

THE CONCEPT OF GENDER JUSTICE AND WOMEN'S RIGHTS IN NIGERIA: ADDRESSING THE MISSING LINK

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ABSTRACT

Over the years, Nigeria has gained the unpopular recognition globally as a patriarchal society in which the inalienable rights of women are often subjected to ridicule, extensive abuse, neglect and violations. Cultural, religious and societal norms have arguably entrenched a historical imbalance in power relationships between men and women and have tilted the overall perceptions and roles of women in Nigeria. In Nigeria, it could be said that the abuse of the natural rights of a woman begins from the time of her birth and only comes to an end at the time of her death. In many parts of Nigeria, particularly the North, women who are prematurely and compulsorily betrothed to a man at birth are not allowed access to basic education and are generally burdened with domestic household chores. These becomes the foundation for a lifetime of circular and absolute dependence on a man she does not know: and upon the demise of the man her right to inherit his property is denied and her life becomes miserable because of obnoxious practices which she could be made to undergo as a sign of respect for the deceased husband. These cultural, religious and societal norms are arguably at the root of the historical neglect of women in Nigeria.

The rapid ascendancy of human rights in Nigeria, coupled with Nigeria's prominent role as a signatory to virtually all the core international human right treaties and instruments raised expectations that women in Nigeria may begin to enjoy some measure of protection from archaic and anachronistic practices that subject them to a wanton abuse. The scope of these happenings requires an extensive reflection and worthy of scholarly examination in the light of recent debates in the Nigeria National Assembly on child marriage, women's right and the need for constitutional protection for the girl child.

This paper examines the nature, scope and extent of human rights protection afforded to women under Nigerian domestic laws and under international law. It reflects on how key issues such as child marriage, women's property rights and female succession norms and practices affect gender justice and the protection and fulfillment of the rights of women in Nigeria. It discusses the possible legal panacea to these historical and cultural challenges in this 21st century.

1. INTRODUCTION

The question of the 'universal' (equal) or 'relative' (contingent) character of the rights declared in the major instruments of the human rights movement has been a source of debate and advocacy from the movement's start. The contest between these positions took on renewed vigour as the human rights movement slowly developed, and reneged on making specific provisions on gender issues.¹ There have also been diverging theories on the sovereign autonomy of a state to follow its own paths in this matter. For example, the

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¹ Steiner J and Alston P., *International Human Rights in Context: Law, Politics and Morals* (OUP 2000) 312.

universal theory of human rights claims that the rights to equality and equity enshrined in the international treaties must be applicable all over the world in the various domiciliary legal systems, even in societies that are fundamentally cultural, religious and or customary.² In those arguably patriarchal societies such as Nigeria (and in sub-Saharan Africa in general), laws rooted in customs and traditions often discriminate against women.³

These discriminatory trends against Nigerian and African women are violations of the fundamental human rights against discrimination, a right recognized in a number of core international human rights instrument. Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that all persons are equal before the law and are entitled without any discrimination to equal protection of the law. It requires States to prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴ Article 2(3) and 3 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR) also contains similar provisions on non-discrimination.⁵

The United Nation Sub-commission on the Prevention of Discrimination and Protection of Human Rights, described prevention of discrimination as the prevention of any action which denies to individuals or groups of people the equality of treatment which they may wish.⁶ Article 1 of the *Convention on the Elimination of Racial Discrimination* (CERD) defines discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁷

Article 7 of the *Convention on the Elimination of All forms of Discrimination against Women* (CEDAW) also provides for the elimination of discrimination against women in political and public life.⁸ Article 5 encourages states to take measures to eliminate prejudices and stereotypes against women. Article 1 of the *Universal Declaration of Human Rights* (UDHR) also provides that ‘All human beings are born free and equal in dignity and rights’. Article 2 notes that ‘everyone is entitled to all the rights and freedoms set forth in the Universal Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or

² Ibid p 161.

³ Elizabeth D. and Birgit E, “Securing Land Rights for Women” (2010) 4 No 1 Journal of Eastern Africa Studies 91 at 98

⁴ International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 (ICCPR)

⁵ International Covenant on Economic Social and Cultural Right adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3 reprinted in 6 ILM 360 (1967).

⁶ This commission was created by the United Nations to specifically address the issues of equality and non-discrimination. See A Bayefsky, ‘The Principle of Equality or Non-discrimination in International Law’ (1990)11 Human Rights Quarterly 5.

⁷ Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, reprinted in 5 ILM 352 (1966)

⁸ See Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW) (Adopted 6 October 1999, entered into force 10 December 1999) 2131 UNTS 83, reprinted in 39 ILM 2819(2000).

other status'. Article 4 provides that 'No one shall be held in slavery or servitude' while Article 7 declares unequivocally that 'All are equal before the law and are entitled without any discrimination to equal protection of the law'.⁹ Though not legally binding, the *UN Commentary on the Norms and Responsibilities of Transnational Corporation and other Businesses with Regard to Human Rights* provides detailed and persuasive explanation of how discrimination trends can be avoided in project planning and execution. It provides that transnational corporation and other business enterprises should ensure equality of opportunity and treatments as recognized in international law to ensure that all forms of discrimination are eliminated from business related activities.¹⁰ The commentary in para 2(c) specifically notes that 'Particular attention should be devoted to the consequences of business activities that may affect the rights of women'.¹¹ It also provides that transnational corporations and other business enterprises shall ensure that the burden of negative environmental consequences shall not fall on vulnerable racial, ethnic and socio-economic groups.¹²

The United Nations Committee on the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) released a general recommendation, which though not legally binding, instructively outlined issues on women's right as follows:

there are countries that do not acknowledge that rights of women to own an equal share of the property with their husband during a marriage or de facto relationship and/ or when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or customs.¹³ Even when these legal rights are vested in women, and the courts enforce them; property owned by a woman during marriage or on divorce may be managed by a man. In many states, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.¹⁴

The social, political and economic system in Nigeria is rapidly and radically changing. Incidentally, in Nigerian chequered political history, the 1st

⁹ Universal Declaration on Human and Peoples Rights, (adopted on December 10,1948) G.A. res. 217A (III),U.N.

Doc A/810 at 71(1948).

¹⁰ Article 2(c), E/CN.4/Sub.2/2003/38/Rev.2. See also J Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"(2011) A/HRC/17/31.

¹¹ *ibid*

¹² See Para 14(c) of Commentary, E/CN.4/Sub.2/2003/38/Rev.2.

¹³ Committee on Elimination of Discrimination Against Women, General Recommendation No. 21: Equality in Marriage and Family Relations,13th Sess., U.N.Doc. A/49/38 at 1(1994) at para 30.

¹⁴ Committee on Elimination of Discrimination Against Women, General Recommendation No. 21: Equality in Marriage and Family Relations,13th Sess., U.N.Doc. A/49/38 at 1(1994) at para 31.

republic from 1960-1965 saw only three women; one senator¹⁵ and two members of the house of Assembly. The constitution of the Federal Republic of Nigeria 1999 has changed several times to accommodate modern changes. Despite these changes however, there are still questions on whether the prominence and the proliferation of human rights laws in Nigeria have provoked the desired level of gender justice, i.e the balanced protection, respect and fulfillment of the fundamental human rights of women in Nigeria. This is the main focus of this paper.

This paper examines the nature, scope and extent of human rights protection afforded to women under Nigeria domestic laws and under international law. It reflects on the key and emerging issues affecting gender justice and the rights of women in Nigeria in this 21st century and the possible legal panacea to these emerging challenges.

This paper is divided into four parts. This introduction is the first. Part two offers a historical analysis and background on child marriage as a major causative factor of gender injustice in Nigeria. It describes how the problem of child marriage is arguable the foundation of women rights violation and power imbalance between men and women in many part of Nigeria. Another fundamental aspect of gender imbalance in Nigeria is the lopsided nature of inheritance and succession practice, which often mean female children lack the capacity to inherit and manage family property. Part three examines these issues and discusses how it affects the rights of women against gender discrimination. This paper wraps up in part four with legal examinations and prescription on how these two concerns can be holistically addressed in Nigeria in this 21st century to better protect the rights of women in Nigeria. It reflects on how Nigerian laws could be better adapted to better protect the rights of women and to ensure gender justice for the Nigerian girl child.

¹⁵ See The Protocol to the African Charter on Human & People Rights on the Rights of Women in Africa in Africa which was ratified by Nigeria on the 18th day of February 2005. See also the convention Declaration on the Elimination of All forms of Discrimination Against Women entered into force in 1981 and which by 1993 had been ratified by 116 countries including Nigeria. In the Government of the Republic of South Africa & others V. Grootbroom & others (2000) (4) SA (CC) a land mark decision confirming the enforceability of Social and economic rights was handed down by the Constitution Court. This case is today regarded as the ground breaking and Leading case in Social and Economic rights. See also, Oludoro & Durojaiye "Enforcement of Social and Economic Rights in Africa" Lesson from South Africa in FQLJ Vol. 3 February 2006 P.31 Contrast the aforementioned Case with Molefi Ts Epe Vs the Independent Electoral Commission & 4 ors reported in C of A (civil) No 11/05 cc 135/05 judgment delivered on the 28th June 2005 wherein in same Lesotho South Africa attempt at complying with the International Treaties convention, Covenants & Bills to bring to terms and enhance the status of Women in politics and public life was vehemently resisted by our male counterpart. See the Guardian of march 21, 2006 at P. 69. Read also Noreen B. "The 1979 convention on the Elimination of All Forms OF Discrimination Against Women", The Netherlands review 1985, P. 49 and Mamashella MP. "The Significance of the convention on the Elimination of All Forms of Discrimination Against Women for Mosotho Women" In African Society of International and Comparative law 5th Annual Conference 20-24 September 1993 at P. 153 also Brain J. Less Than second Change. Nancy & Edna (eds.) (Stanford University Press, 1976) 108.

2. CHILD MARRIAGE AS A ROOT OF GENDER INJUSTICE IN NIGERIA

Child marriage, defined as a formal marriage or informal union before age 18, is a reality for both boys and girls, although girls are disproportionately the most affected.¹⁶ It is a situation where female adolescent and teenagers are married to adult husbands. In these instances, sometimes, the men can be twice their ages and these females become child brides. Historically, the aristocracy of some culture tends to use child marriage among different factions or states as a method to secure political ties between them. The son or daughter of a royal family of a weaker family would sometimes arrange to marry into the royal family of a stronger neighbouring power, thus preventing itself from being assimilated. In the lower classes if they were fortunate, families could use child marriage as a means to gain financial ties with wealthier people ensuring successions.¹⁷

The incidence of child marriage has become a global phenomenon, particularly in Sub-Saharan Africa and Southern Asia.¹⁸ In Nigeria, several researches have been carried out on the incidence of child marriage. In 1999 according to the Nigeria Democratic Health Survey (NDHS),¹⁹ it was reported that in 26.5 percent couples, there is an age difference of 15 or more years between husband and wife. Equally, it showed the median age of marriage in the South East was 20.2 years whilst those of the North West was 14.6 years and slightly higher in the North east with 15.0 years. It concluded that there was a large zonal variation in the mean age of marriage with females in the North marrying on an average of about five years earlier than those in the South.²⁰

¹⁶ Iyabode O. "Child Bride and Child Sex: Combating Child Marriages in Nigeria" Promoting Access to African Research. A Publication of Nnamdi Azikiwe University Journal of International Law and Jurisprudence. Vol 2 (2011) www.ajol.info/index.php/nauijl/article/view accessed on 15th April 2013. See also Child Protection from violence, exploitation and abuse. UNICEF (2012) <http://www.childinfo.org>

¹⁷ *ibid*

¹⁸ In Rajasthan, India, there is the custom of giving very small children away in marriage. On the auspicious day of Akha Teej, the mass solemnization of marriage between young boys and girls is performed. From the parents' point of view, this is the tried and tested way of organizing the passing on of property and wealth within the family. A small but significant proportion of the children involved are under age 10, and some are mere toddlers of two or three years old. Many Bangladeshi girls are married soon after puberty, partly to free their parents from an economic burden and partly to protect the girl's sexual purity. Where a girl's family is very poor or she has lost her parents, she may be married as a third or fourth wife to a much older man to fulfill the role of sexual and domestic servant. In Albania, families in rural areas reduced to abject poverty by the post-communist transition, encourage their daughters to marry early in order to catch potential husbands before they migrate to the cities in search of work and to avoid the threat of kidnapping on the way to school. In Niger, a recent study by UNICEF in six West African countries showed that 44 percent of 20-24 year old women in Niger were married under the age of 15. The need to follow tradition reinforce ties among or between communities studied, all decisions on the timing of marriage and the choice of spouse are made by the fathers. See 'Early Marriage, Child Spouses' (Innocenti Digest No 7 March 2001) a publication of UNICEF Innocenti Research Centre Florence Italy.

¹⁹ Children's and Women's Rights in Nigeria: A wake-up Call, Situation Assessment and Analysis 2001 (National Planning Commission, Abuja and UNICEF 2001) 200.

²⁰ Iyabode O. "Child Bride and Child Sex: Combating Child Marriages in Nigeria" Promoting Access to African Research. A Publication of Nnamdi Azikiwe University Journal of International Law and Jurisprudence. Vol 2 (2011) www.ajol.info/index.php/nauijl/article/view. accessed on 15th April 2013 See also Child Protection from violence, exploitation and abuse. UNICEF (2012) <http://www.childinfo.org>

Another recent research based on the 2003 NDHS revealed that the timing of marriages varies considerably by region and areas of residence.²¹ The median age at marriage is lowest among girls in North West and North East regions, at 15.8 and 16.8 years respectively. Rural girls were more likely to marry early compared with urban girls; for example, in the North West, 29 percent of urban girls married by age 15 compared with 65 percent of their rural counterparts who are married at the same age. The timing of marriage among girls in the Southern regions is later.²²

Unfortunately, early marriage is a predicament, which the girl child as opposed to the boy often faces. It was a common form of marriage under the three dominant cultures; unfortunately it is still practiced in some rural communities especially in the Hausa culture in the Northern States of Nigerian.²³ Under this practice a girl from birth is betrothed to a man to whom she will be formally married between the ages of eight and ten. According to Sabattou (1998) in answer to a question on the practice of child marriage her father answered thus: "This practice existed before I was born and there is no use complaining about it my daughter. Listen to me; I married your mother at the same age"²⁴.

Early marriage robs a girl of her childhood-time necessary to develop physically, emotionally and psychologically. Early marriage inflicts great emotional stress as the young woman is removed from her parents' home to that of her husband and in-laws. Her husband who will invariably be many years her senior will have little in common with a young teenager. Early marriage devalues women in some societies and the practice continues as a result of son preference. In some communities, girls as young as a few months old are promised to male suitors for marriage. Girls are fattened up, groomed, adorned with jewels and kept in seclusion to make them attractive so that they can be married off to the highest bidder. Early marriage has some associated health complications²⁵. Health complications that result from early marriage in the Middle East and North Africa, for example, include the risk of operative delivery, low weight and malnutrition resulting from frequent pregnancies and lactation in the period of life when the young mothers are themselves still growing.

Child marriage is very common in the Northern part of Nigeria and the practice is often connected with the Islamic religion. Islam was introduced into Nigeria around the 11th century and spread throughout the country.²⁶ It has its own distinctive legal system, that is, sharia law. Islamic jurists have

²¹ Annabel S.E and Mairo B, "The Experience of Married Adolescents Girls in Northern Nigeria". The study is collaboration between the Population Council and Adolescent Health and Information Projects (AHIP) Kano, Nigeria (publication of Population Council 2007).

²² Ibid

²³ Ibid. p 89-90

²⁴ Ibid p 90 (Robinson 2001) the above conversations between Sabattou and her father were about the marriage of her ten year old sister. This practice was a cultural practice which still goes on in some rural parts of the country particularly the North.

²⁵ Students of International law and practice of Human Right , Women's Right and customary practices at LL.M level 2010/2011 Session, Faculty of Law, University of Ibadan 3-45 at 36

²⁶ Junaid .O. "The Sharia Legal System in Nigeria; A Historical Survey" in Momoh C.S & Awonusi S. (eds.), Nigerian Integrated Discourse Volume 1 Sharia, University of Lagos, Nigeria 2005, pp. 234-235.

tackled the issue of age of marriage based on the interpretations of Quran.²⁷ According to these jurists, a child “experiencing a wet dream” or “experiencing a monthly course,” as stated in the Quran in relation to the age of marriage, indicates the age of maturity for males and females.²⁸ However the wet dream for males and menstruation for females are attained at any particular age. The age of marriage is determined by a combination of other factors, including environment, climatic conditions and physical growth.²⁹ In essence, it is lawful for a girl who has not attained the age of puberty to enter into marriage. Therefore, Islamic Law does not fix any age for marriage, and this probably explains the higher incidence of “marriage of minors” or “child marriage,” or “child bride” in the North including the sharia implementing states³⁰.

In *Labinjo V Labake*,³¹ the court stated that the contractual capacity begins at puberty under customary law. While on *Folata V Dawomo*³², it was held under Moslem law that maturity is determined by physical maturity or a declaration of the youth in question or failing this by reaching the age of lunar months. Some schools of thought fix marriageable age at 10 if the child has attained puberty.³³ The girl must express her desire to get married³⁴. This is also the case under the Nigerian customary law. Girls are usually betrothed at an early age either from birth or even while in the womb yet unborn. This is achieved by sending gifts of firewood to an expectant mother. After the birth of a child, if a female, the intention may be made strengthened by some betrothal gifts made to the mother of the child.³⁵

Whilst the practice of child marriage may be firmly rooted in the Quran, the *caveat* that copulation should be delayed until when such girls are mature is often abused as these child brides are often engaged in sex.³⁶ The marriage of Ahmed Sani Yerima a 50 years old senator and former Governor of Zamfara State with a 13-year-old Egyptian bride consequent upon his divorcing another 15-year-old bride who had a child for him as reported by the editorial of a reputable newspaper is a case in point.³⁷

²⁷ Ambali M.A., *The Practice of Muslim Family Law in Nigeria* Tamaza Publishing Co. Ltd Zaria 2003, pp. 154-155.

²⁸ *ibid*

²⁹ *ibid*

³⁰ Iyabode O. “Child Bride and Child Sex: Combating Child Marriages in Nigeria” Promoting Access to African Research. A Publication of Nnamdi Azikiwe University Journal of International Law and Jurisprudence. Vol 2 (2011) www.ajol.info/index.php/naujilj/article/view. accessed on 15th April 2013

³¹ (1924)5 NLR 33

³² (1970) NWLR 105

³³ Ruxton F.H. *Maliki Law* (Luzac and Company London) 93.

³⁴ *ibid*

³⁵ Nwogugu E.I Op.cit

³⁶ Abd al Afi, H. ‘The Family Structure in Islam’, International Graphics Printing Service, Maryland, 1977, pp.76-77. A leading proponent in Islamic Family Law explained that under Islamic Law, “marriage in minority would imply a betrothal or some formal agreement, deferring final consummation to a later date

³⁷ “Senator Yerima’s new wife” (Sunday Punch of 18th April 2010) p.10. Ordinarily, polygamy is recognized in Nigeria, but the import of the 50 years old Senator marrying a girl who could be his daughter is not lost on Nigerians. Obviously, this has generated fiery reactions from several quarters. For instance a coalition of Nigeria women’s groups, activists and academics signed and delivered a petition to the Senate calling for an investigation into the alleged marriage. They equally petition that the Senator is in the habit of having child brides. Sometimes in 2006 or thereabout, he married a 15-year-old girl (Hawau) as his fourth wife.

The Senator was invited by the officials of the National Agency for Prohibition of Trafficking in Persons and Other Related matters (NAPTIP) for questioning over his marriage to a minor.³⁸ The Senator maintained he had not contravened any law and tendered his marriage certificate to the girl in a sharia court. The Islamic practice is that marriage in minority is invalid without the consent and participation of the guardian and the responsibility for such a marriage is vested in persons who apart from being the parent or guardian have a good sense of judgment and consciousness.³⁹ The writer will contend that this act by the Senator is despicable to say the least and without any form of reservation on the part of the Senator is instigating members of the Senate to pass a resolution retaining Section 29(4)(b) of the 1999 Constitution. The import of this provision is that a marriage by an underage girl is deemed to be an adult. This move has been condemned from several quarters.⁴⁰

It is hardly disputing that poverty is the basis for such families giving out their teenage daughters. These uneducated child brides could not have been able to give any consent and is a clear abuse of their person even under Islamic law. Moreover, such child brides are denied the right to sexual autonomy as well as face multi dimensional socio-medical implications. The right to sexual autonomy includes the rights of women to have control over and decide freely and responsibly on matters relating to their sexuality.⁴¹ They are entitled to bodily integrity, pleasure and determine the intimate partner of their choice.⁴² In contradistinction, for these under-educated and adolescent girls, sexual intercourse is the likely consequence of their marriages. The assumption of sex within marriage is a priori consensual.⁴³ The emphasis by Islamic scholars that whatever may be the age of the child, final consummation must be delayed until the parties are ready for marital relations, a condition determined by puberty is often jettisoned.⁴⁴

Tragically, recently in Yemen, a 12-year-old girl died of internal bleeding three days after her March 29th wedding. The medical report by the hospital stated that she suffered from “sexual exhaust, cervix tears and severe bleeding”.⁴⁵ A research conducted on several countries, including Nigeria

The Senator divorced the said girl when she was 17 and nursing his child so that he could marry another wife. They urged the senate to suspend him.

³⁸ “Agency grills Yerima over child bride” available at <http://nigeria.com/2010/05/19/newstoday>

³⁹ See ‘Promoting Women’s Rights through Sharia in Northern Nigeria’, A publication of the centre for Islamic Studies, Ahmadu Bello University, Zaria, 2004.

⁴⁰ A US-based online activist Eme Awa has collected more than 15,000 signatures needed to petition the United Nations over the Senate’s passage of the Resolution to retain this provision of the Constitution. See the Punch of page 14

⁴¹ Paragraph 96 of the Beijing Declaration, Working Definition of sexual rights from the World Health Organization. See ‘what is meant by sexual and reproductive health and rights’ available at <http://www.cldis.org/go/topics/resources-guide/health/key-issues/sexuality-and-reproductive-health-and-rights/what-docs-it-mean> (Last accessed 6/12/2010).

⁴² Iyabode O. “Child Bride and Child Sex: Combating Child Marriages in Nigeria” Promoting Access to African Research. A Publication of Nnamdi Azikiwe University Journal of International Law and Jurisprudence. Vol 2 (2011) www.ajol.info/index.php/nauijilj/article/view. accessed on 15th April 2013

⁴³ See ‘Early Marriage, Child Spouses’ (Innocenti Digest No 7 March 2001).

⁴⁴ Abd al Afi .H., op,cit p.76

⁴⁵ Madcline Wheeler, “Yemen’s Sacrificial Child Bride” available at <http://www.huffingtonpost.com/madcline-wwheeler/yemens-sacrificial-child>(Last accessed 8/12/2010)

showed that the modern contraceptive usage rate among married child brides from 15-19 years old in Nigeria is 0.6 percent.⁴⁶ This Percentage is very negligible; such child brides in most cases cannot determine the period of pregnancy and are prone to early pregnancy. With this, they are susceptible to the increased risk of dying, increased risk of premature labour, low birth rate and higher chances that the newborn babies will not live.⁴⁷ There are also the serious medical complications of Vesico-Vaginal Fistula (VVF) and Rectum Vagina Fistula (RVF).⁴⁸ It is pathetic that girls with such medical conditions are considered unclean and ostracized by society. In Nigeria, this condition affects 150,000 women. Out of this, a whole lot of 80-90 percent of wives with VVF is divorced by their husbands.⁴⁹

Child marriage equals early marriage. This inevitably denies children of school age their right to the education for their personal development, preparation for adulthood and effective contribution to the future well-being of their family and society.⁵⁰ The interaction between the number of years of a girl's schooling and the postponement of marriage is firmly established by demographic and fertility studies⁵¹ On the average, women with seven or more years of education marry four years later and have 2.2 percent fewer children than those with no education.⁵² Meanwhile, it has been rightly observed that there is better tool for effective development than education of girls. It lowers infant mortality, promotes health, improves nutrition, raises economic productivity, enhances political participation and prepares the ground for educating the next generation.⁵³

Judging from the array of socio-medical consequences of early marriage enumerated, it is only logical for countries to legislate against child marriages. Therefore, Nigeria enacted the *Child Right Act* which amongst others outrightly prohibits child marriages. Nigeria signed the Convention on the Rights of the Child in January 1990 and ratified the same in April 1991.⁵⁴ Despite stiff oppositions to the Convention on the Rights of the Child, it was domesticated

⁴⁶ Blanc A.K & Way A.A, "Sexual Behaviour, Contraceptive Knowledge and Use", Studies in Family Planning Vol 29, No.2, 1998.

⁴⁷ Senderowitz J. "Adolescent Health: Reassessing the Passage to Adulthood", World Bank Discussion Paper No 272, Washington DC 1995.

⁴⁸ VVF arises from obstructed and prolonged labour. When an under-aged girl goes into labour, her pelvic bones are not sufficiently developed to allow the passage of the baby's head. Consequently, the foetal head presses on the surrounding tissue and organs. If this continues for long, the pressure can lead to fistula, in the form of holes between the bladder and the vagina (VVF) and in extreme cases between the vagina and the rectum (RVF). Children's and Women's right in Nigeria: A wake-up Call, Situation Assessment and Analysis 2001, op.cit p.201.

⁴⁹ 'Final Report on National Baseline Survey of Positive and Harmful Practices Affecting Women and Girls in Nigeria' Centre for Gender and Social Policy Studies, Obafemi Awolowo University, Ile-Ife, 1998

⁵⁰ See "Early Marriage, Child Spouses"(Innocenti Digest No 7 March 2001)

⁵¹ UNFPA State of the World's Population 1990, New York, UNFPA 1990.

⁵² Ibid

⁵³ Kofi A. A., Forward Note, State of the World Children 2004. See also Iyabode Ogunniran "Legal Perspectives on Educational Rights of the Girl-Child and Development Issues in Nigeria" (A.B.U.J.P.I.L.)2007,pp. 41-54

⁵⁴ Status of Ratification of the Convention on the Rights of the Child, available at <http://www2.ohchr.org/english/law/ere-ratify.htm>, (Last accessed 20/8/2010)

as the *Child Rights Act 2003*.⁵⁵ The Child Right Act provides a comprehensive and child specific legislation, which is in accordance with international standards.

The Child Right Act prohibits child marriages. A Person under the age of 18 years is incapable of contracting a valid marriage and where such marriage is contracted, it is null and void.⁵⁶ Furthermore, a parent, guardian or any other person cannot betroth a child in contravention of this section as such betrothal will be null and void.⁵⁷ The Act states clearly the category of persons contemplated by this provision, that is a person who marries a child, to whom a child is betrothed, promotes the marriage of a child or who betroths a child.⁵⁸ In order to show the seriousness of this issue, the Act makes it an offence liable on conviction to a fine of ₦ 500,000 or imprisonment for a term of Five years or both.⁵⁹

Many Northern states have refused to adopt the Child Right Act. In fact, the strongest opposition to the Child Right Act by Islamic leaders pertains to the age of marriage.⁶⁰ A Northern cleric, Imam Sani, declared that if the government imposed the Child Right Act, there will be violent conflicts from some Muslims to the extent that some would even die in the process.⁶¹ Hence, Jigawa state is the only sharia implementing state that has adopted the Child Right Act.

Already, there appears to be some manipulations of this section. The Jigawa State Child Rights Law prohibits child marriage but a child for the purposes of the section is a person below the age of puberty.⁶² It defines this age as when one is physically and physiologically capable of consummating a marriage.⁶³ Even though this is to be determined by the courts, it is our opinion that there will be different judicial opinions depending on each case hence, lack of uniformity. It must be stressed that the definition section defines a child as any person below 18 years but specifically excludes section 15 on child marriage.⁶⁴ And to show its obvious disapproval for the prohibition of

⁵⁵ For instance, that the CRA will demolish the very basis and essence of Sharia and Islamic culture.

Available at Sharia Council Against Child Rights Act, available at <http://www.wluml.org/node/2408> (Last accessed 20/10/2010).

⁵⁶ Section 21. According to some scholars, the rationale for prohibition of child marriage is as a result of incessant cases of VVF in some parts of the country where early child marriages are common. Also, such children below the age of eighteen years may not necessarily be fit mentally and psychologically to bear the burden of motherhood or parental responsibility towards children. See Adeyemi A.A, Dean, Faculty of Law, University of Lagos at the Law Teachers Conference held in May 2004

⁵⁷ Section 22(1).

⁵⁸ Section 22(2).

⁵⁹ Ibid. There are thirty-six states in Nigeria, but presently twenty-four states have adopted the Child Right Act. These are: Abia, Anambra, Bayelsa, Ebonyi, Ekiti, Imo, Edo, Delta, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Oyo, Osun, Plateau, Rivers, Benue, Akwa Ibom, Cross Rivers, Taraba. Only four northern states such as Jigawa, Kwara, Nassarawa, Taraba, Kogi and Adamawa have adopted the CRA. In fact many of the states that are yet to adopt are from the north. Significantly, it is only Jigawa out of the Sharia-implementing states that has adopted it. Interview with Sharon Oladiji, Project Officer Child Protection and Participation Section, UNICEF, U.N. House Central District Abuja.

⁶⁰ Child Marriage in the Islamic World, <http://97.74.65.51/read Article.asapa?ARTID> (last accessed 21/12/2010).

⁶¹ Ibid

⁶² Section 15(1).

⁶³ Section 2(1)

⁶⁴ Section 2(1)

child marriages, the penal provision ridiculously states that a person is liable on conviction to a fine of ₦5, 000 or a term of imprisonment for one year or both.⁶⁵

In the same vein, the proposed bill of Child Rights Law in Borno State cleverly states that no person under the age of 18 years is capable of contracting a valid marriage unless the Law applicable to the child majority is attained earlier.⁶⁶ As earlier reiterated, in Islamic Law, applicable to all Muslims, there is no fixed age of marriage. Hence, a child may not necessarily be 18 years to get married. Also, the penal sanction is a fine of ₦10,000 or a term of imprisonment for six months or both.⁶⁷ It is glaring from these two provisions that child marriages are indirectly encouraged.

3. DEBATES ON SUCCESSION RIGHT OF FEMALE CHILDREN IN NIGERIA

The primogeniture rule has been severely criticized on the ground that it prohibits female children from inheriting.⁶⁸ Kaganas and Murray assert that customary law openly discriminates against Africa women.⁶⁹ Unlike a woman who marries under the Marriage Act, a woman who marries under customary or Islamic Law in Nigeria does not enjoy adequate legal protection in the distribution of assets.⁷⁰ Under customary arrangements, however, the husband is generally regarded as having dominant/legal power to dispose of family property. In some cases, the husband often exercises this power without taking cognizance of the wife's contributions to the assets as they are usually acquired in the husband's name.⁷¹ Under the Yoruba customary law, the deceased's wife

⁶⁵ Section 17

⁶⁶ Section 21. It has been argued that the definition of a child under the Children's Convention as "every human being below the age of eighteen years, unless, under the law applicable majority is attained earlier" is more purposeful, realistic and flexible within the context of Nigerian people especially the Muslim than the blanket provision of eighteen years under the CRA. It is our opinion that the preference for this definition is that under it, the age of marriage will still not be specified as depicted in the Borno State's bill.

⁶⁷ Section 23

⁶⁸ See Bennett Human Right and African Customary Law 80-95; Robinson 1995 SAJHR 457-476; Van der Meide "Gender Equality v Right to Culture: Debunking the perceived Conflicts Preventing the Reform of the Marital Property Regime of the "Official Version' of Customary law" 1999 SALJ 100; See also Liebenberg and O'Sullivan "South Africa's New Equality Legislation A Tool for Advancing Women's Socio-economic Equality?" in Jagwanth and Kalula (ed) Equality Law: Reflections From South Africa and Elsewhere (2001) 70, 72-73

⁶⁹Kaganas and Murray "Law and Women's Rights in South Africa: An Overview" in Murray (ed) Gender and the New South African Legal Order (1994)16. Conversely, it can be argued that whereas patriarchy has often been a feature of customary law rule of inheritance, it was often fortified with checks and balances that ensured the welfare of women and other dependants

⁷⁰ The Married Women's Property Act 1883 accords some recognition and gives a surviving wife inheritance rights on certain portion of the legacy. Married Women's Property Act is a Statute of General Application in Nigeria. Where marriage is dissolved, the Nigerian Matrimonial Causes Act 1970 provides that a judicial order shall divide the family assets between the parties.

⁷¹ See Nwanva v Nwanva (1987) 3 NWLR 697; In South Africa, by virtue of S. 11(3)(b) of the Black Administration Act 38 of 1927, African women married under customary law were regarded as minors under the guardianship of their husbands. Mbatha argues that this minor legal status disqualified them from inheriting family property as wives or daughters. However, this position has changed with s.6 of the Recognition of Customary Marriage Act 120 of 1998 which came into operation on 15 November 2000. The effect of this Act is that women who are married under customary law will no longer be minors subject to their husband's guardianship. They now have equal capacity and full status to acquire assets

is regarded as part of the chattel or property to be inherited⁷² and, as such, she has no inheritance rights in her husband's property.⁷² Exclusion of the wife from inheriting from her husband's estate is based on the customary law notion that succession or devolution of his property follows blood. Not being a blood relation of the husband, a wife or widow has no claim to any share.⁷³ Nigerian customary law follows a patriarchal system, which does not allow women to inherit real property. The fact that a wife is not a blood descendant of her husband's family deprives her of succession rights in that family. As regards her father's place, a woman by culture is never allowed to come from her husband's house to inherit her father's property. In both cases the female loses, as she cannot inherit on either side.⁷⁴

In some communities in the Northern states of Nigeria where the individual has not adopted Islam as a religion, intestate succession is essentially patrilineal. Female children are excluded from inheriting from their father⁷⁵. According to Smith⁷⁶ "if the former head of the Gandu has left two or more widows, each with one or more sons in the home, the unallotted land of the Gandu may soon be apportioned; but if there is only one widow, partition is likely to be postponed until her death, if she remains in the home. In either event, allocation of land made by the previous head of the gandus does not change; and the principle of equal shares guide further division which takes place among the men concerned, since women rarely have the right to inherit compounds or land".

The position of female children in the Ibo speaking area of Nigeria⁷⁷ with regard to succession right is not so different from the Northern area. In *Ugbomia v Ibeneme*⁷⁸, One Reverend Ibeneme a native of Awkuzu, in Anambra local government area of Anambra state died leaving a number of landed properties at Onitsha including No. 44 New Market Road, Onitsha. He was survived by two sons and several daughters. The plaintiffs are the second and six of his sisters. The first defendant is the eldest son and head of late Reverend Ibeneme's family. The plaintiff brought an action seeking a declaration that the property in question being the joint property of all the children of Ibeneme, could not be sold and converted by the first defendant alone. The learned trial judge, *Egbuna J*, held that in accordance with the general Ibo custom which is also the custom of Akwuzu, home of the deceased

and dispose of them, to enter into contracts and litigate.

⁷² This is made possible through levirate arrangement. Under this system, if a person dies leaving a young widow capable of bearing children, she would be expected to enter into a levirate union with one of the deceased's male relatives. This institution ensures that death does not disturb the relationship between the spouses' family and the widow will continue to produce children for her husband's patriline. In some cultures, a similar arrangement is made widely, the sororal union has no root under the Nigerian customary law system and little is known about it if a wife died while still of child-bearing age. In these circumstances, her family would be expected to provide a substitute spouse with whom the surviving husband could consummate a sororal union. However, while levirate union is practiced it.

⁷³ Following customary law, the Nigerian Court of Appeal, Lagos Division held that wives are regarded as chattels which are capable of being inherited by other members of the family of the deceased. See *Ogunkoya v Ogunkoya* Suit No. CA/L/46/88, 56 (unreported).

⁷⁴ *Davies v Sogunro* (1929) 8 NLR 79

⁷⁵ Taiwo E.A. The Customary Law Rule of Primogeniture and its Discriminatory Effects on Women's Inheritance Rights in Nigeria: A Call for Reform. (2008) volume 22 (2) *Spectrum Juris* 105-122 at 114

⁷⁶ Smith M.G., *Hausa Inheritance and Succession* (Oxford University Press 1965) 230

⁷⁷ The Igbo speaking area consists of Abia, Anambra, Ebonyi, Imo and parts of Delta state

⁷⁸ (1967) F.N.L.R. 257

Reverend Ibeneme, women are not entitled to inherit from their father. Consequently, the female children have no locus standi in the action.

However, female children are entitled to be maintained by the person who inherits their father's estate until they are given out in marriage or become financially independent. A female child cannot be made the head of the family in the non-muslim communities in the Northern states as well as in Ibo speaking areas of Nigeria⁷⁹. In *Atuanya v. Onyejekwe*⁸⁰, Egbuna J, held with regard to Ibo native law and custom that "by native law and custom when Udemba dies his land will automatically vest in whoever becomes the head of the family in trust for the members of the family. So on the death of Udemba, his land which were not sold in his life time cannot vest in the second defendant as she can never be the head of the family, she being a woman.⁸¹ In *Nzekwu v. Nzekwu*⁸², the court held that on her husband's death, a widow who has no male issue has only a right to occupy the building or part of the building belonging to her husband subject to good behaviour. The interest in the house is merely possessory and not proprietary. The above were some of the practices in the communities under consideration. But with the recent decision of the court in *Mojekwu v. Mojekwu*⁸³ a spanner seems to have been thrown in to the works as it were. Justice Niki Tobi opined in his judgment as follows:

Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized society does not discriminate against women? Day after day, month after month and year after year we hear of and read about customs which discriminate against the womenfolk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings, male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex and that is constitutional. Any form of societal discrimination on grounds of sex apart from being unconstitutional is antithesis to society built on the tenets of democracy...On my part, I have no difficulty in holding "Oli-Ekpe" custom of Nnewi is repugnant to natural justice, equity and good conscience.⁸⁴

⁷⁹ Ezeokafor v Ubah (1975) 5 W.L.R (Pt 11) 162. See also Ogbobine R.A.I 'Their People and Land Tenure' Bendel Land Law series Vol 4 Oshimi and Aniocha;; Nwogugu E.I Family Law in Nigeria (Revised edition) at p 408

⁸⁰ (1975) 3 S.C 161

⁸¹ Bennet Odiachi v Helen Odiachi (1980) F.N.R 372 at p 377-378

⁸² (1989) 3 SCNJ 167

⁸³ (1997) 7 NWLR (pt512)283

⁸⁴ See also *Mojekwu v Ejikeme* (2000) 5NWLR (pt 657) 403, 429 Where it was held that the Nrachi Nwanyi customary practice of Nnewi (eastern Nigeria) encouraged promiscuity and prostitution and therefore constituted discrimination. In terms of this practice, a man may keep one of his daughters unmarried perpetually under his roof to raise male issue in order to succeed him. Also in *Meriba v Egwu* (1976) 1 All NLR 266, the traditional practice in the Igbo land of Nigeria was found to be inconsistent with natural justice, equity and good conscience. This practice allowed marriage between two women to cater for well-to-do female members of society who were unable conceive. As a result, the practice was declared a nullity by the Supreme Court.

Omotola disagrees with the above view of the Court of Appeal on two grounds. Firstly, he argues that the Oli-ekpe custom should not have been declared as contrary to natural justice, equity and good conscience because female children are not prevented from benefiting.⁸⁵ He submits that the family property inherited by the heir is to be used for the benefit of all family members who will fall under his care. The property does not belong to heir in his personal capacity.⁸⁶ He therefore posits:

What is inequitable in asking property to be held for others or in saying males should hold for females so long as no one that is entitled is thereby deprived? This is principle upon which the English Trust was founded in order to keep the property safe and ensure evenhanded in its administration⁸⁷

Secondly, he argues that the learned Justice referred to the custom (Oli-ekpe) as unconstitutional and antithesis to a society based on the tenets of democracy but did not refer to any specific constitution. Omotola comments:

Although fundamental rights relating to discrimination contained in s.39, chapter IV of the (1979) Constitution were preserved. It is doubtful whether this provision would justify the dismissal of the primogeniture rule, as was done by the learned Justice, especially taking into account the provision of section 20 of the same Constitution which provides for the protection of Nigerian culture.⁸⁸

The above views expressed by Omotola on the decision of the Court of Appeal are arguably debatable. First, while the law of inheritance and succession under English law is reasonably settled, the aspect dealing with customary law is not, which breeds conflict and acrimony among heirs. What's more, the law discriminates among beneficiaries. Some are accorded rights of inheritance and others are not. Consequently, this customary law falls under the repugnancy doctrine test and more important international conventions against discrimination. Omotola had opined that in accordance with the English trust principles males could keep the property safe and ensure evenhanded in its administration.

I submit that the motive behind the Oli-ekpe custom is not that which seeks to ensure the safe keep of the matrimonial property for proper administration but one, which does not have an objective perception of the worth of the female personality as regards devolution of properties. Under the custom, only males can inherit. If truly the custom has in contemplation and preserves the proprietary rights of women, then they should expressly be made heirs in these properties and then the males could hold it in trust.

⁸⁵ Omotola 2003 Spectrum Juris 187

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸ *ibid*

On the second aspect of Omotola's thought, I align myself with the view of a notable scholar.⁸⁹ My humble view is that Section 20 of the 1979 constitution (now s.21 of the 1999 constitution) is a non-justiciable provision of the constitution. The provision is a mere expression of intention not backed up by force of redress, while the provisions of section 36 are inalienable to any citizen of Nigeria and actionable per se.

4. CONCLUSION

The concept of women's right *vis-a-vis* prevailing and anachronistic practices need to be better understood in the light of international standards and expectations. The customary rules of some major ethnic groups have been discussed and their shortcomings analysed. It has been pointed out that these discriminatory practices are against the letter and spirit of various laws such as the constitution, the African Charter on Human and Peoples Right and the Convention on the Elimination of all forms of Discrimination against Women and that discriminatory rules should not be made to thrive in the 21st century. The courts have played a commendable role but can do better in upholding justice and it is hoped that this paper will go a long way in advancing the inalienable rights of the Nigerian woman. Finally if Osborn's definition of customary law in *Lewis v Bankole*⁹⁰ is anything to go by then certain jurisprudential question begs for answers to wit: to what extent has our customary law and practices deviated from its archaic and anachronistic features depicting its flexibility and subjecting it to motives of expediency? The answer is in my view negative.

Having looked specifically at some cultural and other practices that affect the enjoyment of fundamental human rights of women among certain groups of Nigeria, the most affected rights of women are their rights to human dignity, their right to life and their right to personal liberty. Even though the courts have declared some customary practices against women void and aside the promulgation of laws that will effectually abrogate such discriminatory customs, these practices should be criminalized. Laws should be enacted to confer some rights of succession on women married under customary law but without issue or that adequate provision be made for such women from the estate of their late husband like in Europe where would-be couples sign pre-nuptial agreements. This is meant to protect the status of couples to the marriage.

Moves should be made at reviewing decisions of courts, which upheld customs that are discriminatory against female children. For instance, the decision in *Nzekwu v. Nzekwu*,⁹¹ where it was held that the widow's dealing however must receive the consent of the family and she cannot by effluxion of time, claim the property as her own. She has however a right to occupy the

⁸⁹ Taiwo E.A The Customary Law Rule of Primogeniture and its Discriminatory Effects on Women's Inheritance Rights in Nigeria: A Call for Reform. Spectrum Juris Volume 22 pt 2 2008. Professor Taiwo is of the view that the provisions of s. 20 of the 1979 Constitution (now s. 21 of the 1999 Constitution) relied upon by the learned scholar is a mere State Directive on Nigerian culture as opposed to s.39 of the 1979 Constitution (now s. 42 of the 1999 Constitution which is a fundamental right prohibiting discrimination. He is of the view that s. 20 of the 1979 Constitution is of a lesser category compared to s. 39 of the same Constitution because s. 6(6) (c) of the same Constitution makes s. 20 non-justiciable whereas s 39 is justiciable as a fundamental right.

⁹⁰ (1990) 1 N.L.R 82

⁹¹ *supra*

building or part of it but this is subject to good behaviour. It is submitted with due respect that the decisions in these cases are not in tandem with the thoughts enmeshed in the principles of natural justice, equity and good conscience and should be deviated from and so such decisions should be revisited to avoid following bad precedence.

It is also recommended that the Nigerian populace be properly educated so that anachronistic orientation towards the girl child and women can be changed. The imminent danger in giving a girl child out in marriage exposing her to all sorts of health and sexual hazard should be emphasized. It is disturbing that despite the passing into law of the *Child's Right Act 2003*, parents still engage in this obnoxious practice. This means that the issue is sometimes not the law but its enforceability.

Parents should be enlightened on the ills of unnecessary gender preference. Nigerian men should be taught to realize that the basis of the custom denying the rights of women in the past are no longer sustainable nor are they any longer of practical significance in the 21st century. It should be noted that though there are occasions where the courts shifted to the side of the customs in their decisions in issues of marriage, widowhood, succession rights disregarding the provisions of statutes and their decisions resulted in inflicting violence on the women, the role played by the regular courts have not been consistent. However, many judges are now on the progressive path and have taken the bull by the horn in upholding justice.

There should be introduction in school curriculums set cultural values in text books to accommodate the view that women's rights are human rights. The media should be used to sensitize the public both in the urban and rural areas of the hazards of these practices. Social institutions and non-governmental organizations should also be employed to sensitize the public on the effects of these practices. The government can through its instrumentality reach out and amend the cracked bricks of a potentially viable custom and put an end to a potentially destructive one for the sake of humanity.