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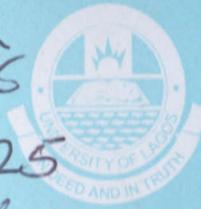
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TOPIC:

TRENDS OF HUMAN
RIGHTS CAMPAIGN
IN FAMILY LAW



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By
PROFESSOR EUNICE UZODIKE

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TRENDS OF HUMAN RIGHTS CAMPAIGN IN FAMILY LAW

An Inaugural Lecture Delivered at the University of Lagos
Main Auditorium on Wednesday 20th July, 2011

by

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INTRODUCTION

Today is indeed remarkable in the course of my academic career in the University of Lagos as I stand before this distinguished audience to deliver my inaugural lecture, a debt owed and payable to my employers. This debt has been so long overdue that in the accounting terminology it may be called a bad debt which can altogether be written off, leaving me acquitted and discharged of my obligations. Had this happened however, it would have been one of the greatest regrets of my life as I would forever stand on one leg and not two as a professor of private Law in this excellent citadel of learning.

Mr Vice-Chancellor Sir, I dare say that my joy is up in leaps and bounds that God Almighty has made this day possible. The choice to write my inaugural lecture on Family Law, approached from a comparative standpoint, is widely supported by my teaching of the subject for over two decades in the Faculty of Law and my unshaken belief that it will capture the interest of a good majority of the University Community and beyond. After all, Family Law affects each and every one of us in diverse ways whether as husband, wife, child or family member.

This subject is fast assuming global dimensions following international standard setting instruments¹ which seem to serve as reflections of international consensus and trends in approach to certain issues of principle; for example, the attitude to children born out of wedlock or the equal rights of

¹ See e.g. The United Nations Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into Force: 2nd September 1990 in accordance with Article 49. Convention on the Elimination of All kinds of Discrimination against Women (CEDAW) Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into Force: 3 September 1981 in accordance with article 27(1).

married women². Significant shifts have also occurred in family structures and attitudes to family relationships in the last fifty years, for example, acceptance of cohabitation outside marriage³ and the growing acceptance of relationships between persons of the same sex quite often justified on the anchor of human rights. There thus, appears to be a wider international approach to family problems.

Traditionally, the study of Family Law focuses on Laws regulating marriage and family relationships which cover the legal formation of marriage⁴ and its incidences, matrimonial causes⁵ such as annulment and dissolution of marriage, custody of children, financial provisions for the parties and children of the marriage, judicial separation and restitution of conjugal rights among others. It also encompasses non-matrimonial issues such as guardianship and adoption of children, parental rights and duties, legitimacy and illegitimacy, property rights of spouses under the Married Women's Property Act/Law⁶ and the inheritance and succession rights of family members. Also included within the framework of Family Law in more recent times are issues of domestic violence, child neglect, physical and mental abuse, child labour and

² G. Douglas, 'The Significance of International Law for the Development of Family Law in England and Wales' in Caroline Bridge (ed.), *Family Law Towards the Millennium – Essays for P.M. Bromley*, (Butterworth's, 1997) 85 – 104.

³ G. Douglas, above n.2.

⁴ Under the Marriage Act 1914, Cap M6, Laws of the Federation of Nigeria 2004 and under customary law.

⁵ Matrimonial Causes Act 1970, Cap M7 Laws of the Federation of Nigeria 2004.

⁶ Married Women's Property Act 1882 (Statute of general application in Nigeria except in the former Western and Midwestern states of Nigeria where the Married Women's Property Law 1958, Laws of Western Nigeria applies).

sexual abuse, trafficking in women and children, surrogacy and assisted reproduction⁷.

This significant surge in the scope of the subject no doubt justifies the statement of Hon. Justice Aubrey - Frazer that "the place of Law as a continuing moral force in any community can only be secure if law possesses an element of growth such as will make it adaptable to new situations and to the constant shifting of social pressures which are inevitable in the modern democratic society⁸."

The numerous human rights instruments dating back to the United Nations Universal Declaration of Human Rights in 1948⁹ have contributed in no mean measure to the current spate of human rights-based campaigns for rights in Family Law. Thus, these instruments provided an anchor for challenging some aspects of family law, examples of which are, the common law definitions of "marriage", "divorce" "adultery" and "family" which were alleged to be discriminatory on the basis of their restrictive scope, for instance, failure to accommodate unconventional relationships. Other areas which have been subject of similar challenges are the restricted rights and inferior position of women married under customary law, status of women under inheritance laws and that of children born out of wedlock, discrimination against and

⁷ These have been tagged family law issues which now dominate discussions at international Family Law conferences.

⁸ Mr. Justice A. Aubrey – Frazer, 'The Law and the Illegitimate Child' – Lecture delivered at Centre of Multi – Racial Studies, Cove Hill, Barbados, June 30, 1971, cited in H. Thompson – Ahye, 'The Relationship Between Social Change and the Law– The Concept of Family and The Child Born Out of Wedlock', *The International Survey of Family Law*, 1997, 445 at 446.

⁹ General Assembly Resolution 217A (iii) 1948. The Declaration was a response to the desire to guard against certain war crimes and human rights breaches. Development of human rights actually began around 300BC See A.V. Atsenuwa, *Human Rights Made Easy*, (3rd Ed. Legal Research and Resource Development Centre 1979)1. Other relevant human rights instruments include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child and numerous others.

suppressed rights of children and other family law legislation which grant certain rights, obligations and privileges to married heterosexual couples to the exclusion of other non-traditional unions.

The successes, following these human rights-based court challenges, yielded, as will be highlighted, the establishment of rights which were foreign to the realm of family law. In some jurisdictions, the courts, impatient to wait for legislative reforms to correspond to the emerging trend, resorted to judicial law making, claiming that their respective governments, having ratified the international covenants, were under obligation to abide by their provisions. Before proceeding further however, it is important to attempt to answer the question, "what is a human right?", as this is central to subsequent discussions.

What is a Human Right?

Some learned authors have admitted that it is difficult to define a human right¹⁰, and some have gone to the extent of stating that human rights do not exist and that those who believe in human rights are like those who believe in unicorns¹¹. The International Bill of Human Rights is the globally recognised source of human rights which refers to "the inherent dignity of all members of the human family"¹². Thus, human rights have been featured as being no more than "the rights that a human being can claim, as opposed to rights that anyone or anything else can claim"¹³, suggesting that "rights are linked to those values we see as significant to humanity"¹⁴. However human rights may be better understood by description than by any attempt at definition, and it has been variously described by writers.

¹⁰ See S. Choudhry and J. Herring, *European Human Rights and Family Law*, (Hart Publishing, Oxford, 2010) 106. See also A. Williams, *Human Rights*, (Bristol, Polity Press 2002), 63.

¹¹ See S. Choudhry and J. Herring above, n. 10 at 106.

¹² J. Griffin, *On Human Rights*, (Oxford University Press 2008) cited in Choudhry and Herring, *ibid*.

¹³ S. Choudhry and J. Herring, *ibid*, P. 106.

¹⁴ M. Perry, *The Idea of Human Rights* (New York, Oxford University Press 1998). See S. Choudry & J. Herring, *ibid*, P. 106.

For example, Freeman referred to human rights as "rights of exceptional importance, designed to protect morally valid and fundamental human interests ... and carrying special weight against other claims ..."¹⁵ In similar vein, Tomuschat aptly noted,

the very idea of human rights presupposes a certain concept of human being. By recognizing legal entitlements for every person, for men and women, for children and elderly persons, for members of tribal communities alike, the international community has acknowledged that indeed all human beings have something in common. They are recognized as persons whose dignity must be respected¹⁶.

Again, human rights could not have been more aptly portrayed than when Femi Falana described it as the bedrock of human existence¹⁷, nor could the United Nations' description have been more appropriate than when in 1987, they classified human rights as "those rights which are inherent in our nature and without which we cannot function as human beings"¹⁸.

The Hon. Justice Nnaemeka – Agu JSC also succinctly remarked that human rights in one form or the other are as old as man in society and have always been there independently of, and before the State¹⁹. In contemporary times according to his Lordship, human rights is a compendious and all

¹⁵ M. Freeman, *Human Rights* (Bristol Polity Press, 2002).

¹⁶ C. Tomuschat, *Human Rights: Between Idealism and Realism*, (Oxford, 2nd Ed.) V. XIII/I.

¹⁷ In A. Ibidapo – Obe, *Essays on Human Rights Law in Nigeria* (Concept Publications 2005), Xi.

¹⁸ A. V. Atsenuwa, et al, *Human Rights Made Easy*, (3rd ed., Legal Research and Resource Development Centre, 1999), p.6

¹⁹ Nnaemeka – Agu J.S.C. 1992, *Judicial Lectures: 'Continuing Education for the Judiciary'*, p. 79. See also the writings of Locke, *Reflections on Civil Government* (1600); Paine, *Rights of Man* 1791; *Age of Reason* (1793); and Burke, *Reflections on the Revolution in France* (1700) on natural law as human rights which triggered off revolutions in England, France and America in the 18th century.

embracing expression encompassing political, economic, civil, social and cultural, as well as fundamental rights which came into our country not so much on the basis of our indigenous concept of rights but by mere accident of history²⁰. Thus fundamental rights stand out as those aspects of recognized human rights which have been selected by individual states from a wide range of human rights norms contained in the Universal Declaration of Human Rights and guaranteed and rigidly protected by written constitutions. In our successive constitutions²¹ under the caption, "Fundamental Rights," are some of the Articles in the Universal Declaration which have the status of justiciability²². Among these are the right to private and family life²³, right to dignity of the human person²⁴, right to freedom from discrimination²⁵, right to equality²⁶, right not to be subjected to disabilities by reason of the circumstances of a person's birth²⁷ and the right not to be denied any rights by reason of one's tribe, sex, age or gender.

Today, the constitutions of most jurisdictions around the world contain human rights provisions which have the force of justifiability.

Against this background the lecture will be presented in four parts, featuring the impact of human rights norms and campaign in some specific important aspects of Family Law and the implication for Family Law in general. Part One examines the evolving concepts of 'marriage' and 'family'. Part Two concerns the rights and protection of children's rights.

²⁰ Ibid, n. 19.

²¹ See especially, the Constitutions of the Federal Republic of Nigeria, 1979 and 1989 respectively. See Part IV of the 1999 Constitution, Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999.

²² Fundamental Rights (Enforcement Procedure) Rules 1979, gazette 1980 for procedure for enforcement of fundamental rights in the constitution.

²³ S. 37, Constitution of the Federal Republic of Nigeria 1999, Chap. IV.

²⁴ S. 34 of the Constitution.

²⁵ Ibid, S. 42(1).

²⁶ Ibid, S. 42(1).

²⁷ Ibid, S. 42(2).

Part Three deals with novel attitudes towards succession or inheritance rights of female persons and Part Four considers the prospects of enforcing human rights and the future trend in Family law.

PART ONE: EVOLVING CONCEPT OF MARRIAGE AND FAMILY

The meaning of the word, "Family", can be a matter for elaborate sociological and anthropological discussion,²⁸ but for a lawyer, only a simple approach is necessary. Simply put, the family is the nucleus, the foundation of every society which requires legal protection.

(i) The Traditional Family

Traditionally, marriage is an essential pre-requisite for the creation of a legally recognized family unit²⁹ which must be between a man and a woman – persons of the opposite sex³⁰. Any purported marriage outside this form would be null and void and creating no legally recognized family unit. In Brazil, as in Nigeria and several other jurisdictions, marriage between opposite sex persons characterizes the institution creating a family which must receive special protection from the State³¹. It is the only institution that confers spousal status and all the legal incidents of marriage, including all the numerous rights, duties and obligations.

The orthodox family thus consists of a male husband and female wife³² or wives³³ and their children, although a husband

²⁸ S. M. Cretney, *Principles of Family Law*, (3rd Ed. Sweet and Maxwell), 3.

²⁹ Marriage creates a status, giving rights and obligations to parties to it who are referred to as "spouses."

³⁰ *Corbett v. Corbett* [1971] P. 83; *Hyde v. Hyde* [1866] L.R. 1P & D 130. Even at customary law it is taken for granted that marriage must be between people of the opposite sex.

³¹ Eduardo de Oliveira, 'Family Law and the New Constitution', *The International Survey of Family Law*, 1997, p. 51; See also section 17(3)(b) of the Nigerian Constitution.

³² One wife at a time is usually the norm in monogamous societies.

and a wife or wives can constitute a family even in the absence of children. Similarly a widow or widower and his or her children consist of a family.

Family may be nuclear or extended. The nuclear pattern is generally typical of western societies while the extended family form is prevalent in most African societies.

Whether the family is in the nuclear or extended form, the conventional or traditional family in most jurisdictions is rooted in the recognized forms of marriage which confer legal rights, duties and obligations exclusive to the union and inapplicable to all other group units or relationships.

From about a decade into the second half of the 20th century, significant shifts occurred in family structures and attitudes to family relationships reflecting greater acceptance of cohabitation outside marriage, tolerance of same sex unions and more recently the legal recognition of homosexual and lesbian marriages. These emerging "family" patterns have been argued to be functional equivalents of a family who share the same emotional commitments and values and therefore should not be treated differently from opposite-sex married couples³⁴. The common law definition of marriage in *Hyde v. Hyde*³⁵ which allows marriage only between persons of the opposite sex was being frequently challenged on the ground that it is discriminatory. This discrimination, they argue, should cease to be the norm and must give way to extended definitions designed to keep pace with the current social evolution.

The growing societal tolerance of these unconventional relationships kindled their desire to be granted familial and spousal status which were the stepping stones to acquiring all

³³ Two or more wives are allowed under polygamous systems.

³⁴ R. Melton, 'Legal Rights of Unmarried Heterosexual and Homosexual Couples And Evolving Definitions of "Family"', *J. Fam. L.*, Vol. Twenty-Nine, Number Two, Feb., 1991, p. 497.

³⁵ (1886), L. R. 1 P & D 130

the marital legal rights. With time, limited marital rights were extended to opposite-sex cohabitants while same-sex cohabitants were denied similar rights.

The controversy surrounding the exclusion of homosexuals from attaining rights, which included the right to marry, created sharp divisions between upholders of conservative moral values on the one hand, and liberal campaigners for gay rights on the other³⁶. The campaign gathered more strength as gays resorted to their respective constitutional human rights provisions and to the international and regional human rights conventions to justify their claims against discrimination. A cursory look at the two most contentious unconventional patterns of 'family' is now necessary.

Unmarried Heterosexual Cohabitation

The concept of defacto relationship has been traditionally understood as the union between a man and a woman who though unmarried, live together like husband and wife as in the institution of formal marriage. This relationship does not give rise to a legal family and in Nigeria, as in many other common law jurisdictions, the union is not regulated by Family Law³⁷, apparently because it generates images of moral decline and crumbling social foundations³⁸.

Several reasons have been advanced which influence individuals to opt for a de facto relationship. But in Africa, with specific reference to some parts of Nigeria, the exorbitant high bride price demanded by some parents or guardians scare away prospective grooms,³⁹ leaving an ever increasing

³⁶ Homosexuals saw no valid reason why heterosexual cohabitants should be more favourably treated. Morality certainly could not be the basis.

³⁷ Rights given exclusively to married couples by family law statutes were only being extended piecemeal to non-traditional "families".

³⁸ N. Dowd, 'Changing Family Realities, Non - Traditional Families and Rethinking The Core Assumptions of Family Law'. *The International Survey of Family Law*, 2002 p. 439.

³⁹ This is despite laws such as the Eastern Nigeria "Limitation of Dowry Law," 1956 Cap. 76, Laws of Eastern Nigeria.

population of unmarried young men and women. Aside from this, the growing freedom and independence of women, the general decline in societal core moral values caused partly by exposure through the media, of young people to all kinds of corruptive influences, the weakened traditional social structure have all resulted in more incidents of unmarried cohabitation in the big cities. Children are sometimes born into these relationships but they and their parents enjoy no legal protection.

The refusal by most individual states to assimilate these unions into the framework of their family laws and statutes or to create special laws to govern the relationship led to a spate of litigations⁴⁰ which were becoming more and more successful as Family law experienced novel changes⁴¹.

In Canada, for instance, Section 15 of the Canadian Charter of Rights and Freedoms⁴² guarantees the equal rights of all its people, ensuring a constitutional protection against discrimination in any form. This provision provided opportunity for parties in unconventional relationships to fault many Family law legislation in Canada on the basis of discrimination against other relationships. Canadian judges and politicians responded by taking steps, in the 90's to grant increased legal recognition and protection to these unions.

The growing acceptance of de facto relationships as a social reality within the Canadian society and the increasing number of successful court actions against discriminatory family law statutes and laws, led to a continuous reduction in the disparity between the legal status of married couples and cohabiting

⁴⁰ Many statutes, including the Marriage Act and other established common law principles which recognized and governed heterosexual marriages were judicially challenged and declared discriminatory and unconstitutional.

⁴¹ e.g. The courts ordered a redefinition of "marriage" and "adultery" to accommodate same-sex couples and ordered the amendment of Family law statutes which excluded unconventional unions.

⁴² Part I of the Constitution Act 1982 which contains human rights norms.

couples. The Canadian judiciary played a particularly active role in narrowing the disparity as they conferred more rights on these unions in recognition of family diversity and human rights in Canada.

In Canada today, most incidents of marriage have been extended to unmarried heterosexual cohabitants indicating that marriage is no longer a prerequisite for all incidents of marriage.

In the US, attitudes towards the issue of unmarried cohabitation and the rights of parties therein varied with different states. The judge in *Wilcox v. Trautz*⁴³ pointed out that social mores regarding cohabitation between unmarried parties have changed dramatically in recent years and living arrangements which were once criticized were now relatively common and accepted. Consequently, as an alternative to marriage, more couples were choosing to cohabit for short or long periods of time and some of these relationships were quite similar to conventional marriages. Despite these developments however, the US states would not recognize unmarried cohabitation as an institution and cohabitants have only limited rights⁴⁴.

In England, opposite-sex cohabitants while being tolerated by English society, do not enjoy the same rights as married couples as their association is not regulated by Family law and there are no laws conferring similar rights. The rights afforded them are limited⁴⁵.

One of the valid arguments against reform of the law to favour opposite-sex cohabitants is that affording them rights the same as those of married couples will undermine the institution of

⁴³ 427 Mass. 326, 693 N. E. 2d 141 (1998)

⁴⁴ S. N. Katz, 'Domestic Partnership Laws,' *The International Survey of Family Law* 1997, 485 – 505.

⁴⁵ K. Standley, *Family Law* (5th Ed., Palgrave Macmillan Law Masters), 50 – 51.

marriage and attenuate the distinction between the two relationships.

(iii) Homosexual Cohabitation

Homosexuality is a fact known since the dawn of human history⁴⁶, down to the early biblical era. It was and is still regarded by many as an abnormal and unnatural sexual deviation and is deeply rejected by society⁴⁷. Those who practised it faced and still face considerable social antagonism in many societies. A document issued by the Vatican attacking homosexuality, called such unions "a deplorable distortion" which should be seen as detrimental to society since it leads to the breakdown of the family⁴⁸.

Homosexuality was indeed at one time regarded as a form of mental illness, a personality disorder which posed a threat to traditional moral values⁴⁹.

For a considerable length of time, many legal systems refused to recognize or legalise homosexual relationships, denying them various rights including the right to marry. Canadian courts later began to recognize that discrimination against homosexuals violated their rights under the Canadian Charter

⁴⁶ P. A. Monroy, 'Legal Update From Colombia: The Project For a Law Giving Equal Status To Same-sex Couples is Finally Sunk', *The International Survey of Family Law 2004*, p. 99 at 103. For the purpose of this lecture homosexuality includes lesbianism.

⁴⁷ M. B. Dias, 'Same-sex Couples' *The International Survey of Family Law*, 2003, 69 – 75.

⁴⁸ N. Bala and R. Jarenko, 'Non-Marital Unions Finality of Separation Agreements and Children Issues', *The International Survey of Family Law 2002*, p. 109 at 113. Judge Mackenzie in the Canadian case of *Chamberlaig v. Survey School District No. 36* [2000] BCJ 1875 C A acknowledged that homosexuality and same-sex relationships remain morally controversial and that the constitutional protection of freedom of religion includes the right to believe that homosexuality is immoral.

⁴⁹ P. A. Monroy, *ibid* n. 46; indicating that homosexuality was before the early seventies classified as a mental illness by the American Association of Psychiatry.

of Rights and Freedoms⁵⁰ and their decisions soon led to the virtual elimination of the legal differences between marriage and long term opposite-sex cohabitation and much later homosexual cohabitation⁵¹. The same was happening in some Western jurisdictions as human rights provisions provided the basis for challenging the legitimacy of family law statutes and laws that precluded homosexuals from marriage and other spousal rights. These countries seemed to be accepting that from an economic, social and psychological perspective, unconventional relationships are functionally identical to marriage⁵² and consequently there was no basis for discriminating against them.

Thus in *M v. H*⁵³, the Supreme Court of Canada, held that section 29 of the Family Law Act violated section 15 of the Canadian Charter of Rights and Freedoms by excluding same-sex partners and that by failing to recognize same-sex relationships, it violated the fundamental principles of human dignity. Ontario was directed to amend its Family Law Act within a six month period to include homosexual cohabitants. The *M v. H* decision was significant in the sense that other provinces soon followed suit and began to amend their Family Law statutes even before they were mandated to do so by the courts.

⁵⁰ This constitutes Part I of the Constitution Act 1982. The Federal Parliament has exclusive jurisdiction over the capacity to marry while provincial legislatures have exclusive jurisdiction over solemnization of marriage.

⁵¹ See N Bala and R. Jarenko, above n. 48 at 111 See also N. Bala, 'The Charter of Rights and Family Law in Canada' (2001), 18 *Can. Fam. LQ* 373 – 428.

⁵² N. Bala and R. Jarenko, *ibid* n. 48.

⁵³ (1999) 2 S.C.R. 3. In *Vriend v. Alberta* (1998) 1 S C R 493, the Supreme Court of Canada held that Alberta's failure to include sexual orientation as a prohibited ground of discrimination in its human rights statute was contrary to section 15 of the Charter. This brought Alberta into conformity with the other provinces which already included sexual orientation as a prohibited ground of discrimination.

In consequence, more Charter-based actions seeking to give gays and lesbians the right to marry⁵⁴ and not merely the right to obtain more rights sprang up in the courts challenging the common law definition of marriage which was alleged to be discriminatory as it failed to include homosexual unions⁵⁵. In *Halpern v. Canada*⁵⁶, the court held that the common law definition of marriage discriminated against homosexuals and was unconstitutional and in violation of the equality provisions of the Charter.

Legislators were directed to promptly reform the law in conformity with the Constitution within 24 months. One of the judges, LaForme J. suggested that marriage should be redefined as the "lawful and voluntary union of two persons to the exclusion of all others," as opposed to "the voluntary union for life of one man and one woman to the exclusion of all others." The pressure was on the Federal government to carry out reforms to include same-sex couples. In 2005, the Civil Marriage Act which allows both same-sex couples and heterosexual couples to marry was passed. Reacting to this, a Catholic Bishop rightly commented,

"What a terrible irony it is to witness our country sinking ever deeper into the morass of moral chaos and confusion. As we ignore the sane order established by God for the good of creation. Rather than protecting this institution so critical to the health and stability of society, our government denatures marriage and the family. The unique irreplaceable contribution to the common good of society that men and women make when they enter into marriage, and especially when they beget

⁵⁴ This took place in the provinces of Quebec, Ontario and British Columbia.

⁵⁵ *Egale Canada Inc. v. Canada*; [2001] BCJ No. 1995 but see (2003) 225 DLR 4th 472 and (2002) 228 DLR (4th) 416 (BCCA) Egale is an advocacy group supporting equality for homosexuals, bisexuals and transgendered groups.

⁵⁶ [2002] O. J. No. 2714 (Div. ct.).

and educate children, is no longer treasured or protected by those who make our laws⁵⁷.

The above observation indeed represents the thoughts of all advocates of traditional moral values. That the government would compromise its entrenched moral and legal institutions at the altar of human rights is a matter of great concern.

It was not long before the legal recognition of homosexual marriages soon reverberated with critical questions. Under the Canadian Divorce Act, adultery is one of the facts that may be proved to establish marriage breakdown and the question which arose was whether two people of the same sex could commit adultery. The common law definition of adultery based on the definition of marriage was, "consensual sexual intercourse between a married person and a person of the opposite sex, not being the other spouse during the subsistence of the marriage⁵⁸." By the definition, homosexual acts were not considered adultery. In two cases⁵⁹ which featured the problem, the courts changed the definition holding that sexual connection between persons of the same sex constituted adultery.

In coming to its decision in *SEP v. DDP*, the court had said, "... I consider parliament's enactment of the Civil Marriage Act to be a legislative statement of the current values of our society consistent with the Charter that I am obliged to use as a guide to my consideration of the current common law

⁵⁷ Quoted in M. Bailey, 'Marriage And Morals', *The International Survey of Family Law*, 2007, 53, p. 54 - 55. Indeed this attitude of government shows her lack of understanding of the ultimate basis of human rights. There ought not to be a conflict between 'moral institutions' and human rights, for human rights are moral entities. Legally enforced human rights are simply moral rights "recognized" by law.

⁵⁸ *Orford v. Orford* (1921) 49 OLR 15 (HC)

⁵⁹ *SEP v. DDP* (2005) 259 DLR (4th) 358 (BCSC) - The judge applied the principle laid down by the Supreme Court of Canada that judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country when making their decisions. *Thebeau v. Thebeau* (2006) 27 RFL (6th) 430 (NBQB).

definition of adultery. Individuals of the same sex can now marry and divorce and the common law would be anomalous if those same-sex spouses were not bound by the same legal and social constraints against extra-marital sexual relationships that apply to heterosexual spouses⁶⁰.”

With this new trend, jurisdictions across Canada were ordered to reform all their Family Law statutes to reflect the new definitions of marriage and divorce and to include same-sex partners in the definition of 'spouse'. By this, the Canadian government has permanently bridged the distinction between heterosexual married couples and same-sex couples thus revolutionizing family law in Canada.

In the United States of America, many states regarded and still regard homosexuality as morally controversial and in some cases an outright sin. Homosexual partners were denied 'familial' and 'spousal' status which held the keys to claiming rights reserved for heterosexual married couples.

However in 1999 the state of Vermont legislature passed a law permitting same-sex couples to enter into a civil partnership that gave them virtually the same rights as those of opposite sex married couples. Connecticut and Washington later followed the trend in Vermont.

In 2004 however the Supreme Court of Massachusetts⁶¹ held that homosexuals had the right to marry and that to deny them this right was a violation of their right to equal protection guaranteed by the State constitution. A law was passed permitting same-sex couples to marry thus making Massachusetts the first state in the US to legalise same-sex marriage.

⁶⁰ Ibid, n. 59.

⁶¹ *Goodridge v. Department of Public Health* 798 NE 2d 941 (Mass/2003; J. T. Oldham, 'Developments in the US – The Struggle Over the Creation of a Status For Same-Sex Partners' *The International Survey of Family Law* 2006, 481, 482.

Following developments in Massachusetts, some States legislatures and the US Congress took steps by enacting laws to protect the traditional marriage and the family. However despite the US Congress passage of the Defence of Marriage Act (DOMA), providing that same-sex couples would not be considered married for purposes of federal laws⁶², four more states, Connecticut, Iowa, New Hampshire and Vermont soon joined Massachusetts in enacting laws that permit same-sex couples to marry.

In a recent press conference, President Obama stated that he could no longer continue to defend the exclusion of same-sex couples from the application of federal statutes. This may probably result in more states legislating in favour of same-sex marriage.

In the African continent, aside from South Africa, homosexuality is still more of a clandestine affair than an open practice. Homosexuality is illegal and criminal in at least 29 countries in Africa of which Nigeria⁶³ is one. In a case⁶⁴ involving the arrest and detention for one year of 17 gay men in a Camerounian night club, a senior Camerounian official responding to inquiry by the New York based International Gay and Lesbian Human Rights Commission, categorically stated that homosexuality was not acceptable in the society and that the arrests of the complainants were necessary to preserve

⁶² S. 3 of DOMA has been challenged by an organisation known as Gay and Lesbian Advocates and Defenders. The action argues that S. 3 of DOMA is unconstitutional under the Equal Protection Clause of US Fifth Amendment because it unjustifiably differentiates between marriages of opposite-sex and same-sex couples.

⁶³ Sections 214 and 217 of the Criminal Code.

⁶⁴ The Nigerian Punch of Friday, March 7, 2008, p. 14. It was also reported in the Punch of May 10, 2010 that two Malawi gay men who openly celebrated their love for each other were arrested, prosecuted and convicted for unnatural acts and gross indecency and given sentences of 14 years each. Following intense pressure from western powers which included withdrawal of financial aid to Malawi, the men received presidential pardon but were warned that they would be re-arrested under the Malawi law if they persisted in the ungodly act.

“positive African cultural values.” Cameroun was nonetheless found to be in violation of its treaty obligations by the United Nations Commission on Human Rights.

The statement by the Camerounian official no doubt represents the attitude of the majority of African countries who regard homosexuals as dangerous sexual deviants from whom children and young adults must be protected.

Between 2005 and 2006, gay and lesbian rights campaigners from Western Europe invaded Nigeria and some other countries in a mobilized effort to change people’s attitudes towards homosexuals and to show that the practice was normal behaviour. They called on the government of Nigeria to respect their obligations under the human rights instruments and the domesticated African Charter on Human and People’s Rights⁶⁵.

In a swift reaction to these unusual developments, former President Obasanjo introduced a bill to the National Assembly which was intended to prohibit same-sex marriages. The bill proposed that anyone who undergoes, performs, witnesses and abets a same-sex marriage faces five years imprisonment. Any display of same-sex amorous relationship is prohibited and such couples cannot adopt children. It was also proposed that anyone who advocates or forms or joins associations in support of gay rights may be imprisoned for five years. Any kind of relationship with a gay person is also banned under the bill.

The US State Department heavily condemned the bill for its highhandedness and so also did a group of international human rights organizations which signed a letter condemning the bill, stating that it violated the freedom of expression, association and assembly guaranteed by international human rights laws and the African Charter. It is hoped that these

⁶⁵ Domesticated by Nigeria by the African Charter on Human and People’s Rights (Ratification and Enforcement Act 1983, Cap 10, Vol. 1.

international pressures are not responsible for the delay in passing the bill into law.

Mr. Vice-Chancellor Sir, there is genuine fear that if the legislature fails to act quickly to ban these unions and protect the institution of marriage and the traditional family, there may soon be court challenges to our marriage laws and other family law statutes on the basis of Section 42(1) of the Nigerian constitution and Article 3(1) and (2) of the African Charter⁶⁶. These provisions guarantee equality of treatment to all Nigerian citizens for all purposes and to protect the right not to be discriminated against. The prospect of a successful challenge is not farfetched.

South Africa in November 2006, passed the Civil Union Act⁶⁷ which regrettably permits same-sex couples of 18 years and above to solemnise and register a civil union, either by marriage or by civil partnership. South Africa thus became the first and only African country to legalise same-sex marriage.

Mr. Vice-Chancellor Sir, only time will reveal the impact of this on other African countries. So far however, no other African nation has followed the trend in South Africa. But one thing is certain, gays are getting bolder by the day and coming out more in the open both in Nigeria and other countries in Africa. They seem less ashamed to declare what they are to the world and these predators are increasingly becoming a moral threat to young people.

Our government must not fold its hands and allow this lunacy to get out of control. It must be promptly arrested by constitutional amendments expressly prescribing that legal marriage in Nigeria can only be between a man and a woman and expressly prohibiting marriage between persons of the same sex.

⁶⁶ Gays and lesbians can also challenge discrimination against them on the basis of international covenants which Nigeria has ratified, such as the International Covenant on Civil and Political Rights.

⁶⁷ The Civil Union Act 2006.

PART TWO: EVOLVING PERSPECTIVES OF CHILDREN'S RIGHTS

For some lawyers, the issue of children's rights offers hope for respecting children as full human beings but for others, talk of children's rights is dangerous, risking harm to children in the name of their liberation⁶⁸.

The Convention on the Rights of the Child seeks to provide an authoritative statement of the rights of children⁶⁹. Obviously, some of the rights contained in that Convention are standard-setting ideals which may not always be realizable. Many of the rights will depend on the cultural and socio-economic circumstances of the individual country⁷⁰.

Prior to recent developments concerning the rights and status of children, the family laws of most jurisdictions laid greater emphasis on the rights which parents have over their children, showing little or no concern for the rights of the child which were generally subsumed in those of the parents or guardians. At both customary and common law, parents exercised all manner of rights over their children⁷¹ including the right to pawn⁷² a child or receive dowry at any age⁷³ and the right to inflict tribal marks and circumcise a female child⁷⁴.

⁶⁸ S. Choudhry and J. Herring, 'European Human Rights and Family Law', 2010, Hart Publishing, p. 221.

⁶⁹ Ibid, at p. 226; See also the following works cited by the authors, - P. Alston, S. Partker & J. Seymour, *Children, Rights and the Law* (Oxford, Oxford University Press 1992).

⁷⁰ Ibid, at P. 226. Typical examples given were, right to health care which will vary depending on where in the world the child is.

⁷¹ E. N. U. Uzodike (1990) 'Custody of Children in Nigeria - Statutory, Judicial and Customary Aspects'. *The International and Comparative Law Quarterly*, Vol. 39, 410 - 433.

⁷² E. N. U. Uzodike, 'Implications and Limits of Parental Rights in Nigeria,' 1990, *African Journal of International and Comparative Law*. Vol. 2, part 2, p. 282 at 288.

⁷³ Ibid, n. 71 at p. 296

⁷⁴ Ibid, at p. 295.

From around the last half of the 20th century, the crusade for greater protection of children led to changes in individual and societal attitudes towards children. This in turn yielded some statutory and other state interventions in parental autonomy resulting in the gradual waning of parental rights⁷⁵.

These developments as was stated, resulted in fundamental changes in the nature of parental authority⁷⁶, prompting recent judicial suggestions that parental rights now exist only in so far as they enable parents to discharge their obligations towards their children⁷⁷.

The evolution of the rights of children under international law began with the Declaration of the Rights of the Child in 1923 and later in 1959, the UN Declaration of the Rights of the Child. The need for a more comprehensive treaty on children's rights persisted until the birth of the United Nations Convention on the Rights of the Child (CRC) in 1989⁷⁸. This document which recognizes the child as a human being; an individual with rights of his own has been described as the most complete statement of children's rights ever made, and the first to give these rights the force of international law⁷⁹. That children's rights are human rights is no longer in doubt,

⁷⁵ See Lord Denning in *Hewer v. Bryant* [1970] 1 Q.B. 357; See also E.N.U. Uzodike, *ibid*, n. 72 at 282.

⁷⁶ P.M. Bromley and N.V. Lowe, *Family Law*, 7th ed. London (Butterworths) 1987. This was buttressed by the Children Act 1989 of England where for "parental rights" the Act substituted the concept of "parental responsibility."

⁷⁷ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 (H.L.) per Lords Fraser and Scarman. While this statement may be considerably true in England, it is not so true in practice in Nigeria.

⁷⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20th Nov. 1989 and entered into force on 2nd Sept. 1990. Nigeria has since ratified the treaty. The OAU Charter on the Rights and Welfare of the Child was tailored by African countries to meet the special needs of the African Child, Nigeria also enacted the Child Rights Act in 2003 in compliance its CRC obligations.

⁷⁹ A. V. Atsenwa et al (eds) *Human Rights Made Easy* (L R R D C) 3rd Ed. 1999, p. 46.

and this new concept has had a significant impact on the development of family law in this field. Thus in recent years, many countries have taken steps to either reform their family law statutes or to enact new ones that comply with the provisions of the CRC and other regional and international instruments⁸⁰. Examples include enactments for the abolition of the status of illegitimacy or the removal of the disadvantages attached to that status, legislation giving the adopted child or child conceived by artificial insemination by donor, the right to seek and know his genetic identity, enactments prohibiting corporal punishment at home and in schools for the purpose of respecting the child's right to dignity and bodily integrity as demanded by the provisions of the CRC. Indeed the child's claim to the right to know his genetic origins runs contrary to the original concept of adoption, and more recently, sperm donation which were issues shrouded in secrecy and constituted a breach of confidentiality to divulge the identity of the birth parents or sperm donor. As will be shown, tension often exists between the rights of the child to know his origins and the rights of the birth parents⁸¹ or sperm donor to privacy.

This second part will thus focus on three areas impacted most by international and regional instruments, namely – the child's rights to know his biological origins, the developing rights and status of illegitimate children and the child's right to equal protection of his human dignity and bodily integrity.

(i) **Right to Knowledge of Biological Origins**

Adopted children and more recently children born by assisted reproduction by donor belong to the category of children whose birth and origins are a matter of doubt and secrecy. At its inception, the primary purpose of adoption was to provide

⁸⁰ Nigeria's effort to comply with the CRC culminated in the enactment of the Child Rights Act 2003 which comprehensively deals with the rights of Nigerian Children which means persons under the age of 18 years.

⁸¹ E.N.U. Uzodike, (1991) 'The Law and Procedure for Adoption in Nigeria', *The Nig. J. of Contemp Law*, Vol. 16, 1 -18.

children for childless couples who craved to have children and not really to find homes for unwanted and orphaned children⁸². Unwanted babies were often handed in for adoption by young unmarried mothers who preferred complete anonymity. As a result, adopted children were denied access to identifying information concerning their birth parents.

Upon the focus of adoption changing from finding children for childless couples to securing suitable homes for unfortunate children and protecting their interests, the modern concept of adoption was established.

One of the rights set down by Article 7 of the CRC is the right of the adopted child or child conceived by artificial insemination by donor (AID) to know and be cared for by his parents.

This provision changed the face of adoption by introducing rights hitherto unknown in the laws of adoption. According to a German constitutional court, the right of information concerning a person's biological origins should be granted on the ground that "human dignity and the right to develop one's personality demand that the individual should know what determines his individuality, and, parentage is a vital key to finding one's individuality and self awareness⁸³." Consequently, a child should not be made to undergo psychological distress caused by doubts about his genetic parentage while developing his or her personality.

In Argentina, the right is now held to have constitutional ranking, justiciable in the law courts. The court has indeed held that there is a social duty to guarantee the child's right to know his origins which is a fundamental right because it

⁸² See E.N.U. Uzodike, 'Law and Procedure for Adoption' *ibid* at p. 3. See also P. Achard quoted by P. A. Monroy in 'Adoption' Law in Colombia, *The International Survey of Family Law*, 1996, 99 at 120.

⁸³ E. Barnat & U. Strava 1993 'Legal Ban On Surrogate Mothers and Fathers?' *University of Louisville Journal of Family Law*. Vol. Thirty – One, Number Two, 267 at 269.

concerns personal dignity and is central to any notion of personal freedom⁸⁴. It is evident that this emerging right is highly rated in the classification of children's rights.

In dealing with applications to enforce the right, the courts have had the difficult task of weighing competing fundamental rights – the right of the child to know his genetic identity on the one hand, and on the other, the parents' right to privacy. For instance, the child's right to know his identity was held by the Dutch Supreme Court to be part of Dutch Law, a right that has to be weighed against other rights but with greater weight placed on the child's right⁸⁵. Thus Article 7 right is not absolute.

The English case of *Rose v. Secretary of State for Health and Human Fertilisation and Embryology Authority*⁸⁶, highlights some psychological issues faced by such children. There, a child born by Artificial Insemination by Donor Procedure (AID) who sought to identify her biological identity lamented that for years she had used her social father's medical history which was irrelevant to her and wondered whether the government thought that because she and others like her were conceived

⁸⁴ C. P. Grossman & D. Inigo. 'The Overridly Interest of the Child in Policy and Judicial Decisions' *The International Survey of Family Law*, 2000 9 at p. 16.

⁸⁵ C. Forder, *The International Survey of Family Law*. 1994, 345 at 357 – 360. Forder in her article discussed the cases involved and the right to know one's origin in Dutch Law. *Roovers v. Valkenhorst*, reported in C Forder *ibid*, n. 138. The mother's right to privacy is protected by section 8 of the European Convention on Human Rights. *Monteyne/de Ruyter/Derks v. Valkenhorst*, discussed in C. Forder, *ibid*.

⁸⁶ [2002] F.L.R. 962. Present in England, following the Human Fertilisation and Embryology Authority Disclosure of Donor Information Regulation 2004, S1 No. 1511 paras. 2, 3, children born from sperm eggs or embryos donated after April 2005 have the right to know the donor's identity. See also M. Welstead, 'The Influence of Human Rights and Cultural Issues' *The International Survey of Family Law*, 2003 p. 151.

through AID procedure, they would not have the natural need to know to whom they were related⁸⁷.

These words are indeed food for thought for the government of any country which permits AID procedure⁸⁸ and adoption of children. The new reproductive technologies have no doubt brought smiles to the faces of couples who otherwise would never have experienced the joy of parenthood but the concomitant problems are yet to be addressed. A judge in *Wand W v. H (Child Abduction: Surrogacy No. 2)*,⁸⁹ correctly noted that "humanity's ability to do things is rapidly outdistancing our abilities to regulate and manage those things. In other words, our scientific capabilities are racing ahead of our ethical grasp of the issues involved."

To tackle these problems, particularly those relating to the right to know one's identity, the Dutch and Swedish governments have passed laws designed to regulate the obtaining, storage and disclosure of information regarding gamete donors by clinics which practice AID procedure and to give the child born this way the right to access such information as and when necessary.⁹⁰

This is indeed a step in the right direction which will bring relief to the child in many ways including a proper guide to his medical history and personality. It is worthy of emulation by other countries. The global emphasis on protecting and enforcing the rights of children whenever necessary indeed supports this. Not all adopted or artificial insemination by

⁸⁷ She alleged that the refusal to let her get information infringed her rights under Articles 8 and 14 of the European Convention for the Protection of Human Rights.

⁸⁸ Artificial insemination involving the usage of the egg and sperm of both parents, poses less problems.

⁸⁹ [2002] 2 F L R 252, cited in M. Welstead, 'From Birth to Death, Family Life in 2002' *The International Survey of Family Law*, 2004. 143.

⁹⁰ See C. Forder, 'Opening-Up Marriage to Same-Sex Partner, and Providing for Adoption by Same-Sex Couples, Managing Information on Sperm Donors ...' *The International Survey of Family Law* 2000. 239 at 256 – 260.

donor (AID) children may demand to know their origins, but in order to prevent maladjustments and to satisfy psychological desires, those who wish to explore their identity should be assisted to do so.

Nigerians are increasingly patronizing these modern technologies by travelling abroad to obtain the benefits of the services. Quite a number of clinics which offer similar services have also sprung up in the country and those couples unable to afford the high cost of foreign treatment resort to these clinics. Successes are being claimed and recorded which heightens the need for legislative control of the practice of the procedure and the establishment of laws to deal with the legal and ethical problems that may likely arise in the future⁹¹.

(ii) Status and Emerging Rights of the Illegitimate Child

(a) Illegitimacy at Common and Customary Laws

A child is illegitimate if at the time of his conception or birth, his parents were not lawfully married or where he is deemed to be so by the laws and custom of his locality.

At both common law and customary law, the illegitimate child was denied many rights and privileges especially maintenance and inheritance rights. However with the dawn of the human rights era, the legal and social attitudes towards illegitimate children are fast undergoing significant transformation.

(b) Current Attitudes to Illegitimate Children

The change in attitude towards illegitimate children was uneventful until the world slowly began to focus its attention on children's welfare. Of great importance is the realization that no child had the capacity to choose to be born legitimate or

⁹¹ Note should be taken that by the adoption laws of our country, children are being regularly adopted aside from children now being born by assisted reproduction. Article 18(3) of the African Charter on Human and Peoples' Rights which is part of Nigeria's domestic law may enable these children to apply to the courts for the right to know their origins or genetic identity. This prospect necessitates the drafting and enactment of laws to regulate this right.

illegitimate. The discrimination against illegitimate children was described as "one of the most deplorable hypocrisies in Family Law, whose pernicious effect was to punish illegitimate children for matters for which they were not in the slightest degree responsible⁹². Though it is argued that legal recognition of illegitimate children undermines the legitimacy and stability of the marriage institution, some have asserted that the parents and not these children should suffer the consequences of their own actions. Depriving the children of rights in relation to their fathers will neither eradicate adultery and fornication nor reduce the rising number of illegitimate births. However many countries have in recent times taken steps to improve the lot of the illegitimate child.

Today, Germany⁹³ and most European countries⁹⁴, South Africa⁹⁵, Zambia⁹⁶, Tanzania⁹⁷, Trinidad and Tobago⁹⁸ and Brazil⁹⁹ have all enacted legislation which treat legitimate and illegitimate children equally with respect to maintenance and inheritance. The new Brazillian Constitution took the important step of rendering expressions such as "illegitimate" and "adulterine" used in any of the country's legal provisions, unconstitutional and invalid thus prohibiting the stigmatization of illegitimate children by reference.

⁹² E. de Oliveira Leite, 'Family Law and the New Constitution,' *The International Survey of Family Law*, 1997, 51 at 61.

⁹³ Equal Status in Succession Act 1997, came into force on April 1, 1998.

⁹⁴ Virtually all European nations with the exception of Italy, do not discriminate against illegitimate children in succession to property of their parents, R. Frank, *ibid*.

⁹⁵ Intestate Succession Act, Act 81 of 1987, S. 1 (2); Law of Succession Amendment Act, Act 43 of 1992, S. 4.

⁹⁶ Intestate Succession Act, Chap. 59, Laws of Zambia, 1989; Wills and Administration of Testate Estates Act, Chap. 60, Laws of Zambia 1989.

⁹⁷ See B. Rwezaura, "Gender Justice and Children's Rights: A Banner for Family Law Reform in Tanzania," *The International Survey of Family Law*, 1997, 415.

⁹⁸ Status of Children Act 1981, Chap. 46: 07 of the Laws of Trinidad and Tobago.

⁹⁹ The New Constitution of Brazil.

In Nigeria, Section 42(2) of the Constitution¹⁰⁰ provides that “no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth”. This provision which is a fundamental justiciable right was intended to outlaw discrimination against the illegitimate child who hitherto was not entitled to inherit from his biological father’s intestate estate or to be maintained by him.

The provision has been the subject of diverse judicial interpretations and its import remains indeterminate. Thus in *Olufemi Marquis V Olufemi Marquis*¹⁰¹, the children of an adulterous union were held to be strangers to their father’s estate and were not entitled to share in it.

In *Da Costa V Fasehun*¹⁰², the court held that section 39(2), now Section 42(2) did not confer a right of inheritance on the illegitimate children of the deceased and they could not inherit the deceased’s estate.

However in *Olulode v. Oviolu*¹⁰³, the court held that section 39(2) was intended to treat every Nigerian citizen whether born in or out of wedlock equally and consequently since that section came into being, the status of illegitimacy no longer existed¹⁰⁴. This interpretation however cannot stand as section 39(2), now section 42(2) addresses only the issue of rights for the illegitimate child as opposed to the issue of status.

¹⁰⁰ Of the Constitution of the Federal Republic of Nigeria 1999, formerly section 39(2) of the 1979 Constitution.

¹⁰¹ Suit No. 1/685/84, unreported, March 3, 1986 in the High Court of Ibadan.

¹⁰² Suit No. M/150/80, unreported, May 22, 1981, in the High Court of Lagos State.

¹⁰³ Suit No. M/133/81 of 27th Nov. 1981 in the High Court of Lagos State.

¹⁰⁴ It is the view of the author that Section 39(2), 42(2) is all about rights being conferred on the illegitimate child and has nothing to do with abolition of the status. It only removed the disadvantages of illegitimacy.

The decisions of Galadima JCA in *Ukeje v. Ukeje*¹⁰⁵, and Tobi and Olagunju JJCA in *Muojekwu v. Ejikeme*¹⁰⁶ seem inclined towards that view where it was respectively held that section 39(2) ensured that despite being born illegitimate, the child could still share in her deceased father’s intestate estate.

Although Ige JCA held in *Salubi v. Nwariaku*¹⁰⁷ that Section 42(2) abolished the status of illegitimacy, the writer’s position is that the language of the Constitution is clear enough to show that Section 42(2) is not concerned with the abolition of the status of illegitimacy¹⁰⁸ but is out to ensure that illegitimate persons shall not suffer any disability or deprivation merely because they were born illegitimate. However, until the Supreme Court rules on the matter, it remains inconclusive especially with the differing opinions in the Court of Appeal.

Our Family Law statutes are still replete with the label, “illegitimate”, unlike in some countries where illegitimate children are referred to as “out-of-wedlock children” or “children whose parents are unmarried¹⁰⁹.” If the word, “illegitimate” connotes stigmatization and thus is discriminatory, Nigeria then, has yet to comply fully with Article 2(2) of the CRC as well as Article III of the OAU Charter on the

¹⁰⁵ Weekly Reports of Nigeria [2001] Vol. 27, p. 142 CA See also *Salubi v. Nwariaku* [1995] 5 NWLR 442 at 445 where Ige JCA held that section 42(2) abolished the status of illegitimacy.

¹⁰⁶ [2000]5 NWLR part 65, p. 401.

¹⁰⁷ [1995] 5 N W L R 442 at 445.

¹⁰⁸ A former Supreme Court judge, Karibi – Whyte JSC in his lecture, “Tyranny of Judicial Precedents,” delivered at the University of Calabar in April 16, 1988 doubted the accuracy of the interpretation of S. 42 (2) that it has abolished the status of illegitimacy. The writer agrees with the learned justice of the Supreme Court as he then was. It is anomalous to regard children born out of wedlock as legitimate as this will hugely undermine the institution of marriage and create disorderliness in the society, which marriage tries to prevent.

¹⁰⁹ However these terms also refer to status so that if the use of the term “illegitimate child” would have psychological effects on the child, so would the use of the terms, “out of wedlock child” or “child whose parents are unmarried”. I believe the psychological effect of the use of the term “illegitimate child” will be stronger than the psychological effect of the use of any of the other two terms on the children.

Rights and Welfare of the Child which both require that no child should, in any form, be discriminated against. Nigeria may perhaps consider taking a cue from Brazil whose Constitution has in clear terms, rendered expressions such as "illegitimate" or "adulterine" used in any legal provision unconstitutional and invalid.

Vice-Chancellor Sir, no child should be deprived as a result of the mistake or irresponsibility of his parents and consequently he should not be denied inheritance or other rights in relation to his father's estate despite the need to protect the sanctity of marriage and the legal family which is founded on marriage.

(iii) Parental Right to Inflict Corporal Punishment and the Child's Human Right to Bodily Integrity

The right of parents and teachers to discipline children under their care and control is firmly entrenched within the legal framework of most jurisdictions. Indeed the parental right to discipline and chastise recognizes the supervisory role possessed by these groups over children in their care and control¹¹⁰. The right encapsulates obligations and duties the neglect of which may authorize the appropriate local government officials, police or other recognized officers to institute proceedings which may result in the parents' loss of the child's custody¹¹¹.

Corporal punishment is sanctioned as an age-old legitimate method of correcting children¹¹². Its approval by the Holy Bible is reflected especially in different chapters of the book of Proverbs¹¹³.

¹¹⁰ E.N.U. Uzodike, (1990) 'Implications and Limits of Parental Rights in Nigeria', *African Journal of International and Comparative Law* Vol. 2, Part II, 282.

¹¹¹ eg. Section 26 of the Children and Young Persons Law. Laws of Lagos State. See now Child Rights Law of Lagos.

¹¹² Customary Law has always recognized this right.

¹¹³ Thus in Proverbs 29 verse 15 it is stated that the rod and reproof give wisdom but a child left to himself bringeth shame to his mother and in

The Nigerian Criminal Code also authorizes parents and school teachers to use reasonable corporal punishment to discipline children of certain ages under their care¹¹⁴.

Although conceptions of what is reasonable vary widely and often engage cultural and religious beliefs as well as political and ethical ones¹¹⁵, whichever cultural context is in focus, the application of the perceived moderate physical chastisement for corrective purposes under the culture, is seen, not as assault or abuse, but as an expression of the parents love and concern for the child's proper development.

Following pressure and campaign from children's rights advocates and the United Nations Committee on the Rights of the Child among others, this parental right has come under severe criticisms. The criticisms are hinged on Articles 37(a), 19(1) and 28(2) of the Convention on the Rights of the Child which prohibit inhuman or degrading treatment or punishment and requires states parties to ban all forms of physical chastisement as this promotes violence against children and violates the child's human dignity¹¹⁶.

Chap 23 verse 13 and 14 it is said', "Withhold not correction from the child for if thou beatest him with the rod he shall not die. Thou shalt beat him with the rod and shall deliver his soul from hell." See also Proverbs 13 verse 24 which states, "He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes." Corporal punishment is just one of several methods of correcting children.

¹¹⁴ See Section 295 of the Criminal Code Act but see now section 11 of Child Rights Act 2003.

¹¹⁵ See M. Bailey, 'Resuscitating the Significance of Marriage' in A Bainham (ed.) *The International Survey of Family Law, 2005*, 151; M. Freeman, "Cultural Pluralism and the Rights of the Child," in Eekelaar and T. Nhlapo (eds.) *'The Changing Family'*, Hart Publishing 1998.

¹¹⁶ Even Section 34(1) of the Nigerian Constitution provides under its fundamental rights that "every individual is entitled to respect for the dignity of his person and accordingly no person shall be subjected to torture or to inhuman or degrading treatment." Although this is intended to protect an individual from illegal actions of state agents and public authorities, the Courts can develop a certain level of flexibility in addressing the application of section 34 within the private context. Moreover Section 11 of the Child's Rights Act 2003 provides

Following the above provisions, the United Nations Committee on the Rights of the Child has persistently called on States parties that endorse corporal punishment to outlaw and possibly criminalise it. Reports have shown that virtually all countries of the world, regardless of culture, class, education, income and ethnic origin, perpetrate violence against children¹¹⁷. Commenting on violence against children, the UN Committee reiterated that corporal punishment was not only degrading, but robbed the child of his human rights to physical integrity and protection from discrimination. After all, adults who misbehave are not subjected to similar punishment.

Other human rights institutions such as the UN Human Rights Committee, Council of European Court of Human Rights, the African Charter on Human and People's Rights and the American Convention on Human Rights all condemn the use of corporal punishment and unanimously recommend that laws of countries which sanction such punishment should be repealed¹¹⁸.

that every child is entitled to respect for the dignity of his person and accordingly no child shall be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment and... similarly no child shall be subjected to fortune, inhuman or degrading treatment or punishment.

At a workshop organized in Nigeria by NAPTIP on August 2009 which aimed to develop standard guidelines for the protection of children, opinions were divided over the use of corporal punishment to nurture children. Some thought there should be a complete ban while others thought otherwise.

¹¹⁷ See G. Van Bueren 'Annual Review of International Family Law,' in A. Bainham (ed.) *The International Survey of Family Law 1995*, 4; See also G. Van Bueren, "Opening the Pandora Box – Protecting Children Against Torture, Cruel, Inhuman and Degrading Treatment and Punishment – Law and Policy" 1996; G. Van Bueren, 'The International Law on the Rights of the Child', 1995.

¹¹⁸ The UK has banned corporal punishment in schools but not in the home. Nigeria still retains its defence of reasonable chastisement provision. Although no legal proceedings can be directly instituted on the basis that the child's CRC rights have been infringed, the CRC is still legally significant in the sense that the UK courts occasionally refer to the Convention to support a particular interpretation of the law, as does the European Court of Human Rights. The Nigerian

Sweden, Finland, Austria, Croatia, Cyprus, Denmark, Germany, Iceland, Latvia, Norway Romania and Ukraine have passed laws to prohibit corporal punishment both at home and in schools but some countries are still reluctant to impose a full or even partial ban of such punishment and to criminalise it.

Indeed Rhona Schuz¹¹⁹ has correctly argued that prosecuting parents for physical discipline of their children may have a more adverse effect on children than the breach of their rights of which the parents are guilty. She stated that apart from the potential irreversible damage to the parent/child relationship, parents would not be able to discipline their children effectively if they felt that their every action would be subject to legal scrutiny.

A North Carolina judge had also remarked that it was "inconsistent with the best interests of society that an appeal should lie to the Court from an act of parental discipline" and that criminalizing corporal punishment would not only greatly impair the efficacy of family government and remove restraints upon the conduct of children but would be harmful to stable family life¹²⁰.

The position taken by the UK government is that "while harmful and degrading treatment of children could never be justified, it did not consider that the right way forward was to make all smacking and other forms of physical rebuke unlawful¹²¹." However corporal punishment has been banned in UK schools, but it is still permitted in the home.

Federal Executive Council has recently approved a national policy on the protection of children and corporal punishment is one of the issues being examined.

¹¹⁹ R. Schuz, 'Child Protection in the Israeli Supreme Court', *The International Survey of Family Law 2001*, 165 at 168.

¹²⁰ Chief Justice Smith in *State v. Jones*, 95 NC 588 (1886) cited and discussed by S.N. Katz, 'Protecting Children Through State and Federal Laws'. *The International Survey of Family Law 2007*, 315.

¹²¹ K. Standley, *Family Law*, Palgrave Macmillan Law Masters, 5th Ed. 2008. Before the enactment of the English Human Rights Act 1998, the courts adopted an approach based on the welfare of the child

In Nigeria, as stated earlier, physical chastisement is legally and socially approved. Although some 'private schools' prohibit this method of punishment because some parents object to it, it is not so in many public government sponsored schools. Children are regularly beaten for misbehavior and neither the parents nor the appropriate law enforcement agents intervene or raise issues about it.

In *Ekeogu v. Aliri*¹²², the class teacher, while hitting the children for mild disobedience, mistakenly hit the plaintiff in the eye, resulting in the loss of that eye. The Supreme Court held that the teacher was not guilty because his action in the circumstances was not unreasonable, apart from the fact that the action was statute barred. He was protected by the reasonable chastisement defence which is still part of our law.

It is suggested however that reasonable chastisement should relate to the nature of the instrument of force, the manner of the application of the force, the part of the body on which the force is applied and the probable physical effect of the use of the force on the child and whether such chastisement is indeed aimed at correction. There should be guidelines on what parts of the body to hit children in schools in order to avoid the type of tragedy that occurred in the case.

It is the writer's view that the legislature should not meddle with reasonable family autonomy all in the name of children's human rights to bodily integrity¹²³. The removal of all parental

principle which gave no adequate consideration to rights protected by the HRA, such as the rights of parents when deciding issues concerning children. In contrast, the European Court of Human Rights engages in balancing the interests of children with that of the parents.

[1991] 3 N W L R. 258.

Corporal punishment is regarded as necessary for the correction of the child. Members of the community who see children misbehaving would often intervene and even spank them without legal consequences because of everyone's interest in seeing that children develop properly and become responsible members of the community.

immunity for hitting children as required by Art. 19 of the CRC has a great potential to harm stable family life and privacy. Corporal punishment, no doubt, sometimes go wrong¹²⁴, but it is certainly not a sufficient basis for its prohibition and criminalization. Parents should be allowed to nurture their children without risking criminal sanctions¹²⁵ and the state should only interfere in cases where the punishment borders on abuse¹²⁶.

While it is important to protect and safeguard the human rights of children to freedom from degrading and humiliating treatment and to have respect for their physical integrity, it should not be done to their own detriment. The interest of children will be decimated by prohibition and criminalization of corporal punishment and such a step must be discouraged in our society.

PART THREE: WOMEN'S INHERITANCE RIGHTS AND HUMAN RIGHTS

Women, like children, belong to the disadvantaged group, marginalised and discriminated against in almost every sphere of life. The genesis of women's suppression and exclusion from rights can be traced to as far back as when man was first created. She was moulded out of his rib and being merely an appendage, she is not a full independent person. Only full persons, being men, could have rights-rights which included

¹²⁴ As happened in *Ekeogu v. Aliri*, above n. 122.

¹²⁵ However the choice of the mode of discipline should be subject to limitations prescribed by law in view of the probable effects of the choice on the physical condition of the children. The law may prescribe that children should not be hit in certain parts of the body like the head in order to avoid such tragedies as that which occurred in *Ekeogu v. Aliri*.

¹²⁶ See E.N.U. Uzodike, 'Child Abuse and Neglect in Nigeria – Socio-Legal Aspects', (1990)4 *Int'l JL & Fam* 83. Nigerian domestic legislation have provisions which protect children from physical and other forms of abuse. The infrastructure that will enable effective implementation of these laws is however inadequate.

ownership of property – the only economic sustenance in early times. The woman was denuded of rights.

Some writers, like Condorcet¹²⁷, Gouges¹²⁸, Wollstonecraft¹²⁹ and Paine¹³⁰, began to assert the rights of women in the 1790's but it was not until late 19th century that the rights were realized¹³¹. The Married Women's Property Act of England, for example, conferred on married women, the right to acquire, own and dispose of property as they desired.

Back in Africa, many countries, including Nigeria, have multilegal systems which present varied property inheritance rules governing the lives of their respective populations. Among these is the customary law system which with its cultural heritage, generally accords inferior status to women in virtually every aspect of life. The marginalization of and discriminatory attitude towards women under customary law are especially manifest in the area of inheritance to property where in some parts of the continent, women are either totally denied the right to inherit¹³² or administer¹³³ property or their rights depend on whether they claim as a wife or as a daughter¹³⁴.

¹²⁷ "On the Admission of Women to the Rights of Citizenship." (1769).

¹²⁸ "The Rights of Women" (1791).

¹²⁹ "A Vindication of the Rights of Women". (1792).

¹³⁰ "Rights of Man (1791).

¹³¹ J. Eekelaar's Foreward in S. Choudhry and J. Herring *European Human Rights and Family Law*, n.116. The 19th Century heralded the enactment of the Married Women's Property Act 1882 in England. This Act applies in Nigeria except in the former West and Midwest where a modified Law was passed in 1958 – Married Women's Property Law, 1958, Laws of Western Nigeria and Midwest.

¹³² This happens mainly among the Ibos of Nigeria. See e.g. *Nezianya v. Okagbue* (1963)1 All NLR 352; *Nzekwu v. Nzekwu* [1989]2 NWLR, Pt 104, p. 373.

¹³³ *Akinnubi v. Akinnubi* [1997]2 NWLR, Pt. 486, p. 144 S.C.

¹³⁴ Under Yoruba customary law, a wife cannot inherit from her husband but can inherit from her father. In Zimbabwe, and Botswana, a wife cannot inherit from her husband.

The anthropological reason for exclusion of the female from inheritance was the need to retain the family generative property within the extended family where it is administered by a member of that extended family for the benefit of the deceased's dependants¹³⁵. If the females were made heirs, they might likely marry and leave with the family property, to the detriment of the extended family of the deceased.

A further reason is the misguided belief embedded in some customary laws that the wife is merely an item or chattel in the list of her husband's properties. This was applied by the Supreme Court in *Akinnubi v. Akinnubi*¹³⁶ where it was held that under Yoruba customary law, a widow under an intestacy was part of the estate of her deceased husband to be administered or inherited by the deceased's family.

This rule certainly is not only repugnant to natural justice, equity and good conscience but dehumanises women and invalid and unenforceable.

Although the social and economic order which prompted the exclusion of women from inheritance have to a large extent ceased to exist, the customary laws of many ethnic groups in Africa have continued to maintain and promote the practice. The inheritance rights of the female remain very limited. For instance, it was held by the Supreme Court of Zimbabwe that under the customary law of Zimbabwe, the eldest son was the natural heir of his deceased father and he was preferred over any older daughters¹³⁷. It has also been held that customary

¹³⁵ See F. Banda, 'Family Law Reform in Zimbabwe – 1987 to the present' *The International Survey of Family Law*, 1995, p. 543, at 555.

¹³⁶ [1997]2 NWLR, Pt. 486, p. 144 S.C. The widow wanted to represent her children in the administration of the estate, for since her husband's death, she had received no financial or other assistance from his family.

¹³⁷ *Magaya v. Magaya* 1999 (1) ZLR 100, See F. Banda, 'Inheritance And Marital Rape' 2001, P. 479 for analysis of women's inheritance rights' in Zimbabwe following the decision in *Magaya*. See also *Vareta v. Vareta* Sc – 41 – 92.

law does not recognize a wife's right to own property independently of her husband¹³⁸.

Indeed the Zimbabwean Supreme Court describing customary law as "immutable and timeless," warned that while there was need to advance gender equality, "it must be recognized that customary law had long directed the way African people conducted their lives and in the circumstances it would not readily be abandoned, especially by those such as senior males who stood to lose their positions of privilege¹³⁹."

In contrast, Obaseki JSC of Nigeria described customary law as the "organic or living law" of the indigenous people of Nigeria which regulate their lives and transactions, importing justice to the lives of all those subject to it¹⁴⁰.

This description aptly shows that customary law is not static but is capable of adaptation to suit the needs of the people it governs in response to social change, but whether it always imports justice to the lives of all those subject to it is debatable because customary law unfortunately discriminates against the female members subject to it thus violating their human rights to equal justice and protection from discrimination as the cases of *Nzekwu v. Nzekwu* and *Nezianya v. Okagbue*¹⁴¹ have shown.

The application of customary law has quite often resulted in gross injustice as in *Seva & Ors. V. Dzuda*¹⁴² where the deceased's two wives and four minor children were evicted

¹³⁸ See *Murisa v. Murisa* [1992] (1) ZLR 167.

¹³⁹ *Magaya v. Magaya* 1999 (1) ZLR, 100, discussed in F. Banda, *ibid.* What a hollow reason to support the retention of customary law.

¹⁴⁰ *Oyewunmi v. Owoade Ogunesan* [1990]3 NWLR, Part 137, p. 182

¹⁴¹ [1989]2 N W L R, Pt. 104, p. 373; (1963)1 All NLR 352. The widows who had no male issues could remain in the matrimonial so long as they are of good behavior. The husband's family determines whether or not she is of good behaviour and they can pick on her just to have an excuse to kick her out of the property. This offends natural justice and fairness.

¹⁴² (1992) (2) ZLR 34.

from the family home by the purchaser from the eldest son who inherited the house. Endorsing the sale and eviction, the Zimbabwe Supreme Court held that the only option left to the widows and their children was to follow the son for maintenance from the estate¹⁴³. The real danger however was that if the heir failed to support the women, they had no effective enforceable remedy at customary law.

This decision and other similar kinds¹⁴⁴, violate the fundamental human rights of women not to be discriminated against on ground of sex¹⁴⁵. They offend Articles 2, 3 and 18(3) of the African Charter which has been incorporated into the laws of most African countries¹⁴⁶. They are also inconsistent with Articles 16(h), 2(f) and 5(a) of the CEDAW and Articles 2(1), 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR) which have been ratified by Nigeria and most other African nations.

Various organizations¹⁴⁷ in Nigeria and Africa in general have been engaged in a sustained campaign for recognition of the rights of women to own¹⁴⁸ and inherit property. Economic empowerment of women through property rights and ownership promotes the overall progress of any society. Evidence abound to demonstrate that women have the capacity to contribute greatly to nation building, and customs or policies that deprive them of the opportunity to realize their

¹⁴³ When this unfortunate step is taken by the heir, the wife or wives and younger children are rendered homeless.

¹⁴⁴ See for example *Nwanya v. Nwanya* [1987] 3 NWLR 697.

¹⁴⁵ See Section 42(1) of the Nigerian Constitution.

¹⁴⁶ It was incorporated into Nigerian Law by the African Charter on Human and Peoples Right (Ratification and Enforcement) Act 1983, Cap A9 LFN 2004.

¹⁴⁷ Examples are the Legal Research and Resource Development Centre; Project Alert on Violence Against Women; Women Advocates Research and Documentation Centre.

¹⁴⁸ Denying women the right to own property contravenes S. 43 of the Nigerian Constitution which provides that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

optimal potentials is a heavy loss to the society and should be reversed.

It is now necessary to examine the extent to which courts in African jurisdictions recognise the human rights of women to inherit property.

Decisions of Courts in African Jurisdictions

Most African Courts, which include Nigerian courts, have been slow in adopting a human rights approach when determining rights in family law. Court decisions indicative of positive response to the unfolding global social change are few and far between but these few are encouraging as the judges seemed prepared to apply the relevant human rights instruments in reaching their decisions. In the Tanzanian case of *Ephraim v. Pastory*¹⁴⁹, which concerned the right of a woman to dispose part of inherited land, the Court held that since Tanzania had ratified CEDAW, the African Charter on Human and People's Rights as well as the International Covenant on Civil and Political Rights, the government must be seen to be committed to upholding the rights of women in spite of the existence of customary laws which maintain contrary positions. On this basis, the court held that the woman had a right to alienate part of the property if she so wished.

In *Dow v. Attorney General*¹⁵⁰, the Botswana Court of Appeal relying on the constitutional provisions, the human rights provisions of the African Charter, the Universal Declaration of Human Rights and the CEDAW, held first, that the fundamental rights in the national constitution require that men

¹⁴⁹ 87 ILR 106, [1990] LRC (Const) 757 cited in F. Banda, above, *The International Survey of Family Law* *ibid*, Also in *Mwajuma Mohamed Njopeka v. Juma said Mkorogoro*, Dares Salaam High Court (pc) Civil Appeal No. 6 of 2001 (unreported) which concerned property dispute between the husband and wife of a Muslim marriage when their marriage broke down, the appellate court in coming to its decision, cited Article 2 of CEDAW which condemned discrimination against women. The wife was awarded one half of the properties.

¹⁵⁰ [1992] LRC (Cons) 623.

and women should receive equal treatment. One of the learned justices of Appeal noted that custom and tradition must yield to the Constitution of the country since a constitutional guarantee could not be overridden by custom. Bizo J. A. stated that although the customs, traditions and culture of a society must always be borne in mind and be afforded due respect, they could not prevail when they conflict with the express provisions of the Constitution.

Aguda J. A. also pointed out that there was a clear obligation on Botswana like on all African states signatories to the African Charter to ensure the elimination of every discrimination against their women folk. He rejected the argument that the Constitution permitted the discrimination owing to the patrilineal nature of Botswana society.

The Tanzanian and Botswana courts decisions indicate a developing trend towards the application of human rights norms when dealing with inheritance and property rights of women.

Within the Nigerian judiciary, Tobi J.S.C. may be singled out as having made the boldest and most notable pronouncements in support of women's equal rights to property, relying on the principles of human rights laid down in the Constitution and other international conventions¹⁵¹. Aside from His Lordship and a couple of others who follow his trend, customs which deny women the right to inherit property, among other things, usually receive condemnation on the ground of the repugnancy doctrine¹⁵².

¹⁵¹ See for example, his landmark pronouncements in *Mojekwu v. Mojekwu* [1997] 7 NWLR, Part 512 p. 283, C.A. The pronouncements were later rejected by Uwaifo JSC in *Mojekwu v. Iwuchukwu*, [2004] Monthly Judgments of the Supreme Court of Nig. P. 161 at 166 and *fig*.

¹⁵² See the various High Court Laws of the states. Eg. S. 27(1) of the High Court of Lagos Act.

Most judges tend to ignore or are oblivious of the human rights provisions in the African Charter and other international instruments which denounce discrimination on ground of sex and demand for equal rights and protection of men and women under the laws of member states.

In *Muojekwu v. Ejikeme*¹⁵³, however, Fabiyi J C A denounced the 'oli-ekpe' custom of Nnewi on the basis of the repugnancy doctrine and section 42(1) of the Nigerian constitution which prohibits discrimination on ground of sex among others¹⁵⁴. He held that the custom discriminated against the daughter of the deceased and was therefore unconstitutional.

Tobi J.C.A. as he then was, invoked both section 42(1) of the Constitution and Articles 2 and 5 of the CEDAW to support the right of Virginia, the victim of "oli-ekpe" custom of Nnewi, to protection from discrimination on ground of her female sex¹⁵⁵.

He made it clear that Nigeria being a party to CEDAW, the Nigerian courts of law "should give or provide teeth to its provisions¹⁵⁶." While the country awaits the domestication of CEDAW, Tobi appeared ready to apply it, Nigeria having ratified it. It is amazing however that the African Charter¹⁵⁷

¹⁵³ [2000]5 N W L R, Part 657, P. 401. C.A. at p. 424.

¹⁵⁴ [2000] N W L R, Part 657 p. 401, C.A at p. 436. Section 42 contains some of the fundamental human rights guaranteed by the Nigerian Constitution.

¹⁵⁵ Ibid, p. 437.

¹⁵⁶ Ibid, at p. 437.

¹⁵⁷ See the preamble to the Charter and Articles 2, 3 and 18(3) which provide for the dismantling through legislation etc. of all forms of discrimination based on sex among others and advocate equality of men and women before the law and equal protection of the law. Article states that both men and women should be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as sex Article 18(3) requires states to ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions. Article 14 also states that the right to property shall be guaranteed.

which has been incorporated into Nigerian law was not considered and applied even though the judges arrived at the desired decision.

In *Ukeje v. Ukeje*¹⁵⁸, Galadima JCA, held that the Igbo custom which disintitiled a female issue from sharing in her deceased's fathers intestate estate was void as it conflicted with Section 39(1)(a) and 39(2) of the 1979 Constitution.

The African Charter was neither mentioned nor relied upon but the fundamental rights provisions in the constitution were held to be superior to any custom that was inconsistent with those constitutional provisions¹⁵⁹.

In the celebrated 1997 case of *Mojekwu v. Mojekwu*¹⁶⁰, Tobi JCA as he then was, reacting to an Nnewi custom which granted a remoter male relative the right to inherit a deceased's property in preference to the deceased's female issues held that any form of societal discrimination on ground of sex, apart from being unconstitutional was antithetical to a society that was built on the tenets of democracy¹⁶¹.

Although the validity of that custom was not canvassed on appeal by the parties, nor was the custom applicable to the case, the Supreme Court judgment of Uwaifo J.S.C. was simply a discouragement to the crusade for women's rights generally. His Lordship, unequivocally disapproved of the 'strong language' with which Tobi JCA condemned the "oli-ekpe" custom, wrongly stating that it was "capable of causing strong feelings against all customs which fail to recognize a role for women¹⁶²."

¹⁵⁸ [2001]27 WRN, 142. .

¹⁵⁹ Citing *Agbai v. Okagbue* [1991] 7 NWLR Pt. 204, 391, the learned judge said that any customary law which sanctioned the breach of any of the fundamental rights in the Constitution was barbarous and should not be enforced.

¹⁶⁰ [1997] 7 NWLR, Part 512, p. 283.

¹⁶¹ Ibid, at 305.

¹⁶² *Mojekwu v. Iwuchukwu* [2004] 7 MJSC p. 161 at 177. His Lordship having hailed from Edo State, especially Benin, where the custom,

His Lordship's statement unfortunately laid to rest the validity, of Tobi JCA's much acclaimed pronouncement to the utter astonishment of many NGO's and even gentlemen and women of the learned profession. The resolve of campaigners for women's right to property does not however appear to have been dampened by his lordship's retrogressive attitude, as various human rights organizations remain committed to achieving positive results in this area.

Some African judges are, no doubt, already playing a laudable role by encouraging this social evolution through condemnation of customs that decimate full societal involvement of women in national development through economic empowerment¹⁶³. This judicial attitude corresponds to the statement of Obaseki JSC that "customary law is organic" in the sense that "it is not static" but changes with the development, needs and advancement of the society it governs¹⁶⁴.

In the considered view of the writer, Nigerian and other African judges should take the human rights of women more seriously when dealing with family issues. The Constitution, the African Charter and other international covenants overwhelmingly support this¹⁶⁵. As Tobi JCA as he then was rightly stated,

supported by the State's Will's Law, denies women the right to inherit property, it would be surprising if cultural sentiments played no part in the above statement. There is nothing wrong in condemning such retrogressive customs in the strongest possible language.

¹⁶³ Retrogressive Customs are usually struck down on the ground of the repugnancy doctrine rather than on the basis of their violation of human rights Ownership and property inheritance foster economic empowerment.

¹⁶⁴ Above.

¹⁶⁵ The provisions of the Charter and the Constitution are clear for they unequivocally state that men and women are equal before the law and entitled to equal protection of the law. Moreover neither sex should be discriminated against on ground of sex. Declaring a custom void on the basis of the repugnancy doctrine on the other hand, depends largely on the personal beliefs and attitude of the presiding judge.

Nigeria being a party to the various international instruments, the Nigerian courts "should give or provide teeth to their provisions."

Customary laws and other cultural practices which denigrate women and which do not recognize their rights and individuality should readily be struck down for, as John Stuart Mill said, "anything whatsoever that crushes individuality is despotism and should not be tolerated in any democratic society¹⁶⁶".

PART FOUR: PROSPECTS OF ENFORCING HUMAN RIGHTS IN NIGERIAN FAMILY LAW

Enforcing the African Charter Rights in Domestic Courts

Following the initial absence of a provision for an African Court on Human and People's Rights for enforcing human rights in the Charter and other instruments, Nigerian judges adopted the position that such rights could be enforced in Nigerian domestic courts. The Supreme Court said as much in *Ogugu v. The State*¹⁶⁷ and *Abacha v. Fawehinmi*¹⁶⁸. In *Abacha v. Fawehinmi*, the Court went further to hold that although the Charter was superior to other Nigerian statutes, it was subordinate to the Constitution meaning that in cases of conflict, the Constitution would prevail.

It has been correctly argued that this Supreme Court decision in effect rendered the justiciability of the rights under the African Charter of no practical value to those whose rights have been violated because some social and economic rights which are made justiciable in the Charter are not under the

¹⁶⁶ John Stuart Mill on "Liberty". Individuality here means individuality in the positive sense.

¹⁶⁷ [1994] 9 NWLR pt. 306, p.1

¹⁶⁸ [1996] 9 NWLR (pt. 475) p. 710.

Constitution¹⁶⁹. This indeed calls for the Supreme Court to review its own decision at the earliest opportunity.

Aside from the above, victims of human rights violations can also now proceed to the African Court on Human Rights which was established in 2004 to adjudicate on complaints about human rights breaches from individuals and organizations. The African Commission on Human Rights¹⁷⁰ performed this function before 2004 and meritoriously handed down milestone decisions such as *SERAC* and *Anor. V. Nigeria*¹⁷¹ and *Achutan* and *Anor. V. Malawi*¹⁷². The African Court will now hopefully cover any existing gaps left by the Commission and deliver more effective justice.

Finally, there is the ECOWAS Community Court, established in 2005 to which complaints on human rights violations can directly go without the need to first exhaust local remedies¹⁷³. Thus where the Constitution forecloses access to remedies for economic and social rights violations, a victim could resort to the ECOWAS Court for determination of the issue under the provisions of the African Charter¹⁷⁴. This has the advantage of obtaining faster and cheaper justice.

¹⁶⁹ See A. Atsenuwa, "Opportunities and Prospects for the Legal Defence of Economic, Social and Cultural Rights before National and Africa Regional Courts. (Unpublished Paper, March 2009).

¹⁷⁰ They were to interpret the Protocol establishing the African Court as well as other human rights instruments ratified by the State concerned. The Commission also interpreted the Charter, formulated and laid down principles and rules aimed at solving legal problems relating to the human and peoples rights which should guide African governments in drafting their legislation. See Article 45 and 60 of the Charter. The Commission was set up 1987 and Nigeria presently has a National Human Rights Commission based in Abuja with regional offices which receive and investigate complaints from member states, organizations or from individuals on breaches of human rights.

¹⁷¹ (2001) AHRLR 60.

¹⁷² (2000) AHRLR 144.

¹⁷³ Hadijatou Mani Karapu v. Republic of Niger, Judgment ECW/CCJ/JUD/06/08 of 27 October 2008.

¹⁷⁴ See Atsenuwa, *ibid*, citing *SERAP v. FRN & Anor* (2001) AHRLR 60 which clarified the relationship between the African Charter and the

The foregoing shows that the prospects and opportunity for enforcing human rights in Family Law in both regional and domestic courts are bright despite the current slow pace of action by judges. It is gratifying that victims of human rights violations can choose to apply directly to the ECOWAS Community Court to enforce rights protected by the African Charter. It will minimize litigation costs, delay and the emotional trauma often associated with court actions.

CONCLUSION AND THE WAY FORWARD

Vice-Chancellor Sir, there is no doubt whatsoever that family law has undergone dramatic changes in the last few years following the influence of international and regional human rights treaties in Europe, the United States and the African continent. The instruments which have added international dimensions to settlement of family issues are becoming increasingly important in family law as many family matters seem to be now governed, not just by domestic laws, but partly by the provisions of these regional and international instruments. They have not only impacted domestic family law reforms¹⁷⁵ but have in some cases, upset long standing judicial decisions¹⁷⁶ so as to correspond to the emerging social trends. For example, the United Nations Convention on the Rights of the Child along with other regional treaties have played pivotal roles in promoting domestic legislation for the protection of children's human rights while CEDAW has had its influence in advancing women's human rights in many countries. Similarly, there's increasing recognition of non-conventional families and a number of jurisdictions, especially in the west, now allow marriage between same-sex couples or a civil partnership union with rights equivalent to those of married

Nigerian Constitution for the purpose of determining justiciability of economic and social rights before the ECOWAS Court.

¹⁷⁵ e.g. the Nigerian Child Rights Act/Laws, the English Human Rights Act, the adoption of the African Charter in Nigeria and by other African countries.

¹⁷⁶ As was the case in South Africa, Canada and some US states where the terms "marriage", "spouse", "family", and "adultery" have been redefined to include same-sex couples.

heterosexual couples. There is a tendency towards a regionalisation if not globalization of family law¹⁷⁷.

In Europe, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms which has been incorporated into the fabric of the domestic laws of many European countries, requires the individual states to take into account the judgments, decisions and opinions of the European Court of Human Rights and to ensure that Convention rights are upheld when deciding family law issues which have arisen in connection with a Convention right. Furthermore, domestic courts are enjoined not to act in a way which is incompatible with a Convention right and where domestic legislation or law is incompatible with a Convention right, the Court must so declare and the government of the country concerned is expected to take steps to amend such law to accord with the provisions of the Convention¹⁷⁸.

In Africa, the standard setting instrument is the African Charter on Human and Peoples' Rights which is the equivalent of the European Convention on Human Rights and Fundamental Freedoms. Many countries within the Organisation of African Unity have adopted it as part of their domestic laws. It was incorporated into Nigerian law by the enactment of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983¹⁷⁹. It created for the Nigerian government the obligation to recognize the rights, duties and freedoms enshrined in the Charter and consequently to enact laws and take other measures to give effect to its provisions¹⁸⁰.

¹⁷⁷ This however will be difficult to achieve particularly in some areas of family law, as a result of differences in economic, cultural and moral values. Some countries may never approve of same-sex unions or relinquish parental rights to spank children for corrective purposes despite their obligations under the international or regional treaties they have ratified.

¹⁷⁸ S. Choudhry and J. Herring, *European Human Rights and Family Law*, 2010, Hart Publishing, Oxford.

¹⁷⁹ Cap A 9, *Laws of the Federation of Nigeria*, 2004.

¹⁸⁰ The obligations under the Charter equally apply to the African nations who have adopted the Charter.

Of importance to family law are Articles 2, 3, 5 and 18(3). By Article 2, all Nigerians are guaranteed the enjoyment of all the Charter rights and freedoms without discrimination on grounds of sex, birth, status etc., while Article 3 guarantees equality before the law and equal protection of the law¹⁸¹. Furthermore the country has accepted the obligation to ensure that every Nigerian citizen is entitled to respect for the dignity of his person and accordingly nobody shall be subjected to torture or to inhuman or degrading treatment or punishment¹⁸². There is also undertaking to uphold the protection of the rights of the woman and the child as stipulated in international Conventions¹⁸³. It is expected that the government should not rest on its oars until some of these obligations which will impact positively on the people are met.

Towards achieving this goal, it is suggested that while recommending the adoption of a human rights-based approach by the courts when confronted with family issues concerning Charter and Convention rights, there is need to exercise some caution. The virtues of African historical tradition and the values of African civilization which have inspired and characterized Africa's reflection on the concept of human and people's rights must not be ignored¹⁸⁴. Although these international and regional instruments condemn discrimination and demand equal treatment and legal protection for all citizens of member states, their provisions concerning certain aspects of family law ought to be interpreted conservatively so as to correspond to our positive cultural and traditional values. Thus the right to marry and found a family should not be construed to include persons of

¹⁸¹ Article 3 of the Charter.

¹⁸² Article 5. This is replicated in section 1(b) of the Nigerian Child Rights Act 2003 and in Section 34(1)(a) of the 1999 Constitution and is contained in other Child Rights Laws enacted by the States. This in effect challenges the right of parents and guardians to physically chastise their children.

¹⁸³ CEDAW has not been domesticated and it therefore remains directly unenforceable.

¹⁸⁴ See the Preamble to the African Charter on Human and People's Rights.

the same sex who wish to exercise that right, nor should the definition of 'spouse' or 'family' accommodate unmarried cohabitants or homosexual couples as is now the case in some "advanced" countries.

Indeed, the traditional marriage and the family should be constitutionally protected by a provision prohibiting same-sex marriage¹⁸⁵ and making marriage between a man and a woman the only valid union in Nigeria. Mere passing of a statutory law is inadequate because the bare possibility that same-sex couples can constitutionally challenge the present marriage laws which apply only to heterosexual couples on the ground of discrimination necessitates such a constitutional provision. The Constitution, the Charter and other international instruments already ratified by Nigeria condemn discrimination in any form and same-sex couples may argue that to refuse them the right to marry is discriminatory and unconstitutional. Such opportunity must be prevented at all costs in this country.

Unfortunately even though the Federal Executive Council had since January 2007 given approval for the National Assembly to make a law to be entitled, 'Same-Sex Marriage (Prohibition) Act 2006' prohibiting same-sex marriage, the law as stated earlier has not yet been passed. By failing to enact this law, the government appears to be yielding to international pressure not to do so, especially from the United States and some groups of international human rights organizations spread across the globe. The country should however not succumb to these pressures. She should do what is right in accordance with our own values.

In addition, the right of parents and school authorities to reasonably administer physical chastisement on children under their care for corrective purposes should not be interfered with despite the human rights of children to respect

¹⁸⁵ Uganda amended its Constitution in 2005 to ban same-sex marriage.

for their bodily integrity and dignity¹⁸⁶. Abolishing this right will give rise to a breakdown of discipline in schools and affect family stability thereby causing more harm than good to the children and society in the long-term. The government should therefore not criminalise corporal punishment and abolish the reasonable chastisement defence currently available under our law and laws of some countries.

There is need for legal control of the practice of Artificial Insemination by Donor (AID) as several clinics offering this service have sprung up in the country. Laws to deal with the ethical issues involved and to govern storage of information about gamete donors should be enacted, and, to be compatible with the CRC and the OAU Charter on the Rights and Welfare of the Child, children born through this process as well as adopted children in Nigeria should have the right to trace their genetic origins not only for the purpose of satisfying their psychological desires and developing their personality but also for medical reasons. Some countries such as Argentina have upgraded this right to a constitutional one.

Although Section 42(2) of the Constitution appears to have put a stop to the discrimination against illegitimate children, especially with respect to inheritance from the estate of their biological fathers, it did not abolish the status of illegitimacy contrary to the decision of Ige JCA in *Salubi v. Nwariaku*.

It is the view of the lecturer that the abolition of the status will undermine the institution of marriage and its role in our social life and structure. On the other hand, illegitimate children should not be made to suffer for the misdeeds of their parents and consequently Section 42(2) which mandates that illegitimate children shall not be deprived of any rights is to be hailed. To further ameliorate the suffering of the illegitimate child, our Family Law Legislation, still replete with the reference, "illegitimate child," should be amended so as to

¹⁸⁶ The Nigerian Constitution, the African Charter, the UN Convention on the Rights of the Child and the Child Rights Act of 2003 all have provisions to this effect.

mollify the psychological problems caused by the use of that term which resonates stigmatization. Such reference should be expunged from our laws and replaced by more dignifying terms such as, "out of wedlock child" or "child whose parents are unmarried". This allows for any stigmatization to be attached to the parents rather than to the child.

On women's rights, especially with respect to the right of inheritance, there is need for the court to be more proactive and adopt a human rights approach when dealing with such issues which involve human rights as laid down in the African Charter, the Constitution and other international instruments. Except for a few judges earlier mentioned, Nigerian courts appear reluctant to perceive issues relating to women's rights from a human rights perspective. This must change. The judges must relinquish their allegiance to customary law and culture which contravene positive Convention and Charter rights. The Charter and other Conventions offer great opportunities to our judges and other African justices to develop a rich jurisprudence in this field. However, Africans are generally not litigious by culture and the high cost of litigation is a discouraging factor that can affect individual pursuit of rights. It is therefore necessary that both government and non governmental bodies should work together to sensitise people, especially through the media, to acquaint them of their rights and more importantly, for government to extend legal aid facilities to deserving cases.

The need for proper education in the field of human rights cannot be over-emphasised for such education is a means of not only eliminating discrimination against women and promoting their human rights, but is also useful as a means of checking child-abuse, thereby protecting and promoting the rights of the child.

Furthermore, proper education could also be a means of dealing with the problems of homosexuality, lesbianism, same-sex marriages and other unnatural acts. Modernism has the tendency of eroding fundamental social values. It is, to a great

extent, a challenge to humanity. Proper education can check its excesses. Proper education however necessitates specialized training in the field of human rights and it will not be a waste to invest in this.

Finally, proper education is relevant to judges in view of the psychological element involved in the discharge of their functions. A judge whose attitude towards Human rights is negative, may perhaps change through proper education and training on the subject.

The progress of a nation depends on equality, freedom and justice for all its citizens irrespective of age or gender. There is no doubt that Nigeria will be the better for it.

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Mr. Vice-Chancellor, Sir, here ends my inaugural lecture. Thank you.