

## **WOMEN PERSPECTIVES IN THE ADMINISTRATION OF JUSTICE**

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**Abstract:**

The 1999 Constitution of the Federal Republic of Nigeria in its Section 42(I) (2) specifically provided for the elimination of all forms of discriminations based on sex. Furthermore, most of international instruments especially Convention on Elimination of all Forms of Discrimination against Women have wonderful provisions on protection of fundamental rights of the women folk. Irrespective of these laws, in the administration of justice most of the fundamental rights of the women are infringed upon. Most of our laws are detrimental and inimical to women's development. Some of them will be the focus of this research work. Some of these The paper highlights all these obnoxious practices militating against the women's rights. It also advocates that the women rights should be protected in the administration of justice and that adequate sanctions be meted out to offenders. This work in its findings advocates that there is urgent need for a legal frame work that will protect the rights of the female folk and that all the laws and statutory provisions which infringes on the rights of the women in the administration of justice should be expunged from our laws. The paper recommends that the Nigerian government should rectify all international instruments that have good and beneficial provisions on the welfare of the women folk. The research method to be included, primary, secondary and doctrinal sources of information.

## 1.0 Introduction

In the administration of justice the women's rights are trampled upon. There are many detrimental laws inimical to women's rights. In Northern states the testimony in Islamic law are gender bias and gender insensitive. In Islamic law, the testimony of two witnesses is equivalent to testimony of one man. A man is equal to two women. What a strange world. Many injustice are meted to the female gender. The death penalty has been introduced for the offence of Zinna which means adultery in Sharia Penal Code<sup>1</sup>. This law is inconsistent with the constitution of Nigeria because adultery is not an offence in the constitution and it contradicts sections 1(1) and 1(3)<sup>2</sup> of the constitution of Nigeria. In cases of rape, incest and adultery, only the woman bears the burden of providing four or eight eyewitnesses to prove that she was raped or prove nonsexual intercourse in case of adultery and even to name the father of her child in case of pregnancy. This is great injustice meted to women folk. How can a man who is normal invite four or eight eyewitnesses to be around before he commits rape, incest or adultery (zinna) against the women. The marginalization of the women folk are well pronounced in some of our laws. The labour Act forbids women to do some night and underground work whereas the Police Regulation mandatory demands that a woman police officer who is desirous of getting married must first obtain permission and also that an unmarried police officer who becomes pregnant shall be discharged from the force.

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<sup>1</sup> Sharia Penal code Laws of Zamfara State, ss. 126 and 127.

<sup>2</sup> Constitution of Federal Republic of Nigeria 1999 (As Amended)

## **2.0 Evidence**

The Evidence Act<sup>3</sup> has elaborate provisions for means of proof of various offences and the relevant rules.

### **Evidence in Rape Trial and other sexual offences:**

On a charge of rape, attempt to commit rape or indecent assault, the main aim of the defence is either to show consent or the low moral character of the victim or prosecutrix. The former Evidence Act; section 211<sup>4</sup> on evidence of prosecutrix in Rape Trial was an abomination to women folk but thanks to the legislature that there has been a little change in the new Evidence Act of 2011.

Section 211 of the Evidence Act provides when a man is prosecuted for rape or for indecent assault, it may be shown that the woman against whom the offence is alleged to have been committed was of generally, immoral character, although she is not cross examined on the subject; the woman may in such a case be asked whether she has had connection on other occasions with the accused and if she denies it she may be contradicted. This provision is intended to find out the following (a) That the prosecutrix was notoriously immoral (b) That the prosecutrix has had previous sexual contact with someone other than the accused and (c) The prosecutrix private sexual history with the accused. The tone of this provision puts the victim on trial instead of the accused. If the prosecutrix was immoral or a prostitute, will that justify a rape attack on her. The provision blames her for the attack on her.

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<sup>3</sup> Evidence Act 2011 (HB. 214)

<sup>4</sup> E 14 LFN 2004

The equivalent provision in the new Evidence Act section 234 of the Evidence Act<sup>5</sup> states

Where a person is prosecuted for rape or attempt to commit rape or for indecent assault, except with the leave of the court no evidence shall be adduced, and except with the like leave, no question in cross examination shall be asked by or on behalf of the defendant, about sexual experience of the complainant with any person other than the defendant.

The only amendment is that the leave of court must be sought and obtained before the prosecutrix's sexual history will be adduced and also before she will be cross-examined to impeach her character. This law is detrimental to women folk. That she has previous sexual contact with the accused does not justify the rape attack on her. Even If she has had sexual relations with the accused does not guarantee a rape attack on her. If it is advocated that marriage does not mean extended consent for sexual relation with one's husband, how much less a sexual relation outside marriage.

This type of prosecution turns that tables of prosecution against the victim in favour of the accused and is therefore not desirable as part of Nigerian law<sup>6</sup>.

### **Testimony under Islamic law:**

In Islamic law, parties are not competent witnesses in their claims. Their testimonies in court are not regarded as evidence but something like statement of claim or defense in the High

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<sup>5</sup> Evidence Act 2011

<sup>6</sup> F Anyogu Access to Justice in Nigeria: A Gender Perspective, (Enugu: Ebenezer Productions Nigeria Ltd, 2009) p. 101.

Court. In *Jatau v Mailafiya*<sup>7</sup>, it was held that for such a statement to be evidence, it must be supported by the testimony of two male unimpeachable witnesses or one male and an oath or one male and two female witnesses or two female witnesses and an oath.

The reasoning in this dictum is very difficult to understand but the implication is that moslem men and women are not equal in giving testimony of what they perceived themselves. A man is equal to two women and equal to an oath. An oath is equal to two women. This is injustice and unconstitutional, against the dictates of international human rights norms, and greatly inhibits access to justice.

### **3.0 Specific Detrimental Laws.**

There are some detrimental laws that relate mainly to the women and such laws need to be amended for the empowerment of the female gender They are as follows..

#### **3.1 Women and Death penalty**

The Constitution of the Federal Republic of Nigeria 1999 permits the application of death penalty. Section 33(1) of the Constitution permits the derogation of the right of life in execution of the sentence of a court in respect of a criminal offence of which a person has been found guilty in Nigeria. The Penal Code Act<sup>8</sup> the Criminal Code Act<sup>9</sup> and the Sharia Penal Codes<sup>10</sup> all prescribe the death penalty for a range of criminal offences. The behavior of women of muslim faith is now regulated and governed by legislation. The death penalty has been introduced for offences

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<sup>7</sup> [1998] 2NWLR (Pt. 533) 682

<sup>8</sup> ss. 221, 302, 214, 159 (2)

<sup>9</sup> s. 208

<sup>10</sup> Zamfara State Penal Code Laws ss. 126 &127.

such as *Zinna*<sup>11</sup>, rape, and incest<sup>12</sup>. The relevant section<sup>13</sup> defines the commission of *Zinna* in the following terms;

Whoever being, “a man or woman fully responsible, has sexual intercourse through the genital of whom he has not sexual rights and in circumstances in which no doubt exists the illegality of the act

*Zinna* which means adultery was previously punishable by flogging by the Penal Code Act. However in the states that have introduced Sharia Penal Laws there is now mandatory death sentence by stoning if the accused is married while a 100 lashes is the sentence if the accused is not married<sup>14</sup>. The charge of *Zinna* and the punishment applies to Muslims only. This is in contradiction with the constitution because adultery is not an offence in the Constitution and it contradicts sections 1 (1) and 1 (3)<sup>15</sup> of the Constitution and they state as follows:

Section 1 (1) CFRN states

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

Section 1(3) CFRN also states

If any other law is inconsistent with the provisions of the constitution this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

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<sup>11</sup> Sharia Penal code Laws of Zamfara State, ss. 126 and 127.

<sup>12</sup> ss. 130 and 131 Zamfara, ss. 132 and 133- Sokoto, ss. 125 and 126- Kaduna, ss. 126 and 127- Kano

<sup>13</sup> ss.129- Sokoto, SS 121 and 122 – Kaduna State

<sup>14</sup> Quoran – 24: 2

<sup>15</sup> Constitution of Federal Republic of Nigeria 1999.

It also infringes on their Fundamental Human Right on Right to life<sup>16</sup>, Right to dignity of human person<sup>17</sup>, Right to private and family life<sup>18</sup>, Right to freedom of expression<sup>19</sup> and other of the Fundamental Right.

Furthermore, there are several conditions related to the person who commits adultery that must be met. One of the conditions is that the punishment cannot be enforced unless there is confession of the person, or four eyewitnesses who each saw simultaneously, the private organ of the man inside the vulva of the woman. All of these must be met under the scrutiny of judicial authority<sup>20</sup>.

It must be noted that for the woman however, the fact of pregnancy outside marriage is evidence of adultery. (*Zinna*), while the man needs to be convicted only if, he confesses or four male witnesses give evidence against him.

Similarly under Sharia, a woman who is raped must produce four male eyewitnesses (or 8 females since 2 females are equal to one male) to prove she did not commit adultery.

The “four witnesses” standard comes from the Quoran itself, a reverend Muhammed announced in response to accusation of adultery leveled against his wife Aisha:

Why did they not produce four witnesses? Since they produce not witnesses, they verily are liars in the sight of Allah<sup>21</sup>

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<sup>16</sup> Ibid s.33

<sup>17</sup> Ibid s.34

<sup>18</sup> Ibid s.37

<sup>19</sup> Ibid s. 39

<sup>20</sup> F Anyogu *op cit* p. 159.

<sup>21</sup> Ibid

In any case, whether adultery, rape or incest, only the woman bears the burden of providing four or eight eyewitnesses to prove that she was raped or to prove consensual sexual intercourse in the case of adultery and even to name the father of her child in case of pregnancy. This is great injustice to the women folk. How can a man who is normal invite four or eight eyewitnesses to be around before he commits rape, incest or adultery or confesses that he has committed this hideous crime, whereas the mere fact of pregnancy is evidence of adultery (*Zinna*) against the woman. Many abortion-related offences are to fall under the capital offence of culpable homicide under the penal code and criminal code Acts<sup>22</sup>.

However, there are specific abortion related offences not carrying the death sentence under these two codes despite this two fact, women involved in abortion-related cases have instead been charged with the offence of culpable homicide and therefore subject to death penalty<sup>23</sup>.

Culpable homicide in S. 221 of the Penal code is defined thus; Except in the circumstances mentioned in section 222, culpable homicide shall be punished with death:

- (a) If the act by which the death is caused is done with the intention of causing death; or (b) if the doer of the act knew or had reason to know that death would be the probable and not only an injury, which the act was intended to cause. A report by Amnesty International portrays this heartbreaking story.

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<sup>22</sup> Penal code Act ss. 83 and 98, Criminal code Act Cap 38 Laws of the Federation of Nigeria ss. 233, 234, 235 and 239.

<sup>23</sup> SS 83 and 97 of the Penal code Act. And SS. 233, 234, 235 and 237 of the Criminal code Act



The penal law of Nigeria is discriminatory against women and grossly subjugates them to the point of death. A report by Amnesty International portrays this heartbreaking situation RM – 23 years is charged with culpable homicide under the Penal Code. She is married and is illiterate. According to her statement she was charged with killing her baby but she told Amnesty International that she delivered the baby after having aches. She was subsequently taken into hospital as she developed cold after the delivery. During this time, her mother cared for her baby. While still in hospital, she was told that her baby had died. Her husband allegedly informed the police who subsequently arrested her and she has since been in detention<sup>24</sup>.

The offence of *Zinna* is gender biased. It is intended to kill the women for not protecting the property of her husband in her. It is even absurd in law that people should be punished for an act of sexual intercourse between two consenting adults, which took place in private.

If the pregnant woman has to be punished at all the same punishment (not death sentence) has to be given to the woman and the man. The woman should be the one to prove that the man had sexual intercourse with her, not four other witnesses since the act is normally done in secret. The offence of *Zinna* as invented by Sharia should be scrapped off the death penalty list.

### **3.2 Women and Labour:**

Sections 55, 56 and 57 of the Labour Act<sup>25</sup> seek to protect women from night and underground work, and empower the minister of labour to make regulations that prohibit women from undertaking

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<sup>24</sup> F. Anyogu Op. Cit. P 165

<sup>25</sup> Cap LI Laws of the Federation of Nigeria, 2004.

certain specified jobs. Though section 55(2) of the Act exempts certain categories of women from the prohibition, yet such exemption does not obliterate the fact that the provision limits women's access to work in spite of the seemingly good intentions on the law<sup>26</sup>. In the same vein, the Nigerian Taxation policies, tax relief is denied females and granted only to males under the presumption that a man is the "bread winner" of the family, hence men enjoy tax exemption, this law fails to take cognizance of the fact that there are also single mothers with dependents, and as such ought to enjoy similar exemptions. This unequal taxation offends Article 7 of the ICESCR and Article 2(a) of the Convention on The Elimination of All Forms of Discrimination against Women (CEDAW) which guarantees equal pay for equal work as well as equal treatment, for both sexes. This practice, no doubt, flies in the face of reality as it is well known that all over the country, there abound single mothers on whose shoulder rests the sole responsibility of meeting the material needs of their children.

Denying single mothers tax rebates and concession which attitude has its roots in cultural role stereotypes will tantamount to not only discriminating against the women but also punishing them for being single mother<sup>27</sup>.

### **3.3 Women and Police**

Another worrisome practice is entrenched in Police Regulation<sup>28</sup> 121, 122, 123, 124, 125, 126 and 127 which make no pretensions

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<sup>26</sup> I Oraegbunam 'A Jurisprudence of Affirmative Action as a Platform for Women Empowerment in Nigeria Today' in G U Ukagba *et al* (eds), *The Kpim of Feminism* (USA: Trafford Publishing, 2010) P. 489.

<sup>27</sup> *Ibid.*

<sup>28</sup> Cap P. 19, *Laws of the Federation of Nigeria, 2004*

about discriminating about women on the basis of their sex. For instance, Regulations 124 mandatorily demands that a woman police officer who is desirous of marrying must first apply in writing to the Commissioner of Police requesting permission to marry and given the particulars of the finance. Such permission can only be given if the intended husband is of good character and the woman police officer has served in the force for a period of not less than three years. As if this not enough, Regulation 127 holds that unmarried woman police officer who becomes pregnant shall be discharged from the force, and shall not be re-enlisted except with the approval of the inspector general. Regulation 124 of the Regulation has changed marriage from a contract between spouses to one between an employer and an employee. This is particularly worrisome as what is demanded by the regulation is not mere notification but real permission which can be refused under certain conditions. Regulation 127 criminalizes single motherhood and punishes the guilty woman by terminating her Appointment<sup>29</sup>. All these discriminatory regulations run counter to natural law rights to marriage, family life and self-determination as enshrined in many international human rights instruments; to which Nigeria is a signatory and they are as follows: Universal Declaration of Human Rights (UDHR) 1948<sup>30</sup>, Declaration on the Elimination of Discrimination Against Women 1967,<sup>31</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979<sup>32</sup>, Convention on Consent to Marriage, Minimum Age for marriage ad Registration of Marriage 1964<sup>33</sup>.

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<sup>29</sup>I Oraegbunam *op cit* P. 490

<sup>30</sup> Art. 16

<sup>31</sup> Art. 6 (2) (a) & 10.

<sup>32</sup> Art.16

<sup>33</sup> Art. 1

International Covenant on Civil and Political Rights (ICCPR) 1966<sup>34</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966<sup>35</sup>, African Charter on Human and People's Rights (ACHPR) 198<sup>36</sup>. It must be noted that African charter has been domesticated in line with the provisions of section 12 of the 1999 constitution of the Federal Republic of Nigeria.

### 3.4 Women and Bail

Bail means the practice of releasing an arrested imprisoned person on terms to guarantee the suspect/accuser's attendance at a place and time required of such a suspect or accused.

The grant of bail is generally dependent on the gravity of the offence and it would seem that capital offences carrying death penalty can only be granted at the discretion of a judge. There are however factors that may present themselves as unusual and exceptional for the purposes of the grant of bail. These include;

(1) Health of the convict/applicant but this has to be really compelling as in *Chinemelu v C O P*<sup>37</sup>

When the appeal contains substantial grounds of law-  
*Mohammed v Olawunmi*<sup>38</sup>.

(2) Where the applicant is a first offender and had previously been of good character.

These provisions on bail need some amendment. They could be amended to accommodate pregnancy as an exception. It is therefore submitted that the law will be achieving great justice if

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<sup>34</sup> Art. 23

<sup>35</sup> Art. 10

<sup>36</sup> Art. 2

<sup>37</sup> [1995] 4 NWLR (Pt. 380) 467.

<sup>38</sup> [1993] 4 NWLR (Pt. 287) 254.

the pregnant state of a woman is added to the exceptions to the grant of bail even in capital offences.

### **3.5 Women and Criminal Responsibility**

The Criminal Code Act<sup>39</sup> provides that;

A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband. But a wife of a Christian marriage<sup>40</sup> is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and which is done or omitted to do done in his presence, except in the case of an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm to the person of another, or an intention to cause such harm, is an element, in which case the presence of her husband is immaterial.

The effect of this provision is that if a man leads his wife to steal or damage somebody's property, as long as she is compelled by him; if she steals or damages the property in his presence in a manner not attracting a death penalty and does not cause grievous harm on the person of another, she is criminally exonerated. One wonders if it would be right to hold the husband liable under the

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<sup>39</sup> C. 38 LFN 2004 s. 33

<sup>40</sup> S.I. (Interpretation Section) of the Criminal Code Act defines Christian Marriage as a marriage recognized by the law of the place it is contracted as the voluntary union for life of one men and one women to the exclusion of all others.

Act<sup>41</sup>. Since no offence has been committed by the fact that the real offender is not criminally responsible. This law imputes gross sub-ordination on the woman and irrational supremacy on the man. The commission of a crime should not be justified by assigning the role of a toy to the woman. It is also submitted that in line with the gender-neutral assertion, this law should have been framed to, protect both husband and wife. A woman can also compel her husband to commit a crime within the meaning of this provision especially as the means of compulsion is not stated<sup>42</sup>. However for equal responsibilities in marriage, Section 33 of the Criminal Code Act, should be made to protect both husband and wife.

Section 36 of the Criminal Code Act stated when a husband and wife of a Christian marriage are living together, neither of them incurs any criminal responsibility for doing or omitting to do any act with respect to the property of the other, except in the case of an act or omission of which an intention to injure or defraud some other person is an element, and except in the case of an act done by either of them when leaving or deserting or when about to leave or desert the other.

This section 36 removes criminal responsibility on a husband and wife of a Christian marriage in relation to their separate properties. This provision may be construed to mean that where a man or woman by fraudulent means succeeds to sell a separate property of the other spouse, he or she is criminally exonerated as

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<sup>41</sup>Criminal code Act Cap 38 Laws of the Federation of Nigeria s. 7 (d)

<sup>42</sup> F Anyogu op cit p. 147.

long as; he or she had no intention to defraud another person, and their marriage is a Christian marriage, and they are still living together.

Where a husband out of blind jealousy burns the wife's property<sup>43</sup> he is not criminally responsible. No other law protects her since she cannot even enforce this unless she is leaving. This law should be amended to protect the interest of the women because they are the people mostly affected in this our patriarchal society. Some men go as far as tearing the education's certificates of their wives in order to subdue and disempower them.

#### **4.0 Practices under Customary Law:**

There are many customary laws in Nigeria. Various definitions of customary law have been postulated in Nigeria. Section 258(1) (d) of the Evidence Act<sup>44</sup> defines customary law as a rule which in a particular district has from long usage, obtained the force of law. Customary law was defined in *Owoniyin v Omotosho*<sup>45</sup> as a mirror of accepted usage. In *Oyewunmi v Owoade*<sup>46</sup> Obaseki J.S.C. defined customary law as;

The organic or living law of an indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary laws goes further and imports justice to the lives of all those subject to it.

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<sup>43</sup> R v Car (1913) QWN 8

<sup>44</sup> The Interpretation Section of the Evidence Act 2011.

<sup>45</sup> (1961) 1 ANLR 309.

<sup>46</sup> (1990) 3 NWLR 182 at 207.

Customary Law as it adversely affects women in Nigeria; For many years men dominate the female in our society. Women have always been relegated to the background because they generally lack the economic, political and social clout to fight back. It would seem that the constitutional provision on freedom from discrimination on the ground of sex<sup>47</sup> and the inalienable rights conferred on every person by International Human Rights Instrument<sup>48</sup> have not had much positive impact on customary laws in favour of women. The idea of women as chattels or property dominates Nigeria customary laws on marriage, Divorce, property ownership, inheritance and succession and even incidents of birth and death<sup>49</sup>.

#### **4.1 Marriage**

The provisions of CEDAW<sup>50</sup> enjoin state parties to ensure that women and men enjoy on equal basis, the rights to choice of spouse, and the same rights and responsibilities during marriage. But in Nigeria the reverse is the case. women's rights are constantly violated. We have two forms of marriage, marriage under the Act and customary law marriage and they have different rights.

#### **4.2 Bride Price**

Valid customary law marriage cannot be contracted without parental consent irrespective of the age of the girl. The husband

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<sup>47</sup> Constitution of Federal Republic of Nigeria 1999 s. 42.

<sup>48</sup> Universal Declaration on Human Rights (UDHR) 1948, Convention on Elimination of All Forms of Discrimination against Women (CEDAW) 1981.

<sup>49</sup>G.I. Udom-Azungu 'Women and children- A Disempowered Group under Customary Law' in Towards a Restatement of customary laws (Federal Ministry of Justice Lagos, Nigeria 1991 P. 130.

<sup>50</sup> Art. 16 (1).



pays the bride price and the girls' parents acceptance of the bride price signifies consent.

Payment of bride price is condition precedent for any valid customary marriage. Payment of bride price simply implies the price paid for the purchase of a wife. The high bride price has been monetized and complicated by exorbitant prices that are paid. It seems as if the wife is been sold to the highest bidder and that is the reason for treating the woman as a chattel or property. It looks like purchase of goods which can be returned if it is a defective good and price of the good returned to the purchaser. The disheartening thing about the return of bride price to the husband incase of dissolution of the marriage notwithstanding the duration of the marriage or the number of child birth the woman must have gone through make the whole thing look like purchase of goods.

In the traditional setting until this refund is made the woman is still regarded as legally married to her former husband and if she has a child, the child is said to belong to her former husband. This was aptly illustrated by Mahmud-Bappa when he said

If your she goat visited another house where it becomes pregnant and delivered, will you leave them there<sup>51</sup>

In recent times the courts have however refused to give such a child to the former husband as was held in *Edet v Essien*<sup>52</sup>. This case is not a very strong authority on this as the ruling was based more on the fact that it was not ascertained whether that was the culture of the area in that case. The issue of bride price offends

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<sup>51</sup> F.Anyogu *op cit* p.110

<sup>52</sup> (1932)1 NLR 47

not only the Right to be free from discrimination<sup>53</sup> but also the fundamental Right on the dignity of human person<sup>54</sup>.

### **4.3 Polygamy**

Under customary law a man is free to take as many wives as he likes but the fact that a woman is already married is a complete bar to her further marriage. Polygamy is the state or practice of having more than one spouse simultaneously. It is also termed plural marriage.

Polygamy can be simultaneous (if more than one spouse is simultaneously present) or successive if spouses are married one after the other<sup>55</sup> Marriage under the Act is deemed to be monogamous while customary law and Islamic law marriages are potentially polygamous. Thus a person married under the Act cannot contract another marriage with a third party either under the Act or under customary law else, he commits the offence of bigamy. This offence is rarely prosecuted in the courts and the women suffer in silence. Polygamy has very devastating effects on the women folk.

### **4.4 Rights and Duties in Customary Marriage:**

In all customary law marriages (muslim) inclusive, the husband has the duty to provide accommodation for the wife, clothing, feeding, medical care, satisfy her sexual needs and bury her wife if he predeceased her.

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<sup>53</sup> Constitution of Federal Republic of Nigeria 1999 s. 42.

<sup>54</sup> *Ibid* s. 34.

<sup>55</sup> B Garner, *Black Law Dictionary* (8<sup>th</sup> edn, U.S.A: Thomas West, 2004) p. 1197.

The wife has the duty to cook, wash his clothes, clean his house, take care of him and his children, give him money on demand, buy him clothes, by reason of misfortune and she has the right to live in the matrimonial home for as long as she is married or widowed, to give her opinion in matters concerning her children's education and demand the performance of the husband's duties towards her<sup>56</sup>. A close look at the duties of both husband and wife under the customary law, will show the wife plays multiple roles of financial provider, care-giver, home-keeper and domestic operator while the man plays the single role of financial provider. Paragraph 344 of the customary law manual also places a duty on the woman to maintain the husband and the children if through no fault of the man, he is unable to do so.

This provision is very discriminatory, inhuman and unjust against the women folk as there is no provision for the man to take over the duties of the woman (e.g. cooking, keeping home etc) when through no fault of hers, she is unable to do so.

For a woman to enforce the duties of a husband towards her she either complains to the elders in the family or she withdraws from the matrimonial home until he does his duties. The man in order to enforce the duties of the wife either drives her out of the matrimonial home or chastises her reasonably<sup>57</sup>.

Whatever reasonable chastisement means, it is against the constitutional right to dignity of the human person of the woman

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<sup>56</sup> S.N.C. Obi *The customary Law Manual of Eastern Nigeria* 1976, para 305 (1). This was never adopted by legislation however in *Ugo v Obiekwe* (1989) 1 NWLR (Pt. 99) 566, Nnaemeka Agu (J.S.C.) (as he then was) stated that he regretted the fact that this study was not coded

<sup>57</sup> *Ibid.*

and also a criminal act if done in the south since the Criminal Code Act unlike the Penal code does not provide for wife chastisement.

### **Divorce**

Any of the party is free to divorce the other. It is of no effect that the other party has not committed any matrimonial offence against the spouse seeking a divorce<sup>58</sup> Despite this provision, reasons include cruelty, desertion or laziness on the party of either party, refusal to maintain wife and children, failure by wife to cook meals regularly, lack of respect on the part of the wife for her husband and members of his family, refusal by wife to have sexual relations with the husband and the practice of witchcraft by the wife<sup>59</sup>.

A close look at the grounds would present the practice of witchcraft as an exclusive hobby for women. The provision did not consider a situation where the husband could refuse sexual relations with wife. This can be construed to be saying that a husband has the right to refuse his wife sexual relations and has the right to practice witchcraft.

On divorce, the wife is chased out of the matrimonial home whether it was built jointly by the couple or alone by the wife. She is not entitled to any maintenance on account of herself. She has no right to custody of the children, unless a child of tender age. This child is taken away from her at age of five years. If she is pregnant at the time of divorce, the husband is entitled to the child when it is born. The wife on divorce may take away movable items she brought into the matrimonial home. In some

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<sup>58</sup> S.N.C. Obi (no 56 )

<sup>59</sup> Ibid Para 348.

areas she may take away property she purchased with her own money and in a few other areas, she takes nothing except the clothes she had on her body during the divorce<sup>60</sup>.

These provisions are highly biased against women and put them at a disadvantage and make them economically dependent on men as a woman may have poured out everything she has into the marriage, thinking it was an effort to build up what she regards as her family for life, only to end up empty handed and stranded on divorce. This is man's inhumanity to man. The interest of the children is not considered, even if the wife was in a better position to take care of the children, custody is still given to her husband. The customary laws and practices discussed above are against public policy. They are repugnant to natural justice, equity and good conscience. They seem also to take the Nigerian society hundreds of years behind history. The writer submits that in line with the provisions of Section 18(1) and (3) of the Evidence Act<sup>61</sup>, they be accordingly abrogated.

The relevant section provides;

Where a custom cannot be established as one judicially noticed, it shall be proved as a fact in any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.

These customary laws and practice are unjust to women.

They have also resulted in giving women lower legal status than men and indirectly making them second class citizen and also

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<sup>60</sup> S.N.C. Obi (no 56 ) Para 365, 369, 374, 370

<sup>61</sup> Evidence Act 2011

robbed women the socio-economic clout to access justice when necessary.

### **Conclusion**

The paper advocates that any law that is discriminatory to any of the sexes must be jettisoned or at least amended with immediate effect. The paper recommends that, in customary marriages, when the marriage has broken down irretrievably the property must be shared equally. The wives must not be chased out of their matrimonial homes. In most cases the family homes were built by both of them especially now that most wives make significant contributions in the family. The interest of the children will be paramount and in most cases the wives may be in a better position to take care of the children especially while they are still young. Custody should be given to her not to her husband. Discrimination of the female folk is a daily occurrence and they need to be protected by the law.