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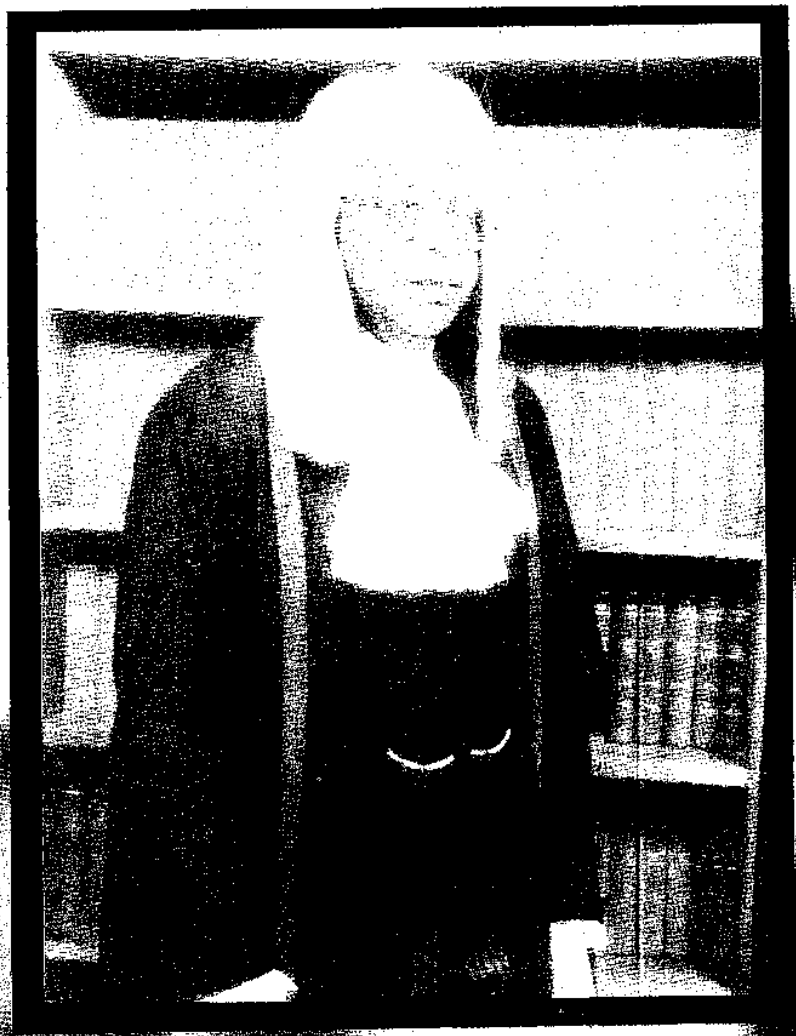
Justice in the Judicial Process

(Essays in Honour of Honourable Justice Eugene Ubaezonu, JCA)



Edited by C.C. Nweze

Chapter 8

Public Law Perspectives Of Rights Of Women In Nigeria

-Prof. Taiwo Oniptan

Introduction

Global concern about the rights of women, dates back to a conference held in France in 865 A.D. The Conference was organised solely to investigate if women are human beings, who deserve to enjoy human rights. Despite the findings of the Conference, that women are human beings, it (the Conference) nevertheless, concluded that women are created solely to worship men.[1]

Expectedly, the above conclusion justified previous and subsequent inferior treatment of women globally. It is noteworthy that as a result of growth in individual and group struggles, many nations are now gender-sensitive. The world has witnessed a gradual, but steady, movement, from sympathetic concern to aggressive feminism.

Concern about the rights of women has been shown at International,[2] Regional and National levels. The Universal Declaration of Human Rights, (adopted by the United Nations General Assembly in 1948) proclaims that "all human beings are born free and equal in dignity and in rights."[3] In the same vein, the International Covenant on Civil and Political rights states:

[1] *Women's Rights as Human Rights*, (Lagos: Legal Research Resource Development Centre, 1995) p. viii.

[2] International Covenants on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; The Convention on the Political Rights of Women; The Convention on the Nationality of Married Women; The Convention on the Elimination of All Forms of Discrimination Against Women.

[3] Article 1

all persons are equal before the law and are entitled to equal protection of the law. In this respect, the law shall prohibit any discrimination on grounds such as race, colour, sex.....[4]

The Convention On The Elimination Of All Forms of Discrimination Against Women remains the most impactful gender-sensitive Convention. The years, 1975-1985, were also dedicated by the United Nations as the decade for women. This was in realisation of the need to redress situational imbalances arising from the marginalisation of women; and their non-participation in social and economic activities. The decade (whose theme, was Equality, Development and Peace) sought to remedy wrongs of the past and ensure that concrete steps are taken, to bring women into focus in social development activities.

At the regional level, Article 18 of the African Charter on Human and People's Rights[5] imposes a duty on states to "eliminate ... every discrimination against women and also to ensure the protection of rights of women ...." Conferences[6] on rights of women, have also been held. Some of these Conferences have resulted in agenda and platform for actions[7]

It is noteworthy that the outcome of these Conferences, forms the basis of municipal legal rights of women in most countries. These rights include family and property law rights. Educational, Economic, Political and Social rights of women, are other examples of municipal law rights of women.

The inquiry below is, however, confined to municipal public law rights of women in Nigeria. The object of the inquiry is to ascertain the extent to which public law protects and promotes

Article 23

5 The Charter became a domestic legislation in 1983, when African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) was passed.

6 World Conference on Women held in Mexico 1975, Mid-decade Conference in Copenhagen 1980; End of Decade Conference in Nairobi 1985; World Conference on Women in Beijing, 1995.

7 Nairobi Forward Looking Action 1985, Beijing Declaration and Platform for action 1995 – An agenda for the empowerment of women.

rights of women in Nigeria. The inquiry is of primary importance in a constitutional democracy. It will be contended below that politics is a game of numbers. Consequently, a Government which fails to promote the rights of women stands the risk of being voted out of office by vigilant women electorate.

Definitions

The definitions of relevant concepts are evidently pertinent to the exercise below. Nevertheless, we must quickly acknowledge the futility of aiming at a universally acceptable definition of these concepts. A definition is essentially "a translation of thoughts into words."[8] Consequently, a definition must, definitely, generate divergent views. Law remains basically an exercise in controversy.

What is Public Law?

Law is generally defined as "a rule which men are obliged to make their conduct conformable; a command enforceable by sanction."[9] Municipal law can also be defined as "aggregate of rules, enforceable by judicial means in a given country."[10] It has been observed that the definition of public law is a difficult one because it can be used in many senses.[11] In revolutionary situations (Military Regimes) it is virtually impossible to define public law. As a matter of fact, Professor Desmith attests that in revolutionary situations "Public Law is not to be found in books; it lies elsewhere viz: the events that have happened."[12]

In spite of the above highlighted difficulties in the definition of the Public law, Public law can broadly be defined, in a constitutional democracy, as the body of laws dealing with the

8 Ajomo, *Of order and disorder: The relevance of International Law.* (Inaugural Lecture, University of Lagos of 17/1/84) at p.3.

9 Earl Jowitt, *Dictionary of English Law* (London: Sweet & Maxwell, 1959) p.1063.

10 Ibid at p.1064.

11 Harding, *Public Duties and Public Law* (London: Clarendon Press, 1988) p.3.

12 "Constitutional Lawyers in a Revolutionary Situation" 1968 *Western Ontario Law Review*, Vol. 7, p.68.

state. It is also defined in terms of the relationship between the state and individuals. Put in other words, it is the body of laws regulating the rights and obligations of the State and individuals. Administrative, Constitutional and Criminal Laws, as well as the Law of Evidence, are ready examples of public law subjects.

Who is a Woman?

A woman has been defined as an adult female, with feminine emotions.[13] From the view point of a gender activist, a woman is "an adult female human being, physically weaker than the man, exhibiting feminine characteristics, quite distinctive from the opposite sex."[14] The need to distinguish between a woman and a girl justifies the assertion that a woman is "any person of the female gender of 16 years and above."[15] Three classes of women can be identified from the above definition. These are married and unmarried women, as well as widows.

What is A Right?

There is no uniform theory of rights. A right has different connotation to different people. In the literal sense, a right is an entitlement or interest recognised and protected by law. It is a claim which is just and proper. It has consequently been contended that "rights are things we can assert, obligations which we often feel that people should be made to perform and whose non-performance, occasions feelings of resentment or indignation rather than mere disappointment."[16]

From jurisprudential view-point, a right involves the existence of jural relations. Both Hobbes[17] and Jeremy Bentham[18] are noted

[13] Oxford English Dictionary p.969.

[14] Otaluka – "Protection of women under the Law" in Awa Kalu and Y. Osinbajo (eds) *Women and Children under the law*, (Lagos: *Federal Ministry of Justice, nd)* p.95.

[15] Ibid at p.236.

[16] Hobbes, *Dialogue Between a Philosopher and a Student of Common Law of England* p.30.

[17] Jeremy Bentham, "The Limits of Jurisprudence Defined" (Ed Everett) Chapter 2.

[18] *Fundamental Legal Concepts* Chapter 1

for demanding a clear distinction between being bound (claim duty relation) and being free (liberty). The liberty to do or not to do an act hardly gives rise to a duty. Consequently, no right is claimable in such situation. Without a duty, there can be no right.

A right is only claimable if there is a corresponding duty, foisted on the other party. Hofeld's[19] contribution to the theory of rights lies in his working "out a table of jural relations with incisive logic"[20] Hofeld's thesis is that the assertion of a right invariably depends on the existence of corresponding obligation. It is, therefore, correct to assert that "a right in its most obvious sense imposes an obligation: To have a right is to be the intended beneficiary of an obligation".

The Nigerian Supreme Court has also given judicial expression to the theory of rights. In *Afolayan v Ogunrinde*[21], the Court reasoned that every right involves a three-fold relation in which the owner of such right stands. These are the right against some person or persons, the right to some act or omission of such person, as well as the right over something to which the act or omission relates.

The rights of women under municipal public law are examined below. The issues examined are confined to rights under the Constitution, the criminal process and rules of evidence.

Constitutional and evidentiary issues

The right to freedom from discrimination on ground of sex is fundamental in any discussion on rights of women. Curiously, the 1963 Constitution of the Federal Republic of Nigeria, failed to

[19] Dias, *Jurisprudence* 4th Ed. (London: Butterworths, 1976) p.35.

[20] Angie, Op. Cit. p. 237.

[21] (1990) N.W.L.R. (pt. 127), 369. See also *Nwokoro v. Onuma* (1994). N.W.L.R. (pt. 343) p.206. "Right means an interest or title in an object or property. A just and legal claim to hold, use or enjoy an object. Rights are interests recognized and protected by the law" – per Katsina – Alu J.C.A.

address the issue of discrimination.[22] It is gratifying that the 1999 Constitution of the Federal Republic of Nigeria, contains anti-discrimination provisions. Discrimination on ground of sex is, therefore, specifically prohibited under the 1999 Constitution. It states:

> A citizen of Nigeria of a particular community, ethnic group, place of origin or sex shall not by reason only that he is such a person:-
>
> (a) be subjected either expressly by or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, are not made subject; or
>
> (b) be accorded either expressly by or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities ethnic groups, places of origin, sex, religious or political opinions.[23]

The above constitutional provision aims at redressing situational imbalances. It guarantees equal rights and protection to men and women alike. The provision is also one of those absolute rights under the Constitution. Consequently, there can be no derogation from the right to freedom from discrimination "in the interest of defence, public safety, public order, public morality or public health".[24]

Section 39(1) of the 1999 Constitution (similar to Section 42(1) of 1979 Constitution) has attracted judicial and academic attention. According to Justice Augie, the provision

> ..... is a far reaching section which guarantees to men and women alike the same treatment, the same privileges, the same liabilities, the same restrictions, where they are legally and socially considered desirable. Therefore, if any law, any executive or administrative action discriminates against women and even men, the courts will hold such law inconsistent which both the spirit and the letter of the 1979 Constitution under Section 1(3) of the Constitution and thus unconstitutional. Then the provisions of Section 39(1) of the constitution will prevail.[25]

Professor Nwabueze also contends that:

> The reference to any law in force in Nigeria covers customary law, Islamic law as well as a State law. It follows, that a rule of law or any of these systems of laws in Nigeria which imposes special disabilities or restrictions or accords special privileges or advantages based on any of the specified grounds or classification is unconstitutional and void.[26]

The fundamental weakness of Section 42(1) of the Constitution lies in its restriction to executive and administrative actions of Governments. Consequently, while it is possible to invalidate discriminatory laws, executive and administrative actions of Government, there are no constitutional basis, for challenging discriminatory, non-governmental executive and administrative actions. A woman who suffers discrimination in the hands of a private employer on ground of her sex, cannot invoke section 42(1) of the constitution against such employer. Similarly, a female student who suffers discrimination on ground of sex, in a private institution of learning, has no constitutional provision to rely upon to challenge discriminatory acts of such private institution. If we realise that women in public and private sectors suffer discrimination equally, then we should be quick to appreciate the need to enlarge the scope of Section 42(1) of the Constitution, to cover all forms of discrimination, whether in Government or Non-Governmental Organisations.

Interestingly, despite the protection against discrimination afforded women under the Constitution, there is no known reported case challenging the constitutionality of any existing law, executive or administrative act of Government. Must we then

[22] Section 18 of the 1963 Constitution merely prohibited discrimination on grounds of tribe, place of origin, religion or political opinion.

[23] Section 42(1) 1999 Constitution of the Federal Republic of Nigeria.

[24] Section 45 1999 Constitution of the Federal Republic of Nigeria.

[25] "Women Rights in Law and Practice" in *Women in Law* (1993) Southern University Law Centre and Faculty of Law, University of Lagos, p.242-243.

[26] *Presidential Constitution* (London: C. Hurst & Co. 1982) p.452.

assume that all is well with women vis-à-vis their rights against discrimination on ground of sex? Must we also presume the non-existence of discriminatory laws, executive or administrative acts of Government? A careful perusal of our rules of evidence reveals the contrary.

Evidentiary issues: competence and compellability

Our Evidence Act[27] has rightly been described as "relic of colonialism with organised imperial base."[28] Expectedly, the Evidence Act contains provisions which negate societal values. A good example of negation of societal values, is in the area of competence and compellability of spouse witnesses in court proceedings. The Act evidently discriminates against spouses of non-monogamous marriages.

An obvious discrimination also exists in the admissibility of the evidence of spouses in civil and criminal cases. In civil proceedings, the spouse (wife) of a party is generally[29] a competent and a compellable witness.[30] The reverse is generally the situation in criminal cases, where the spouse witness is generally[31] an incompetent[32] witness, except upon the application of the accused. The rationale for the discriminatory treatment of evidence of spouse witnesses in civil and criminal cases is difficult to discern. Are civil cases perceived as more important than criminal cases? The fact that a single act such as assault or conversion, constitutes crime and a civil wrong, underscores the artificiality of any distinction between civil and criminal proceedings. Why then must the competence of a spouse and

[27] Cap.112 Laws of the Federation 1990 Edition.

[28] N. Tobi "Spousal Protection in Evidence Law: A case for the polygamous spouse," in *Women and Children under the Nigeria Law. op. cit.* p.115.

[29] For exceptions see Section 148 Evidence Act.

[30] Section 158.

[31] For exceptions see Section 161 Evidence Act.

[32] Section 161(2) Evidence Act.

indeed spousal privileges[33] depend on the type of proceedings initiated against the spouse?

The restrictive definition of wife and husband as "wife and husband of a monogamous marriage" under Section 2(1) of the Evidence Act seriously limits spousal protection and privileges to spouses of Christian monogamous marriages.

It is gratifying that a rebuttable presumption of monogamy exists in favour of every marriage. Consequently, all spouses are rebuttably presumed to have contracted monogamous marriages and, therefore, incompetent witnesses in criminal trials. Thus spouse witnesses who swore on Holy Bible[34], Gun[35], Koran[36], Knife[37], still enjoyed the presumption and benefits of monogamy in different cases. The burden is, consequently, on the prosecution, to rebut the presumption of monogamy, between a spouse witness and the accused person. Where the prosecution successfully refutes the presumption, the wife of the accused in such situation is not only a competent witness, she is also a compellable one. The privileges attached to information received in matrimonial confidence are also destroyed in such cases. But why must the quality of justice and access to evidence depend on the type of marriage a witness contracts with the accused person? Why the obvious discrimination against wives of non-monogamous marriages?

The discrimination against wives of non-monogamous marriages, generates the impression that monogamous marriages are superior to non-monogamous marriages. The impression is further generated, that…., there exists more oneness of purpose, more confidentiality, more affection and more unity between spouses of monogamous marriages than spouses of polygamous

[33] Section 161(3) Evidence Act; Osibanjo: "Unraveling the rules on Evidence of Spouses in Nigeria" 1987 Vol. 2 *The Legal Practitioners Review*, pp. 22-28.

[34] *Afiyola v The State* (143) W.A C.A.22.

[35] *Idiong v The State* (1950) 13 W.A.C.A. 30.

[36] R *V Udom & Others* (1947) 12 W.A.C.A.

[37] *Lamu v The State* (1967)1 All. N.L.R 107.

marriages."[38] The presumption of more oneness and more unity in monogamous marriages[38a] than non-monogamous marriages, also finds scriptural support in Adam's statement, soon after the creation of Eve thus:

> This is now bone of my bones and flesh of my flesh. She shall be called woman because she was taken out of man. Therefore, shall a man leave his father and mother and cleave unto his wife and they shall become one flesh.[39]

A monogamous marriage is evidently synonymous with a Christian marriage. It is the union of a man and a woman to the exclusion of all others during marriage. However, the celebration of monogamous marriages is not exclusive to Christians. Christians and non-Christians alike, contract monogamous marriages. Some spouses of monogamous marriages abide by the tenets of monogamy (i.e. a union of a man and a woman to the exclusion of all others). There are other spouses of monogamous marriages who live polygamous lives. Interestingly, there are spouses of non-monogamous marriages who are still able to practise monogamy. Consequently, there are adequate reasons to agree with Niki Tobi that:

> Love, oneness, cordiality of purposes, loyalty and reciprocal respect and regard in the matrimonial home depend largely on the idiosyncrasies of individual spouse and not on the nature or type of marriage. There are known instances of total abuse of love, cordiality and loyalty between spouses of monogamous marriage and the presence of same between spouses of polygamous marriage. Of course, the reverse position is also true. And some rule of the thumb is not possible as there is no room for any generalisation.[40]

[38] Niki Tobi: "Spousal Protection in Evidence Law:" A case for the polygamous spouse." *Op. Cit.* p. 122.

[38a] A monogamous marriage is defined "as a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage" Section 18(1) Interpretation Act 1964.

[39] Genesis 2 Verse 24 (King James Version)

We cannot ignore the fact that majority of our women contract non-monogamous marriages. Consequently, any law which discriminates against such women, on account of the nature of their marriages, cannot ensure the greatest happiness of the greatest number of people. Such a law definitely ignores societal values. It is contended that the provisions of the Act, which discriminate against wives of non-monogamous marriages, indirectly confer a superior status on Christian religion. This is underscored by the restriction of spousal protection and privileges to spouses of monogamous (Christian) marriages. Consequently, a woman who in exercise of her religious faith, contracts a non-monogamous marriage, is deprived of the spousal protection and privileges under the Act. It suffices to say that the provision of the Act can be impeached on the basis of its religious discrimination.[41] Again, it is contended that the provision of the Act conflicts with the constitutional injunction that "the Government of the Federation or a State shall not adopt any religion as State religion."[42]

We must, therefore, bear in mind the fact that:

> ..... in Nigeria now, we live in an increasingly multi-culture and multi religious society. Religious beliefs are diverse and our democratic society is sufficiently liberated to ensure that there is no distinction between the various type of marriages that co-exist in our society.[43]

It is, therefore, suggested, that the provisions of the Evidence Act should be amended as to provide equal protection for wives of monogamous and non-monogamous marriages alike.

[40] Niki Tobi: "Spousal Protection in Evidence Act: A case for the Polygamous Spouse" Op. Cit. 123.

[41] Section 38 and 42 1999 Constitution.

[42] Section 10 1999 Constitution.

[43] *Workshop Papers on the Reform of the Evidence Act* (Lagos: Nigerian Law Reform Commission 1995) p.174.

Economic, political and social rights

The Constitution contains some gender-sensitive provisions aimed at the attainment of equalities and a welfare state. The preamble to the Constitution proclaims the Constitution as an instrument for "promoting the good government and welfare of all persons in our country on the principles of Freedom, Equity and Justice, and for the purpose of consolidating the unity of our people".

Expectedly, the whole of Chapter II of the Constitution deals with Fundamental Objectives and Directive Principles of the State. The inclusion of the chapter in the Constitution has been described as "a new innovation that makes the Constitution an ornamental piece in the constitutional history of Nigeria."[44] The chapter covers political, economic, social, and educational rights. The primary objective of the chapter is to spread educational, economic and political developments round the nation.

While national integration is to be actively encouraged, discrimination on ground of place of origin, sex, religion etc., is prohibited under Section 15(1) of the Constitution. From the angle of economic objectives, the Constitution mandates the State to:

> ..... direct its policy towards ensuring that all citizens without discrimination on any ground whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment.[45]

The Constitution further directs that every citizen shall have equality of rights, obligations and opportunities before the Law.[46]

Section 16(1) directs that national economy be managed in a manner which secures maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status

[44] R. S. Bhala. "Fundamental Objectives and Directives Principles of State Policy under the Constitution of Nigeria," 1982, Vol 18 *Nigerian Bar Journal* at p 27.
[45] Section 17(3)(a)
[46] Section 17(2)(a)

and opportunity. Other issues covered by the chapter include educational[47] political[48] and cultural issues.[49] Equality before the law, equal access to educational and social facilities are, therefore, central issues in the chapter.

The problem with Chapter II of the Constitution vis-à-vis the promotion of women's rights lies in its being a non-justiciable chapter. Quite unlike Chapter IV of the Constitution, (which empowers any person alleging the infringement or the likely infringement of his fundamental right(s) to apply to the High Court for redress[50]). Chapter II is specifically rendered non justiciable. Accordingly, "the judicial powers vested in accordance with the foregoing provisions of this Section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution".[51]

Evidently, we must look beyond the provisions of the Constitution for the realization of the goals set out in Chapter II of Constitution. This is inspite of the Section 13 of the Constitution which provides "it shall be the duty and responsibility of all organs of government and of all authorities and persons exercising legislative executive or judicial powers to conform to, observe, and apply the provisions of this Chapter of this Constitution".

Admittedly, the Provisions of Chapter II are legally unenforceable; nevertheless, they are politically enforceable in a constitutional democracy. Chapter II sets certain goals before the legislative and executive arms of government. The provisions constitute the criteria for assessing the performance of a

[47] Section 18
[48] Section 15
[49] Section 20
[50] Section 46 1999 Constitution
[51] Section 6(6) (c)

democratic government. A democratic government which ignores these provisions stands the risk of being voted out of office by vigilant women electorate. Consequently, though not legally enforceable, the provisions are useful political weapons in the hands of the women electorate for voting out a government which suppresses the rights of women.

The proceedings of the defunct Constituent Assembly corroborate the efficacy of Chapter II of the 1979 Constitution thus:

> What is the punishment behind these non justiciable items? It is public opinion, public political opinion, and for the people who are politicians, that is more important because it is something against which you cannot hire a lawyer. Public political opinion is the thing that stands between you and the next election. If you were in power and you were to go on violating these Fundamental Objectives and Directive Principles, you must know that your chances of coming back into power must be very slim in present day Nigeria which is becoming more and more conscious of its political, economic and social requirements. So, that is the sanction behind these Fundamental Objectives and Directive Principles of State Policy.[52]

The above view has also been supported by a writer thus:

> The Fundamental Objectives and Directive Principles are a government's charter over which the government operates for four years. Since the country ensures free choice by the people among different candidates with different political programmes, it is logical to conclude that the people will elect those who are likely to transform these principles into reality. These Fundamental Objectives thus seen, constitute a kind of basic standard of national conscience. Those who violate its dictate do so at the risk of being ousted from the positions of responsibility which they have been chosen. The agents of the state at a given time may not be answerable to a Court of Law for the breach of these principles but they have to stand for judgement, from which they cannot escape, facing a higher and more

[52] *Proceedings of Constituent Assembly* Vol. 1 (Lagos: Federal Ministry of Information) p. 483 Paragraph 945.

> powerful Court which will at regular intervals (of four years) do the reckoning.[53]

Rights under the Criminal Process

The Right to Human Dignity: Rape

The offence of Rape aims at preserving the dignity of the person of a woman against unwanted invasion. The offence of rape is consequently committed by "any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent if her consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm or by means of false or fraudulent representation as to the nature of the act or in the case of a married woman by personating her husband."[54]

In view of the fact that rape "is the most heinous offence that may be committed against a woman",[55] it is not surprising that the offence attracts a maximum punishment of life imprisonment with or without whipping.[56] It is evident from the above definition, that only a woman can be the victim of rape. It is, therefore, legally impossible for a man to be raped. The gender sensitivity of the offence cannot be divorced from the traditional belief that rape is synonymous with physical force or violence. And because women are also traditionally believed to be physically weaker than men, the presumption is that men, cannot be raped by women. However, if we realise that the commission of the offence is not restricted to the use of physical force or violence on the victim, then we should appreciate the need for rethink on the scope of the likely victims of rape.

[53] Bhalla, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution," *Op. Cit.* at pp. 19-20.
[54] Section 357 Criminal Code
[55] Jadesola Akande "Women and the Law" in *Women in Law*
[56] Section 353 Criminal Code

It is trite that unlawful carnal knowledge as a result of threat, intimidation and blackmail of the victim (who is compelled to surrender to the demand of the accused) will support the conviction of such accused person for rape. Consequently, a male chief executive of a private organisation who, due to threat or intimidation has unlawful carnal knowledge of his female employee, shows no greater disrespect for the dignity of the employee, than a female secondary school teacher, who, as a result of threat, has unlawful carnal knowledge of one of her innocent male pupils. Both the chief executive and the female secondary School Teacher should be liable for rape. We must, therefore, redefine the offence of rape as to protect the weak, defenceless and innocent male victims. The present scope of the offence gives the impression that women are always weaker, disadvantaged and, therefore, open to exploitation. The impression is necessarily not correct. Women too are also placed in vantage positions to sexually exploit innocent boys and weak men. Such boys and men deserve protection as well. We, therefore, share the views that:

> ..... if we recognise that the man is just as entitled to protection against undeserved invasion of his person sexually, even to every uttermost as the woman, we would see that there exists no justification for designating rape to protect women.[57]

A perturbing aspect of the offence of rape, is the impression created under the Evidence Act, that the rape victim is the person on trial. In a rape trial, the character of the victim is a relevant fact in issue.[58] The rape victim is, therefore, liable to be cross-examined on her previous connection with the accused, as well as with other men!

[57] Oyajobi "Better Protection for Women under the Law," in *Women and Children Under the Law*, *Op. Cit.* p. 17.

[58] See, *Phipson on Evidence* 12th Edition paragraph 540: "On charges of rape or attempts to ravish, the general bad character as to sexual morality of the prosecutrix is material not only to her credit as a witness but also as to the issue."

Section 211 of the Evidence Act provides:

> When a man is prosecuted for rape or for attempt to commit rape or for indecent assault, it may be shown that the woman against whom the offence is alleged to have been committed was of a generally immoral character although she is not cross-examined on the subject. The woman may in such a case be asked whether she has had connection with other men but her answer cannot be contradicted. She may also be asked whether she has had connection on other occasions with the prisoner and if she denies she may be contradicted.

From the view point of respect for the dignity of women against unwanted invasion of their persons, the immediate question for resolution is: of what relevance is the immoral character of the rape victim or of her previous connections with the accused or other men to the question of whether she was raped or not on the particular occasion?

Surely, a rape victim does not present herself as a spotless angel! What such victim is alleging is that on the particular occasion, the accused had carnal connection with her without her consent. Although there is no requirement of corroboration in the Evidence Act, for rape cases, in line with the practice in England, our courts again insist on corroboration.[59] This is inspite of the fact that most rape cases take place behind closed doors. Only the accused and victim can give the best account of events which took place behind closed doors. Corroborative evidence is, consequently, difficult to adduce.

Different theories have been advanced for the hostile treatment of rape victims. These theories include: women being "shy or neurotic", "advancing yet retreating" the woman not

[59] See Aguda – *Law and Practice Relating to Evidence in Nigeria* (London: Sweet and Maxwell, 1980) p. 349: "It would appear that Nigerian courts following English courts now take a view that in cases of sexual offences where corroboration is not required as a matter of practice, it is incumbent on the judge to direct the jury that it is not safe to convict on the uncorroborated testimony of the prosecutrix but that they may do so if they are satisfied of the truth of the testimony. If a direction on these lines is not given then any conviction recorded by the courts will be quashed by the Appeal Court."

being "capable of distinguishing between truth and untruth" "yes the last time means yes this time even though she is voicing no this time". "When a woman says no she means yes" and "she asked for it."[60] These various theories and the stiff provisions of the Evidence Act invariably discourage, rather than promote, the assertion of the rights (of woman's personal dignity) against unwarranted invasion by rapists. We must appreciate that it is the right of a woman to choose her sexual partner. It is also the right of the woman to decide when and when not to have carnal connection. The right should not be lost merely because she had connections with the accused or some other persons previously. Men have the corresponding duty to know when "no" means "no" and when "yes" means "yes".

Against this backdrop, we suggest that the provisions of Section 211 of the Evidence Act permitting the admissibility of evidence of bad moral character, should be done away with. We further suggest that the practice, (by the courts) of requiring corroboration in rape cases, should be jettisoned. We advocate that in all rape cases and sexually related offences, there must be absolute respect for the dignity of the person of women. Consequently "..... the vagaries of the law, should not make a woman of today submit to complete denial of her right to protect her body."[61]

Rape victims are wives, daughters, sisters and cousins of men. The emotional trauma of being raped is shared by men who are related to the rape victims. Respect for the victims of rape, is respect for womanhood and manhood alike. Disrespect for victims of rape is also disrespect for womanhood and manhood.

[60] For detailed analysis of these theories see Akande "Women and the Law" *Op. Cit.* 19, Oyajobi "Better protection of women and children under the law," p.20.

[61] Akande "Women and the Law," *Op. Cit.* p. 19.

Domestic violence– wife-beating

Assault and wife-beating are ready examples of domestic violence in Nigeria. It is noteworthy that assault aims at the preservation of the dignity of a person against unwanted invasion.[62] Not surprisingly, assault is a crime[63] as well as a civil wrong. The criminal and civil remedies for assault have proved to be insufficient to deter some men who assault their wives. Some men are known to have turned their wives into punching bags. These men visit their drunkenness, emotional and economic frustrations, on their wives. These unfortunate wives suffer minor and major injuries and, in some cases, death from the hands of such husbands. Of course, there are cases of mutual spouse battering.

Domestic violence has, therefore, generated some concern. The concern has been on the appropriate criminalisation policy to adopt, on wife beating. In other words, do we criminalise wife-beating? Or must we look beyond criminal process in resolving the problems of wife-beating? Justice Augie summarizes the divergent views on the problems of domestic violence thus:

> Two divergent views have however emerged as to the relevance of the criminal law is its management. The first is that criminal law is at best a blunt instrument and at worst totally inappropriate in the context of domestic violence. Those of this view favour an approach which focuses on conciliation or mediation; a model which is welfare oriented or therapeutic and seeks to avoid the intervention of the law enforcement process with its accompanying arrest prosecution and sentencing, the second view emphasizes that domestic assault notwithstanding that it takes place inside the family and occurs between those bound by ties of marriage or blood, is a crime and demands that it should be treated not differently from any other crime.[64]

Doubtlessly, wife beating is condemnable as exploitative and abusive of marital relationship. Men who beat their wives show disrespect for the dignity of such women. Such men fail to

[62] Section 252 and 253 Criminal Code

[63] Section 34, 1979 Constitution

[64] "Women's rights in Law and Practice: Social Welfare" Op. Cit p.263.

appreciate the warning of Lord Denning, that marriage is a partnership and as such, it does not create an autocracy with husband as the head.[65] Against this backdrop, Oyajobi supports the criminalisation of the offence of wife beating. She argues:

> A legislation specifically prohibiting spouse battery will emphasise legal and societal abhorrence for this kind of conduct and exploitative character. Further, its deterrence value should not be under-estimated.[66]

Admittedly, wife beating is highly condemnable. It is, however, difficult to agree with Oyajobi, that its criminalisation will deter wife beaters from continuing with their shameful acts. If the criminalisation of assault has not sufficiently deterred some men from assaulting their wives, it is doubtful if the purported offence of wife beating will deter such men. We must also bear in mind that in the selection of appropriate criminalistion option, the law-making process must opt for policies which reflect societal norms. Consequently, an act should only be criminalised, if it is beyond society's tolerable level. Unfortunately, in our society, wife beating is socially tolerable. Individuals and law enforcement practitioners (Police, Prosecutors and Judges) view domestic violence as purely within the exclusive domain of domestic relations. A policy of non-interference is, therefore, adopted by the society to wife beating. Akande rightly notes that:

> Jurisdictions which have made matrimonial violence criminal and provided compensation for injuries suffered have found that this is not a panacea for the ill. The Police are always reluctant to take action in domestic cases. They rationalise their reluctance in terms of sanctity of marriage. ... most of our women are not complete without a man. Therefore, it is unlikely that she will get support even from her own family unless and until the violence is patently unbearable even to the most unreasonable human beings.[67]

[65] *Dunn v Dunn* (1948) 2 All. ER 822.

[66] "Better protection for women and children under the law" Op. Cit. p.26.

[67] "Women and the Law" at p.18.

A related problem of the criminalisation of wife beating is the consequence of prosecution (of husbands for the offence) on the continued existence of such families. Prosecution for wife beating will definitely generate bad blood between the affected spouses. In most cases, wives who prosecute and sustain convictions of their husbands must be prepared to call it quit with such husbands. Such wives must, therefore, be ready to give their marriages befitting burials. The stigma of being the wife or the former wife of an ex-convict, as well as the children of the marriage, being described as children of ex-convicts, are factors, which will militate against the criminalisation of wife beating.

Consequently, we find it difficult to support Oyajobi on the criminalisation of wife beating. Our position should, however, not be construed as supporting wife beating. We, therefore, disagree with the provision of the penal code, which gives legitimacy to wife beating for correctional purposes. The penal code legitimizes wife beating thus:

> Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done ...by a husband for the purpose of correcting his wife, such husband or wife being subject to any native law or custom in which such correction is recognized as lawful.[68]

The above provision allows a husband to batter his wife under the guise of correction provided such beating is recognized under their native law and custom and provided also, that no grievous hurt[69] is inflicted thereby on the wife. The above provision of the penal code is definitely unconstitutional. A conflict exists between that provision and the constitutional right to dignity of the persons of affected women guaranteed under the constitution.[70]

Another reason why the provision of the penal code is invalid is the requirement that the customary law of the affected spouses, must accord recognition to wife beating for correctional

[68] Section 55

[69] Section 241(A) – (E) of the Penal Code enumerates various grievous hurt.

[70] Section 34 1979 Constitution

purposes. Admittedly, the Courts are enjoined to apply and enforce customary laws.[71] Nevertheless, the courts will not enforce customs which are repugnant to equity and good conscience or contrary to public policy.[72] Nothing can be more repugnant to good conscience and public policy than a custom which gives legitimacy to wife battering and which also promotes domestic violence.

Overall, the picture which emerges, on the controversy on domestic violence, is the need for caution in our criminalisation policies. A man who turns his wife to a punching bag, definitely has problems which the punitive sanctions of the criminal process can hardly resolve. A welfare, rather than legal approach, on the issue of wife battering is hereby suggested. We suggest that counselling centres should be established for this purpose. The centres should play conciliatory and mediatory roles with the aim at uniting the spouses.

Conclusion

A modest attempt has been made above to examine some (not all) of the rights to women under our municipal law. The issues examined reveal the existence of some gender sensitive constitutional and statutory provisions, aimed at correcting situational imbalances.

The right to freedom from discrimination on ground of sex and the restriction of victims of rape to women, are examples of our gender-sensitive laws. It has been shown, that some of our laws are gender-neutral as well. They ensure equal rights of men and women alike. The law of assault and the right to personal dignity guaranteed under the Constitution (applicable to men and women alike) are ready examples of gender neutral laws. The

[71] Section 41(1) Evidence Act

[72] Section 14(3) Evidence Act. See *Lewis v Bankole* (1908) 1 NLR p.81 *Ojewumi v Ogunbeian* (1990) 3 NWLR (pt 137) p 182; *Okonkwo v Okagbue* (1994) 9 NWLR (pt.368) p.301.

provisions of Chapter II of the Constitution, (despite the non-justiciable status) seek to promote "good government and welfare of all persons in our country on the principles of Freedom, Equity and Justice." Accordingly, equality of sexes, educational, political and social opportunities, are central issues under Chapter II of the Constitution.

Outside these common areas, some of our laws discriminate against spouses of non-monogamous marriages. The benefits of not being liable for conspiracy[73] or accessory after the fact[74] under the criminal code, are restricted to wives of monogamous Christian marriages.[75] Our rules of evidence also discriminate against wives of non-monogamous marriages by rendering them competent and compellable witnesses in criminal trials involving their husbands. The practice of law enforcement practitioners which disallows women from standing as sureties to persons granted bail, and the passport offices, insisting on letter of consent from the husbands of married women, before issuing them with passports, are some examples of discrimination suffered by women.

The picture which emerges from a careful analysis of municipal public law rights of women nevertheless reveals the existence, but non-enforcement, of women's rights. For example, since its introduction under the 1999 Constitution, the constitutional provision prohibiting discrimination on the ground of sex has not been invoked in any reported judicial decision. Yet, women suffer discrimination regularly. The problem is, therefore, primarily not that of non-existence of rights of women under municipal public law, but more of non-enforcement of these rights. Experience has shown, that majority of our women educated and non-educated alike, are unaware of their rights as

[73] Section 34 Criminal Code Cap. 77 Laws of the Federation 1990.

[74] Section 10 Criminal Code

[75] Section 1(1) Criminal Code

women. Since a person cannot enforce the unknown, most of these rights of women under municipal public law, fall into total disuse. Again, the few women who are aware of their rights, lack the financial capacities to assert their rights in our courts.

Against this backdrop, it becomes imperative for women wings of various professional bodies and non-governmental organizations to embark on massive enlightenment campaigns aimed at educating women on their rights. Where necessary, women centres should be opened for the purpose of properly counselling women on their rights. No nation should lay claim to meaningful development unless situational imbalances are seriously addressed. We cannot lose sight of the fact that "without progress in the situation of women there can be no true development. Human rights are not worthy of the name if they exclude the female half of Humanity. The struggle for women's equality is part of the struggle for a better world for human beings and all societies."[76] From the angle of Democracy, the right of women to vote and be voted for, are useful political weapons, which can be utilised by women to redress situational imbalances, and the gradual empowerment of women. Politics is obviously a game of numbers. If women are well organized in politics, they will be able to vote for those who will ensure the elimination of existing inequalities. The political, economic, educational and social goals set out in Chapter II of the Constitution though presently non-justiciable, are still realizable through the vigilance of women electorate. A government which ignores the provisions of Chapter II of the Constitution stands the risk of being voted out of office by vigilant women electorate. However, in order to fully realize their political rights, our women

[76] Boutros Ghali, United National Pamphlet "The United and Status of Women: Setting the Global Agenda:" D.P./1672/Woman – May 1995. Quoted in "4th Obafemi Awolowo Foundation Dialogue: Nigeria Democracy and the Rue of Law" (1996) p.339.

must properly organize themselves politically. They must speak with one voice. They must appreciate the strength in unity and the weakness in division. Overall, they must shake away the yoke of inferiority complex and constantly bear in mind the wise counsel of Hon Justice Oputa that:

> Our women have got to squeeze out of themselves any still lingering notion of inferiority or of weakness or of instability or of immaturity. They have to convince themselves that they are persons not things; that they are human beings deriving from the same humus, even as the men, that like any human being, they have human dignity and intrinsic worth; that it is because of this human intrinsic worth and dignity that certain inalienable, basic and fundamental rights, certain political and social rights, certain economic rights especially the right to development should attach to them as human beings and also as of right, not as of sufferance.[77]

[77] Keynote address to the 5th African Regional Conference of the International Federation of Women Lawyers (FIDA) quoted in Women in Law Op. cit. p.252.