a fault-based petition.

When all of the above issues have been settled in one accord, then the dissolution of the marriage can be granted by the court in accordance with the applicable law.

WILLS AND PROBATE (TESTACY AND INTESTACY)

This section contains analysis of the matters that I dealt with under a subheading titled “ancillary relief under statute” (albeit very briefly). This is because the most serious concerns relating to discrimination, oppression and maltreatment suffered by some women and children within their domestic environment mostly come to limelight at the intestate demise of the husband or father. It is important therefore that I look at some of the problems which usually arise with regard to “who gets what” from the estate of the deceased husband and parents survived by wife and/or children. The main concern here shall particularly be the fracas which usually follows if the disposition was made by a valid Will, and if not, what usually results in the event that the distribution is done in accordance with rules on *intestacy* (statutory and customary).

NIGERIA

Testate succession

With regard to testamentary disposition under statute in Nigeria, the Wills Acts 1837 – 1852, The Wills (Soldiers and Sailors) Act 1918 and Wills Law 1959 of Western Nigeria, are some of the pieces of legislation that regulate it. Testate succession may be under either statutory law or customary law, as both systems of law recognize the disposition of property by Will. Where a man married under the Matrimonial Causes Act makes a valid Will and there are conflicts as to which takes pre-eminence between the Will and another law, customary or otherwise, his wishes under the Will prevail.³⁷⁰ With regard to a Will made by couple married under the Act, one very important issue is the date of the Will. This is because section 18 of the Wills Act 1852, provides that all Wills are revoked on marriage. This is however not true of customary law marriage as section 15 of the Will Act provides that a customary marriage does not revoke a Will. Statutorily, if there is a valid Will, the deceased's estate is usually administered in accordance with his or her wishes. This, in practice, is not a simple task. What this means in essence is that those family members who are charged with the job of deciding which customary law method to employ in order to ensure an equitable distribution of such estate may not be fair in making that choice. Igbo customary law, for example, lays down that a woman cannot inherit land from her husband's estate. Therefore, if the object that is the cause of a legal wrangling is land, then the family members may opt for customary law adjudication which, obviously, will only serve their own interest.

Take the case of *Yinusa v Adesubokan*³⁷¹ which is one of the landmark cases by which the Supreme Court of Nigeria reaffirmed the right of an individual (irrespective of his/her religion) to make a testamentary disposition as an example. While the final verdict of the Apex Court in that case was generally applauded by many, others share different views. One of such critics is Usman, Hamidu B.³⁷² After having taken a thorough look at the power of a

³⁷⁰ See the decision of the Supreme Court of Nigeria in the case of *Adesubokan v Yunusa* (1971) NNLR 77, where it was held that when a Muslim exercised his testamentary powers under the Wills Act, he was no longer bound by the limitations imposed by Muslim law.

³⁷¹ *Yinusa v Adesubokan* (1971) ALL NLR 225

³⁷² See Usman, Hamidu B. "Testamentary disposition of property under Islamic law and the general law in the northern states of Nigeria: The conflict between the two systems", Available online at: <http://www.ascleiden.nl/GetPage.aspx?datastore=4&url=/publications/bibliographies/islaminafrica/ref9478> (accessed 03/04.2010)

Muslim to make a will under Islamic law rules, and how that power conflicts with the power to make a will under the Wills Act, 1837, concludes that the situation with regard to the applicability of such Act relating to testamentary disposition of property in the Northern States, is unsatisfactory.

Intestate Succession

Intestate succession is a situation whereby a person dies leaving no Will at all or left one that is deemed by the court to be invalid on the grounds that it was not properly constituted.

The issue of intestate succession is very complicated, disuniting and raises many legal and social concerns. According to Okigbo,³⁷³ the non-customary law of intestate succession in Nigeria is in a state of utter confusion. This statement seems to have been necessitated by the complex nature of the body of laws regulating succession in the Nigerian state. As Okigbo points out, in many cases, the applicable rules are difficult to discern, and even where they are known, the provisions are not readily subject to precise interpretation. He asserts that the result of this state of affairs is that sometimes it is difficult to determine whether there are precise applicable rules.³⁷⁴

As I earlier mentioned, the tripartite legal systems which permeate the entire family law regime in Nigeria is such that every State (presently 36 altogether) has its own succession rules which it either enacted on its own or adopted from the defunct Regional Authorities. This is in addition to the numberless customary laws which also regulate the same subject *pari passu* with statutes on the subject. And in some cases the former is perceived to be higher in hierarchy of norms than statutory provisions.

Before 1954³⁷⁵ there only existed Federal-enacted succession provision contained in the Marriage Ordinance which was believed to apply only to the Colony of Lagos at the time. This Ordinance specified how the estate of a person subject to native law and custom who died intestate can be distributed: whether in accordance with the law of England or customary

³⁷³ Okigbo B. "The Legal Approach To Women's Inheritance Rights". Available at: <<http://www.hurilaws.org/newsletter/e-news-december%2007.htm>> Accessed 20.11.2011

³⁷⁴ Ibid

³⁷⁵ Between 1914 and 1958 Nigeria underwent various rigorous constitutional reforms that saw the nation being fragmented into more regions, as well as shifted from unitary system to federal system.

law. This also applied to any issue of such a person. The most relevant part of the Marriage Ordinance is section 36(1) which deals primarily with the issue of succession, particularly to the effect that any portion of a deceased interstate estate which would ordinarily become "casual hereditary revenues" of the crown, would, pursuant to this said section 36(1), be distributed in accordance with customary law and not in accordance with the law of England.

However, there have been controversies as to what was the precise meaning of the wording of the Ordinance with regard to "Colony". Many believed that section 36 (1) of the Ordinance only applied to the Colony of Lagos because subsection (3) clearly states that:

"this section applies to the Colony only".

Although it does not say Colony of Lagos, but at the time of its enactment, it was only Lagos that was referred to as "Colony"; hence the section is interpreted restrictively.

In 1954 however, succession became a regional matter by its inclusion in the Concurrent Legislative List of the Constitution Order in Council, 1954 which empowered each region to legislate on matters of succession. And before the advent of State creation from the pre-existing regions, the Western Regional Administration of Estates Law, 1959 came into being. This repealed section 36 of the Marriage Ordinance in that region but other sections of the Ordinance were allowed to co-exist with the regional Marriage Law of 1959 of the Western Region. With the passage of time, these regions were further broken into various States, with each State re-enacting on what was available to it at the time. For instance, while Ondo, Edo, Delta, Ogun, Osun, Oyo and Lagos that were created out of the defunct Western Region sought to restructure the problem associated with section 36 by abrogating that particular section, the Eastern States held onto to it in the Eastern States. Okigbo³⁷⁶ further writes that there is still confusion with respect to intestate succession of persons married under the Act.³⁷⁷ He points out that in response to this problem, some states in the Eastern region of Nigeria, namely Anambra, Enugu and Ebonyi States have adopted the Succession Law Edict. The Legislation, he asserts, deals with inheritance/succession to real and personal estate on intestacy. And in addition, section 120 of the Administration and Succession (Estate of Deceased Persons) Law, 1987 prescribes detailed rules of distribution of real and personal estate on intestacy.

³⁷⁶ Okigbo B. "The Legal Approach To Women's Inheritance Rights"

³⁷⁷ Ibid

Intestate succession under customary law (including Sharia law)

There is no statutory law in the Northern States which governs the distribution of intestate estates. Consequently, where the deceased married under the Marriage Act then the law allows the surviving spouse and children to administer the estate after they have applied and have been awarded Letters of Administration from the Probate Division of the High Court of the State.

Intestate succession under customary law is usually more contentious. This is dependent on the domicile of the deceased before s/he passed on. Even this is not so clear cut as it seems because there have been series of judicial interpretations with conflicting results. This has made the body of case law on this topic somewhat confusing.

Couples married under customary law usually have different stories to tell. A Customary Law Will takes the form of an oral declaration made voluntarily by a testator during his lifetime.³⁷⁸ This is known in law as *nuncupative Will*. Such declaration may be made while the testator is in good health in anticipation of death.³⁷⁹ Although the English law does not regard such will as valid except it is a privileged will (i.e. those made by military men and women in times of war or under certain similar circumstances), but under Customary law, it is not compulsory that there be a signed written document. However, there must be oral evidence of such disposition which trust-worthy witnesses must corroborate.

This requirement is provided for under statute. For example, section 59 of the Evidence Act emphasizes that when it comes to deciding any matter relating to native law and custom, it is necessary that those that are versed in the subject of native law and custom such be consulted. These may be chiefs or others with excellent understanding of the subject of native law and custom. Other relevant sources are books or manuscripts in the subject matter that are known and recognized by the local people as legal authority in that regard.³⁸⁰

However, the credibility of such witnesses is usually another big issue, as many of the beneficiaries who are disadvantaged by the disposition would normally doubt the sincerity of purpose of such witnesses. And indeed, there may be some kind of connivance between

³⁷⁸ Okigbo, B. "The Legal Approach to Women's Inheritance Rights" Available online at WWW.hurilaws.org

³⁷⁹ Ibid

³⁸⁰ Evidence Act, Chapter 112 L.F:N. 1990. Available online at: <http://www.nigeria-law.org/EvidenceAct.htm>

certain beneficiaries and such witnesses, who may, as a result the expected pecuniary gains, bear false witness. Hence it is understandable that the genuineness of such witnesses is usually in question.

In the absence of a Will the usual mechanism for deciding who gets what is the body of long-existed customary law rules on intestate distribution. However, there are circumstances whereby those who are vested with the power to carry out the sharing of the property are confused as to what rules to apply in a particular case.

Among the Yoruba people, for example, Alaba³⁸¹ writes that some modern Yoruba Christians generally imbibe the foreign idea of “one man, one wife” by contracting Church or Registry Marriage (i.e. marriage under the Ordinance); and then go out to keep mistresses (concubines) or wives married according to neither the Christian Customs nor the Ordinance. They do this (usually) without letting the main wife know about it. When they pass on, the other women and their children come to the man’s family to make their existence known and to demand their rights. They are usually allowed to come for their own portion of the inheritance, which he might have included in his will. If he dies without having written a will, the elders in the family will use their customary discretion to share his property among all his children.

It is important to note that there are certain parts of a man’s estate that cannot be disposed of by Will. The native law and custom in some parts of the Eastern Nigeria as documented in the *Customary Law Manual 1977*, provides that:

*“A man has a right to dispose of specified items of his property by Will...No person has a right to dispose of his entire estate by Will, and certain items of property are not disposable by will.”*³⁸²

And section 14 Evidence Act Chapter 112 L.F.N. 1990 also provides the grounds on which a custom may be accepted as a law governing a people of a particular community. These are: 1) if the court has judicially noticed such a custom, i.e. if in previous similar case, a particular court of co-ordinate or superior jurisdiction recognized such custom as being a native legal instrument; and 2) if the custom has been proved to exist by acceptable evidence. It is important to note that the onus of proving the existence of such native law is on the person invoking it.³⁸³

³⁸¹ Alaba, O. “Understanding Sexuality in the Yoruba Culture” (2004) p 7.

³⁸² Customary Law Manual 1977 p 145

One very important provision in this statute that seems to negate many of the discriminatory customary law principles is subsection (3) which prohibits the application of any native law or custom that is "contrary to public policy and is not in accordance with natural justice, equity and good conscience".³⁸⁴

Equity simply means fairness. And because equity is one of the elements contained in the constitution from which all other forms of law derive their authority, it is therefore questionable how those discriminatory sections of customary law are able to get the force of law and still be backed by the constitution. And also, according to Evidence Act, they (rules of customary law) *shall not be enforced as law* if they are contrary to principles of equity.

³⁸³ Section 14 Evidence Act Chapter 112 L.F.N. 1990. Available online at: <<http://www.nigeria-law.org/EvidenceAct.htm>>

³⁸⁴ Section 14(3) Evidence Act Chapter 112 L.F.N. 1990. Available online at: <<http://www.nigeria-law.org/EvidenceAct.htm>>

Chapter 15

RIGHTS PROTECTION IN AUSTRIA: A LESSON FOR NIGERIA?

In this chapter I shall attempt to look at the Austrian legal system as it relates to the family unit, with a view to drawing some examples regarding the entrenchment of true democracy, human rights and rule of law and how far it has gone in actualizing these values. Attention may also be paid to decided cases so as to demonstrate how Austria's judicial and administrative authorities, *inter alia*, respond to changes imparted to it by the introduction of coherent principles of modern human rights instruments from the outside.

In any modern democratic society where rule of law, human rights and good governance are highly regarded and practised, the promotion and protection of rights of citizens, though challenging, are a sacrosanct task and the mechanisms for carrying out such tasks are usually well articulated. Accordingly, the populace is equally well informed. Although it could be argued that such society does not exist, but it should be borne in mind that “good governance” is the result of “political will” and continuous hard work. In any economic or political advancement, there are two sets of characters – one that leads and one that is wise enough to follow. What this simply means in essence is that while those ahead (the path-finders) are making progress – wading through “thick and thin” – the ones behind must follow up with relative speed, lest the gap widens. And if that happens and those trailing behind now find themselves at economic or political crossroads of some sort, chances are that they will venture in whatever way their independence dictates and in the end they may come to grief.

What this means in essence is that, where a nation is unable to devise a means of sustaining its economic, leadership and democratic processes, it can borrow a lead from other systems. This also holds true for a nation's legal system because there has never been and can never be a single legislation that can bring all human activities under its ambit. Hence there is the need to amend or abrogate instruments and new and more coherent ones put in their place. And because no nation can exist alone, therefore, in order to belong to a comity of nations, certain things must be done to foster interdependence with other nations. Accordingly, I deem it probable that a hard look at systems operational in Austria and other European nations which have had to grapple with all sorts of catastrophes – natural and man-made – but have been

able to emerge from them, such nations might serve as typical model for Nigeria's pursuit of social, legal, political and economic developments. Although it could be argued that the Western world is not the best of all possible worlds, but such comparisons usually help in development efforts by nations like Nigeria. Somebody once said that "the desire for food does not satisfy hunger, but it will, at least, get you started towards a restaurant"

As Austria is bound by the tenets of the European Convention on Human Rights, so is Nigeria bound by the principles of the African Charter on Human and People's Rights. And as Austria is a member of the European Union and Council of Europe (with their human rights protection mechanisms), so also is Nigeria a member of the African Union (AU) and Economic Community of West African States (ECOWAS) and thus subject to their rules. Coincidentally, and gladly too, each nation was also built from relics of wars. And having experienced such devastating hostilities which can be said to have been caused by lack of dignity and respect for the humankind, both nations should now be increasingly passionate about human rights principles as contained in various international instruments. And it has thus become understandable to both nations that there is great need to establish institutions to ensure strict compliance with all such international treaty obligations. And in that respect, all obstacles which hinder such compliance must either be repealed or amended so as to reflect the tenets of such international instruments.

However, while Austria seems to be working hard towards ensuring that its domestic law conforms to the tenets of European Union law, the European Convention on Human Rights and its treaty obligations under international law, Nigeria, on the other hand, is battling with three legal systems characterized by various conflicting provisions. Although there have been cases of human right violation, such as racial discrimination, police brutality, indiscriminate detention of especially foreigners by the police, etc., in which Austria was adjudged to have been in breach by the ECtHR, but such judicial pronouncements can be seen to have been used to improve on Austria's legal and political systems. And many of the resultant observations made by the international authorities have been, or are in the process of being, complied with, to the letter.

Let me at this juncture cite two opposing examples of human rights cases which are reflective of both nations' attitudes with regard to compliance with their obligations under international

law; particularly with the non-discrimination instruments at the international level. And these are *Karner v Austria* in the case of Austria and *Mojekwu v Mojekwu* in the case of Nigeria.

AUSTRIA

The case of *Karner v Austria* illustrates the current wind of change in Austrian legal system in form of *Registered Partnership*. This demonstrates, to some extent, Austria's compliance with its obligation under the European Convention on Human Rights.

In the case, the European Court of Human Rights (ECtHR) was able to establish that unmarried cohabiting same sex couples be granted same rights as unmarried cohabiting opposite sex partners.

The case concerns one Mr Siegmund Karner who was in a homosexual relationship with one other man, Mr W, with whom he had lived for about five years and shared all expenses resulting from the use of a Flat before the latter died. It was reported that Mr Karner nursed Mr W as his "life companion" (*Lebensgefährte*) when the latter suffered from full blown AIDS from which he subsequently died in 1994.

But after Mr W's death, his Landlord sought to terminate the tenancy agreement which hitherto existed only between him (the landlord) and the late Mr W. As "life companion" of the deceased W, Mr Karner sought to exercise his legal rights under the section 14 of the Rent Act (*Mietrechtsgesetz*) which generally grants family members (including life companion) of a deceased tenant the right to succeed to his/her estate.

Mr Karner claimed that as he was the surviving relative of the late Mr W, he was entitled to inherit, to the exclusion of others, the Flat of the deceased in accordance with the section 14 of the Rent Act. But the Counsel for the Landlord, who sought to cancel the tenancy agreement, argued that the provision of the Rent Act that grants the right of succession to family members which include "life companion" (*Lebensgefährte*) does not extend to homosexual partners and therefore brought action against Mr Karner before the District Court (*Bezirksgericht*).

Held (District Court (*Bezirksgericht*)) Austria:

Mr Karner was entitled to succeed to the Flat as provided for by the Rent Act, holding that the notion of “family members” also extends to homosexual partners.

Still unsatisfied, the Landlord appealed to the Regional Court for Civil Matters.

Held (Regional Court (*Landesgericht für Zivilrechtssachen*)):

The Appeal Court upheld the District Court’s decision and dismissed the Landlord’s appeal.

And finally the Landlord appealed to the Supreme Court (Oberster Gerichtshof).

Held (Supreme Court (*Oberster Gerichtshof – OGH*)):

The highest Appellate Court of the land decided that the lower courts were wrong in deciding for Mr Karner and therefore quashed the lower courts’ previous decisions. It declared that a statute must be interpreted according to when it was enacted and since it was found that when the Legislature enacted the law which granted family members the right of succession in 1974, it did not have homosexual relationship or relationship between persons of the same sex in contemplation. The Court therefore interpreted the notion of “life companion” very narrowly, i.e. as meaning only traditional family members.

Mr Karner felt discriminated against on grounds of his sexual orientation and therefore instructed his Counsel to file an appeal at the European Commission for Human Rights. This was later transmitted to European Court of Human Rights (ECtHR). But in the course of the proceedings the applicant, Mr Karner, died.

After his death, the State of Austria requested that the case be struck out of the list of cases in accordance with Art 37 (1) of the European Convention on Human Rights (ECHR), since the applicant had died.

But as the case concerned “respect for human rights”, coupled with the fact that interested group of NGOs who claimed to have been affected by Austria’s alleged discriminatory

practice pursuant to Article 34 ECHR had intervened, Counsel for Mr Karner successfully argued on the continuation of the case on behalf of Mr Karner.

The NGOs relied on the last part of Article 37 (1) ECHR which states:

*"However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."*³⁸⁵

The ECtHR also considered that the case transcended Mr Karner as a person. And this it considered as an additional ground to proceed with the examination of the case. It also declared that the continued examination would contribute to elucidate, safeguard and develop the standards of protection under the ECHR. And accordingly, the ECtHR rejected the State of Austria's request for the application to be struck out of its list.

The applicant, Mr Karner, made a submission that by denying him the benefit of section 14 of the Rent Act by which he could have succeeded to his partner's (Mr W's) tenancy, he had been discriminated against on grounds of his sexual orientation which is prohibited under the ECHR. He sought to rely on Article 14 of the ECHR which prohibit discrimination, taken in conjunction with Article 8 of ECHR which guarantees the "right to respect for family and private life".

Republic of Austria submitted that the aim of the provision contained in the Rent Act was to protect what it referred to as "traditional family" unit.

It is important to note here that although according to the ECtHR case law, a High Contracting Party may treat people differently on certain grounds, but such party must put forward a justification for such difference in treatment. Even then, such justification must be weighty enough before the ECtHR could regard a difference in treatment based exclusively on grounds of sex as compatible with the ECHR.³⁸⁶ According to the ECtHR, for the purpose of Article 14, for a differential treatment to be recognized as pursuing "legitimate aim", there

³⁸⁵ Article 37 (1) ECHR available on the official website of European Court of Human Rights.
<http://www.echr.coe.int/Documents/Convention_ENG.pdf>

³⁸⁶ See case note on Karner v Austria online at: <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263#{"itemid":\["001-61263"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263#{)> (Accessed 5.1.2010). See also *Mata Estevez v. Spain*, No. 56501/00, ECHR 2001-VI,

has to be reasonable justification for it and the means of achieving this said aim must have some level of relationship of proportionality.³⁸⁷

Held (European Court of Human Rights) : Republic of Austria had not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act and therefore found its decision discriminatory. And this discriminatory decision, from which Mr Karner suffered the loss of rights of succession to Mr W's estate, was a violation of Mr Karner's right under Article 14 taken in conjunction with Article 8 of the ECHR.

I must however say that although this case does not relate to the right of a child or of women, but it does demonstrate Austria's approach with regard to compliance with the equality principle contained in the various international agreements to which Austria is a signatory. And consequently, this ECtHR case law has gradually impacted on the Austrian legal system and has thus changed it forever as the resultant change now permits and gives legal recognition to same sex Registered Partnerships in much the same way as it does heterosexual marriage. This means that both heterosexual and homosexual relationships now have force of law.³⁸⁸

NIGERIA

In much the same way as the *Karner* case in Austria, the case of *Mojekwu v Mojekwu*³⁸⁹ on the other hand, is a typical illustration of Nigeria's attitude with regard to fulfilment of its obligation under international law. As I have always maintained in this thesis, it is obvious that the interests of the woman are particularly affected by the operations of multiple legal systems governing family law in Nigeria.³⁹⁰ A woman's rights and responsibilities in marriage, inheritance, ownership and widowhood practices may be governed by one of these

³⁸⁷ See case report on *Karner v Austria* on the official website of ECHR, available online at: <

³⁸⁸ See also ECtHR's decision in *Schalk and Kopf v Austria* Registered Partnership Act, Federal Law Gazette (*Bundesgesetzblatt*) vol. I, no. 135/2009, which entered into force on 1 January 2010. Section 2 of it provides as follows: "A registered partnership may be formed only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations."

³⁸⁹ (1997) 7 N.W.L.R 283

³⁹⁰ See Bamgbose, O. "Customary Law Practices and Violence Against Women: The Position Under the Nigerian Legal System." Available online at: <http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/customary%20law/Oluyemisi%20Bamgbose.htm> Accessed 14/9/2010

systems under discussion and they are dependent on the place of residence, type of marriage, ethnic group, or religion. This was one case that gave the judiciary (with its power to strike down any law that conflicts with the constitution) the opportunity to discourage the continued application of those parts of customary law that run contrary to the spirit and intent of the constitution and the international human rights treaties applicable to Nigeria. It is important to note that any law that is inconsistent with the constitution of void.³⁹¹

Nevertheless, in the case, the appellant, Mr Augustine Mojekwu while relying on the “Ili-Ekpe” customary law (also reported in other documents as “Oli-ekpe”) practised in Nnewi the South East of Nigeria had instituted action against the respondent, Mrs Mojekwu, and prayed the court to award in his favour the property of his deceased paternal uncle who was survived by a wife, (the respondent) and two daughters. He argued that under Ili-Ekpe customary law, a woman is not permitted to inherit her deceased husband’s property and that the same applies to her two daughters. Consequently, the respondent and her daughters, being women, were therefore excluded from inheriting under the Ili-Ekpe custom which applied to the deceased.

It was further argued by the appellant’s Counsel that the Ili-Ekpe custom only allowed the deceased’s closest male relative (a position held by the appellant) to inherit if the deceased had no son. And as a result, the appellant, Mr Mojekwu, claimed ownership of the deceased’s house situated in Onitsha (a commercial city in the East of Nigeria). In its decision, the Court of Appeal held that *Kola Tenancy* (a customary law of the place where the property was situated), which allows the daughter of a deceased to inherit, governed the devolution of the said house.

Kola Tenancy was described in an earlier case of *Udensi v Mogbo* thus:

“Kola tenancy in the main has the features of most customary tenancies; it creates a landlord and tenant relationship between the parties to it, and it certainly is more than a mere occupational licence which confers no interest in land. Like most customary tenancies, Kola tenancy confers to the grantee full rights of possession but it confers no more than a mere possessory right i.e. a right of occupation of the tenant. This is borne out in the definition of this type of tenancy as set out in section 2 of the Kola Tenancies Act No 25 of 1935 (now appearing as the Kola Tenancies Law Cap. 69 in the 1968 edition of the

³⁹¹ See section 1(3) of the 1999 Constitution of Nigeria

*Laws of Eastern Nigeria) which reads: “a right to the use and occupation of any land which is enjoyed by any native in virtue of a Kola or other token payment made by such native or any predecessor-in-title in virtue of a grant for which no payment in money or kind was exacted.”*³⁹²

– Per Alexander, J (pp. 14 – 15, paras. G – D)

The Supreme Court in the Udensi case also confirmed the respondent’s submission that:

“If a Kola tenant of that family dies leaving no male issue and he had prior to his death improved the land (in respect of which he held the tenancy) the female children of any of such a tenant are allowed to continue the tenancy”.

And at the same time, in the instant case (*Mojekwu v Mojekwu*), the Appeal Court reached a decision in the light of Repugnancy Doctrine. The doctrine provides that a court shall not enforce any custom as law if, in the opinion of the court, the custom is contrary to public policy or repugnant to natural justice, equity and good conscience. The Appeal Court also touched on the human rights concerns raised by the practice of Ili-Ekpe custom, saying it violated not only the individual fundamental rights guaranteed by the Nigerian Constitution, but also the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) which obviously prohibits discrimination on grounds of sex.

However, as with the decision of the Austrian Supreme Court in the *Karner* case discussed earlier, when the case was appealed to the Supreme Court of Nigeria, it criticised the lower court (the Court of Appeal) for taking into consideration the human rights concerns that might have been raised by the application of the *Ili-Ikpe* custom. It determined that, as none of the parties to the proceedings raised the issue of human rights infringement by the application of the custom, it was not procedurally proper for the Appeal Court to do so for the parties. The Supreme Court therefore declared that the rules of procedure precluded the Appeal Court from determining whether or not the Ili-Ekpe custom was repugnant.

In his leading judgement, Justice S.O. Uwaifo stated:

³⁹²Augustine Udensi v. Alice Mogbo (1975) LPELR-SC.269/1975. Available online at: <<http://www.lawpavilionpersonal.com/lawreports/summary.jsp?suite=olabisi@9thfloor&pk=SC.269/1975&apk=468>>

*I cannot see any justification for the court below to pronounce that Nnewi native custom of [(o)li-ekpe was repugnant to natural justice, equity and good conscience...the learned justice of appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at,(sic) and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run there native communities.*³⁹³

However, although the Supreme Court subsequently upheld the Appeal Court's decision and concluded that Mrs Mojekwu be allowed to inherit her deceased husband's estate, but the issue as to whether or not the application of the purportedly discriminatory customary law was unconstitutional and/or that it conflicted with Nigeria's obligation under international law which prohibits discrimination against women, was not resolved by the Supreme Court in the case.

Although it would invariably have amounted to "*ultra petita*"³⁹⁴ if the Supreme Court had reasoned in line of the human rights violation contents of the case, as did the Appeal Court, but it must be reiterated here that, on the contrary and in the affirmative of the Appeal Court's decision however, the 1999 Constitution in section 42 prohibits discrimination based on circumstances of the birth of anyone. And furthermore, the Appeal Court's pronouncement, with regard to the human rights violation contents of the case, seems to be corroborated also by the Evidence Act 1990, a Federal legislation which prohibits the enforcement of any custom that is contrary to public policy, natural justice, equity and good conscience.³⁹⁵ And also section 4 (5) of the 1999 Constitution expressly stipulates that Federal law supersedes

³⁹³ *Mojekwu v Iwuchukwu* (2004) 4.S.C. (Pt.II). This case started off as *Mojekwu v Mojekwu*, (supra) but the citation had to be changed because Mrs Mojekwu, the original respondent in the latter case, died in the course of the proceedings and her daughter, Mrs Iwuchukwu, continued from where her mother left off. This case is available online at:

<http://www.lawpavilionpersonal.com/lawreportsummary.jsp?suite=olabisi@9thfloor&pk=SC.11/2000&apk=8890>

³⁹⁴ Black's Law Dictionary states that "a judgment or decision is said to be *ultra petita* when it awards more than was sought or sued for in the petition or summons..."

³⁹⁵ See section 14 (3) Evidence Act 1990. Available online at: <<http://www.nigeria-law.org/EvidenceAct.htm>>

State law. What this means is that if a State makes a law that is inconsistent with a Federal law, or vice versa, the State's law shall, to the extent of that inconsistency, be void.

With the outcome of the *Mojekwu* case however, there is considerable doubt as to whether women's right not to be discriminated against, particularly under customary law, as guaranteed under various national and international instruments (particularly Articles 18 (3) and 19 of African Charter on Human and People's Rights and Article 5 (a) of CEDAW), can ever be protected in Nigeria.

Conversely, in an earlier case of *Abacha v Fawehinmi*³⁹⁶, the Supreme Court of Nigeria held that the spirit of a Convention or a treaty demands that the interpretation and application of its provision should meet international and civilized legal concepts. In that regard, one would expect that all intents and purposes of both the Nigerian constitution and ratified international agreements (in this case the African Charter) pertaining to protection of fundamental rights, would reflect in the judicial interpretation that the Supreme Court gave in the *Mojekwu v Iwuchukwu*³⁹⁷ case. But instead, the Supreme Court digressed on the grounds that the lower courts did not follow procedural rules.

By analogy, it has been demonstrated a few times in Europe that mere existence of a law that is contrary to certain legal norms may give rise to a legal tussle. This inference can be drawn from case C-205/206 (*Commission of the European Communities v Austria* 48 ILM 473 2009) in which the ECJ, inter alia, demonstrated its support for the elimination of pre-existing instruments that are incompatible with European Community obligation. In the case, the European Commission argued that a clause contained in the bilateral agreements which Austria had with China, Malaysia, Korea, Russia, Turkey and Cape Verde before Austria's accession to the European Community was incompatible with the second paragraph of Article 307 EC on the ground that it was liable to make it more difficult or even impossible for a Member State to comply with its Community obligations. The ECJ agreed with this submission and held that by not taking appropriate steps to eliminate incompatibilities, the republic of Austria failed to fulfil its obligations under the second paragraph of Article 307EC.

³⁹⁶ (2000) 6 NWLR Part 660

³⁹⁷ (2004) 4.S.C. (Pt.II). I, which started off as *Mojekwu v Mojekwu* but had to change to *Mojekwu v Iwuchukwu* because Mrs Mojekwu, the original respondent, died in the course of the proceedings and her daughter, Mrs Iwuchukwu, took her position

The nonchalant attitude towards the promotion and protection of fundamental rights appears to be synonymous with the Supreme Court of Nigeria; right or wrong. And it has been criticised on the ground that when called on to strike down a piece of challenged legislation in its entirety, the Court has often exercised restraint. And with regard to its readiness to take on political issues and uphold the Supremacy Clause, the Court has been reluctant to declare any piece of legislation illegal,³⁹⁸ let alone customary law. Indeed, it has yet to invalidate any enactment in its entirety on grounds of unconstitutionality.³⁹⁹ This minimalist interpretative approach of the Court is believed to be rooted in its history. This attitude, from which it has rarely departed, according to Yusuf,⁴⁰⁰ is that it is beyond the purview of the judiciary to embark on what he refers to as “wholesale striking down of legislation”. This is a situation that is reflective of parliamentary supremacy that characterises the British common law system and which, since the Nigerian independence, has been corrupted and misinterpreted by successive authoritarian military regimes in Nigeria. And this is believed to have contributed to poor administration of justice as well as general institutional decay.

It is therefore submitted that a purposive approach, such as prevalent in many common law countries’ judicial systems, would have put an end to (or at least, rationalize) the uncertainties posed by the application of tripartite conflicting set of laws in the country. For example, the general approach to statutory interpretation in Australia, known as the purposive approach, is exemplified by section 15AA of the *Acts Interpretation Act 1901* and it lays down that “In the interpretation of a provision of an Act, a construction that would promote the purpose or the object underlying the Act (whether that purpose is or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object”⁴⁰¹

Another scenario that lends its support to the idea of *purposive approach*, as opposed to a narrow interpretation, can be found in the English case law which developed from the decision in the case of *Pickstone v Freeman* (1988). In the case the English House of Lords found that domestic legislation, Equal Pay Amendment Regulations made under section 2(2) of the European Communities Act appeared to be inconsistent with Art 119 of the Treaty of Rome. It held that despite this apparent conflict, a purposive interpretation of the domestic

³⁹⁸ Yusuf, H.O. The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria” International Journal of Constitutional Law 7 (4) (2009): 654-682

³⁹⁹ Ibid

⁴⁰⁰ Ibid

⁴⁰¹ Coxon, B. (2009)p 3

legislation would be adopted. That is to say that the plain meaning of the provision in question would be ignored and an interpretation which was not in conflict with Art 119 would be imposed on it. As Fenwick (2001: 140) rightly observed, this decision was made on the basis that Parliament must have intended to fulfil its obligation under the EU law after it had been forced to do so by the European Court of Justice.

The House of Lords used similar approach in the case of *Lister v Forth Dry Dock Engineering*.⁴⁰² It is obvious that where there is room for domestic authorities to interpret the domestic legislation at stake in a manner that is in compliance with the international norm, there is, according to the European Court, no violation of the Convention.⁴⁰³

Inter-American Convention on Human Rights

Looking outside European environment, one finds that the application of the American Convention on Human Rights by the Inter-American Court of Human Rights (IACtHR), for example, is not much different. The Court has declared with regard to the question of whether the mere existence of a law constitutes a breach of an obligation and how such breach can be established, “that the Commission may formulate recommendations to the State concerned, whether or not that norm has been applied to a concrete case”

The IACtHR further found that “the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty, and if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question”

Still on how much can be achieved through judicial interpretation, perhaps it is useful to compare the verdict in the *Mojekwu* case with ECtHR’s decision (or even a domestic court applying the principles of ECHR in line with the ECtHR’s case law) in a similar hypothetical scenario in Europe. I am convinced without any iota of doubt that a judicial interpretation of some sort would have been espoused in order to achieve the intents and purposes of the drafters of the human rights instrument in question. And quite clearly, there is no doubting the

⁴⁰² (1989) 1 All ER 1194

⁴⁰³ See Boerefijn (2009) p 173

fact that the ECtHR's case law system on human rights has been developed to a point where the workings of certain pieces of legislation are articulated via judicial interpretation.

For example, in its judgement in an inter-state case of *Ireland v United Kingdom*, the ECtHR examined whether the mere existence of a particular law could be a violation of the European Convention of Human Rights. I must however stress that although this case differs a bit in that under the inter-state complaint procedure the extant of a victim is not required in order for a case of violation of the ECHR to be established with regard to admissibility. It is the practice of the European Court of Human Rights to examine the level of the tendency of a particular law to affect the rights of individuals. And in its observation, the ECtHR found that a breach can result from mere existence of state measures that are not compatible with "rights and freedom safeguard".

This case demonstrates not only that a law can be altered by putting it in the context of a particular matter through judicial interpretation, but also that the proper functioning of African Court on Human and People's Rights, is a necessity. Such court must not only deviate from aligning itself with parochial ideologies, prejudices, biased traditional manoeuvrings, as well as self-serving and domineering traditionalist's view of matters, but must also be truly competent in handling all such issues in the most impartial and unbiased manner. And its decisions must be made binding on all ratifying African nations just as the ECtHR and the ECJ function in Europe. Although there are "Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights" and the "Protocol of the Court of Justice of the African Union", but at time of writing,⁴⁰⁴ while the former had been signed, ratified and deposited (09/06/2004, 20/05/2004 and 09/06/2004 respectively), the latter Protocol (though signed by Nigeria 16th December, 2003) had not been ratified.

The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was established pursuant to the "Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights", by the Organisation of African Unity in 1998. The

⁴⁰⁴3 February 2010

Protocol however entered into force in on January 25, 2004 upon its ratification by fifteen member states. Presently, out of the 55 countries in Africa, 24 have ratified the Protocol, 25 have signed but have not ratified it, while 5 have neither signed nor ratified it.

As Pityana⁴⁰⁵ has noted, the protocol stipulates that the Court would *complement* the protective mandate of the African Commission. That suggests that both the Court and the Commission coexist as independent bodies but within a mutually reinforcing relationship. Pityana reiterates that although there is no intended hierarchy between the two bodies, by reason of its status as a court, the African Court would be the final arbiter and interpreter of the African Charter and further highlights a more serious concern, which is that the Court would undermine the domestic courts and as such would be unconstitutional. The introduction of an extraterritorial jurisdiction is a concept that has not yet received wide acceptance in Africa. “In the European context,” Pityana, drawing on the attitude of Europeans as opposed to Africans’, concludes that “it has now become widely established that state parties to the European Convention undertake to abide by the decisions of the European Court (referring to the ECtHR) “and, generally, the orders of the Court are observed.” There are 47 Member States in the organisation called the *Council of Europe* and all members are parties to the European Convention on Human Rights (ECHR) and accept the competence of the European Court of Human Rights (ECtHR). The court’s decisions are binding on all such Member States. This is generally not the case in Africa.

The African Court’s very first decision in the case of “*Michelot Yogogombaye v The Republic of Senegal (2009) Appl No 001/2008*” ended in a not too helpful manner to the cause of this dissertation. It started in December 2009 and was concluded in July 2010.

In the case, the Applicant, Michelot Yogogombaye, a Chadian National, sought to prevent the government of Senegal from conducting the trial of the former Chadian head of State, Hissene Habre, in Dakar, Senegal. In its decision, the Court held that it lacked jurisdiction to hear the case as Senegal had not made the declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights establishing the African Court on Human and People’s Rights granting individuals the opportunity to bring cases directly before the Court. Article 34(6) provides that:

⁴⁰⁵Pityana N.B. African Court on Human and Peoples’ Rights in Municipal Law”
http://www.unisa.ac.za/contents/about/principle/docs/Municipal_Law.doc

*“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration”.*⁴⁰⁶

The implication of this provision as demonstrated in the *Michelot* case is such that, if a particular country does not make a declaration accepting the competence of the Court, as required under section 34 (6) above, aggrieved nationals of such country cannot appeal from a domestic court to the African Court on Human and Peoples’ Right.

It is documented that Nigeria has ratified the Protocol Establishing the African Human Rights Court, but such ratification amounts to nullity as the declaration accepting the competence of the Court pursuant to Article 34(6) of the Protocol establishing it has not been made by Nigeria. And consequent upon that omission, any case involving Nigeria, whether such case was brought by another ratifying state, an individual or group, would go the way of the *Michelot* case that was declared inadmissible for lack of jurisdiction pursuant to Article 34(6).

African Commission on Human and Peoples’ Rights

Before the African Court on Human and Peoples' Rights was established, the African Commission of Human and People's Rights was responsible for the protection and promotion of the rights contained in the African Charter. In fact, it was a sort a quasi judicial body modelled after the UN Human Rights Committee without binding powers.

Under the African Charter, the mandate of the Commission as expressly provided in Article 45, is limited to examining state reports, considering communications alleging violations, and interpreting the Charter at the request of a State party, the OAU, or any organization recognized by the OAU.

⁴⁰⁶ Article 34(6) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available online at the website of the Commission on Human and Peoples' Rights: <<http://www.achpr.org/instruments/court-establishment/>>

The Supreme Court's ruling on the application of domestic and external legal instruments

In relation to the issue of supremacy between the provisions of African Charter on Human and Peoples' Rights and Nigerian domestic law, the Supreme Court also held in the *Abacha* case that, since the Charter had been incorporated by statute into Nigerian domestic law, the Charter should be regarded as 'a statute with an international flavour'. In the event of a conflict between the Charter and other statutes, its provisions will prevail over those of domestic laws because it is presumed that the legislature does not intend to breach an international obligation. Thus, the Charter possesses a greater vigour and strength than any domestic statute. The Court also found that, since the African Charter on Human and Peoples' Rights was an instrument for protecting human rights, its provisions could be referred to before Nigerian courts.

On the other hand, the constitution of the Federal Republic of Nigeria 1999 provides that mere accession to or ratification of a convention does not in itself confer on the treaty a binding force of law in Nigeria unless and until it is domesticated by the National Assembly and ratified by a majority of all the Houses of Assembly in the Federation.⁴⁰⁷

In the *Abacha v Fawehinmi* case, Ogundare, JSC stated that:

"Suffice it to say that an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. See S. 12 (1) of the 1999 Constitution which provides: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly." Before its enactment into law by the National Assembly an international treaty had no such force of law as to make its provisions justiciable in our courts. "See the recent decision of the Privy Council in HIGGS & Another v Minister of National Security & Others, The Times of December 23 1999, where it was held that "In the law of England and Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the crown. "Treaties formed no part of domestic law unless enacted by the legislature. Domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizen's rights and duties in common or statute law. They might have an indirect effect upon the construction of statutes or

⁴⁰⁷ See Section 12 of 1999 Constitution of Nigeria

*might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty". In my respectful view, I think the above passage represents the correct position of the law, not only in England, but in Nigeria as well". [Emphasis added]*⁴⁰⁸

In accordance with the above mentioned provisions, coupled with the decision of the Nigerian Supreme Court, it can be seen that Nigeria's fate, with regard to non-implementation of the African Charter in full, (i.e. for not re-aligning its pre-existing discriminatory and obsolete laws, namely: customary and Sharia laws, to reflect the principles of international law) appears critical, and such failure, *prima facie*, amounts to someone's rights being trampled upon. In addition, the *Abacha* case has thus established that once the provisions of an international instrument are incorporated into domestic law, they become binding and Nigerian courts must give effect to them like all other laws in Nigeria. And this also seems to demonstrate what the Court's decision would be in cases where a particular treaty had been ratified or acceded to, but yet to be incorporated into domestic law. To reconcile this decision with Article 27 of the Vienna Convention on the Law of Treaties 1969 which precludes nation states from relying on their domestic law to the detriment of their international obligations, is likely to put many legal practitioners in two minds. Even in circumstances where it is established that the agreement to be bound was expressed by an official in violation of internal law, this cannot be accepted as an excuse.⁴⁰⁹ Some States do use such excuse as a cloak for their non-compliance with international agreement.

While the Austrian legal system is impacted on or influenced by the ECHR and the European Union, including the case law systems developed by their respective courts – ECtHR and ECJ – the Nigerian legal path ends at the level of the Supreme Court of Nigeria. However, there were times when it was procedurally possible to appeal from the Supreme Court to the West African Court of Appeal (W.A.C.A.) and from there to the Privy Council. But this system was altered by the 1954 Constitution Order-in-Council, so that appeals then lay from the Supreme Court directly to the Appellate division of the Privy Council in London, thereby by-passing the W.A.C.A. Prior to this, because Nigeria operated (it still does to this day) the case law system (i.e. principle of *stare decisis*), the decision of the Privy Council was binding on the W.A.C.A. in much the same way as the latter's was binding on the Supreme Court. In 1963, the Privy Council was also abolished, leaving only the Supreme Court as the highest and final

⁴⁰⁸ *Abacha v Fawehinmi (2000) 6 NWLR Part 660*

⁴⁰⁹ Article 46 (1) of Convention on the Law of Treaties 1969

appellate court in the Nigerian legal system. Although there is no provision in the 1963 constitution that says that the Supreme Court shall be bound by previous decisions, but taking a cue from the English legal system, under which higher courts would bind lower courts, or by which the Privy Council could overrule its previous decision, the Supreme Court possesses the power to overrule its own previous decision and those of lower courts.

By this arrangement, it is the Supreme Court that has the utmost jurisdiction to overrule any law if it finds that such law runs contrary to the constitution. But any such law must first of all be challenged by the affected individual or group.

In a study of the “The reintroduction of Islamic Criminal Law in Northern Nigeria” – Sharia law, Ruud Peters writes that the constitutionality of the penal codes can only be challenged in courts by a person with *locus standi*, which, in Nigerian law, is interpreted rather strictly.⁴¹⁰ He also found that class actions are not admitted, so that human rights organisations cannot initiate proceedings on any such issues. The most surprising thing is that some individual religious leaders are even more powerful than institutions. This therefore means that in certain cases their word is law. When they pass a judgment, many are unwilling to challenge it. According to Ruud Peters, it seems that this unwillingness is caused both by social pressure to accept the sentence, since opposing it could be seen as criticism of Islam, and by the idea that they deserved the punishment (even amputation) so that their conscience can be at rest.⁴¹¹

In practical sense, there is very little room to challenge any law that conflicts with both the constitution and or the international law which should become enforceable as a consequence of Nigeria’s ratification of such international agreements as did the NGOs in the Karner case after the death of the latter litigant.

Another contentious issue is that of hierarchy of courts in the Nigerian legal system. While the Austrian legal system has three courts at the topmost level – the Supreme Court (Oberster Gerichtshof), the Administrative Court (Verwaltungsgericht), and the Constitutional Court (Verfassungsgerichtshof -VfGH), Nigeria has one vertical judicial system, albeit with a

⁴¹⁰ Ruud Peters (2001) “*The Reintroduction of Islamic Criminal Law in Northern Nigeria*”. Available online at: Academia.edu

<http://www.academia.edu/666941/The_Reintroduction_of_Islamic_Criminal_Law_in_Northern_Nigeria>

⁴¹¹ Ruud Peters (2001) “*The Reintroduction of Islamic Criminal Law in Northern Nigeria*”. Available online at: Academia.edu

<http://www.academia.edu/666941/The_Reintroduction_of_Islamic_Criminal_Law_in_Northern_Nigeria>

somewhat galaxies of supposedly inferior Sharia, native or customary courts, whose proponents regarded as not being bound by neither the constitution nor the decisions of higher courts, other than related courts.

In the case of Austria, although the Supreme Court is the highest appellate court in the country, but this is only for simple or soft laws. All administrative matters are settled at the Administrative Court. In the same vein, all matters that border on constitutionality are referred to the Constitutional Court. This system may appear a bit winding, but in comparison, it is cost-effective for litigants as it reduces time spent trying to get the court to rule on the constitutionality of any act. Although some legal academics in Austria have opined that the Austrian legal system is quite cumbersome, but when compared with the Nigerian system, one realises how good it is to have one source of law– the legislature – than having one that is complicated by rules of customary law (including Sharia); all of which either compete for supremacy or simply operate on parallel lines. With regard to marriage in Nigeria, for example, Okeaya-Inneh (2007: 25) citing *Oshodin v Oshodin* (1963), declares that marriage under Benin Custom is recognized by Statute. He further notes that although it has become the practice that married couple under custom submit themselves to court or church marriage, but this subsequent marriage by statute, according to him, does not affect or legalize one conducted under Native Law and Custom. He further stresses that in the event of the bridegroom going to Court for divorce, the dissolution under the received English System does not automatically set aside the Marriage conducted under Native Law and Custom. The latter remains valid until it is set aside by the Customary Court. He concludes that a couple intending to divorce must go to the Customary Court.⁴¹² One can imagine the problem of petitioning for two divorce proceedings in two different courts for the same marriage relationship.

Ruud Peters (2001) opines that challenging the constitutionality of a particular law or procedural absurdity could take up to ten years of legal wrangling from courts of first instance before it finally gets to the Supreme Court.⁴¹³ Obviously this will attracts high legal cost.

⁴¹² See generally Okeaya Inneh (2007) “Benin Native Law and Custom at a Glance”. Benin City

⁴¹³ Ruud Peters. (2001) “*The Reintroduction of Islamic Criminal Law in Northern Nigeria*”. Available online at: Academia.edu
<http://www.academia.edu/666941/The_Reintroduction_of_Islamic_Criminal_Law_in_Northern_Nigeria>

With regard to the constitutionality of any law in Nigeria – domestic or incorporated – one cannot but be forced to always refer to section 1 (1) of the 1999 Constitution which is the supreme authority under which all other laws derive their legality. It further states in no equivocal terms under subsection (3) that any law that is inconsistent with its provisions is to the extent of such inconsistency void. It follows therefore that the joint effect of both subsections is to render void those sections of either Sharia or Customary law that run contrary to the spirit and intent of the Constitution. However, many of the religious activities that serve as catalyst for the propagation of these legal conflicts are usually funded by the government. For example, Ali Ahmad⁴¹⁴ writes that "Nigeria has supported Christian and Muslim causes as a state policy: it contributed equally to the building of their respective national places of worship; it has and is still subsidizing Muslim and Christian pilgrimages, and is supporting and funding purely religious holidays and functions." He further emphasizes with regard to the Nigerian Constitution however, that "perhaps, the intention of the framers was that Nigeria or any of the federating states should not give preference for one religion against the other, or more accurately, should not give preference to Islam against Christianity or vice versa; as there is clear discrimination between Islam and Christianity on the one hand, and other religions such as tribal African religion or little known others." He therefore reaffirms that "Many Christians have been molested for not complying with dress codes, alcohol in commercial quantities belonging to Christian merchants have been confiscated or destroyed." "Thus, one can definitively say that in its application in Nigeria, Shari'ah impacts negatively on non-Muslims", he concludes. And twelve northern states in Nigeria, as I earlier mentioned, have reintroduced the Islamic law (Sharia Penal Code) in their respective states, namely: Zamfara, Sokoto, Kaduna, Bauchi, Kano, Niger, Jigawa, Yobe, Katsina, Kebbi, Borno and Gombe.

⁴¹⁴ Ali Ahmad "Living with Conflict: Shari'ah and One Nigeria" Available at: <https://www.law.emory.edu/ihr/worddocs/ali1.doc>

Chapter 16

HARMFUL TRADITIONAL PRACTICES AND THE LAW (I)

Harmful traditional practices, as the name implies, are simply those practices that are harmful to the people to whom they are directed, particularly women and children. There is no clear-cut definition of “Harmful Traditional Practices”. In place of a definition however, the various relevant instruments have only provided us with some succinct descriptive analyses of the acts that amount to harmful traditional practices and their consequences. These practices are so notorious that domestic, regional and international instruments prohibit them in very strong terms. For example, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa in its Preamble, stipulates that:

*“...despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.”*⁴¹⁵

Grabman and Eckman write that "although the rights to culture and religion and the rights of minorities have been invoked in support of harmful traditional practices, such arguments contradict guarantees in the Universal Declaration of Human Rights that protect women's equality without exemption for the cultural or religious practices of the community".⁴¹⁶ The duo referred to UNFPA, UNICEF and WHO, which they quoted as stating unequivocally that:

It is unacceptable that the international community remain passive in the name of a distorted vision of multiculturalism. Human behaviours and cultural values . . . have meaning and fulfil a function for those who practise them. However, culture is not static but it is in constant flux, adapting and reforming. People will change their behaviour when they understand the hazards and indignity of harmful practices and

⁴¹⁵ Preamble to Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available online at: website of the African Commission on Human and Peoples' Rights <<http://www.achpr.org/instruments/women-protocol/>>

⁴¹⁶ Grabman, G. and Eckman, A.K. “Harmful Traditional Practices” Available at: Human Right Matrix. <http://www.policyproject.com/matrix/harmful%20trad%20practices.cfm#_edn3> Accessed 03.03.2013

*when they realize that it is possible to give up harmful practices without giving up meaningful aspects of their culture.*⁴¹⁷

These practices inflict on the victims both immediate and long term physical and psychological pain and they are numerous as they come in various forms; depending on the tradition or culture concerned. “Harmful practices” are the result of gender inequality and discriminatory social, cultural, and religious norms, as well as traditions, which relate to women’s position in the family, community and society and control over women’s freedom, including their sexuality.⁴¹⁸ The ones that readily come to mind in the case of Nigeria are: Female Genital Mutilation (FGM), child marriage, forced marriage, facial scarring, son preference, wife inheritance, widowhood rites, bride price (dowry-related issues), polygamy, maltreatment of widows, witch-hunting, virginity tests, stereotyping, stoning of women, etc. Flogging of women (whipping, lashing, caning) is closely related to stoning, as it, too, is a corporal punishment for adultery and attributed to Islam. This punishment is instituted in the Shari’a laws of Afghanistan, Indonesia, Iran, Nigeria, Pakistan, and Sudan.⁴¹⁹

Many of these practices are linked to other forms of violence against women.⁴²⁰

Although various international, regional, and domestic measures have been put in place to address these harmful practices, the effectiveness of the mechanisms or measures has been severely compromised by the fact that many of them are grounded in widely accepted cultural and religious norms.⁴²¹ The challenge lies in finding ways to respect diverse cultures without allowing the human rights of women to be curbed by the mores and religious practices of the culture in which they live.⁴²² According to Greiff, a woman’s human rights are absolute, and may not be limited by those seeking to invoke culture or religion as a justification for practices which violate international human rights standards.⁴²³ As Greiff rightly emphasizes,

⁴¹⁷ Grabman, G. and Eckman, A.K. “Harmful Traditional Practices” Available at: Human Right Matrix. <http://www.policyproject.com/matrix/harmful%20trad%20practices.cfm#_edn3> Accessed 03.03.2013

⁴¹⁸ See “Good Practices in Legislation on “Harmful Practices against Women”. A Report of the expert group meeting (2009) Available online at:

<http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Final%20report%20EGMGPLVAW.pdf>

⁴¹⁹ Greiff, S. (2010) “No Justice in Justifications: Violence against Women in the Name of Culture, Religion, and Tradition” Available online at:

<http://www.wluml.org/sites/wluml.org/files/SKSW%20Policy%20Briefing%20Series%201_No%20Justice%20in%20Justifications_Greiff.pdf> Accessed 01.03.2013

⁴²⁰ See generally, The Advocates for Human Rights. Available online at:

<http://www.stopvaw.org/harmful_practices> Accessed 23.02.2013.

⁴²¹ The Advocates for Human Rights, Available online at: <http://www.stopvaw.org/harmful_practices> Accessed 23.02.2013.

⁴²² Ibid

⁴²³ Greiff, S. (2010) “No Justice in Justifications: Violence against Women in the Name of Culture, Religion, and Tradition” Available online at:

just as it would be unacceptable to cite religious or cultural norms to justify slavery, a woman may not be denied her human rights simply because of the way her culture or religion views gender roles.⁴²⁴ Some of these practices expose the victims, who are mostly women and female children, to various health hazards. For instance, while women forced into polygamous marriage are exposed to sexually transmitted diseases, including HIV and AIDS, children given out in marriage at very tender age have been found to be vulnerable to vesicovaginal fistula, succinctly referred to as VVF.⁴²⁵

However, Dr Tsalhatu Moriki, a principal medical officer at Zamfara State-owned Farida General Hospital was reported to have refuted this contention contrary to the earlier reports that blamed the sickness on early marriage. An online news platform, “All Africa”, quotes Dr Moriki as saying that “most VVF cases are caused by prolonged labour contrary to the perception by many that it is due to early marriage. I therefore urge pregnant women, especially those from the rural areas to make sure that they attend ante-natal”, All Africa concludes.

Dr Moriki may not be entirely wrong for ascribing VVF to “prolonged labour”, but he omitted the other key word – obstructed – which is the major cause ascribed to it by other medical experts. The Doctor did not ask himself the question: what is the cause of the prolonged labour? He appeared not have understood (or chose not to understand, which I doubt anyway) that the prolonged labour could have been as a result of the obstruction. Many reports regarding VVF in those parts of Nigeria have it that because of early marriage most teenagers (usually about 13 years of age) find it hard to deliver safely because their pelvises were too small. For instance, Shuaibu writes that young girls and early teenagers have a high risk of suffering from prolonged obstructed labour because their pelvis is not fully developed to allow for vaginal delivery.⁴²⁶ Shuaibu notes that there are 2 million cases of VVF around the world out of which Nigeria has between 400,000 and 800,000 cases. 37 percent of girls between ages 15 and 19 are forced into marriage in Nigeria. VVF is particularly prevalent in

<http://www.wluml.org/sites/wluml.org/files/SKSW%20Policy%20Briefing%20Series%201_No%20Justice%20in%20Justifications_Greiff.pdf> Accessed 01.03.2013

⁴²⁴ Ibid

⁴²⁵ VVF, according to Wikipedia, is an abnormal fistulous tract extending between the bladder and the vagina that allows the continuous involuntary discharge of urine into the vaginal vault. It is often caused by childbirth (in which case it is known as an obstetric fistula), when a prolonged labor presses the unborn child tightly against the pelvis, cutting off blood flow to the vesicovaginal wall. Available online at:

<http://en.wikipedia.org/wiki/Vesicovaginal_fistula> Accessed 23.02.2013

⁴²⁶ Shuaibu, S. (2012) “Early Marriage and the “V” Word” Available online at: DeltaWomenNGO <<http://deltawomen.blogspot.co.at/2012/02/early-marriage-and-v-word.html>> Accessed 23.02.2013

Northern Nigeria where early marriage is widely practiced by people living in rural communities. She further emphasizes that in North West and North Central Nigeria, the minimum age for marriage is 14; however, some families go as far as marrying their daughters off at the tender age of 11 or 12. The World Health Organization (WHO) reported that 70 percent of the VVF cases recorded in Nigeria come from the North. Punch,⁴²⁷ another prominent news medium in its online version, quoted one Dr Patrick Okolie, an Abuja based medical practitioner, as saying that “the condition (VVF) was one of the two common obstetric fistulas that were found in the developing world like Nigeria”. According to Dr. Okolie, “it (VVF) is generally associated with early age of childbirth and marriage, which is more common in some states”. “The average age of occurrence of VVF in Nigeria, especially in the Northern part of the country”, according Punch’s report of Dr Okolie’s statement, “is between 11 years to 15 years of age.” “It is associated with early pregnancy and unskilled or unattended childbirth”, Punch concludes.

It appears that Moriki was probably only trying to defend his religion by trying to disprove empirical scientific finding at the expense of general people's health. He seems to be *playing to the gallery* with a matter that is so serious that it has now become an international concern, particularly, in parts of Africa and Asia. It is either he does not know or just conniving with the proponents of the traditions that keep many men in total control of women, one of whom is the then Governor of Zamfara State.

Ironically, while many traditional practices are intended to control women’s sexuality and reproductive capacity, these practices expose women to reproductive health risks that threaten women’s fertility and lives.⁴²⁸ These practices have been known to violate a number of human rights contained in various domestic, regional and international human rights instruments. These include the right to non-discrimination on ground of sex; the right to liberty and security of person, which includes the right not to be subjected to violence and recognizes the need for children to receive special protections; the right to health; the right to freedom from inhuman or degrading treatment, which recognizes the inherent dignity of the person. In addition, the regional instrument, ACRWC specifically stipulates that:

⁴²⁷ Punch online news Available at: <<http://www.punchng.com/news/physician-caution-parents-to-prevent-early-marriage/>> Accessed 23.02.2013

⁴²⁸ The Advocates for Human Rights, Supra

*“Any custom, tradition, or cultural or religious practice that is inconsistent with rights, duties or obligations contained in the present Charter shall to the extent of inconsistency be discouraged”*⁴²⁹

And in the case of discriminatory practices, the document prohibits same and guarantees equality of every child under Article 3, *“...irrespective of the child’s or his/her parent’s or legal guardian’s race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status”*⁴³⁰

Traditional practices, as they are referred to today, are so contentious that they have become non-negligible bane of the lives of citizens in Nigeria with regard to customary marriages. I have been asked a couple of times whether they are new political challenges in Nigeria; to such questions I have equally provided an emphatic “No” as my answer. In addition, I also never forget to quickly emphasize that although they may be as old as the country itself, but like old problems with new impacts, they require practical and decisive solutions which must be derived from contemporary strategies.

Quite clearly, a number of the proponents of these ferocious laws may regard this author as someone who has probably lost track of his heritage. This is not unexpected because many African ideologists often contend that people directly affected by colonialism and others who, consequent upon having had the so-called “western education”, suffer partial loss of their genuine African identity. As a result of this conviction, it has become acceptable amongst the shrewd local African nationalists to point accusing fingers, particularly for Africa’s ailing economies and decadent society, and say that those who propagate the eradication of those age-old traditions are the cause of Africa’s present political and economic woes. Truly, there is a strong indication that Africa’s and indeed, Nigeria’s political and socio-economic slow down or relapsing condition are partly as a result of the emergence of “partially assimilated” educational policies from such colonial educational system that was equally as culturally ruinous as the obstinate traditions themselves.⁴³¹ But far from all of these however, this author is only advocating that those who propagate the application of obstinate traditions should be

⁴²⁹ Article 1 (3) Africa Charter on the Rights and Welfare of the Child, available on the website of African Union <http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf>

⁴³⁰ Article 3 Africa Charter on the Rights and Welfare of the Child, available on the website of African Union <http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf>

⁴³¹ See generally Izevbaye (1990) p 127

made to understand that there is need to get out of those onerous and barbarous life styles of our forefathers as we cannot continue to live in the past. In other words, while advocating that our cultural heritage be preserved and celebrated, this author is equally of the view too that there are a number of the so-called traditions or native law and customs that must be de-emphasized if the nation must move forward. And ideally, gender inequality and child neglect are only but a few of them.

However, there are several sides to this discourse, with each of them competing to outwit the others. And therefore, in order not to be seen as taking sides or conniving, I have strived in this thesis to keep a safe distance from all sides of the debate. And even though I may have veered from steering an independent course into a position that may seem to demonstrate connivance; each time that happens, I have always tried to provide reasons for it. And in my earnest opinion, such reasons are usually based on the principles of reasonableness. With such justification, I do hope that I am able to make up for what may have appeared as collusion. And this explains the reason why I have always used both the constitution and some ratified international instruments that are binding on the Nigerian state as the means to highlight what appears to be wrong with our legal and political systems. And when a degree of reasonableness is evidently demonstrated and proven beyond reasonable doubt in matters of this nature, one should be ready to concur with that voice of wisdom. That way, we would not be naively following irrational traditions that are not only cumbersome to practise, but also difficult to be made integral part of our contemporary world of competition, particularly because some of them are not subject to amendment or repeal.

A. SHARIA LAW VERSUS CONSTITUTIONAL LAW

From what my research in the course of writing this thesis has revealed, it is clear that many of the harmful traditional practices are based on religion. In Nigeria, Sharia is a legal system based on the Islamic religion and many of the practices regarded as harmful are backed by Sharia. At least, that is what the proponents make the people to believe. One of the contentious characteristics of the legal system is that its provisions conflict with the legal document – the constitution – from which it supposedly derives its power of operation. Although the proponents of Sharia like to believe otherwise, it must be stressed that the right of free exercise of one's religion does not relieve an individual of the obligation to comply

with a valid constitution on the ground that it is that constitution that prescribes the way and manner by which any individual or group practises their religion. Going by that fact, it has often been mentioned that both the reintroduction of Sharia Penal Code and the manner in which it is applied within the Nigerian legal system are tantamount to violation of the Nigeria's 1999 Constitution. One is then prompted to ask the question: what is Sharia?

According Ayesha:

“The word Shari’a simply means law in Arabic. The root word means ‘the way’. These laws are commonly held to be divine laws. However, they are not divine but merely religious, being based on human—mostly male—interpretations of divine revelation. For the most part the laws themselves are not directly outlined in the Qu’ran.”⁴³²

Many sections of Sharia law attract some elements of “illegality”, “irrationality” and “procedural impropriety” so that the persistent application of such law becomes clearly illogical.

Right or wrong, the following points represent the areas in which Sharia Penal Code appears to be in conflict with both the Nigerian constitution and the international law.

1) Discriminatory practices against women and female children

- In cases of inheritance, Chapter 4:11 of the Koran, provides that a male child is entitled to twice the share of a female child;
- It permits polygamy – a man is allowed to marry up to four wives – but precludes a woman from marrying more than one husband – polyandry.⁴³³ In defence of this provision, some Sharia proponents are often quick in arguing that although the Koran permits polygamy, but it does not require it;
- In any criminal case before a Sharia court, (e.g. rape), four male witnesses must be called. But if the witnesses are women, the number must be eight; which by

⁴³² Imam, A.(2004) “Women, Muslim Laws & Human Rights in Nigeria – Keynote Address, Occasional Paper Series No. 2 published online by Wilson International Center for Scholars (February 2004). Available at: <<http://www.wilsoncenter.org/sites/default/files/nigeria.pdf>> (Accessed 18/11/2009)

⁴³³ Polyandry (the feminine equivalent of polygamy) is forbidden for women (Holy Koran :Al wisa verse 33)

implication means that two women are equal to one man. Although there are arguments as to whether this is actually true in Islamic jurisprudence. For example, in cases of hudud, punishments for serious crimes, 12th-century Maliki jurist, Ibn Rusdn, writes that jurists disagree about the status of women's testimony.⁴³⁴ As a result, many argue that the notion of a woman being regarded as the half of a man is a matter of interpretation. The possible section of the Holy Koran from which this notion has developed in this respect states (in matters of financial transaction only) thus:

*“And bring to witness two witnesses from among your Men. And if there are not two men (available), then a man and two women from those whom you accept as witnesses – so that if one of the women errs, then the other can remind her”*⁴³⁵

- The issue of headscarf that must be worn by Muslim women, but never the men, has caused a lot of controversies in many nations of the world for so long that it does not need to be further debated here. This is also being enforced by some proponents of Sharia in Nigeria. Some also declared that it is wrong for a woman to be dressed in trousers. This, they claim, is an exclusive mode of dressing for men. But paradoxically, the female medical personnel at both public and private hospitals are instructed to dress in trousers as part of their work uniforms so as to prevent the flaunting of any sexually sensitive parts of the female body. What a contradiction!
- The Holy Koran in Chapter 4:15 that stipulates that women who engage in sexual immorality should be placed in confinement till they die or till Allah deals with them in some other way. Whereas the same Holy Koran in Chapter 4:16 provides that if two men are involved in similar act, they should be punished, but if they repent, they should be left alone.
- In the event that compensation (*Diyyah*) is to be paid to a victim's relatives, the Sharia Penal Code provides that such compensation can only be paid to the deceased's *agnatic heirs*,⁴³⁶ thereby discriminating against women.

⁴³⁴ See Wikipedia online available at: www.wikipedia.org

⁴³⁵ Holy Koran in Sura 2:282

⁴³⁶ See section 59 Zamfara State Sharia Penal Code

2) Superiority and authority of man over woman: This again translates into the notion that Sharia promotes gender inequality as it does not guarantee women the right to be regarded as equal to their male counterparts. This inference can be drawn from the wording of the Holy Koran that authorizes the power or guardianship of men over women in several verses.⁴³⁷

3) Sharia law prescribes corporal punishment for women and children and thus sanctions domestic violence: It is apparent from certain sections of Sharia Penal Code that it supports violence against women and promotes physical abuse of children by parents, guardians or teachers. This inference can be drawn from some sections of Sharia Penal Code and the Holy Koran. For example, Sharia law provides for the correction of the child, pupil and wife, by parents, teachers and husbands respectively – a master–servant relationship which implies the authorization for a man to spank his wife or children as long as they (the victims) do not sustain “grievous hurt” as a result - whatever that means.⁴³⁸

In another development, section 76 seems to contradict section 215 both of the same Shari'ah Penal Code which provides that –

*“Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.”*⁴³⁹

The Sharia Penal Code law goes further to state under section 217 that –

*“Whoever does any act with the intention of thereby causing hurt to any person or with the knowledge that he is likely thereby to cause hurt to any person and does thereby cause hurt to any person, is said voluntarily to cause hurt.”*⁴⁴⁰

And finally, section 219 of the same code prescribes punitive measures for such offence viz:

⁴³⁷ See Holy Koran Surah 4:34

⁴³⁸ See section 76 of Zamfara State Sharia Penal Code Law

⁴³⁹ section 215 Zamfara State Shari'ah Penal Code Law

⁴⁴⁰ section 217 Zamfara State Shari'ah Penal Code Law

“Whoever voluntarily causes hurt to any person shall be punished with imprisonment for a term which may extend to six months or with caning which may extend to twenty lashes and shall also be liable to pay damages.”

On the other hand, if everyone is equal in right and dignity before the law as guaranteed under the constitution and international law, it follows therefore that this Penal Code must also grant the woman (being equal to her husband) the right to correct her husband in much the same way as does the man against the wife. But does the Sharia Penal Code allow this?

Furthermore, section 101 Zamfara State Sharia Penal Code Law provides that *a sentence of caning may be passed by any court whether trying a case summarily or otherwise on any offender as the punishment for that offence* and therefore sanctions whipping, amputation, stoning to death and penalty of retaliation⁴⁴¹

In a report⁴⁴² after his official visit to Nigeria in 2007, Nowak, a UN Special Rapporteur on Torture (as he then was) and a Director at the Ludwig Boltzmann Institute of Human Rights Vienna, Austria, narrated at length his discovery of some of the violations which I have described so far in this dissertation. His report to the seventh session of Human Rights Council of the UN reveals that corporal punishment, such as caning, amputation, flogging and stoning to death of offender prescribed by Sharia penal code of the northern states, remain lawful in Nigeria. He reiterates that any form of corporal punishment is contrary to the provisions contained in international law that prohibits torture and other cruel, inhuman or degrading treatment or punishment and therefore a violation of international human rights treaties to which Nigeria is a party.

Such visit by highly placed human rights personality should be encouraged by the international community so as to propagate the reinforcement of the efforts of the local people who are agitating for the promotion and protection of the rights of the oppressed in the country. Nowak's visit came at a time when Nigeria was ruminating on the way forward as it had just emerged from long standing and successive dictatorial military regimes during which the most vital institutions in the country were ruined.

⁴⁴¹ See sections 93, 95 and 101 of Zamfara State Penal code law. For more concise analysis of this see also my illustration below

⁴⁴² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment presented to the Human Rights Council of the United Nations

4) Sharia Penal Code is forced on both Muslims and non-Muslims

The debate as to whether or not the application of Sharia law extends to non-Muslims has been on for a long time without acceptable conclusion. Although the Zamfara State Sharia Penal Code provides that its provisions shall be used to regulate only offences committed by “everyone who professes the Islamic faith”, but in practice, this does not seem to be the case. And also, in its introductory page the document lays down that:

*C. Every person who professes the Islamic faith and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of Shari'ah Courts established under the Shari'ah courts (Administration of Justice and certain consequential changes) Law, 1999, shall be liable to punishment under the Shari'ah Penal Code for every act or omission contrary to the provisions thereof of which he shall be guilty within the State.*⁴⁴³

As Akintola (2003)⁴⁴⁴ rightly notes, the holy Koran shows how God (Allah) warned that Christians should not be made to attend Sharia court. Citing a reference from the Koran, he narrates how a group of Jews came to Prophet Muhammad, asking him to adjudicate in a legal tussle among them. He recounts how God (Allah) advised the Prophet, saying:

“Why should they come to thee for legal decision when they have their own Taorah which contains the laws of God? Even if thou apply it to them, they would still turn away (from you). For they are not really men of faith (Qur'an 5:46)

Akintola further declares that Sharia is not intended to coerce or intimidate people of other religions. In fact, he goes on to say, “any attempt to force Shari'ah on Nigerian Christians for their personal use will be tantamount to gross violation of the provisions of the verse (referring to verse 5:46 mentioned above). It is *haram* (forbidden) in Islam, he concludes.

To buttress the contrariness of the rhetoric of many Sharia proponents that non-Muslims do not fall within the ambit of the application of Sharia law as can be established from the above provisions, Bolaji (2010:123) notes that non-Muslims do suffer a reduction in Nigerian

⁴⁴³ Zamfara State Sharia Penal Code. Contrast this with Ali Ahmad's argument on page 234 - 235 of this thesis

⁴⁴⁴ Akintola “Shari'ah in Nigeria: An Eschatological Desideratum” (2003) p 25.

citizenship as they cannot do certain things that non-Muslims in the non-Sharia states do. Bolaji's investigation reveals that children of non-Muslim minorities who attend state run schools are compelled to wear the Islamic headscarf (*Hijab*). And also in Azare in Bauchi State, 12 nurses were reported to have been sacked for non-compliance with a dress code based on Sharia. Furthermore, it has often been alleged that the Christian communities face discrimination in the distribution and allocation of land for construction of their churches and schools.⁴⁴⁵ And also, the extension of the penal code and the non-compliance with the directive that stipulates the employment of Islamic teachers to teach Islamic studies has led to the closure of some of their schools.⁴⁴⁶ And regarding Nigeria's purported secular constitution, Bolaji (2010:124) concludes that the Islamic conception of citizenship has overshadowed all other conceptions of citizenship as this has overridden Nigerian citizenship and denied it its secular character; therefore making the citizenship arising from the extension of Sharia an atypical of the much talked about asymmetrical federalism.

Secularism and the supremacy of the constitution

In a homogeneous society (although such society may be hard to find in practical sense), it may be easier to develop a single framework – a kind of one-size-fits-all-legal arrangement to cater for the legal needs of the entire populace. On the other hand, if there are reasons to believe that the peoples that make up a particular state are heterogeneous, which is the case with Nigeria, one would expect that that would augment the need to adopt some kind of cross-cultural method of governance: such that finds expression in the adoption of a single instrument. And that instrument must be one that addresses, to a very large extent, the yearnings and aspirations of the general populace, taking into consideration the diverse social, cultural, ethnic, religious, linguistic and geographical backgrounds of the people. This would usually involve the making of compromises by all sides of the divide and invariably solicit for the non-partisan document that lends support to secularism. But instead, Nigeria opted for what it refers to as legal pluralism which in some quarters is also regarded as amounting to *asymmetrical arrangement*.⁴⁴⁷

⁴⁴⁵ See Bolaji "Shari'ah in Northern Nigeria in the Light of Asymmetrical Federalism" (2010) p 123

⁴⁴⁶ Ibid p124

⁴⁴⁷ See Bolaji "Shari'ah in Northern Nigeria in the Light of Asymmetrical Federalism" (2010) p 115

The concept of legal pluralism has generally been used (as a descriptive theory) to refer to situation in which two or more legal or normative orders co-exist perfectly within the same social setting. Such is generally believed to characterise the Nigerian state, as I mentioned earlier. But from all indications and in my opinion too, it appears erroneous to think that that is the case with Nigeria. The closest to *legal pluralism*, in terms of practical semblance therefore, is what kamau (2009) describes as “*weak legal pluralism*”, which, according to her description, arises in situations where parallel legal regimes co-exist but depend for their legitimacy on the recognition or accommodation accorded them by the state legal order.⁴⁴⁸ Even then, it is also hard to say that the latter is the case because, while some proponents of Sharia have it that Sharia is a substantive law by itself, others even go further to claim that Sharia is superior to the constitution and to all other statutes enacted by virtue of that constitution. This assumption is premised on the somewhat dogmatic belief that Sharia is not man-made and is therefore the supreme law. Many Sharia law proponents seem to rely on subjective reasoning as they usually draw references from the Koran to support their standpoint. For example, in relation to the rationale for Sharia law application in Nigeria, Akintola, a lecturer in Islamic Studies at the University of Lagos, has this to say:

*“Homo sapiens have rejected the Divine Manual (Shari’ah) of the Supreme Maker. They are now paying dearly for it. The world is in chaos. Our creator knows our nature. He knows how best to guide us. He therefore gave us Shari’ah, his own Divine law, to protect the dignity of man. But man continues to rebel against his Maker thinking that he can design his own law. The result is confusion.”*⁴⁴⁹

From the above statement, it is clear that because it is believed that “Allah is All-knowing, All-wise” (Koran 4:26), his law is a perfect law, and therefore, whenever there is a conflict between Sharia law (believed to be Allah’s own law) and man-made law, (which, of course, includes the constitution), Sharia law prevails. Hence Akintola (2003:11) writes that “man cannot be compared to God. “Neither can the laws of man. Human beings must therefore submit totally to God and allow the Supreme Creator’s law to guide his entire life”.

In a democracy the power lies with the people. And it is them that decide what is law and who represents them when such law is being made and in all public matters, irrespective of

⁴⁴⁸ Kamau (2009) p 135

⁴⁴⁹ Akintola (2003) p 8

tradition, religion or other affiliations. But the process of choosing those representatives and defining their *modus operandi* must be contained in certain document in the form a constitution. This is mainly to guide against treachery or other objectionable use of those powers of representation on the part of those representatives. Bolaji (2010) critiquing the thesis of one Mazrui (2001), which is alleged to contain the views of many intellectuals who accepted that the extension of Sharia from personal law to penal code could be accommodated under the theory of “asymmetrical federalism”, describes “asymmetrical federalism” as variation that are discernible in the constitutional provisions or policies of a polity in which some regional governments are granted special powers to carry out certain functions.⁴⁵⁰ This standpoint seems comparable to Kamau’s “weak legal pluralism” theory that I have earlier mentioned, except that even the weak legal pluralism principles, as they are described, do not completely encompass, in totality (or fall within the ambit of), the Nigerian system.

Misinterpretation of the Constitution

Consequent upon the misunderstanding ascribed to *asymmetrical* arrangement of the Nigerian society which equally leads to the misinterpretation of the constitution, many discrepancies which have thrown the nation into disarray have emerged and have thus left many in much apprehension. And furthermore, the proponents of other legal regimes now see the constitution as merely one of the many instruments that regulate the enactment of the various laws in the country. And they have thus resorted to promulgating their own laws which apparently tend to violate the supposedly “omnipotent” constitution.

Astonished as well as confused by such misinterpretation, Murna (2009), critiquing the reintroduction of the Sharia Penal Code, describes how Muslims were quick to point out certain areas that seemed inconsistent with their cultural and religious values as if the constitution were subordinate to Sharia law. He goes further to agree on how proponents of Sharia claimed that the 1999 Constitution of the Federal Republic of Nigeria provided the legal foundation for the introduction of Sharia and how they averred that such inference complied with the wordings of section 38 (1) which provides for the entitlement of everyone to the freedom of thought, conscience and religion and the freedom to change one’s religion. They often draw critics’ attention also to section 275 which provides for any state requiring it

⁴⁵⁰ See Bolaji “Shari’ah in Northern Nigeria in the Light of Asymmetrical Federalism” (2010) p 115

the freedom to establish Sharia Court of Appeal. According to Murna, emotions have often skewed the debates into further complexities, forcing members on either side of the aisles to reject astute legal reasoning and rely solely on subjective, sometimes religiously biased reasoning. Murna's analysis also confirms the very obvious and constant attitude of some proponents of Sharia who, when justifying their position with regard to the extension of Sharia law to penal code, refer to sections of the constitution, but at the same time, are also quick to reject the same constitution where the meanings of other sections of it appear to run contrary to the provisions purported to support their earlier claim.

When interpreting the law, the usual practice is to look at the law in its totality. And therefore, it must be stressed here that a thorough examination of most of those sections which Sharia proponents claim to support the application of Sharia would dispel such erroneously drawn inference with respect to the actual intent of the Constitution when such sections are read together with the other related sections of the same constitution.

Therefore, while the inference regarding the constitutional authority to practise Sharia may be drawn from those sections of the Constitution that provide for the establishment of Sharia Courts of Appeal, such inference must not be drawn without having other related sections of the constitution in contemplation. For instance, while section 275 provides for the establishment of such courts which most proponents have often relied on subjectively, it must also be borne in mind that section 277 only expressly confers upon such courts "appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law". And for that purpose, the Constitution is quite explicit in subsection (2) of section 277. Apart from limiting the scope of Sharia court to matters of Islamic personal law, it precisely limits it to matters relating to marriage concluded in accordance with that law, including question relating to the validity or dissolution of such marriage and guardianship of infant. And under section 277 (2), the constitution also shows the limit of Sharia court regarding what it refers to as, *wakf*, *gift* and *will*, and the application of Sharia in such matters is permissible only where all the parties to the proceedings (endower, donor, testator, or deceased person, etc.) are Muslims. Even in situations where all the parties to a particular proceeding are Muslims, the constitution requires, in addition, that they (the parties) must have also consented to such Islamic law being applied in their case. Furthermore, I must add here that this section must also be taken together with section 42 of the same constitution which prohibits discrimination on any ground, including that of religion. Evidently, the constitution does not intend to

bestow a jurisdiction on any part of the juridical arm in violation of its own provisions. It follows therefore that the application of parts of Sharia law that tend to violate some sections of the constitution, particularly its extension to criminal jurisdiction, is a violation of the constitution and therefore void. This is irrespective of the textual connotation which the proponents of Sharia have often attached to only a part of section 277 (1) so as to perpetrate the misapplication of the law in somewhat contradiction of the constitution as a whole. That subsection if taken as a whole (and not in parts) talks of the “COMPETENCE” of the court which are firstly: "Civil Proceedings" and secondly: "questions of Islamic personal law".⁴⁵¹ Even then, the subsection is not entirely on its own; subsection (2) stresses on the jurisdiction of the court, particularly matters involving not just Muslims alone, but Muslims who accept the authority of such court.

On the other side of the debate however, there are a number of people who believe in the practice of secular system in Nigeria, irrespective of our various religious inclinations. For instance, Murna (2009), who appears to have also closely followed the arguments, has in his very comprehensive analysis, also lashed out at those opposed to the application of Sharia, saying that their reasoning, which he likens to those of the proponents of Sharia, is just as shallow. Murna argues that they often engage in what legal logicians call inductive reasoning. He describes their arguments as often based on spurious assertions, often generalised, with no cogent premise supporting their claims. Such arguments, he further opines, are not deductively valid; nevertheless, it is improbable that their conclusions are false; as they are based on selective reasoning which he agrees may be logical, but false.

B. SHARIA LAW VERSUS STATUTES

For the sake of female children, one may also need to look at the rules under the Child

Rights Act 2003⁴⁵² which provides under section 10 that no child shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. Apparently, this conflicts with some rules under Islamic law; some of which I mentioned earlier.⁴⁵³

⁴⁵¹ See section 277 (1) of the Nigerian Constitution 1999, available online at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>

⁴⁵² This Act is a Federal legislation made in response to ACRWC and CRC and it has only been adopted by some of the Houses of Assembly of the States of the country as required by section 12 of the 1999 Constitution. At time of writing, 24 out of 36 States have so far adopted it.

With regard to validity of marriage in terms of age and consent, CRA expressly provides that early and forced marriage and child betrothal are prohibited.⁴⁵⁴ Anyone found in violation of this provision is liable on conviction to a fine of five hundred thousand Naira or imprisonment for a term of five years. It follows therefore that anyone who marries a child under the age of 18 and decides to have sexual intercourse with the child commits the offence of rape and is liable on conviction to life imprisonment under the CRA.⁴⁵⁵ One other very good provision in the CRA that is worth mentioning, in relation to unlawful sexual intercourse with a minor, is the section which provides that the fact that the offender believed that the minor was more than 18 years of age is no defence.⁴⁵⁶

The inference of primacy of the CRA 2003 and Evidence Act over state legislation can be drawn from the fact that they are both pieces of Federal legislation enacted by the National Assembly. And in that connection therefore, attention should be drawn to the fact that the 1999 Constitution provides that in case of inconsistency between federal and state legislations, the federal legislation shall prevail and the inconsistent part of the State legislation shall be void.⁴⁵⁷ The effect of this is that the Sharia Penal Code and the Customary Law, being somewhat in the rank of State legislation, are subordinate to Federal legislation. Therefore, those sections of both Sharia and customary laws that are inconsistent with CRA 2003 and Evidence Act are, to the extent of their inconsistency by virtue of the constitution, void. Accordingly, the CRA 2003 might not have been in force at time of writing due to the fact that it had yet to be fully adopted by majority of the States of the Federation, as provided for under the Constitution, but the Evidence Act was already in force.

It must however be noted that although Sharia law was re-enacted recently in Nigeria, it is not necessarily a statute or Act of Parliament per se as it is drawn primarily from Islamic religion. And therefore, it is not subject to repeal, neither is it subject to reform on account of human logical or critical legal reasoning.

⁴⁵³ See section 14 Evidence Act L.F.N 1990 and the concise outline I have made under “Points of collision between Sharia, the Constitution and international law” in the text

⁴⁵⁴ Section 21 – 23 Child Rights Act 2003

⁴⁵⁵ Section 31 Child Rights Act 2003

⁴⁵⁶ See section 31 (3) Child Rights Act 2003

⁴⁵⁷ See section 4 (5) Constitution of the Federal Republic of Nigeria 1999

C. SHARIA LAW VERSUS INTERNATIONAL LAW REGIME

When one thinks of Sharia law, the issues that come to mind are its discriminatory and brutal contents which, if abolished, will put the rest of its provisions in proper footing. The golden rule is “do unto others as you would want them do unto you”. How this rule plays out in relation to the discriminatory content of Sharia, for example, is that, if all the male proponents are treated the way women are treated, there is the tendency that the law would have since been amended or repealed. Let us imagine, for example, a situation whereby married women are allowed to practise polyandry; if they could beat up their husbands; and if only men must wear the hijab, niqab, and all sorts of veil that Muslim women (and never the men) are made to wear.

At the international level, the true meaning of discrimination with regard to female gender is clearly outlined in Article 1 of CEDAW. And Article 2 of the CRC also prohibits such practices with regard to a child, irrespective of gender.

With regard to the punitive measures contained in the Sharia Penal Code however, while it is understandable that the Penal Code forbids anyone from publicly insulting or seeking to incite contempt of “any religion” under section 400, it tends to violate the right to freedom of religion and worship principles under international law. This inference can be drawn from the Penal Code’s section that provides that the “worship or invocation of any subject or being other than Allah” is unlawful. It follows, by implication therefore, that the worship or invocation of other subject or being, other than Allah, amounts to worshiping of “juju” which the Sharia penal code prohibits under section 405 and which attracts death sentence under section 406 on conviction. This is because it is believed that there is no other “God” but Allah.

It is also quite clear from sections of CAT that torture or cruel, degrading or inhuman treatment or punishment should not be administered by ratifying state party to the instrument. The instrument lays down that no person shall be subjected to such acts and State Parties must prevent such practices from being committed by public servants.

Although under CAT, a number of issues have arisen as to what amounts to torture, degrading or inhuman treatment, but the United Nations General Assembly’s definition of “Torture” can

be of immense help at this juncture. It provides that “Torture constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment”.⁴⁵⁸ Torture is clearly defined under Article 1 of CAT to include mental and emotional pain deliberately inflicted on anyone as punishment for the act s/he has committed. By virtue of that express provision therefore, I cannot seem to imagine how a woman, a child or a school pupil can be made to undergo forceful coercion of any sort in order to be *corrected* within the meaning of Sharia law without such coercion not amounting to torture. Even if an act is regarded as not being severe enough to amount to torture, inhuman treatment or punishment within the meaning of CAT, but it does not preclude such treatment from amounting to “*assault and battery*” or “*Child abuse*” under any civilized public law, which, pursuant to modern constitutions and other ratified human rights instruments, must prohibit child abuse, domestic violence and other related offences. And from the wording of the provision, if the act is to forcefully “correct” the individual, a certain degree of hurt which, in other words, means harm, ache, pain, etc., must be inflicted on the victim in order to achieve the desired result. If that be the case, the question then arises thus: “how does one determine the borderline between what is normal and what is severe?” Quite clearly, human beings react to harm, hurt, ache and pain in different ways because we all do not have the same level of resilience, fortitude or endurance. Therefore, it is difficult, if not impossible, to draw a line between what is “grievous” and what is not, as this depends on the individual concerned.

I am particularly concerned about the Zamfara State Sharia Penal Code because Zamfara State was the first State to reintroduce Sharia law and therefore all other States that have adopted Sharia law modelled theirs after Zamfara State’s.

It is also obvious that many international law instruments will render negative the Islamic rule, particularly those which, for instance, preclude an illegitimate child from inheriting the estate of his illegitimate father. Although under certain circumstances, some statutes may allow some discriminatory practices when it comes to imperfect bequest or the transfer of a family’s long-standing inheritance. But even then, the judges are only allowed to use their objective discretionary powers to reach such decision.

Similarly, the non-discrimination principle in international law will invalidate the formula under Islamic law of inheritance where the male child gets twice the share of female child or

⁴⁵⁸ Art 1 of UN General Assembly Resolution 3452 (XXX) of 9 December 1975: Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment.

that a non-Muslim child cannot inherit from his Muslim father and vice-versa. Under Chapter 4:11 of the Holy Koran, a male child is entitled to twice the share of a female child in cases of inheritance. Similarly, Sharia law prohibits right of inheritance between two persons of different religions. All of these seem to me unacceptable practices in a modern world that has now become a global village where what affects one segment triggers some sort of chain reaction that permeates the others.

Points of collision between Sharia, the constitution and international law

For easy understanding of how some rules in Sharia law contradict provisions of the Nigerian constitution, as well as the international law, I have put in perspective (tabular format) below some of the points where they collide with each other.

Domestic Instrument		Regional Instrument Africa		International Instrument			
Sharia/Koran*	1 Nigeria's 1999 Constitution	2 ACHPR 1981	3 ACRWC 1990	4 ICCPR 1966	5 CEDAW 1979	6 CAT 1984	7 CRC 1989
Legal Implication	Section	Article	Article	Article	Article	Article	Article
Discrimination							
Polygamy is allowed for men, but polyandry for women is forbidden ⁴⁵⁹	42,	2, 3, 4, 18	1	3	2, 3, 15, 16		
In inheritance, female children are entitled to half of what male children are entitled to. ⁴⁶⁰	42	2, 3, 4, 18	3, 21	3, 23, 24, 26	2, 5		2
Women guilty of lewdness are liable to confinement for life (without pardon?), whereas men guilty of same offence can plead for leniency and be pardoned ⁴⁶¹	42	18		3			
Cruelty							
Women and children are allowed to be "corrected" by whipping them. ⁴⁶²	34	5	16, 17		2		2, 19
Stoning to death of criminal offenders; Whipping of offenders; and amputation are prescribed ⁴⁶³	34	5	1, 16, 17	7		2, 4, 16	37
Inequality							
In criminal cases (e.g. rape), 8 female witnesses are equal to 4 male witnesses	42	2, 3, 18	3	14, 26	2, 3, 5		40
Men are generally regarded as masters of women ⁴⁶⁴	42	2, 3		3, 23	2, 5, 15		
Ultra vires status							
Extension from Personal Law to Penal law jurisdiction	1, 10, 277						

*In addition to the provisions contained in the Zamfara State Shari'ah Penal Code, the instrument specifically outlines other punitive measures for offences under section 92 which, if they be offences under the Koran, shall also be punishable under the instrument. Another issue to contend with is the fact that the Holy Koran permits *lex talionis*—the retribution of an eye for an eye (surahs 2:178, 5:45 and 16:126)⁴⁶⁵

⁴⁵⁹ See The Holy Koran Chapter 004:003 – An Nisa

⁴⁶⁰ See The Holy Koran Chapter 004:011 – An Nisa

⁴⁶¹ See The Holy Koran Chapter 004: 015 – 016–An Nisa

⁴⁶² See sections 76 and also 95 Zamfara State Sharia Penal Code. See also the Holy Koran – 004: 004 - An- Nisa

⁴⁶³ See sections 93, 95 and 101 Zamfara State Sharia Penal Code, (See also section 92)

⁴⁶⁴ See The Holy Koran Surah 004: 034 - An- Nisa

⁴⁶⁵ See Zamfara State Shari'ah Penal Code Law 2000, published by Dr Shima Atallah, available online at:

<<http://www.shaimaatalla.com/vb/showthread.php?t=758>>



No	STATE	Capital City	No.	State	Capital City
1	Sokoto State	Sokoto	7	Kano State	Kano
2	Kebbi State	Birni Kebbi	8	Jigawa State	Dutse
3	Niger State	Minna	9	Bauchi State	Bauchi
4	Zamfara State	Gusau	10	Yobe State	Damaturu
5	Katsina State	Katsina	11	Gombe State	Gombe
6	Kaduna State	Kaduna	12	Borno State	Maiduguri

Figure above: A map of Nigeria and table showing States that have adopted the practise of Sharia law⁴⁶⁶

⁴⁶⁶ See map of Nigeria depicting areas where Sharia law is applied, courtesy of www.world-gazetteer.com

Chapter 17

HARMFUL TRADITIONAL PRACTICES AND THE LAW (II)

In this chapter, I will attempt to throw more light on the issue of harmful traditional practices through discussion of the types mostly prevalent in the southern part of Nigeria. I shall also be looking at the causes and the complication associated with the effects of the practices as well as the advantages and disadvantages of some of them. I must not forget to stress that I intend to critically appraise some topical issues in customary law just as I have done in the case of Sharia law but without the latter being subsumed in it, other than by analogy. Although the application of Sharia law also brings with it some elements of harmful traditional practices, I intend to deal mainly with customary law in this chapter, unless there is need to drag in some Sharia law matters that also amount to harmful traditional practices when they interconnect with each other. I am distinguishing customary law from Sharia law here as prescribed by the Plateau State Customary Court of Appeal Law 1979 which expressly provides in its definition of customary law that the latter does not include Islamic personal law. Perhaps this approach was adopted as a result of the animosity constantly exhibited by some Sharia proponents whenever they came across sections of the law - constitutional or statutory - in which Sharia law was categorized as customary law.

In addition to my earlier analysis of harmful traditional practices, perhaps a look at Article 5 of the Protocol to the African Charter on the Human and People's Rights on the Rights of Women will help draw more attention to the level of their seriousness in the international arena. It expressly condemns all forms of harmful traditional practices and violence against women in very strong terms, while at the same time, it encourages the support for victims of these acts.

A. CUSTOMARY LAW AND THE LAW

I am looking at customary law and its intricacies from the perspective of harmful traditional practices, particularly as they affect the family. Quite clearly, the application of customary law may appear somewhat out of the ordinary from its superficial looks. But a closer look at

its intrinsic attributes, vis-à-vis, the gender inequality, potentially polygamous nature of its marriages, the child neglect, the health hazards, the discriminatory practices, domestic violence, etc., will reveal its truly pathetic state. Although so much has changed over the years in terms of how the law is being applied in many communities in Nigeria, but it still appears critical. This indication could also be argued from a different perspective, particularly from the general belief that customary law changes as the society changes. Perhaps the pace at which it changes is much too slow to be easily noticed. Otherwise, how else can one explain the fact that the principles of customary law have not changed to accommodate (or adapt to) those modifications in the Nigerian society?

Although the good attributes of customary law are many but the concerns raised by matrimonial causes, such as marriage, divorce, inheritance, discrimination, domestic violence, etc., that are subject to its rules, appear to be more critical and therefore necessitate a more serious discussion. Therefore, I intend to throw some light on some of them here.

Polygamy (Polygyny)

Let me start with the issue of polygamy (or polygyny) which is one of the major characteristics of customary law relevant to this discussion. In doing this, I think it is also helpful, to start by distinguishing between polygyny and polygamy because they are now commonly used inter-changeably in many legal texts to the effect that it sometimes poses some sort of problem as to which is which.

Polygamy which, most times, is used in place of polygyny, is “the state or practice of having more than one spouse simultaneously”. That is the long and short of it. But historically, it means “the fact or practice of having more than one spouse during one’s lifetime, though never simultaneously”.⁴⁶⁷ The reason for this categorisation is that “until the third century, polygamy included remarriage after a spouse’s death because a valid marriage bond was considered indissoluble”.⁴⁶⁸ Therefore, if a spouse got married to a single spouse, even after the death of his earlier spouse, such remarriage would still be regarded as *successive polygamy; serial polygamy; or sequential polygamy*, since marriage was only contracted once in one’s lifetime. Polygyny, on the other hand, “is the practice of having more than one wife

⁴⁶⁷ See generally Black’s Law Dictionary 8th Edition (2004)

⁴⁶⁸ Ibid

at the same time”.⁴⁶⁹ And this describes the subject matter under discussion more vividly and therefore more relevant. In most modern legal texts however, both are used interchangeably. For the purpose of this discussion therefore, I shall make use of polygamy (being more commonly used) as meaning polygyny.

Polygamy, as practised in Nigeria, is known to be as harmful and disastrous as can be. I say this with all sense of responsibility because I have experienced it first hand – not as perpetrating agent though, but rather as a victim of its unpleasant consequences. Although some may declare that they have never had any such unpleasant consequences but I make bold to say that such persons are either pretentious or have been engaged in a somewhat “master to slave” sort of marriage. In such marriages, the relationship that exists is such that the woman is habitually in the marriage only as a mere chattel and is therefore always at the whim of the master-husband.

How is it done? A man who is of age gets married to a young woman, irrespective of whether he found the woman for himself or the woman was betrothed to him by her parents at the request of his own parents⁴⁷⁰ and two or three years into the marriage, he feels he has had enough of the woman; he then plots to get another one: preferably a younger one; the choice is entirely his. There are somewhat curious instances too whereby the first wife may look for a younger woman with whom she thinks she can cohabit and bring her home to her husband for marriage. Such marriages usually blossom peacefully at the beginning, but it is only a matter of time before unhealthy rivalry sets in; bringing with it all sorts of ills which will eventually permeate the entire family (both immediate and extended). And in the end, the man, instead of regretting ever taking a second wife, reasons that a third one will bring about the desired peace to the home and he goes for it. This may go on endlessly until the home begins to look like what someone once called “miniature federal community inhabited by various constituents in the form of family units”. This is because the family is usually divided according to the number of wives and therefore each begins to fend for itself; which invariably leads to child neglect and denial of women’s rights. Although it could be argued that the fault lines run also in the direction of the women themselves, but the root cause of the women’s poor understanding of things is traceable to their poor economic position which is, in turn, determined by their poor level of education, social awareness and political

⁴⁶⁹ Ibid

⁴⁷⁰ See more details on Customary law marriages in the chapter on Marriage (Nigeria)

emancipation. All of these perpetually keep the men in position of authority to the effect that the women are made dependent on their “whims and caprices”.

If any of the wives feels that she has had enough and petitions for divorce, then the problem as to who takes custody of the children becomes an issue. The matter may turn very sour and sometimes altercation-filled! This is because it is at this point that the man who, under customary law, is regarded as the “owner” of the children and their mother, decides, independent of their mother, what he wants to do with them all.

What usually happens is that, if the woman is bent on moving on with her life, and she reasons that petitioning for the custody of the children may complicate matters, she may decide to go away, leaving her children behind. In some cases the man may decide not to let her go. In the latter instance, the man may demand to be paid the “dowry” as compensation. This may include money and other gifts given to the parents of the woman by the estranged husband during and before marriage. The trouble with this is that, the woman’s parents may never be able to refund all of them and as a consequence, may encourage their daughter to remain in the marriage, no matter how violent, at least, to save them the impending embarrassments.

Polygamy may be enjoyable to the master but the enjoyment is at the detriment of the enslaved wife; to put it mildly. It can also be very wearisome and demeaning as every woman in it is usually seen as just a number that can be replaced instantaneously without due consultation. But this has now reduced greatly as more and more women are becoming economically or financially independent of their husband.

Some of the advantages and disadvantages of polygamy as have been highlighted by many commentators can be summarised as follows:

Advantages of polygamy

1. **It reduces the problem of man-shortage** – in most countries of the world, finding the right husband or wife is a major task and therefore the search for “Mr Right” or “Miss Right” becomes almost illusive. This is why many believe that polygamy, if

consensual, could bring about the much desired relief (albeit one-sided, as polyandry – the equivalent opposite of polygamy – is forbidden for women in most societies). This is because some women find love in men who are already married. Although this can, arguably, be attributed to inequitable distribution of economic resources that put men in perpetual control of scarce resources. That is to say that because men deprive the women of economic power to the effect that they (the women) are often left at the mercy of the men, they are “ostentatiously” submissive to the men. And this gives the men the upper hand and keeps them in perpetual control.

2. **It reduces infidelity on the part of the men** – it has often been argued (this is again one-sided) that polygamy prevents the men from having too many concubines outside of their marriage as it is legal for them to marry more women of their choice. According to Ann Griffiths (2001:114), it may be argued that polygamy, far from discriminating against women, provides for a more inclusive approach that is not necessarily at odds with women's interests
3. **It boosts reproduction** – it allows for the reproduction of many children and increases the size of the family (one-sided) which translates into some form of security against outbreak of pandemic which may result in mass infant mortality.
4. **It boosts the family's social status** – it enhances economic resources in form of manpower which translates into massive income which, in turn, boosts the social status of the man and the entire family within a given society.
5. **Source of social security** - Anne Griffiths (2001:114) cites Hellum (1998) as noting in the latter's research on Zimbabwe, how polygamy played an important role in protecting women's interests, especially where an older woman was childless and in danger of being abandoned by her husband. Had this been under the Act marriage, the man would have thrown the older woman out and married a younger one.

Disadvantages of polygamy

1. **Infidelity** – research has shown that it is difficult for a man to satisfy a woman sexually and as a result, unconfirmed sources have it that about 90% of women do not get orgasm. If this were to be true, it means that if a man can hardly satisfy one woman sexually, marrying more than one will only create room for infidelity on the part of the sex-starved wives who may crave such satisfaction from outside sources.
2. **Vulnerability to sexually transmitted diseases/HIV and AIDS** – there is no denying the fact that changing sexual partners creates room for transmission of sexually transmittable diseases, including HIV and AIDS. Because the man goes round his wives, one after the other, thus, if one becomes infected, irrespective of how she became infected; all the others will be infected. And because the man has the right to bring more and more women from the outside into the home, this puts him at great risk of contracting any form of sexually transmitted diseases with which he will subsequently infect his other wives.
3. **Incitement to enslavement of women** – polygamy under customary law is a form of enslavement in that the women are like goods which, if worn out as a result of long usage, can easily be replaced with new ones. This is analogous to chattel. And since polyandry is forbidden in most of the societies where polygamy is practised, such discriminatory act can only exist in somewhat “master–slave” relationships.
4. **It exacerbates child neglect** – because there are too many wives and children to cater for, there will always be inadequate resources to go round. What happens in such circumstances is that the children are left to fend for themselves or left in the hands of their mothers, who, in most cases, do not have adequate means to cater for them. This may subsequently make the children (and sometimes their mother) vulnerable to cases of human trafficking, sale of children, child prostitution and child pornography, thievery, early marriage, drug trafficking and other social vices.
5. **Increases poverty rate** – family members will always require the basic necessities of life. In the absence of these therefore, the definition of poverty, which is “the condition of being indigent”, will be inevitable. It is obvious that because of the size

of the family, the women and children cannot always be adequately provided for and therefore, the rate of poverty in such family is usually very high.

6. **Increase in illiteracy rate** – high incidence of illiteracy in most Nigerian homes is as a result of inadequate financial resources. What this means is that there is a causal connection between polygamy and poverty, child neglect, corruption, diseases, illiteracy and increased infant/maternal mortality rate; whichever one comes first. And a closer look at all of these elements will somehow reveal how closely knit and interdependent they are with each other.
7. **Spread of infectious/contagious diseases due to over-crowding in the home** – because most polygamous homes are highly congested, this makes the environment dirty and eventually creates room for the spread of infectious/contagious diseases, such as cholera, tuberculosis, malaria, etc.
8. **Decline in life span, widowhood and hardship** – because the men usually marry women much younger than they are, the age difference makes it more likely that the women will survive the men. What this implies is that the women become widowed very early in life. And because of the harsh condition experienced by the widowed women consequent upon the demise of their "breadwinner" husbands, the life span of the women are also drastically reduced.
9. **Other medical conditions** – in most polygamous homes the head of the family, especially, is usually restless as there is always one problem or another. This restlessness usually leads to high blood pressure, heart attack and paralysis resulting from stroke.
10. **It promotes domestic violence** – in most polygamous homes, there is always one problem or another which most times arise from unhealthy rivalry and this gives room for gossiping, bickering, yelling, screaming and fighting. In order to quell the situation, the man (the husband) gets agitated and aggressive. And if the man or any of the parties to the fracas does not exercise restraints, a very disturbing and unwholesome atmosphere can result. This happens almost on daily basis.

11. Discriminatory distribution of family wealth – it is not unusual (it is indeed natural) for a man to love one of his children or wives more than the others. This is demonstrated by the way the most beloved is showered with more gifts and other items than other members of the family. Exhibiting such traits in a polygamous setting spells disaster in the form of unhealthy envy and bitterness in the home. This behaviour is mostly demonstrated during the distribution of family wealth either *inter vivos* or by a Will. In fact in so many polygamous marriages, you find out that a better part of a man's wealth is either willed or transferred *inter vivos* to the most beloved child or wife, to the detriment of the others. Most of such bequests are usually challenged on grounds of unfair or discriminatory distribution. It could also be challenged on the ground that such bequest is in violation of their custom and therefore there is usually suspicion of foul play.

B. INHERITANCE UNDER CUSTOMARY LAW

As I earlier discussed in this thesis, inheritance under customary law is quite a daunting issue and therefore a matter requiring much attention in any legal discourse. In some ethnic groups, a woman is regarded as either a negligible part of the family or a mere chattel that may, on the demise of the man, be distributed along with other parts of her deceased husband's estate. This custom however, varies from place to place. For example, there are differences between the Yoruba Customary law and that of Igbo ethnic communities. The Igbo customary law particularly prohibits women from inheriting land from their lineage. Land can only pass from father to male children. If women desire to go into farming, then any piece of the land belonging to their father or husband that they decide to cultivate must be on a temporary basis and not in perpetuity; even if they lived in the same house with the deceased father or husband.

And as I analysed earlier, if the deceased left a Will (even if it is a nuncupative Will), his estate may be distributed in accordance with that Will, but in the absence of a Will, the estate is distributed in accordance with customary law principles of the areas regarded as the deceased's domicile or where the property in question is situated.⁴⁷¹ There are statutory provisions to that effect. Sadly enough, this is time when the fate of the woman is left hanging

⁴⁷¹ See the Supreme Court's decision in *Mojekwu v Mojekwu (Iwuchukwu)* (2004) 4.S.C. (Pt. II) 1

on the co-operation of the head of the family because she cannot inherit land from her husband's estate; not even from her father's lineage. The family of the deceased usually takes over the ownership and control of such property.

Conversely, the same customary law, according to Onuoha, also generally precludes a husband from inheriting his deceased wife's share from her family's property, for the husband is treated as a stranger who is not entitled to share in the property of the family of which he is not a member.⁴⁷² But the man cannot be precluded from taking over his late wife's property.

This practice is particularly pathetic and dehumanising in circumstances where a man dies without a male child. In the Igbo tradition, there is a customary practice whereby one of the daughters of the deceased is chosen to stay back in the household for the purpose of procreation on behalf her late father. She does so by selecting male lovers with whom she reproduces children who will eventually bear her father's name so that the father's lineage does not go into extinction. According to Bamgbose (2010), such women are known in Igbo culture as "Idegbe" and in Edo culture they are called "Arewa" (If such practice in the latter culture ever existed, it does not exist anymore in present day Edo to the best knowledge of this author). In such situation, there is no question of marriage because the objective is secret and therefore bride price is not paid. And a woman is not regarded as married if a bride price is not paid on her; which, in practical terms, means that every child born of such a woman during her "Idegbe" period, belongs to her family and bears the mother's maiden name as his/her surname. It does not make any practical difference whether the biological father of such children (if known) subsequently marries her. Such were the characteristics of the "Oli-ekpe" custom in Nnewi community in Nigeria. In the case of *Mojekwu v Mojekwu*⁴⁷³ which I earlier discussed, the Court of Appeal sitting in Enugu found such "Oli-ekpe" custom (also reported as "Ili-Ekpe" in other documents) discriminatory and in violation of the rights of women to marry and that the female child does not need to perform "Nrachi"⁴⁷⁴ rites in order to inherit her father's estate. Although the Supreme Court eventually quashed the Appeal

⁴⁷² In *Caulcrick v Harding* (1926) 7 NLR p. 48, the deceased landowner left property for his three daughters, one of whom was the plaintiff's deceased wife. The plaintiff's husband claimed a third share of the property by virtue of his deceased wife's right. It was held that the plaintiff had no such right

⁴⁷³ (1997) 7 NWLR 283

⁴⁷⁴ "The Nrachi Ceremony", according to Onuoha, citing *Mojekwu v Ejikeme* (2000) 5 NWLR pt. 657 402, available online at: <www.icnl.org/knowledge/ijnl/vol_10iss2art_4.htm>, "is done to enable a daughter bear children in her father's compound in order that the children if males will represent the father of the mother". "Such children", if males", he further observes, "will inherit the mother's father's property". Onuoha however regrets that though the "Nrachi may be seen as the customary equitable intervention to cure the mischief in Oli-ekpe, yet it is still repugnant to natural justice, equity and good conscience".

Court's decision on the ground that the lower court did not follow procedural rules, but the woman in question was eventually allowed to inherit because the apex court applied the principles of a more favourable custom in preference to the discriminatory one (Ili-Ekpe) chosen by the appellant (the uncle of the respondent). This custom has been highly criticised by legal academics and commentators. With regard to the Supreme Court decision in the Mojekwu case, for example, particularly, the presiding judge's speech, Onuoha has this to say: "I would not subscribe to Uwaifo JSC's pronouncement." He further emphasizes that aside from the fact that Nigeria is part of the international community, it is very difficult to rationalize the views of Uwaifo JSC (Justice of the Supreme Court) with the African Charter, protocols, and convention for the elimination of all forms of discrimination against women. Apparently, Onuoha's assessment of Justice Uwaifo, in relation to the latter's pronouncement on the matter, is premised on the latter's ancestral customary law background, as the Justice happened to come from Edo (ancient Benin Kingdom), where customary law of inheritance is still very strong. It is also worth-mentioning that coincidentally, the early indigenes of Onitsha, whose seemingly non-discriminatory "*Kola Tenancy*" custom was subsequently applied in the final judgement which favoured Mrs Mojekwu, happened to be from Edo, whereas the Oli-Ekpe custom is the practice applicable in Nnewi community in Igboland.

C. CUSTOMARY LAW AND WIDOWHOOD

If a man dies leaving behind a wife and only female children, the fate of all such females, in many customs in Nigeria, is a disaster. The reason is not far-fetched: a male child is seen as the true child of the father, as inheritance rights are gender-based: mostly patrimonial. When a man dies, in most cases, it is generally believed that he was killed by his wife, either directly (such as poisoning) or through witchcraft, or as a result of the abominable sin committed by her in the home. In such cases, all the women are made to perform certain hideous funeral rites in order to be exonerated of any suspicion. In some families, the surviving wife (or wives) may be forced to drink the water by which the corpse had been washed; with the belief that any one of them that has a hand in the man's death would be affected by such fetish funeral rites. The discriminatory side of this custom is that the men are not made to undergo similar funeral rites when they lose their wives, except in very rare circumstances where the family of the woman is rich and influential and the man's is poor.

D. CUSTOMARY LAW AND FEMALE GENITAL MUTILATION (FGM)

Female Genital Mutilation, also commonly referred to as female circumcision in Nigeria, as a custom in some parts of the world, has been so passionately debated on various occasions that it does not have any new dimension to it. But one thing is sure, and that is that Nigerian women have had a fair share of the bitter ordeal. In the world today, FGM is no longer regarded as one of those hideous traditional practices of some uncivilised peoples in some regions of the world; it is now regarded as one of those aspects of harmful traditional practices that are injurious but yet have no benefit. In fact, to the victims, it is a life-long physical and psychological anguish. First, the excruciating pain and then the trauma of having to live with its daunting effects, is an immeasurable devastation to the female folks. “It is like living with constant pain” a woman once admitted to me.

FGM Procedures

According to UNICEF, “Female Genital Mutilation (or female genital cutting) comprises all surgical procedures involving partial or total removal of the external genitalia or other injuries to the female genital organs for cultural or other non-therapeutic reasons”. The World Health Organisation (WHO) has classified FGM into four major types viz: Clitoridectomy, Excision, Infibulations and Other (all other harmful procedures).⁴⁷⁵

Sadly enough, according to UNICEF’s report, Nigeria in the past had the highest absolute number of cases of FGM in the world, accounting for about one quarter of the estimated 115 – 130 million circumcised women in the world. Gladly enough however, the source also has it that Nigerian Government has recognised that the practice is harmful and barbaric and as a result, there are now few pieces of state legislation to the rescue. Notable among them are: Edo State Female Genital Mutilation (Prohibition) Law 2002; Cross River State Girl Child Marriages and Female Circumcision (Prohibition) Law 2000. But whether the traditionalists will comply with the provisions of any such legislation is a different matter altogether. But

⁴⁷⁵ See WHO Factsheet No. 241 Available at: <<http://www.who.int/mediacentre/factsheets/fs241/en/>> Accessed 09.03.2013

efforts have been geared towards ensuring that perpetrators are punished in accordance with the law.

According to “Female Genital Cutting Education and Networking Project” (FGCENP), an NGO which seeks to address this menace, it (FGM) is explained by some as a decree by their ancestors while others consider it a prerequisite for all girls that want to marry. When it is not seen as a puberty rite, it is rationalised as a way of making the female genitals aesthetically more pleasing or cleaner. It is also said to increase fertility of women as well as to ensure easy child birth.

Consequences of FGM

The consequences of this custom are many. UNICEF and FGCENP observe that, apart from the excruciating pain and psychological trauma associated with it, there are other consequences. Few of these are enumerated thus: bleeding that may lead to death or anaemia, as a result of using crude implement in carrying out the exercise; risks of infection, notably tetanus or HIV/AIDS as a result of using same knives on many females without proper sterilization, and this invariably leads to death, permanent disability or permanent damage to the female organ. WHO does not see any health benefit that FGM produces, instead, it harms both women and girls in many ways. It has been found to complicate health issues and the untold pains and suffering its victims undergo are many.⁴⁷⁶

In some parts of Nigeria, in the event of an obvious damage being done to the organ in the process, some of the people who carry out this excise would usually attribute it to the abominable wrong earlier committed by the female child or her mother. In some instances the abrasion may not heal; bleeding may not stop; the organ may become swollen; and the operator may mistakenly cut beyond originally intended contour.

⁴⁷⁶ See WHO Factsheet No. 241 Available at: <<http://www.who.int/mediacentre/factsheets/fs241/en/>> Accessed 09.03.2013

Legal implication of FGM

Apart from the health concern of the practice of FGM, it also has legal implication to it. Firstly, it is bad enough that the practice is discriminatory, as its main traditional justification for the exercise – to dissuade women from promiscuity and infidelity – violates sections of various domestic and international legal instruments, particularly, the Nigerian constitution, ACRWC, CEDAW and CRC. Secondly, the cruelty associated with it also runs contrary to legal norms of any civilised society and it violates sections of the Child Rights Act 2003. Particularly, the right to Dignity of the Child (s.11) which prohibits a child from being subjected to any form of physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse; the right to health and health services (s. 13) which entitles a child to the enjoyment of the best attainable state of physical, mental and spiritual health. Other human rights principles violated include the right to be protected from harmful traditional practices prejudicial to children and women's health; and the right to freedom from ideology of which tend to create the notion that men are superior to women or vice versa or that certain roles in society should be exclusively reserved for men or women.⁴⁷⁷ Even the Austrian Medical Practice Act prescribes punitive measures for anyone who “mutilates or otherwise injures the genitals in such a way as to cause permanent impairment of sexual sensation” and physicians who carry out the procedure are liable for prosecution. Article 90 (3) (§ 90 Abs. 3 StGB) specifically provides that: the mutilation of genitalia or other injury that is likely to bring about a lasting impairment of the sexual feelings is illegal. The implication of this section of the Austrian Penal Code (StGB) is that even if the person on whom the mutilation is to be performed consents to the act, it does not make it any less illegal because the law prohibits it. The criminalisation of FGM began at the inception of the criminal provision enacted in 2001 and came into force in 2002.

The practice is ridiculous particularly because it is based primarily on traditional beliefs and very little has been done in that direction. In many societies, FGM is considered a cultural tradition, which is often used as an argument for its continuation.⁴⁷⁸ The UN Committee on CRC, in its reports however, regrets the lack of up-to-date information on measures taken by Nigeria to either prevent or eliminate harmful traditional practices.

⁴⁷⁷ See Art 5 CEDAW.

⁴⁷⁸ World Health Organisation

On the other hand, there are also arguments that even though some proponents propagate these traditions, there are proofs that religious leaders take varying positions with regard to FGM. WHO's reports have it that the practice spreads not on account of traditional relevance but rather as a result of community influences. In some societies, recent adoption of the practice is linked to copying the traditions of neighbouring groups, while in some; the act is practised by new groups when they move into areas where the local population practices it.⁴⁷⁹ It is also sad to note that women are also engaged as perpetrators of these harmful traditional practices.

Furthermore, while reiterating its support for the elimination of FGM and other harmful traditional practices through legislation, the UN Committee on CRC however, recommends that there should be public enlightenment campaign involving, parents, women and female children, heads of families, traditional dignitaries, as well as religious leaders.⁴⁸⁰

Points of collision between customary law, the constitution and international law

For easy understanding of how the customary law of some communities in Nigeria contradicts the provisions of the constitution and the international law, I have put in perspective (tabular format) on the next page,⁴⁸¹ some of the key areas where collisions appear to have occurred. And because the diagram occupies a full page, I have decided to leave the following space blank so as to allow for sufficient space for the table on the next page.

⁴⁷⁹ Ibid

⁴⁸⁰ Good Practices in Legislation on "Harmful Practices against Women" (2009). Available at: <http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Final%20report%20EGMGPLVAW.pdf> Accessed 11.12.2023

⁴⁸¹ I have decided to shift the tabular form depicting points of collision to the next page for lack of space

Domestic Instrument		Regional Instrument (Africa)		International Instrument			
Customary law	Nigerian 1999 Constitution	ACHPR 1981	ACRWC 1990	ICCPR 1966	CEDAW 1979	CAT 1984	CRC 1989
Legal Implication	Section	Article	Article	Article	Article	Article	Article
Inequality/Discrimination							
Polygamy is allowed but Polyandry is an abomination ⁴⁸²	42,	2,3,4, 18,19		3	2,3, 5, 15,16		
In inheritance, females are not entitled to inherit from their father, particularly, land. ⁴⁸³	42	2,3, 18,19	1, 3, 21	3, 23, 24, 26	2,3,5,15,16		2
Final decision on all matrimonial matters, e.g. on the receiving of “bride price”, is mostly made by the father or male agnatic family member	42	2,3,18, 19		3,23,26	2, 5, 15, 16		
Under customary law of some Igbo communities, if a man is survived by only female children and any of them wishes to inherit from her father’s estate, she may have to perform “Nrachi Ceremony” ⁴⁸⁴	42	2,3, 18,19	1, 3, 5,	3, 23,26,	2, 3, 5,15,16		2
Cruelty							
Female Genital Mutilation		1,	16, 21				24
Forced/early marriages and child betrothal			1, 5, 16,21	23	15, 16		12, 24
A widow may be subjected to hideous funeral rites but a widower is not subjected to same	42	1,2,3,5,18, 19		3,7,23,26	2,3,15		
A man may smack his wife, but it is an abomination for a woman to hit her husband	42	1,2,3,18, 19,		3,23,26	2,5		
Ultra vires status	1						

⁴⁸² Polygamy is practised in many Communities in Nigeria. However, with much enlightenment campaign and education, such practices have reduced drastically. Polyandry, according to Black’s Law Dictionary, is the condition or practice of having more than one husband at the same time. In fact, it is the direct opposite of polygamy.

⁴⁸³ In some communities women must bear male children so as to benefit from what their male children will be entitled to.

⁴⁸⁴ Nrachi Ceremony”, according to Onuoha (available online at: www.icnl.org/knowledge/ijnl/vol_10iss2art_4.htm. (Accessed 05.06.2008), “is done to enable a daughter bear children in her father’s compound in order that the children, if males, will represent the father of the mother”. “Such children”, if males, will inherit the mother’s father’s property” from which she may now benefit.

E. CUSTOMARY LAW, SHARIA LAW AND THE PRINCIPLE OF ULTRA VIRES

Having done a lot of analyses regarding impacts of Sharia law, customary law and their antecedents in the foregoing chapters, sections and subsections, I think it is proper to sum it all up with final notes on the principles of ultra vires in relation to them. Accordingly, I want to state categorically that the continuous application of Sharia and customary law amounts to what, in English common law system from which Nigeria developed its legal system, is referred to as the principles of *ultra vires* (unauthorized, beyond the scope of power allowed or granted...by law⁴⁸⁵) Consequently, if Nigeria's 1999 Constitution is anything to go by, it follows therefore that those areas of Sharia and customary laws that I have critiqued and found to contain discriminatory and harsh provisions, are not only unconstitutional, but may also be regarded as *ultra vires*. And as a result, they must be set aside, repealed or judicially declared null and void and of no legal effect whatsoever.

⁴⁸⁵ Black's Law Dictionary (2004) 8th edition

Chapter 18

A RECAP OF MAJOR ISSUES EXAMINED

After having generally outlined and examined some major issues in the Nigerian tripartite system with regard to alimony and child support obligations in law, as well as the factors militating against their operation, I think it is proper to now consider myself as being better placed to make an informed judgement as to the way forward for the country's legal system. To start with, I presume that it is also worth mentioning that my research in the course of this dissertation revealed both advantages and disadvantages of legal pluralism as a result of which Nigeria came to be characterised by statutory, customary and Sharia law rules. In this chapter therefore I want to highlight some of them in the form of a recapitulation of the previous chapters.

In this thesis, I have attempted to use both Alimony and Child Support obligations in the form of *inducement* to draw attention to the points of collision between and amongst the various pieces of legislation in Nigeria, as well as Sharia law, customary law and ratified international human rights provisions. I examined the state of the general protection of the family, particularly as it relates to the girl child, inheritance, land and property ownership, marriage and marital causes, custody of children, gender inequality and discrimination, relationships, divorce, access to education and reproductive health services, economic empowerment, access to justice, political participation, poverty, etc.

In all of these, I have discovered that because alimony and child support payments are uncommon in the Nigerian society, such subjects do not have much content as topic for general legal analysis and therefore much of the discussion is centred on other topical issues that are analogous to them. I have therefore illustrated that as a result of that fact, I deemed it necessary to concentrate my analytical efforts on the factors responsible for the non-availability of such mechanisms in places. And at the same time, I have emphasized that in situations where these mechanisms are available, they are not properly enforced for almost the same reasons that they are not available in other places. For emphasis, I have cited some landmark cases with a view to throwing some light on the implications of the continuous application of customary law. I have critiqued some academic articles and reviews in journals and other forms of publication on the subject. I studied some legal wrangling from other

cultures; critiqued their judicial pronouncements; and gave my earnest opinions on some of the issues that were analogous to the topic of this dissertation. All these were drawn particularly from Austria, Australia, Americas and parts of Africa.

In this work, I have also clearly drawn out in tabular format the points of collision between Sharia law, customary law, the Nigerian Constitution, and international law, for easy evaluation and understanding. Furthermore, I have cited some decided cases, particularly because the rulings on them were reached by virtue of contextualized pieces of legislation and instruments.⁴⁸⁶ And in the process, I discovered that it was necessary to review the various segments of the Nigerian state from historical, religious, political and legal perspectives so as to acquaint the readers with some of the reasons why the colonialists adopted the pre-existing systems of administration – the so-called customary law – to which the people were already accustomed before they were subjugated. I have therefore traced that customary law from its historical perspectives up to its inclusion in the Nigerian legal system. I started off by looking at it holistically and later went on to dissect it into components parts by which Sharia law which was originally subsumed under it emerged as a substantive legal system by itself. Having appraised the dichotomy between Sharia law and customary law, I decided to treat each separately: their advantages and disadvantages within the Nigerian state. I have also narrated briefly the prospect of eradicating or strengthening them and, in making such choices, what chances there are of creating either a long-term peace or long-term mayhem as the case may be. And in that regard, I concur with Knight's observation⁴⁸⁷ as with those of the other authors that hold similar view point, that customary systems are in a constant state of evolution; adapting to the changing political, legislative, demographic and ecological circumstances and choosing innovations that work best to accomplish the desired ends. It may be argued however, that very little pure tradition remains; today's customary law is a mixture of various practices that have been inherited, observed, transmuted, learned and adopted.⁴⁸⁸ And with these transmutations in contemplation, one cannot but be forced to reckon with Greiff, who, in relation to violence against women in the name of religion, culture or tradition, put up series of questions thus:

⁴⁸⁶ Such as the Constitution, ACRWC, ACHPR, CRC, CEDAW, CAT, ECHR, etc., and these were used as templates to draw attention to the challenges of rights violations in Nigeria.

⁴⁸⁷ Knight R. S (FAO Rome 2010 "Statutory Recognition of Customary Land Rights in Africa, An Investigation into Best Practices for Lawmaking and Implementation Available online at: <<http://www.fao.org/docrep/013/i1945e/i1945e00.pdf>> Accessed 20.02.2013

⁴⁸⁸ Ibid

*“But are these practices really part of an ‘authentic’ cultural tapestry? Who is speaking for these cultures”? Whose interests do they represent? Which cultures or cultural practices are at stake? And where are the voices of women themselves when it comes to cultural and religiously justified violence against women?”*⁴⁸⁹

I have discovered that customary law could provide a basis for result oriented legislation. And therefore, if they are well codified, they would go a long way in strengthening or complementing efforts to improve any justice system through a process of incorporation. It is apparent that the primary aim of customary law is the resolution of dispute between the wronged and the wrongdoer through a process that is reflective of the people’s way of life. The underlying aim, which is proved through centuries of experience, is to ensure a sense of justice and resolution amongst the disputing parties and to restore or maintain social responsibility through this means. As my research also revealed, many Nigerian citizens live in the countryside. It is believed that the agriculture sector employs approximately two-thirds of the country's total labour force and provides a livelihood for both the rural and urban population. In most such communities it is usual that everybody knows almost everybody and, as a result, they mind not only their own businesses, but others’ too. Their local chief (village head) or a collection of trust-worthy elders represent some kind of local justice system. Their word is law and their decision is final and well respected by many. They can hand down judgements in various matters affecting their communities and in some very rare and extreme cases, pronounce *banishment* – a punitive measure whereby the offender is ordered to move out of the village or community for the rest of his/her life. Any crime that attracts a penalty of banishment would, in the old dispensation, probably attract death penalty. However, in modern day, even the banishment order is no longer prescribed; firstly because of its severity and secondly, because if such crime is not punishable under criminal law (public law), the affected person may take his case to a higher authority, such as magistrate’s court or High Court and the decision may be quashed by the higher authority. As a result of these facts, the highest penalty in such communities is what is referred to in Edo language as *aburho*. This is a penalty in the semblance of someone being held *incommunicado*. The difference is that while in the latter case the offender is kept in captivity, in the *aburho* punitive measures, the offender is neither arrested nor kept in solitary confinement, but nobody is allowed to speak to him or listen to him when he speaks; nobody sells anything to him; and no one buys from him. Similarly, when the offender falls sick or is in some sort of

⁴⁸⁹ See Greiff, S. (2010) “No Justice in Justifications: Violence against Women in the Name of Culture, Religion, and Tradition”

dire straits, nobody must lend him a helping hand. Cruel, as it might seem, *aburho* is passed on anyone who commits crime regarded as “abominable”. But with the evolution of customary law, influenced by modern criminal justice system, the power to pronounce death or banishment sentences, no matter the seriousness of the crime, has been taken away from the local kings, chiefs or village heads. That is why the highest punishment is now “*aburho*”. Even at that, the measure is still as punitive. In fact, the offender is practically made to be an island unto him- or herself. The uniqueness of the measure, although uncommon in modern day Nigeria, is that it is difficult to overrule in any court of law because it is impossible to force people, who believe that the offender deserves the sentence he received, to rescind such order. And whoever violates such order is made to face similar punishment. However, this order can be pleaded and appealed against. And appeal in this regard lies to the Oba’s palace in Benin (in the case of Edo people). This was (and still is) the highest appellate authority in all such matters. But for a poor peasant, who has lived all his life in a remote village to bring an appeal before the Oba in his palace in Benin City, can be quite cumbersome.

It could be argued that the passing of such order may appear dictatorial in that it does not allow for popular participation which characterises modern justice system, but its measure, though rarely used, served as a better deterrent than the present statutory law system which imposes committal to varying prison terms, and in extreme cases, life or even death sentence as the case may be. In some instances, you find out that a criminal act committed by ‘A’ against ‘B’ may have its roots in a long-standing dispute between the parties, and the criminal act is only but the final aggressive way of expressing his pre-existing grievances. Therefore, adjudicating on the recently committed crime, as is done in the modern criminal justice system, will only resolve the matter at hand, but, at the same time, it will create an environment that may result in the commission of more crimes which are premised on the basis of ‘*tit for tat*’ course of action against the disputing parties.

Accordingly, in spite of the many negative sides to the application of customary law, Johnson⁴⁹⁰ writes that there are several rationales for engaging with customary legal systems as a means of contributing to the empowerment of users. She further opines that in conflict situations, engaging with customary legal systems can also contribute to grassroots peace building efforts, for example, through efforts to strengthen local dispute resolution capacity.

⁴⁹⁰ Johnson N. “Enhancing Legal Empowerment through Engagement with Customary Justice Systems – Small Grants Program” Available online at: http://www.idlo.int/Documents/PNG_inception_paper.pdf > Accessed 03.02.2013

Amongst the attributes of customary legal systems that Johnson has listed and which one cannot dispute, are cultural legitimacy and public participation and perception of increased fairness. And Mukoro,⁴⁹¹ in enumerating the merits and demerits of customary law, also writes (inter alia) in favour of its application on the ground that it is a way of giving recognition to the people's cultures and traditions. He further opines that it gives assurance to the unlettered and illiterate as such people are pleased to see their culture being used to adjudicate cases. He concludes that customary laws keep "our traditional rulers and knowledgeable people in cultural matters very busy" and that such activities "give them recognition and role to play in the society".

It must however be stated also that the application of customary law thrives as a result of the people's mind-set and the pressure exerted upon it by a collection of neighbourhood peers. As I stated earlier, majority of the parties to Customary law cases are illiterate or semi-illiterate, and therefore, taking a case beyond the control of their local chief or king is seen as "*washing one's dirty linen in outside*", which usually has very strong negative consequences on the concerned individuals within the locality. And therefore, I have tried to show that the highest echelon to which most of the cases get is the customary court. Even then, for a particular case to be taken to the customary court, that case must be a very contentious matter. Otherwise, it would end with the local village head. This possibly explains why some researchers have opined that customary law regulates the lives of about 80% of Nigerians and therefore argued that Nigerian courts should enforce customary laws⁴⁹². And accordingly, many of those local cases do not go beyond the local level at which they are heard by local chiefs and/or customary courts. By implication, unless and until much enlightenment campaign is done to educate the minds of this category of people so that their mind-set is changed, their beliefs will remain the same and so will the extent to which their cases go.

It may not be quite understandable that most Nigerian still patronise the customary law system in spite of its anachronistic nature and in the face of modernity. The answer to this is not far-fetched. One can take a lead from the closely-knit pattern of its constituent parts. For instance, with regard to obligations owed by a particular family member to other family members, be it wife, child, nephew, niece, cousin, uncle or aunt, it is helpful to state

⁴⁹¹ MUKORO, A. "The interface between customary law and local government legislation in Nigeria: A retrospect and prospect" Available online at: International NGO Journal Vol. 4 (4), PP. 167 – 172, April 2009 <http://www.academicjournals.org/INGOJ> (Accessed 04.02.2013)

⁴⁹² See generally Olubor, J.O. "Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal"

emphatically that, under customary law, all of these people owe it as a moral duty to support each other. In this respect, Nwogugu⁴⁹³ rightly observes that members of the extended family owe each other some obligations under the traditional social system. This, according to Nwogugu, is much unlike the society where people act (or refrain from doing certain act) only when they are under a duty imposed by law. For instance, in a customary system, it is usually a moral duty of an employed or income earning member of family to assist the less fortunate relatives in any way possible. This obligation, though not legally enforceable, is a moral right of the beneficiaries and a default on the part of the benefactor and may attract very severe penalty in the form of social sanctions and stigmatization in the event of a default.

In a customary law setting, the moral obligations which a member of an extended family owes to his relatives often conflict with his obligations to the members of his immediate family – his wife and children.⁴⁹⁴ And in the event of a dispute, a customary law setting accords both families the opportunity to mediate and resolve any dispute between the married couple in the most cost-effective manner, as opposed to Act marriages whereby most disputes are settled by outsiders, such as marriage counsellors or therapists, judges, ADR Officials, etc. It is also unquestionably correct to say that customary marriage subsists longer than Act marriage. However, this does not come without a price.

As much as it is understandable that much of the Nigerian society is regulated by customs and traditions which may appear to have been revered very highly, it must also be understood that a society is a collection of persons; each of whom is unique in his/her own different way. And by this fact, each of them has his or her own understanding as to how best to live his or her life and each displays this in whatever way their independence dictates. In order to pull all of these people's divergent ideologies, idiosyncrasies and philosophies of life together therefore, determined efforts by way of comradeship-inducing discourse must be engaged. In the main, "compromise" must be the watch-word. And such is the content and character of a constitution which, by implication, is the reflection of people's affirmation of semblance of social contract. And therefore, if the components of the philosophies or value systems captured by the terms of that contract are changing or seen to have changed, that is an indication that the terms of the previous agreement must change. Logically, laws may be made to bind the past and near future, but no law can be made to bind entire future; otherwise

⁴⁹³ Nwogugu, E.I. *'Family Law In Nigeria'* (1999) p 429

⁴⁹⁴ Ibid

we all, as humans, will be stagnant. Ladan⁴⁹⁵ evaluating the scholarly proclamations of Muhammed Bello, the second Sultan of Sokoto Caliphate, in the context of the re-adoption of Sharia law, opines that no generation should rely on another as far as the understanding and application of the Sharia is concerned. He further affirms that super-imposing *figh* of one generation on another would ultimately lead to corruption.

At this point, let us remind ourselves that one of the major reasons the colonialists decided to allow the application of customary law in Nigeria was because it was believed that that way the people would be happy as governance would (seem to) be deep rooted in the peoples' tradition. And as I earlier analysed in this work, this statement was made at the formation stage of British rule in Nigeria. And it is clear from this assertion that the British were willing to make compromises so as to accommodate the pre-existing customs and traditions of the then indigenous peoples. It was generally believed that accommodating these customs would help to lubricate the wheel by which they could chart the appropriate way forward in the administration of the area, and hence they tried to streamline those pre-existing somewhat *primitive* customs and traditions so that they could be compatible with what obtained in England. The Supreme Court Ordinance No. 11 of 1863 – one of the vehicles used – therefore permitted the application of customary law as long as it did not impinge natural justice, equity and good conscience or other form of law in force at the time. Succeeding Supreme Court Ordinances that were drafted also took the form of the pre-existing instruments so that the position with regard to the application of customary law remained intact; hence when, in 1914, at about the time the northern and southern protectorates were amalgamated, the Supreme Court Ordinance No. 6 of 1914 re-affirmed this position.⁴⁹⁶ And also, according to Olubor,⁴⁹⁷ they immediately abrogated some norms of Islamic and customary law that they thought were barbaric and unacceptable. This strategy was furthermore incorporated into other pieces of legislation, such as the Evidence Act Chapter 112 LFN 1990.⁴⁹⁸ These limitations have however been tested under various circumstances. Oba⁴⁹⁹ can be said to have been very contextual in the analysis he made of the grounds on which the British endorsed the retention of the native law and customs of the then peoples of the once fragmented Kingdoms

⁴⁹⁵See Ladan M.T. “The Development and Application of Sharia in Northern Nigeria: Issues and Challenges” Available online at: <<http://library.fes.de/pdf-files/bueros/nigeria/50282.pdf>>

⁴⁹⁶ See generally Yakubu, J.A. (2002) “Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria”.

⁴⁹⁷ Olubor O.J. “Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal”

⁴⁹⁸ See section 14 (3)

⁴⁹⁹ Oba, A. “Religious and Customary Laws in Nigeria” (2011) p. 888 – 889

and Settlements now called Nigeria, when it was colonised. As he rightly observes with regard to *Repugnancy Test*, in order for any so-called customary law to be applied in the country, it needed to satisfy repugnancy doctrine tests.

And accordingly, the first of such test was invoked to nullify two customs: one that offered a man whose wife had separated from him the legal paternity of all the woman's subsequent children as long as the dowry had not been refunded; and another bequeathing a man's estate to his elder brother if the man died leaving only daughters. The second test is that an Islamic or customary law must not be incompatible either directly or by implication with any law presently in force. This has also been tested in the case of *Adesubokan v Yinusa* which I earlier analyzed in this dissertation, where the testamentary disposition of a Muslim father under the Wills Act was allowed to hold in spite of the challenges posed by the Islamic law which precluded a Muslim from disposing of his entire wealth without due consideration to the contrary provisions contained in Islamic law in that regard. The public policy test was invoked in the case of a custom that permitted a (possibly barren) woman to marry another woman so she could bring forth children for her in a somewhat "employer-employee" sort of condition (i.e. in form of surrogate mother, except that in this case the surrogate woman is a permanent wife of the paying woman). She would do this by procuring men to have sexual intercourse with her. And the children so procreated would be the children of the woman with the "master" or "employer" status as though she had them naturally for her husband.

Conversely, Olubor J⁵⁰⁰ also opines that the provisions of section 1 of the Evidence (Amendment) Decree No 61 of 1991, has made the Evidence Act inapplicable in civil causes or matters before Sharia Court of Appeal, Customary Court of Appeal, Area or Customary Court in Nigeria. He further opines that the inapplicability of the Evidence Act in the courts under discussion (meaning Sharia/Customary Courts) has not changed the application of the repugnancy doctrine in Edo and Delta States. The Honourable Justice cites, for example, section 24(a) of the Bendel State Customary Courts Edict, 1984 applicable to Edo and Delta States, which provides that:

"Subject to the other provisions of this Edict, a customary court shall administer the appropriate customary law specified in section 25 of this Edict in so far as it is not

⁵⁰⁰ Justice Olubor, J.O., President of the Customary Court of Appeal, Edo State in his paper, "Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal", available online at: <<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure>>

repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force."⁵⁰¹

The above provision is also contained in section 45(1) (Part 1X) of Bendel State Customary Court of Appeal Edict 1984 (as amended) applicable to Edo and Delta States.

These conflicting provisions are further compounded by the Honourable Justice's own assertion thus:

*"I wish to quickly state here that care must be taken not to overstretch the provision of the above enactments. It is pertinent to note that the mere fact that a particular custom is no more in vogue in other communities or that the custom has fallen short of modern trend in the technologically advanced parts of the world or that it is inconsistent with any aspect of the common law should not be the determining factor as to whether or not a particular custom is legally valid"*⁵⁰²

In light of the above analysis, I have tried to show that the idea of applying customary law, in spite of its *rigid, anachronistic* and *ferocious* characters, is tantamount to further inciting fanaticism, civil unrest and disenfranchisement of mainly the poor in our society. Our customary law, especially in the area of inheritance, is uncertain. A typical example that supports this assertion can be drawn from the Yoruba method of intestate inheritance by either per stirpes (Idi igi) or per capita (Ori-ojori). The former being a situation whereby the estate of a man who died intestate is distributed in equal shares according to the number of wives, irrespective of the disparity in the number of children each wife has, whereas in the latter case – Ori-ojori – the estate is distributed according to the number of children.⁵⁰³ I have analysed how it has been argued that this law leaves room for abuse, oppression, and exploitation of the weak, because in most cases, the head of the family as a last resort will be asked to choose a more convenient system of distribution. He will often decide on an option that will be more beneficial to his own interests or those of his *confidante* if he decides to connive with any of the beneficiaries. Such practice can be equated to being a judge in one's own case.

⁵⁰¹ As cited by Justice Olubor, J.O., President of the Customary Court of Appeal, Edo State in his paper, "Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal", available online at: <<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure>>

⁵⁰² As cited by Justice Olubor, J.O., President of the Customary Court of Appeal, Edo State in his paper, "Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court of Appeal", available online at: <<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure>>

⁵⁰³ See Vincent v. Vincent 2007) LPELR-CA/L/437/2003; See also Obidairo v Bakare All FWLR (2005) Pt. 256.

I have also emphasized that the application of those rules of customary law that are not only discriminatory, but also very cruel in Nigeria, amounts to contravention of provisions of various human rights instruments. It could be argued that choosing one's own legal system in a federal system like Nigeria's, conforms to the principle of "internal self-determination" which may refer to various political and social rights in international law, but exerting one's right under it must be done with the rest of the political spectrum in contemplation. For example, the constitution which is a set of fundamental principles according to which a given State is governed, prescribes the method by which such self-determination principles are to be exerted. Otherwise, the principles of "external self-determination" will be the other alternative and it comprises the right to secede. If the latter is not what is desired, it therefore means that total compliance with such constitution is the only alternative.

In another scenario, in reviewing a book ⁵⁰⁴ in which the author, Ibrahim Ado-Karuwa, decries problem of not allowing the free extension of Sharia to penal law, the reviewer, John Boye Ejibowah of the Department of Political Science, University of Toronto, Canada, also draws on the lop-sidedness of the argument (eccentric arguments typical of most Sharia proponents in Nigeria) to critique Ado-Karuwa's standpoint on the issue. In the book, Ado-Karuwa also argues that the British colonizers undermined Sharia law by subjecting it to the validity (repugnancy) test, limiting it to civil cases, and finally degrading its observance and enforcement to native courts. While succumbing to this point of argument as a fact, it is helpful to mention that this was done, not only in the case of Sharia, but also in matters of all native law and customs in the whole of the territories under British rule at the time. Without such decision, there was no way the British could have been able to bring together all the pre-existing fragmented settlements and kingdoms to form the country now known as Nigeria. The Repugnancy Test can be found in an earlier Supreme Court Ordinance 11 of 1863; a document that predates the creation of Nigeria in January 1914.

On the restriction of Islamic law to personal level and subordinating to English law, Ado-Karuwa also argues that that was a conscious attempt to promote Christian civilization over Islamic civilization. Ejibowah refutes this assertion saying it would not withstand interrogation, given Ado-Karuwa's earlier argument in the book that Christianity endorses the separation of Church and state, and that the religion (Christianity) declined in Europe when

⁵⁰⁴ Ado-Karuwa, I. "Sharia and the Press in Nigeria: Islam versus Western Christian Civilization"

secularism became a practical reality. The redress of Islamic marginalization ascribed by Ado-Karuwa to the reintroduction of Sharia law in 12 northern States in Nigeria is also dismissed by Ejibowah by reconciling it with arguments by Kayode Eso, a retired Justice of the Supreme Court that the expansion of Sharia to criminal jurisdiction amounted to adopting a state religion. And finally, on the declaration by governors of Zamfara and Kano States that Sharia law would apply to only Muslims, Ejibowah discards this with the fact that some Igbo traders had received various sentences for being in possession of alcohol in those States – Alcohol is not prohibited for those practising other religions. It is also no longer contestable that while Sharia prescribes caning (*jald*), amputation (*qat'*) and retaliation (*qisas*) and other harsh and discriminatory measures, the Nigerian constitution and the international law provide otherwise.

It is important to note that some African countries have attempted to incorporate their native law and customs in their justice systems by removing those barbaric and/or discriminatory dogmas. The South African Constitution, for example, mandates the court to take the "Bill of Rights" into consideration when interpreting or developing any law, be it common law, a piece of legislation or customary law.⁵⁰⁵ And accordingly, the South African case of *Bhe and Others v Magistrate Khayelitsha and Another (2004) (case CCT 69/03)* represents a distinctive illustration of that transformation. In the case, the Constitutional Court of South Africa considered the questions of the constitutional validity of section 23 Black Administration Act which on 23 Black Administration Act (this section along with other sections of the Act have since been repealed) and the constitutional validity of the principle of primogeniture in the context of the customary law of succession. The Deputy Chief Justice, Langa held that the customary law rule of male primogeniture, in the form that it had come to be applied in relation to inheritance, had stagnated and thus become out of touch with realities of urbanisation and changing family relationships. And therefore, since it discriminates on the bases of gender and birth, it is unconstitutional. He stated that it discriminates unfairly against women and illegitimate children and therefore declared it not only *unconstitutional*, but also *anachronistic* and therefore *invalid*.

In Uganda, the Constitution also prohibits the application of any law that is against the dignity of women, irrespective of whether such law is derived from traditions, cultures or custom. As long as the law affects the welfare, dignity and status of women, it is prohibited.

⁵⁰⁵ See section 39 Constitution of the Republic of South Africa No. 108 of 1976, available online at: <<http://www.gov.za/documents/constitution/1996/a108-96.pdf>> Accessed 07.07.2014

Having identified and analysed the elements in legal pluralism that are intractable and have thus triggered the head-on collision between the tripartite legal systems in Nigeria, there is no denying the fact that, even though these elements may be anachronistic, discriminatory and cruel, they have the potential to improve or weaken the socio-political positions of particularly women and children, depending on how they are applied. With regard to Sharia for example, Adamu⁵⁰⁶ writes that emphasis on the punitive aspect of social relations laws has impacted negatively on the living conditions of women. She further notes that women are more likely to be excluded from positions of leadership and become victims of Sharia implementers such as the courts and *Hisbah*. The assertion, according to her, becomes valid when one examines the number of cases tried under the legal system, majority of which affect women and the poor. Drawing affirmative reference from one Yusuf regarding the high expectation earlier placed on Sharia law implementation by ardent believers of Islam, she concludes that their (the Islam believer's) hopes were raised and dashed because Shariah, as it is currently being implemented, has done nothing but filled them with despair; only poor women and men seem to be the convicts of the Shariah courts. She further emphasizes that the elites and the rich appear to have inbuilt immunity from Sharia law; a position she regrets “is a clear case of injustice which cannot be rationalised in a Muslim community”.

RECOMMENDATIONS AND CONCLUSION

Religion, culture, morality, tradition and customs, etc., are unquestionably entwined. They are paradigms of the progressions of law. In my opinion, law may be developed from these component parts as each of them represents a raw phase of the law. Therefore, any law that lingers in any of those stages could be regarded as a law that has yet to fully develop. And because the proponents of any of them usually derive some form of egocentric benefits from that state of immaturity which may be detrimental to others, it would not be wrong to say that the application of such underdeveloped phase of that particular law be de-emphasized until each of them reaches a full stage of developmental process. In that connection therefore, while it may quite encouraging preserving traditional institutions for historical or posterity sake, there are other correlating issues to also contend with. These institutions are not a negligible unit of the political arrangement in the Nigerian state. Therefore, those harmful,

⁵⁰⁶ Adamu, F.L. “The Dynamics of Gender and Poverty under Shariah Legal Systems in Zamfara and Sokoto States of Northern Nigeria”. Available online at: <<http://web.uct.ac.za/org/gwsafrica/african%20feminist%20thinkers/adamu/adamu%20publication8.htm>> Accessed 06.02.2013

discriminatory, oppressive and other burdensome practises associated with them, whether these transpire in the form of human rights abuses or otherwise, they do permeate the entire fabric of the state so that they appear awkwardly insurmountable. This is one of the major reasons the traditional institution and the proponents of its values are constantly challenged but yet extant. And because of their insurmountable nature, it has become imperative to go back to the basics and renegotiate the somewhat social contract through which ideologies were collated and agreed upon in the early times. To do this, there should be some high level consultations among all sides of the legal, political, religious, traditional, etc., divide; with each baring its mind without reservations. Everyone must be guided by the certainty that, while it may be important to steadfastly hold unto one's views on so-called value systems – be they defined by spiritual or temporal inclinations – it must also be borne in mind that in order to form a society that enjoys optimal rule of law and peaceful co-existence with one another; letting go of some views by way of compromise, will not only create compatibility, it will also bring about harmonious co-existence that is most desired. Let me stop here with a forward by John Witte in relation to the statement attributed to Rowan Williams, the Archbishop of Canterbury, which seems to give an insight into people's reaction to the prospect of adopting Sharia law or state religion in modern "secular" democratic setting, and it runs thus:

*"Anglican Archbishop Rowan Williams set off an international firestorm on February 7, 2008, by suggesting that some accommodation of Muslim family law was "unavoidable" in England. His suggestion, though tentative and qualified, prompted more than 250 articles in the world press within a month, the vast majority denouncing it. England, his critics charged, will be beset by "licensed polygamy," "barbaric procedures," and "brutal violence" against women encased in suffocating burqas. Muslim citizens of a Western democracy will be subject to "legally ghettoized" Muslim courts immune from civil appeal or constitutional challenge. The horrific excesses and chronic human rights violations of their religious courts elsewhere in the modern world prove that religious laws and state laws on the family simply cannot coexist. Case closed."*⁵⁰⁷

⁵⁰⁷ Rowan Williams, Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), <http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>; and cited by John Witte, Jr., "Foreword—Frontiers of Juridical Pluralism: Law, Religion, and the Family" Available at: Emory International Law Review <<http://www.law.emory.edu/student-life/law-journals/emory-international-law-review/content/archive/volume-25.html>> Accessed 24.03.2013

Recommendations

In order to improve on the enforcement of the legal mechanisms regarding alimony and child support payments in Nigeria therefore, the following recommendations are hereby proffered for consideration:

1. Constitutionality of all rules of customary and Sharia laws should be adjudicated upon by superior courts.
2. Constitutional Court should be established to urgently rule on the constitutionality of any matter as obtains in most democratic nations.
3. If application of Sharia or Customary law is to be allowed for the time being, it must be in line with the constitutional law and any rule that violates the Constitution and other ratified international law provisions, must not be expunged.
4. In the case of Sharia practising States, because it is generally believed that the *Hishba* groups conscientiously work according to the teachings of Islam, a Commission in that regard should be established and granted authority to work with other security operatives in the form of Human Rights Commission.
5. Enlightenment campaign on the rights and duties of all individuals, particularly women and children, should be carried out regularly.
6. African Charter on Human and Peoples' Rights, particularly, Article 2, which enshrines the principle of non-discrimination on any ground should be fully and conscientiously implemented, and where it is already in force, it should be strengthened and monitored by human rights professionals.
7. Human rights doctrines should be a compulsory subject in schools curricula and children of primary and secondary school ages should be the main targets.
8. The police, army and other security operatives should, as a matter of obligation rather a choice, participate in human right courses on a regular basis.

9. It should be made compulsory for Judges and other court officials to participate in human rights courses on a regularly basis.
10. Any high profile case that sets precedent at all superior courts in contentious customary law matters should be made freely accessible to all citizens and NGOs.
11. All court judgements must be published immediately the decisions are reached and there should be a website designated for such publications.
12. The government should ensure that all court orders are complied with by every individual and institution and failure to comply should be regarded as serious contempt of court and should be severely punished.
13. The press: electronic or print media must be granted free access to all court cases (unless it is deemed irrational to do so in the interest of the concerned parties and/or the State).
14. The judicial arm of the government must ensure that it exhausts all legal means in all cases pertaining to violence against women and children, as well as in all matters concerning harmful cultural and traditional practices.
15. Procedural rules of all courts of law; whether statutory, customary, Sharia or otherwise, must be presumed to contain implied terms of non-application of all discriminatory, oppressive, violent or harmful traditional practices and the presence of such elements should automatically nullify any case before all courts in Nigeria. The burden of determining the presence of such elements shall be on the presiding judge before whom the case has been brought.
16. All relevant sections of particularly the African Charter on Human and Peoples' Rights; African Charter on the Rights and Welfare of the Child, CRC, CEDAW and CAT, should be implemented as a matter of urgency.

17. The required declaration under Article 34 (6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of African Court on Human and People's Rights, accepting the competence of the Court in all cases before the African Court, as provided for under Article 5(3) of the Protocol, should be made with immediate effect.
18. Whenever the court deems it necessary, all divorced, separated or widowed women should be granted ancillary relief by the competent courts in accordance with the law of the land and all obsolete legal provisions should be updated and reinvigorated to meet contemporary legal standards.
19. All spouses who contributed to a family's wealth during marriage should be granted a settlement proportionate to his or her contribution to that family's wealth on divorce, separation or on the demise of a spouse.
20. Alimony and child support payments calculations and guidelines must be statute-based rather than on judges' discretionary assessments and they must be reviewed at specified intervals so as to keep abreast of inflation rates.
21. Financial or other obligations in the form child support should be awarded against any parent for the benefit of the children of the family in the event of divorce or judicial separation or death a spouse and in accordance with recommendation number 20 above.
22. All biological parents must be made to cater for their children irrespective of whether the children are legitimate or not, except there are reasons to believe that such verdict will be too harsh on any of the parties to the matter and in reaching such decision, regard must be had to all circumstances of the matter.
23. The 2003 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)* which requires that States parties legislate on all forms of harmful practices which negatively affect the human rights of women so as to ensure that such practices are prohibited should be strengthened and implemented. This should include complete prohibition, through legislative measures

backed by practical sanctions of all forms of female genital mutilation and all other practices.

24. All harmful traditional practices identified by WHO, UNICEF, UNESCO, UN, etc., as injurious and/or demeaning to women and children should be prohibited with immediate effect.
25. The predominance of patriarchy in customary law systems should be discouraged.
26. Where customary law and other forms of law operate simultaneously, their application must be guided by human right principles and rule of law and all such laws must be made subordinate to statutory instruments that are subject to amendment and repeal.
27. Even though the application of customary law (including Sharia) may be seen to be supportive of the concept of *self-determination*, it is now evident that such traditional practices whether expressly provided for under certain legal norms or simply negligently acquiesced by the supposedly designated operatives, the level of antagonism, apprehension and social discontent it has caused Nigeria over time have become immeasurable. Therefore, if prohibiting it for now may be too sudden, then there is urgent need to draw up the various segments of the society with a view to renegotiating the methodology by which some of the its provisions should be applied; irrespective of whether this is defined by religious, cultural, legal or moral sentiments. And to do this, information must be drawn up and collated from a wide variety of perspectives, and this must be followed by high-level discussions on all fronts and at all levels of the society.

Conclusion

To this end, it is submitted that unless and until the legal order which comprises primary and secondary legislation, including body of case law, enacted or adjudicated by virtue of the Constitution and ratified international treaties and conventions, is recognised as the only body of laws generally applicable in all the states of the federation, the Nigerian tripartite legal systems as they presently stand can only be regarded as nothing more than some acquiesced

legal order that amounts only to a “*dead letter*”. And therefore, the traditional practices which have overtly or covertly hindered the pre-existing mechanisms for enforcing alimony and child support obligations, as well as prevented the enactment of new standardized legal instruments, shall continue to undermine all political and socioeconomic developmental objectives of the country. And consequent upon these facts, the spirit and ‘intendment’ of slogans, such as “*Federal Character*”, “*Government of National Unity*”, “*One Nigeria*”, etc., will be but or an illusion. The only remaining wise choice therefore, is to adopt some kind of cross-cultural legal arrangements, such that would not favour one side of the legal or political spectrum to the detriment of the others and this is only possible through compromise.

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Words on Marble:

Before you blame a younger generation for moral decadence, ask your parents what they think of your own generation, and what your parents' parents thought of your parents' generation. People and things do change, either way.

– Lambert H.B. Asemota
Vienna, September, 2014.

Abstract

Child support and alimony payments are almost unheard of in Nigeria where the decision of the man is undeniably dogmatic. When a marriage breaks down in Nigeria, the man, unquestionably, decides alone what he wants to do with the children: keep them and send their mother away without any form of financial support or send them and their mother away with or without any arrangement for the children's upkeep. The mother, in such situation, is usually left alone to fend for all the children, while the man, probably, goes on to marry a younger wife. This work takes a critical look at Nigerian statutory provisions that regulate alimony and child support obligations and how these provisions collide with customary (traditional) law (including Sharia), as well as how the latter not only collide with, but also impede the application of ratified international treaties and conventions.

Zusammenfassung

Unterhalt für die Kinder und die geschiedene Frau sind in Nigeria fast unbekannt, wo die Entscheidung des Mannes unbestreitbar als Dogma angesehen wird. Wenn in Nigeria eine Ehe zerbricht, entscheidet der Mann unbestritten alleine, was mit den Kindern geschehen soll: sei es, dass sie bei ihm bleiben und die Mutter ohne jeder finanziellen Unterstützung gehen muss, oder dass er sich von den Kindern und der Mutter mit oder ohne Vorsorge für deren Unterhalt trennt. Die Mutter muss in einer solchen Lage üblicherweise für die Kinder sorgen, während der Mann möglicherweise eine jüngere Frau heiratet.

Diese Arbeit wirft einen kritischen Blick auf die Rechtsvorschriften in Nigeria, welche den Unterhalt für die Kinder und die geschiedene Frau regeln und wie diese Vorschriften zum hergebrachten (traditionellen) Recht ("Customary Law") (einschließlich der Scharia) nicht nur in Widerspruch stehen, sondern auch die Anwendung internationaler Verträge und Übereinkommen verhindern.

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Besondere Kenntnisse

- Sprachen:** Englisch (sehr gut in Wort und Schrift)
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Edo (Muttersprache)
- EDV:** MS Windows, MS Office, Internet (jeweils User Level)
- Hobbie:** Musik und sport

Wien, July 2014

**Alimony and Child Support Obligations in Law:
The Law in a Somewhat Head-on Collision with Tradition:
-Nigeria as a Case Study**

Lambert H.B. Asemota, LL.M

Research Proposal

Introduction

Tradition is a belief system or a customary way of doing something that has existed amongst a group of people for a long time. It usually emanates in small scale, particularly from family setting, and may subsequently spread until the entire community is engulfed by it. Tradition is not law, but it can exist alongside law within a community. In some instances, a particular tradition may be elevated by a constituted authority to the status of a legally binding instrument as it becomes widely acceptable within that society. It seems to rank a little below morals. Whilst tradition's scope of authority may be within the confines of the family or community from which it emanated, law on the other hand, may be made to regulate the affairs of some people or everybody in the entire country, including the country in which the law was enacted. But when tradition and law collide, in civilised societies, chances are that the legally binding instrument, which obviously has a wider scope of application, takes pre-eminence. Otherwise, the resultant consequences may play out in sporadic disquiets within that society.

In Nigeria, 'alimony' and 'child support' obligations, though almost unheard of, are not only regulated by law but also by pre-existing tradition in the family and/or communities in the form of customary law or Sharia law. The topical issues to be critiqued in this work are therefore centred not only on how these set of traditional or customary law rules violate the rights of people, but also on how it conflicts with and invariably impedes the application of ratified international treaties and conventions, particularly with regard to the rights of the child and gender equality.

Research Questions

The major research issues that this project seeks to critique are:

- How the enforcement of alimony and child support obligations can be used to check unrestrained traditional practices in Nigeria;
- How human rights violation in the form of child neglect on the one hand, and gender inequality in the context of denial of the rights of women on the other hand, can culminate in inadvertent polarization in social class and invariably put one in continual unfair dominant position;
- general analysis of the Nigerian legal system with regard to child protection and gender equality with a brief look at the Austrian legal culture in the same respect; and
- How the lack of proper application of domestic law on the subjects amounts to violation of relevant sections of international treaties and conventions, particularly, with regard to the United Nations Convention on the Rights of the Child (CRC) and the Convention for the Elimination of all forms of Discrimination against Women (CEDAW)/

Research methodology

To carry out this research work, various methods shall be engaged. The following sources may be relied on for information gathering:

- i) relevant statutes books from Nigeria;
- ii) relevant statutes books from Austria;
- iii) domestic and international law reports on child/family protection from selected parts of the world;
- iv) possible case studies of some model children/families in Austria who have benefited from existing statutory provisions on child/family protection;

- v) a comparable case studies of neglected children/families in Nigeria consequent upon the absence of child/family protection laws or the non-enforcement of same; and
- vi) a glimpse at the UK, EU and International laws/agreements relating to the subject matter, to which Nigeria and Austria are signatories, and have ratified.

Structure

This research work shall be structured in varying heads and subheads and in such a way as to enable its findings to be explicitly clear for easy readability. The topics shall be titled and addressed according to each of the research questions above and with other issues as they unveil themselves in the course of the project.

Possible benefits of the project

Nigeria – a developing country- ravaged by years of colonisation, civil war, military rule and a “somewhat enshrined” system of corruption, is likely to find this project as a practical model for its legal, political and economic development. However, other developing nations, especially within and around sub-Sahara Africa may find this comparative analysis useful.

The Austrian authority in charge of child protection is likely to find the outcome of this project useful for visualising the possible danger in the event of a slip-up or a loophole in its existing system.

Other likely beneficiaries are civil society organisations, NGOs and policy makers who work on the promotion and protection rights of the child as well as gender equality.

Possible challenges and obstacle

The Nigerian legal system is one of common law having once been a British colony, where justice is dispensed using case law as well as Acts of Parliament. However, considering the level of corruption in almost every of its adjudication, it can be argued that substantial parts of

all its statutory interpretation and consequent judicial pronouncements are likely to amount to miscarriage of justice when viewed in the light of what obtains in countries that respect and uphold the rule of law. On these grounds therefore, it is going to be a rather complex mission to ascertain which parts of its case law are or not a true state of the law as provided for by its constitution. It is hoped that this will make it rather interesting!

In conclusion, it is submitted that if in the end this project is able to leave some readers thinking that the law and the dominant popular morality have been successful in curtailing the power of mere tradition or what seems a religious madness that has kept a number of people in the dark for years on end, then this project will have attained its objectives.

L.H.B. Asemota

Vienna, February 2012