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The Justiceability and Enforceability of Women's Rights in Nigeria

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I. INTRODUCTION

The legal framework for women's rights in Nigeria is based on the Constitution primarily, other local laws and international treaties relating to women ratified by the country. Nigeria is a country with very high but youthful population.² Women in Nigeria constitute more than two - thirds of the country's 70% adult non literate population. Despite the fact that women also constitute about 49% of the total population, they are discriminated against in all spheres of governance. The marginalization of Nigerian women is much more pronounced in the native laws and custom which constitutes a major aspect of the sources of Nigerian law. The issue of women's rights in Nigeria is very sensitive. Right is defined as 'A power, privilege or immunity, guaranteed under a constitution, status or decisional laws or claimed as a respect of long usage.'³

Although Nigeria is a party to many international and regional conventions the country, many of the conventions have not been tested in the Nigerian courts of law. Some of the international treaties applicable to women and ratified by Nigeria includes; International Covenant on Civil and Political Rights (ICCPR) 29 July, 1993, International Covenant on Economic, Social and Cultural Rights (ICESCR) 29 July, 1993, Optional Protocol on ICCPR concerning individual petition, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 28 June, 2001, International Convention on the Elimination of all Forms of Racial Discrimination (CERD) 16 October, 1967, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 23 April, 1984, Optional Protocol on the Elimination of all Forms of Discrimination Against Women 22 November, 2004 and the Convention on the Rights of the Child (CRC) 19 April, 1991. Other major instruments ratified include, Convention relating to the Status of Refugees (23 October, 1967), Protocol relating to the Status of

Refugees (2 May, 1968), Geneva Convention relative to the Protection of Civilian Persons in Time of War (October 10, 1988) and the United Nations Convention Against Corruption (9 December, 2003).

Importantly, the 1945 Declaration served as the basis for subsequent declarations on the rights of peoples geared towards the protection of the rights of women such as the Convention on the Elimination of All Forms of Discrimination against Women 1979, a treaty signed and ratified by Nigeria without reservations with the Optional Protocol signed on 8th September 2000 and ratified on the 22nd of November, 2004. Article 28 (2) adopted the impermissibility principle contained in the Vienna Convention on the Law of Treaties. It also states that a reservation incompatible with the object and purpose of the Convention shall not be permitted and may be challenged by other States parties.

The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."⁴

The Convention provides the basis for achieving equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life including the right to vote and to stand for election as well as education, health and employment. State parties agreed to take all appropriate measures⁵, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agreed to take appropriate

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² The World Bank in a 2009 estimate records the Nigerian population to be 154, 728, 892

³ Dr C.O. Isiramen, Humanism and Women's Rights in Nigeria found at <http://www.iheu.org/node/1134> (last visited on March 16th 2011)

⁴ Article 1 Convention on the Elimination of Discrimination Against Women (CEDAW) 1979.

⁵ The court, in *Serac V. Nigeria*, recognized a fourth duty of promoting enjoyment of human rights. The Commission held that the duty to undertake measures involves preemptive steps to prevent human rights violations even if not caused by direct acts of government agents

measures against all forms of traffic in women and exploitation of women.⁶ As such, ratification of the many international instruments on human rights principally the Universal Declaration of Human Rights (UNDHR) has inspired more positive responses within the human rights domain. The UNDHR however, is now considered a key component of the National Customary Law as many state parties strive to achieve the objectives of the covenant. It served the purpose of taking over from where the League of Nations which was established at the end of the First World War stopped especially since its efforts was not adequate enough to stop the subsequent Second World War. Since its adoption at the Geneva Convention in 1948 following the cruelty and horrors of human rights abuses witnessed during the Second World War, the UNDHR has served to promote several social, economic and cultural rights of peoples across the world. The preamble to the instrument stated clearly the lofty aim sought by the governments of the world represented when it stated that, "recognition of the inherent dignity and of the equal and inheritable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Other instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) also came in by encouraging state parties to take steps through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, for the full realization of the rights of its citizens guaranteed without discrimination as to race, colour, sex, religion, political or other opinion, origins, property, birth or other social stratification. This convention also sought, among other things, to protect the economic rights of people especially in the payment of just and favourable remuneration for employment⁷ and the provision of assistance for the family specifically in promoting family unification by providing that women should be afforded the right to be with their newly born babies for a period of time obviously to encourage bonding.⁸

The International Covenant on Civil and Political Rights (ICCPR) to which Nigeria is also a member enjoined state parties to ensure the equal rights of men and women⁹ to the enjoyment of all civil and political rights including the right of men and women to freely choose their marriage partners¹⁰ and ensure that parties to a marriage must be capable of freely exercising their rights and responsibilities to the marriage during the subsistence of such marriage and

at its dissolution with adequate protection¹¹ given by the state to the parties at dissolution.¹² Every citizen shall also have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives and vote and be voted for through the universal secret ballot system, guaranteeing the free expression of the will of the electors and the right of equal access to public service in his or her country.

Other international instruments such as the African Charter on Human and Peoples' Rights¹³ enjoined state parties to ensure the elimination of all discrimination against women and to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.¹⁴ Additionally, the very important Convention on the Elimination of all forms of Discrimination against women (CEDAW) decries all forms of discrimination against women, denying or limiting their equality of rights with men as fundamentally unjust and constitutes offence against women's dignity.¹⁵ Child marriage and betrothal of young girls before puberty shall be prohibited with effective action including legislation must be taken to specify a minimum age for marriage and to make marriages in an official registry compulsory¹⁶. In Nigeria however, this has been problematic despite the ratification of the CEDAW since local laws are clearly inconsistent with this provision of the covenant. For example, Apart from advocating for equal rights of men and women¹⁷ and the freedom of choice and consent in marriage¹⁸, the convention also enjoined all state parties to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of all

¹¹ Article 26 of the ICCPR also provides for equal protection of law for all

¹² Article 23 ICCPR

¹³ Article 2 provides for the right of individuals to enjoy rights and freedoms recognized in the convention without discrimination of any kind as to race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Article 3 also provides that everyone is equal before the law and be entitled to equal protection of the law.

¹⁴ Minister of Health & Ors. v. Treatment Action Campaign & Ors. (2002) AHLR 189, (2005) SA 721 (CC). In this South African case, the court determined the right of the woman to dignity specifically the right of the HIV/AIDS victims to treatment especially in ensuring that adequate treatment is given to prevent mother-to-child transmission of HIV considering the special vulnerability of women and children in the effort to combat HIV/AIDS in South Africa.

¹⁵ Article 1 of the Convention of Elimination of all forms of Discrimination against Women (Hereinafter referred to as CEDAW)

¹⁶ Article 6 (3) of CEDAW

¹⁷ For example, Articles 2, 4 and 5

¹⁸ Article 5 provides for the right of women to acquire, change or retain their nationality. See the case of A.G Botswana v. Unity Dow (1998) 1 HRLRA 1. Article 6 (2) and (3) also provides for the equal rights of men and women during marriage and that the best interests of the children shall be paramount in all cases relating to the children of the marriage.

⁶ United Nations Websiste <http://www.un.org/womenwatch/daw/cedaw/>

⁷ Article 7 of the ICESR

⁸ Article 10 ICESR

⁹ Article 3 of the International Covenant on Civil and Political Rights (hereinafter referred to as the ICCPR)

¹⁰ Osamwonyi v. Osamwonyi (1972) All NLR 792 established a woman'

customary and social practices that are biased and based on the idea of the inferiority of women.¹⁹

The Beijing Declaration which later followed in 1995 was designed to help foster/assure the human rights of women worldwide. The "eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centered sustainable development"²⁰.

Article 2 is central to the objects and purpose of the Convention since States parties agree that discrimination against women in all its forms should be condemned and that the strategies set out in article 2, subparagraphs (a) to (g), should be implemented by States parties to eliminate it. No traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the provisions of the Convention. Any reservations to article 16 are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn. The consensus to eradicate all forms of domestic violence as crimes was also reached with the added duty to promote people-centered sustainable development, including sustained economic growth, through the provision of basic education, life-long education, literacy and training, and primary health care for girls and women.²¹

Governments, the international community and civil society, including non-governmental organizations and the private sector were called upon to ensure that the persistent and increasing burden of poverty on women is addressed. Also, the inequalities and inadequacies in and unequal access to education and training, access to health care and related services must be tackled in order to reduce the burden of violence against women.²²

The effects of armed or other kinds of conflict on women, including those living under foreign occupation, inequality in economic structures and policies, in all forms of productive activities and in access to resources and inequalities between men and women in the sharing of power and decision-making at all levels must also be addressed with particular attention paid to the establishment of structures, systems and enforcement mechanisms needed to protect the rights of women.²³

Importantly, the goal was to promote the human rights of women and encourage equality between men and women, promotion of social justice and the empowerment of women with the purpose of achieving political, social, economic and cultural security of all persons.

II. APPLICABILITY OF RIGHTS TO WOMEN IN NIGERIA

The Constitution of the Federal Republic of Nigeria 1999 forms the basis of the rights inherent in every citizen. Sections 33 to 44 of that constitution grants inherent fundamental human rights such as the right to life, fair-hearing, personal dignity,²⁴ personal liberty, freedom of thought, conscience and religion, freedom from discrimination and the right to compulsory acquisition of property among others. Importantly, S. 19 (d) of the Nigerian Constitution declares that "respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication" shall be one of the state's foreign policy objectives. In applying international laws and treaties relating to the human rights of women in Nigeria, the Constitution is the primary source of law. The Federal Constitution as the supreme law of the land²⁵ allows a system whereby international laws and treaties ratified and adopted into law by the parliament becomes part of the accepted law of the land. Problems occur however because many of the Nigerian states have not adopted and passed into law most of the treaties and covenants ratified by the country. The Nigerian Constitution in protecting the human rights of Nigerians divides the rights into civil and political and socio-economic. It guarantees the civil and political rights in its Chapter 4 and socio-economic rights in its Chapter 2. The distinction lies in their justiceability. While the civil and political rights are justiceable, the socio-economic rights are not but are acknowledged as Fundamental Objectives and Directive Principles of State Policy.²⁶

Hence, women's rights as a fundamental part of the general human rights broad spectrum are problematic to enforce within the country. This paper presents the dual view of the current Nigerian legal

study of the provisions relating to women as contained in the Beijing Declaration.

²⁴ Section 35 of the Constitution provides for the personal dignity of individuals including women. This right is violated by many law enforcement officials who arrest and detain women for alleged offences committed by their husbands, boyfriends or sons. Worse still, they are abused and many times raped while in detention. See also Uju Peace Okeke, 'A Case For The Enforcement Of Women's Rights As Human Rights In Nigeria' (2004) found at http://www.wunrn.com/news/2010/04_10/04_05_10/040510_nigeria.htm

²⁵ S. 1 (1) of the Constitution of the Federal Republic of Nigeria 1999.

²⁶ See Uju Peace Okeke, 'A Case For The Enforcement Of Women's Rights As Human Rights In Nigeria' found at http://www.wunrn.com/news/2010/04_10/04_05_10/040510_nigeria.htm

¹⁹ Article 3 of CEDAW

²⁰ Article 16 of the Beijing Declaration

²¹ Fourth world conference on Women: The Beijing Declaration 1995 See Declaration

²² See <http://web.un.org>

²³ See <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> and <http://www.un-documents.net/bpa-4-i.htm> for an in-depth

system as explicitly stated within the Constitutional framework of the country as far as it relates to social, cultural and economic rights. It also provides a framework for understanding the conflicts that may be inherent in certain decisions of the court as it either sustains limitations in the attainment or enforceability of rights and the respect for justiceability within the legal system.

- a) Indeed, S.42 of the Constitution of the Federal Republic of Nigeria 1999 provides that, "A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
- b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions."

The applicability of rights to women in Nigeria has also been motivated by the desire to act in line with the multifarious international laws and treaties embraced by the country through acts of ratification and limited adoption. This is seen mostly in the fact that the country, in her effort to seem compliant, has initiated some lofty ideas and programs to enhance the lives of women with huge sums of money devoted by some state governments towards the enforcement of women's rights. The issue becomes more important when country reports are sent to the international bodies who compile such reports to either show case any development or decline in the general status of women world-wide. This works out to be a soft check on the state parties and also encourage accountability and further commitment from member states.

However, women's rights are often challenged in Nigeria most especially in family law areas such as succession rights and widowhood issues. Most cultures in Nigeria do not afford women with rights such as afforded by the international instruments and local laws including the constitution of Nigeria. Chapter 4 of the Nigerian Constitution deals with the Fundamental rights of all individuals including women who are individual rights bearers.

III. ENFORCEABILITY AND JUSTICE ABILITY OF WOMEN'S RIGHTS

Women are generally discriminated against in Nigeria despite statutory provisions to the contrary. Examples may be found in such areas as:

a) *Right to Work*

Regarding the right of women to work, the court in the Tolani case²⁷ affirmed that the Convention on the Rights of Women with disabilities was ratified on 3rd day of May, 2008 as part of the Nigerian law especially when discriminated against in their place of work. Article 3 of this Convention states:

"The principles of the present Convention shall be:

- a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b) Non-discrimination;
- c) Full and effective participation and inclusion in society;
- d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e) Equality of opportunity;
- f) Accessibility;
- g) Equality between men and women;
- h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

b) *Right to Property & Succession Rights*

The right of women to own property under marriage and to accede to family chieftaincy and family headship vary from one local culture to the other. Of all the cultures of Nigeria, the Yoruba culture of inheritance and succession has been given judicial endorsement. The case of D.W Lewis & Ors. v. Bankole & Ors.²⁸ has become the "*locus classicus*" of women's rights (as grandchildren of a Chief Mabinuori who died in 1874 in Lagos, leaving twelve children, the eldest being a daughter), to the family compound and (2) that the family compound was the family property of the deceased. The court held that there was no reason why a Lagos woman would be disentitled from managing the domestic affairs of her family despite the argument that a male family member will be more desirable than a woman within the local system. In this case, Osbourne J. admitted the evidence of Yoruba traditional chiefs that the Yoruba native laws and custom does not

²⁷ See the case of Tolani v. Kwara State Judicial Service Commission & Ors. (2009) LPELR-8375(CA)

²⁸ 1 NLR 81

discriminate against women on issues of inheritance and succession.²⁹

The rights of women under the Nigerian customary law are very precarious. For example, the "Primogeniture Rule" where males were preferred to women in inheritance matters. For example, the eldest male known as the "Okpala" becomes the head of the family and inherits as of right, the late father's dwelling and the immediate surrounding compound to the exclusion of the daughters.³⁰ Also, in the case of *Alajemba Uke & Anor. V. Alberet Iro*, the "Nnaeto" custom which allows a man to keep one of his unmarried daughters to raise children for him and the "Oli Ekpe" custom which allows only male children precludes a woman. In the case of *Archbishop Olubunmi Okogie V. Attorney General of Lagos State*,³¹ the court held that the provisions of chapter II of the Constitution are not obligatory on the government, meaning social-economic rights are not attainable in Nigeria. As such, it has been difficult to assert the right to health in Nigeria.

c) *Widowhood practices*

Under the Ibo customary law, a widow is not to succeed to the personal or real estate of her deceased husband.³² The Ibo culture of widow inheritance is oppressive to women. The only mitigating factor under this system is the right of the widow to be maintained from the proceeds of the estate of the late husband for as long as she lives within the compound. Also, the culture of forcing one of the daughters of a father who had no sons to remain in the family in order to produce a male son for the family was held unlawful.³³ In *Mojekwu's case*, the court's jurisdiction to declare a local custom repugnant to "equity and good conscience" was called into play with the case becoming a landmark case for the elimination of such customs that are repugnant to natural justice, good conscience and equity.³⁴

²⁹ See also the case of *Ephraim v. Pastony & Another*, (1993) LRC 231. The Tanzanian District Court upheld the rights of women by holding that since the incorporation of the Bill of Rights into the Constitution; women clan members had the same rights as men.

³⁰ See *Nwafia v. Nububa* (1966) 1 All N.L.R. 8

³¹ (1981) 2NCLR 337

³² See *Nezianya v. Okagbue*

³³ See *Emeka Mojekwu & 2 Ors. v. Okechukwu Ejikeme & 4 Ors.* (2000) 5 NWLR (Pt 657) 413. The court in this case held that "the Nrachi custom encourages promiscuity and prostitution, the latter condemned in Article 6 of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) promiscuity and prostitution are anti-social conducts which are against public policy within the meaning of the proviso to S. 14 of the Evidence Act (Cap 112, Laws of the Federation of Nigeria..."

³⁴ See also, *Attorney General, Botswana v. Unity Dow* (1998) 1 HRLRA 1 and the case of *Sarah Longwe v. Intercontinental Hotels Ltd.* 1993 HP 165

d) *Sexual Offences*

The Nigerian Criminal Code (applicable in the South) and the Nigerian Penal Code (applicable in the North) makes it a criminal offence to subject a woman to indecent sexual assault, rape and defilement. However, this offence happens too frequently with many of the women either too afraid to seek justice or made vulnerable by the stigma and embarrassment that may follow the report of such an offence. In certain instances, corroborating the evidence of the victim may create a problem for the prosecution to prove the case of sexual assault. For example, in the case of *State v. Akingbade Gabriel*,³⁵ the accused having been charged with the offence of rape of a 20-year old girl was later discharged and acquitted despite being found to have raped victim for lack of corroboration of the victim's statement. The court held in that case, that "... corroboration is evidence which shows or tends to show that the crime has been committed, but that it was committed by the accused." The court therefore went further to hold that in "applying the test, it (is) difficult to discover the necessary corroborative evidence in this case. The girl's prompt report or complaint to her parents is certainly not the corroborative evidence. That complaint and both the girl and her father's evidence of it satisfy me that she did not consent to sexual intercourse by the accused with her. In the result, the prosecution must fail and I regrettably discharge and acquit the accused." One is appalled by this decision especially in the learned judge's quest for a reason to convict. The requirement of corroboration is a device to circumlocute doubt and not a legal requirement but a cautionary requirement to ensure justice and fairness. Also, section 26 (2) (a) of the Constitution discriminates against women when it permitted a wife of Nigerian to acquire Nigerian citizenship unlike husband of a female Nigerian. This is express discrimination on ground of sex. Section 360 CC which defines unlawful indecent assault of females as mere misdemeanor attracting 2 years imprisonment while assault of males is a felony attracting 3 years imprisonment is discriminatory as it protects perpetrators (men) rather than the real victims (women).³⁶

One other important social problem is the issue of male chauvinism in most of our local systems. This is seen in the attitude of most of our judges and indeed in protecting women from rape by their husbands. In fact, the Nigerian Penal Code provides that a man is not able to rape or indecently assault his wife. This was the common law stance as stated in the case of *R v. Steel*³⁷ where the court held that, "the husband cannot be guilty

³⁵ (1971) All NLR 508

³⁶ See *Uju Peace Okeke*, 'A Case For The Enforcement Of Women's Rights As Human Rights In Nigeria' found at http://www.wunm.com/news/2010/04_10/04_05_10/040510_nigeria.htm

³⁷ (1977) CLS 270

of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife had given up herself in this kind ... to her husband from which she cannot retreat." Section 357 of the Criminal Code defines rape as '*...unlawful carnal knowledge of a woman or girl, without her consent... or, in the case of a married woman, by personating her husband...*' However, section 6 of the Criminal Code specifically provides that sexual intercourse between a husband and a wife cannot amount to rape unless there is a decree absolute or possibly a decree nisi. This provision therefore encourages marital rape and domestic violence in families. In the case of *Akinbuwa v. Akinbuwa*,³⁸ the court held that minor assault of the wife by the husband for corrective purposes is tolerable. This is in line with the Penal Code³⁹ which allows for wife chastisement. Also, in the case in *A.L.E Alawusa v. Lydia Ade Odusote*,⁴⁰ the appellant had shaved the pubic hairs of his wife under Native Laws and Custom. The learned counsel for the appellant argued that a man cannot be convicted of indecent assault upon his wife since he cannot be convicted of rape against his wife. The court was however of the view that the assault upon one's wife is not rendered "indecent" by circumstances which would render it "indecent" in the case of another woman. Here, the court then substituted the verdict of the Magistrate court from "indecent assault" to a verdict of "assault" contrary to section 351 of the Criminal Code with a sentence of six weeks imprisonment. One is worried about this decision as a man should not be immune from criminal action for indecently assaulting his wife simply because they are married. Within the customary system, a woman is the property of the husband who can be corrected by whipping or abused in the manner deemed fit by the husband. This system is made worse by the application of Sharia laws within the country. Many of the Northern States that adapted Sharia have technically legitimated the abuse of women domestically with the resultant effect of the subjugation of the rights of women within these territories.

The justiceability of women's rights has been put in question especially under the Sharia law.⁴¹ A primary concern is the fact that most of the judges in the court are not lawyers or persons knowledgeable in the law. The fact that women's rights are in jeopardy under this system⁴² cannot be overstated. For example, in the case of *Safiyatu Hussain Titudu v. Attorney General,*

*Sokoto State*⁴³, the plight of women under the Sharia system of justice was brought to question in the determination of guilt of the male and female participants in adultery. The appellant in this case was charged with the offence of "Zina" (adultery) committed with one Yakubu Abubakar contrary to sections 128 and 129 of the Sokoto State Sharia Penal Code Law 2000. The Sharia court was of the view that since the 2nd Accused, who was once married and divorced, had confessed to the offence of Zina with the first accused having legitimately exercised his right under the Sharia to retract his admission of the offence and change his plea, the 1st accused was discharged and acquitted. The court then went further to state that the offence of Zina was proved against the 2nd accused since she got pregnant and delivered a baby. She was then sentenced to death by stoning in the presence of other Muslims as witnesses. The death sentence was delayed to allow her time to breastfeed her baby before her execution. Under the Maliki school of thought, which dominates the interpretation of Sharia in northern Nigeria, pregnancy is considered sufficient evidence to condemn a woman for Zina, an offence that is to be read as adultery or as voluntary premarital sexual intercourse. The oath of the man denying having had sexual intercourse with the woman is often considered sufficient proof of innocence unless four independent and reputable eye-witnesses declare his involvement in the act of voluntary sexual intercourse. Safiya Hussaini was sentenced to death in her first trial for adultery on the basis of her pregnancy.⁴⁴ However, on further appeal to the Sharia Court of Appeal, her conviction was fortunately set aside and was discharged and acquitted.

The case of *Safiyatu Hussain* can be likened to the case of *Aminatu Lawal*, another Northern woman sentenced to death by stoning under the Sharia law in 2002. This system of law is problematic in Nigeria especially in the procedure of application of death penalty under the Sharia Penal system that allow Sharia courts, often only consisting of one judge and having no guarantees for adequate legal representation, to impose the death penalty. Under the Penal Code of Northern Nigeria and also the Nigerian Criminal Code applicable in southern Nigeria, cases attracting capital punishment could only be tried by the State High Court. The Nigerian government by ratifying the Convention Against Torture in June 2001, the Federal Republic of Nigeria agreed not to apply punishments such as stoning, flogging or amputation which are considered cruel, inhuman and degrading treatment by international human rights standards.⁴⁵

³⁸ (1998) CA/B/6/94, 13 (Court of Appeal Benin).

³⁹ Penal Code Law, 1959, Cap 89, Laws of Northern Nigeria, 1963 section 51(1)(d)

⁴⁰ (1941) 8 WACA 140

⁴¹ Sharia law is enforced in twelve states of Nigeria namely, Zamfara, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto and Yobe

⁴² See <http://news.bbc.co.uk/2/hi/africa/2519595.stm> last visited March 15th 2011.

⁴³ (2008) Vol. 1 WHRC 309

⁴⁴ See http://www.amnesty.org.uk/news_details.asp?NewsID=13699 Last visited on March 16th 2011

⁴⁵ See http://www.amnesty.org.uk/news_details.asp?NewsID=13699. Last visited March 16th 2011

e) Custody Issues

The Convention on the Rights of the Child (CRC)⁴⁶, the International Convention on Economic and Social Cultural Rights (ICESR),⁴⁷ the CEDAW⁴⁸ and the Child Rights Acts among other relevant provisions of the law, provides that the best interests of the child should be taken into consideration in issues relating to children generally and especially in custody matters. However, in *Onwochei Odogwu v. Otemeoku Odogwu*,⁴⁹ custody of the three of the marriage was given to the father by a Lagos High Court judge on the 17th of December 1990. On appeal by the mother, the court found for the mother and ordered that the children be sent back to their mother.⁵⁰

f) Health Issues

Female Genital Mutilation (FGM) is another issue of concern within many of the local cultures of Nigeria. FGM is still practiced in some parts of the country and among all religious groups. The age of mutilation varies from 3 months to 17 years or just about the first pregnancy. Female Genital Mutilation is a violation of the right to privacy. Many young girls face several health risks including of HIV infection due to unhygienic methods used for the mutilation such as the repeated use of the same blade/knife on different girls, using unclean rags as swabs whilst cross infecting patients etc. However, some states passed laws prohibiting female circumcision and genital mutilation. FGM as harmful traditional practices is recognized and efforts to combat it have not yielded much fruits.

In Northern Nigeria, the majority of girls face the prospect of early marriage which has resulted in a large number of cases of vesico-vaginal fistula,⁵¹ some of the abuse of these teenage girls results often in unwanted pregnancy. For many girls, this situation is disastrous because it leads to severe discrimination within their own community or even family. They are often punished for being pregnant or are excluded from school.

The deeply rooted practice of polygamy has also complicated the health issues faced by women within many of the Nigerian cultures. This has increased the prevalence of HIV/AIDS amongst married couples

when men engage in the practice of being sugar daddies to girls, some of whom end up as wives in the home of the man. Women's lack of reproductive choice has also increase the incidence of HIV/AIDS with the consequent effect on the social and economic consequence on women.

IV. CONCLUSION

Women must have a voice in the implementation of equality standards and cultural practices and norms. Effective, facilitated dialogue, together with careful litigation, will allow women to shape the customary law and cultural practices that dramatically affect their daily lives.⁵² Women must also be recognized as both members of their cultural communities and as advocates for gender equality within those communities⁵³.

As for the Sharia, arguments have been proffered that in Nigeria's multi-ethnic society, "a national collective conscience has never existed. Unsurprisingly, Shari'ah debate has accordingly divided Nigerians into retentionists and abolitionists. Those who advocate retention argue that the authority and ideals of Muslim law and government derive directly from the Quran. Since the colonial period, such ideals, embodied in the people's accepted culture and religious have, according to Jeremy Hinds, meant freedom from the British; the powers of the old Fulani emirs, and most importantly, freedom to be under Muslim law."⁵⁴ Whatever good the Sharia intends or advocates, the disparity between the treatment of men and women can serve no other purpose than the suppression of the rights of women resulting in the denial of basic fundamental human rights granted by the Constitution which is the supreme law of the land.

Sharia also has great implications on the woman's right to divorce. Although there are different types of divorce under the Sharia such as the Talaq, (which means the undoing of the act of marriage and usually employed by the husband after saying the word 'talaq' three times), the Khul or mubaraat (usually employed by women to divorce their husbands), although there has been much debate on dowry and *kuhl* divorce. The Holy Qur'an, Surat Al Baqarah (The Cow) 2:229, states that it is not lawful for you (Men) to take back Any of your gifts (from your wives), Except when both parties Fear that they would be Unable to keep the limits Ordained by Allah." Women who are economically disadvantaged often have issues pursuing

⁴⁶ Article 3 of the CRC

⁴⁷ See Article 23 (5) of the ICESR

⁴⁸ Article 6 (2) and 3 CEDAW. S. 71 of the Matrimonial Causes Act also provides that in the award of custody of children in divorce proceedings, the interest of the children is paramount and that custody must be awarded to the parent that is in a better position to provide for their welfare, education and upbringing.

⁴⁹ (1990) 2 NWLR (Pt. 225) 571

⁵⁰ See also the case of *Sidney Adeyemo Afonja v. Eburn Olufunke Afonja* (1971) U.I.L.R 105

⁵¹ This is a condition caused by giving birth when the cervix is not well developed which occurs because the pelvic bones have had insufficient time to develop to cope with child-birth. Corrective operations require the consent of the spouse with sufferers abandoned or divorced by their husbands and ostracized by their communities.

⁵² See Johanna E. Bond, GENDER, DISCOURSE, AND CUSTOMARY LAW IN AFRICA Southern California Law Review March 2010

⁵³ See Celina Romany, Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender, 21 Brook. J. Int'l L. 857, 857-58, 860 (1996)

⁵⁴ Matthew Kukah, Human Rights in Nigeria: Hopes and Hindrances 19-27 (Missio 2003)

khul.⁵⁵ However, The Holy Qur'an also "strongly disapproves of slandering one's wife just to divorce her and take back from her the dower money given to her."⁵⁶

Other customary practices in Nigeria should also be made to fall within the context of the supreme law of the land (the constitution) through the repeal of all customary laws that are repugnant to equity, justice and good conscience. States in Nigeria must also be encouraged to pass into law, provisions of the ratified international instruments advocating for the rights of women in Nigeria.

The role of civil societies and stakeholders in advocating for the rights of women cannot be overstated. Lawyers should also be encouraged to undertake more pro bono cases to assist women who really need legal representation and advice. This will help to create the enabling environment which includes structures, laws and policies while the stakeholders include, government, women, law enforcement agents, media, courts, religious and traditional rulers, women's rights activists and community advocates.

It is advocated that the enforceability and justiceability of women's rights in Nigeria must commence with the codification of appropriate laws and instruments followed by the court's insistence on enforcing provisions that are fair and equitable, and not repugnant to justice and good conscience. In the dictum of late Hon. Justice Pats-Acholonu in *Magit v University of Agriculture, Makurdi*⁵⁷ "It is said that the function of the court is to interpret laws made by legislature and not

to make laws. In theory, that is so. But it must equally be admitted that judges are not robots (or zombies) who have no mind of their own except to follow precedents. They are intrepid by their great learning and training and can distinguish in order to render justice to whom it is due. As the society is eternally dynamic and with fast changing nature of things in the ever changing world and their attendant complexities, the court should empirically speaking situate its decisions on realistic premise regard being had to the society's construct and understanding of issues that affect the development of jurisprudence'.⁵⁸

⁵⁵ Kathleen A. Portuan Miller, 'WHO SAYS MUSLIM WOMEN DON'T HAVE THE RIGHT TO DIVORCE?--A COMPARISON BETWEEN ANGLO-AMERICAN LAW AND ISLAMIC LAW' New York International Law Review, Winter, 2009 suggesting that a *khul* divorce is acceptable because a husband is essentially making a trade-off by regaining the dowry in exchange for his marriage with his wife); see also Ran Hirschl, *The New Constitutionalism and Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 738 (2006) (discussing a court decision that answered the debate by holding that a husband's consent is unnecessary to obtain a *khul* divorce so long as the woman provides the husband with some value in exchange for the divorce); see also Rehman, *supra* note 50, at 118-19 (comparing the contrasting, debating views of different schools of Islamic beliefs with regards to women being able to initiate divorces).

⁵⁶ See ASGHAR ALI ENGINEER, *THE RIGHTS OF WOMEN IN ISLAM* 121 (St. Martin's Press 1992) at 121 (asserting that taking back the wife's dowry money by defaming and divorcing her is condemned in the Holy Qur'an); see also HAIFAA A. JAWAD, *THE RIGHTS OF WOMEN IN ISLAM AN AUTHENTIC APPROACH* 86 (1998) (commenting that not only did the Qur'an discourage divorce, but slandering the wife to take back her dowry was reprehensible and disallowed); see also Leila P. Sayeh & Adriaen M. Morse, Jr., Note, *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 327 (1995) (asserting that in Islam, the dowry belongs solely to the wife and the Qur'an prohibits the husband from trying to get the money by slandering her to cause a divorce).

⁵⁷ (2005)19 NWLR PT.959 211, 259 D-E

⁵⁸ See also Uju Peace Okeke, 'A Case For The Enforcement Of Women's Rights As Human Rights In Nigeria' found at http://www.wunrn.com/news/2010/04_10/04_05_10/040510_nigeria.htm