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# GENDER DISCRIMINATION UNDER THE NIGERIAN LEGAL SYSTEM: AN APPRAISAL

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## *Abstract*

*Despite the existence of constitutional provisions and commitments of regional and international human rights conventions, the rights of female are grossly violated and devalued in Nigeria and many African countries. The establishment of structures of inequality has generated gender discrimination against women. Although, women play vital roles in nation development, they do not have equal share of land, credit, education, employment, and political power with men. Fundamentally, women have been subjected to domination by men as a result of persisting cultural stereotype, abuse of religious and traditional practices, patriarchal societal structures in which economic, political and social powers are dominated by men. This article examines the concept of female gender discrimination and empowerment, its background and its causes in Nigeria. This study reveals that in spite of the existence of various legal frameworks protecting women against discrimination, the practices continue in Nigeria. It further reveals that Islamic law protects women's rights in Qur'an and Sunnah contrary to some expressed negative opinions. To accomplish the thrust of this study, the writers employed primary and secondary sources like international, national and regional instruments on human rights, Nigerian Constitution, Qur'an and Sunnah. Others are text books, journals and internet. The study recommends for the abrogation of practices that discriminate against women, amendment of provisions of Nigerian legislations that discriminate against women and to restructure some federal agencies that discriminate against women folk.*

**Keywords:** Gender Inequality, Gender Discrimination, Gender Based Violence, Empowerment

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## Introduction

The etymology of commitment to gender equality in the United Nations can be traced to the UN Charter and Universal Declaration on Human Rights 1948 which states that rights and freedoms will not be limited by person's gender and establishes that all human beings are born free and equal in dignity and rights. UN created the Division for the Advancement of Women (DAW) in 1946 to champion women's empowerment and gender equality in order to ensure that women that constituted half of the world's population enjoy equal rights as well as living in dignity as equal citizen everywhere.<sup>[4]</sup> The AU member states are signatories to the AU General Assembly landmark Convention for the Elimination of all forms of Discrimination against Women which was adopted in 1979. The AU commitment to gender equality has its origin in the African Charter on Human and Peoples Right. This commitment is reinforced by the protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa, the solemn Declaration on Gender Equality in Africa (SDGEA) and the Post Conflict Reconstruction and Development adopted by the Heads of State and Government in 2006 among others. Although many conferences gave birth to the recognition of the crucial role of women in rural and urban areas, at family, community and national levels, women's specific contributions to national development has not been appreciated.<sup>[5]</sup>

Therefore, gender based discrimination is pervasive and ubiquitous everywhere in the world. This is why females find it difficult than males to access market activities, political power, health and education inputs.<sup>[6]</sup> No country in the world has attained equality between men and women in critical capacities like economic participation, education, health and political empowerment.<sup>[7]</sup>

It is momentous to state here that gender inequality and discrimination thrive among various strata in Nigeria.<sup>[8]</sup> This was obvious during the debate on the amendment of the 1999 Constitution of Nigeria<sup>[9]</sup> which raised controversial questions on the position and treatment of women under the law. Serious shock and disappointment have been expressed over the unequal treatment of women by the Constitution. Its

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\*This paper is in compliance with the ethical standards as expressed in the editorial policy of the Journal.

\* The authors declare that nowhere in the article was informed consent required as this is a doctrinal research study.

<sup>4</sup> African Union Gender Policy. 2009.

<sup>5</sup> *ibid*, 3.

<sup>6</sup> Fasina F F. 2017.

<sup>7</sup> Fasina, *ibid*, 6.

<sup>8</sup> As at 2017, with an index of 0.64, Nigeria ranked 122 on the world global gender gap index see World Data Atlas <https://knoema.com/atlas/topics/World-Rankings/World-Rankings/Global-gender-gap-index?baseRegion=NG>

<sup>9</sup>The Constitution of the Federal Republic of Nigeria 1999. The Constitution has undergone several amendments, the current debate is with regard to a prospective alteration via the Constitution of the Federal Republic of Nigeria, (Fourth Alteration) Bill, No. 1, 2017.

language has been criticized to be gender insensitive<sup>[10]</sup> because the male pronoun –He|| appears in the Constitution about 235 times. Consequently, some advocates have recommended replacing the pronoun –he|| with –a person|| or –He and She.|| Also, the provision of Section 29 (4) (b) of the Constitution has come under fire by anti-child marriage advocates as being inequitable for the girl child/women. Discrimination is growing more complex and there is the need for Nigeria to start initiating legislation that tends to incorporate all forms of discrimination not hitherto provided for in the 1999 Constitution. Without mystification, the Constitution gives every citizen the right to freedom from discrimination relating to particular community, ethnic group, place of origin, sex, religion or political opinion.<sup>[11]</sup> However, discrimination against women continues unabated contrary to this constitutional guarantee. This study identified areas of the Nigerian law that are gender discriminatory in one form or the other.

### **Understanding Concepts**

i. **Gender:** Images of men and women are conveyed by myths and fairy tales as well as pictures and religious texts. These images may be the source of attitudes and beliefs and they may reflect and maintain stereotypes.<sup>[12]</sup> Gender is a system of power relations that affects individuals, relationships and society.<sup>[13]</sup> It can also be said to mean a woman or man in a specific place and time.<sup>[14]</sup> It changes from time to time and varies from culture to culture. It subsists from country to country and whilst appreciable progress may have been made in some jurisdictions, legal roadblocks still persist in legislations to stem gender discrimination.

ii. The term discrimination has been defined as –a practice that confers privileges on certain class or that denies privileges to a certain class because of race, age sex, nationality, religion, or handicap or differential treatment, especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.<sup>[15]</sup> Discrimination is painstaking as consequential from the conception, conservation and preservation of configurations of inequality against women contrary to men. The process of engineering transformation involves both the manipulation of rules, norms and procedures as well as organisation for political action by women to protect what rights they have to improve the quality of

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<sup>10</sup> See Editorial, *Nigeria Law Legalised Gender Discrimination*. Online

<sup>11</sup> Constitution of the Federal Republic of Nigeria, 1999, section 42 (2).

<sup>12</sup> Crawford M and Unger R. 2004. 49

<sup>13</sup> Ibid, p 517

<sup>14</sup> S. Coltrane & Adams M. 2003. *Gender & Families*.

<sup>15</sup> Bryan AG. 2014. Black's Law dictionary.

protection and increase the comprehensiveness of the rights to which they are authorised.<sup>[16]</sup>

iii. Gender discrimination has been defined 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 the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, religion, cultural, civil or any other field.<sup>[17]</sup> It has further been described as a situation in which someone is treated less because of their sex, usually when a woman is treated less than a man.<sup>[18]</sup> Gender inequality can be the disadvantageous treatment of an individual or group of individuals based on gender. Sexual harassment is a form of illegal gender discrimination. It is treating of an individual differently based upon his/her gender in academic or extracurricular activities, class assignments given in classroom, class enrolment, physical education, grading and/or athletics.<sup>[19]</sup>

iv. Discrimination against women is defined 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."<sup>[20]</sup> Nigeria signed the convention on 23 April 1984 and ratified it without any reservations on 13 June 1985, and it ratified the optional protocol to CEDAW on 8 September 2001.

### **Discrimination against Women In Nigeria**

In many developing countries, Nigeria inclusive, it is common to find women employed in unskilled, heavy manual work, such as laborers on construction sites and road building. Similarly, women are responsible for much of the manual work in the agricultural sector. Such employment goes unpaid. Gender discrimination, sexual exploitation and the denials of life's opportunities to women are being presented as part of culture that should be preserved. Gender inequality is, thus, the result of unjust economic, political and social relations. Discrimination against women takes different forms in different societies and historical epochs, thus requiring differential strategies in each place and time. It occurrences are examined below:

#### **Nigerian Constitution and Citizenship Rights**

<sup>16</sup> Fasina. *ibid* 7.

<sup>17</sup> European Institute for Gender Equality.

<sup>18</sup> Cambridge Dictionary. *Gender Discrimination*.

<sup>19</sup> Langston University. *Gender Discrimination Defined*.

<sup>20</sup> The United Nations Convention on Elimination of all forms of Discrimination against Women (now referred to as Convention or CEDAW), 1979, article 1.

The provision of the Constitution which is deemed as gender biased is Section 26 (2) (a) of the 1999 Constitution. This provision confers the right of citizenship to any woman who is married to a Nigerian citizen but denies such right to foreign men married to Nigerian citizens who are women. Section 26(1) broadly provides:

*Subject to the provisions of section 28 of this 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 Schedule to this Constitution.*

*(2) the provisions of this section 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.*

The implication of this provision is that by literal application, only women who are/were married to a Nigerian man can be registered, to the exclusion of women married to foreign men. This is obviously a discrimination against Nigerian women married to foreigners.<sup>[21]</sup>

It is pertinent to state the position of Islamic law here before it is fully discussed in the last part of this study. Based on a broad religious basis, a Muslim woman is formally forbidden to marry a non-Muslim man regardless of his religion while a Muslim man is allowed to marry a non-Muslim woman, Christian or Jew, considered by the Islamic jurists as ‘People of Book.’<sup>[22]</sup>

The only verse that discusses this issue is absolutely the main verse that states the provision on marriage with the category of non-Muslim. It provides as follows:

<sup>21</sup>The current alteration bill inter alia seeks to alter section 25 of the Constitution to guarantee a married woman’s right to choose either her indigeneship by birth or by marriage for the purposes of appointment or election. See *Full List 1999 Constitution Amendment*. Online at: <https://www.channelstv.com/2017/07/27/full-list-1999-constitution-amendment/>. We submit that this alteration may be better suited for section 26 of the Constitution even though this alteration fails to address the identified limitation

<sup>22</sup> People of Book or ahl al-Kitab are people belonging to a religion in which a Book was revealed as the Torah or Bible. Muslims are compelled to believe in these Books because they were revealed by the same Creator. The Qur’an, the last revelation, is the follow-up of the same universal spiritual message addressed by Allah to all human beings by means of His successive prophets.

And do not marry Al-Mushrikat (idolatresses) they believe (Worship Allah Alone). And indeed a slave woman who believe is better than a (free) Mushrikah (idolatress), even though she pleases you. And give not (your daughters) in marriage to Al-Mushrikun till they believe (in Allah Alone) and verily, a believing slave is better than a (free) Mushrik (idolater), even though he pleases you. Those (Al-Mushrikun) invites you to the Fire, but Allah invites (you) to Paradise and Forgiveness by His Leave, and makes His Ayat (proofs, evidences, verses, lessons, signs, revelations, etc) clear to mankind that they may remember.<sup>[23]</sup>

The Quranic verse tackling the marriage of Muslim men or women to a believer or other religions, sets some rules using egalitarian language. However, it is worth mentioning here that the scholars agreed unanimously on the prohibition of the marriage of Muslim woman to a Jew or Christian while no part of the Qur'an provides for such or justifies the discrimination. This verse clearly forbids the marriage of believing men and women to polytheists, called at the time Mushrikin.<sup>[24]</sup>

We should go back to the meaning, the purpose and the moral of the Quranic verse that talks about the interreligious marriage through a dispassionate debate that goes beyond emotions. We should review the real and deep meaning of some concepts in our globalized and multicultural societies, such as 'the believing men and women and 'people of Book'... We should stress the main value and the initial spiritual trend that underlie this verse that calls for honesty, decency and mutual respect as the pillars of any marriage.

However, if we construe another provision of Qur'an relating to marriage, we may have second thought to the above verse. The Almighty Allah enjoins Muslims men to marry women among people of Books as follows:

... (Lawful to you in marriage) are chaste women from the believers and chaste women from those who were given the Scripture (Jews and Christians) before your time, when you have given their due Mahr (bridal money given by the husband to his wife at the time of marriage)... And whosoever disbelieve in oneness of Allah and in all the other Articles of Faith (i.e. His Allah's), Angels, His Holy Books, His Messengers, the Day of

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<sup>23</sup> Al-Bakarah 2: 221.

<sup>24</sup> Asma L. 2013. -What Does the Qur'an Say about the interfaith Marriage?]

Resurrection and *AlQadar* (Divine Preordainments), then fruitless is his work, and in the hereafter he will be among the losers.<sup>[25]</sup>

This verse allowed only Muslim men to marry ‘People of Books’ but Muslim women are not allowed to marry any other person but Muslim men. The rationality behind this is that most people of other Books did not believe in oneness of Almighty Allah but in Trinity which is contrary to dictate of Almighty Allah in the Qur’an, where Allah says: –*Say (O Muhammad): He Allah (the) One; The Sufficient Master, Whom all creatures depend; He begets not, nor He begotten; And there is none co-equal or comparable unto Him.*’<sup>[26]</sup>

Furthermore, section 37 of the 1999 Constitution provides that –*the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.*|| Some activists have expressed fear that this section is too broad and can serve as a cover for those who engage in Child marriage and domestic violence.<sup>[27]</sup> Construed in its ordinary meaning, it prohibits interference into a person’s private matters, without limitation or exception.

### **Discrimination against Female Police officers and others**

A government agency that has come under attack for discriminating against women is the Nigeria Police Force. For instance, Police women on duty are prohibited from putting on jewelry except wedding or engagement rings and /or wristwatches and they are prohibited from applying face powder, lipstick or colored nail varnish.<sup>[28]</sup> Police women are required to place the alphabet ‘W’ before their rank. In addition, in cases of compensation, gratuity and disability pensions, provision was made for payment only to wife or widow. There is no reference to spouses (husbands).<sup>[29]</sup> Police women married to civilian husbands are disallowed from living in police barracks.<sup>[30]</sup> Again, travel allowance made only for accompanying ‘wife’ and children but no provision for police women’s husbands<sup>[31]</sup>. According to Rule 121 of the Police Regulations, women police officers shall as a general rule be employed on duties which are concerned with women and children.

<sup>25</sup> Al-Maidan 5:5.

<sup>26</sup> Al-Ilklaas 112: 1-4.

<sup>27</sup>Editorial, Nigeria Law Legalised Gender Discrimination. *ibid.*

<sup>25</sup> *ibid*

<sup>26</sup> *ibid.*

<sup>27</sup> *Ibid*

<sup>28</sup>*Ibid*



According to Rule 122, married women are disqualified from enlisting in the Police; a Police woman who is single at the time of her enlistment must spend two (2) years in service before applying for permission to marry and she has to give particulars of her fiancé who must be investigated and cleared before permission for marriage is granted.<sup>[32]</sup>

Section 125 of the Police Regulation states that —A married woman police officer shall not be granted any special privileges by reason of the fact that she is married and shall be subjected to posting and transfer as if she were unmarried.<sup>[33]</sup>

Section 126 of the Police Regulations provides that —A married woman police officer who is pregnant may be granted maternity leave in accordance with the provisions of general order (a Federal Government instruction that regulated the condition of public officials). However, an unmarried woman police officer who is pregnant shall be discharged from the force.<sup>[34]</sup>

Another instance of gender discrimination in a government agency was the complaint made to the Senate Committee on Ethics and Privileges by a dismissed former employee of the National Drug Law Enforcement Agency, Miss Udoka Tochukwu on account of her engagement to a driver with the Niger Delta Development Agency, Mr. Ozorumba Osondu.<sup>[35]</sup> She also stated in her testimony that the agency recommended the abortion of her pregnancy in an attempt to stop her from getting married.<sup>[36]</sup> It is disheartening that some government agencies still operate obnoxious rules and practices that contravene the Constitution amidst the fight against discrimination of women and gender equality around the world.

### **Nigerian Law on Inheritance and Customary Practices**

Nigerian law on testate inheritance/succession include the Received English law- the Wills Act of 1837 and its Amendments (1852); the Wills Law Western Nigeria,<sup>[37]</sup> Succession Law Edict, 1987, of old Anambra State as amended and applicable to Enugu and Ebonyi States. While the Wills Act do not place any disability on widows with regard to their right to inherit property under testamentary disposition, the Nigerian Laws and statutes do not extend this to widows who contracted customary law marriages. Judicial attitudes until recently tended to perpetuate this discrimination. In *Nezianya v Okagbue*,<sup>[38]</sup> the court held that under the native law

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<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> <http://saharareporters.com/2010/02/20gender-inequality-and-official-discrimination-against-women-nigeria-agencies>.

<sup>36</sup> *ibid*.

<sup>37</sup> Wills Law, CAP 133. 1958. Laws of Western Nigeria.

<sup>38</sup> (1963) ALL NLR 358.

and custom of Onitsha, a widow's right on her deceased husband's property is like that of a stranger. She cannot deal with her late husband's property without the consent of her husband's family. Further, if a husband dies without a male issue, his real property descends on his family and his daughter (s) are not entitled to inherit the property based on the custom. Also in the case of *Nzekwu v Nzekwu*,<sup>[39]</sup> the Supreme Court of Nigeria restated the principle that the widow's dealings over her deceased husband's property must receive the consent of the family, and she cannot by the effluxion of time claim the property as her own. She has however, a right to occupy the building or part of it during her lifetime but this is subject to her good behaviour. It is worthy to note that under Shar'iah or Islamic law, women can acquire and retain their own property, can pass it on to their heirs, and can inherit from their deceased parents, husbands, brothers, sisters, daughters and other relations.<sup>[40]</sup>

Recent judicial pronouncements have taken a second look at discriminatory customs against women. In *Mojekwu v Mojekwu*,<sup>[41]</sup> the Court of Appeal, Enugu division, held that the —Oli-ekpe|| custom of Nnewi in Anambra State where only male children inherit their father's property is unconstitutional. Honourable Niki Tobi J.C.A (as he then was) delivering the lead judgment asked the following questions: =

*Is such a custom consistent with equity and fair play in an egalitarian society such as ours? Day after day; month after month and year after year, we hear of and read about customs, which discriminate against women in this country. They are regarded as inferior to the men. Why should it be so?*

The learned Justice further observed:

*All human beings-male and female-are born into a free world, and are expected to participate of freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on ground of sex, apart from being unconstitutional is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi "Oli-ekpe" custom are not consistent with our civilized world in which we all live today. In my humbly view, it is the monopoly of God to determine the sex of a baby and not the parents. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront, I have no difficulty in*

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<sup>39</sup> (1989) NWLR (Pt.104) 373.

<sup>40</sup>Editorial, *ibid*.

<sup>41</sup> (1997) 7 NWLR (Part 512)283

*holding that the “Oli-ekpe” custom of Nnewi, is repugnant to natural justice, equity and good conscience.<sup>[42]</sup>*

Also in the case of *Muojekwu v Ejikeme*,<sup>[43]</sup> the Court of Appeal held that a female child could inherit from the deceased father’s estate in Igboland without the performance of the Nrachi ceremony.<sup>[44]</sup> The Court held as follows:

*by section 42 (1) of the Constitution of the Federal Republic of Nigeria 1999, 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,*

*(a) 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 ethnic to disabilities or restrictions which citizens of Nigeria of other communities, groups, places of origin, sex, religious or political opinions are not made subject.*

Consequently, the court held that such a custom clearly discriminated against the daughter of the deceased who did not perform the ceremony and was therefore unconstitutional in the light of the provisions of section 42 of the Constitution. The court refused to apply the custom and declared it repugnant to natural justice, equity and good conscience in that it legalized fornication and encouraged prostitution, as the women remained unmarried procreating outside the bounds of marriage.

### **Child Custody under Customary Law**

Generally speaking, Statutory and Customary law in the Southern Region of Nigeria dictates that children are under the custody of their father. In the absence of a custody order, the father is given priority. This position was given credence in the case of *Ejanor v. Okenome*<sup>[45]</sup> which re-examined the position of *Edet v. Essien*<sup>[46]</sup> forty-four years later.

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<sup>42</sup> *ibid*

<sup>43</sup> [2000] 5 NWLR (Part 657) 402.

<sup>44</sup> According to Francis O A. Reducing Gender Discrimination and Violence against Women. Online at: <http://unllib.unl.edu/LPP/>. Nrachi is a ceremony in which a man keeps one of his daughters at home unmarried for the rest of her life to raise issues, especially males, to succeed him. After a daughter performs this rite, she takes the position of a man in her father’s house. Technically, she becomes a –man|. In that case, the court took the liberty to interpret the constitutional nature of freedom from discrimination vis-à-vis the –ili-ekpe or Oli-ekpe custom of Nnewi that does not recognize female inheritance unless Nrachi ceremony has been performed on the female.

<sup>45</sup> (1976)6 ULLR (Case decided on March 4., 1976 at the High Court of Bendel state, Sapele Judicial decision

<sup>46</sup> (1932) 11 N.L.R 47 here the Plaintiff had paid bride price for a woman and she left him and entered a new marriage with another by whom she subsequently had two children, it was held per Carey J. that a rule under native law and custom which held that the Plaintiff was entitled to the custody of the children since the bride price had not been refunded to him was repugnant to natural justice, equity and good conscience

In the case, the Ishan customary law stipulates that the paternity of a child born by a wife at a time when the customary marriage has not been dissolved, by the refund of the bride price (dowry) paid, belongs to the husband, even though he is not the biological father.<sup>[47]</sup> The court stoutly refused to declare this custom as repugnant to natural justice, equity and good conscience.<sup>[48]</sup> Ijalaiye rightly observed as follows:

*In a matter like this, quasi-legal sources and results of sociological research on what the people have regarded as their laws are very vital. Dr Obi in his Modern Family Law in Southern Nigeria at 302 (1966) quotes Dr Elias as saying that "if a married woman leaves her husband for another man by whom she later has a child, before her first marriage has been formally dissolved and the dowry returned to her husband, customary law would award the child to the first man to whom she is still regarded as married." This statement aptly applies to the present situation. It goes to show that the Ishan custom has support in some other areas in the country, I think we should not be in a hurry, in our courts to condemn the old and established customary law of the people by holding that it is contrary to natural justice, equity and good conscience where the people have all along regulated their lives by that custom.*

With due respect to Ijalaye, this position can be cited as an example of a chauvinistic culture and belief where the woman is seen as property of her husband, equated with chattel or animal, so much so that her offspring is deemed to belong to any man who has paid her bride price notwithstanding the biological and physical fact of paternity. By this, the opinion of the woman does not count under customary law in southern Nigeria; this is reinforced by the disheartening stance of a judge who having undergone formal education was expected to rise to the occasion.

### **Criminal Code and Penal Code Provisions on Rape and Indecent Assault**

The Definition of Rape in Nigeria is gender specific. It has been defined as:

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 and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.<sup>[49]</sup>

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<sup>47</sup> Ijalaye D A. 1993. *Natural Law and the Nigerian Experience in Nigerian Essays in Jurisprudence*, in Elias T O and Jegede M I(eds), Lagos: MII Publishers.

<sup>48</sup> Ijalaye .ibid.

<sup>49</sup> Section 357 of Criminal Code Act, Cap 77, Laws of the Federation, 1990.

The Penal code provides:

A man is said to commit rape who, 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 her 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 consent, 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 to puberty.<sup>[50]</sup>

Furthermore, in the case of *Idris Rabi v The state*,<sup>[51]</sup> court defined rape as an –act of sexual intercourse committed when the woman’s resistance is overcome by force or fear or under other prohibitive conditions. || The underlying theme from the foregoing is that consent is central to the offence of rape. Where there is consent from the woman or girl to the sexual intercourse, then the charge of rape must fail.<sup>52</sup>

Historically, women have been subjugated and oppressed by men in most cultures in Nigeria.<sup>[53]</sup> This situation is due to the inequality in gender relations between men and women. Rape has always been with mankind throughout the world.<sup>[54]</sup> However, in recent times, the incidence of rape has increased in Nigeria. The hegemonic patriarchal values and practices make it difficult for women who are raped to obtain justice.<sup>[55]</sup> Perpetrators often go unpunished even if the victims have the courage to report the incidence. In a study about causes and incidence of rape among middle aged and young adults in Lagos State, Nigeria, Peters and Olowa<sup>[56]</sup> found that between 2001 and 2005, 10,079 rape cases were reported. The same study also indicated that only 18 per cent of rape cases in Nigeria are reported. A figure of 10,079 (which is assumed to be 18%) within these few years, is an indication that rape is very rampant in Nigeria and constitutes a serious public health problem. In the

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<sup>50</sup>Section 282 (1) of the Penal Code. No. 18 of 1959, designated as Cap 89, the Laws of Northern Nigeria, 1963.

<sup>51</sup> (2005) 7 NWLR (Pt. 925) 491.

<sup>52</sup> Alobu E E. 2016. *Criminal Law and Sexual Offences in Nigeria*. Lagos: Princeton & Associates Publishing Co. Ltd, 119

<sup>53</sup> Muoghalu C O. 2012. *Rape and Women’s Sexual Health in Nigeria: The Stark Realities of Being Female in a Patriarchal World*. *African Anthropologist* 19 (1-2): 1. Online at: <https://www.ajol.info/index.php/aa/article/view/118206/107765>. Last accessed 20<sup>th</sup> November 2018.

<sup>54</sup> *ibid*,

<sup>55</sup> *ibid*,

<sup>56</sup> Peters, T.O. & Olowa, O.W. –Causes and Incidence of Rape among Middle Aged and Young Adults in Lagos State, Nigeria. | *Research Journal of Biological Sciences*. 5 (10): 670-677. 2010.

vein, it was indicated in the WHO multi-country study<sup>[57]</sup> on women's health and violence against women, that 15-59 per cent of women had at some time experienced sexual violence from intimate partners in Nigeria, Kenya, South Africa and other sub-Saharan African countries. According to Amnesty International,<sup>[58]</sup> rape by police and security forces is endemic in Nigeria as is the abject failure of the Nigerian authorities to bring perpetrators to justice.<sup>[59]</sup> The court acquits most of the rape offenders on account of the lack of evidence or because the victim has a 'questionable' character. Owing to this, rape victims suffer in silence due to the stigma and humiliation attached to the public acknowledgement of rape. In addition, By virtue of judicial practice in Nigeria,<sup>[60]</sup> a person may not be convicted of rape without the corroboration of the evidence of the victim. In *Isa v. Kano State*,<sup>[61]</sup> the Supreme Court Per Muhammad, J.S.C. held: *–On the issue of corroboration of the offence, it should be noted that no law in Nigeria, as of now that says that corroboration is necessary. It is however, desirable to get the evidence of the prosecution strengthened by other implicating evidence against the accused<sup>[62]</sup>(Emphasis mine)."*

There is also the issue of marital rape. Many countries across the globe recognize marital rape. The Nigerian criminal law doesn't recognize marital rape. Section 282(2) of the Penal Code<sup>[63]</sup> provides that –sexual intercourse by a man with his own wife is not rape if she has attained puberty. Indeed, by the same provision 282 (e), a girl who is at least 14 years of age cannot claim to have been raped if her consent was attained. Giving that the legal age of majority in Nigeria is 18, and the common law age being 21, those advocating for recognition of marital rape claim that this provision condones defilement of young girls. Indeed, it has been asserted that as at 2015, despite the prevalence of rape cases in the country, only 18 rape convictions have been held in the country.<sup>[64]</sup>

<sup>57</sup>Ilonzo N, Ndungu N, Nthamburi N, Ajema C, Taejimeyer M and Theobald S. 2009. –Sexual Violence Legislation in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages. || *Reproductive Health Matters*. 17 (34): 10-19.

<sup>58</sup>*Rape, the Silent Weapon*, Amnesty International, Nigeria Report in <http://web.amnesty.org/library/index/ENGAFR440202006>. 28<sup>th</sup> November, 2006

<sup>59</sup> Abuja policemen raped us after raid-Ladies detained after mass arrest in Nigeria's capital city. Punch, 4 May, 2019. Online at: <https://bit.ly/2SVnw2>.

<sup>60</sup>There is no law in Nigeria that requires corroboration in proving rape.

<sup>61</sup>(2016) LPELR-40011(SC)

<sup>62</sup>See also *Reekie v The Queen* (1954) 14COACA 501, 502; *State v. Ojo* (1980) 2 NCR 391 and *Ogunbayo v. State* (2007) 8 NWLR (Pt.1035) 157

<sup>63</sup> Fasina. *ibid*

<sup>64</sup> *Only 18 Rape Convictions Recorded In Nigeria's Legal History – Lawyer*, Online at:<https://www.premiumtimesng.com/news/top-news/192895-only-18-rape-convictions-recorded-in-nigerias-legal-history-lawyer.html>

The Criminal Code Act discriminates against women on the issue of punishment against personal assault. If a man is assaulted, it is a felony (serious offense). When a woman is assaulted, it is a misdemeanor (less serious offense). Section 353 of the Criminal Code Act provides that –*Any person who unlawfully and indecently assaults any male person is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant.*” Conversely, Section 360 provides 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.*||

### **Gender Based Violence and Spouse Abuse**

According to the United Nations, gender-based violence, interchangeably used with Violence against Women or at times domestic violence, is any act of violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women/young girls, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in private [domestic] or public life.<sup>[65]</sup> Violence against women can be physical, sexual or psychological. Other types can be in form of neglect and abandonment and economic disempowerment. Physical violence can occur both in private and in public and it includes but not limited to such acts as slapping, kicking, stabbing, shooting, hitting, pouring acid or any corrosive substance and murder. Other forms include harmful traditional practices and female genital mutilation.<sup>[66]</sup> It is estimated that 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives. However, some national studies show that up to 70 per cent of women have experienced physical and/or sexual violence from an intimate partner in their lifetime.<sup>[67]</sup>

Although we may agree that Gender-based violence is a global phenomenon and not limited to Nigeria, It however seems to be the norm in the Northern part of Nigeria so much so that domestic violence was codified as legal in the Penal Code Act<sup>[68]</sup>. Section 55(1) of the Penal Code provides,

*Nothing is an offence which does not amount to the infliction of child, pupil, grievous hurt upon a person and which is done-*

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<sup>65</sup> Cited in Bilikis B. 2014 *Tackling Gender-Based Violence*. in PM NEWS Online at:<https://www.pmnewsnigeria.com/2014/04/15/tackling-gender-based-violence/amp/>

<sup>66</sup> *ibid*

<sup>67</sup>World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council (2013). Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence, p.2. For individual country information, see *The World’s Women 2015, Trends and Statistics*, Chapter 6, Violence against Women, United Nations Department of Economic and Social Affairs, 2015 and UN Women Global Database on Violence against Women. Online at:<http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>

<sup>68</sup> Penal Code (Northern Nigeria) Act Chapter 53 LFN Cap P3, 2004

- a) *by a parent or guardian for the purpose of correcting his child or ward that child or ward being under eighteen years of age; or*
- b) *by a schoolmaster for the purpose of correcting a child under eighteen years of age entrusted to his charge; or*
- c) *by a master for the purpose of correcting his servant or apprentice, the servant or apprentice being under eighteen years of age; or*
- d) *by a husband for the purpose of correcting his wife such husband and wife being subject to any customary law in which the correction is recognized as lawful.*

One can argue that this provision condones domestic violence and may be used as justification for abuse against women in matrimonial relationships. It is also interesting to note that in this provision a wife is equated with a child, servant or a ward under the age of eighteen. Does this mean that a woman is equated as having the mental faculty of an under aged child? This truly leaves much to be desired.

### **Position of Women Under Islamic Law**

The concept of human right is not applicable in Islamic jurisprudence, rather, there are Divine rights.<sup>69</sup> There is absolute no distinction between men and women in Islamic jurisprudence as far as their relationship to Almighty Allah is concerned because both are promised the same reward for good conducts and the same punishment for evil conducts.<sup>[70]</sup> While Almighty Allah is addressing the believers, often uses the expression, ‘believing men and women’ to emphasis the equality of men and women regarding their respective duties, virtues and merits. He says:

*Verily! The Muslims (those who submit to Allah) men and women, the believers men and women (who believe in Islamic monotheism), the men and the women who are obedient (to Allah), the men and women who are truthful (in their speech and deeds), the men and women who are patient (in performing all the duties) which Allah has ordered and in abstaining from all that Allah has forbidden, the men and women who are humble (before their Lord-Allah), the men and women who give sadaqat (i.e, Zakat and alms), the men and women who observe saum (fast) (the obligatory fasting during the month of Ramadan, and the optional Nawafil fasting), the men and women who guard their chastity (from illegal sexual acts) and the men and women who remember Allah much with their hearts and tongues, Allah has prepared for them forgiveness and a great reward (i.e, paradise).<sup>[71]</sup>*

<sup>69</sup> Abdul Fatah Ibn Raji. 2001 CE/1422 A.H. Islam and Human Rights in Broader Perspective, 57. Lagos: Alashela Islamic Publication 57.

<sup>70</sup> AbdulRahaman Doi (undated) Women is Shar’iah, Islamic Law, 5.

<sup>71</sup> A—Ahzaab 33: 35



Islam also abolished the principle of discrimination between men and women as human being. Islam declares that men and women are equal as human being in this world and in the hereafter. This is expressed in the following verse of the Qur'an: 'So, their Lord accepted of them (their supplication and answered them), 'Never will I allow to be lost the work of any of you, be he male or female. You are member one of another...'<sup>[72]</sup> Islam not only permitted the Muslim women to acquire knowledge but also commended her to do so if it would assist her in her life in this world and in the hereafter.<sup>[73]</sup>

The principle of equality between men and women is greatly protected in Islamic jurisprudence thereby protecting the rights of women in Islam. A woman is permitted to hold any position outside her matrimonial home provided she occupies in respectable and dignified manner that do not put her in any embarrassing predicament that is contrary to the principles of Shar'iah.<sup>[74]</sup> Muslim working women are allowed to associate with the male sex in the public according to the rules and teachings of Islamic jurisprudence.<sup>[75]</sup>

Shar'iah grants the Muslim women equal civil rights and the right to manage her business affairs like participating in legal contracts that deal with sale and purchase of any property or foods in addition to her legal right to grant gifts and to contract a will. Islam frowns at derogation from the right of a woman to personally manage her wealth and supervise her financial affairs. These rights naturally necessitate association with male sex and it is a well-known historical fact that Aishat, a daughter of Talha, the granddaughter of Abubakar Al- Siddiq, first companion after the death of the prophet, fought side by side with men in the battle against the infidels and that she fought bravely with spears and arrows.<sup>[76]</sup>

Islam ordains equality between men and women before the law and in all civil rights matters. This applies to married women and unmarried girls. The Islamic law of marriage does not cancel her civil rights or capacity to possess property or wealth. She can own property in her name and her wealth belongs to her alone and cannot be appropriated by her husband. A husband has no right to dispose off his wife's property or wealth without being grants a power of attorney to act on her behalf. It is

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<sup>72</sup> Ali-Imran 3: 195.

<sup>73</sup> An-Nisaa 4: 32.

<sup>74</sup> Hanafi A H & Wahab OE. 2017. 'Protection of Women's Rights in Africa: Roles of the New Partnership for Africa's Development, Islamic Jurisprudence and other Human Rights Instruments,' Novena University Law Journal. 3 (1): 12-37, 31.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid*

equally the right of the wife to cancel the power of attorney granted to her husband and to subsequently make a grant to whoever she wishes.<sup>[77]</sup>

Shar'iah do not discriminate between Man and woman except in matters where this discrimination is due to the nature of their sex for their welfare and for the welfare of the community, the family and in particular, for the welfare of the woman.<sup>[78]</sup>

In Islam, a married woman has the absolute right to own, sell, give away or manage her property. This property include the gift (Mahr) given to her by her husband at the time of marriage. The husband has no right to take it away from her. A Husband and wife can however acquire property together during marriage.<sup>[79]</sup>

Allah further commands regarding the personal property of women in the following verse:

*O you who believe! You are forbidden to inherit women against their will, and you should not treat them with harshness, that you may take away part of the gift (mahr) you have given them, unless they commit open illegal sexual intercourse. And live with them honourably. If you dislike a thing and Allah bring through it a great deal of good.<sup>[80]</sup>*

In Islamic jurisprudence, men and women have equivalent rights, including but not limited to working, acquiring wealth, possession of property and the concept of inheritance. The Qur'an declares that for men, there is a share from what their parents and their close relative leave, and for women, there is share from what their parents and close relative leave, be it little or considerable, a definite share.<sup>[81]</sup>

This verse makes it clear that like men, women inherit and have definite share. The verses regarding inheritance were revealed to the Prophet (SAW) at a time when women in the world and especially among benighted Arabs were bereft of worth of status. In the age of ignorance, men were ashamed when they heard that their newborn child was a girl and many innocent baby girls were even buried alive.<sup>[82]</sup> The possessions of the deceased went to their sons or eldest son only and girls were deprived of inheritance unless a father determined an amount in his will or his sons took property upon their female siblings and gave them something. Thus, when the verse of inheritance was revealed, it gave women definite share in the legacy, some

<sup>77</sup> Ali Abedel Wahi Wafy. 1423-2002. *Human Right in Islam*. Arab Republic of Egypt Ministry of Al-Awqaf Supreme Council for Islamic Affairs 59.

<sup>78</sup> ibid

<sup>79</sup> Leslie H. 2014. -Women's Rights in Uganda. | Centre for Women's Land Right, 6.

<sup>80</sup> An-Nisa 4: 19.

<sup>81</sup> An-Nisa 4: 7.

<sup>82</sup> Ibrahim A. -An Introduction to the Rights and Duties of Women in Islam. | Online at: <https://www.al-islam.org/introduction-right-and-duties-women-islam-ayatullah-ibrahim-amini>, accessed 31 May 2019.

people were also astonished. Regarding the conditions revolving around this verse revelation, Imam Fakhr Razi written:

Ibn Abbas gives account that Aus Ibn Thabit Ansari died and left behind his wife with three daughters. Two of his male cousins by names Sawid and Arafjah, who were his inheritors, came and took all the properties. Aus's wife came to the Prophet and narrated her experience and said; Aus's two inheritors left nothing for my daughter and I. The Prophet said; return home until I see what God instructs. Subsequent to this was the revelation of the aforementioned verse which shows that both men and women can inherit.<sup>[83]</sup>

Indeed, by legislating women's inheritance in such times, Islam has honoured women and has considered their status as inheritors equal to that of men. However, In Islamic law, the share of women's inheritance is half that of men's inheritance. Allah has stated in the Qur'an as follows: —Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...<sup>[84]</sup>

Based on the Quranic provision, sons inherit twice of daughters, brothers, twice that of sisters, and husbands inherit twice that of wives except regarding the father and mother if the deceased. If they are living at the same time of their child's death, each equal receive one-sixth of the deceased legacy.

The law of inheritance has been critised because woman has been discriminated against with allotment of half the share of man. Is this not prejudice and oppression? The difference in the inheritance shares of man and woman should not be seen disassociate from the laws and commandments and discussed and judged independently. It is true that regarding inheritance, there is differentiation in Islamic law between men and women. However, this distinction is due to realistic perception and financial obligations that men bear. In Islam, men have to bestow property (mahr) on their wives. Therefore, men must work diligently to provide all living expenses, whereas women are not required to work and pay for living expenses. If a woman has wealth, she is not expected to spend it for the family; she may save it for her self-desire. All possessions that she gains through work, mihr, gifts, inheritance or any other legitimate methods are solely hers and she can amass it all if she wishes. This is in contrast to men who are legally and canonically required, in addition to bestowing mihr, to provide all living expenses of their spouses and all members of the family.

The reason why male takes twice of male is justified in the following verse of Qur'an:

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<sup>83</sup> ibid

<sup>84</sup> Al-Nisaa 4:11

Men are the protectors and maintainers of women, because Allah has made one of them to excel the other and because they spend (to support them from their means). Therefore, the righteous women are devoutly obedient (to Allah and to their husbands) and guard in the husband's absence what Allah orders them to guard (eg, their chastity, their husband's property)....<sup>[85]</sup>

Equally illustrated this, is the prophet who reported to have said that the reason why women receive half the share of men from inheritance is that when woman marries, she takes mahr and gifts, for this reason, man have larger share. Another reason is that a wife is dependent on her husband and the husband must pay for her expenses, while a wife is not expected to pay her husband's expenses or financially support him in need.<sup>[86]</sup>

Also in Islamic law, man and woman enjoin equal right in marriage and divorce and this is why it is provided in the Qur'an as follows: *“O you who believe, you are forbidden to inherit women against their will, and you should not treat them with harshness, that you may take away part of the *Mahr* you have given them, unless they commit open illicit sexual intercourse. ...”*<sup>[87]</sup>

Woman can also initiate dissolution of marriage through a procedure known as *khul'*. *Khul'* is an Arabic term derives from the verb *khala'* which means *'to dispossess'* and in effect, this legal procedure allows the woman to remove herself from the tie of possession that binds her to her husband. If the husband accepts the financial compensation offered by his wife to end their marriage, the marriage dissolved immediately.<sup>[88]</sup>

*Al-khul'*: While *talaq* is the right of a man to initial and determine the fate of a marriage contract with respect to all injunctions of Allah, *al-khul'* is the dissolution of marriage at the instance of a woman when she can no longer cope with her marital obligations her husband, putting into consideration all injunctions of Allah.<sup>[89]</sup> It is substantiated in a Qur'anic verse as follows: *“If you fear that they cannot observe the limits prescribed by Allah, then it shall not be a sin on any of them in what she offers to get freedom.”*<sup>[90]</sup>

Almighty Allah gives right to initiate divorce in Qur'an as follows:

<sup>85</sup> An-Nisaa 4: 34.

<sup>86</sup> Bilar al-Anwar, Vo. 104, 326.

<sup>87</sup> An-Nisaa 4: 19

<sup>88</sup> Corinne Fortier, *ibid*

<sup>89</sup> Ambali MA, 2003. *The Practice of Muslim Family Law in Nigeria*.

<sup>90</sup> Al-Bakarah 2: 229.

Then, if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her *Khul'* (divorce). These are limits ordained by Allah, so do not transgress them. And whoever transgresses the limits ordained by Allah, then such are *Zalimun* (wrong doers).<sup>[91]</sup>

It is obvious from this verse that it is not illicit for you to take back anything you have given them unless the two of them fear that they cannot conform to the bonds of Allah, no blame attaches to them both.

It is further based on a hadith where prophet instructs a man to agree to his wife's wish of divorce if she gives a man back a garden received from him as part of Mahr. A *Khul'* is concluded when the couples agreed to divorce in exchange of a monetary compensation paid by the wife, which cannot exceed the value of Mahr she had received and generally a smaller sum or involving wife. The divorce is final and irrevocable, effective when the contract is concluded.<sup>[92]</sup>

In the studies of Mamluk Egypt and the Balkans under Ottoman rule, *Khul'* was known to have been the principle means of divorce. Women employed a number of strategies to force settlement from their husbands. Some neglected their marital and household duties, making family life impossible for their husbands. Others demanded immediate payment of the deferred Mahr, knowing that their husbands had no means to comply and would be jailed if failed to do so.

*Custody of Children (Hadana)*: In the case of *Odejayi Jemilat v. Odejayi Muktar Taiwo*<sup>[93]</sup> *Hadana* has been defined as protection and care of a child in his worldly affairs such as feeding, clothing and cleanness of his body. This is applicable to a person who is not independent in taking care of his body and it is a form of guardianship and women are considered to be more suitable to assume because they are more experience in the area of looking after children and they are generally more caring and compassionate. The jurists unanimously agreed that the mother has the right to the custody of her biological children after separation or death of her husband. Except if she becomes adulteress or goes out every time and abandoned her children at risky.<sup>[94]</sup>

Abdullahi Ibn Umar said that a woman complained to prophet saying: 'This my child, my stomach was his abode, my thigh was his playing centre, my breast was reservoir to quench his thirst. His father wants to take him from me.' The Prophet replied him saying: 'You have better claim to the guardianship than his father as long

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<sup>91</sup> Al-Bakarah 2: 229.

<sup>92</sup> Ambali *ibid*.

<sup>93</sup> Appeal No: KWS/SC/cv/ap/il/01/2013, 63-83, 76.

<sup>94</sup> Wahaba al-Zuhayl, *Fiqh al-Islamu Wa'adilatuh*, vol. 10, 7298.

as you have not remarried.<sup>[95]</sup> A girl remains with her mother until she marries while the boy remains with her until he reaches the age of puberty, that is, maturity. After this, he is given the choice to stay with his father or mother.<sup>[96]</sup>

### **Conclusion**

This study has examined the concept of gender discrimination and particularly, discrimination against women. Nigeria is signatory to various International and national instruments that frown at discrimination against women in all ramifications, in fact, its organic law prohibits any discrimination in section 42. Despite all these, practices of discrimination against female gender are prevalence in every sectors of human endeavours in Nigeria. The provisions of most of legislations on the protection of discrimination against women in Nigeria are nebulous and contradictory as can be seen from this study. This study therefore recommends for the amendment of the provision of the Constitution which favours male against the female. More so, there is need to stem the practices that tend to discriminate against women in some Federal Agencies like the Nigerian Police, National Drug Law Enforcement Agency, Immigration and others. The study equally recommends for the abrogation of obnoxious practices that discriminate against female gender and to imbibe with religion ethics that recognise and protect the chastity and rights of women.

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<sup>95</sup> As-Syyid Sabiq (403H/1983) *Fiqh Sunnah*, Darul Fikr, Lebanon, (4<sup>th</sup> edn) Vol. II, 289.

<sup>96</sup> Imam Al-Hussein, \_The South Circular, Dublin. Online at: [https://www.irfi.org/articles\\_551\\_600\\_custody\\_of\\_children\\_shariah.htm](https://www.irfi.org/articles_551_600_custody_of_children_shariah.htm)

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### **Conventions**

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