DISCRIMINATORY PRACTICES AND POLICIES INIMICAL TO WOMEN'S RIGHT IN NIGERIA. *

Abstract

Gender marginalization is a sensitive issue, both when it happens, and when it is alleged to have happened, even though it did not happen. Historically, gender-based discrimination was accepted as a normal basis for composition of society. Under the rubric of development and civilization, discrimination based on such immutable characteristics as gender are increasingly perceived as unacceptable. The 1999 constitution of the Federal Republic of Nigeria makes provision abolishing discrimination on grounds of gender. However, the cold print of the constitution and the warm blood of societal conduct are disparate. In this paper, we have set out some current and outstanding remnants of gender-based discrimination in the present Nigeria society. In order to establish our thesis that notwithstanding constitutional provisions of gender equality, sex-based discrimination is still pervasive in Nigeria, we commenced our analysis by disclosing that beyond societal practices and conduct, out laws are still invidiously discriminatory. In this regard, we set out and analyzed the constitutional provisions for citizenship by naturalization for spouses of Nigerian citizens. Our analysis shows that there is greater burden on the spouse of a female Nigerian citizen than on the spouse of a male Nigerian citizen. In looking at succession and inheritance, we showed that despite a long line of judicial decisions to the contrary, the Supreme Court decision in Ukeje v Ukeje finally eliminated gender-based discrimination is inheritance and succession in customary law. We contrasted the position of customary law with the position of statute-based law and established that by treating men and women differently, inheritance and succession statutes remain

prejudiced against women. Finally, we looked at the position of the criminal law in sex and gender-based offences. Our thesis in this area is that the disparate treatment of the male and female gender does not serve any discernible societal purpose, and to that extent would be conceived as invidiously discriminatory. We then concluded by suggesting that it is proper that a continuous review of laws and societal practices be undertaken with a view to abolishing any and every disparate treatment of both genders.

Keywords: *Gender, Inimical, Fundamental Human Right, Policies, Practices, Development, Constitution*.

Introduction

The Nigerian Constitution prohibits discrimination based on gender. However, the same constitution, in provisions relating to acquisition of Nigerian citizenship by naturalization, adopts a gendered treatment in the granting citizenship to foreign spouses of male and female Nigerians. This inconsistent treatment by the Nigerian constitution of gender issues is replicated across a wide spectrum of legislation and practices in Nigeria. Thus, while official orthodoxy is that discrimination on grounds of gender is prohibited, both official and unofficial practice is that invidious discrimination against the female gender thrives in all areas of national life and legislation. In this paper, we have set out to highlight and analyze on a non-comprehensive basis, certain areas of national life that require affirmative action so that the obvious and patent discriminatory practices against the female gender immanent in them could be eliminated. In the section next following, we will deal with specific acts discriminatory and deleterious to the welfare of women. Under that heading, we will look at disparate gender treatment in acquisition of citizenship by naturalization by foreign spouses of male and female Nigerian

citizens. Thereafter, we will examine the gaps that exist in the offence of rape and argue for creation of the offence of wife rape. We will also look at the disparate gender treatment in the issue of age of marriage and in the crime of indecent assault. We will finally consider the obvious discriminatory treatment in the issue of inheritance and succession under both statutory and customary law. All these taken together will lead to our conclusion regarding the existence of pervasive discrimination against women at both institutional and personal levels. We will thereafter suggest abrogation of every discriminatory policy, legislation and practice.

Specific Acts Inimical to Women Development

Gender-blind policies leave negative impacts more on the women than on men which ought not to be so. People must have access to equal opportunities.

A. Citizenship:

The conditions governing citizenship in Nigeria are expressly provided for by the Constitution of the Federal Republic of Nigeria 1999. Section 26(1) of the Constitution provides that subject to the provisions of section 28 of the Constitution, a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the president is satisfied that

(a) He is a person of good character,
(b) He has shown a clear intention of his desire to be domiciled in Nigeria; and
(c) He has taken the oath of Allegiance prescribed in the seventh scheduled to this constitution.

S. 26(2) of the Constitution provided that the provisions of s. 26(1) shall apply to

(a) Any woman who is or has been married to a citizen of Nigeria; or
(b) Every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.

From the provisions of the Constitution, Nigeria recognizes three categories of citizenship namely;

(a) Citizenship by birth
(b) Citizenship by registration
(c) Citizenship by naturalization

Of particular interest to us in this current analysis is the procedure for acquisition of Nigerian citizenship by registration under s. 26(2) (a) of the Constitution. In practical application, under this procedure, a Nigerian male can confer citizenship by registration on his foreign wife but a Nigerian female cannot confer citizenship by registration on her foreign husband.

In *Frontiero v. Richardson*[1] the question before the United States Supreme Court concerned the right of a female member of the uniformed services, to claim her spouse as a "dependent", for the purposes of obtaining increased quarters allowances, and medical and dental benefits, on equal footing with male members. Under the statutes, a serviceman may claim his wife as a "dependent", without regard to whether she is in fact dependent upon him for any part of her support, but a servicewoman may not claim her husband as a "dependent" unless he is in fact dependent upon her

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[1] 411.US.677,p.93, Sc.1764.

for over one half of his support. The United States Supreme Court held yet again that, classifications based upon sex, like classifications based upon race or national origin are inherently suspect and must be subject to a stricter standard of judicial review:

> Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex, would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility.

In *Craig v. Boren* [2] an Oklahoma Statute prohibited the sale of 3.2% beer to males under the age of 21, and to females under the age of 18. The question to be decided was, whether such a gender-based differential constituted a denial to males 18 – 20 years of age, of the equal protection of the laws. Mr. Justice Stewart concurring in the majority opinion of the court delivered by Mr. Justice Brennan, held that the disparate statutory treatment of the sexes without a colorable valid justification or explanation, thus amounts to invidious discrimination.

No discernible societal purpose or public policy justifies this constitutional provision that makes it easier for Nigerian males to obtain Nigerian citizenship for their foreign wives, than Nigeria females. This provision stands in direct contradiction of the right to freedom from discrimination on account of sex provided for in s. 42 of the 1999 Constitution. By way of contradistinction, in

[2] 429.US,190,97Sc.415.

Botswana, in *Unity Dow v A.G Botswana*[3], a female Botswana citizen married to an American male challenged the Citizenship Act of 1984 which discriminated against a child born by a Botswana woman in Botswana on the basis of the child's father's nationality exclusively. The court held that the constitution should be interpreted as prohibiting sex discrimination. It is our suggestion that s. 26 (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria should be amended to read:

> *Any person who is or has been married to a citizen of Nigeria.*
>
> or
>
> *Any man or woman who is or has been married to a citizen of Nigeria.*

B. Sexual Offences Laws: Rape

Section 357 of the Criminal Code Act[4] provides

> Any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm or by means of false or fraudulent representation as to the nature of the act or in case of a married woman by personating her husband, is guilty of an offence which is called rape.

Section 282 of the Penal Code Act[5] provides that

[3] (1998) 1 HRL R –A p.1

[4] C 38- 1 Laws of the Federation 2004

[5] Cap P31 LFN 2004.

> A man can be said to commit rape save in the case referred to in sub-section (2) has sexual intercourse with a woman in any of the following circumstances.
>
> (a)Against her will
> (b) Without her consent
> (c) With her consent, when her consent has been obtained by putting her in fear of death or of hurt.
> (d) With the consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
> (e) With or without her consents, when she is under fourteen years of age or of unsound mind.
> (2) Sexual intercourse by a man with his own wife is not rape, if she has attained puberty.

The meaning of these two provisions as decided by judges have been regarded in some judicial authorities as rape.

In *Upahar v The State*[6] what constitutes rape was said to be in Section 282(1) of the penal code Act, and the ingredients were listed as

(a) There was sexual intercourse
(b) It was done in circumstances falling under any of Section 282
(c) Prosecutrix is not the wife of the accused

In *Ogunbayo v State*[7] rape was also given a meaning with reference to Section 357 CC; and it was also held that to prove

[6] [2003] 6 NWLR (Pt. 816) 230 CA
[7] [2002] 15 NWLR (Pt. 789) 76 CA

the offence, there must be unlawful carnal knowledge without the consent of the woman or girl.

It was also held here that the slightest penetration is sufficient proof. In *Rabiu v State*[8] rape was summarily said to be the unlawful carnal knowledge of a woman by a man forcibly and against her will. It is the act of sexual intercourse committed by a man with a woman not his wife and without her consent or committed when the woman's resistance is overcome by force or fear or under other prohibitive condition.

Looking at the provisions of the two codes operating in Nigeria[9] rape is easily construed to mean the unlawful, non-consensual, carnal knowledge of a woman by a man. It can only be committed by a man against a woman and this makes it a gender- oriented offence. It is due to patriarchal nature of the society. The provision is just to protect the property of the man in the woman. A brief discussion of the elements of rape would more vividly illustrates how biased these provisions are against women. As was held in *Igbine v The State*[10] in a charge of rape, "sexual intercourse or carnal knowledge" must be proved. Mere penetration is sufficient and it is not necessary to prove any injury or the rupture of the hymen in case of a virgin and ejaculation is not necessary either.

As the law stands now only penal penetration of the vagina can constitute rape. There are other acts on a woman such as insertion of objects into her genital or anal cavities, which could have more degrading, humiliating, devastating effect on her than rape. Some

[8] [2002] 7NWLR (Pt 926) 491 CA
[9] Criminal Code Act and Penal Code Act
[10] [1997] 9 NWLR (Pt. 519) 101.

jurisdictions have extended the actus reus of rape to include vaginal or anal penetration by any part of the assailant's body or any object and shall include non-consensual anal sex[11].

a. Lack of Consent

For the sexual intercourse to amount to rape, it must be extra marital and must be without the consent of the woman. It appears that under both codes while a woman is protected from intercourse by a person impersonating her husband, she is not protected against a person impersonating her lover.

The penal code does not make provision to cover cases of fraudulent misrepresentation about the nature of the act of sexual intercourse. It therefore means that a case like *R v Williams*[12] if decided under the penal code would not have amounted to rape. In that case a choirmaster had intercourse with a sixteen year old girl chorister under the pretest that intercourse was a medical operation to improve her voice projection. As the girl knew nothing about sexual matters and her consent ineffective, it was held to amount to rape.

The Nigerian provision was only eager to protect the property of the man in a woman by concentrating on things like it has to be extra marital and the assailant has to impersonate her husband. This led to a total disregard of specific instances where a person is incapable in law of appreciating the nature of the act. Such circumstances should include when the person is asleep, unconscious, under the influence of any medicine, drug, alcohol or other substance, a mentally impaired person or below the

[11] F. Anyogu, *op cit* p. 90
[12] I KB 340

approved age of consent. These provisions are inimical to women development.

b. Wife Rape

The provisions of both the Criminal Code Act and the Penal Code Act expressly exclude a man from liability for rape on his wife[13]. A husband forcing his wife to have sexual intercourse with him against her wish or without her consent is not an offence in Nigeria jurisprudence. Marital rape was not a crime at Common Law, but under modern statutes, the marital exemption no longer applies, and in most jurisdiction, a husband can be prosecuted for raping his wife[14]. In the olden days and even in this era some husbands still find it difficult to understand that wife rape is an infringement of women's human rights. The under listed citations portray the rate of marital raping in our society. According to Freeman, he stated what some husband's commentator said in regards to wife rape.

> "But if you can't rape your wife, who can you rape"?[15]
>
> "I would never think of taking it by force except from my wife. I don't think I would get it up in a rape situation. It so appalls me that I couldn't do it"[16]
>
> "I don't think I have ever wanted to rape a woman except may be, my wife, and I am not

[13] ss. 357 and 282.

[14] C Arinze- Umobi *op cit* p. 4.

[15] MDA Freeman*, (1981), "Family Law Quarterly 1"New Law journal , New york:August 21, 1989,777* as quoted by C Arinze- Umobi *Ibid* p 114

[16] Male Respondents, the Hite Report on male Sexuality, shere Hite 1981 as quoted by C Arinze- *Ibid*.

> sure why I would want to rape her at this point. I don't even believe in rape in marriage"[17].

Wife sexual abuse is very visible within the context of a generally abusive and explosive relationship. Finkelhor and Yllo characterized marital sexual abuses as having little to do with sex, and much more to do with humiliation, degradation, anger and resentment"[18]

A notion of wives as property is fundamental to a perfect understanding of wife rape. Not only are wives regarded as property of their husband but they are also seen as the sexual property of their husbands. This is best illustrated in John Stuart Mills degrading and devastating write up:

> A female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse to her master the last familiarity. Not so the wife, however brutal a tyrant, she may unfortunately be chained to, though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him, he can claim from her and enforce the lowest degradation of human being, that of being made the instrument of an animal function contrary to her inclination. Note that the so called right of the female slaves mentioned by Miller hardly served as an effective protection. The right of women to reject the sexual advances of men other than

[17] Ibid
[18] Ibid.

> their husbands was and is also constantly violated[19].

The viewing of wives as their husband's property is part of patriarchal heritage. Patriarchy is government by men and it refers to as sexual politics and wife rape must be seen in the context of patriarchal family.

The Punch Newspaper of July 21st, 1999 reported the killing of a wife by her 51 year old husband[20], for rejecting his sexual advances. Wife rape and wife beating are two very serious and cruel forms of husband abuse of their powers over their wives. They are both extreme acts of domination. The fundamental problem is not that husbands abuse their power, but they have so much of it in the first place[21].

Sir Mathew Hale[22]has maintained thus:

> But the husband cannot be guilty 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 unto her husband whom she cannot retract".

Sir Hale made this devastating statement more than two hundred years ago and up till now it is this position of the common law that still subsists in the Nigerian law and it escalates subjugation, emasculation of the women folk. Just on the same vein, Sir Hale

[19] E H D Russel 'Rape in marriage' (Violence against Women, Classic Papers), pp.99-100.
[20] C Arinze- Umobi *op cit* P. 55
[21] Ibid p 117
[22] Ibid.

had supporters in this embarrassing view William Blackstone polluted more the air on this issue of subordination of women into their husband's personalities Blackstone wrote[23]

> "By marriage, the husband and wife are one person in law, that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of the husband; under whose wings, protection and cover she performs"

It is indirectly submitted that on marriage, a wife gave her irrevocable consent to sexual intercourse. The position of law as propounded by these eminent jurists simply spelt hardship for Common Law wives as non of these wives could maintain victorious rape charges against their husbands. But there is a glimpse of hope in the case of *Popkins v Popkins*[24] a petition for divorce by the wife was met with the pronouncement that a man was entitled to the person of his wife at all times, except where her health is in danger. But these other cases followed Sir Hale proposition that a husband can never be guilty of rape of his wife**,** *Rex v Clark*[25]*Reg v Miller*[26].

Furthermore, the three instances that have been established where a man can be guilty of raping his wife are where there is Decree of judicial separation, decree nisi and where an injunction has

[23] C. Arinze- Umobi and O.V.C. Ikeze *Gender Rights Law in Nigeria (1,* (Onitsha:Folmech Printing and Publishing Co. Ltd, 2008) P. 8, Blackstone, Commentaries on the laws of England New York: Garland (1978), Vol. 1 422.
[24] (1954) 2 SWB 285
[25] (1994) 2 ALL ER, 448
[26] (1954) 2 WB, 282

been granted against the husband from molesting his wife. The situation is now changing. According to Simon Brown J in *Reg v C*[27]hit the nail at the head when he stated

> There is no material exception to the law of rape and accordingly, a husband may be convicted of the rape of his wife if she does not consent to his intercourse regardless of whether he is living with or apart from his wife.

Lord Lane CJ nailed the issue and dismantled the concept of spousal immunity as pounded by Mathew Hale in England in the case of *Regina v R*[28] when he stated

> We take view that time has now arrived when the law should declare that a rapist remains subject to the criminal law irrespective of his relation with his victims…, the idea that a wife by marriage consents in advance to husband having sexual intercourse with her whatever her state of health, or however proper her objections, is no longer acceptable. It can never have been other than fiction, and fiction is a poor basis for the criminal law".

Rape including wife rape is a horror and its devastating effects on the women folk and even society at large can never be over emphasized. Arinze- Umobi and Ikpeze in Gender Rights Law in Nigeria[29] enumerated the negative effects of rape. It has very negative, enormous, unquantifiable effects and they are as follows:

[27] (1991) 1 ALL ER, 755
[28] (1992) 1 AC 599 & 610
[29] C Arinze- Umobi *op cit* p. 31-32

(a) Physical Injuries- It is manifest through bodily injuries especially around the vaginal and injuries on other parts of the body especially at the back, scars, bites inflicted on her body because of her resistance.
(b) Psychological or emotional effects exhibited by these women that are raped whether in matrimony or otherwise may also follow, manifesting as fear, misery, depression and other behavioral changes, and those who cannot contain the situation, escape, relocate or even commit suicide.
(c) Economic effects are discernable from the combined effects of (a) and (b) leading to pain and loss of interests in one's environment, business and life. It could lead to excessive depression and loss of job or employment.
(d) Societal effects- It is obvious that anything that affects individuals in any given society affects the society as an entity. Thus rape in matrimony lead to socio-cultural consequences and traumatized society; giving rise to a high rate of divorce, insecurity, depression, suicide, great nervous wreck. Family instability and break-ups putting the institution of marriage in jeopardy[30]
(e) Victims also face the risk of unwanted pregnancy and sexually transmitted diseases including HIV/AIDS infection and in many societies a social stigma.

The Criminal Code Act[31] states Unlawful Carnal knowledge" means carnal connection which takes place otherwise than between husband and wife".
This section encourages gender violence by legalizing spousal rape and is inimical to women development as enumerated above.

[30] Ibid.
[31] s. 6

The legal implication of this section is that, under no circumstance can a man be found guilty of raping his wife. This discriminatory section which is still part and parcel of our law was unfortunately the 17th century view of Sir Mathew Hale of England. The global trend now is to the effect that about 104 countries of the world now prosecute spousal rape. Countries that have criminalized marital rape include Turkey, Mauritius and Thailand[32].

c. Indecent Assaults on Males/Females

The Criminal Code Acts[33] states

> Any person who unlawfully and indecently assaults any male person is guilty of felony and is liable to imprisonment for three years. The offender cannot be arrested without warrant

It also states in S. 360 of criminal code Act that:
Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanor, and is liable to imprisonment for two years.

It should be noted that the elements of the two offences are the same since they both involve some indecency. In both offences the accused must have assaulted the victim indecently. The disparity in punishment is still a mirage. The reason for making one a felony with the punishment of three years imprisonment and the other a misdemeanor with punishment of 2 years imprisonment is difficult to fathom out. There is no cogent reason why indecent assault on a male should be a felony attracting a

[32] S C Ifemeje, 'Gender Based Domestic Violence in Nigeria: A Legal Perspective'***2010*** Capital Bar Journal , 4.
[33] s. 353

stiffer penalty than one on a female. Probably this is informed by the notion that a female is essentially evil, and leads men into temptation and when she is assaulted indecently, it is her fault. This is an imbalance in our law and should be corrected[34] other jurisdictions use the neutral gender and give uniform punishment.

Accordingly the two sections should be merged together and should read:

> Any person (male or female) who indecently assaults another person (male or female) is guilty of a felony and is liable on conviction to imprisonment for three years.

C Age of Marriage:

It is very difficult to categorically state who is a child in Nigeria as the supreme law of the country, the Nigerian Constitution failed woefully to define a child [Actually it is not the business of the constitution to define who is a child for purposes of marriage. It is the business of the Marriage Act or the Interpretation Act to do that]

Section 29(4) (b)[35] States "any woman who is married shall be deemed to be of full age."

Apart from this constitutional provision, several conventions, protocols and statutes have given its definition as follows: The child and young persons law of 1946[36] states that a child means a person under the age of fourteen years and went further to define a young person as one under the age of seventeen (17) years. In

[34] F Anyaogu p 95
[35] Constitution of Federal Republic of Nigeria
[36] S. 2

the Child Rights Act, a child is a person under the age of eighteen (18) years[37].

Furthermore, the Convention on the Rights of the child[38] states that a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. There is no clear definition of what marriageable age is by both the marriage Act and other statutes. [Please check the marriage Act and be certain about what it says about the age for getting married]

It is a fact that by various laws in Nigeria girl-child betrothal still takes place. Some are married off at such an age as young as twelve (12) years.

It is posited that the constitution must not become an instrument of perpetuation of injustice with reference to any girl-child marriage. The constitution must be amended to state the clear age of any child which must be below eighteen years. Imputing marriage as yard stick for age of majority is mischievous to say the least. Definitely, the Supreme Law should have gone out of its way to prescribe punishment for anyone that encourages marriage before the attainment of adulthood[39]. Section 29 (4) (b) of the CFRN is highly discriminatory against the girl-child and infringes on the fundamental rights to freedom from any form of discrimination based on sex[40]

[37] Child Rights Act 2003 s. 277
[38] Convention on the Right of the Child 1990 Art. 1.
[39]O Ikpeze 'The Nigerian Child's Rights Act 2003: A critical Appraisal'(2011) 4UNIZIK Journal of Public and Private Law 111
[40]Constitution of Federal Republic of Nigeria 1999 s. 42.

This constitutional provision relating to the age of maturity is a monster and is better appreciated by Islamic law marriage where it is observed that a woman has no right of choice of a husband particularly, in the first marriage. This is because her father is the person with unqualified right to make a choice for her virgin daughter in the concept of "*Ijabar*" subject to the age of girl. For those daughters who have attained the age of maturity or puberty, "*Ijabar*" is ruled out and "*Hibaril Bulug*" (option at puberty for the girl to continue with the marriage or put an end to it)[41]. The pathetic story of the gruesome murder of Hauwa Abubakar says it all. At the age of nine, her father married her off to one Mallam Shehu

Garba Kiruwa, a 40 year old cattle dealer to whom he owed money. She ran away two times, on the third occasion, the Mallam pinned her down, and cut off her legs with a poisoned cutlass, which resulted in her death[42].

She had lost her life because her father forced her to a man whom she would not have thought of ever getting married to. A man old enough to be her father and she was used to settle a debt which her father owed the Mallam.[43].

Section 18 of the Marriage Act[44] states;

> If either party to an intended marriage (not being a widower or widow), is under twenty one years of age, the written consent of the

[41] C Arinze-Umobi and A Umobi, *Crises in Family Law* (Onitsha:Folmech Printing and Publishing Co. Ltd, 2009) p. 102-103.
[42] Ibid.
[43] Ibid.
[44] M 6 LFN 2004.

> father or if he be dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind, or absent from Nigeria, of the guardian of such party, must be produced annexed to such affidavit as aforesaid before a license can be granted or a certificate issued.

This Act does not stipulate any specific age for marriage. It only gives the age below which consent of a parent if required for marriage. It is also obvious that from 21 years, one does not require parental consent to get married under the Act. By implication the Act does not forbid child marriage which mostly adversely affects women. A man must have attained a certain level of economic independence before marriage by which time he certainly would be over 21 years of age. This provision is so detrimental to womenfolk as they are the ones who suffer the consequences of child marriages most.

Where one party is a minor, it should be noted by the provisions of this Act that the mother of such a party can only give valid consent where the father is dead or is of unsound mind or absent from Nigeria. This provision of the law in practical terms offends the rights of both parents to equal rights over their children[45]. The right to give consent could be given to both spouses equally. Child marriage is harmful to girls in numerous ways. Arinze-Umobi enumerated the effects of child marriage as follows.[46] it endangers the physical, emotional, moral, social or education

[45] Universal Declaration on Human Rights (UDHR) 1948 Art.16
[46] C. Arinze-Umobi *op cit* p. 94

welfare of the child. It also has short and long term health consequences.[47]

D Wife Chastisement

Section55 (1) (d) of the Penal Code provides;

> Nothing is an offence which does not amount to infliction of grievous hurt upon any person which is done by a husband for the purpose of correcting his wife, such husband or wife being subject to native law or custom in which such correction is recognized as lawful

This is an aberration to human existence. The children who are supposed to be disciplined by both parents now see their mother reduced to nothingness. This has the effect of eroding her authority over her children. This in turn affects the family adversely and of course the society at large as child discipline is supposed to start from the home. The erosion of her authority over her children put aside, this provision most importantly is an aberration of her constitutional right to dignity and integrity of the human person. This law should be expunged.

E Estate of Deceased Intestate

Generally, in succession and administration of estates, the law and practice show a marked preference of the male over the female. The initial position under customary law was openly and unapologetically discriminatory against females. In *Loye v Loye*[48] the court held that a widow has no right to inherit to the estate of her deceased husband. In *Dosnmu v Dosnmu*[49] the court, refused

[47] *Ibid* pp. 96
[48] (1934) 11 NLR 134
[49] (1954) 14 WACA 52

a claim to inheritance of two rooms allegedly allocated to the late mother of the plaintiffs by their late father, and held that to uphold such custom would result that upon the death of a childless woman, members of her family of origin would claim such rooms from her husband's family. In *Nezianya & Anor v Okagbue & Ors*[50] the Supreme Court that a wife is a property of her husband to be inherited by the deceased husband's male relatives. This was also the opposition in the case of *Oshilaja v Oshilaja*[51],where it was held that a widow cannot inherit because as a chattel under native law and custom she could be inherited. The Supreme Court re-affirmed the preceding positions in *Akinnubi v Akinnubi*[52],and held it was a well settled rule of native law and custom of the Yoruba that a wife wouldn't inherit her husband's property; under intestacy she is regarded as part of the estate of her deceased husband and to be administered and inherited by the deceased family. With respect to daughters, in *Uboma v Ibeneme*[53] the court held that daughters cannot inherit out of their deceased father's property; and that while land can be allotted to women for farming purpose, they cannot call the land their own. The tide started turning in *Salami v Salami*[54] where it was held that daughters can inherit equally with sons. The tide continued turning in in *Nzekwu v Nzekwu*[55],which pertained to a widow's right to inherit her late husband's estate under Onitsha custom where the widow has only two female children. Although the court held that her right is only possessory and not proprietary, the court further held that any Onitsha custom which postulates

[50] [1963] 1 ALL NLR 352
[51] (1972) 2 UILR 313
[52] [1997] 4 NLR (Pt 484) 144
[53] (1967) ENLR 251
[54] (1971) 1 ALL NLR 57
[55] [1989] 2 NWLR (Pt 104) 317

that an 'Okpala' has the right to alienate property of a deceased person during the life time of his widow should be regarded as repugnant to equity and good conscience and therefore unacceptable. The tide finally turned in *Ukeje v Ukeje*[56], where the court held that the Igbo native law and custom which disentitle female from sharing in their deceased father's estate is void as it is in conflict with the provision of s. 42(2) of the 1999 constitution. Prior to the *Ukeje* case, the court of Appeal had in *Muojekwu v Muojekwu*[57] held that a custom under which males and not females inherit their father's property was repugnant to natural justice, equity and good conscience. The Supreme Court in *Muojekwu v Iwuchukwu*[58], had reached the same result as the Court of Appeal by holding that holding the personal customary law of the parties repugnant was unnecessary since it was the *lex situs* that applied, and the *lex situs* in any even permitted females to inherit. This decision of the Supreme Court permitting female inheritance came after its decision in the *Ukeje* case. Thus, it was following the precedent it had previously laid. In *Azika v Atuanya*[59],it was held that a law which prevents female children from inheriting their father's property was repugnant to natural justice, equity and good conscience; and that custom must treat children of the deceased equally with reference to inheritance. From the above developments, it may be confidently asserted that although discrimination against females in succession and inheritance was acceptable practice under customary law, currently, there is equality of gender treatment. With the decision in *Ukeje's* case and its subsequent and constant application by other courts, gender-based discrimination in inheritance and

[56] (2001) 14 WRN 31
[57] [1997] 5 NWLR (Pt. 512) 413
[58](2004) 11 NWLR 196
[59][2008] 17 NWLR (Pt. 117) 484

succession under customary law is no longer accepted law. However, as at yet, there is no indication that Sharia law is in the process of going the way of customary law. Thus, in *Mohammadu v Mohammadu*[60] the Court of Appeal, held that daughters will inherit half of what sons ought to inherit under Islamic customary law and a widow was entitled to one-eight (1/8) of the deceased husband's property when there were children of the deceased otherwise she would have been entitled to one-quarter (1/4).

Unlike customary law which could be asserted currently to be gender neutral in succession and inheritance matters, statutory law is still gender-biased in inheritance and succession matters. For an example the Administration and Succession (Estate of Deceased Persons) Law of Anambra State[61]provides that:

(i) In all cases to which this law applies the residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section and the distribution of the residuary estate of an intestate shall be in accordance with the following table.

(a) If the intestate leaves a husband or wife but does not leave any children or parent or children's children;

The residuary estate shall be held on trust for the surviving spouse absolutely provided; that where the surviving spouse is the wife and the intestate leaves brothers and sisters of the half blood, such wife's interest shall be for life or until she marries (whichever first occurs) after which the residue of her interest shall go to the

[60][2002] 5 NWLR (Pt 708) 1

[61] s. 120 Cap. 4 The Revised Laws of Anambra State of Nigeria

> intestate's brothers and sisters absolutely in equal shares.

The difficulty with justifying this provision is that when it is compared with the counter vialling provision of a widower inheriting the estate of his deceased widow, it is not conditioned on his forbearing to remarry. To the extent that when a woman dies, the surviving husband takes her estate absolutely without any conditions attached, this provisions as framed would only be interested as discriminatory against females. In Reed v Reed [62]the appellant had launched an attack against Section 15-314 of the Idaho Code which seemed to have preferred the father of the deceased to his mother for purposes of taking out the letters of administration over the deceased's estate where each was equally entitled. The US Supreme Court held that a mandatory preference to members of either sex over members of the other is arbitrary
It is consequently expected or anticipated that statutory law would adopt non-discrimination as the norm, and create an equality of rights, obligations, benefits and duties for both males and females in succession and inheritance matters.

Conclusion

Without doubt, gender treatment in our community life at both micro and macro levels is disparate. The inequality manifests itself both in unconscious societal attitudes and consciously created sustained and reinforced practices. These include social behaviors, customs and legislations. Since social behaviors falls within the realm of personal prejudice, nothing much can be done about it until the underlying societal framework is dismantled. After a long period of vacillation, the courts have finally adopted

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the position that rules of customary law should not discriminate between males and females on the issue of inheritance and succession to estates. This is only the beginning. There is still a long way to travel until gender parity is attained. While gender equality of sorts has been attained in customary law, the same may not be asserted regarding statute. Consequently, despite the noisy avowal of the constitution to gender equality, it still contains discriminatory provisions. The same is also true of a good number of our laws. However, the hope and expectation is that the path charted by Supreme Court in *Ukeje's* case would eventually find application in every sector of our community and social life.