

**THE IMPACT OF CUSTOMARY LAW ON  
WOMEN'S HUMAN RIGHTS IN NIGERIA: THE  
PERCEIVED AND ACTUAL SITUATION**

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**Abstract**

*The concept of women's human rights with particular reference to the idiosyncrasies and prejudices of customs and customary laws have been the focus of several debates and discussions by various scholars and authors. These debates have more often than not resulted in controversial positions that have painted African customs in a negative light by generalising that these customs are intrinsically and fundamentally opposed to and derogatory to women's rights thereby subtly placing customary laws, norms and values at logger heads with the western notions and concepts on the promotion of women's rights in Africa. The aim of this research was therefore to highlight some positive customary practices and the underlying factors portrayed by African customary law notwithstanding the perceived negativity. Furthermore, the research attempted to demystify and clarify the lopsided and somewhat prejudicial picture portrayed about the nature of African customs and its relationship with Women's rights that have up until now dominated western authors' discuss on women's rights in Africa. This research adopted a qualitative and doctrinal approach, with a review of existing literatures on women's human rights. The research also engaged in a critical analysis of the provisions of the various International, regional and National Instruments on the protection of women's human rights such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), African Charter on Human and Peoples' Rights (ACHPR) and Constitution of the Federal Republic of Nigeria, with particular focus on Reproductive and Sexual Rights and also women's rights to inheritance in Nigeria. An online cross sectional survey was conducted using social media research recruiting method to interrogate women's perception and experiences about the effect of customs and customary laws on their reproductive rights and inheritance rights within their families and society. The survey targeted about 1000 women but was only able to extract responses from less than 2.5 percent. This is because many Nigerian women were lethargic about discussing the circumstances behind the violation of their rights. These responses further corroborated the fact that despite the dynamic nature of customs, some customary laws have endured due to other cogent factors that are held dear by the people themselves. The research concluded that though the customs do have a patriarchal tilt, the true factors and intendment behind the customary law positions that seemed*

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*to violate the inheritance rights and reproductive rights of women, were more economic than they were chauvinistic. Acknowledging this is key to making significant progress with the protection of women's rights in Nigeria. The research therefore proposed a more positive and objective outlook that projects African customs and customary law as protective of women's rights within the context of relativism rather than as antagonistic and suppressive. There is a need for a home grown solution or approach to contextualising women's rights in order to effectively protect same in African societies.*

**Keywords:** African customs; Customary law; women's human rights; discriminatory practices; cultural relativism

### **Introduction**

It is an established fact that the family is central to the life of an African, as vital aspects of an individual's life such as marriage, citizenship, succession and property rights are hinged on the membership of the family. The definition of family in the African context is very wide and this allows its extension to a wider range of relationships that will be clearly outside the scope of Euro-African law of the family. Under African Customary law, the family can perpetuate itself as a corporation that can acquire rights and incur obligations just as a corporation would at common law. The growth of the African family is a result of polygamous marriage and the number of children borne by each wife forms the basis for succession to the family title. The administration of the African family is rests on the male children from each wife. Invariably, the privileges and rights that accrue to the average African woman depends on her ability to produce a male child. This has made the birth of a male child an event sought with ardent tears and desperation by most women. Traditionally, the woman is the natural, biological and emotional receptacle, nurturer and enabler of human life. This background is necessary in objectively analysing what the actual impact of customs have been on women's human rights. This paper begins by contextualizing the true definition of customary law. The paper also attempts to answer the question whether the reproductive role of women which are held in high regard themselves as already highlighted should be an avenue for jeopardy, discrimination and deprivation of their human rights due to the nuances of customary practices. There has been copious research about women's rights as it relates to culture. The works range from the theories of cultural relativism, to the claims that recognising women's rights is also tantamount to discrimination against men. The research goes on to reveal that there is a dearth of papers that emphasis on actual factors creating the patriarchal system that appears to subjugate women's human rights and to fill the gap.

Customary law in the twenty-first century has not escaped the definitional problem of law in general. There have been several attempts by scholars to define law either by using a rule-

centred conceptualisation or by adopting a social-behavioural viewpoint.<sup>1</sup> While the former is criticized for choosing to neglect the obvious fact that there are factors beyond the state's perception of law that regulate human behaviour; the latter is criticized for being too broad as to perceive all social practices as law.<sup>2</sup> As a general rule, people are predisposed to acting in culturally acceptable ways. Culture refers to the assumptions, meanings, ideas and practices that shape and are shaped by people's everyday interactions. In other words, such practices can be a source of strength or operation depending on the context.<sup>3</sup>

Notwithstanding the existing debate, customary practices can have the impact of law or be viewed as a central part of customary law when it creates a sense of duty that attracts pressure for conformity by those obliged. It is important to draw the line between customs and customary law especially because of the unwritten nature of customary law. This question therefore becomes important; what actually informs the sense of duty towards a custom? Is the pressure for birthing a male child, a mere custom or actual customary law? While there are no straight forward responses to these questions, we can however conclude that when a threatened deviation from a customary practice meets with pressure to conform or an actual deviation is seen as a violation to be accompanied by penalties, then the custom in question already has the weight of law and must be regarded as such.<sup>4</sup>

### **Are Customary laws 'living' or static?**

The notion of 'living' law was inspired and evolved from the work of scholars who realised the need to define customary law as what people believe they ought to do as opposed to focusing on the judicial interpretation of customary law.<sup>5</sup> This distinction and clarification is fundamental to the position of this paper because of the need to clarify concepts in the mind of readers as to what customary law actually is for the purpose of this research.

The concept of living law connotes that culture is dynamic and evolves as the society changes. However, does this 'livingness' attribute of customary law apply in circumstances that have prevailed over time such as the male primogeniture custom, for example?<sup>6</sup> The argument that the customs of people change over time has been flawed by the continuous existence and

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<sup>1</sup> C. D. Anthony, 'The Concept of Living Customary law: A Critique.' (2017) (49:2) *The Journal of Legal Pluralism and Unofficial Law*. 143-165. <doi:10.1080/07329113.2017.133130> accessed 21 September 2021

<sup>2</sup> B. Dupret, 'Legal pluralism, Plurality of laws, and Legal practices.' (2007) (1) *European Journal of Legal Studies* 1-26.

<sup>3</sup> D. Hodgson, *Introduction: Gender and Culture at the Limits of Rights* (UPP 2011)

<sup>4</sup> Fuller, 'Human interaction and the Law.' (1969) (14) *American Journal of Jurisprudence* 1-36.

<sup>5</sup> Harnnett, J, 'Chieftaincy and Legitimacy: An Anthropological study of Executive Law in Lesotho.' (1975) London; Routledge.

<sup>6</sup> This is one of the strongest criticisms of this 'livingness' notion.

persistence of certain belief systems over a period of time. This therefore makes it necessary to begin to identify and take as important, the consideration of other factors that prolong customary practices that have lingered over time. Particularly, those that hamper the enjoyment of women's human rights.

### **The Origin, Scope and Basis for some Customs and Customary Laws**

It is important to trace the source of what is regarded as African Customary Law. Is it just merely the African customs or colonial law? Under African Customary Law, a family can acquire rights and incur obligations just as a corporation would at Common Law<sup>7</sup> and the definition of family widely extends to a range of relationships that will be clearly outside the scope of Euro-American Law. As a result of the wide differences in the scope of what family is between the Western and African civilizations, the colonial law which formed the basis for statutes in Nigeria is suspected to have been perpetuating this agenda of women's relegation by allowing women to be chastised by their husbands 'where custom allows'. This is believed to be an attempt to feign deference to an African Custom of wife beating which did not exist.<sup>8</sup> To assume that Customary law is always necessarily froth with women-subjugating rules may be a major error. It may also indirectly be a way of validating a problem that does not exist. This study in principle therefore agrees with the fact that most of the modern laws which were made during the colonial era pretends to give women a better status under a statutory marriage. However, it ended up portraying a woman as weak and unintelligent.<sup>9</sup> In actual fact, professions were gender neutral in Africa as women could be priestesses, diviners and were the backbone of agriculture and trade<sup>10</sup>.

In Yoruba land of South West, Nigeria, women were in charge of the markets. It was highly organised usually in front of the palace under the leadership of the '*Yeyelaja*' (mother of the market) or the '*Iyalode*' (queen of ladies).<sup>11</sup> The question to ask therefore is; what exactly brought a drastic change to these customary patterns? It seems the answer is embedded in the dynamics of history featuring an imposition of foreign values through the colonial experience. Little wonder, that the colonial laws all over Africa made an indelible impact on these critical

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<sup>7</sup> A. Ibidapo-Obe, 'A Synthesis of African Law' (2005) Concept publications ISBN 978-8065-57-0

<sup>8</sup> Opcit

<sup>9</sup> Criminal code CAP 77 LFN 1990 s (33)

<sup>10</sup> B.A. Oni, 'Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The need for reforms' (2014) 2(19) IOSR-JHSS 30-43.

<sup>11</sup> Opcit

gender and family rights.

This however, is not to say that all that was introduced by foreigners were unprofitable. The encouragement of monogamy by colonial law could be seen as a validation of the natural law of creation as well as for the protection of women's reproductive rights<sup>12</sup>. Even African societies fully realise the dangers and disadvantages inherent in the institution of polygamous marriage. The Yorubas record this in their philosophical rendition (Ifa panagetic) where a verse reads as follows: <sup>13</sup>

It is only one wife that brings pleasure to man  
When there are two wives, they become rivals,  
When they increase to three, they destroy the wine,  
When they increase to four, they laugh each other to scorn,  
When they increase to five, they will accuse someone  
amongst them for monopolising their husband's property.  
When they increase to six, they become wicked people,  
When they become seven, they become witches.

From a foregoing, it is clear that though polygyny was an acceptable type of marriage according to Yoruba customary law, while the English marriage under the statute is monogamous, the Yoruba who customarily practiced polygyny were nonetheless aware of the challenges of that kind of marriage. This confirms that the monogamous marriage under the statutes is without the kind of challenges listed here and thus a better kind of marriage, It is however pointed out by this paper that in spite of this, polygyny has continued to be regarded as a recognised legal African matrimonial practice.

### **Women's Propriety Rights**

Land is one of the main sources of social and political power in most African communities. It lies at the heart of gender inequalities. This paper argues that women's rights to own property indiscriminately is another significant aspect that has been impacted by African customary law, howbeit for reasons a bit different from those popularly tabled. In actual fact, no known custom stops a woman that has the means, from acquiring property but a family property will not be allowed to be administered by a woman. The reasons are more political than discriminatory. Studies reveal that practices such as Levirate marriage and widow-inheritance have majorly lingered to preserve the sovereignty and perpetuity of the African family name<sup>14</sup>. The high

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<sup>12</sup>O. Olomola, 'An appraisal of polygyny and reproductive rights of women in Nigeria' (2012) 5(1) Journal of Law and Conflict resolution 6-15

<sup>13</sup>W. Abimbola, 'Sixteen Great Poems of Ifa' (1975) UNESCO

<sup>14</sup>P.I. Onekpe, 'Levirate Marriage and wife-inheritance: A comparative study' (Masters dissertation, Edo State University) 41-47

preference for male children as well as polygyny<sup>15</sup> is essentially linked to the need to expand the family and increase the labour force for economic and political power.<sup>16</sup> According to the Yoruba<sup>17</sup> custom, both male and female children inherit if the man dies intestate. The children and the wives have a right to live in the house but a widow that remarries loses this right.<sup>18</sup> The rationale for keeping the headship in the male child is that women, upon marriage, will have to perpetuate the name of the husband. Under African customary law, the main unit of land holding is through the family. For a person to be entitled to claim land, he or she has to be identified with the family. Section 20(4) of the Western Nigerian Customary Law provides that: ‘Where customary law applying to land prohibits, restricts or regulates the devolution on death to any particular class of persons of the right to occupy such land...this should be interpreted to mean that the intendment of any such customary law is not gender discrimination against a woman’s right to inherit out rightly but to preserve family property and keep it within the family.’

Acquiring wives (polygyny) was therefore invariably associated with increased productivity. Hence, the woman with more male children will attract more wives to the family unlike the female children that will be married off into other families. Having female children was somewhat regarded as an economic loss. Without prejudice to the aforesaid, civilization and the advent of mechanised farming renders this historic justification irrelevant. There are jurisdictions in Africa that have made efforts to protect women’s rights to own land, though not without some hiccups. These efforts have been coloured with the nuances of culture still. For example, in the Democratic Republic of Congo, The Code de la Famille (CDFL) provides rules on how property is to be divided in the absence of an oral or written will. The CDFL does not discriminate between male and female children. All qualifying persons according to the categories provided for in the code are entitled equally. However, if there are no heirs, the property reverts to the State but acquiring land by inheritance under customary law is a herculean task. A native proverb clearly explains the plight of women under customary law:

“Women inherit wrapper and clothing; men inherit fields”<sup>19</sup>.

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<sup>15</sup> Polygyny is a marital practice in which a man has more than one wife simultaneously.

<sup>16</sup> Olomola (n 11) 10

<sup>17</sup> The dominant tribe in South West Nigeria.

<sup>18</sup> B. A. Oni, ‘Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The need for Reforms’ (2014) 19(2) IOSR Journal of Humanities and Social Science 30-43 <<http://www.iosrjournals.org/iosr-jhss/papers/Vol19-issue2/Version-4/E019243043.pdf>> accessed 7 September, 2021

<sup>19</sup> M. Mulumeoderhwa, ‘Landless and ‘Childless’ in the Eastern DRC: High School students’ perceptions of Gendered Constitutional Rights’ (2019) 52(4) Law and Society Review 1026-1059.

Though the law provides baseline protection for women estranged by socio-economic status but it is usually undermined by the actual customary practice. While the law allows a widow to inherit in a legally registered marriage, the custom dictates that only men can. In cases where the woman is allowed, she is forbidden to sell.

In some parts of Bas Congo, a woman is not allowed to plant a tree on land as this could mean that she owns it. In South Kivu (Kalehe area), brothers are allowed to choose the better portions of land first while the sisters have the leftovers. Under no condition, is a woman allowed to sell without permission from the head of the family who is a male<sup>20</sup>. This corroborates the economic and political factors that are intertwined with property rights. Without ambiguity, the preference for a male child continues to linger even among tribes that allow women to inherit property without discrimination<sup>21</sup> It is obvious that customs have greatly influenced the overall behavioural patterns of adherents.. This will clearly be the case in the scenario gleaned from female participants in an earlier mentioned study, who initially were vehement in protesting against treating women as inferior when it comes to inheritance seem to blindly endorse the inequality when it comes to child custody. They claim that children belong to the husbands.<sup>22</sup> Though Congo women culturally hold on to their maiden names, the children bear the husbands' surnames. This could also be attributed as one of the reasons why despite the changing tides of the human rights campaign particularly with reference to women's rights, the preference for male children (just like the practice of polygyny) has persisted.

### **Male-Child Preference and Polygyny: Social Implications**

The issue of Gender preference is not limited to Africa but it exists and persists in many parts of the world including; South East Asia and the Middle East.<sup>23</sup> In a research conducted in China, the results of the survey revealed that expectant mothers experienced prenatal anxiety in families where there was a strong preference for sons.<sup>24</sup> It has also been observed and established that there is a link between customary pressure to have male children and the use sex selection technologies. The tradition of patrilineal inheritance in many societies coupled with a reliance on boys to provide economic support, to ensure security in old age and to

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<sup>20</sup> Syn and Paliku, 'Improving Women's Access to land In Eastern DRC: Challenges and Emerging opportunities' (2015) Learning from Emerging Practices. Report no: HS/14/15E, UNH Settlement Programme.

<sup>21</sup> Ibidapo-Obe (n8)163

<sup>22</sup> M. A. Kubeka, 'Exposure to violence at Home: A Qualitative exploration of Experiences and Perceptions of Black adolescents in South Africa' (2008) 39. South Africa Review of Sociology 282-300.

<sup>23</sup> T. Hesketh and ZW Xing, 'Abnormal sex ratios in human populations: Cause and Consequences' (2006) 103(36) Proceedings of the National Academy of the Sciences of the United States 13271-5

<sup>24</sup> Kek K. Loo and others, 'Prenatal anxiety associated with male child preference among expectant mothers@ 10-20 weeks of pregnancy in Xiangyun County, China.' (2010) International Journal of Gynaecology and Obstetrics.

perform death rites without doubt has placed greater value on sons than daughters.<sup>25</sup>

In addition, a general trend towards declining family size, occasionally fostered by stringent policies restricting the number of children people are allowed to have, is reinforcing a deeply rooted preference for male offspring. As a result, women are often under immense family and societal pressure to produce sons and failure to produce male offspring may lead to consequences that include violence, rejection by the marital family or even death. This leaves women with no choice but to continue becoming pregnant until a boy is born, thus putting their health and their life at risk. It is against the backdrop of this intense pressure from family members and broader social norms that women seek to discover the sex of a foetus and when it is not a male fetus, abortion becomes an option. Where abortion doesn't occur, women will have to bear the consequences of giving birth to an unwanted girl.<sup>26</sup> In situations where abortion is restricted for sex-selection purposes, terminating a pregnancy for this reason is likely to involve an unsafe procedure carrying high risks. Even where abortion is legal, as in India, some health-care providers have reacted to sex selection by denying access to abortion – resulting in women seeking clandestine abortions with elevated risks to their health.<sup>27</sup> The pressures to engage in sex selection in a gender discriminatory environment not only directly affect women's reproductive decisions (with implications for their health and survival) they also put women in a position where they must perpetuate the lower status of girls through son preference.<sup>28</sup>

Without prejudice to the already described customary factors that have set the stage for the precarious situation that most women have found themselves, the male child preference has several consequences and the effects on the survival of the girl child. This can be seen even in the nutritional status and physical development of both sexes, the contraceptive practices in relation to sex composition of children in the family, as well as discriminate access to health and educational facilities.<sup>29</sup> Findings in a particular study further suggests that women in societies with birth restriction policies indirectly experience greater anxiety. Sociocultural

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<sup>25</sup> Preventing gender-biased sex selection: an interagency statement OHCHR, UNFPA, UNICEF, UN Women and WHO 2011, ISBN 978 92 4 150146 0.

<[http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460\\_eng.pdf;jsessionid=A4117DDC04C7F688DE1969FA8A0A41BC?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460_eng.pdf;jsessionid=A4117DDC04C7F688DE1969FA8A0A41BC?sequence=1). >accessed 14 October 2021.

<sup>26</sup> *ibid*

<sup>27</sup> Gita Sen, 'Gender biased sex selection. Key issues for action' (2009)

<sup>28</sup> WHO, 'Preventing gender-biased sex selection: an interagency statement' (2011) OHCHR, UNFPA, UNICEF, UN Women and WHO ISBN 978 92 4 150146 0.

<[http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460\\_eng.pdf;jsessionid=A4117DDC04C7F688DE1969FA8A0A41BC?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460_eng.pdf;jsessionid=A4117DDC04C7F688DE1969FA8A0A41BC?sequence=1). >accessed 14 October 2021.

<sup>29</sup> R.P. Pande, 'Selective gender differences in childhood nutrition and immunization in rural India, the Role of siblings. Demography' (2003) 40(3) 395-418



policies are believed to mitigate these anxieties, if well investigated<sup>30</sup>. According to some religious beliefs, it is a woman's responsibility to have a male heir and the ability to achieve this confers a status on her in the community and society<sup>31</sup>. According to the study conducted on adolescents, parents with only female children were more likely to have additional children with the aim of getting a male heir. Male children therefore perceive their counterparts as inferior while they receive special attention. Ironically, the absence of a male child expected to perpetuate the lineage usually makes infidelity (which would have otherwise been unacceptable) to be acceptable.<sup>32</sup> The foregoing therefore provides the justification for investigating African customary laws and the contributory factors, particularly to decipher the impact of customary law on women's human rights using Nigeria as a case study.

### **Implications for Women's Sexual and Reproductive Rights Law.**

Sexuality is a human phenomenon which can be experienced and demonstrated in thoughts, desires, attitudes, moral persuasions, values, behavioural patterns and relationship roles. However, not everyone gets to experience or express their sexuality in all these dimensions. Customs and traditions have a direct impact on the sexuality of human beings. Hence, the need for Sexual rights.<sup>33</sup> Sexuality and by consequence, reproductive rights are influenced by physiological, legal, cultural, ethical and spiritual factors.<sup>34</sup> Reproductive rights were not newly created rights but rather a constellation of rights that have been distilled from existing human rights documents<sup>35</sup> Reproductive health related problems are responsible for about one-third of the disease burden of women. While mortality rate of mothers is a major cause of morbidity among women of reproductive age in Nigeria; Nigeria maternal death rate is second highest in the world after India. Even though there are no reliable statistical reports on maternal death rate in Nigeria, Nigeria records yearly, 1.5 million women in agony of morbidity while an estimated 515,000 women die yearly from complications that are related to pregnancy and childbirth. This is calculated to be at a rate that is short of one death every minute.<sup>36</sup> Reproductive Health

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<sup>30</sup> Loo and others (n 14)

<sup>31</sup> Zaidi, S and others, 'Sexual rights and gender roles in religious context.' (2009) 106(2) Intl. Journal of Gynaecology and Obstetrics 151-5

<sup>32</sup> M. A. Kubeka, 'Exposure to violence at Home: A Qualitative exploration of Experiences and Perceptions of Black adolescents in South Africa' (2008) 39. South Africa Review of Sociology 282-300.

<sup>33</sup> Olomola (n 11)

<sup>34</sup> WHO 1995

<sup>35</sup> Transforming Health Systems, 'Gender Rights in reproductive health: A training curriculum for health programme managers' (2000)

<sup>36</sup> R. J. Cook and others, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*. (New York: Clarendon Press 2003)

Rights is a cocktail of and is related to multiple Human rights namely: Right to Life, Right to be free from torture, Right to Health, Right to Privacy, Right to Education and Right to Prohibition of Discrimination among others. One of the violations of these rights is when a woman is forced or compelled to have repeated pregnancies too closely together.

The legal basis for the above listed rights well entrenched in both international and domestic human rights instruments. For example, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Article 16, provides for the elimination of discrimination against women in matters relating to marriage and family relations. It had a clause on reproductive rights whose exercise is linked to the survival rights of both women and children. This article provides that men and women on the basis of equality must be able to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to ensure they can exercise these rights.

Also, in 1994, more than 180 States adopted the United Nations International Conference and Population Development (ICPD) definition of reproductive rights, recognizing that:<sup>37</sup>

‘...reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.’

Polygyny, a related consequence of male-child preference is a practice that violates a woman’s sexual and reproductive rights. Women in such unions do not have the choice to decide freely on the number and spacing of children because of the underlying pressure to give birth to a male heir. A woman in such marital practice (especially if she is the first wife), is lonely and usually deprived of frequent sexual enjoyment because she has to share her husband with other women.<sup>38</sup> Such women are at risk of sexually transmitted diseases because of the husband’s multiple partners. Reproductive health is thus an area of health in which inequity is very striking.

Three major reasons for Polygyny were highlighted to be as follows:

1. It was a means of demonstrating economic prowess and a status symbol

<sup>37</sup> United Nations, Programme of Action of the International Conference on Population and Development. New York, United Nations. 1994

<sup>38</sup> R. Posner, ‘*The History of Sexuality from the Perspective of Economics*’ (Harvard University Press 1992) <<https://doi.org/10.2307/j.ctvjhzq7t.9>> accessed 2 September 2021.

2. To heighten economic productivity as a result of increased manpower from wives and children
3. For sexual fulfilment as sexual intercourse was forbidden and regarded as a taboo during the pregnancy of a wife as well as postpartum.<sup>39</sup>

Other factors have been identified to include; the desire for a male heir, death of males due to war and male infanticide. Notwithstanding the aforementioned factors, Polygyny or preference for a male child as a result of any of these factors, hampers and violates a woman's sexual and reproductive right as she does not have a choice to decide freely on the number and spacing of her children without anxiety, emotional pressure, discrimination or violence, no matter how subtle.

### **Examining the Legal Framework in Nigeria: International Covenants and Constitutional Provisions**

The position of the Nigerian constitution is unambiguous regarding discrimination.<sup>40</sup> The issue of discrimination is a constitutional matter and no provision of law is allowed to violate this right to freedom from discrimination even in a state of emergency, in the interest of defence, public safety, public order morality or public health, or even for the purpose of protecting the rights and freedom of other persons. This shows that the right to freedom from discrimination is a first-class fundamental right and must not be derogated from unlike other constitutional rights which are subject to certain clauses as stated in the Nigerian constitution. The clauses spell out the circumstances under which a law may derogate from some other fundamental rights<sup>41</sup>

### **Convention on the Elimination of all kinds of Discrimination Against Women (CEDAW).**

The CEDAW is the only human rights treaty that affirms the reproductive rights of women and identifies that culture and tradition are the major influential forces that shape gender roles and family relations.<sup>42</sup> Nigeria ratified CEDAW in 1985 and ratified the Optional Protocol in 2004. There is the need to also domesticate the already ratified international instruments like CEDAW. While some states have implemented some special laws such as Violence Against

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<sup>39</sup> A. R. Radcliffe-Brown and F. Daryll, *'African System of Kinship and Marriage'* (Oxford University Press London 1960) 89,1120

<sup>40</sup> CFRN 1999(as amended) s 42(1)

<sup>41</sup> CFRN 1999(as amended) s 45(1)

<sup>42</sup> United Nations <<https://www.un.org>> accessed 21 September 2021

Persons Prohibition Act 2015 (VAPP), uniform adoption and implementation of a National Reproductive Health Law will be of great benefit<sup>43</sup>. Though the situation has improved from what it used to be; most Nigerian women are still informal sector workers with little access to credit, technology or other support required to build capital.<sup>44</sup> State parties have been enjoined by the instrument to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular ensure on a basis of equality of men and women decide freely and responsibility in the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.<sup>45</sup> While state parties cannot influence successfully the African definition of roles in a family which we have seen to be mostly an organisational issue based on politics and economy; state parties can however fulfil this obligation by deliberately allowing women to have access to economic resources to improve their trade and industry. This will indirectly ameliorate the economic factors that may strengthen certain patriarchal concepts that limit the inheritance rights of women in some climes.

### **Understanding the African Charter on Human and Peoples' Rights (ACHPR)**

The Maputo Protocol<sup>46</sup> obligates<sup>47</sup> state parties to enact appropriate legislation to ensure that women and men enjoy the same rights in marriage and to ownership of property. In case of separation, divorce, annulment of marriage, women and men shall have the right to equitable sharing of joint property deriving from the marriage. Part of the discrimination based on sex facing women becomes obvious in the event of annulment or separation. This is because women's contributions to marriage are usually seen as 'non-monetary'. Such contributions made during the subsistence of the marriage through non-remunerated efforts and unpaid care work includes works like minor child care, home keeping, cultivation and improvement of land. These are often difficult to assign economic value. This can result in gross discrimination against the woman who usually in many parts of Africa has used her resources for the upkeep of the family and maintaining the home while men use theirs for acquisition of property.<sup>48</sup>

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<sup>43</sup> O. Olomola, 'Adoption of Convention on the Elimination of all kinds of Discrimination (CEDAW) and women's rights in Nigeria: A wild goose chase?' (2008) (2) African Journal for the Psychological Study of Social 92-104. <<https://www.ajol.info/index.php/ajpssi/issue/view/4733>> accessed 21 September 2021

<sup>44</sup> Aloamaka and others, 'The Prospects of Reproductive Health Rights protection in Nigeria' (2019) 12(2) 65-78

<sup>45</sup> Article 16 of CEDAW.

<sup>46</sup> This is complimentary to the ACHPR as it protects more comprehensively the equal rights of African women in marriage and in owning property.

<sup>47</sup> Article 7 of the Maputo Protocol

<sup>48</sup> General Comment No 6. on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted at the 27<sup>th</sup> Extra Ordinary Session of ACHPR held in Banjul, Gambia

Nigeria, by the enactment of the African Charter on Human and Peoples rights (Ratification and Enforcement) Act,<sup>49</sup> has given effect to the adoption of the provisions of the ACHPR. Thus, the provisions of the ACHPR have the force of law in Nigeria and are to be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria. The Heads of member states of Organisation of African Unity (OAU) agreed to the articles of the ACHPR because of the consciousness of their obligation to achieve total liberation of Africa and undertaking, to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.<sup>50</sup>

### **Effect of Customary law on the human rights of Married women in Southern Nigeria**

Having examined law and practice, there is a need to investigate the perceptions of women in South-West, Nigeria.

#### **Geographical context**

The fieldwork was carried out majorly by conducting online interviews and distributing interview google forms to over 1000 women on social media between the ages of 26 to 70 years. This method was chosen so as to get unbiased and impersonal responses from women who feel safe and unknown because of the sensitive nature of the questions.

In terms of sampling, the method was chosen for a wider and faster investigation. However, only 1 out of every 100 approached were willing to discuss such a topic which apparently and altogether buttresses the fact that the expectation of society regarding the birth of a male heir, poses such a great burden on women. Nonetheless, the study records ninety-one percent success in terms of testimonies that confirm that customary law has hampered the selected women's right to enjoy family life, reproductive self-determination and freedom from gender-based discrimination. In other words, this challenge, though can be seen as a limitation to the study, buttresses the fact that there is stigma associated with the inability to birth a male child in Africa even till date.

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on 19 February to March 2020 < <https://www.achpr.org/legalinstruments/detail?id=75>> accessed 16 September 2021

<sup>49</sup> CAP A9, LFN 2004

<sup>50</sup>ACHPR<<https://www.lawyard.ng/wp-content/uploads/2015/11/AFRICAN-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS>> accessed 16 September 2021

### **Method and Data Collection**

A qualitative research methodology was employed to weigh the impact of customs and customary law on some specific aspects of women's human rights. The online investigations were targeted at women who had experienced marital, societal and peer pressure and have been deprived of certain rights due to the absence of a male child.

The following specific questions were asked and the responses given are recorded accordingly.

1. What customary practice do you consider the most derogatory to women in your place?
2. What are the things that a woman without a male child cannot benefit from or participate in, in your place?
3. What importance is attached to the birth of a male child according to your custom?
4. Can a woman become a traditional ruler in your town?
5. What suffered the most when you were unable to bear a male child?
6. Do you think you would have enjoyed your family life better if this custom was not there?
7. Who mounted the greatest pressure on you?
8. Do you think you are responsible for not having a male child?
9. Were you made to feel responsible for not having a male child?
10. Do you know any other woman who experienced pressure in this area?

### **Summary of findings**

The responses given by the women who volunteered to share their experiences were diverse, personal and real. However, they cut across the following themes; preference for a male heir, disruption of cordial family and spousal relations, marital anxiety, discrimination, deprivation of rights to land ownership or family title. In responding to Question 1 on the customary practice they considered most derogatory, 20% of the respondents mentioned harmful widowhood practices while 50% mentioned preference for a male child and resultant gender discrimination. In response to the question on what benefits were forfeited by a woman without a male child, 65% of the women mentioned deprivation of inheritance and political rights while 30% highlighted loss of cordial relationship with husband and in-laws. As to whether a woman could become the traditional woman in the respondents' communities, it was 100% in the negative.

In response to the question on the importance attached to the birth of a male child, a woman said: ‘A lot... that it makes having a female child feel like a failure.’ Another respondent said: ‘They are seen as the carriers of the family name and promoters of the next generation.’ The negative impact of such a discriminatory customary rule as male child preference is very grievous and directly violates women’s human rights in very harmful ways. The gravity of violation is far reaching and this can be clearly deduced from the responses of the following female respondents most of whom were above 50 years of age. An elderly woman recounted regretfully: ‘My sister in-laws never missed a chance to point out the fact that I had no male offspring in the most derogatory manner even though I birthed a male stillbirth.’ Another respondent said: ‘In my own case, I have four females and for this my husband abandoned and maltreated me to the extent of wishing me dead’. A very open respondent confessed: ‘I was mostly occupied with "wishes of having" a male child. That almost became my ultimate prayer request... couldn't really think of anything less.’ A middle-aged respondent said sorrowfully: ‘My spouse blames me for not being able to produce a male child, so he has decided to take another wife.’ These are a cross section of the heart -wrenching experiences shared by the respondents on the field during this study. Most women considered their plight as unfortunate and some were still hopeful about bearing a male child. As such they did not want to be categorised with those having such an experience.

### **Recommendations and Conclusion**

From the findings which corroborates the position of this paper, preference for a male child remains till date among the Yorubas irrespective of civilization and increased awareness of women’s human rights. This paper recommends that states and local government councils must engage in dialogue to remind Nigerians of the historic regard and honour for women which is our true cultural heritage. It is also recommended that there is a need for investigation into the customs that emanate from religious circles. This kind is usually the most difficult to combat. Marital counsel from these circles have usually become a strong source of the dogma and beliefs that promote or pressurize persons into conformity with social expectations to the extent that some even begin to acquiesce to the violation of their own rights so as to be recognised as ‘faithfuls’<sup>51</sup>. This can be achieved by adopting the Human Rights Defenders approach. One of the primary ways the Human Rights Defenders (HRDs) have been able to navigate the negative

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<sup>51</sup> I. Olude, and T. Ife-Folabi, ‘Acquiescence to Domestic Violence in Matrimonial Setting and the Effect on Women’s Mental Health’ (2020) *Elizade University Law Journal* 3:225. ISSN:2636-23555

impact of societal expectations on the roles of women, particularly in African patriarchal societies, is by using male HRDs in negotiations and lobbying. This helps them to penetrate the male-dominated legislature, communities and religious institutions. This is recommended as it supports the position of this paper that customary practices are embedded not in customary law as we are made to believe but, in the mind-sets, and paradigms that are grounded in patriarchal hegemony, which form the structural set up of the African family and societal institutions<sup>52</sup>.

As mentioned earlier, economic factors play a role in the establishment of most cultural practices as it is believed in most cases in African communities, that a man who pays his wife's bride price is entitled to custody of the children. The overall effect of such discriminatory practices and attitudes is that women ultimately end up neither inheriting from their father nor their husband's estate for the same discriminatory reasons. Customary law, if and when it is allowed to reflect the changing needs of society and the true values of the people; will cease to be 'a cloak of excuse to hide under' as the basis for practices that violate women's rights. Customary law in the real sense of it is a reflection of the norms of a people and it is usually an interesting milieu of political, economic and socio-cultural interests of the family unit which is a significant cell in any African society. A lasting solution will be to address these underlying interests at the state level and enforce using the men as the HRD after sufficient orientation and education has been provided at the level of the family units.

Also, on the issue of sex selection technologies in modern times as an escape route for women pressured by customs, there a need for the government in various nations (and in Nigeria) where women are affected by this cultural stigma to set limits to restrict the use of sex selection technologies that lead to the choice of abortion with punishment except in cases where it is medically recommended. This has already been in force in five Asian and South Asian countries over the past three decades. These restrictions have included laws that prohibit determination and disclosure of the sex of the foetus (except on medical grounds), those that prohibit abortion for sex-selection purposes and those that prohibit any advertising relating to prenatal sex determination. Such laws are associated with punishments such as fines and/ or imprisonment for anyone contravening them.<sup>53</sup>

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<sup>52</sup> N. Okino, 'They were Supposed to Protect Us: Analysing Patriarchy and the Work of Human Rights Defenders in Nigeria' (2021) 2 York Law Review 215.

<sup>53</sup> WHO, 'Preventing gender-biased sex selection: an interagency statement' (2011) OHCHR, UNFPA, UNICEF, UN Women and WHO ISBN 978 92 4 150146 0.

[http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460\\_eng.pdf;jsessionid=A4117DDC04C7F688DE1969FA8A0A41BC?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460_eng.pdf;jsessionid=A4117DDC04C7F688DE1969FA8A0A41BC?sequence=1). >accessed 14 October 2021.



Furthermore, laws and policies are important tools for providing State support for women's rights and the achievement of gender equality. Countries should develop and promote legal frameworks and socioeconomic policies that will sustain gender equity and equality, and in particular encourage active participation of the female gender in the civil society. Finally, it must be established that neither women nor men have the power to determine the sex of a child ultimately. Although, it is a biologically established fact that the chromosome X or Y that determines the sex of a child is from the man as women only have the X chromosome. Biologically, the table turns in favour of the female gender disproving the supposed customary belief that a woman is solely responsible for the sex of a child. This biological fact however is not to place the onus of sex determination on a man, as that would equally be unfair. Deliberate education of men and women is fundamentally required for lasting reformation of those who propagate discriminatory beliefs especially in climes where women are stigmatized for not having male children.

In conclusion, it is clear that compelling adherence to any law or a human right without regards to cultural predicates may be an exercise in futility. Rights can be effectively protected when factors that created room for acceptance of the former practices, are understood and resolved headlong. Otherwise, those who are the perceived victims may not be willing to give evidence in court.