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ABORTION POLITICS WITHIN THE DISCOURSE OF RIGHTS CLAIMS AND RIGHT TO HEALTH: MATERNAL REPRODUCTIVE HEALTH AS KEY TO DEVELOPMENT

BY

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ABORTION POLITICS WITHIN THE DISCOURSE OF RIGHTS CLAIMS

ABSTRACT

The rhetoric of rights claims is important in situations where specific rights belonging to individuals are threatened or contested. This is especially true in the abortion politics. Thus in contemporary rights analysis, a right to abortion is sometimes viewed negatively in that it is seen as asserting a right for selfish individualism. It is argued that right to bodily and decisional autonomy is a woman's fundamental right. A 'woman's right to choose' is premised on reproductive freedom and should therefore be respected as a right to which a woman can lay a claim.

INTROUCTION

This article looks briefly at abortion politics within the discourse of rights claims. It discusses and analyses the problems associated with feminists' view of rights claim to abortion within the context of abortion access. It is argued that a right claim is still the best way to articulate women's right to choose abortion in that the shift now is to a more comprehensive rights to reproductive freedom in family planning which invariably must and should include abortion access. However, the individual rights to reproductive freedom are not discussed. First, the term abortion is defined and explained from both medical and legal perspectives. Second, the concept of rights is analysed within the context of the rights to abortion discourse.Thus abortion access is looked at here, from the perspective of legal right(s) within family planning.

ABORTION

It is pertinent,at this point, to outline the medical and legal definitions of abortion, for a clearer understanding of the term.It should however, be noted that the term abortion has been interpreted in different ways and it has been said that such changes in terminology mark stages in the evolution of therapeutic abortion[1]. Within medicine as a discipline, there was no precise or uniform definition of the term abortion, before the twentieth century, but generally speaking, abortion refers to the expulsion of the products of the uterus before six months or seven months of gestation, and it is regarded as an untimely event[2]. Technically, the word miscarriage to some medical practitioners could be taken to mean the expulsion of the gravid uterus in the second trimester. In legal and technical language, abortion refers to the expulsion of the foetus anytime during pregnancy, and it is regarded as synonymous with the terms miscarriage and premature labour[3]. In the case of R(on the application of Smeaton) v *Secretary of State for Health*[4] *Mumby J,* gave the current meaning of the word 'miscarriage'. He said: "miscarriage is the termination of a post-implantation pregnancy. Current medical-and

1 Petersen K, Abortion Regimes, (Ashgate: Dartmouth Publishing Company Limited, 1993) p.4
2 Ibid.
3 Ibid. p.5 ; Curzon L. Dictionary of Law second edition, (London: Macdonald and Evans Ltd, 1993) p.248
4 [2002] Criminal Law Review 664

indeed, I would add, current lay and popular – understanding of what is meant by 'miscarriage'plainly excludes results brought about by IUDS, the pill, the mini-pill and the morning-after pill".[5] Therefore to date, the choice of definition is a matter that is best left for whichever reasonable argument is adoptedfor a particular purpose because of what is now known as selective reduction of multiple pregnancies[6]. This procedure goes contrary to the usual way therapeutic abortion is performed, in that, the destroyed foetus is usually absorbed in the woman's body[7]. The term 'abortion' denotes an intentional interruption of pregnancy by removal of the embryo from the womb[8]. Abortion is medically defined as a pregnancy:'expelled or extracted before the 28th completed week of gestation'.[9] Abortion is also defined as a 'separation of a non-viable human foetus from its mother'[10]. It is also defined as the 'ending of a pregnancy before its natural term'.[11] As a crime of child destruction, intentionally destroying the foetus is the legal meaning of abortion.[12] As Price explains, 'it is the causing of foetal death which is the essence of the crime of abortion and not simply the expulsion of the foetus from the mother'.[13] According to the World Health Organisation (WHO), an 'abortion is the discontinuance of a pregnancy before the attainment of viability. It can occur naturally spontaneous abortion because a foetus does not develop or because the mother has an injury or disorder, which prevents her from carrying the pregnancy to term. This type of abortion is called miscarriage'.[14] Abortion can also be induced, either because the pregnancy is unwanted or because it presents a risk to the mother's health. However, given that abortion procedure is a technical operation, the circumstances under which an induced abortion is performed will make the abortion either safe or unsafe. The World Health Organisation (WHO) defines unsafe abortion as 'terminating an unwanted pregnancy by

5 Ibid.
6 See Morgan D, and Lee R, Blackstone's Guide to the Human Fertilisation and Embryology Act 1990, (London: Blackstone Press Limited, 1999) p.57
7 Ibid.
8 Weinberg D, Family planning and the Law, (New York: Oceana Publications, 1979) p.1
9 Adi I, 'The Question of Abortion', (1982) Nigerian Current Law Review p.195
10 Curzon L, Dictionary of Law, Second edition, (London: Macdonald and Evans Ltd. 1993) p.248
11 Curzon L, Dictionary of Law, Fourth edition, (London: Bloomsbury publishing Ltd, 2004) p.2
12 Price D, 'Selective Reduction and Feticide: The Parameters of Abortion', [1998] Criminal Review 199.
13 Ibid p.200
14 The punch Monday June 25, 2001 p.43

persons lacking necessary skills or knowledge or in an environment lacking the medical standards or both'.[15] The term abortion actually refers to any premature expulsion of a human foetus, whether naturally or spontaneously, as in miscarriage, or artificially induced as in surgical or chemical abortion.[16] Today, where the term abortion is used, it is usually taken to mean as automatically referring to induced abortion.[17] Induced abortion is regarded as the deliberate interference with pregnancy, either by the pregnant woman herself or by a person with the intention of terminating it.[18] Therefore, this could be legal or illegal, and also, depending upon the laws of the country where this happens, it can serve as evidence upon which a state could base its demographic policies, or women's rights. [19] In the next section, the discussion and analysis will be centred on the concept of rights within the context of the rights to choose abortion political discourse.

UNDERSTANDING ABORTION POLITICS WITHIN THE RIGHT TO CHOOSE

In this section, some of the problems associated with the feminists' articulations of rights claims for abortion access will be examined. As we will see, most times making rights claims does not necessarily mean that it would produce gendered public/private dichotomy. Although it has been contended and criticised that basing choice advocacy and rights claims for reproductive freedom as serving not so much useful purpose for women's reproductive freedom with regard to abortion provision and the politics surrounding it, the rights theory is still the basic and purposeful platform upon which the writer considers one could advocate a feminist agenda for reproductive freedom.

There are two senses within which a person can be said to have a right.[20] It is therefore pertinent at this point to distinguish between the two senses. The first sense in which a person is understood to have a right is

15 Ibid.
16 Muhammad Y. Legalisation of Abortion: Another view, (Lagos: De sage Nigeria Limited, 2001) p.1
17 Ibid.
18 Ibid.
19 Ibid.
20 Eekelaar J. Family Law and Personal Life. (Oxford: Oxford University Press, 2007) p.134

premised upon contemporary moral principles accepted to be of universal value, and it is functional in societies or the whole world. This right is understood by Eekelaar as a right in the weak sense.[21] The other sense whereby a person could be said to have a right has to do with social context. In cases like these, the right is recognised throughsocial or institutional mechanisms and again Eekelar understands this to be right in the strong sense.[22]

According to Eekelaar:
When someone claims to have a right, they are either claiming that the context of the right is socially recognised (and this recognition should be marched by action) or that it should be socially recognised (and acted on). Someone claiming a right is unlikely to be concerned only to state a moral position: the whole point is to bring about social action. These kinds of references are to rights in the strong sense. [23]

Therefore there is the need for us to understand the questions as what needs to be recognised or claimed in the case of rights. To these questions a clearer answer widely accepted has been provided by Raz thus:
Rights themselves are grounds for holding others to be duty bound to protect or promote certain interests of the right holder [24]

Therefore the reasons or the grounds upon which duties are imposed are what constitute the right in contrast to the state of affairs upon which the claimants seek to achieve or abstentions of others which have been designed to achieve or protect that interest. [25] Furthermore, 'if talking about people having rights is to have any force at all, we must believe they have a right to be freed from operation and to achieve competence as far as possible so that they can comprehend and articulate their own self-interest.' [26] 'This is consistent with Hart's argument which is to the effect that where special rights as well as general rights are recognised, it means to say that

21 Ibid.
22 Ibid.
23 Ibid. p. 135

24 Raz J. The Morality of Freedom, (Oxford: Clarendon press, 1986) p.44
25 Eekelaar J, Family Law and Personal Life. (Oxford: Oxford University Press, 2007) p.135
26 Ibid. p. 137

equal rights of all men to be free is recognised .[27]

A claim to a right in essence means a claim to a distribution of power as a matter of entitlement. However, the claim should have the capability of being supported by reasons that bear justification. The claim therefore in essence entails a moral system just in the same way that Hart showed that claims to legal rights presuppose the existence of a legal system.[28] However it should be noted that the rights that are claimed do not constitute morality. Thus 'the strength of right-claim is that, they focus on fact situations which apply, interpret and, most often, extend the application of moral principles through the extension of duties'.[29] Nevertheless, the above assertion can be strongly contested but the resultant effect is that it allows for the expansion of the scope of obligations.Thus according to Donnelly,[30] this explains the reason why the rhetoric of rights seems to be mostly important in situations whereby the right is threatened or contested. In addition to the above reason for justification, there is also a second element regarding the issue of justification and it is referred to as the social base for the right. Thus according to Eekelaar,[31] if individuals lay claim to the fact that they are morally entitled to a specific end-state, then in this light he sees them as people who are committed to uphold that any other person going through a similar experience as theirs will be entitled to it as well. Therefore, "the social position will be characterised either by some social category, event, condition, or activity with which the claimant identifies and which also forms the ground upon which the claim is based".[32] Consequently, the implication of this appears to be neglected in contemporary rights analysis and as a result of this neglect, it has led to a situation whereby rights discourse is seen negatively in that it is regarded as selfish individualism.[33]

Generally, discussions with regard to rights claims (other than human

27 Hart L, Essays in Jurisprudence and the Philosophy, (Oxford: Oxford University Press, 1983).
See also Waldren J, Theories of Rights, (Oxford: Oxford University Press, 1989) chapter 6. p.90 for an examination of a wider concept of rights.

28 Ibid.

29 Eekelaar I, Family Law and Personal Life, (Oxford: Oxford University Press, 2007) p.138

30 Donnelly J, Universal Human Rights in Law and Practice, (Oxford: Cornell University Press, 1989).

31 Eekelaar I, Family Law and Personal Life, (Oxford: Oxford University Press, 2007) p.138

32 Ibid.

33 John L, 'Beyond Rights', (2003) 23 Oxford Journal of Legal Studies p.265

rights) are more commonly associated with assertions of sectional interests. A typical example of this is the woman's right to choose abortion.[34] Consequent upon this, feminists' arguments in support of abortion rights have created room for diverse debates over whether these rights are sufficient to be regarded as grounds to remedy inequality and injustice. For instance, Kingdom[35] has questioned the political and moral desirability of framing disputes in terms of competing individual rights. In particular, Kingdom sees it as unhelpful to place issues of reproduction in rights framework because rights arguments always produce counter claims to competing rights, and therefore may notserve women's interests. Thus, according to her, individual rights based on freedom of choice are problematic in a society where material and social conditions make choice an unrealistic option.[36] Furthermore, Himmelweit has argued that 'we need to reconceptualise pregnancy as a period when women are actually actively nurturing the foetus. This challenges the idea that the foetus and the mother are simply separate entities which the rights argument does so much to sustain'.[37] According to Diduck and Kagamas[38] the notions of individual rights cannot be used at all or in the alternative these must be reformulated in a radical way when the questions of pregnancy and child birth are raised. However, Smart argues and rightly so that because of the prevailing political climate, it makes it difficult for rights arguments to be abandoned, and until this political climate changes, women must of necessity still resort to rights claims.[39]

The use of the term 'choice' is also seen as one of the reasons why these pressures have been raised with regard to the right to abortion. The term 'choice', when looked at critically and legally tends to portray privacy and autonomy. On its political value, Petchesky[40] defines choice as 'a woman's right to control her own body... has to do with bodily and decisional

34 Eekelaar J, op.cit. p.139

35 Kingdom E, What is Wrong with Rights (Edinburgh: Edinburgh University Press, 1994)

36 Ibid

37 Himmelweit S, 'More than a Woman's Right to Choose', (1988) 29 Feminist Review pp 38-56.

38 Diduck A, and Kagamas F, Family Law, Gender and the State, Text Cases and Materials, 2nd edition, (Oxford: Hart publishing, 2006) p.74

39 Smart C, Feminism and the Power of the Law, (London: Routledge, 1989) pp. 158-59

40 Petchesky R, Abortionand Woman's Choice The State, Sexuality and Reproductive Freedom, (London: Verso, 1986) p.7 see also Luker K, Abortion and the politics of Motherhood, (Berkely: University of California Press, 1984).

autonomy but its use should be limited in the sense that this lets men and society neatly off the hook.'[41] According to Davies[42] and Himmelweit[43], too much emphasis has been laid upon privacy on the issue of abortion and because abortion is a complex issue, it does not allow for any consideration of the socio-political forces which could lead to involuntary pregnancies. Obviously in such circumstances abortion access would be needed. Furthermore, this notion of privacy constrains the 'choices' of different women in different contexts. Thus the rhetoric of choice and control has succeeded in creating the atmosphere of criticism about the woman who is seen as the king who reigns over the body.[44] In other words, it means that the concept of choice used by women as a basis for right to abortion could be misunderstood. The term could lead women to be seen as having absolute control over their bodies without them giving due considerations to other issues and people.

The idea of choice has led to many tensions and with regard to the anti-abortion politics. As a result of the obvious challenges faced by pro-choice movement, women's decision and bodily autonomy are most times still at stake. At times, the idea of choice facilitates the 'illusion' to use Himmelweit's[45] term, that a woman can make a 'private' choice free from social economic, and political constraints. Thus according to Petchesky,[46] the idea of a 'woman's right to choose', if understood only as the main basis upon which the principle of reproductive freedom is premised, then certainly it is insufficient, in addition to the problems it has raised because it is an issue that is politically compelling. Nevertheless, it has been rightly pointed out that, although privacy as defined has problem associated with it as it is contestable but in the eyes of feminists, privacy is constructed not as something familial or within the domestic sphere although relevant in the circumstance but rather as the imaginary sphere of personal identity

41 Petchesky R. Abortion and Woman's Choice The State, Sexuality and Reproductive Freedom, (London: Verso, 1986) p.7.
42 Davis A, Women Race and Class, (London: The Women Press, 1981)
43 Himmelweit S, 'More than a Woman's Right to Choose', (1988) 29 Feminist Review pp 38-56
44 Cornell D, 'The Imaginary Domain: Abortion, Pornography and Sexual Harassment, (London; Routledge, 1995) p.33
45 Himmelweit S, 'More than a Woman's Right to Choose'?, (1988) 29 Feminist Review, p.40
46 Petchesky R, op.cit. pp.6-7

and self-realisation.[47] It means, privacy is seen as some form of freedo and liberty with due regard to autonomy in reproductive decision maki in the circumstances. It means that a woman is capable of coming t rational decision in reproductive decision making. This is for the reas of regulating fertility without external interference.

Even though, problems have been identified as a result of basing clai on the context of claiming abortion access, feminists' have shifted the arguments from claiming the right to choose alone. The emphasis is no changed to more comprehensive rights to reproductive freedom. Th shift has become necessary in view of the fact that the concept itself able to link up all different aspects of birth control and child bearing[48] It therefore provides a more comprehensive approach to abortion acce even though it is recognised that there is no absolute right to control re production.[49]

47 Smyth L, 'Feminism and Abortion Politics: Choice, Rights and Reproductive Freedom', (2002) 25 Number 3 Women Studies International Forum, pp. 335-346. See also Cohen J, 'Democracy, Difference and the Right of Privacy', in Seyla B, (ed.), Democracy and Difference: Contesting the Boundaries of the Political, (Princeton: Princeton University Press, 1996) pp 87-217 at p.201

48 Smyth L, 'Feminism and Abortion Politics: Choice, Rights and Reproductive Freedom', (2002) 25 Number 3 Women Studies International Forum, pp. 337

49 Ibid. p. 337

CONCLUSION

We have been able to establish from the discussion and analysis that rights themselves form the basis upon which individuals hold others to be duty bound to protect or promote certain interests for the benefit of the right holder. Consequently, an equal right of all men to be free is recognised in order to articulate one's own self-interest. Thus a claim to a legal right in essence means a claim to a distribution of power which provides for entitlement based upon justifiable reasons. In the final analysis, right to abortion access in family planning is now articulated through a more comprehensive individual fundamental human rights to reproductive freedom.

RIGHT TO HEALTH: MATERNAL REPRODUCTIVE HEALTH AS KEY TO DEVELOPMENT

ABSTRACT

The right to health guarantees women access to reproductive health services. It is the aim of millennium Development Goal 5 that maternal mortality be reduced by three quarters by 2015. Achieving the MDG will invariably improve maternal reproductive health. The benefits of this achievement are for both the individual and societal well-being. The quality of care provided is optimal as well satisfying the unmet need for family planning. This article shows that right to health as an individual right is one of the platforms upon which reproductive freedom could be articulated with the objective of taking necessary actions for the actualization of maternal health development goals. On the whole it is shown that improving maternal reproductive health is important as this enhances women's empowerment towards development.

INTRODUCTION

The right to health guarantees all persons the highest attainable standard of health. State governments are required to ensure that people within their countries can access health care, as well as maintain conditions necessary for good health from the context of pregnancy and child birth; it entitles women to the full range of reproductive health services during pregnancy, child birth, and the post partum period. Consequently it follows in the circumstances that the right to enjoy the benefits of scientific progress guarantees all women high quality care that reflects current medical knowledge and practice.

In 2000, when the international community adopted the Millennium Development Goals (MDGs) as a framework for measuring development progress, it made the reduction of maternal mortality a key priority. Millennium Development Goal 5 calls for the reduction of maternal mortality by three-quarters by 2015[50].

Maternal survival was emphasised earlier on and was adopted both in Cairo and Beijing. For instance, the International Conference on Population and Development Programme of Action adopted in 1994 was reaffirmed at Beijing Conference one year later, and it states as follows:

> All countries, with the support of all sections of the international community, must expand the provision of maternal health services in the context of primary health care... The underlying causes of maternal morbidity and mortality should be identified, and attention should be given to the development strategies to overcome them.[51]

In recent address to the UN General Assembly, the UN Special Rapporteur on the right to health said, "It is time to recognise that avoidable maternal mortality is a human rights problem on a massive scale."[52] The Rapporteur advocates a policy strategy for addressing maternal mortality

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United Nations Population Fund (UNFA). About the Millennium Development Goals. http://www.unfa.org/icpd/about.htm (last visited Nov 20, 2006).

Programme of Action of the International Conference on Population and Development, Cairo Egypt, Sept. 5-13, 1994, para 8.22, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

Paul Hunt, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Statement to the General Assembly, Third Committee, Oct. 19, 2006, available at http://www.ishhrn.org/UserFiles/Paul_Hunt_GA_2006.pdf.

that is grounded in the right to health, expressing the view that such a approach is likely to be "equitable, inclusive, non-discriminatory, partic patory and evidence-based'. [53]

The global commitment to achieving the MDGS provides a good o portunity to reconsider how more resources could be provided as w as intensify program efforts by donors, governments including the ci society in order to improve maternal reproductive health for individu and societal well-being.[54]

It is well established as a fact that it is impossible to separate the discussi of maternal health from reproductive health, and we know that mater health is just one facet of reproductive health. Up to 358,000 wom world-wide die each year in pregnancy and child birth. It has been ide tified that most of them die because they had no access to skilled rout and emergency care. Increasing numbers of women are now seeking c during child birth in health facilities and therefore it is important to e sure that quality of care provided is optimal.[55] It is estimated that satisf ing the unmet need for family planning alone could cut the number maternal death by almost a third.[56] Progress towards MDG 5 is mo itored through achievement of targets namely: First, reducing by thr quarters, between 1990 and 2015, the maternal mortality ratio. Second achieving by 2015, universal access to reproductive health.[57]

This article discusses the necessary actions that need to be taken with t objective of moving toward achieving the maternal health MDG5 a thus invariably establishing maternal reproductive health. This is with view to empowering women's development. The article begins with a examination of right to health. For the purpose of this article, right health is looked at from the perspective of reproductive health. This

53 Paul Hunt, Report on the UN General Assembly. The Right of Everyone to the Highest Attain Standard of Physical and Mental Health, 61st session para.39, U.N. Doc A/61/338 (2006), avai ilable at http://www2.essex.ac.uk/human_rights_Center/rth/docsGA%2006.pdf.

54 Health, Nutrition and Population (HNP) Discussion Paper 2005 The International Bank for Reconstruction and Development P.1.

55 World Health Organisation /MDG 5: Improve maternal health available at who.int/topics/..../ index.htm/ last Accessed 31-12-2010.

56 Ibid.

57 Ibid

followed by definitions of reproductive health and health care, examination of determinants of maternal death and why improving maternal reproductive health is important for women's empowerment for development.

The article concludes by highlighting the major determinants of maternal death. At the end, suggestions are made for a way forward in the circumstances.

RIGHT TO HEALTH

Right to health as an individual right provides one of the basis upon which reproductive freedom is protected by international human rights treaties. The right to health is recognised in article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (Economic, Social and Cultural Rights Covenant), which requires states to "recognise the right of every one to the enjoyment of the highest attainable standard of physical and mental health'. Article 12(1) of the Convention on the Elimination of All forms of Discrimination Against Women (Women's Convention) further requires governments to "*take all appropriate measures to eliminate discrimination against women in the field of healthcare*".[58]

Article 25 of the Universal Declaration provides as follows:
Everyone has a right to a standard of living adequate for the health and well- being of himself and his family including food, clothing, housing and medical care and necessary social services – motherhood and childhood are entitled to special care and assistance.

Thus, state legislation that provides for the purpose of promoting family planning, abortion and voluntary sterilisation based upon health benefits are recognised and they form part of a general right to health under international law.[59] It has been established that illegal abortion is one avenue through which women's lives are wasted and also contribute to the ruining of chances of family lives. In the circumstance any policy that stands

58 For similar provisions refer to the article 25 of the Universal Declaration; Article 16 of the African Charter; Article XI American Convention.

59 Cook R, and Dickens B, 'International Developments in Abortion Law: 1977-88. Volume 78. (1988) American Journal of Public Health p.5.

or has the potential of constituting hindrances for understanding that legal abortion is a common cause of human suffering and death must be challenged in no uncertain terms.[60] Therefore, from the various declarations and resolutions concluded, it is recognised and also acknowledged that there is a nexus of family planning to health and it is fundamental to women's empowerment and development.

REPRODUCTIVE HEALTH

Reproductive health is defined as follows:
Reproductive health is a state of complete physical, mental and social well being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice for regulation of fertility which are not just against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and child birth and provide couples with the best chance of having a healthy infant[61].

In the same vein, reproductive health care is defined as follows:
These are constellation of methods, techniques and services that contribute to reproductive health and well being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases[62].

Given the above definitions, it is necessary to offer some explanations as to what they imply in that they are broad-based. These definitions

60 Sai H. and Nassim A. 'The Need for Reproductive Health Approaches', supplement 3,(1989) International Journal of Gynecology and Obstetrics p.108.

61 Excerpted from Program of Action, paragraph 8.25, by the International Conference on Population and Development (ICPD), 1994, New York: United Nations; and Reproductive Health Services and Managed Care Plans: Improving the Fit (Issues in Brief), by the Alan Guttmacher Institute, 1996, New York: Allan Guttmacher Institute

62 Ibid.

provide an avenue for a well considered and useful understanding of the relationship between fertility regulation and women's health as rightly pointed out by Ruth Dixion-Mueller[63] . Thus according to her, the question now is, because these definitions are broad in their application, 'how does a woman's ability to use contraception and to space, limit or avoid child bearing affect her physical and emotional well-being or can family planning be considered as an ingredient which enables a woman to exercise her right to health?'[64] To Margret Sanger, a woman's death from clandestine abortion, symbolised ignorance and lack of accessibility[65]. An understanding of sexual and reproductive health shows that they overlap and therefore in addition to supporting normal physiological functions such as pregnancy and child birth, they also help in reducing devastating consequences of sexuality and reproduction.[66]

Sexuality and reproductive health are also about enabling people of all ages, including adolescents and those older than the reproductive years, to have safe and satisfying sexual relationships. In this way, obstacles such as gender discrimination, inequalities in accessing health services, restrictive laws, sexual coercion, exploitation, and gender-based violence are addressed and tackled.[67]

The positive side effects of family planning on maternal and child health have been universally recognised and this has led to the definition of family planning as a vital preventive and positive health measure. This has been shown where several international conferences have highlighted these connections, such as International Conference on Better Health for Women and Children through family planning and the International Safe Motherhood Conference in Nairobi Kenya in 1987.[68] Sexual and

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63 Dixion-Mueller R, Population Policy and Women's Right: Transforming Reproductive Choice, (Connecticus West Port: Praeger 1993) p.142.

64 Ibid.

65 Ibid.

66 Ibid.

67 Glanier A, et al, 'Sexual and Reproductive Health: A matter of Life and Death', (October 2006) The Lancet. P.1.

68 Black M, Better Health for Women and Children through Family Planning: Report on an International Conference held in Kenya Nairobi, October1987, (New York: The Population Council, 1987); Starrs A, Preventing the Tragedy of Maternal Deaths: A Report on the International Safe Motherhood Conference, Nairobi Kenya, February 1987, (Washington DC: The World Bank).

reproductive health services are not meant only for the provision of family planning clinics for the purpose of treatment of sexually transmitted infections. The five core components of sexual and reproductive health care are made up of the following:

Improvement of ante-natal, pre-natal, post-mortem, and newborn care, provision of high quality services, elimination of unsafe abortions, prevention and treatment of sexually transmitted infections, including HIV, among many other things.[69]

In the next section, we shall be examining briefly the determinants of maternal death. These will include both direct and indirect determinants.

DETERMINANTS OF MATERNAL DEATH

There are five major complications which have been identified as principal determinants of maternal death. These include hemorrhage, infection, complications of unsafe abortion, hypertension and obstructed labour.[70] According to Gelband, indirect determinants of maternal death could be defined as pre-existing diseases or diseases that are aggravated by the physiological effects of pregnancy (not related to direct obstetric determinants).[71] Among the principal indirect determinants identified in many settings include aneamia, malaria, hepatitis and diabetes.[72]

Apart from direct and indirect determinants of maternal mortality, there are other underlying determinants which we shall examine in the next section.

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69 WHO, Reproductive Health Strategy to accelerate Progress towards the attainment of international development goals and targets, (Geneva: World Health Organisation, 2004).

70 Safe Motherhood Technical Consultation Report, The Safe Motherhood action agenda: Priorities for the next decade, New York: Family Care International in Collaboration with Safe Motherhood Inter-Agency Group (SMIAG) 1997.

71 Gelband H, et al, The evidence base for interventions to reduce maternal and neonatal mortality in low and middle-income countries (Commission on Macroeconomics and Health [C M H] Working Paper, no.5 Geneva: WHO Retrieved November 27, 2002, form World Wide Web: http://www.cmhealth.org/doc/wg5.paper.5.pdf.

72 Ibid.

UNDERLYING DETERMINANTS OF MATERNAL DEATH

There are many underlying determinants which can have profound effect on maternal health and, it goes without saying that these would ultimately affect maternal mortality. These determinants include social, cultural, health system and economic factors.[73] We shall endeavour to discuss some of these determinants albeit briefly. These will be limited to women's status, community level and health systems.

WOMEN'S STATUS

Women's status in the society determines the way they could access facilities and opportunities for their development. Where, in many settings, women's access to resources such as land, credit, and education are restricted, these have the devastating consequences of limiting their access to productive work, constrain their ability to seek health care, and deny them the power to make decisions that affect their lives directly.[74] And because they lack empowerment, even when they seek health care, they have to grapple with high opportunity cost.[75] Hence in such situations, as rightly pointed out, "these must give up time that they would normally spend on house hold chores such as caring for children, collecting water and fuel, cooking, cleaning, doing agricultural work, and engaging in trade or other employment. These restrictions and other human rights abuses are pervasive, and they relate, in part, to gender inequalities and can impede progress in improving maternal health outcomes among the poor".[76]

It has been established by a study done in Turkey that strong association exists between women's education and or literacy levels and use of repro-

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73 See Mc Carthy J, and Maine D, 'A Framework for Analysing the Determinants of Maternal Mortality, (1992) Studies in Family Planning, pp. 2-33; Claeson M, et al 'Poverty Reduction and the Health Sector,' 2001, 'Poverty Reduction and the Health Sector' 2001, Washington DC: The World Bank Reduction Strategy Source Book, p.6 for detailed examination from both a demand and supply perspective organised into pathways at the following levels: individual, household and community, health system and related sectors, and government policies and action.

74 Health, Nutrition and Population (HNP) Discussion Paper 2005. The International Bank for Reconstruction and Development.

75 Ibid.

76 Ibid.

ductive and maternal health services.[77] Thus, it could safely be concl that there is more likely hood that poor, rural women would have l education and are invariably less likely to make use of available serv For example, there is evidence from Punjab, India, which indicates education is significant as it contributes to women's self-confidence improved maternal skills, as well as increases their exposure to infor tion and alters the way others respond to them.[78]

COMMUNITY LEVEL

As noted earlier on, where local cultural norms tend to govern wom reproductive lives, there is no doubt such will have profound effect their health and mortality. In some cultural settings, men's decision-m ing authority over women can impede their use of reproductive he services. This is especially true where there is the practice of social is tion of women. In such settings, male peer groups condone and leg mise violence, which often contributes to high rates of gender-based v lence.[79] In some cases, such as in Bangladesh, it has been indicated t poor households tend to rely on free and low-cost services for housek income on preventive care and treatment for women and, especially, family planning.[80]

A woman's ability to regulate her fertility could be affected by cultu norms operating at community level as these norms are capable

77 Celik Y, and Hotchkiss D, "The socio-economic determinants of maternal health utilisation in Turkey' volume 50 issue 12, (2000) Social Science and Medicine, pp.1787-1806.

78 DasGupta M. 'Death Clustering, mothers' education and the determinants of child mortality in rural Punjab, India, Volume 44 issue 3, (1990) Population studies pp 489-505. For the relationship betwe female education and fertility holds across countries, even after controlling for socio-economic factors and in relation to stage fertility transition of a particular country see Cleland J, Education and Future Fertility Trends, with Special Reference to Mid-Transitional Countries. New York: United Nations, (2002). Availab on the World Wide Web: http://www.un.org/esa/population/publications/completingfertility/CLELANDpa per.pdf.

79 Koenig M. et al, Individual and Community Level Determinants of domestic violence in rural Bangladesh. Hopkins Population Center Paper on Population No. WP 99-04 (Baltimore: John Hopkins University 1999).

80 Schuler S. et al 'Paying for reproductive health services in Bangladesh: Intersections between cost, quality and culture', volume 8, (2002) Health Policy and planning pp.415-425. For further reading on beliefs about health risks and health problems during pregnancy, at birth, and during the post partum perio see SEWA Rural Research Team 'Beliefs and Behaviours regarding diet during pregnancy in a rural area in Gujarat, Western India, in Gittelsohn J. et al (eds.), Listening to women talk about their health: Issues and evidence from India. (New Delhi India: Har-Anand Publications 1994).

house hold dynamics. These are seen in area where there is expectation of high fertility and large families as well as early marriage and early child bearing. Consequently, especially among the poor, there is low usage of health services resulting in high maternal mortality. In some cultures, sons are more preferred to girls and these can influence fertility choices and behavior with regard to seeking health care for in-laws.[81] In some circumstances, a woman may be under pressure to keep on reproducing until at least, she is able to get one son which invariably increases her risk of pregnancy related morbidity and death. For example, a study in North India found that one out of every six women who had an abortion (in the last 18 months) did so with the knowledge that they were carrying a female child.[82] In a related development, in a study in rural China, 36% of the 301 women who reported induced abortions, acknowledged them to be sex-selective abortions.[83]

HEALTH SYSTEMS

The decision to seek care, invariably, is related to the financial security women feel they have towards that purpose. Nevertheless, there are still several obstacles to obtaining good quality health care. It is therefore imperative that women must have the means and the opportunity to access comprehensive health care. The objective is to improve their overall health and mortality outcomes as envisaged by the MDGs. This comprehensive care means that health system must make high-quality services accessible, available and affordable not only at the primary care level but also at the referral levels. This will be examined in relation to quality care, accessibility and availability and government policies and implementation.

a) Quality of care

Where the quality of care is poor and the services are unacceptable, women would not utilise such services. In some situations, it has been

81 Johnson A. et al 'Population Policy, Son Preference and the use of IUDS in North Vietnam' volume 6, Issue 11 (1998) Reproductive Health Matters, pp. 66-76.

82 Ganatra B. et al, 'Sex Selected abortion: Evidence from a community-based study in Western India,' volume 16, Issue 2 (2001) Asia-Pacific Population Journal pp 109-124.

83 Junhong C, 'Prenatal sex determination and sex selection abortion in central China', volume 27 Issue 2 (2001) Population Development Review pp 259-281.

identified that health services could be inappropriate for cultural reasons. Consequently, accessible and affordable maternal health services are underutilised.[84]

b) Accessibility

The geographical coverage of health facilities in terms of distance or time required to reach the nearest health facility center is an important factor in view of the fact that it can hinder women particularly these from rural areas and urban slums from accessing such health facility. In addition, poor road infrastructure and lack of reliable public transport or access to emergency transportation equally make accessibility difficult.[85]

c) Availability

In many settings, there are usually limited human resources and shortage of skilled providers especially those meant for the poor and geographically remote areas. For example, in Asia and Sub-Saharan Africa, studies have established only one skilled attendant is available for every 300,000 people, resulting in a ratio of one skilled attendant for every 15,000 births[86]. It is also worthy of note that there are few incentives for skilled workers especially those who work in rural areas and because in some settings, the remuneration is poor, skilled medical professionals get attracted to western countries where the pay is high and thus this factor contributes significantly to the overall "brain drain" of medical professionals from developing countries.[87] In addition, in many counties where there is evidence of high maternal mortality, referral systems are not systematic and consequently availability of emergency health-care services is uncertain.[88]

84 Van Lerberghe W, and De Brouwere V, 'Reducing maternal mortality in the context of poverty', in De Brouwere V, and Van Lerberghe (eds.), Studies in Health services organistaion and policy: Vol 17 Safe motherhood strategies: A Review of the evidence. (Ant werp, Belgium. ITG Press 2001) pp 1-5; Leslie J, and Gupta R, Utilisation of formalservices for maternal nutrition and health care. Washington DC: International center for Research on Women.

85 Celik Y, and Hotchkiss D, 'The socio-economic determinants of maternal health utilisation in Turkey' volume 50 issue 12, (2000) Social Science and Medicine, pp.1787-1806.

86 Mac Donald M, and Starrs A, Skilled care during child birth information booklet: Saving Women's lives, improving newborn health. New York: Family Care International.

87 Heller S, and Mills A, Health Workers here and there, of July 25, 2002 International Herald Tribune. Retrieved November 11, 2002 from the World Wide Web: http://www.iht.com.

88 Jalaney N, and Korejo R, 'Mothers brought dead: An inquiry into causes of delay', (1993) Social Science and Medicine pp 36, 371-372; John A, et al, 'Maternity care in rural Nepal: A health services analysis', (2002) Tropical Medicine and International Health pp 5, 657-665.

d) Government Policies and Implementation

It is well understood that medical interventions for specific maternal complications is a necessity in order to address maternal mortality. However, in many settings, how to create the enabling health systems and policy environments are lacking coupled with the lack of political will to do so.[89] Thus, there is need for health policies at the national-level with the purpose of improving the overall functioning of health systems as a whole. The aim is to foster multi-sectorial linkages among different ministries such as that of health, education, social protection, and transport.

WHY IMPROVING MATERNAL AND REPRODUCTIVE HEALTH IS IMPORTANT FOR WOMEN'S EMPOWERMENT IN DEVELOPMENT

It is a well-known fact that keeping mothers alive and healthy is a key for the betterment of women, society at large and their immediate families. Complications during pregnancy and child birth, sexually transmitted diseases particularly among women of reproductive ages have been identified as causes among many others, which lead to death and disability. [90] Reducing maternal mortality has fundamental beneficial effects for society. This is obvious because investments in safe motherhood would not only improve a woman's health and the health of her family but also will lead to increase in labour supply, productive capacity, and economic well-being of communities.[91] In situations where women have frequent or too early pregnancies, poor maternal and reproductive health, pregnancy

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89 Campbell O, 'What are maternal health policies in developing countries and who drives them? A review of the last century', in De Brouwere V, and Van Lerberghe W, (eds.), Studies in health Organisation and policy: vol.17 Safe Motherhood strategies. A reviewing evidence. (Antwerp, Belgium: ITG press 2000) pp 415-446.

90 World Health Organisation (WHO) (2001) Maternal Mortality in 1995: Estimates Developed by WHO, UNICEF, UNFPA, Geneva: WHO; World Health Organisation (WHO) (2002) Malaria in Pregnancy. Roll Back Malaria: 2001-2010 (United Nations Decade to Roll Back Malaria Information Sheet) Washington DC: The World Bank; World Health Organisation (WHO) (2003) Mother-to-Child transmission of HIV Retrieved May 22, 2003, from http://www.who.int/reproductive-health/rtis/mTcT/index.htm

91 World Bank (1999) Safe motherhood and the World Bank: Lesson from 10 years of experience. Washington D.C: The World Bank.

complications, and caring for sick children including the elderly the obviously put burdens on women. Consequently, the implication is

that, it drains women's productive energy, jeopardises their income-earning capacity, and eventually leads to their poverty.[92] On the other hand "strengthening maternal and reproductive health services also can bring benefits to the overall health system, which can enhance access and use of a broad number of reproductive health care services and can improve economic productivity in society."[93] In addition, and also equally of most uttermost importance to the health and economic rationale for ensuring maternal and reproductive health is the compelling human rights dimension as this is capable of reducing death and illness associated with pregnancy and child birth.[94]

92 Ibid.

93 The International Bank for Reconstruction and Development/The World Bank Washington DC, Health Nutrition and Population (HNP) Discussion Paper 2005 p.4.

94 Ibid.

CONCLUSION

We have seen that the right to health guarantees all persons the highest attainable standard of health. Governments all over the world are expected to ensure that people are able to access health care and also maintain conditions that enable people have good health. One of the key objectives of the Millennium Developments Goals as a framework for measuring development progress, is to see to the reduction of maternal mortality by three-quarters by 2015. We have also identified the principal determinants of maternal death which include hemorrhage, infections, complications of unsafe abortion, hypertension and obstructed labour. Women's status, local cultural norms and health systems are among the factors that affect women's ability to access health care facilities and their capacity to regulate their fertility.

We have been able to establish why improving maternal and reproductive health is important for women's empowerment in development. Reducing maternal mortality has fundamental beneficial effects for society such as increase in labour supply, productive capacity and economic well-being of communities. It can also bring benefits to the overall health system. The right to health encompasses the right to health-care services, which invariably includes the full range of reproductive health services. Even though lack of financial resources is a major factor for lack of accessibility of health care services, governments need to pay close attention and implement policies towards giving women quality care, accessibility and availability of human resources in terms of highly skilled medical and overall health care providers and services.

RECOMMENDATIONS

To improve maternal reproductive health, it will require health and non-health interventions. These include:

1) Political commitment on the policies which will give enabling environment for investment in social and economic development such as female education, poverty reduction, improvement in women's status, provision of family planning services.
2) There should be provision of more highly skilled medical personnel

CHAPTER 2

CHILD ABUSE IN NIGERIA: THE ALMAJIRIS OF NORTHERN NIGERIA IN PERSPECTIVE

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CHILD ABUSE IN NIGERIA: THE ALMAJIRIS OF NORTHERN NIGERIA IN PERSPECTIVE

ABSTRACT

There has been a clear line of segregation between the average Nigerian and the almajiris whose existence has suffered neglect and aspersion. They are clearly forgotten, yet their existence cannot be denied. Statistically they are only a few million, but the number is growing with the trend of abuse that characterizes their living. As human beings they have rights which they are entitled to enjoy. This paper deals with the broad issue of children's rights generally and the topic of child abuse in Nigeria. It particularly discusses the institution of almajiri in the northern part of Nigeria against the backdrop of their rights as human beings protected under the various municipal and international human rights instruments in force in Nigeria. The paper concludes with a few suggestions on steps to address this social problem

INTRODUCTION

Child abuse may be understood to be any form of abuse of the child in any manner that may include physical torture, mental or psychological torture, denial of God-given rights, neglect, emotional abuse, sexual abuse, psychological abuse, exploitation. It is a situation in which the fundamental human rights of a child are tampered with. According to an International Labour Organization (ILO)[1], a staggering 15 million children under the age of 14 are working across Nigeria. The factor of poverty has constituted a real threat to homes in terms of how it increases the number of children on the Nigerian streets by the hour. Traditionally children in Africa are taught skills to work with their families and indeed contribute to their own upkeep[2]. This is more especially in poor families where the contribution of the child constitutes a significant part of the family's income.

Working children generally do not have the time, energy or interest to go to school. About six million working children in Nigeria, equally split between boys and girls, do not attend school at all, while one million are forced to drop out due to poverty or parents' demand to contribute to the family[3].

This article broadly examines the issue of child abuse in its international grasp. It attempts a jurisprudential analysis of the question of who is a child, while exploring the rights of a child as guaranteed by relevant international as well as municipal documents. The work culminates in the vexed issue of almajiri menace in Northern Nigeria, which is then followed by concise recommendations on tackling the social syndrome.

WHO IS A CHILD?

The trouble with child rights begins with the very definition of a child in law. In Nigeria although a child attains majority when he attains the age

1 UNICEF, (2006). Child Labour: UNICEF Nigeria 2006, p.1, found at www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_ChildLabour.pdf on 12/11/2011.
2 Ibid.
3 Ibid.

of 18, under different circumstances the minimum age for the purpose of punishing juvenile offences is different. Under the Criminal Code, a child under the age of 7 is not capable of being criminally responsible for an act or omission. A person under the age of 12 is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission[4] .

In our indigenous societies, criminal liabilities and even civil responsibilities are clearly limited to adults of the age of discretion. At that age, the family is seen as responsible for the deviant behavior of their wards. The unwritten convention was that every adult had the responsibility to correct an erring juvenile and instill requisite rectitude in him at that age. In the old world civilization, it was not that simple to answer the questions, who is a child, when does childhood cease or begin. Philippe Aries as cited by Bajpai[5] said that the child in the middle ages did not exist as an independent anthropological category and therefore children did not need to be taken into consideration. It was an established doctrine that the father had absolute rights over his children. It was only during the 20th century that the concept of children's rights emerged[6] . The landmark legislation in that century was the United Nation's Convention on the Rights of the Child (CRC), 1989 which has been ratified by many countries including Nigeria. Article 1 of the CRC defines a child as every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier. Age limit is significant, in that it regulates many sectors of the child's life: when he can be admitted to school, when he can leave school, when he can marry, whether he can vote, when he can be treated as an adult by the criminal justice system, when he can work, when he can be admitted into the army, etc.

There are several grey areas as occasioned by several legislation on the issue of majority of a child. Under the Labour Act[7] a child is a person under

4 The Criminal Code Act, Chapter 77, Laws of the Federation Nigeria, 1990. Section 30

5 Bajpai, A. (2009, May 18). Who is a Child. infochange agenda, retrieved from http://infochangeindia.org/agenda/child-rights-in-india/who-is-a-child.html on 11/11/2011.

6 Ibid.

7 Labour Act (1971). Chapter 198, Laws of the Federation of Nigeria, 1990, s. 90(1).

twelve years. The Criminal Code Act[8], for the purpose of punishing for the unlawful killing of a child, defines a child capable of being killed as when the child has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not. Irrespective of the definition of a child, his rights are protected under these legislation from any form of cruel treatment.

RIGHTS OF A CHILD

The 1999 Constitution of the Federal Republic of Nigeria (as amended) does not make specific provisions for a child. But the child is entitled to enjoy all those rights provided for in the Constitution as these rights are fundamental and inalienable. However, because of the vulnerability of a child, the government of Nigeria has joined other countries of the world in making or ratifying legislation for the protection of the child. The United Nations Convention on the Right of the Child enacted in 1989 and the Charter on the Rights and Welfare of the African Child are some of such international legislation on child's right Nigeria is signatory to. The Children and Young Persons Act (CYPA)[9] indicated the first statutory recognition of the welfare of children by its broad provisions for the treatment of young offenders and establishment of juvenile courts[10]. Ali went further to analyze the Act, saying that the law is divided into nine broad parts. Part one deals with preliminary issues. Part two deals with juvenile offenders especially issues such as bail of children arrested, custody when they are not granted bail, association with detained adults while in custody, conditions under which a parent or adult may attend court, and so on. Other matters dealt with in part two include the constitution of the juveniles, method whereby children and young persons charged with offences may be dealt with and the power to establish places of detention for juveniles. Part three deals with probation officers. Part four deals with approved institutions, while part five deals with juveniles in need of care and attention and provisions on situation when the parent or guardian is unable to exercise control. Part six makes provision for the contribution

8 The Criminal Code Act, Chapter 77, Laws of the Federation Nigeria, 1990. Section 307

9 1943

10 Ali, Y. O. (n.d.). Legal Support for the Rights of a Child in Nigeria. retrieved from www.yusufali.net/articles on 12/11/2011

of parents or guardian to the maintenance of juvenile, while part seven, eight and nine consider miscellaneous issues such as trading in children and power to make regulations respectively.

In September 2003, President Obasanjo signed the Child's Right Act (CRA) into law. It was a revolutionary piece of legislation which sought to convert into law, the principles and guidelines espoused by the United Nations and other international bodies. According to UNICEF, "it domesticated the obligations of the Convention on the Rights of the Child and consolidated all laws relating to children into one piece of legislation".[11] The Act gives an extensive coverage to the rights of a child. It virtually encapsulates the provisions in the CYPA. Some of its salient provisions include prohibition of betrothal of a child, making tattoos or marks on a child, female genital mutilation, forced labour, discrimination of any kind, physical, mental, or emotional abuse.

The native laws and customs which constitute part of the Nigerian legal system are not silent on the issue of child's rights. Nigeria is a country of over 250 ethnic nationalities[12] . Each of these ethnic groups value children highly. Practices such as confinement after delivery, breast feeding, carrying the child on the back and sleeping with the child are some of the healthy practices among various Nigerian cultures which respect the rights of the child to good health. These rights are implemented through various effective media, including social opprobrium, superstitious beliefs about a defaulting mother or taboos. The provisions of this system are however subject to the standard test of natural justice, equity and good conscience. These rights however, in most customs, are sex discriminatory. For example, the male child is considered superior to and more valued than the female child for economic reasons and for the preservation of the lineage[13] .
Islamic law, a constituent of the Nigerian Customary law which is mostly

11 Again, a Justice System on Trial [Editorial]. (2011, November 12). NEXT, retrieved from http://234next.com on 12/11/2011.

12 'Culture of Nigeria' (2011). Retrieved from http://en.wikipedia.org/wiki/Culture_of_Nigeria on 18/11/2011.

13 Bamgbose, O. (n.d.). Customary Law Practices and Violence Against Women: The Position Under the Nigerian Legal System, retrieved from http://www.vanuatu.usp.ac.fj/sol_adobe on 12/11/2011.

applicable to the northern states, equally has its comprehensive provisions on rights of a child. Sheikh Al-Uthaimin[14] explained that children are a trust on the necks of the parents and the parents will both be held responsible for their children on the Day of judgment and are responsible for their education, religious cultivation and etiquettes. He added that the child in Islam has a right to life whether a boy or girl, and it is obligatory for the parents to provide food, drink and clothing to sustain the body of their children. These rights are perhaps summarized in the Covenant on the Rights of the Child in Islam which is open to ratification by all Member States of the Organization of the Islamic Conference (OIC)[15].

Generally the rights of the child are now more preserved in the Child Right's Act of 2003. Akinlami[16] did a random breakdown of the provisions of the Act.

- Provisions of freedom from discrimination on the grounds of belonging to a particular community or ethnic group, place of origin, sex, religion, the circumstances of birth,

- It is stated categorically that the dignity of the child shall be respected at all times,

- No Nigerian child shall be subjected to physical, mental or emotional injury, abuse or neglect, maltreatment, torture, inhuman or degrading punishment, attacks on his/her honour or reputation,

- Every Nigerian child is entitled to rest, leisure and enjoyment of the best attainable state of physical, mental and spiritual health,

- Every government in Nigeria shall strive to reduce infant mortality rate, provide medical and health care, adequate nutrition and safe drinking

14 Al-Uthaymin, M. S. (2008). Rights of Children in Islam and the Prohibition of Abusing Children. SalafiManhaj, p. 2. retrieved from http://www.salafimanhaj.com/pdf/SalafiManhaj_RightsOfChildren.pdf on 19/11/2011.

15 Covenant on the Rights of the Child. (2004). Article 22 (2). retrieved from www.en.tranoic.ir on 11/11/2011.

16 Akinlami, T. (2011, May 20). Child Rights Act (2003): A Random Breakdown of its Provisions. Businessdayonline, retrieved from www.businessdayonline.com/NG/index/php/family/2135 on 11/11/2011.

water, hygienic and sanitized environments, combat diseases and malnutrition, support and mobilize through local and community resources, the development of primary health care for children,

- Provision for children in need of special protection measures (mentally, physically challenged or street children): they are protected in a manner that would enable them achieve their fullest, possible social integration and moral development,

- Expectant and nursing mothers shall be catered for, and every parent or guardian having legal custody of a child under the age of two years shall ensure its immunization against diseases, or face judicial penalties,

- Betrothal and marriage of children are prohibited,

- Making tattoos or marks, and female genital mutilation/cutting are made punishable offences under the Act; and so also is the exposure to pornographic materials, trafficking of children, use of narcotic drugs, or the use of children in any criminal activities, abduction and unlawful removal or transfer from lawful custody, and employment of children as domestic helps outside their own home or family environment,

- Child abduction and forced exploitative labour (which is not of a light nature) or in an industrial undertaking are also stated to be offences. The exceptions to these provisions are where the child is employed by a family member, in work that is agricultural, horticultural or domestic in nature, and if such a child is not required to carry or move anything heavy that is likely to adversely affect its moral, mental, physical, spiritual or social development well-being.

Several rights have been identified and discussed by many writers. A few may be explored here as variously contained in the African Charter on Human and Peoples' Rights, United Nations Convention on the Rights of the Child, Charter on the Rights and Welfare of the Rights of the African Child, and CYPA[17].

17 Ali, Y. O. loc. cit.

i. The Socio-Economic Life

The right to survival[18] , the right to health[19] , the right to education[20] , the right to be protected from all form of economic exploitation[21] , the right to leisure, recreation and cultural activities[22] , and the right to special measures of protection in case of handicap[23] . The rising cases of corruption by African leaders both within military and erstwhile conceived sanitizing democratic regimes with a rich nation like Nigeria as a case in point, means that the rights and future of children are endangered since limited resources is invested in such ventures as education, better or accessible health care and employment.

ii. The Political Rights

The right to non-discrimination[24] , right to freedom of expression[25] , the right to freedom of thought, conscience, and religion[26] , the right to freedom of association[27] , the right to be protected against torture[28] , the right to be protected against harmful socio-cultural practices[29] , the right to be protected in case of armed conflict[30] and the right to protection of privacy[31] . Given the persistent problems of military dictatorship and utter disregard for the democratic principles of freedom of speech, association, thought and fair trials, one wonders how African states, that nonchalantly violate basic human rights, could adopt appropriate measures for the protection of its maltreated children.

iii. The Private or Personal Rights

The right to a name and nationality[32] , the right to a protected and united

18 Article 5
19 Article 14
20 Article 11
21 Article 15
22 Article 17
23 Article 13
24 Article 3
25 Article 7
26 Article 9
27 Article 8
28 Article 16
29 Article 21
30 Article 22
31 Article 10
32 Article 6

family[33], the right to parental care and protection[34], the right to procedures protecting the best interests in case of adoption[35], the right to be protected against sexual exploitation[36], drug abuse[37], sole trickery and adoption[38], and the right to fair trial and special condition of detention in case of crime[39]. These rights appear feasible on paper but how would they be implemented? For instance, how many children have access to education, health facilities and even leisure especially when states are charged with deducing measures for endorsing and defending child welfare? What factors also constitute measures of appropriate welfare provision? It may be deduced therefore, that when one considers the problems of extreme poverty and dysfunctional democratic ideals impeding the advancement of the Nigerian child, one may not be too hasty to condemn the gains of child labour as a survival strategy for some children who do not have the state, community or parents to rely on. With the preceding, it is evident that Nigerians have been paying lip service to prevention of child abuse for appropriate prevention of child abuse should touch on the primary level of complex political, economic, cultural and social problems stimulating child abuse. When primary instead of secondary prevention measures come to bear in the Nigerian environment, this should be heralded by increased education of the masses, political lobbying, formulation of new laws and economic measures all targeted at protecting the Nigerian child.

iv. Right against cruelty

Cases of cruelty abound in the Nigerian society. A child could be refused his meal for failing to run an errand or not working on his parents' farm or carry out menial jobs. A child could be lacerated if he visited his divorced mother without his father's consent. Street hawking kids is a common sight in our society. Dumping of unwanted babies at refuse dumps or other odd places, killing of daughters in preference for male children. These cases abound in the Nigerian society.

33 Article 18
34 Article 19
35 Article 24
36 Article 27
37 Article 28
38 Article 29
39 Article 17

Children are said to be the leaders of tomorrow. Any society that turns its attention away from the proper and sound upkeep of this segment of the society risks creating an irresponsible and unproductive future leadership. It is sad to note that these practices are rather on the increase notwithstanding the myriad of both municipal and international legislation against child abuse.

v. Right to Life

The 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that 'Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty Nigeria'[40] . Life is considered precious and must be protected from any form of violation even right from before birth. The Criminal Code Act[41] and the Penal Code[42] both prohibit abortion. One of the greatest challenges facing this right in Nigeria is the area of child health. This is notwithstanding the ratification of the major international treaties on the rights of child and the enactment of a child-centered legislation in 2003 – the Child Rights Act. Available data still paint a depressing picture. According to the World Health Organisation (WHO)[43] , Nigeria is among the five countries that contribute to 50% of the annual global mortality among infants and children under five years of age. Worse still, Nigeria was among 12 countries identified in a report by the African Development Bank as regressing from and in danger of not meeting the 2015 M.D.Gs of reducing infant mortality by two thirds. Life expectancy, according to the United Nations Organization (UNO)'s 2010 report is now 48.4 in Nigeria[44].

CAUSATIVE FACTORS OF CHILD ABUSE

Child abuse has a very strong psychological effect on a child and reduc-

40 1999 Constitution of the Federal Republic of Nigeria (as amended), Laws of the Federation of Nigeria, 1990, s. 33.

41 Criminal Code Act, Chapter 77, Laws of the Federation Nigeria, 1990. Ss. 228-230

42 The Penal Code, Federal Provisions Act, Chapter 345 Laws of the Federation of Nigeria, 1990. ss. 232 and 234

43 Nnamuchi, O. (2007, December 12). The Right to Health in Nigeria. Social Science Research Network, retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622874 on 18/11/2011.

44 Awolusi, B. (2010, November 30). Life Expectancy in Nigeria is Now 48.4 Years Says UN. Nigerian Bulletin, retrieved from http://nigerianbulletin.com/2010/11/30/life-expectancy-in-nigeria-is-now-48-4yrs says-un-report-the-guardian/ on 18/11/2011.

on his chances of maximum activeness in social endeavors with his colleagues[45]. It has long lasting effect across multiple domain of functioning, not just in the childhood but lasts into adulthood. Prominent forms of child abuse in Nigeria are child labour, child battery, child abandonment, child neglect, teenage prostitution, forced marriage. Frequently, researchers have revealed a relationship between most cases of child abuse and economic hardship, broken homes, postmodern cultural realities, traditional/customary practices.

Child Abuse and Economic Hardship

The average Nigerian suffers from poverty due to the harsh economy, the country is facing. The sorry reality is that this state of affairs is worsening by the day with a succession of governments whose impact on the lives of the people is hardly felt positively. The notion that hardship leads to increase in child abuse is not new as scientific research and anecdotal reports have long shown a relationship[46]. The Los Angeles Times reported on increases in child abuse and neglect during the recession in 1994 and referred to a study in which a rise in abuse was documented after a hurricane hit the Southeast and another involving increase in abuse during military deployment[47].

Historically, economic hardship has always corresponded with increases in child abuse, observed Professor Carole Jenny, an expert in identifying and treating victims of child abuse[48]. According to her, the increase in economic hardship worsens cases of abuse as this markedly increases the pressures on the families who transfer same to their children. Child labour has been identified as a direct consequence of poverty[49]. This is because, a child at work is an additional means of some income for a poor family. Besides, for most children on the street, their only source of

45 Fatokun, K. V. (2007). Child Abuse and the Educational Attainment of Secondary School Students in Science Subjects. Journal of Research in National Development. 5, 2, p. 1

46 Lopez, I. J. Study (2011, September 19), SLC Hospital: Child Abuse Cases Rises with Stressful Times. Standard-Examiner, retrieved from http://www.standard.net/stories/2011/09/19/study-slc-hospital-child-abuse-cases-rise-stressful-times on 11/13/2011 on 13/11/2011.

47 Ibid.

48 Sharples, T. (2008, December, 2). Most Child Abuse Goes Unreported, Time, retrieved from http://www.time.com/time/health/article/0,8599,1863650,00.html on 13/11/2011

49 W.R.M. (1998). Child Labour: a New Dimension to Malaise. In S. Nwogu, & G. H. Ruwerem (Eds.). Journal of Women Justice Programme, p.1 (13), 11-15

income is what they get from working"[50].

• Child Abuse and Broken Homes

Studies have shown a significant relationship between child abuse and broken homes. Broken homes can lead to child neglect which can lead to physical neglect, emotional neglect or medical neglect. It has been shown that a child is safest living with both biological parents that are married and least safe when his mother is cohabiting with a man other than her husband[51]. A child, in a broken home, will not receive as much emotional, psychological and financial support as a child in a settled home. Emery[52] noted that neglected children, often, are more seriously disturbed than abused children. The neglected child is treated more as if he were not there or as if his parents wished he were not there and this insidious fundamental rejection can inflict deep psychological wound[53]. Ganga *et al*[54] did psychosocial analysis of antisocial behavior and concluded that child abuse which robs children of their happy childhood is contributing to the growing number of violent young people who diminish the freedom to live and walk around safely in the society.

• Child Abuse and Postmodern Cultural Realities

As part of the process of rapid demographic and socio-economic change due mainly to urbanization and modernization, patterns of family formation and family life are continuing to undergo considerable change, altering the composition and structure of families in our societies. More prominent in urban areas is the rapid appearance of nuclear family system lacking the sense of cohesion of a typical extended African family. It is not as easy as in the past to provide children with the same amount of care and attention they automatically receive in the extended family

50 Sholex, (n.d.). Child Abuse Practice in Nigeria, retrieved from http://sholex.hubpages.com/hub/sholex on 13/11/2011.

51 Bosede, A. E. (2010). Broken Homes and Child Abuse. Pakistan Journal of Social Sciences,7, 3, 241 - 242

52 Emery, R. (1989). Abused and Neglected Children. Am psycho., 44: 21-328

53 Fagan, P. F. (1997). The Child Abuse Crisis: The Disintegration of Marriage, Family and the American Community. Heritage Foundation Backgrounder, 1115. Retrieved from http://www.heritage.org/search?query=the+child+abuse+crisis on 13/11/2011.

54 Bosede, supra

set-up. Modernization and urbanization directly cuts across ancestry based residence and mutual social, spiritual and economic cooperation[55].

A child growing up in such homes must contend with their postmodern cultural realities that predispose them to survive by figuring out answers to their questions partly because their parents are too busy making a living or are not together, as a couple. By extension, they must quickly understand the expectations of their reality and find a way to negotiate survival. These demands continue to make life difficult, breeding tension and uncertainties in them. This abuse may have far reaching effect than may be ordinarily contemplated. This factor redefines the child's interpretation of life and he may begin to see life as unfair. This may trigger crimes and socially unacceptable habits, and the list of possibilities is endless.

Modern civilization now advocates the involvement of women in white-collar jobs. Degbe observes that the involvement of more mothers in the modern labour force deprives the family of the daily love and care so necessary for proper child rearing and development[56]. This has greatly stressed the attention the child could enjoy. Thus the child suffers neglect and deprivation which are serious forms of abuse.

• Child Abuse and Traditional/Customary Practices

Childhood is that special period when a child is protected, preserved and sheltered against the harsh realities of life[57]. An ideal childhood is that in which a child is free from want, worry, and is exposed to the ethics decency and good behavior. In traditional African belief, a child must be respectful and know how to greet his elders.

It is sad to note that this definition may be hard for many African children to accept especially since it suggests that childhood is a period of innocence. The reality is that childhood is more than this. Put succinctly,

55 Degbe, J. L. (n.d.) Africa Family Structure, The Hild Foundation, retrieved from http://www.jicef.or.jp/wahec/ful217.htm on 13/11/2011.

56 Ibid.

57 Yenika-Agbaw, V. (2009). African Child Rearing in the Diaspora: a Mother's Perspective, Journal of Pan African Studies, 3 (4), 3

childhood is not simply a utopian space separate from adult cares and worries. It is subject to the same historical shifts that shape all human experiences[58]. A child in Africa is part of the obstacles that typify the family life structure. It is a common knowledge that children, especially in the rural part of Nigeria, travel several kilometers in the wee hours of the morning to fetch water, firewood or run some other errands for the family. He is expected to understand what the adult as well as the community expects of him and is often required to compromise[59].

Other causal factors in connection with child abuse include illiteracy, ineffective social services agencies, single parenting, etc.

ALMAJIRI INSTITUTION

"A forlorn murmur of young voices echoes from a shack pieced together from rusted corrugated iron. Inside, more than 50 children with torn clothes and unwashed faces hunch over small wooden tablets or torn scraps of paper with sections of the Quran. Above them stands a 20-year-old with a small whip -- the children are here to memorize the Quran. They are the almajiri. On the walls hang small bags with their few belongings. In these dark, cramped conditions, the children must study, sleep and eat", captured Purefoy[60].

The word 'almajiri' is borrowed from Arabic for someone who leaves his home in search of knowledge[61]. The original word it originates from is 'almuhajiri' (the emigrant), a term which came as a result of prophet Muhammad's (S.A.W) historic journey from Mecca to Medina with his companions in 622CE due to the persecution of the Meccan idolators[62]. Today in the Hausa Northern part of Nigeria, the term almajiri refers to anybody

58 Henry, I. K. (2011). Nigeria – The North and "The Almajiri Armageddon": Ending Feudalism through Education, retrieved from http://henryik2009.wordpress.com/2011/06/17/nigeria-the-almajiris-and-the-northending-feudalism-through-education/ on 14/11/2011.

59 Yenikо-Agbaw, V. supra

60 Purefoy, C. (2010, January 7). Nigeria's Almajiri Children Learning a Life of Poverty and Violence. CNN World, retrieved from http://articles.cnn.com/2010-01-07/world/nigeria.children.radicalization_1_religious-violence-religious-clashes-kano?_s=PM:WORLD on 13/11/2011.

61 "The Almajiri Education Foundation", retrieved from www.comss.net/almajiri.html on 13/11/20.

62 Muhammed, A. (2011). The Almajiris: Nigeria's Child Beggers, retrieved from http://www.africanoutlookonline.com/index.php?option=com_content&view=article&id=2942:the-almajiris-nigerias-child-beggars&catid=96:allcomers&Itemid=54 on 14/11/2011.

who begs for assistance in the street or from house to house. The common ages of these children are between seven and fifteen[63] . These children are exposed to different forms of pressures, problems, job lack and hunger. They are always ready to undertake any form of menial job, however demanding, in order to meet basic needs like food. In Kano alone, not less than 1.6 million almajiris walk the streets[64].

Almajiri is an ancient tradition in which poor families from rural areas across West Africa send their children to a network of Islamic boarding schools in the cities of northern Nigeria[65]. An afternoon break sends the children flooding the streets with small bowls to scrap for food. Over time the system became overwhelmed, neglected and abused. As a result the word 'almajiri' came to connote street-children without any form of parental care.

This practice of begging, ironically, is strongly condemned by Islamic teachings except in special circumstances such as when a man suffers loss of properties in a disaster, or a man has loaned much of his property for a common good, such as bringing peace between two warring parties.

This class of people, which has been described as mendicant urchins[66] , suffers a lot of deprivation. With their unkempt hair, dirty faces, blistered lips, tainted teeth, crusty skin, stinking bags and bare feet, they are distinctive[67] . Armed with plastic bowls, decorated with shabby attires and congregated into small groups, they accost members of the public with alluring songs and soliciting alms. They are common sights in the Northern states including Kano, Katsina, Kebbi, Niger, Gombe, Kaduna, Jos, Sokoto. According to the statistics of the Ministry of Education, 2009[68] , Kano state alone has about 1.6 million almajiris in some 26,000 'madrasas'; Sokoto, Kaduna, Niger and Borno states are homes to about 1.1 million, 824,200, 580,000, and 389,000 almajiris respectively. In Northern

63 Ibid.
64 UNICEF, 2006 supra
65 Purefoy, C. supra
66 Henry, I. K. (2011). Nigeria – The North and "The Almajiri-Armageddon": Ending Feudalism through Education, retrieved from http://henryik2009.wordpress.com/2011/06/17/nigeria-the-almajiris-and-the-northending-feudalism-through-education/ on 14/11/2011.
67 Muhammed, A. supra
68 Ibid.

Nigeria alone they are estimated to be about 10 million.

Parents put their children in the school and abandon them hoping that the society will cater for them. A typical day in an almajiri's life starts with morning Quran recitation and memorization from the pre-dawn prayer till around 7:30am. After this they disperse into the streets, local food parlours, mosques, motor parks, markets, residencies of wealthy persons and social gatherings; begging. This is repeated thrice a day punctuated with breaks at intervals for further lessons at intervals. After the day's toil and hustle, they finally retire to their dormitories for night lessons and sleep[69].

It is noteworthy that the almajiri system then has produced many scholars and society leaders many of whom are embodiments of the pristine 'sunnatic' knowledge. With the passage of time however, the system deteriorated and became abused. Professor Idris A. Abdulqadir observed that the current form and condition the almajiri system is operating is not that it started with. The system has been forced, especially with the coming of the British colonialists, to its present pitiful state[70]. He observed that in the pre-colonial days, the pupils lived with their parents for moral upbringing and the schools were located within the immediate environment where the people came from. He further observed that the management of the school enjoyed the involvement of the state, communities, the parents, the 'Zakkah', 'Waqf' and supplemented by the teachers and students through farming. The failure of the almajiri system, according to him, was occasioned by the British invasion of the region in which they killed most of the emirs and deposed some and deliberately withdrew state funding of the almajiri system, thus leading to the loss of fundamental control of the system and its collapse like a pack of cards.

TACKLING THE ALMAJIRI MENACE

It is agreeable that the system, as it is presently being practiced, seems to have outlived its usefulness. Standards of living are very low, no good

69 Ibid.

70 Abdulqadir, A. I. (2003). The Almajiri System of Education in Nigeria Today, retrieved from http://www.gamji.com/article5000/NEW55956.htm on 17/11/2011

teachers and no governmental involvement as such. As a result, the system is allowed to cater for itself, hence the resulting menace of about 10 million street urchins constituting nuisance to the environment. One could imagine 10 million medical doctors, engineers, pharmacists, etc with Quranic knowledge acquired in a decent environment. The parents of these children have abdicated their God-given responsibilities and allowed these leaders of tomorrow to turn into socially excluded bowl carrying children. Not just the parents, the society and authorities alike share in this conspiracy of silence over a social problem which must not go unwatched.

There is need for proper formalization of this almajiri system and integration of the school into the State's basic education system with a view to bringing together Islamic disciplines and conventional subjects, providing dual language competency in English and Arabic and cultivating a culture of learning cum moral decency. The system has been shown to have enjoyed proper state's presence in the pre-colonial era which accounted for its success for centuries. Government of the various Northern states may provide economic incentives to the teachers so that they do not have to depend on the children to beg for them to survive. Viewed from the economic perspective, these millions of unemployable youths who often lack basic training or skills become potential barrow boys and rather than contribute to the economy, are its liabilities.

The Nigerian government has made some input at some point at combating poverty generally. The question of sustainability and effectiveness of such programs however makes a mockery of such efforts. The establishment of the National Poverty Eradication Programme (NAPEP) is an example. Data has it that over 25 billion naira from 2001 till 2010 has been received by NAPEP for the fight against poverty in Nigeria; unfortunately the poverty level seems to be unresponsive to these windfall of resources addressed for the fight[71]. Neither the almajiris nor other classes of poor Nigerians living below poverty level have been elevated in their economic conditions.

71 Agbiokoro, T. C.(2010). The Impact of National Poverty Eradication Programme (NAPEP) on Economic Development of Nigeria, retrieved from http://chitueconomist.blogspot.com/2010/04/impact-of-national-poverty- eradication.html on 18/11/2011.

Efforts of the Federal Government have been noticed recently at integrating the almajiri education into the mainstream educational system. The Federal Government recently commenced the building of almajiri schools in 19 states[72]. This is besides the establishment of the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) which has called public's attention to the pupils' plight and their dire need for aid. Some state governments have made efforts at combating the menace. The establishment of the almajiri schools by the Kano and Sokoto state government is a plausible step towards salvaging the deplorable state of the almajiri institution. Education is the backbone of every society. Saidu[73] argues however that rather than set up special schools for them, the government should open up more classrooms to accommodate them for formal education so that they have an even playing field with the rest of the citizens in their states. In addition trade schools should be opened so that the products of the system can be gainfully employed as useful citizens. It is also plausible to note that individuals have been making efforts to initiate reforms to the system. The Almajiri Education Foundation (ALEF) in Sokoto State, a body founded by a product of the almajiri system itself, partners with Voluntary Services Overseas to fund the construction of a centre for the pupils[74].

Although laudable, these efforts have however proved to be insufficient in alleviating the predicament of the almajiris. Most of these efforts lack the fundamental quality of sustainability and consistency. In 2010 Dr. Muazu Babangida of Niger State formed a committee to come up with a blue print on how to integrate formal education curriculum into almajiri system to which the committee submitted a report in two volumes. But that was the last ever heard of the report[75]. The Federal Government's effort such as the Almajiri Education Foundation Program is, at best, an attempt. There is yet to be results to indicate any significant success with the attempt.

72 'FG Awards Almajiri School Contracts in 19 States' (2011, October 26). Leadership, retrieved from http://www.leadership.ng/nga/articles/7266/2011/10/26/fg_awards_almajiri_school_contracts_19_states.html on 18/11/2011.

73 Saidu, S. A. (2011, October 12). Almajiri Schools or Beggars' Colleges. allAfrica.com, retrieved from http://allafrica.com/stories/201110120821.html on 17/11/2011.

74 Muhammed, A. supra

75 Ibid.

CONCLUSION AND RECOMMENDATIONS

There are two basic characteristics of the almajiri system of learning that need to be arrested in order to sanitize the institution: the culture of itinerancy and the art of begging with impunity. Tracing the historical antecedent as captured by Professor Idris A. Abdulqadir, the almajiri system was a working institution which took its sustenance from sources that ranged from the government to the parents. The systematic disorganization of the system with the British colonialism came like a scissors disconnecting the institution's umbilical cord, and like a motherless baby, left to cater for itself.

The institution is a child of its society and deserves the sustenance efforts of its society. It is suggested that more commitment be shown to the almajiri trend of child abuse with especial attention. It must be noted that there are no sufficient legislations catering for these growing millions roaming the Nigerian streets. Even though a few exist at the moment[76] there is need for much more legislative involvement at both federal and state level in solving the problem.

Again it is suggested that skills acquisition be promoted side by side the almajiri system. This will remove them from street begging and equip them with skills that will make them become employable citizens.

It is further suggested that the current efforts of the governments in combating the menace should be taken more seriously. This must not be politicised if it is to achieve any far-reaching and meaningful success.

Government should set up a working welfare scheme that will take charge of any economically challenged home in terms of ability to cater for their children.

Primary and secondary school education should be free and compulsory. In addition, Islamic/quranic subjects should be incorporated into the regular curriculum so that the itinerant quest for Islamic knowledge would be

76 Kwara State enacted a law in 2006 towards eradicating the growing number of almajiris. See Abubakar, M. (2011, August 2). Kwara to Commence the Full Implementation of 'Almajiri' Law. allAfrica.com, retrieved from http://allafrica.com/stories/201108020259.html on 18/11/2011.

adequately catered for. This will make needless the peripatetic pursuit of Islamic learning as same would become obtainable within the four walls of the classroom.

Government of Northern states should provide free food for children who attend schools, at least the primary school level. This will hopefully secure the belief in the child that he doesn't need to hound for food on the street. In addition, free medical services should be made available for children within the school.

Conclusively, it is suggested that the Northern States Governors should institutionalize the collection of *zakah*. A certain percentage from its proceeds should be devoted inter alia, to catering for the almajiris and giving them quality education. These steps would go a long way in not just sanitizing but reengineering the attainability of the goals set by its forerunners.

CHAPTER 3

CORRUPTION AND GOOD GOVERNANCE IN NIGERIA

BY

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CORRUPTION AND GOOD GOVERNANCE IN NIGERIA

ABSTRACT

It is generally held view that corruption is one of the vicious socio-economic and political epidemics in the country. Corrupt practice is so prevalent within and outside of the government circle such that Nigeria has been christened one of the most corrupt nations in the world[1] . Corruption thrives where there is no accountability and transparency. This paper examines corruption, its effects on good governance and the implications for socio-economic wellbeing of the individual citizens, and economic growth and development of Nigeria as a nation.

We attempt to define some terms and examine the scope, nature and characteristics of corruption and the effects on good governance. We also consider elements constitute 'good governance and its characteristics. Causes of corruption and its overall effects on human rights and development are also examined. We also attempt to identify various ways and means by which corruption has been fought in Nigeria through penal law, the enactment of legal and the institutional frameworks like ICPC and EFCC, to curb the menace of corruption in Nigeria, which also seems to have failed to address the issue of corruption. Based on the critical examination and analysis of the challenges posed by corruption in Nigeria, suggestions and recommendations are made.

1 In the case of AG Ondo State V. AG Federation & Ors. (2002) 9 NWLR (PT. 772) at 364, the l earned Judge Justice Mohammed (JSC) lamented over the alarming rate of corruption that put Nigeria in the bad light as one of the leading nation in corruption globally

INTRODUCTION

It is a notorious fact that corruption is a worldwide and cross border affliction...[2] It is a global phenomenon that cut across both developing and the developed world. The only different is the magnitude of the practice which vary from nation to nation and from the various segments of the society. Thus, 'Gone were the days when corruption was exclusively the sour grape of the third world countries. Corruption has encapsulated the world like a total eclipse leaving in its waves'[3]

In Nigeria, corrupt practice is obnoxious as everybody, whether rich or poor, young or old, men or women, even the religious bodies' gets involved in one form of corrupt practice or the other, because corruption is a game of chance and a quick means of enriching oneself illegally. It has eaten deep into the fabric of the nation such that it has become a way of life. In the celebrated case of AG Ondo State vs. AG Federation & Ors., the learned Justice Katsina-Alu says:

It is a lame argument to say that private individuals or persons do not corrupt officials or get them to abuse their power. It is right that everyone involved in corrupt practices and abuse of power should be made to face the law in our effort to satisfy intention of the framer of our constitution.[4]

The above dictum underscores the seriousness of the evil of corruption and its devastating effects on the larger society, especially, in relation to human rights and national development. There is need to wage a frontal war against all forms of corruption using not only the instrumentality of the law and the justice delivery system. it requires in addition, the hands of every well meaning Nigerians put in place of authorities, the religious bodies, youths and the civil society to say 'a big no' to corrupt practices in Nigeria.

2 Afe Babalola, "Transparence Today and Tomorrow": Being an Address delivered on 31/1/07 on the occasion of the Chairman Guest Forum of ICPC. Abuja 2007

3 Agbo, M. Corruption: Bridging the Communication and Collaborative Gap between Nigerian Legislatures and International Anticorruption Agencies. Published in Kogi State Law Journal 2010

4 AG Ondo State V. AG Federation & Ors. (2002) 9 NWLR (PT. 772) at 364.

MEANING, NATURE AND CHARACTERISTICS OF CORRUPTION

It is not an easy task defining some terminologies; 'corruption' is one of the concepts that is devoid of a single and widely acceptable definition. There is no single comprehensive, universally accepted definition of corruption, because the concept stirs up different emotions in different people, depending on their perception and conception of corruption. However we shall attempt the various definitions offered by various authors, dictionaries and those offered by the statutory provisions. The purpose is to have better understanding of the scope, nature and the characteristics of corruption and corrupt practices particularly, in Nigeria

Successive legislations have neither been able to give a comprehensive definition of corruption. The Corrupt Practices Act of 1975, instead of defining corruption in section 30 simply enumerates the constituent elements of gratification. However, Section 2 of the Independence Corrupt Practice (ICP) Act[5] evasively defines corruption in the following phrase; *"Corruption includes bribery, fraud and other related offences"*

This is hardly a definition as it only merely provides descriptive nature of the subject matter without an in-depth definition.

The Black's Law Dictionary defines corruption as:
The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the right of others"[6]

This definition finds approval in the work of Gould and Amaro-Reyes, they define corruption as: "The use of public resources for private gain. It involves, but not limited to monetary benefit and material rewards obtained by public officials and/or civil servants for private use during the performance of their duties"[7]

5 ICP Act 2000

6 Brian, A Garner (Ed.) 8th Edition p. 371

7 Gould, D.J. and Amaro-Reyes. The Effects of Corruption on Administrative Performance. Illustration from Developing Countries. Washington DC (World Bank) 19988. For more definitions of corruption, see Ali Aku, Anti-Corruption Crusade in Nigeria Kaduna (Soft Land Associates 2003 at 16.

Corruption is also defined as 'the use of power for profit, preferment, or prestige, or for the benefit of a group or class, in a way that constitutes a breach of law or of standards of high moral conduct"[8] . Similarly, the Webster Dictionary[9] defines corruption as 'a price, reward, gift or favour bestowed or promised with a view to pervert judgment or corrupt the conduct especially of a person in a position of trust'.

This definition is similar to that offered by Kong. He defines corruption as "The extraction and acceptance of payment from private entities (be they individual citizens or businesses) by public officials, and the private misappropriation and abuse of public funds"[10]
Dey[11] also defines corruption as "any act undertaken with the deliberate intent of deriving or extracting monetary or other benefits by encouraging or conniving at illegal activities"
Most of these definitions focus on bribery, whereby, public officers using their fiduciary position to offices they occupy to unjustly enrich themselves.
Some other definitions focus attentions on the nature and effects of corruption.

Friedrich observes that:
Corruption can be said to exist whenever a power holder who is charged with doing certain things, i.e., who is a responsible functionary or office-holder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby does damage to the public interests.[12]

Here, corruption is defined in term of transaction or exchange between individuals who corrupt and the persons engaged in the corrupt practices. From the various definitions attempted, although, the definitions may not be explicit as to what constitutes corruption or corrupt practice, never

8 The Dictionary of Social Sciences 1964 p.142
9 Third International 1960
10 Kong, T. Y. "Corruption and its Institutional Foundations: The Experience of South Korea" IDS Bulletin, vol. 7, No. 2, 1996, p.49.
11 Dey, H.K, "The Genesis and Spread of Economic corruption: A Micro-Theoretic Interpretation" World Development 17(4): 1989, 503 – 504.
12 Friedrich, C. J. "Political Pathology" The Political Quarterly vol.37, 1966 p.74

the law, it reveals that beyond bribery and fraud, corruption and corrupt practices cover more vices of economic and political related offences. It can be summed up that corruption is the unlawful use of one's position or office to obtain advantages or gain inconsistent with that position in order to circumvent laid down regulation to the detriment of the larger society. Thus, corruption by nature occurs in the course of an individual carrying out normal duty or someone in a peculiar position that can be used for personal gains or an officer using public office for his private gains.

NATURE AND SCOPE OF CORRUPTION

Corruption or corrupt practices cover a wide range, scope and is all pervasive in nature. Firstly, most of the economic related crimes are backed up by corrupt practices, especially in government circles; chief among which, are embezzlements, money laundering and misappropriation of funds by persons in authority, especially funds that are meant for public utilities which have been diverted into private accounts and uses.

Bribe is another form of corrupt practice commonly associated with office work whether in public or private office or in business circles.

Another common form of corruption in the context of Nigeria is nepotism in relation to appointment, promotion, or award of contracts to kinsmen, friends and associates. These practices are widespread in the public sector and private enterprises in violation of subsisting rules. Here merits often give way to favouritism thereby jeopardising effective and efficient performance. This also invariably has a negative impact on socio-economic growth and development in Nigeria.

Another form of corruption is politically motivated whereby there is corrupt practice in election which may be characterised by massive rigging which may often lead to violence and killing of opponents. This is very dangerous with its attended risks of ushering bad leaders which often lead to bad governance[13] Corruption therefore, may involve bribery, nepotism, political violence and fraud (embezzlement, inflation of costs of services, and forgery). It suffice to say, the use of the fiduciary positions

13 The last general election of 2020, although, was characterised by irregularities as widely reported by local news papers and various independent bodies or monitoring institutions both at national and international level. However, there were little or no remedies. The corrupt practices ushered in lot of bad leaders that also continue to perpetrate corruption with impunity.

by people in authorities to gain material wealth for their own advantages often make corruption a herculean task to tackle.[14]

CAUSES OF CORRUPTION IN NIGERIA

Many reasons account for why corruption and corrupt practices thrive in Nigeria unabated. They can be classified under three major categories- social, economic and political. The categories which are highly interwoven and interrelated include:

- Greed, Poverty, Illiteracy,
- Inadequate infrastructure
- under-development, Unemployment and population explosion
- Break down in norm, moral and value system or the general moral decadence
- Lack of political will, poor political leadership and bad political climate
- Lack of internal control for effective enforcement of rules and regulations
- Lack of spirit of nationalism (collectivism) and ethnic pluralisms and religious bigotry
- Lack of self control
- Lack of respect for rules and regulations and inadequate penal sanction
- Lack of or inadequate supervision of rules and regulations
- Absence of social justice and Poor family background
- Internalisation of corrupt practices in Nigeria
- Modern technology-(computer crime both in the banking sectors and other corporate organisation, government circles relating to white collars crime, cyber/internet crime)[15]

The above lists which are by no means exhaustive are the common causes and features of corruption in the Nigerian governance that make corrupt practice problematic, thus, hampering effective promotion and protec-

14 Ibori's case, one of the former ruling classes, is a classical most recent example. Here EFCC did not only drop several charges of corrupt practices against him because he was a privileged government official with immunities. He was discharged and acquitted only to be convicted of the same or similar offences abroad.

15 These factors and several others have been indicted by several authors like professor E.O Alemika. Especially those factors compiled Dr. Ekumankama O.U in his book: Law, Corruption and Other Economic Crimes in Nigeria; Problems and Solutions. These are regarded as key and strong indicators of causes of corruption and corrupt practices in Nigeria

rights, economic growth and national development.

CHARACTERISTICS OF CORRUPTION

Corruption and corrupt practices are characterised by the following:
- Erosion of transparency and the rule of law in order to conceal illicit actions and illegitimate decisions;
- Loss of government funds through the inflation of costs for procurement, services and projects;
- Poor delivery of services as money meant for such services are embezzled or incompetent personnel are recruited to provide or deliver goods and services.
- Cases of poor power and water supplies, provisions and maintenance of good road network, poor education and health services
- Loss of revenues and loss of public trust and legitimacy by the government.
- Inequality in service delivery as service provision is influenced by either ability to bribe or nepotism or clientele relationships with officials;
- Widening economic and political inequalities as those who are involved in corruption become richer and more powerful, without corresponding productivity and at the expense of the fellow citizens ;
- Disincentives for investment and economic growth because it produces additional unproductive costs
- High costs of doing business which may in turn cause widespread poverty and unemployment due to high prices of goods, low purchasing power resulting low capacity utilisation by producers and manufacturers which in turn results to retrenchment and low employment generation;
- Political instability as different groups in society struggle to control state power in order to ensure their corrupt enrichment and ability to dispense patronages to their cronies, relatives and associates.
- Political, ethno-religious and communal conflicts and violence are largely due to corruption which flows from absence or inadequate accountability and transparency.

Corruption is an age long problem in Nigeria. Since the colonial administration, governance in Nigeria continues to be characterised by the above listed which constitute major socio-economic problems that is largely ac-

countable for bad governance in Nigeria[16] . We shall proceed to discuss the basic elements of good governance.

ELEMENTS OF GOOD GOVERNANCE

Governance may be generally described as management. Good governance therefore means good management. 'Good governance' presupposes that there is also' bad governance.' Generally, good management involves the optimum mobilisation, combination and coordination of resources within an agency or society in order to attain steady and efficient production of goods and delivery of service.[17]

Like the concept 'corruption' the concept 'Governance' has no generally acceptable definition. According to Hanngi, "Governance refers to the structures and processes whereby a social organisation-from the family to corporate business to international institutions steers itself, ranging from centralised control to self-regulation".[18]

Krahnam defines governance as "The structures and processes which enable a set of public and private actors to coordinate their independent needs and interests through the making and implementation of binding policy decisions in the absence of a central political authority' Governance is also defined as "The manner in which power is exercised in the management of a country's economic and social resources for development"[19] Mohiddin[20] classifies Governance into the following categories: Political governance, Administrative governance, Economic governance, Civic governance and Systemic governance.

16 See Bernard Storey (1953) Report of the Commission of Inquiry into the Administration of the Lagos Town Council Lagos: Government Printer, and E. W. J. Nicholson (1956) Report of the Commission of inquiry into the Administration of Ibadan District Council. Ibadan: Government of Western Region.

17 Ogiogio, G. "Capacity Building and Knowledge Management in Africa: Concepts, Issues and Implications for NETF, A Discussion Note presented at the Seminar on Building Capacity for the Education Sector in Africa organized by the Royal Norwegian Ministry of foreign Affairs, the World Bank and the Norwegian NETF Reference Groups Rica Park Hotel, Holmenkollen, Oslo, Norway, October 2005. 13-14.

18 Hanggi, H. 'Making Sense of Security Governance' in Hanggi, H. and H. Winkler (eds.), Challenges of Security Governance. (Verlag , DCAF and LIT, 2003). p.6

19 World Bank, Managing Development. The Governance Dimension (World Bank Publication 1991)11

20 Ahmed Mohiddin 'Reinforcing Capacity towards building the Capable State in Africa' Concept Paper for the Seventh Africa Governance Forum (AGF VII) on the theme Building the Capable State in Africa (Ouagadougou, Burkina Faso, 24-26 October) 2007 (New York: Regional Bureau for Africa, UNDP).

Political governance is concerned with the participation of the people in the decision-making processes that affect their lives and livelihood. Political governance is further described as relating to the issues of democratic representation and participation, power sharing and the relationship between the institutions of governance, such as the legislature or local council, the executive and the judiciary, political parties and civil society organizations.

Administrative governance deals with the implementation of the decisions, the establishment of the institutional framework for the efficient and effective implementation of public policies and the supply of the public services. Economic governance on the other hand, relates to the decision-making processes, the efficient allocation of economic resources in order to promote growth and development, the creation of wealth, employment, equity and sustainable development.

Civic governance refers to the working of the civil society, the relationship between the various voluntary and non-profit civil society organizations such as NGOs, CBOs, and cultural, ethnic and religious organizations. Systemic governance is responsible for the convergence of all the domains and processes of governance that brings together government [central and local], private sector and civil society in an efficient, effective and meaningful framework for efficient performance.

The classifications above suggest that governance is all encompassing. It takes into account and consideration of every sphere of the life of its citizenry. The various classifications on the other hand, demonstrate that the concept of governance is applicable to both governmental and non-governmental processes and activities aimed at achieving specific objectives.

CORE ELEMENTS OF GOOD GOVERNANCE.

The United Nations Commission on Human Rights and United Nations Economic and Social Commission for Asia and Pacific in a resolution, identify eight core elements of good governance.They are, transparency, accountability, participation, responsiveness, Consensuses, Effectiveness and Efficiency, and Equity and the Rule of Law.

Transparency- Transparency simply means openness. It implies the availability of clear rules and guidelines for actions and decisions in spe-

cific aspects of governance, which are scrupulously observed by everyone concerned. The principal goals and benefits of transparency are the existence of explicit and publicised rules of action and the observance of the rules by those who enforce or apply them, and as a result, the absence of arbitrary exercise of power.

Accountability- Accountability refers to holding officials responsible for their performance and the use of authority and resources assigned to them to produce goods or deliver services. According to Schedler[21] the "term 'accountability' expresses the continuing concern for checks and oversight, for surveillance and institutional constraint on the exercise of power"

Participation- This implies the capacity and opportunity of all sectors of society to be represented in the processes and institutions through which vital political and economic decisions are made.

Responsiveness- Responsiveness refers to prompt, sensitive and empathetic response by public officials and agencies to demands for goods and services by citizens, especially those in distress and vulnerable situations.[22] The term also refers to sensitivity to public sentiments and opinions on an issue. Nigerian government institutions and officials are not known to be generally responsive to public opinions and interests

Consensus Oriented- In a democratic society or a society characterised by good governance, policies and decisions are not imposed by the rulers. On the contrary, policy ideas and issues are subjected to extensive and free public debates so as to benefit from wide spectrum of opinions and knowledge that will lead to the production of more robust, relevant and effective policies.

Effective and Efficient- Effective government refers to the capacity of the relevant agencies to perform the tasks assigned to them for the benefit

21 Schedler, A. 'Conceptualizing Accountability' in Diamond, L. Et Al (Eds.) The Self-Restraining State – Power and Accountability in New Democracies" (1999)

22 United Nations Commission on Human Rights (UNCHR) Resolution 2000/64

of the citizens. For instance, an effective government should be able to guarantee adequate power supply for various uses by citizens at all times, guarantee security and safety; ensure access to shelter, adequate food and nutrition, healthcare, education, employment, assistance in times of distress and protect the rights and freedoms of all citizens, without discrimination and at all times.

Efficiency refers to the use of resources in the best way that minimizes cost and waste and optimizes effectiveness on sustainable bases. Scientific and technological advancements as well as transparency can enhance effectiveness and efficiency.

Some of the obstacles to effectiveness and efficiency of public institutions in Nigeria are lack of transparency, exclusion, and corruption in the form of bribery, fraud and nepotism. Resources available for delivering services at effective level are diverted through bribery and embezzlement. Contracts are awarded to incompetent contractors, and incompetent and inexperienced persons are appointed to positions for which they are least suited, while more competent persons are excluded. These corrupt and nepotistic practices affect the effectiveness and efficiency of the Nigerian public institutions.

EQUITY, INCLUSIVENESS AND THE RULE OF LAW.

Equity refers to fairness or justice, giving to everyone whatever is their due without discrimination.[23] Government institutions and officials are expected to be fair in their dealings with the citizens. Inclusion or inclusiveness refers to the participation or involvement of every group in the society in decision-making.

In Nigeria, some groups and individuals are excluded from participation or appointment to positions for which they are best suited in major national institutions in pursuit of federal characters. The question is, is it possible to objectively achieve this so-call federal character with just and fairness or without discrimination?

23 www.unescap.org/huset/gg/governance.htm, accessed October 22, 2011

Discrimination is the live experience of most Nigerians, in their contacts with or employment in public institutions. This is an example of government that is ineffective in its enforcement of the provisions of the constitution that protect citizens' rights from exclusion. Corruption and discrimination can inhibit inclusion and equity.

Rule of law. Rule of law connotes several interrelated ideas such as the precepts of equality under law and equal protection by law as well as prohibition of arbitrary (unpredictable) exercise of power by the government and especially its coercive agencies (police and security services). Raz, an English legal philosopher, proposed that the requirements of the rule of law are that:

- All laws should be prospective, open and clear, relatively stable, guided by open, stable, clear and general rules.
- Independence of the judiciary must be guaranteed;
- The principle of natural justice must be observed;
- The courts should have review powers over the implementation of the other principles;
- The court should be easily accessible' and the discretion of the crime-preventing agencies should not be allowed to pervert the law.[24]

These precepts constitute the doctrine of rule of law. However, in Nigeria the precepts have been observed more in breach by successive governments that is characterised by nepotism and corrupt practices.

CORRUPTION AND GOVERNANCE IN NIGERIA

Chapters I, II and IV of the Constitution of the Federal Republic of Nigeria 1999 enjoin the governments to guarantee the following conditions:

- National territorial boundary and integrity
- Popular sovereignty, security and welfare of the citizens
- Power-separation and power-sharing among organs and tiers of government
- Majority rule with the protection of the rights of minorities (political

24 See www.unescap.org/huset/gg/governance.htm, accessed October 22, 2011

and social)
- Social justice and welfare for the citizenry
- Transparency and accountability through checks and balances and anti-corruption measures; limited government (including institutional and procedural measures that define and limit the powers of government)
- Succession to power through elections that is fair and free or devoid of rigging, and
- Fundamental human rights, equal protection and due process of law.

Synchronising the above provisions with the elements of good governance and the state's practices that are characterised by absolute corrupt practices, the question is, has governance in Nigeria been good or bad? On the other hand can we claim that there have been good or bad governance in Nigeria since independence? These questions can only be answered in relation to the degree to which successive administrations in the country have performed the duties assigned to them in the nation's constitutions in accordance with the prerequisites for good governance as indicated above.

Alemika[25] observes that, there has been unevenness and decline in the quality of governance in Nigeria since independence. He re-iterated that, from independence in 1960 to late 1970s, some measure of good governance existed in Nigeria and resulted in 'functional and effective public services; reasonably stable macroeconomic policies; functional socio-economic infrastructure; high quality educational system, and responsive and effective healthcare delivery system. However, the quality of governance has declined since the early 1980s resulting in mass poverty, endemic destructive corruption, high rates of unemployment; collapse of industrial production sector; widespread violent conflicts (ethnic, religious, communal and political), deterioration and inadequacy of infrastructure (especially rail and road transportation, electricity); decay of educational and healthcare institutions; brain drain; high incidence and prevalence of violent and serious economic crimes; neglect of agriculture and rural development, and decline in human development resources within the public institutions, and lately the incidence of terrorism. These conditions

25 Alemika, E.O "Good Governance and Accountability in Nigeria" Paper Presented to Course Participants at the National Defense College, Abuja on 25th October 2007. P.3

were the consequences of bad governance.[26] Thus the ingredients and benefits of good governance that existed in the first one and half-decade after independence have been steadily eroded by corrupt practices and replaced with bad governance during the past three decades[27].

WAR AGAINST CORRUPTION IN NIGERIA.

Since independence, several efforts and measures have been advanced to control for corrupt practices in Nigeria. Successive governments in Nigeria since 1975 have introduced different anti-corruption measures in addition to several dozens of elaborate laws, institutions and programmes to control corruption. For example, Murtala - Obasanjo dismissed thousands of officers in the nation's public service; Established the Corrupt Practices Investigation Bureau; Enacted the Corrupt Practices Decree (1975), repealed in 1979. Shagari regime introduced National Ethical Revolution Programme. (1979-1983). Buhari military regime introduced the War against Indiscipline Programme. (1984 - 85) The National Orientation Movement was introduced by Babangida military regime. Abacha military regime launched War against Indiscipline and Corruption (WAIC). Similarly, one of the cardinal campaign promises and policy pronouncement of the former President of Nigeria, Olusegun Obasanjo also canvassed for war against corruption and corrupt practices, which gave birth to Independence Corrupt Practice Commission (ICPC) and the Economic and Financial Crime Commission (EFCC) as anti-corruption agencies.

In spite of these and all other propagandas, corruption and corrupt practices continue to thrive unabated in Nigeria.
Below also are some of the existing provisions or statutes which either had been reinforced, re-enacted or established as new orders promulgated with or without institutional frameworks directly or by inference, for preventing, controlling and putting in checks the corrupt practices in the country. They include:

26 Ibid, Alemika at p6

27 Alemika, E.I " Corruption and Corrupt Practices, Impacts on Good Governance and Implications for National Development Being a paper presented at a three Day Workshop organised by African Development Studies(ADSC) Centre for the Senior Officials from the Oil (Petroleum) Sector at Nugget Hotel Utako Abuja21-23 March 2012

(ii) The Criminal Code Act [28]
(iii) The Penal Code[29]
(iv) The Police Act[30]
(v) The Corrupt Practices Act 1975
(vi) The Code of Conduct Bureau and Tribunal Act[31]
(vii) The Public Complaint Act[32]
(viii) The Failed Banks (Recovery of Debts) Financial Malpractices in Banks Act
No. 18 of 1994 (repealed).
(ix) The Advance Fee Fraud and Other Related Offences Act No. 13 of 1995.
(x) The Foreign Exchange (Monitoring and Miscellaneous Provi sion) Act No. 17 of 1995.
(xi) The Corrupt Practices and Other Related Offences Act 2000.
(xii) The Economic and Other Financial Crimes Act 2004. (EFCC)
(xiii) Independent Corrupt Practices and Other Related Offences Com mission

The above are various anti-graft provisions in Nigeria established at various points and different times to combat corrupt practices, yet, corruption continues to thrive with impunity with no remedy in sight. The question is, in spite of above various legislative efforts and the propagandas by the government itself, why does corruption and corrupt practices remain a herculean task to control?

In a study of this nature, it is often not possible to find answers or solution to all the corrupt practices in Nigeria. However, part of the problems of corruption in Nigeria can be traced to lack of the independence of both the legal and institutional frameworks for controlling, preventing and the total eradication of corruption and corrupt practices in Nigeria. Also the independence of the judiciary is greatly undermined to curb the excess of corruption in Nigeria. Closely associated with the above factors is the lack of political will and the greed of the politicians which greatly undermine

28 Cap. 77 LFN
29 Cap. 86 LFN
30 Cap. 359 LFN
31 Cap. 56 LFN
32 Cap. 377 LFN

the effective and efficient performances of the various mechanisms put in place to check corruption in Nigeria. For example, the political players accused of corruption are the same groups of people to promulgate anti-graft laws and the institutional frameworks for fighting corruption, it is the same body responsible for appointing the officers for enforcing the anti-graft laws like the EFCC, ICPC and the like; it is the same political bodies that are responsible for controlling the judiciary. Thus, assuming there are genuine findings or solutions concerning corrupt practices in Nigeria with elaborate recommendations, to who shall recommendations be directed? Who are at liberty to implement? It is still the same political accolades whose personal interests are higher above the interest of the general populace. Hence, solutions to corruption are likely to continue to be illusions in Nigeria until the civil society can find the right political climates which also require seeking external international governmental agencies and other relevant NGOs[33] to address the issues of corruption in Nigeria.

All hope is not lost; other nations with similar culture and history of corruption akin to Nigeria have tackled corruption frontally with high measure of success.[34] It is therefore necessary for the Nigerian government to rise above its present status as the leading nation in corruption and corrupt practices, to avail itself to the various opportunities from the other developing countries like Hong Kong, Botswana, Malaysia and host of others to combat corruption for the overall economic growth and national development in order to meet the global minimum standard of a zero tolerance of corruption

GLOBAL WAR AGAINST CORRUPTION.

Growing concern about corruption as an international problem has been on the increase since the 1980s and 19990s. Corruption has continued to

33 Records have shown that Hong Kong was once as corrupt as Nigeria. However, the basic Law of Hong Kong and its Constitution gave its Anti-Corruption Commission maximum support and backing with most of its staff - sergeants recruited and trained from the UK Police forces to be able to fight corruption Squarely in the country.

34 See Malaysian Anti-Corruption Commission www.en.wikipedia.org/wiki/malaysian Accessed April 8, 2012; Anti-Corruption Agencies (ACAs) 2006 www.usaid.gov/ACA_508c.pdf. See also Malaysian Anticorruption Agencies 2008, www.acf.com. Se also www.bankof Botswana.bw/asset./ ups www.gov.bw/en/Ministries-Autho

...discourse at international terrains. As a result, a number of le...binding and normative instruments and international anti-corrup...agencies have been developed in response to corruption. The legal ...framework can be classified into three major categories. They include:-

(i) Binding Legal Instruments: These are certain concrete requirements ...that are of legal obligations binding on state parties to the ...concerned in international law;
(ii) Normative legal instruments: These include instruments that are legal ...but not legally binding on parties.
(iii) Normative instruments that set standards that are not legal in nature, ...example, the allocation of resources to combat corruption. Some of ...instruments and agencies are as listed below:
(a) United Nations Convention against Corruption[35]
(b) United Nation Convention against Transnational Organised Crime
(c) The United Nation International Code of Conduct for Public Of...
...of 1996.
(d) The United Nation Declaration against Corruption and Bribery in ...International Commercial Transactions of 1996.

The Anti-corruption Agencies include;

i. United Nations Office on Drugs and Crime (UNODC).

The UNODC is the midwife of the UN Convention against Transnational Organised Crime. The Convention is intended as a blue print for countries to effectively track down international criminal organisations, eliminate "safe havens", protect witnesses and block money laundering. State Parties are enjoined to take measures to fight transnational crimes. These measures include the enactment of legislation against domestic criminal offences in order to combat the problem, the adoption of new framework for mutual legal assistance, extradition, law-enforcement, cooperation, technical assistance and training.

ii. The World Bank

The World Bank also promotes good governance and has supported the

35 In November 2002, a conference was organized in Abuja Nigeria on implementing the United Nation Convention Against Transnational Organized Crime And It's Protocol.

anti-corruption war globally. The World Bank has repeatedly a... ICPC since its inception particularly in the area of research and pub... It sponsored a corruption survey in Nigeria and, international co... ences on corruption in Ethiopia and Lome-Togo[36]
Through proper channel our legislatures can key into these opportu... to enhance human development and capacity building.

iii. The United Nation Development Programmes (UNDP)
The UNDP readily avails its expertise and resources to anti-corrupt... agencies and institution in the area of training, research and provisio... working tools.

Other relevant regional based documents on anti-corruption include:

-Economic Co-operation and Development (OECD)
OECD was set up in 1997 to Combat bribery of Foreign Public Offici... in International Business Transaction. There was recommendation by t... OECD Council on the Tax Deductibility of Bribes of Foreign Officials.

-Council of Europe Instruments and Documents

(a) Criminal Law Convention on Corruption of 1998
(b) Civil Law Convention on Corruption of 1999.
(c) Model Code of Conduct of Public Officials of 2000.

-The Organisation of America States (OAS)
a. Inter-America Convention against Corruption.

Other international agencies that the Nigerian Government do collaborate with from time to time include:

(i) The United States Agency for International Development (USAID)
(ii) The Department for International Development (DFID);
(iii) The National Center for State Courts (NCSS);
(iv) Transparency International (TI);
(v) US Justice Department;

36 Ali Aku, Anti-Corruption Crusade in Nigeria Kaduna: Soft Land Associates 2003 p. 136-138

(vi) Deutsche Geseslllschaft fur Technisch Zusammenarbeit (GTZ)[37] ; and

(vii) US Office on Crime Control.

Most of these international organizations although are not formally set up principally for anti corruption crusade, but as a result of the multi-dimensional and hydra-headed nature of corruption and its impact on governance, both nationally and at international level. These agencies have collaborated and provided one form of assistance or the other to the Nigerian government through its agencies such as ICPC and EFCC over the years.

It is worth noting that the various Conventions, Instruments and Documents listed above are veritable sources of Anti-corruption legislation held at international level. They can be used as comparative study to our local legislations for in-depth study, analysis and adoption where necessary with a view to strengthening our domestic Anti-corruption laws.

The various Conventions and Protocol against corruption particularly the United Nation Convention against Corruption (UNCAC) can only become effective or have the force of law if enacted into law by the National Assembly. However, discrepancies and loopholes in domestic laws do not help matters. For example by virtue of section 12 (1) 'No treaty between the Federation and other country can have force of law in Nigeria except such treaty is first enacted into law by the National Assembly' [38] This often is a herculean task to so do as there is lack of political will on the part of the political leaders and the politicians who are greedily pursuing their own selfish interests.

Our legislature can no longer fold arms and watch while the country is continually plunged into the disarray of corruption unbridled. Therefore there is the need for the legislature to study and analyse the various Conventions, and various anti-graft provisions of other nations especially, modus operandi of those anti-corruption agencies, with a view of offering the legislative back bone for a credible, sustainable and effective war against corruption in Nigeria. The emphasis here is on the dire need for

37 The GTZ has being working on judicial integrity projects in Nigeria with Lagos, Edo and Borno as Pilot States.

38 1999 Constitution FRN

multilateral approach through international cooperation, like the UN CAC. However, Cooperation and collaboration in this war against corruption must start from home as the saying goes, '*charity begins at home*' if we are to achieve meaningful result.

The reception of technical assistances will greatly enhance the competence and institutional capabilities and responses of our legislators to the issue of corruption. A cursory look at the UNCAC document revealed that technical assistance was a crosscutting issue that requires implementation. The various International Anti-Corruption Agencies identified and highlighted in this paper may be willing and able to render assistance and capacity building of the EFCC, ICPC and other relevant anti- corruption agencies. But there must be transparency in public communication, and mechanisms to give the Assemblies broad, straightforward and timely access to information.

One of the by-products of corruption is the use of the proceeds of corruption and other economic crime to acquire properties in foreign lands. Article 57 of UNCAC sets up the mechanism for the recovery and return of assets acquired with the proceeds of corruption. This is not an easy task for reasons that are obvious, because, corruption also adversely affects the economy of the receiving nation. Also, it requires the willingness and the cooperation of the home government of the corrupt officers.

Special efforts are needed therefore to overcome legal obstacles between requesting and requested states. This will involve amending the loopholes caused by discrepancies in the legal system. The advanced economics also need to have an attitudinal and behavioural change towards the feeling and sentiments of the victim states that are mainly of the third world stock.

It is sad to note that currently, there is no functional regional anti-corruption Instrument in Africa as obtained in other continents for effective control and prevention of corruption in the African region. This means that the fight against corruption has not received the necessary support and push regionally in Africa. The Africa Union must as a matter of urgency come up with Instruments on corruption because of the transnational nature of corruption.

THE IMPACTS OF CORRUPTION ON GOOD GOVERNANCE

It is widely recognised that corruption is one of the major impediments to democracy, development, promotion and protection of human rights, good governance; security, safety and peace in the country. No statement captures the ills of corruption more than the view of their Lordship in the case of AG Ondo State vs. AG Federation and 35 Ors.[39] Ogwuegbu J.S.C. says, "*Corrupt practice and abuse of power can, if not checked threaten the peace, order and good government of the Federation or any part thereof*"

His Lordship also quoted copiously from the preamble to Chief Afe Babalola's brief at page 338 that: "*If these were the only consequences of corruption it would not have been so threatening. The deadly threat is the effect on the economy of the country with the attendant inflation and lack of control on the monetary and fiscal policies of the government*"

On the other hand, Justice Mohammed (JSC) had this to say: "*The disastrous consequence of the evil practice of corruption has taken this nation into the list of the most corrupt nation on earth*"[40]

In his inaugural speech on 29th May, 1999 and in 2000 respectively, Mr. President Olusegun Obasanjo (the former Head of State) spoke on the evil of corruption when he stated thus: "*with corruption, there can be no sustainable development, no political stability. By breeding and feeding on inefficiency, corruption invariably strangles the system of social organization. In fact, corruption is the antitheses of development and progress*"[41] .

There is lack of concerns and absence of responsive governance, accountability, equity, inclusiveness and observance of the rule of law as evidence of good governance. For example, 'Ghana- must-go' bags are now synonymous with the mace as the symbol of legislative authority. It is sad to note that the government that is struggling to pay N18, 000 as minimum wage and also a government that could deny its citizenry the new year day celebration by removing fuel subsidy in order to revamp its economic, can

39 Supra at page 337.
40 Ibid at 347.
41 This was on 13th June, 2002 during the signing of the ICPC Bill into Law.

afford to approve for the members of House of Rep, a whooping amount of N38.8 billion per anum whereby, each member is to go home with N27million as a special quarterly allocation or allowance which is said to be for oversight functions. The 'Nation News Papers' recorded that the quarterly allowance used to be N15million which amounts to 80% increase. The 'Nation News' reiterates that this is just one of the numerous allowances enjoyed by the Member of the House of Rep and Senators apart from their salaries.

Other benefits and allowances approved by the Revenue Mobilisation Allocation and Fiscal Commission (RMAFC) are salaries, vehicles maintenance, entertainment, utilities, Constituency Allowances, vehicle loan, duty tour and estacode. Only last year, the same House requested for Camry cars for its 360 members for oversight functions costing a total of N2.5billion.[42]

The Honourable members of National House of Assembly and the House of Reps must be held politically accountable and this requires that the civil society must checkmate the members with regards to the business of the legislature and the conduct of its individual members.

The evils of corruption are in exhaustive as many writers have contributed on this score, especially; if we translate those points as enumerated under the sub-title -'characteristics of corruption' above.

The impacts of corruption on economic growth and national development are legions and enormous.[43] Suffice to say that both the givers and receivers of bribes at the end of the day are worse off. Because, corruption and corrupt practices deprive the general populace- the citizens of their rights to the common goods, needs and services, peace and tranquilities, protection of lives and property, equity and equality, justice and fairness and a host of other features of good governance for which the executioners of corruption and corrupt practices are not generally exempted.

42 The Nation of Sunday 18 March 2012 p.6

43 See: Alobo, J.E. Corruption on the Rock Abuja (Josim Publishing House) 2008 at 61-71. Ekunankuna, D.U. Law Corruption and other Economic Crimes in Nigeria Today (New World Publishers.) 2002 at 95-142.

RECOMMENDATION

We should borrow a leaf from the traditional recommendations for control of corruption, especially by liberal political economy ideologists[44], which include:

1. Strong democratic culture of accountability, including parliamentary oversight of government expenditures;
2. Transparency, accountability, and good governance;
3. Adequate reward for public officials.
4. Strong legal control and judicial system.
5. A 'small' government that is not involved in the ownership, control and management of economic enterprises, in order to reduce the scale of resources in its control that may be corruptly appropriated. The logic is that big government entails both concentration of resources as well as low visibility and accountability. Thus small government reduces resources and opportunity for corruption.
6. The committee with oversight functions over ICPC must guarantee and protect the independence of the commission by ensuring that the commission's allocation in the Appropriation Bill is passed untouched.
7. The challenge of governance in the country requires that all patriotic citizens must unite to address, evolve, defend and continually strengthen a system of government that guarantees peace and security; Nigerians must rise and defend their rights to good and democratic governance as well as their rights to human security[45]. They must resist and stop the use of state power to defend the security of the lord and serfs of the ruling oligarchy.
8. Government must create an enabling environment for economic growth an equitable distribution of its benefits, promotion of universal access to education, health and social services; encourages and promotes freedom of expression, information, association, and participation; in-

44 The ideological are as enumerated professor Alemika in the paper presented at the Nigeria War College

45 Human security will entail in (a) economic terms job creation to prevent high unemployment, poverty reduction, reducing wide inequalities, promoting industrial productivity, efficiency and equity in the use of resources and distribution of resulting benefits; enhancing economic diversification, investments and international trade, human capital development and scientific/technological development; (b) political terms (promoting social and efficacious citizenship through the guarantee of participation, inclusive governance, and generally social democratic governance, rather than limited capitalist/free market driven liberal democracy with its shallowness of emphasis on electoralism and formal equality rather than substantive equality, and (c) social terms (guaranteeing human rights, universal access to (i) cultural, scientific and technological education and development; (ii) food security, (iii) health care, and safety and security).

...ests in human resources development; deals swiftly and effectively ...
...corruption; ensures political continuity and

10. The Human Rights Commission, NGOs and other related organ...
...forms have supportive roles to play while the civil society stands its g...
...to monitor the Government activities as regards corrupt practices in ...
...nation.

11. The legislature must also beam the searchlight on itself. The pu...
odour of corruption in the National Assembly and Houses of Assembly ...
the State are most disturbing.

Many of these proposals or recommendations are relevant to the control ...
corruption in the country and were previously introduced under vario...
governance in the past which fail to yield good results. In spite of the...
measures, corruption remains endemic and widespread because mea...
ures have not addressed the symptom or targeted the wrong sectors an...
actors leaving the groups and individuals leaving the major beneficiari...
who control the economic and political systems of the country some o...
who are also syndicates in corrupt practices. The question is where do we...
go from here?

CONCLUSION

These legislatures must be proactive in the ongoing war against corruption. The help of other anti-corruption agencies at international level must be sought to assist the legislatures in strengthening the roles they play in areas critical to the fight against corruption. These include areas such as transparency and accountability in Government, and specific areas, such as the formulation and adoption of independent anti-corruption policy that is akin to total eradication of corrupt practices in Nigeria. Also, the independent, multi-partisan oversight of anti-corruption efforts must evolve and sustain a delicate balance between concern for a corruption-free society and respect for human rights and the rule of law. Here, it requires the cooperation and collaborative efforts of the Nigerian Government with the various anti corruption agencies globally.

Finally corruption is an ill wind that does nobody no-good. It requires multilateral cooperation and approach for the fight against the scourge to be meaningful. Nigeria is again at crossroads, with a window of opportunity to follow the path of good governance and accountability in order to attain socio-economic and political development and human security generally. The areas of mutually beneficial collaboration between Nigerian legislators and their foreign collaborations are in-exhaustive, and we suggest more refreshing research on corruption for further public education and enlightenment.

CHAPTER 4

MARRIAGE: THE CASE FOR REDEFINITION OF MONOGAMY IN NIGERIA FOR NIGERIANS

BY

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MARRIAGE: THE CASE FOR REDEFINITION OF MONOGAMY IN NIGERIA FOR NIGERIANS

ABSTRACT

Marriage in Nigeria is a highly esteemed institution and its outcome therefore is of utmost importance not just for the parties involved, but even more so, for the progressive advancement of the society. One issue arising from its present structure is the culturally entrenched effect of patriarchal structure which is incompatible with monogamy as known in the Western world. The reinforcement of patriarchal structure in Nigeria tends to exclude women and girls from optimally participating in, and contributing to positive societal growth as this attitude appears to encourage carelessness by men in marriages. While this structure is compatible with polygyny and therefore expected and prepared for, by the women involved, it is incompatible with monogamy, invariably resulting in a dysfunctional society. Studies have been conducted by various writers on polygyny and its relationship with divorce, economic power, disempowerment and political complexity etc. This paper takes a closer look at the inter-web of culture, marriages and ineffective legal framework on development and women empowerment in Nigeria. The author observed a continuing dilution of monogamy with traditional marriage and family customs making it a distinctively Nigerian cross-breed and a departure from the norm. The departure occurs with dire consequences for the woman and child, functional marriage and family life and suggestions are made for all to flourish. Aside from personal observations and experiences, this work has referred to sociological research and data from five related works, Hitun, M. & Weldon, S. (2011) Aluko, M. & Aransiola J. ((2003)) Gage-Brandon, A. (1992), Peters, D. (1998) and Rahmatian, A. (1996)

INTRODUCTION

The type of marriage contracted (e.g. monogamy, polygyny, polya... group marriage, etc) goes to the roots of the mutual obligations, ... rights of parties, distribution of authority, marital happiness, stabili... instability among other outcomes. Stemming from differences in his... social experience, cross-cultural influence and relative geographical ... cation, different societies evolve peculiar marriage and family patt... sometimes that are a hybrid of the 'pure' and common types.

Moreover, the institution of marriage, just like the family that it gives ri... to, is to state the obvious, dynamic and diverse in structure, functi... organisation and constitutive social norms, beliefs, values and practic... from one place to another.

Monogamy in the Nigerian or indeed African context is a subject tha... has engaged the attention of scholars including foreigners. The reason ... traceable to the apparent failure of the concept to acclimatise in this loc... terrain.

Nigeria is essentially steeped, as in all developing civilisations in patriar... chal, male dominated societal structures. Against this background is the ... awareness that for an all round development, individual emancipation ... an imperative contributory factor to realisation of innate potentials, this ... in turn a key factor in development, political and economic growth of any ... society. The tension therefore is how to bring about positive masculine ... expressions that accommodate gender differences in a healthy manner. ... One area that typifies this tension and the need for a paradigm change is ... marriages and its expression in monogamy and polygyny. An Australian ... writer has already made a vital point to the effect that monogamous mar... riages in Nigeria is for the female, an economic question in the absence ... of social welfare schemes, and for the male a failure *abinitio* because of ... the customary equivalent that are potentially polygamous, a factor that ... makes monogamy and its statutory enablement, for the male an alien cul... ture.[1] This factor combined with a steeped patriarchal structure has left

1 A Rahmatian 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' International Journal of Law, Policy and the Family 10, (1996), 281

marriage institutional and heterosexual relationships legal frameworks in chaos.

research work engages the marriage institution in Nigeria, variant and statutory enablement which governs all mo- marriages, whether conducted by a government agency or a li- agency such as a church and the consequent disorderliness created efforts by women to survive in the harsh environment of the structure. The paper identifies the cultural terrain of negative of masculinity underlying patriarchal structure, a setting that abandonment if society is to develop positively. To this end it dis- the *nrachi* custom also known as 'woman to woman' marriage an of patriarchalism in some parts of the country under the subtitle ethical issues. It further examines the place of divorce and its legis- framework in the light of the larger goal of society for the well being inclusiveness of the woman in economic and political equations.[2]

monogamy has been so weakened by our local customs and traditions so much so that it is a law widely obeyed in breach without any sanction law must either be reviewed to accord with reality or otherwise en- as it is. To watch the practice drift into anarchy without action is allow recklessness, uncertainty, confusion and normlessness. The pur- of this article is to stimulate active discussion on this subject with a ultimately to retaining and enforcing or redefining the meaning of monogamy in the Nigerian context.

Against this background this paper is divided into four parts. Part I is the role of patriarchal structure on the subject of monogamy and its deleterious effect on women and general advancement of the society. Part II is an account of the apparent outnumbering of men by women in the light of the cultural, religious and socio economic setting of the country. Part III is an analysis of the legal framework for marriages and the tension arising from plurality of laws. It examines the socio-ethical dimensions of

2 On this point the view expressed by President Obama on behalf of the G8 summit for the year, held in Camp David, that women empowerment should be on the front burner as it has been observed that they could be very useful in questions of international and national security relations amongst other areas is a welcome development.

the subject, encompassing the quest for marriage under the Act vis-a-vis other forms of marriages such as heterosexual marriages and the N... marriage under customary law, the latter an offshoot of patriarcha... Part IV is on the resultant socio ethical issues arising. The paper conc... with suggestions and recommendations for future policy directives.

DEFINITION OF TERMS

Monogamy: Monogamy is the union of one man with one woman to ... exclusion of all others. It usually would be sacramental or civil. Mo... amy always makes room for divorce although in most cases divorce ... be difficult to obtain. In monogamy, divorce is equally available to b... partners. There have been suggestions for its extension to cover the u... of one woman to another woman in cultures which practice woman to ... woman marriage such as the Nuer people of South Africa. This cult... also exists in some Ibo speaking parts of Nigeria discussed below. Fema... female marriage is done to keep property within a family that has no so... It is not a form of lesbianism.

Polygamy: This is an umbrella name for polygyny and polyandry a... covers marriages by a man to many women or a woman to many men. ... Canada, polygamy is a criminal offense.

Polyandry: This is the marriage between a woman and many men. It ca... mean different things at different times. Thus it could mean that that ... woman marries several brothers, of whom only the oldest is the offici... father of her children, or it can mean that she marries several unrelate... men who all enjoy equal rights.

Polygyny: Polygyny which means long-term simultaneous unions between one man and multiple wives is legal in some countries today. In fact, polygyny was accepted in the great majority of traditional human societies before the rise of state institutions. Even in officially polygynous societies most men have only one wife at a time.

Group marriage: This may be the accidental outgrowth of polygamous practices or a conscious deliberate experiment. Group marriage has always been rare.

EXAMINING THE ROLE OF PATRIARCHAL STRUCTURE

Patriarchalism and power in Nigeria, as in many parts of Africa remain a reality that cannot be ignored as the result is exclusion of a large population of the country constituted by women and girls particularly from self determination and participation in positive societal growth. The case of Mojekwu v *Mojekwu* affords one a clear picture of how far patriarchalism can go.[3] As Atsenuwa notes, "...also given their size in the population, we can ill-afford to ignore women's needs if we aim to have a just society as much as we aim to optimise society's human resources for sustainable development....no form of development (whether economic or social) takes place without human intervention. Where the potential of half of the human population is not optimised in any society, overall development is stunted".[4]

Did the scriptures not note that man was made to dominate the world and all of creation the woman being a mere helpmate in this master plan?[5] In reality is it not in fact the case with every society that the man is more physically endowed in strength than the female and is innately endowed with the qualifications for dominance- for is might not right? Were the early law making machineries not established and their institutions peopled mainly by men? But the question that always emerges is what male dominance has contributed to any given society in terms of progress - individual empowerment, advancement and civilisation.[6]

If history and research demonstrated that male dominance invariably produces positive outcomes for humanity or specific societies, there would perhaps be no objection or quarrel with women subjugated to males. In much of Europe and North America, family laws were historically patri-

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3 *Mojekwu v. Mojekwu* [1997] 7 NWLR 283, 304 - 305

4 A Atsenuwa 'Constitutionalism and Legal Feminism: Stepping Stones or Impediments on the Long Road to Freedom for Nigerian Women?' Maiden Professor Jadesola Akande Memorial Lecture (Nigerian Institute of Advanced Legal Studies 05/10/2011)

5 K Blore 'A Space for Feminism in Islamic Law? A Theoretical Exploration of Islamic Feminism' (2010) elaw Journal: Murdoch University Electronic Journal of Law 17 (2), 1

6 V Struensee 'Globalised, Wired, Sex Trafficking in Women and Children' (2000) elaw Journal: Murdoch University Electronic Journal of Law 7 (2); Ennin, T. P. 'Lahoucine Ouzgane. Men in African Film and Fiction' [2011] 12 (4) African Studies Quarterly 99

archal.[7] But writing to her husband John Adam, months to the dra... of the United States Constitution Abigail noted,

In the new Code of laws which I suppose will be necessary for you to m... I desire you would remember in the new Code and be more favourab... women than your ancestors. Do not put unlimited powers in the hand... husbands. Remember all men would be tyrants if they could. If partic... care and attention is not paid to the ladies, we are determined to foment... rebellion and will not hold ourselves bound by any laws in which we h... no voice or representation. That your sex is naturally tyrannical is a truth... thoroughly established as to admit of no dispute.[8]

These words have a special resonance for the situation in Nigeria whe... the outcome of male dominance and patriarchal structure has been large... negative, reflected in underdevelopment, greed, primitive accumulation... sexual harassment/intimidation, and violence. These ills even extend ver... regrettably reinforcing the belief in voodoo, with its dire consequenc... for victims.[9] One research finding on enduring patriarchal structure wit... its attendant discrimination against women indicted Nigeria along wit... Algeria, Bangladesh, Egypt, Iran, Jordan, Malaysia, Pakistan, Saudi Ara... bia and Israel as countries with the lowest score on discriminatory law... against women.[10] The authors also note quite correctly, "...These restric... tions are consequential for more than women's autonomy and dignity... as they have broader implications. Societies that subordinate women are... more likely to be authoritarian, and their populations poor, uneducated... unhealthy, and demographically imbalanced, with high rates of popula... tion growth".[11] This is the main objection to patriarchal structure.

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7 M Hirun & S Weldon 'Power, Religion, and Women's Rights: A Comparative Analysis of Family Law' (2011) 18 (1) Indiana Journal of Global Legal Studies 145. C Frances-Adams Familiar Letters of John Adams and His Wife,

8 C Frances-Adams Familiar Letters of John Adams and His Wife, Abigail Adams, during the Revolution (New York, Vintage Press, 1876); M Schneir The Essential Historical Writings (New York, Vintage Press, 1972) 3

9 African Traditional Religion is static and has barely evolved, with the result that such atrocities as human sacrifice remain aspect of the religion. Most religions while starting off with one form of human sacrifice or the other shed this form of worship as it soon became clear that human sacrifice was at variance with civilisation and the true worship of a living God that does not delight in, nor has any gains in blood- letting or drinking.

10 M Hirun & S Weldon ibid, 158; see also

11 Hirun, M. & Weldon, S. ibid, 146

subordination resonates in the nature and consequences of marriage in such societies, which ultimately robs women of a good portion of their self worthiness.

women constitute more than half the Nigerian population, by popular estimation it is said that for every Nigerian son there is born at least four daughters or more. The probable reason for this seeming statistical imbalance will be presently highlighted. Of these women, the society expects every one of them to get married or be married to a man, the marriage, providing her with a status and validity as an autonomous being.[12] Yet many women will remain unmarried in Nigeria in the light of several changes including the effect of the following variables; education of females, urban residence etc. which have brought about changed patterns of preparedness for marriage between the sexes.[13] While there is no formal sanction for being unmarried in Southern Nigeria, yet the status attracts various forms of indignity ranging from denial of residential accommodation to diverse forms of indignity and discriminatory practices. Only recently one State, married off a hundred women in one fell swoop. While marriage is undoubtedly a great event, its present structure in Nigeria reinforces male dominance and dishonesty in personal relationships to the detriment of women's right to self determination and emancipation. As will be explained below, this situation has been largely compounded by the advent of Christianity coupled with colonisation, a combination which produces a serious clash of culture in Nigeria, as in many African countries, between the received way of life and the people's existing culture.[14]

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12 A Atsenuwa 'Constitutionalism and Legal Feminism: Stepping Stones or Impediments on the Long Road to Freedom for Nigerian Women?' above n. 4; see also NN Chinwuba 'Cohabitation: human dignity and one aspect of gender insensitivity', (2010) 14(4) The International Journal of Human Rights, 624 — 634

13 A Gage-Brandon "The Polygyny – Divorce Relationship: A Case Study of Nigeria' (1992) 54 (2) Journal of Marriage and Family 285, 287; I. Da Silva Interview the punch Vol. 7118 No. 1608 April 7th 2012 www.punchng.com 38

14 Many women will remain in unhappy marriages than have a divorce. Very recently a young woman whose parents had done all in their power to stop her from returning to her equally young but abusive husband was eventually killed allegedly by him. He was said to be not only a graduate but also a pastor. See 'Nigeria: Divorce Law and Practice among Muslims' NGA 101046 of 21 March 2006 (published by Immigration and Refugee Board of Canada); see for Uganda, L Khadiagala 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda' [2002] J.A.L. 1; South Africa, AGM Sanders "Towards a People's Philosophy of Law' [1988] J.A.L. 36, 41; where Sanders notes, "...To complicate matters, a trend has developed among the people, notably in respect of marriage, of "adding" European law to customary law, each being held to be distinct and applicable according to circumstances.

There can be no doubt, that there is a relationship between the slow development of the nation and the Nigerian woman's perpetual struggle for a place in a man's house rather than a definitive aspiration for self realization, self-determination and emancipation, leaving the man with an omnipotent perception of himself and an inclination to channel the natural male energies towards excesses, domination authoritarianism. One further outcome of the patriarchal structure is polygyny.[15] It appears that this outcome is also unfortunate as polygyny diminishes the self worth and dignity of a woman, if not the parties.[16] In *Shahnaz* v *Rizwan*[17] Wilson J thought that from historical evidence the institution rang more like concubinage or slavery.[18] In a sociological study on polygyny in contemporary Nigeria, the authors found,

"*Some of the advantages of polygamy to men include, extensive procreation, sexual satisfaction and gratification...while majority of the respondents believed that polygyny has no advantage for the women. On the other hand, the disadvantages of polygyny as identified by the respondents include premature death, spiritual and physical attacks and incessant quarrelling and bickering in the homes. It is also clear from the findings that majority of the respondents no longer favourably disposed towards the practice of polygyny. Thus, majority of the women both in monogamous and poly-gynous settings want a total eradication of the practice while majority of their men counterparts advocated for legislation against polygyny.*"[19]

Nwogugu notes,

In any discussion of reform of family law, the question of the cultural background of the country will invariably arise. Nigeria has been a conservative society, clinging as much as possible to the past..... While it will be inappropriate, at this point, to argue that our values have been Europeanised

15 D Peters 'Feminism and the Institution of Polygamy: A Forward-Looking Approach' 4&5 Nigerian Current Legal Problems (1996-1998) 1

16 M Aluko & J Aransiola 'Peoples' Perception of Polygyny in Contemporary Times in Nigeria' Anthropologist, 5 (3): 179 – 184 (2003); A Gage-Brandon 'The Polygyny – Divorce Relationship: A Case Study of Nigeria' (1992) 54 (2) Journal of Marriage and Family 285

17 [1964] 2 All E.R. 993

18 [1964] 2 All E.R. 993,996

19 M Aluko & J Aransiola 'Peoples' Perception of Polygyny in Contemporary Times in Nigeria' as above, 179, 183 (2003); see also Rahmatian, A. "Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' above note 1, 281

*remains that Nigeria is no longer an Island shorn of foreign influ-
Consequently, conduct which in times past were regarded as unac-
or even a taboo have today become the norm. Being part of the
village, Nigerians will increasingly seek to examine solutions to fam-
problems adopted in other countries within and outside Africa. We can
no longer be content to remain isolated in an era of increasing interrelation
between Nigeria and the world*[20].

That patriarchal structure has assumed some starting presumptions is evidenced by the fact that every marriage in Nigeria is potentially polygamous. Rahmatian who has also noted that no modern legislation will prohibit polygamy, puts it in this way in noting the criticisms against the Nigerian Matrimonial Causes Act, 1970; "Many remarks have been made on this subject. Some, though, are rather astonishing." To wit;

(i) the grounds of divorce should reflect African traditional views that while adultery can be a ground of divorce if done by a woman, it should not be so for a man.

(ii) marriage in Africa is for the purposes of procreation and if a married woman fails to deliver on this term of the contract, this should be a valid ground for divorce under the MCA.[21]

The startling presumptions and paradoxes surrounding patriarchalism in Nigeria is aptly depicted by these lines in the draft reform Bill for Reformed Marriage Act by the Nigerian Law Reform Commission.

Bigamy: *The draft Bill does not contain any provision for the offence of bigamy as does the current Marriage Act. This is because the Commission considers it a bad policy to leave on the statute book a serious crime which has existed for over sixty years, which is committed in large numbers each year by people in high places and low, and in respect of which there has never been a conviction. Such a law makes a mockery of the legal system and tends to create the impression that laws can be broken with impunity. The draft Bill, however, does not seek to legalise bigamy. Bigamous marriages are still null and void; children of such marriages are still illegitimate. It is only*

20 E I Nwogugu 'What Next in Nigerian Family Law?' [2006] 7 NIALS Founders' Day Lecture (Nigerian Institute of Advanced Legal Studies 2006) 7

21 A Rahmatian above note 1, 292. It must be noted that the promoter of barrenness as a ground of divorce is female, Rahmatian citing, EN Uzodike 'A Decade of the Matrimonial Causes Act, 1970' Nigerian Current Law Review (1983-1990) 5

the offence of bigamy that is sought to be abolished.[22]

This Bill was initiated in 1980 and needless to state, by a male, and happ has since not seen the light of day, the offence of bigamy being still a pa of all marriage Statutes.[23]

II SOCIAL ACCOUNT OF POPULATION EXPLOSION OF WOMEN

Women can only be effectively integrated into society if there is a co ducive environment for the realisation of their innate potential as a tonomous beings. If such an environment is nonexistent, attempting t enhance women's status is pointless, given that men have had all the ad vantages and remain more empowered, qualified, available, and willing to flourish.

A Nigerian female is disadvantaged from birth by the patriarchal struc ture which dominates the Nigerian cultural terrain. The male dominated ruling class profits from this state of affairs and so sees little need for a change. Predictably, nor are there programmes planned to bring about a paradigm shift of opinion. The Nigerian boy/child is given a pride of place from the moment of birth. As in all traditional agrarian settings, typically he goes to farm with the girls. But these duties completed, typically he returns home and does nothing else while the girls and their mothers re turn to the kitchen and generally tend to the home and affairs of the men. He then goes about 'having fun and sowing wild oats' to the admiration of his father, mother and sisters. Whilst many agrarian societies have jet tisoned this way of prioritising the status of young males, it remains a true picture of life in modern day Nigeria.[24] The male patriarch is revered by his mother, his wife, even his sisters who look to him for protection and admirably envision him as a power 'house' or 'base'. On the death of the patriarch, in many parts of Nigeria, only the males can inherit. Most importantly, the ownership of wealth is often linked with political status,

22 Law Reform Nigerian Law Reform Commission No.1 of December, 1980 at 15 (also repeated in Vol. 2 of the same year)

23 Initiated by Dr. S.N. C. Obi

24 M Aluko & J Arunsiola 'Peoples' Perception of Polygyny in Contemporary Times in Nigeria' Anthropologist' above note 16; D Peters 'Feminism and the Institution of Polygamy above note 15

holding a large chunk of the economic power of the na- Nigerian politics is stiff with intrigues, barbarism and violence.[25] result of this only men can dare venture into the terrains leaving out contribution of a vast number of very educated and capable women The idea that respectable women could take part in politics is thus Nigerians.[26]

situation invariably reinforces Nigerian society's predilection for fa- male children which is reflected in male economic power, inher- and succession rights.[27] In these circumstances it is therefore not to understand the main reason for the explosion of women's in Nigeria. Each wife desires to have several sons; only one may soon meet with some tragedy and she would be left with no so she must have several. In the search of a son, she may bear many sometimes as many as eight. When a wife fails in this enter- the husband may quickly take another wife - who may also fail to the desired son. Indeed when a woman delivers a child the first ques- is often on the sex of the child. Thus the accepted 'slang' is to enquire she delivered Mr. 'Sought After'; the man boastfully speaking male prowess if she bears a son. Regrettably though, the maternity wards often prove a disappointment for the men who have noted that in many such wards, of, ten deliveries eight would be females.

Christianity has had no positive impact on this matter and men even attend church services with multiple wives while those in the Catholic Church simply change or convert to other denominations or the matter is simply kept secret. Only very few people bother to go through the process of divorce for reasons which will soon emerge. The clash of cultures be

25 J Campbell Nigeria: Dancing on the Brink (2011 New York: Rowman & Littlefield Publishers, Inc.); B O Arah 'John Campbell. Nigeria: Dancing on the Brink' (2011) 12 (4) African Studies Quarterly 76; Ouzgane, L. Men in African Film and Fiction. ((2011)UK: James Currey); T P Ebenin 'Lahoucine Ouzgane. Men in African Film and Fiction' (2011) 12 (4) African Studies Quarterly 99

26 Chindung Dung Sha 'Women and Politics of Parliamentary Representation' (2009) 1 (1) Nigerian Journal of Law: Practice & Procedure of Legislature (NJLPL) 45; see also Onyeka Owenu lament ing the situation amongst the Igbos in 'Good Women Don't Grow Old' Saturday Punch, 16th June, 2012 at page 27

27 Atsenuwa, above note 2, 6; J Akande 'Women and the Law' in Obilade, A.O. (Ed.), Women in Law (Southern University Law Centre, Baton Rouge, Louisiana & Faculty of Law, University of Lagos, Lagos) 25

comes evident in that, while Western cultures which the average Nig identifies with, are steeped in individualism as an inherent right ca with it the right of every individual to self determination, extended even to some animals, Nigeria continues to pride herself in a conser culture which is in many respects anti progress and development.[28]

III LEGAL FRAMEWORK FOR MARRIAGE AND THE TENSION CREATED BY PLURALITY OF LAWS

a) Marriages under the Act and Heterogeneous Customary L Marriages

Scholars have noted that Nigeria despite, the adoption of some Eng ways of life, remains steeped in polygyny.[29] Thus Marriage in Nigeria hydra event, usually coming legitimately in four to five packages for marriage celebration. There will usually be customary law marriage wh encompasses a customary law engagement and marriage, a statutory which is a State registration cum marriage package usually too prece by a formal Western type engagement, and finally a church wedding of these ceremonies have crucial societal importance and by the rece promulgated Evidence Act, 2011 legislative and judicial recognition su jected however, to the Marriage Act, the provisions of which are discus below.

A typical Southern or Northern Christian Nigerian woman would ha all five events prelude to being a wife. Typically, no Nigerian is an Afr can Traditionalist in religious terms, everyone is an apparent Christian

28 E Unodike 'Trends of Human Rights Campaign in Family Law' University of Lagos Inaugural Lecture Series 2011 (University of Lagos Press 12th Lecture 2011 delivered 20 / 07 / 2011) 25; see for a better view on the prospects of advancement for women of the third world, V Held 'Joh Locke on Robert Nozick' (1986) Social Research 169, 190

29 This position can best be depicted by the marriage of the late Nigerian Afro Beat musician, Fela Anikulapo kuti to 27 women in one fell swoop. See further Peters 'Feminism and the Institution of Polygamy: A Forward-Looking Approach' 485 Nigerian Current Legal Problems (1996-1998) 1; EN Uzodike 'Nigeria: Defining the Ambit of Custom' 13 ULJFL [1989] 399, 403; Atsenuwa, A. 'Constitutionalism and Legal Feminism: above note 2; see also NN Chinwuba 'Cohabitation: human dignity and one aspect of gender insensitivity', above note 11; M Aluko & J Aransiola 'Peoples' Perception of Polygyny in Contemporary Time in Nigeria' Anthropologist, 5 (2): 179 – 184 (2003); A Gage-Brandon 'The Polygyny – Divorce Relationship: A Case Study of Nigeria' (1992) 54 (2) Journal of Marriage and Family 285; P Webb 'Polygamy and the Ebbing Winds' [1965] 14 ICLQ 273; G Bartholomew 'Recognition of Polygamous Marriages in America' [1964] 13 ICLQ 1022

...albeit most are African Traditionalist in reality. Nigerian Mos... has been stated above practice polygyny, so are the recognised ... Traditionalist.

...Christianity requires one man to be the husband of one wife, and ... people tend to like the idea of being identified with Christianity or ... doctrines, particularly because Christianity is a status confer... association, the Christian formal marriages is very appealing to the ...[30] It also possesses the unique feature of allowing the adherents, ... cases, the power to intimidate others with holiness and virtuous... while using the same to exclude so many as for instance denounc... them as witches, demonic or immoral.[31] In the circumstances every ... wants to have a Statutory type wedding, but more so because usu... the churches require a Statutory one as condition precedent for the ... The role of a statutory marriage in this scheme is very crucial ... again based on sheer ignorance or superstition. A statutory marriage ... some form of security on a married woman in a country where ... succession is rare and most men die intestate with their estate ... mainly according to very unfavourable customary laws ex... they conducted a statutory marriage. The so called security in itself, ... soon find out is also a myth on the death of the man in the face ... patriarchal structure that allows male relations to disinherit the ... and her children despite the statutory marriage.[32]

...However, in reality the real marriage recognising ceremony is the tradi... customary one as most Nigerians in reality more readily connect ... the African Traditional Religion than the received religions. As has ... rightly noted in a different context, "Properly speaking Nigeria is ... a secular state; Nigeria is a multi –religious country. We have African ... traditional religion practitioners; in fact, they are more because all of us ... a way relate with it".[33] Indeed, where a person carries out either the

30 To be known and addressed for instance, as a knight of any of the confraternities of the Catholic or Anglican church is a great accolade.

31 Abimbola Adelakun, 'It's a question of Power' The Punch (Lagos, 22 December 2011) 64 (email aa_adelakun@utexas.edu)

32 OT Feyi-Sobanjo 'Overcoming Legal Challenges to Electronic Will Creation' (2010) 1 (8) Information Technology and E-Commerce Law Bulletin 2; K Mwenda Etal 'Property Grabbing under African Customary Law' (2005) 37 Geo. Wash. Int'l Rev. 949

33 Primate of Church of Nigeria, (Anglican Communion) Most Revd. Nicholas Okoh 'It's Puzzling for anyone to declare Jihad on Nigeria' The Punch (Lagos, January 7, 2011) 48; A Rahmonian

Christian or Statutory marriage without the customary one it is
as though the person has never married in society even when it
valid State recognition by registration. It is now no longer unusual
foreigners adorned with the Nigerian regalia to marry Nigerian
either in their countries when families agree, and usually this is
or head down to Nigeria to perform the rites. Now, while all
under customary law are recognised by the people and sanctioned
law, with or without a statutory variant, many do not take any
the sanction of the law on bigamy; if in breach of an existing
one, a man marries again under customary law.[34] It is against this
drop that the tension of plurality of laws becomes evident. A man
married his first wife in his youth, usually will keep mistresses or
as many wives as he pleases as he gets older and presumably richer,
native law and custom. The Statutory wife usually does nothing
death of the man.[35]

Although the received English laws and culture is fashionable
the elite class, capped by the predominant Christian population in
South, the tenets of Christianity have not eliminated the basic
need for companionship and so men and women continue the search
the fulfilment of this need accepting in many cases, not what is best
what is available.[36]

Thus as has been earlier noted, that polygyny or at least the idea of
lygyny is the norm in Nigeria, rather than the exception is now not
bateable.[37] This is also evinced by the fact that although there had
been a law on bigamy in Nigeria by section 370 of the Criminal Code
(which its very expunction from the current revised Criminal Code

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"Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the
Experience' International Journal of Law, Policy and the Family 10, (1996), 281, 294

34 E. Uzodike 'Nigeria: Defining the Ambit of Custom' above note 29

35 Uzodike, ibid

36 Peters 'Feminism and the Institution of Polygamy: above note 26, 1, 25

37 It is to be noted that polygyny is the norm and not polygamy. The custom or practice of a
having more than one husband at the same time is very rare and has in modern times been nearly
ed. This could be found in some parts of Edo State of Nigeria such as amongst the Ibnis. Peters 'Feminism
and the Institution of Polygamy: A Forward-Looking Approach' as above; Uzodike, above note 29, 403; E.
Onuoha 'Discriminatory Property Inheritance under Customary Law in Nigeria: The Need for Reform' in
Smith, I.O. (ed.), Law and Real Property Rights in Nigeria - Essays in Memory of Prof. I.A. Omotola (200
Faculty of Law, University of Lagos) 230, 244

and proposal for its expunction by the Law Reform from the Family Law Statutes, is a clear indication of the society on the subject), no woman affected by the myriad succession and children born out of wedlock to Nigerian mar- instituted any suit against any of the men prior to his de- the only known Nigerian case on the subject involved an It must be noted that, while the offence of bigamy may expunged from the Criminal Code Act it is well and strong in Act and the Matrimonial Causes Act.

Causes Act, 1970 governs statutory marriages the pro- which by sections 27, 33, 35, 39 (1) and 58 jointly make it an marry howsoever once married under the Act with a sanction years imprisonment.[40]

of the Marriage Act, on the other hand, is a re-enactment of visions of the former Criminal Code Act and makes it an offence by five years.[41] Sections 46 and 47 on the other hand attempts directly simultaneous marriages to different people under the and customary law. Thus section 46 provides "whoever contracts marriage under the provisions of this Act, or any modification or re- thereof, being at the same time married in accordance with ary law to any person other than the person with whom such mar- is contracted, shall be liable to imprisonment for five years". Section

Olufemi Marquis v. Olukemi Marquis suit no. 1 / 685 / 84, unreported 3rd March 1986, High Ibadan; Professor Olufemi Marquis died intestate on May 6th 1982. He had married the first plain- 1960 at St. Mary's Catholic Church Sunderland, England. There were four children of the marriage. Marquis subsequently married a Nigerian woman with whom he lived until his death, without dissolution of the first marriage, by whom he had three children. On his death the question of who was entitled to a grant of a letter of Administration arose, and it was held that without doubt the first woman was entitled, the court describing the wife under native law and customs as a mere mistress

R. v. Princewill (1963) N.N.L.R. 54; see further provisions on punishment for offences similar to bigamy in sections of the Marriage Act, 2004 (Cap M6 Laws of the Federation 2004); 27, 33, 35 and 39(1) of the Matrimonial Causes Act, 1970; see further MC Onokah, Family Law (Spectrum Books Limited, 2003) 105. It must however be noted that Lagos State lacked the necessary legislative competence in the first place to enact a law on bigamy as marriage is on the exclusive legislative competence of the Federal Government which retains the section on bigamy on the current laws of the Federation, 2004

Cap M7 1970 (Laws of the Federation 2004); see also section 370 of the Criminal Code Act Cap C – 38 113 Vol. 4 (Laws of the Federation 2004); see also Agbeja v Agbeja [1985] 3 NWLR (part 11) 11see also L Khadiagala 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda' above note 14

Ibid.

47 provides that "whoever, having contracted marriage under this Act or any modification or re-enactment thereof, or under any enactment repealed by this Act, during the continuance of such marriage contracts marriage in accordance with customary law, shall be liable to imprisonment for five years".

Circumventing the Matrimonial Causes Act, 1970 and other legislation by marrying several other women under native law and customs is the order of the day for many Nigerian men.[42] In many cases this is almost done as of right with the Statutory wife only merely sometimes informed. As for dating by married men, the Nigerian married man is more available in the relationship terrain than the single man, recklessly dating women of all ages openly and without sanctions. Indeed, the younger the girl the more attractive because of the myth that virginity and youth keep the men younger. Marriages in clear circumvention of the Marriage Act are celebrated so openly that one wonders whether it should be called circumvention, rather than flagrant disregard and abuse of the law. Indeed it is perhaps only the wife that some of the men pay regards to in the matter rather than the sanction of the law. Curbing the menace through law has failed woefully. In *Kuforiji & Anor.* v. V.Y.B. (Nigeria Ltd.)[43], Obaseki JSC stated that bigamy was a dead letter law, even though 'in our Statute book'.[44] Nwogugu, a distinguished male family law Professor, expressed

42 On the general retreat of the legal process in Nigeria see Y Osinbajo 'The Retreat of the Legal Process' (Being a Paper Presented at the 2011 Founder's Day Lecture of the Nigerian Institute of Advanced Legal Studies on 17/03/2011)

43 (1981) 6-7 SC 25. See also Nkiru Amobi v. Grace O. Nzegwu & Ors. CA / L / 493/ 2000; However see R. v. Tolson 23 Q.B.D. 168

44 For Rahmatian, prohibition will never suffice as in the absence of a national insurance, marriage provides some form of insurance for women. 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' International Journal of Law, Policy and the Family 10, (1996), 281,304. Bigamy is an offence by section 370, Criminal Code Act, Cap C38-113 Vol 4. Laws of the Federation 2004. This case is at least an indication that should there be a willing litigant, the courts will be prepared to support subsisting marriages. Perhaps a civil legal framework would be a more effective machinery to check the situation, since Nigerians would be reluctant to institute an action against a man for a jail term for an offence which is essentially emotional and moral in nature. The other issue is that while bigamy covers conducting of two marriages under the Act, the law leaves a lacuna for the law does not make it clear that it is an offence when only one of the marriages is under the Act but the other is under customary law even though the Matrimonial Causes Act, 1970 (Cap M7 Laws of the Federation 2004) clearly stipulates that marriages under the Act and Customary law should not be in conflict. Thus, so far, men find it easy to circumvent the Act and marry as many women as they wish under native law and customs without bothering to divorce their wives under the Act, perhaps out of ignorance of the provisions of the Act. The fact remains, that no one has tested the efficacy of these marriages at the onset of the marriage under the

on the subject, "Should the offence of bigamy be re- law? A positive answer should be given because it reflects and legal framework. Once a man is given the freedom the monogamous to the polygamous union at will and ir- the feelings of his partner, we would have undermined our What is required is the cultivation of strict obedience to and of the law. There is a role for education and enlightenment their legal rights".[45]

custom (Daughters / Widows Retention)

long custom of the Igbo speaking people of Nigeria by simple translation, a person establishes his lineage by succes- the term is used in reference to difficult situations where not in the natural course of events and something further done for the lineage to spring into being. It is now judicially 'woman to woman' marriage.[46]

custom of the people of Eastern Nigeria extends to other Ibo parts of the country such as those from the current Delta State Its genesis is traceable to cultural efforts aimed at ameliorating effect of the dominant patriarchal structure of the society and its evo- Another source is effort at ameliorating the harsh consequences who either fail to have male children or any children at all such eventuality, her deceased husband's property would usu- 'grabbed' by his brothers and family.[47] By and large the custom aided in cushioning the physical and emotional pain suffered inflicted on this class of women ranging from physical molestation to of all sorts such as becoming 'the village witch'.

pattern is that by a woman who is either unable to have a child or to have the much sought after male child to have a young girl

bigamy, or the provisions of the Matrimonial Causes Act, first because as has been mentioned it is inheritable, secondly and most importantly, it does not matter to many women until the death of and the distribution of his estate. See sections 27, 33, 35 and 39(1) of the Matrimonial Causes Act,

Nwogugu, above note 20, 22

See also its equivalent amongst the Nuer people of South Africa referred to in the judgement of Uwais JSC in Okonkwo v. Okagbue [1994] 9 NWLR (pt 368) 301, 324

Mwenda, Etal 'Property Grabbing under African Customary Law' above note 32

married in her behalf for the purpose of realising the objective of ha... male child. As has been earlier noted, the pattern of population in N... especially in the areas under consideration naturally shows, wome... number men. Women will sometimes have as many as eight to ten ... dren in search of a male child. Men, sometimes marry as many as ... wives simultaneously all in search of a male child. Although, scienc... since demonstrated that the man is the carrier of the chromosome ... determines sex of children and not the woman, the ignorance persi... scope and breath.[48] Thus there are cases where despite taking as ma... three wives all three wives rein in a blessed harvest of all females, w... happens next can only best be imagined.

The other widely practised version is when a patriarch himself allow... own daughter to stay back in the family with the objective of produci... male child by a consort who becomes by the tenets of the custom a ch... of the patriarch. As sometimes happens, the daughter may never proc... such a male child. Another pattern is for a widow to have children thro... the same process. Now the manifestations of this variant can someti... turn out much like the powerful presumption of marriage raised in re... tion to children. Thus here, where a family sends away a widow with... a male child without returning the bride price and the widow has a s... while in 'Diaspora', by the tenets of the custom, the son remains a child ... her late husband, who if he has property is succeeded by that son.

As time evolved, the custom extended to cater for the woman who ha... son and the son died. She then marries a woman who bears children ... the name of the son all in an effort to fall in line of succession. Second... to have the protection which eventually a son would give her in a socie... where barrenness or only female children is sure to make the woman ... witch sooner or later. The custom has a further angle by which even whe... the matriarch of only female children passes on, the female children a... enjoined to marry a woman who would uphold the lineage of the dea... woman in her husband's name. Such is the extensive nature of the nrach... custom spanning all memorable generations back by popular version... into Biblical days.

48 For fuller details of the ambits of this custom see, the judgements of Niki Tobi J.C.A. and Ola gunju J.C.A in Mooiekwu v. Ejikeme [2000] 5 NWLR 403

The *nrachi* custom is crucial because of its impact on the children resulting from the custom as increasingly the Nigerian courts continue to declare the custom repugnant to natural justice equity and good conscience quite oblivious of the magnitude and prevalence of the custom particularly amongst the Ibo speaking people of Nigeria and the import of such judicial activism. Many clans amongst the Ibos trace their genealogy to the *nrachi* custom.[49]

Declaring the custom repugnant in *Okonkwo* v. *Okagbue*[50] the Supreme Court thought that it encouraged prostitution and on grounds of public interest must be obliterated. In *Meribe* v. *Egwu*[51] another Supreme Court decision, Madarikan J.S.C. who delivered the unanimous judgement of the court said, "in every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage: and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14 (3) of the Evidence Act and ought not to be upheld by the Court".[52]

Meant to cushion the effect of not only inheritance but also the amelioration of the emotional suffering of women and the undue emphasis placed by society on male children, the practice remains vibrant largely due to the still high rate of illiteracy, backwardness, greed and selfishness amongst the citizenry. Thus, as Olagunju JCA stated in *Muojekwu* v. *Ejikeme*

True enough it cannot be gainsaid that at the time of its conception, 'Nrachi ceremony' was designed for the purpose of circumventing the harshness of 'idi-Ekpe custom' that was so invaluable to the cultural, economic and social

49 K Omiđire 'Customary Law in Nigeria: A Reflection on the Application of the Repugnancy Doctrine' in Obilade, O.A. (ed.), A Blue Print for Nigerian Law (Faculty of Law, University of Lagos 1995) 77; see also in relation to Uganda, Khadiagala, 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda' [2002] J.A.L. 1; and to South Africa, Sanders 'Towards a People's Philosophy of Law' [1988] J.A.L. 36

50 [1994] 9 NWLR (pt 368) 301

51 (1976) 1 All NLR 266

52 (1976) 1 All NLR 266, 275; see also Uzodike, E. 'Trends of Human Rights Campaign in Family Law' above note 28, 25 et seq.; who while arguing strongly that only heterosexual marriages should be recognised in Nigeria surprisingly approves of the 'nrachi custom' as a valid form of marriage.

aspirations of an environment which called Idi-Ekpe into play that is ... different from the aspirations of the present era. But with the passage ... and cross fertilization of values with other cultures of the world 'Idi ... custom' for the iniquity of which 'Nrachi ceremony' provides a panacea ... become anachronistic and sheer customary relics for the modern time ... is yearning desperately for some booster to buy up the low level of ... tity that pervades the permissive society which the practice of Nrachi ... pounds. That the twin practice which has all the trimmings of a prim... evolution should survive the 20th century with only a few days to run ... irony of the legacy on the cultural horizon that will be bequeathed ... new millennium. It is retrograde.[53]

In 1994, however, the *nrachi* custom which is always a source of liti... tion and judicial pronouncements reared its head once again as it is ... to in the case of *Okonkwo* v. *Okagbue*.[54] The Supreme Court once ag... declared the custom once again repugnant divesting children of the ... tom of inheritance without referring to the Constitution. In 2004 in ... *jekwu* v. *Iwuchukwu*[55], following the much celebrated judgement of ... same case at the Court of Appeal in *Mojekwu* v. *Mojekwu*[56] which it ... thought had quashed the discrimination characterised or typified by ... *oli ekpe* custom to which the *nrachi* custom is an antidote was short live... This was because the decision of the Supreme Court was delivered wit... out reference to another subsisting judgement of the Supreme Court ... the earlier case of *Okonkwo* v. *Okagbue* which had ruled on the questi... of suo motu on declaration of repugnancy, that was the basis for the reje... tion of the widely accepted reasoning of the judgement of the Court o... Appeal.[57] The Supreme Court in *Mojekwu* v. *Iwuchukwu*[58] was evidentl... more interested in how the judgment and pronouncements of the Court ... of Appeal on discrimination against women will impact on religious rites ... titles and family headship and declared that the Court of Appeal should ... not have delved into an analysis of the oli ekpe custom *suo motu* without ... reference to the earlier Supreme Court decision of *Okonkwo* v. *Okagbue*.[59]

53 [2000] 5 NWLR 403, 438

54 [1994] 9 NWLR 301

55 [2004] 11 NWLR 196

56 [1997] 7 NWLR (pt. 512) 283

57 For the legendary conflicting precedents and decisions of the Nigerian hierarchy of Courts see, Osinbajo, 'The Retreat of the Legal Process' above note 39, 5; Osakue v. Federal College of Education (Technical) Asaba (2010) 10 NWLR (Pt. 1201) 1

58 [2004] 11 NWLR 196

59 [1994] 9 NWLR 301

[illegible] declared otherwise.[60]

[illegible] the Supreme Court through the very limited consideration and [illegible] of the rules of Kola tenancy applicable to the particular family [illegible] and the provisions of the Kola Tenancies Law without re[illegible] to the larger and superior provision of the Constitution, affirmed [illegible] judgement of the Court of Appeal to the effect that the women, that [illegible] daughters of the Kola tenant could inherit while condemning the much [illegible] approach and statement of the Court of Appeal on discrimination [illegible] women.[61]

The *nrachi* custom is an ongoing one that cannot be obliterated without [illegible] matic policy goaded approach. It is not only as the learned judges [illegible] the Courts of Appeal noted in aid of property acquisition, but it also [illegible] off several havocs which is wrecked on the woman on account of [illegible] typing by society including the privileged status of marriage as op[illegible] to family and the fundamental human right of self-determination. It is more so because as was pointed out to the Supreme Court in *Okonkwo v. Okagbue* so many persons are offspring of that custom amongst the Igbo speaking people of the Eastern parts of Nigeria.[62]

Addressing the *nrachi* custom from a legislative broad based perspective as discrimination against women rather than repugnancy would resolve the issues raised by the custom in a forward-looking progressive manner that does not affect the rights of women and progenies of the custom to self-determination in line with the Constitution, international and regional instruments.[63] This is atypical of many African customary norms.

60 [2004] 11 NWLR 196, 217; in dealing with the question of institutional titles and honours which may be crux of the dictum of the learned justice of the Supreme Court above, the English Family Law Reform Act provided for this in sections 19(4) and sections 27(3) without disturbing the normal life and progress of the people. It is not in doubt that the question of ascendency as natural rulers and family heads may also be additional issues that might continue to undermine the accurate interpretation of the provision of section 42(2) of the 1999 Nigerian Constitution as evinced by the statement of Uwaifo J.S.C. in Mojekwu v. Iwuchukwu [2004] 11 NWLR 196, 216- 217 paras H -G

61 Mojekwu v. Ejikeme [2000] NWLR 436,404 paras A-F

62 Captured aptly in paragraph 6 of the Preamble to the CEDAW, "Concerned, however, that despite these various instruments extensive discrimination against women continues to exist". See also paras. 7,11 and 12, Articles 2, 3,5,10, and 15

63 See for instance, D Offornze & F Monekie "The Ambit of Legislative Powers under the 1999 Constitution of Nigeria' Legislative Practice Review 25; see further PA Akhihiero 'Legal Aspects of Reproductive Health/Family Planning Practices' Being a Paper presented at the Edo State Chapter of the Planned Parenthood Federation of Nigeria on 10 / 05 / 2006, where the presenter noted that while protracted Military

Thus in relation to Ghanaian succession it has been quite aptly noted

— *a practical word of qualification may be needed. History shows when a state legislates for a radical departure from customary practice legislation [as court order] is apt to be disregarded. Section 48 of the Marriage Ordinance was not totally effective...The effectiveness of analogous reforms elsewhere in Africa has been similarly doubted. The Intestate Succession Law acknowledges the problem in so far as it provides criminal sanctions for infringements. But will private individuals and officials enforce these, and will they do so sufficiently regularly to make the entirety of the Law effective?....Thus the customary laws which the Law seeks to control may still seem to many people part of the natural order. Nous avons changé tout cela: but a legislator no more than a fake doctor can reform the natural order by declaration.*[64]

Omidire's admonition bears the same hallmark. "The society should be studied to identify the cause of friction before laws are made to remedy any problem. A pre-emptory solution is not likely to achieve any positive result."[65]

IV SOCIO-ETHICAL ISSUES

The Nigerian woman, unless she is lucky to marry under the Act, is in a dilemma of a loss /loss situation. Once married, divorce is often not an option as the woman goes to all length to maintain her status. More often than not, unless the man himself decides to throw a Nigerian woman out, she sits through the marriage, come rain and shine not necessarily out of any altruistic motive, but for the security marriage provides for the women more in respect of self esteem and society's validation. This has assured regrettably, that the potentials of women whether within the

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rule had drawn the Country backward, the continued anachronistic and archaic state of the Country's laws required urgent resolution. See further A Rahmatian 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' International Journal of Law, Policy and the Family 10, (1996), 281

64 GR Woodman 'Ghana Reforms the Law of Intestate Succession' (1985) 29(2) JAL 118, 128-9; Khadiagala 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda' above note 49; Sanders, 'Towards a People's Philosophy of Law' above note 49, 41

65 Omidire, 'Customary Law in Nigeria: A Reflection on the Application of the Repugnancy Doctrine" above note 49, 86

family or in the polity are unrealised and unutilised. Women have neither respect for themselves nor are they prepared to utilise a voice even when the men concede one.

If the Nigerian woman stays single, she is labelled promiscuous and treated with indignity. Niki Tobi, J.S.C of the Nigerian Supreme Court, who is well recognised for his forward-looking perspective on matters that affect the dignity of women and children quite in line with civilised tenets, notes quite regrettably, in *Muojekwu* v. *Ejikeme*, "a woman who has no husband generally has more freedom to involve in sexual practices than one who is married. In such a situation, indiscriminate sexual practices would result in promiscuity and prostitution. While I should not be misunderstood as saying that a married woman is entirely free from such sexual practice, it is much more pronounced in cases of unmarried women. The study of sociological patterns confirms this view".[66]

This view clearly, which by the way, is the overall societal view of unmarried women in direct resistance of the truism and permanence of change that has since been running through every aspect and strata of society, thus an unmarried woman in Nigeria, notes Atsenuwa has no status, unless such single status is a prescription of the gods.[67] It is not fair to women who are accomplished in other areas of life albeit unmarried to

66 Muojekwu v. Ejikeme [2000] 5 NWLR 402, 432; see also Olagunju JCA at 438, paras. A – C. The same views were expressed by the Supreme Court in more stringent terms in Okonkwo v. Okaghue [1994] 9 NWLR 301, 324 - 326. This statement is despite the fact that the learned Justice referred at least on three occasions to the United nations Convention on the Elimination of All Forms of Discrimination against Women (hereafter referred to as CEDAW) and in particular to Article 1. This article defines discrimination against women as meaning any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Clearly this type of categorisation is a clear example of discrimination. Thus a single woman in Nigeria despite the provision of Article 15 (4) is often required to present a husband before she can rent an apartment. A woman dare not appear in a hotel or a bar to even await the arrival of her date, she would be asked to leave, unless she can justify her stay by other means. The women in some cases simply conjure a husband particularly as there are many visiting husbands of which the conjured one could simply be one.

67 A Atsenuwa 'Constitutionalism and Legal Feminism: Stepping Stones or Impediments on the Long Road to freedom for Nigerian Women?' Malden Professor Jadesola Akande Memorial Lecture (Nigerian Institute of Advanced Legal Studies 05/10/2011); see also Chinwuba 'Cohabitation: human dignity and one aspect of gender insensitivity' (2010) 14(4) The International Journal of Human Rights, 624 — 634; see however Re P (Adoption) Unmarried Couple v Regina [2008] UKHL 38; [2008] Fam Law 977; [2009] AC 173; [2008] 3 WLR 76; Ghaidon v Godin-Mendoza [2004] 2 AC 557; [2004] UKHL 30

be dismissed as promiscuous because they are not married. For [illegible] some women now engage in educational pursuits and careers [illegible] consequence, are no longer available to be married off to the [illegible] men that come along as suitors in their teens. Despite the worth [illegible] marriage as an institution, and the desire of most Nigerian women [illegible] married, not every woman or man indeed desires to be married [illegible] where they so do, not everyone can, particularly, in the light of ster[illegible] ing that has seen the man as the dispenser of the favour of marriage [illegible] status of not being married, does not automatically translate to an [illegible] tion of promiscuity for a woman.[68]

If the Nigerian woman in response to societal distress placed on her [illegible] ries a man who is already married, she stands the risk of having the [illegible] dren of the marriage declared illegitimate and in the end labelled a [illegible] tress, which unfortunately she is anyway, the man always eating his [illegible] and having it.[69] However rather than stay single and suffer indignity [illegible] society often the Nigerian woman if not visited by the serendipity of [illegible] riage would rather attach herself to a man in any form rather than [illegible] the opprobrium of being unmarried. A male commentator, ironically [illegible] aptly portrayed the abysmal scenario,

Apart from this, cultural cum societal attitudes often seem to weigh heavily in the mind of Nigerian women in deciding whether or not to get married or remain single. For instance, in a survey by the writer in Mushin and [illegible] areas of Lagos, it was discovered that majority in polygamous union in the pool were in the union not so much for the essence of marriage but to avoid the alleged "social stigma" associated with single motherhood. But ironically, these women are more or less de facto single – mothers. For instance, twenty-five out of forty of them said they are financially independent, expect little or no financial or material provision from their husbands, and are only in the union for the sake of marital status. Seventeen of them were in their second marriage. But surprisingly more than 50% of twenty unmarried ladies in yet another pool would rather be in polygamous union than be single mothers.[70]

68 The view held of the woman becomes more crucial when it is understood that a single mother is the family to which paragraph 5 of the Convention on the Rights of the Child refers when the child has the mother as parent and that protection before as well as after birth in paragraph 9 clearly refers to the physical health, mental condition and societal relations of the mother.

69 Olufemi Marquis v. Olukemi Marquis suit no. 1 / 685 / 84, unreported 3rd March 1986

70 Peters 'Feminism and the Institution of Polygamy: A Forward-Looking Approach' 4&5 Nigerian

The man in turn hardly cares in most cases about what happens after his demise, which may explain the lacklustre attitude to testate succession even amongst the educated elite. As was noted above because marriage has been elevated to a position where it determines the self-respect and worth of a woman, it is a highly sought status. Very in line with human nature, whatever is sought for at all cost has down sides.

A close examination reveals that this situation of things can be a source of deep emotional upheaval for all parties concerned on the demise of the man, and indeed in his life time. For, the Nigerian man can do as he pleases with a woman whether married or unmarried and whether married under the Act, or outside of it, secured in the inadequacy of the legal process to hold him responsible and accountable, although it must be noted that divorce is more difficult when the marriage is under the Act as most men would not want to go through the litigation involved. The women in turn can hardly attain self actualisation or contribute effectively to their own emancipation or development of the society in these circumstances as often times their emotional life is in turmoil and all attention and time spent on preserving their status as married women. When the disputes arise on the demise of the man, most of the litigations are conducted up to the Supreme Court in extreme bitterness.[71] This makes the matter a very serious one, particularly in the light of international instruments to which Nigeria is a signatory all of which advocate inclusiveness and underscore the dignity of the person, tolerance and the securing of the emotional well being of every individual.[72]

It must however, be noted that aside of the overall societal relevance marriage accords a woman and the apathy of women folk, a major disincentive for women challenging the behaviour of their husbands is the legal

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71 Lawal Ors. v. Younan & Sons (1961) 1 All NLR 257; Bamgbose v. Daniel (1954) 14 WACA 116; Olubuomi Cole & anor. v. Akinyele (1959) FSC 160; (1960) SCNLR 192; see also Saluhi v. Nwariaku [1997] 5 NWLR 442

72 See Articles 4, 5 and 28 of the African Charter on Human and Peoples' Right and Article 16 (1) which provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. See also Articles 1 and 5 of The United Nations Convention on the Elimination of All forms of Discrimination Against Women. Article 1 of the Universal Declaration of Human Rights (UDHR) and the United Nations International Covenant on Civil and Political Rights (ICCPR).

process which has failed to adequately provide for the divorced w financially at least, to a standard she was used to in the marriage Nwogugu quite aptly notes,

In matters relating to ancillary relief, Nigerian courts have, in most ca been unfair to divorced wives in spite of criteria prescribed in section of the Matrimonial Causes Act, 1970 for making an order for mainte and the power of the court to make an order for settlement of proper der section 72. Often the divorced wife is granted a paltry periodic or sum which does not reflect the affluence of the husband and his know nancial standing. Such women are left in penury while the husband e his wealth with other women.[74]

In addition by virtue of the customs of many ethnic groups in Niger woman being an inheritable asset of a man has no rights to succession all cases as a wife. Legislative framework has not obviated this prob If a man dies testate, he can choose to exclude a wife from his Will un the wife comes from a State such as Lagos where by the provisions of Wills Law, section 2 a spouse can apply to a court based on provi for dependents to receive some 'reasonable provision'.[75] For intestate su cession, some of the States also provide for the wife in line with recei English law on the subject which in Nigeria means laws in existence as 1900.[76] However, there are no clear traditions such as settlements, p nuptials and nuptials.

73 Nwogugu, as above, 20

74 The provisions of the Matrimonial Causes Act, 1970 are grossly inadequate, inelegantly drafted and therefore open to misuse as has been the case with the predominantly male judiciary. See sections 25m42 and 72 of the Act. Egunjobi v. Egunjobi (1976) 2 Federation of Nigeria Law Report 78 - 88; Ayangbayi v. Ayangbayi (HD/92/77 of Lagos State) 1; Nwogugu 'What Next in Nigerian Family Law?' [2006] 7 NIALS Founders' Day Lecture (Nigerian Institute of Advanced Legal Studies 2006) 10; Uzodike, E.N.U. 'Maintenance – Sixteen Years after the Matrimonial Causes Act' (1987 & 1988) Vol. 8 & 9 J.P.P.L 21; EN Uzodike 'Women's Right in Law and Practice: Property Rights' in Obilade, E. (ed.), Women in Law (Southe University Law Centre & University of Lagos, 1993) 300; Adekile 'Property Rights of Women in Nigeria as Impediments to Full Realisation of Economic and Social Rights' (2007) 1 (1) Unilag Journal of Human Rights 19

75 Cap W2 Laws of Lagos State, 1990 in 2004 Ed. much like the English Inheritance (Provisions for Family and Dependants) Act 1975

76 Lagos State, Administration of Estates Law, Cap A3, 1990, section 49

[illegible] THERE A NEED FOR ADDRESSING THE [illegible]VES?

[illegible] well being of individuals is very crucial in any society and [illegible] that impedes that well being is dishonesty. Dishonesty is gener[illegible] an emotion-wrecking attribute and destructive discovery in any rela[illegible] but more so, in intimate ones. Since the present stereotyping of [illegible] in Nigeria and the discrimination perpetuated by male domina[illegible] only yield fruits of dishonesty it requires tackling on a broad honest [illegible] manner. Not surprisingly many men would rather have this [illegible]. There are also some Nigerian men who would rather marry the [illegible] they have interpersonal relations with on a polygyny basis rather [illegible] the present destructive tendency of sowing wild oats unsanctioned. [illegible] others would like monogamy properly streamlined with women [illegible] rights that would enable them maintain the dignity that disallows [illegible]achment by men. In a bid to conform to societal standards many [illegible] refuse to take responsibility where pregnancies become the conse[illegible]ence of relationships with them leaving the women affected and chil[illegible] in distress. Invariably, the society is the worse off because in the end, [illegible] children in adult years in seeking an identity return to these fathers, [illegible] reap and celebrate where they have not sown, if the story is a suc[illegible]. Where it is not, armed banditry, prostitution etc, are the outcome of [illegible]cared for children.[77] At least one high standing person in society has [illegible]gued for the retention of laws that illegitimate the children perpetually [illegible]ite in contradistinction with other tenets of Westernisation which the [illegible] elite is at home with. Thus "one of the most powerful concep[illegible]tions that the Western liberal tradition has provided is that a person is a [illegible]nique individual, not just a member of a fixed or even mobile group, [illegible] just another in a long line of noble or ignoble ancestors, and not even [illegible] a member of a class. A man is himself and not just what his father [illegible] grandfather were before him. This conception is finally contribut[illegible]ing to the realization that, remarkable as it seems to so many, a woman is [illegible]herself".[78]

77 Occleston v Pullalove (1873-74) L.R. 9 Ch. App. 147; Salubi v Nwariaku [1997] 5 NWLR 442; [2003] 7 NWLR (Part 819) 426

78 Held 'John Locke on Robert Nozick' (1986) Social Research 169, 190

As the Nigerian situation cannot be removed from global developments and advancements, it is worth mentioning the provisions of Article (a) of the CEDAW which enjoins State parties to "take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". Article 17 (3) (3) of the African Charter on Human and Peoples' Right provides that the State shall ensure the elimination of every discrimination against women and also the protection of the rights of the woman and the child as stipulated in International Declarations and Conventions, while Article 16(b) enjoins the protection of the emotional well being of all.

It needs be underscored that society can only advance and relationships meaningful, if individuals are given the space to realise themselves within or without a relationship[79]. Arguably, the undue protection accorded marriage gives more room for promiscuity as people may marry not necessarily for altruistic reasons but to escape the opprobrium of not being married which may result in both parties commencing a life of prolific adultery sanctioned by the hypocrisy of the law. In the event, more meaningful and deeper relationships as far as the parties to a marriage are concerned may in some cases be sought or met outside the confines of marriage while maintaining the charade of marriage.[80] This is certainly a very regrettable and dishonest state of affairs.[81]

79 J Eekelaar Family Law and Personal Life (Oxford University Press, 2006); M Henaghan 'The Normal Order of Family Life' (2008) OJLS 165

80 L Da Silva Interview the punch Vol. 7118 No. 1608 April 7th 2012 www.punchng.com 38

81 Henaghan 'The Normal Order of Family Life' ibid

CONCLUSION

Major concern raised in this paper is the devious operation of monogamy in the Nigerian context. We observed the existence of a culture of silence among law officers, spouses, governments, and society at large who stand idly by and watch the dilution and flagrant violation of the rules guiding statute marriage as contained in the relevant laws specifically, the Marriage Act, 1970 and the Matrimonial Causes Act, 1970. With only one known decided case against bigamy in *R* v *Princewill* (the parties being foreigners but residing in Nigeria then) and no known Nigerian ever convicted for that offence, in a context in which mixed marriage practices is rampant but ignored, we observed further that the non-enforcement of the law of monogamy in Nigeria is one area of law that has suffered a total impact of the culture of patriarchy, gender inequity, and institutionalized male supremacy. Owing to the interconnection between women and children, the disadvantage suffered by women almost invariably rubs off negatively on younger children in the family in a number of cases. The adverse fallout on women and children erodes the chances of the society making the best out of the practice of one man one wife. It also complicates the rights, duties as well as the enjoyment of marital happiness in polygynous marriages and has the overall tendency to cause marital disorganization and family instability in the country. Further study will be required to investigate the contribution of this factor to the high and rising rate of divorce in the country. The original intendment of monogamy law is to maximize the peaceful enjoyment of marital life by the parties – the wife, the husband and their children. By extension, although the father and mother are different status-roles, they are equally expected to benefit from the stable marital monogamous union or suffer from any dilution of its principles and practice. Monogamy is also expected to protect the rights of the respective parties, shield each union from external interference and guarantee overall stability of marriage and the nuclear family even in times of crisis. It does this by providing adequate safety nets and catchment troughs, tame the daring spouse, and stave off any let or hindrance against the weaker parties in the union. It was however observed that even in the customary forms of monogamy such as *Nrachi* these core values are acknowledged and protected.

Indeed these are the principles that make monogamy attractive to [illegible] cal people despite its alien justification. Perhaps that is part of the [illegible] of the practice of monogamy, its alien imposition against a wide [illegible] customary infrastructure of polygyny. It was observed that in tradi[illegible] society a man in a monogamous marriage was widely regarded as [illegible] ure; his farm and barn small, his house and compound small, [illegible] number of children equally small. Men reared large families, many [illegible] and multiple house compounds because were status symbols of [illegible] achievement, greatness and distinction.

It would appear that while many men in contemporary society com[illegible] with polygyny or serial monogamy or monogamy garnished with [illegible] cubinage, they do not worry about the exploits, invectives and ab[illegible] by those who while being *de jure* monogamous are *de facto* polygy[illegible] Considering the advantages of monogamy as a stronger unit within wh[illegible] to optimize family functions of securing and protecting the members [illegible] the one hand, and the recklessness, confusion, marital instability and [illegible] joy in diluted monogamy, we have suggested amendment of our marri[illegible] laws generally and stricter enforcement of the observance of the rule [illegible] monogamy in the country.

One unresolved question, however, that kept going and coming back [illegible] we wrote this piece is whether the ordinary Nigerian people out there re[illegible] ally care about preserving monogamy as received under English law and [illegible] Christianity during the colonial era or is it us concerned intellectuals that [illegible] are imposing our desires, our interpretations and subjective values on [illegible] generation that is probably monogamy-weary and contemptuous of the [illegible] practice of one man one wife despite religious injunctions and belong[illegible] ingness requirement. This is another lead that needs to be followed up [illegible] subsequently to throw more light on the dimension of popular opinion [illegible] on this subject.

If society fails to protect any group of people then the seams that bind [illegible] the society are not in place and the society is bound to lack cohesion. [illegible] Those who feel cheated not having a voice will go along but it is not in [illegible] doubt that all is not well. If men are left unchecked in what they met out [illegible] to the women in their society the society is worse off for it. Held asks in

secular framework in relation to property distribution, "why on earth shouldn't rich and powerful men (given the historic and current distribution of economic and other power, there is little doubt which sex would usually do the buying and which would be forced to sell out) be able to buy up as many women as they please, not just as sexual partners and secretaries and servants but as wives? Why should anyone's right to acquire marital property be limited?[82] The only reason this is not the case in any civilised society is because there is a check by the law which is enforceable. Masculine behaviours are not natural and unchanging, they are liable to change and healthy models of masculinity are already emerging across the continent.[83]

Suggestions for Reform

1. The laws in relation to marriage in Nigeria are clearly outdated and should therefore be revised to make provisions that take into account the emerging hybrid or cross-breed marriage forms, effective divorce process, maintenance provisions, for children and the spouses, particularly the women.
2. Sanctions for breaches should be civil and compensatory rather than criminal which will promote litigation.
3. Registration of marriages in line with the recommendation of Part V of the Law Reform on Family Law but on mandatory terms, should extend to marriages under customary laws as well as church marriages where these are not coupled with statutory marriages. People should not feel bound to go through all forms of marriages as is presently the case.
4. A Federal Marriage Court should be established with experts in the field of Family Law as judges. This is somewhat like the Family Court under the Child's Rights Act, 2004 but with emphasis on the best possible outcome on social security and support for the weaker party or parties, almost invariably, the women and children.
5. People should be sensitized on the benefits of pre-nuptial agreements and marriage settlements.
6. The laws on succession should be revised and harmonised in line with civilized tenets to allow inheritance by all legitimate persons as well as

82 Held, 'John Locke on Robert Nozick' above, note 75, 190
83 Ennin, 'Lahoucine Ouzgane. Men in African Film and Fiction' [2011] 12 (4) African Studies Quarterly 99, 100

dispense with the present restrictions on only first sons.

7. Statute marriage and attendant obligations and rights should be cured through adequate enforcement after due amendment to p those who suffer deprivation in the extant situation taking due c sance of local customs and traditions.

CHAPTER 5

IMPACT OF REGULATION DRESS IN THE LEGAL PROFESSION ON THE RIGHTS OF MUSLIM FEMALE LAWYERS IN NIGERIA

BY

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IMPACT OF REGULATION DRESS IN THE LEGAL PROFESSION ON THE RIGHTS OF MUSLIM FEMALE LAWYERS IN NIGERIA

ABSTRACT

The legal profession in Nigeria, like some other profession all over the world has its formal or regulation dress which is compulsory for the legal practitioners on training as well as in practice. Islam is a complete way of life with its laws governing all aspects of human endeavor. Shari'ah - the Islamic law has equally prescribed a code of dressing as obligation for the Muslim men and women. Nigeria by her Constitution of 1999 has granted her citizens the freedom of religion and the freedom to manifest the religion in practice and observance. A Muslim woman legal practitioner therefore, has dual responsibilities with regards to her dressing. A Muslim woman who aspires to go into the legal profession and reach the peak of the profession is faced with the challenges of which of the dress code to abide with as a Muslim desirous of upholding her faith. The paper therefore examines the requirements of dressing of the legal profession and that of the Islamic law. It examines the areas of convergence and divergence. It also discusses the constitutional human rights and gender issues as well as professional ethics involved in the regulation dress of the legal profession. It concludes by suggesting possible compromise and by putting together the requirements of the two dressing codes.

INTRODUCTION

The issue of 'formal' or 'regulation' dress or code of dressing in the profession is an issue of concern to most female Muslims who are wish to go into the legal profession. In training at various campuses Law school in Nigeria, Muslim female students come face to face challenges of having to expose some part of their body in contra of the dictates of their religion in an effort to comply with the requi of regulation dress of the legal profession.

In the last three decades, there has been in Nigeria and elsewhere world, a strong wave of religious consciousness leading invariably lamic revival. The Islamic revival has not only brought the Islamic code into places where hitherto it was not seen, it has equally br the intellectual discourse on it to the fore. Hence the legal professio the corporate world are now faced with teeming numbers of wome wish to comply with the Islamic dress code.[1] One of the signs of this voluntary adoption of the Islamic dress code by many female stude higher institutions of learning. Consequently an average female M student now is trying to comply with Islamic dress code in one way o other. The non-covering Muslim female students especially in the M populated areas of Nigeria are now exception rather than the rule.

Annually the Nigerian Law School admits many female students wh Muslims. The faithful female Muslim students have to contend with dilemma of complying with Islamic dress code and at the same time ing by the regulation dress. As part of the official regulation dress, are required to expose their hair, neck and some part of the legs du the compulsory law dinners, court attachment, law office attachment, tures and other official outings. This experience starts in some case universities during the academic pursuit for the LL.B degree. One of striking features in some law faculties in Nigeria is the introductio dress code for law students. This is to enable the students get themse acquainted with the acceptable modes of dressing expected of legal

1 I.Obi, A.A, "Religious Rights and the Corporate World in Nigeria: Products and Personnel Perspectives"(2004) Recht in Africa, .195-216

in Nigerian courts.[2] The female lecturer in law may some- be spared from facing the dilemma and challenge especially the needs to meet with Accreditation Panel from the Council for Education. The Muslim female judges equally face the same experi- in the discharge of their responsibility. The female legal practitioner or in practice faces this experience despite the fact that there to be no specific statutory provision prescribing this particular ment of the dress code. This paper therefore sets out to examine requirements of the two codes of dressing by tracing their origin and with the objective of coming out with the areas of similarity and gence on the one hand as well as areas of conflict divergence on the hand with a view to recommending areas of possible compromise discussing the constitutional, human right, ethical and gender is- involved in the regulation dress. It is hoped that in the final analysis minds of faithful Muslim women who are aspiring to be in the legal sion are put to assurance and those already in the profession are raged to continue without doubt. In a bid to achieve this objective, paper is divided into six segments dealing with the various aspects this topic thus: the first segment is the general introduction while sec- segment dwells on dressing for women in the profession. The third ent examines Islamic dress code for the women, the fourth deals comparative analysis of the two dress codes. Finally fifth segment is oted to making a case for head cover as part of the regulation dress, pointing out some of the legal ethical, constitutional and human issues involved in the subject of the paper. Thereafter the paper con- des with some remarks.

DRESSING FOR WOMEN IN THE LEGAL PROFESSION

The Nigerian Law School with campuses presently located in five areas; Lagos, Abuja, Kano Enugu and Bayelsa (Adamawa campus will soon commence operation) is the school where people aspiring to be in the legal profession are trained after their graduation from the university with law degrees. It is after the training in the law school and passing the bar

2 2. Aghehaku DCA & Omoregie LO, "Teaching Ethics and Values in the Legal Profession: the Nigerian Perspective at www.iaisnet.org/meeting/teachingpapers/aghehaku accessed on 23/07/2011

final examination conducted by the Council for Legal Education that could be called to bar (declaring the person to be a full-fledged legal practitioner in Nigeria i.e. Barrister, Solicitor and Advocate of the Supreme Court of Nigeria.)

On getting to the law school, orientation is organized to sensitize the students on acceptable practices, norms, values and traditions in the legal profession. During the orientation lectures which normally take place in the first week of resumption at the school, students are informed, among other things, of the code of dressing required of them during their stay at the school and beyond. It is expected that the students should have been informed and made aware of this dress code right from their days in the universities as undergraduates. The dress code, the students are made to understand is part of the ethics of the profession[3]. The judge, before whom a legal practitioner appears, however has the discretion to accept or reject his dress as meeting or not meeting the requirement of dress code in the profession.

The origin of the legal profession in Nigeria including the regulation of dressing is traceable to the English legal system and the English legal profession. This is because Nigeria was a colony of the British which remained her colonial master for many decades. The Nigerian legal profession and education is therefore borrowed from the British legal system and profession. The history of dressing in the legal profession[4] in English courts comprising the wig and gown has been traced as follows:

The wig was introduced by Louis XIV to mask his increasing baldness after his originally magnificent head of curly hair had set the fashion, it remained an indispensable item in a gentleman's wardrobe for more than a century, powdered white or grey, large and elaborate or small and neat. the wig replaced men's natural hair at any social occasion until the French Revolution, at court functions for another 30 years after that, and in the law courts of Britain to this day[5].

3 Ibid visited on 2/09/2011

4 A Orojo J O, Conduct and Etiquette for Legal Practitioner (London: Sweet and Maxwell, 1979), p1. See also Niki Tobi, The Nigerian Lawyer (Lagos: Law Research and Development Forum Ltd., 2002) p. 15

5 Abdulraheem N M, The Hijab, Barristers' Dress Code and Religious Freedom in the Legal Profession in Nigeria@nimahabdulraheem .com visited on 23/07/2011 citing Microsoft. Encarta Encyclopedia 99(1993-1998, Microsoft Corporation)

trace the history of the legal profession regulation dress, vividly stated that:

> ...costume with which lawyers and judges adorn themselves and when attending ceremonies is largely an accident of history. ...does not be speak any originality on the part of the profession which must not therefore be given credit for any sartorial elegance ...by their appearance in the exotic robes of their office. As far as ...dress is concerned, we are simply heirs of a scholastic and ecclesiastical tradition going back to the days when long mantles were worn ...consistorial of papal court and the lawyers of the Roman ... In 1340, there was a reaction by others against the length ...garment, it was the lawyers who stubbornly decided to cling to the ...robe." Towards the twentieth century, the matter of dress became ...entrenched in some countries or states. St Lucia provided a ...example.[6]

...Justice Ekundayo, while discussing the appearance of the legal ...practitioner before the courts in Nigeria affirmed the fact that the Nigerian legal professional dress is borrowed from English system and clearly ...the requirement of the regulation dress when he stated thus:

> *"Our courts will not go as far as the court in England by demanding that ...appear before them in striped trousers, dark three piece suit with an ...handkerchief sticking out of your breast pocket. They would and should, however, demand from you the minimum standard of dressing, below which a gentleman should not descend. The call to the Bar makes a lawyer an automatic life member of the club of gentlemen. You have to give all it takes to be a worthy member."*[9]

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6 Phillips Sir Fred, The Evolving Legal Profession in the Commonwealth.(New York: Oceana ublications, 1978) 113 cited in Abdulraheem N M op cit

7 Ibid.

8 Legal Practitioners Ordinance (St Lucia), Section 5(1)

9 Ekundayo A, Hints on Legal Practice, (Lagos: N.I.A.L.S Law Series No 5 Nigerian Institutes of Advance Legal Studies, 1992) 52

The learned justice emphasized the need for lawyers to be neat and ... an impressive appearance in court. He however further succinctly ... that:

"A counsel appearing before court other than the High Court, the C... of Appeal and the Supreme Court is expected to be in clean dark ... clean white shirt, smart tie, and well-polished shoes. That every gentle... should carry an handkerchief is basic. In the High Court, the Court o... peal and the Supreme Court, you of course, appear in the barristers' r... The bib and collar should be immaculate white. It is important that ... bib conceals your front stud. As for Customary Court of Appeal and ... Sharia Court of Appeal, the opinion of the writer is that counsel should ... appear before them in robes.....lawyers should robe up only before t... courts whose Judges also wear the English style of robes for court busin... Lawyers ought to appear before the Customary Court of Appeal and ... Sharia Court of Appeal in suits. The robes, worn by Judges and barriste... the English tradition, are in no way relevant to Customary or Islamic L... Courts. That explains why the judges and Kadis of these Courts do not w... those types of robes.[10]

From the discussion so far on this segment dressing in the legal profess... in its origin does not have history of professional height attainment rath... it comes to be by accident. The lawyers' dress, though detested by so... men has never posed any serious problem for men the same way it do... to some female law students and female practicing lawyers. In the discus... sion of professional dress, no attention is given to the female dress. Thi... may not be far from the fact that legal profession at beginning was dom... nated by men. More so, legal profession recognizes only one gender an... everyone in the profession whether male or female is regarded as gentle... man. But the reality is that female gender exists in the profession and th... need to be gender sensitive is inevitable in line with the International Hu... man Rights standard. The proper dress for a female law student as against... that of the male during the legal training in lecture rooms and any official... outing is either a dark (black or navy-blue) suit comprising a skirt, a coat... and a white blouse worn inside, or a dark (black or navy-blue) gown[11].

10 Ibid, p 53

11 This is usually the instruction given in the orientation lectures at the Law School and in the uni... versities experience by the writer of this paper

Kayode while explaining the required dress of female student at the Law school quoted a circular issued by the Council for Education to the students of the Nigeria Law School thus:

female students, white blouse, dark jacket and black skirts covering the (dark suit) or dark ladies dress and black shoes are to be worn. There be no embroidery and trimmings of any type and only moderate (ear-rings, and watches) are allowed to be worn[12]

graduation and call to the bar, a woman in the legal profession is to to appear in this dress in any official outing. In her appearance a Superior Court of Record, she adds to the regulation dress, law- wig and gown and the collarets or bib. That is the legacy left behind the colonial master.[13] Appearing in the regulation dress especially in court of law is the requirement of law. Thus section 36 of Rules of Pro- nal Conduct[14] provides as follows:

When in court room, a lawyer shall-
(a) Be attired in a proper and dignified manner and shall not wear any apparel or ornament calculated to attract attention to himself;
(b) Conduct himself with decency and decorum, and observe the custom of practice at the court with respect to appearance, dress, manners and courtesy;

It is clear though from the foregoing that the regulation dress is a legal requirement of law in the legal profession, but it is not too clear whether there is any specific statutory provision prescribing or stipulating what exactly constitutes the essential requirement of the dress code for the Legal practitioner and the law students. It can only be inferred from experiences, historical antecedents and practice borrowed from British colonialists along with the reactions and utterances of the learned judges of the courts of records or the head of institutions of learning. In practice, the

12 Fayokun, Kayode "Limits to the Campus Dress Codes", vol. 7, (2003) Journal of International and Comparative Law, 1 at 13-14

13 See generally Abdulmalik Bagiya Mahmud A Brief History of Sharīah in the Defunct Northern Nigeria. (Jos: University of Jos Press1986)

14 Legal Practitioner Act (CAP 20 LFN 1990) Rules of Professional Conduct for Legal Practitioners, 2007

non compliance with the dress code has consequences that raise ... fundamental constitutional right issues. These issues include den... the right of audience in court and the denial of litigant the right to ... representation of his choice. There are judges who will refuse lawyers ... dressed with her head cover an appearance or audience in his court. ... of such judges would ask counsel: how many headdresses can one ... the same time? The judge requires the counsel to put only the wig a... headdress. The female Muslim lawyer is faced with a stark choice either ... remove her head cover or forfeit her right of audience. The usual ch... is the former and the lawyer returns to the court with the head cover ... moved and humiliated. This problem is not limited to lawyers. It is ... becoming a problem at the bench. With the increasing number of Mu... women appointed to the bench, such incidents have started emerging ... the bench.[15] The entitlement to appear before any court and present ... case or defend a case is guaranteed by the Legal Practitioners Act [16] which provides;

• Subject to the provision of the next subsection and of any enactment in force in any part of Nigeria prohibiting or restricting the right of any person to be represented by a legal practitioner in proceedings before the Supreme Court or the Sharia Court of Appeal or any Area or Customary Court, a legal practitioner shall have the right of audience in all courts of law sitting in Nigeria.

A clear reading of the section will show that the only known condition upon which the right can be denied as specified in the sub section is the failure to pay practicing fee as may be prescribed from time to time. While it is conceded that dressing in the prescribed form is enjoined for a legal practitioner seeking to appear before a court of law, it was never made a condition precedent under the Act. The condition precedent for the grant of the right of audience is only a call to the bar and enrolment to practice as Barrister and Solicitor of the Supreme Court of Nigeria. Hence it is submitted that to deny a Muslim woman legal practitioner the right

15 There was reportedly a hot exchange between a Chief Judge of a certain State in Nigeria (a Christian) and his female magistrate (a Muslim) who insisted on putting on her head cover for the opening of the legal year. This incident is reported in Abdulraheem N.M op cit, p11

16 S 8(1) Legal Practitioner Act

audience and appearance to present her case or defend a case on behalf of her client on the basis of her Shari'ah compliant dressing run contrary to the provisions of the Legal Practitioner Act which as a law takes precedence over the codes of conduct.

Consequently too, denying a Muslim woman legal practitioner the right of audience or representation of her client in a court of law on the basis of her dressing infringes on the constitutional right of a person or litigant to a legal practitioner of his choice. Fundamentally, it is a denial of the right to fair hearing as enjoined by the provisions of the constitution.

ISLAMIC DRESS CODE FOR MUSLIM WOMEN

Islam is a complete way of life, which prescribes rules governing every aspect of the lives of its adherents' including the mode of dressing. This prescribed mode of dressing is important to the Muslims, because people generally are viewed and treated by their appearance including their dressing. Their appearance reflects their personality, hence the popular adage 'you are addressed the way you are dressed'. The mode of dressing for women and men has been prescribed by Shariah in its primary sources consisting of the Quran and Sunnah of the Holy Prophet (SAW). For Muslim women, Allah (SWT) enjoins them, thus:

And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof, that they should draw their veils over their bosom and not display their beauty except to their husbands, their fathers, their husbands' father, their sons, their husbands' sons, their brothers or their brothers' sons or their slaves whom their right hand possess, or male servant free of physical needs, children who have no sense of the shame of sex, and that they should not strike their feet in order to draw attention to their hidden ornaments. And O you, who believe, turn you all together towards Allah that ye attain bliss.[17]

17 Q24:31

Allah (SWT) also told the Noble Prophet, Muhammad (SAW);

O Prophet tell your wives and daughters and the believing women th should cast their outer garments over their persons (when abroad) most convenient that they should be known as such and not molested Allah is Oft-forgiving Most Merciful.[18]

In a Hadith of Prophet (SAW), Aisha (RA) reported that Asma daughter of Abu Bakr (sister of Aisha the wife of the Prophet (S came to the Messenger of Allah (SAW) while there were thin (tra ent) clothes on her. He (SAW) reproached her and said: "O Asmau, a girl reaches the menstrual age, it is not proper that any portion o body remain exposed except this and this (he pointed at her face palms)". (Abu Dawud)[19]

From the above verses of the Quran and the Hadith of the Prophet (SA it is clear that a dress code has been prescribed for the Muslim wom The prescription requires Muslim woman to put on the dress that co all parts of her body except the face and the palms when she goes o side her home, where men outside those mentioned and listed in the cited verse (Q24:31) are present. This is the opinion of all the four su schools comprising of the jurists of Maliki, Shafi', Hanafi and a versio Hanbali schools.[20] It should however be noted that there are some juri who are of the opinion that covering of face and palm is part of the quirement of the Hijab (the Muslim female dress code).[21]

Other requirements of Islamic dress code for Muslim women include t following:

- The woman dress must be thick as against the transparent dress so not to show what is covered. "In this regard, the Prophet (SAW) was re

18 Q33:59;

19 Karim. AMF Mishkatul Masabih, English Translation vol 1(Lahore, Pakistan: Law Publishing Company Undated). 460-461. See also Ibn Kathir, All The Exegesis of the Grand Holy Qur'an Al Sharif. M M Irana ,1st ed. (Beirut, Lebannon: Dar AL-kotoob Al-Ilimiyah 2006), 582

20 Al- Albani MN. Hijab ul Mar'at il Muslimah til kitab wassunah, 3rd Printing (Beirut, Lebannon: AL maktabuul-islami, 1969) 41-42 cited in Badawi JAA Woman under the Shade of Islam. Organization of Islamic Conference/WAMY. Jeddah, KSA 1998), 50

21 Blankinship KY. "HIJAB AL- MARAH"@www.hamppostproductions.com/?p=3425 visited 12/1/2012

have said: In the latest part of my Ummah (nation of Muslims) shall be women who are naked in spite of being dressed, they have their high like the humps of the Bukht camel, curse them, for they are cursed. They will not enter Al-Jannah(the paradise) and would not even perceive its fragrance, although its fragrance can be perceived from a distance of 500 years traveling camel".[22]

- It must be roomy and not tight. If it is tight, it will be descriptive of the woman's body and this violates and defeats the whole purpose of the dress code. In this regards, the Prophet (SAW) was reported to have given to Usamah b Zayd a garment who in turn gave the garment to his wife. The Prophet (SAW) asked him why he was not using the garment. He told the prophet (SAW) that he gave the garment to his wife. So the prophet advised him to tell the wife to wear '*gholalah*'[23] under the garment so as not describe the shape of her bones.[24] The hadith of Asma bint Abubakar cited above is equally relevant.

- The dress must not be displayed: Allah has ordained dress of the Muslim women so as to cover the beauty of the women from the outside world and not showing off. Allah (SWT) says; "…..and not show off their adornment except only that which is apparent."[25] And also; and stay in your homes and do not display yourselves like that of the times of ignorance."[26]

- The dress must not be perfumed; on the authority of Ad Diya Al-Maqdisi, the Prophet (SAW) said; any woman who perfumes herself and passes by some people that they smell her scent, then she is a *Zaniyah* (Adulteress)[27]

- The Islamic dress code of the woman should not resemble that of a man; Imam Ahmad, An-Nisa'ee reported that the Prophet (SAW) said; Women who assume the manners of men are not from us and also those of men

22 Al-Tabarani and Sahih Muslim. See Al-Albani op cit, 56

23 Gholalah in Arabic language means a thick fabric worn under the dress to prevent it from describing the shape of the body

24 Musnad Ahmad cited Al-Albani op cit, 59-63

25 Q24:31

26 Q33:33

27 Shuaib, Imam An-Nisa'i A. A., Sunan an-Nasa'i. . Vol IV ch 35, no5126 Al-Sharif MM, Trans, (Lebanon: Dar Al-Kotob Al Ilmiyah 2008), 394.

who assume the manners of women.[28] Abu Hurairah also narr
"The Prophet (SAW) cursed the man who wears the dress of a wo
a woman who wears the dress of a man.[29]

The Hijab, the Islamic code of dressing for Muslim women is a co
ment of Allah and His Prophet (SAW). Whenever Allah and His
make a ruling, a Muslim has no alternative but to abide by the co
ment of Allah. Refusal to comply will amount to disobedience,
makes disobedient liable to the curse or punishment of Allah. Th
(SWT) in the Glorious Quran said:

It is not befitting for a believer, man or woman when a matter has b
cided by Allah and His Messenger to have any option about their dec
anyone disobeys Allah and His Prophet, he is indeed on clear wrong

This verse of the Qur'an cited indicates that a Muslim woman is
obligation to abide by the dress code prescribed by the shari'ah. Dr
differently from it is a violation of the law of Allah and is tantamo
disobedience to Him. Hence the need to explore a situation whe
Muslim female legal practitioner can conveniently discharge her re
sibility to her faith as well as her profession.

COMPARATIVE ANALYSIS

Going by the regulation dress in the legal profession for women as
cussed above, a female lawyer is to cover all parts of her body except
face, the palms and part of the legs and some part of the neck if she is
wearing the bib. The Islamic dress requires the Muslim women to co
all parts of their body except the face and the palms. The regulation dr
may be tight or loose depending on the choice of the lawyer wearing
dress. So the female Muslim lawyer has the option to sew her dress lo
or bourgeois to ensure that she does not reveal the shape of her body
compliance with the Islamic dress code.

28 Khan M. M. (Trans), Sahih Al Bukhari Vol7, ch 62, no 774 (Beirut- Lebanon: Dar Al Arabia Undated), 432
29 Ibid, no 775
30 Q 33:36

dress of the legal profession is one dark colour which is attractive, neither is it capable of displaying the beauty of wearing it. Section 36 of the Rules of Professional Conduct, stipulates that the lawyer shall not wear any apparel or ornaed to attract attention to himself. The skirt and the top or the is the dress of the women and not men, and this conforms to ent of Islamic dress that frowns at the dress of the opposite be pointed out that Muslim female lawyer should decidedly gown or skirt long to cover the legs to match the prescription ic law. The main conflict between the regulation dress and the which a Muslim female lawyer has to face is the covering of and drawing the head cover over the shoulder. This is usually where the female lawyer or student faces problem with her teachers, principals etc. The covering of the head will not necessarily much difference to the regulation dress, yet it makes a lot of difference to the Muslim woman.

MAKING A CASE FOR HEAD COVERING AS PART OF THE REGULATION DRESS

discovered that the covering of head is compulsory duty on the woman and as a matter of fact for women from some other religions, it will be necessary and reasonable for the Council for Legal Education and Body of Benchers to allow their women to put on a head cover even if it means that the colour as well as the style is prescribed by the appropriate body or authority for uniformity and conformity with the requirement of the religion of the lawyers. The law is supposed to be made for the people and not people for the law. Reforms are being made in our law to conform to the changes in the society. If it is realized that a number of Muslim women are now interested in the legal profession, why would the professional dress code not be modified to conform to the people's desire? This should be so especially when there is no specific provision of the law prescribing the contrary. Giving the opportunity of complying with the provisions of one's religion is part of the fundamental human

right as entrenched in the Constitution. Section 38 of the Constitution gives the right to every Nigerian citizen the freedom of religion including the freedom to manifest the religion in practice and observance. This right is guaranteed in most part of the world, recognized globally and entrenched in International Conventions.[32] Section 38 of the Constitution provides as follows:

(1) *Every person shall be entitled to freedom of thought; conscience and religion, including the freedom to change religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching practice and observance.*

Freedom to manifest one's religion or belief shall be subjected to such limitation as are prescribed by law and are necessary in a democratic society in the interest of public safety, for protection of the rights and freedom of others. Hence the right provided under section is however limited by section of the constitution which provides as follows:
Nothing in sections 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society:-

(a) in the interest of defence, public safety, public order, public morality or public health; or
(b) for the purpose of protecting the rights and freedom of other persons.
What constitutes freedom to manifest religion in practice and observation has been explained in cases before the courts of law, even as it relates to and affects dressing and particularly the dressing of women. The import of section 38 was given consideration in the case of Bashirat & ors. The Provost Kwara State College of Education, Ilorin & ors.[33] The Ilorin High Court in this case upholding the contention of the Applicants that the school regulation which denied the students right to veil their face

31 The Constitution of the Federal Republic of Nigeria, 1999 & 2011

32 See Article 18 of Universal Declaration of Human Rights, 1948, Article 8 African Charter Human and Peoples Right 1981 and Article 9(1) and 2(2) of European Convention on Human Right.

33 (Unreported) Suit No KWS/28M/2006 delivered by Kawu J on 8th May, 2006. See also "COE Ilorin: Muslim Students Floor Provost over Dress Code Law" in Daily Trust (Abuja) 9th May, 2006 @www.dailytrust.com./news1d.htm accessed on 22nd May, 2006 by and cited in Oba A A (2006) "The Hijab in Education Institutions and Human Rights: Perspectives from Nigeria and Beyond" in Identity, Culture & Politics An Afro-Asian Dialogue. Vol 10, No1, pp 51-74

accordance with their religious belief is a violation of the freedom of religion of the students and interpreted the basic words of section 38(1) of the constitution as follows:

According to the LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH NEW EDITION at page 867, the word MANIFEST means "to show or to appear or became easy to see, while OBSERVANCE is defined at page 973 to mean "....a part of a religious ceremony in ritual observances the word PRACTICE is defined at page 1104 to mean "something that you do often because of your religion or.....religious beliefs and practices"[34]

In this case, three female Muslims students of College of Education, Ilorin who alleged that their life is purely guided by Islamic doctrine that require them to cover their body with a veil went to court to challenge the Article J of a circular titled "Dress Code for Students of the College" issued by the respondent on 28th September, 2005, prohibiting the wearing of "dress/apparels that cover the entire face of an individual thereby making the immediate identity of the person possible." In pursuant to the Article, the respondent prevented the applicants from attending lectures and writing examinations.

The court held that the prohibition of the veil by the respondent cannot be brought within the permitted limits to freedom of religion stipulated under section 45 of the constitution (quoted above) as the prohibition needs to reasonably be justified in the interest of defence, public safety, public order, public morality or public health and for protecting right of others. It's interesting to note that the court also held that the fact that other female Muslim students in the school do not wear veil could not defeat the rights of the applicants. The court therefore strikes down Article J of Dress Code in favour of the applicants."[35]

The issue of outward appearance and right to freedom of religion attracting the intervention of the court is not limited to adherent of Islamic faith alone but of people of other faith. Hence the decision of the High court

34 Ibid at p 6
35 Ibid at 12

of Anambra state in Onyinyeka M Enoch V Mary U Akobi,[36] was se... criticized by legal luminaries. In that case religious right of a seco... student in connection with the school hair style regulation was in ... A fresh student with a newly permed hair contrary to the school ha... regulation which requires the student to cut her hair short was re... registration by a Federal Government College. The student while in ... citing some verses of the bible (Corinthian chapter 11, verses 5-6 and ... 15) argues that her Christian faith requires her never to cut her hair. ... court held inter alia that the school regulation requiring students to ... the hair short is "not only reasonable, but accords with proper and ... discipline in a model educational institution."[37] The decision was he... criticized on some grounds which inter alia include the followings:

- That the court introduced without any basis, the limitation of "rea... able" to freedom of religion;
- That the court interpreted religion solely as a system of belief and ... missed summarily without any reason to the biblical passages cited by ... applicant and held that the religious right of the applicant have not b... violated. It ought to have considered the biblical passages cited to de... mine whether the contention of the applicant is correct or not.

Prof Okonkwo rightly observed and his view was supported by b... Nwauche and Oba that if the learned judge had averted his mind to ... effect of section 39(1) of the 1979 Constitution (now section 45 of 19... constitution as amended in 2011), the court may have reached the verd... that the plaintiff's fundamental rights have been infringed. The discuss... of the learned scholars is an additional contribution to the understand... of the import of section 38(1) of the 1999 constitution.[38]

On the foreign scene, Abraham Henry, J while explaining freedom of r... ligion under US jurisdiction comments thus:

Each individual does, of course, possess the basic right to believe what ... choose, to worship, whom he pleases and how he pleases, always, provide...

36 (1994) ANSLR 338 cited in Oba A.A, op cit p 62 from Nwauche E.S, "A Note on Manifesting the Right to Freedom of Religion in Nigeria" Vol 4 no. 1, (1999)Calabar Law Journal, 97 at 104-105

37 At 358

38 Okonkwo CO, "Religious Freedom – *Onyinyeka M. Enoch* V Okobi: A Comment" vol. 6, (1996 - 1997) Nigerian Juridical Review, 214 at 217, Nwauche E. S. op cit, 104 and Oba A. A op cit 61-62

not impermissibly interfere with the rights of others. Hence we who believe in nothing, those who believe but doubt, those who without questioning, those who worship the Judeo-Christian God in different ways, those who adhere to Mohammed's creed, those a cow or other animals, those who worship themselves, those several Gods – to mention just a few of the remarkable variety of belief that obtain.[39]

ment rightly recognizes the different level and mode of individ- observance and manifestation of religious belief. In line with the meaning of manifestation of religion in practice and observance given consideration by courts' decision in US. In the cases of *Sher- V. Verner*[40], the applicant was a worker in a textile mill on a five-day She was equally a member of the Seventh Day Adventist Church. employer in 1959 changed the work week to six days requiring her work on Saturday contrary to her religious belief. She became unem- because of her unwillingness to work in pursuance of her reli- belief. She was denied unemployment benefit because she had left work without good cause in the opinion of the Employment Security mission. The Supreme Court held that the decision of the Commis- forced her to choose between her religion and forfeiting benefits and that it was a violation of her freedom of religion.

western countries, where the legal professions sprang from, have made changes in their dressing. In USA for instance, the legal practition- are permitted to wear any formal suit even in the court without much attachment. This change in the mode of dressing of legal practitioners in U.S.A. among other reasons is to give the litigant opportunity to speak freely viewing the lawyer as any other person with whom he could speak freely. This attitude could assist the litigants to speak their mind honestly. Reservations on the mode of dress in the legal profession and the call for its modification are not new but had been on even in England. For example Sir Fred Phillips showing the non-significance of the legal dress in terms of efficiency and effectiveness in the profession (while calling for a

39 Abraham Henry J. Freedom and the Court, 2nd Edition. 211 cited in Ogwuche, A.S.(ed) 2006 Compendium of HUMAN RIGHTS LAW, (Lagos: Maiyati Chambers) 63

40 (1963) 374 U.S. 398 cited and reported in Ogwuche, A.S op cit. 66

change in the rigidity in the dressing requirement of the legal profe... clearly showed that, wig is not loved by all and had always been the ... ject of disdain. To that effect he wrote:

Thomas Jefferson is said to have described the wig as "the monstro... which makes the English judges look like rats peeping through bunch... oakum". Maitland is reported to have said of lawyers that "they re... the silliest adornment that the human head was yet invented for itself ... even physician and Bishop had recovered wonted sobriety. And Lord C... bell on his own stated "who would have supposed that this grotesque ... ment, fit only for an African Chief would be considered indispensably ... sary for the administration of Justice in the middle of the 19th century? ... Denman L.C.J. described it as "the silliest thing in England". Sir M... Hale objected to wearing the wig because he is been contented to cove... head with a black velvet skull cap.[41]

A cursory look into the history of wig, the theories of gown and othe... tires of the noble and learned profession indicates that they are thos... westernization, colonization and to a lesser extent Christianization. Si... independence meant a reshaping of the national interests to align w... the indigenous people's norms, custom and religion within the orbi... modernity, these legacies ought to have been either removed and s... planted completely or radically reformed and transformed. Nigeria h... come of age, though with a lot of challenges. Policy makers and inde... implementers of Nigeria's system should seek constant way out of ... colonialism; both in forms and mental ideas except of course where c... tomization and globalization are the parameters. The issue of conform... of the Muslim women dress within the body system of the law profess... should be viewed and treated within this rubric.

It is interesting to note that the women bankers are expected to be in su... and on few occasions in full traditional wears. In response to the yearnin... and aspiration of the Muslim women in the sector, and as a matter of du... in granting them their constitutionally given right, they are not denie... the right to put a head cover drawn over their shoulder in the conduc...

41 IBID. 114-115.

their official duty especially in the northern and other Muslim dominated parts of the country like Lagos and in southwest. In the same vein the women from the medical profession conventionally wear the white or laboratory coat and yet wear their head cover drawn over their shoulder. In each of these cases, the women with the head cover perform their jobs as effectively than those without the head cover. The head cover does not make them undesirable in appearance from others who do not wear head-cover. The legal practitioners could take a clue from the medical profession and the banking sector.

The professionals and legal practitioners from other countries could see reason to adjust their professional dress to move with the time why not the legal profession in this country? Why the rigidity? It has been viewed that the present dress code in the legal profession is a legacy from colonial masters, even before independence. Hence, there is need to review it to reflect the needs of the present period, situation, and indeed with the people's yearning, aspiration as well as their indigenous belief.

It has been argued against the adjustment or modification in the dressing, that many people have gone into the profession because of the professional outfit. The big question is; Does this desire of some people bar the chances of others who wish to go into the profession to contribute to the development of their society, while still holding unto the tenets of their religion? The first group of people can be allowed to strictly adhere to the present code, while the latter group should be allowed to make the necessary adjustment.

Another argument put forward by a member of an accreditation panel to faculties of law in some Nigerian universities, is that insisting on the regulation dress is democratic because one is not forced to go into the profession. It was further argued that if one must hold unto his religion firmly, then he has the choice to keep off the membership of the legal profession.[42] The question again is that how would a head-cover put on with the regulation dress make one less lawyerly. In other words, how does the Muslim dress make one perform less in the profession? Why the

42 This view is held by Prof Abayomi in his visit as the chairman of Accreditation Panel of Council for Legal Education to Faculty of Law, Bayero University, Kano in June, 2003

insistence on bare head on the regulation dress by some judges
court of records and management of the institution of learning
there is even no legal backing for the insistence? Law and religion
are not to be contradictory; rather, they should complement one
In a democratic setting, people are given the freedom to be wh
wish to be as long as they do not infringe on other people's freed
this situation the constitution of Nigeria grants her citizen the freed
manifest his/her religion in practice and observance. Dressing acc
to ones religion is part of manifesting in practice and observance on
ligious belief. It neither interferes with the rights of others, nor is it a
the public interest. Conversely, insistence on strict assumed "ethical
fession dress" would invariably breach the Muslim woman lawyer's
stitutionally guaranteed right to freedom of religion.

There is the need for the authority concerned including Council for
gal Education and Body of Benchers to consider accommodating
requirement of the Islamic dress code by Muslim women in confor
with changing times. There is the need for the profession to move wit
times. It will not assist the course of the profession to remain static
rigid in this regard. Presently, some judges of Nigerian superior cour
records accommodate the Islamic touching to the lawyer's dress

CONCLUSION

From the foregoing it is clear that the dress code of legal profession is entirely in conformity with Islamic dress code if the head cover drawn over the shoulder is added to it. It is the submission of this paper therefore that allowing or permitting the Muslim female lawyer to dress in conformity with her religion will grant her nothing more than her right to freedom of religion. In addition to the fact that there is nothing in the law prohibiting the head cover or requiring women to leave their hair bare in the regulation dress, it has not and will not in any way jeopardize the dignity of the profession. As a matter of fact, God-fearing Muslims who insist on following the dictates of the faith or commandment of God will uphold better, the ethics and nobility of the profession. This is because such Muslims will perform their jobs and obligations in the profession with all diligence and honesty as required by the legal profession as well as the Islamic faith. They would not be involved in any act contrary and shameful to the profession.

The paper is therefore calling on the Muslim women in the legal profession and outside it to demand through due process of law, the allowance to wear official dress in conformity with their religious beliefs in all professions including the legal profession.

The country is in a democratic dispensation where people are pressing to be given the right to perform acts which may seem unreasonable to other people, and yet they are granted. Demand by the Muslim women in the legal profession to dress in conformity with their religion is very reasonable and constitutional. This will not make them any less presentable, fit and proper person for the noble profession.

There was a good reason for making the women in the legal profession wear skirts in contrast with the trousers which men in the profession wear despite the fact that men and women in the profession are regarded as one and the same. This is because among other reasons, some recognized beliefs do not accommodate the wearing of trousers by women. Presently, women who desire are allowed to some extent to wear trouser suits during the official outing in the legal profession. This is a new allowance too.

It is therefore the passionate call of this paper to the body concerned to respond positively to the yearning and aspiration of the Muslim women who wish to be part of the learned and noble profession. The judges, the principals of law firm, and the Heads of Law Faculties and Law schools campuses should permit the female law students and lawyers who desire to dress in conformity with the tenet of Islam to do so as presented above.

CHAPTER 6

INDIVIDUAL CRIMINAL RESPONSIBILITY IN ARMED CONFLICT SITUATIONS: FROM IMPUNITY TO ACCOUNTABILITY

BY

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INDIVIDUAL CRIMINAL RESPONSIBILITY IN ARMED CONFLICT SITUATIONS: FROM IMPUNITY TO ACCOUNTABILITY

INTRODUCTION

Individual Criminal responsibility is a process whereby persons are made to answer for the crimes they have committed either as members of an armed group or as commanders. The development of individual criminal responsibility in international law heralds the coming together of elements of traditional international law with more recent approaches to human rights law and humanitarian law, and involves consideration of domestic as well as international enforcement mechanisms. Prior to the 20th Century, states were primarily the only subject of international law, hence the title given to the subject was the "The Law of Nations". This notion was fuelled by the rise of positivism in the 18th century and the writings of Jurists at that time[1]. It is trite to note that at the time individuals were treated as subjects of international law only as an exception to the general rule as it relates to the crimes of slavery and piracy[2]. With the passage of time, the individual has come to be recognized as a subject of international law who possesses both rights and corresponding responsibilities as shown in a number of international instruments that accords such rights and responsibilities to the individual[3]. For the purpose of this study, this paper will focus on the responsibility of individuals in respect of international crimes as it relates to armed conflicts knowing fully well that the world today is confronted by a disturbing proliferation of conflicts which are no longer International in nature[4] as it were, and

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1 Oppenheim, L. H. International Law as cited in O'Brien, J. International Law, (London: Cavendish Publishing; 2001) p 785. See also Shaw, M.N. International Law, 6th ed. (Cambridge: Cambridge University Press; 2010) p. 397.

2 Re – Piracy Jure Gentium (1934) AC 586, where the International Jurisdiction in respect of the offence of piracy was affirmed.

3 There are plethora of examples in International Convention for the Suppression of the circulation of Obscene Publications 1910, International Convention for the Protection of Submarine Telegraphic Cables 1884, Agreement Concerning the Suppression of Opium Smoking 1931, International Convention for the Suppression of Counterfeiting Currency 1929, Convention for the Suppression of the Illicit Traffic in Dangerous Drugs1936, etc, which all grant rights and responsibilities to the individual in international law.

4 Meron T. "International Criminalization of Internal Atrocities",(1995) AJIL, p. 554. See also Gradinsky T. "Individual Criminal Responsibility For Violations of International Humanitarian Law Committed in Non International Armed Conflicts" (March 1998) IRRC, No 122, p 29.

in which the basic problem regarding the classification of offences s... to be that the borderline between war crimes and crimes against hu... ity appears blurred. Therefore, this paper is to determine the exte... criminal responsibility to be borne by those participating or taki... tive part in hostilities and the position of the international comm... when atrocities are committed during armed conflicts. Hence, it wi... cus on the concept of individual responsibility, Command responsib... Pre Nuremberg and Tokyo Tribunals, the Impact of the Nuremberg ... Tokyo Trials, the Ad hoc Tribunals in the 1990's and the Internati... Criminal Court, the Hybrid Courts and the jurisdictions of these co... and tribunals with respect to time, location and subject matters.

INDIVIDUAL CRIMINAL RESPONSIBILITY

The concept of individual criminal responsibility with respect to ar... conflicts cannot be separated from the concept of *Jus in bello* since ... matter of fact individual criminal responsibility could only arise wh... there is a breach of *jus in bello*[5] . Some authors[6] have pointed to the f... that the first attempt at frowning at the use of force by the internatio... community came with the escape of Napoleon from the island of E... and his entering into France with an armed force, earning him conde... nation as an outlaw by the Congress of Vienna in 1815. This becam... precedent when in 1919, the treaty of Versailles with the attendant d... struction occasioned by the first world war noted that the German g... ernment[7] recognised the rights of the Allied and Associated powers ... bring individuals accused of crimes against the laws and customs of w... before military tribunals and also established the individual responsib... ity of Kaiser Wilheim II[8] not minding his status as king of Prussia an... German Emperor. Although this did not achieve much due to politic... and economic undercurrents, a precedent had been established, furth... enforcing the norm that armed conflict did not offer *Carte blanche* to th... parties involved.

5 Advisory Opinion of the Inter American Court of Human Rights In Re – Introduction of Death penalty in the Peruvian Constitution Case 16 HRLJ, 1995, p 9 at 14, where the court affirmed that the individual responsibility may only be invoked for violations that are defined in international instruments as crimes under International law.

6 Supra note 1, p 785. It is trite to note here that the first recorded trial for breach of jus in bello dates back to 1474 when a tribunal tried and convicted Peter Van Hagenbach for atrocities committed as Governor of Breisach.

7 Article 228, Treaty of Versailles.

8 Article 227, Treaty of Versailles.

witnessed an unprecedented level of barbarism, violence and during World War II[9]. At the end of the war in 1945, there to be a concensus among the Allied Powers that the perpetrators these crimes against the laws and customs of war should be brought to especially in view of the fact that there existed overwhelming evi- against Nazi Germany that it had targeted different categories of in- civilians, including homosexuals, gypsies, mentally ill and most horrendously the Jewish nationals. This was the height of anti – Semitism shown in the concentration camps of Auswictch[10] and Sobibor. Thus, the 8th of August 1945, the United States, France, United Kingdom, the Soviet Union concluded the London Agreement which provided for the establishment of an International Military Tribunal. Annexed to the Agreement was the Charter of Nuremberg Tribunal. Although this move of the Allied Powers was criticized on the grounds that it was an attempt of the victors of a war to finish off the vanquished, such criticisms could not hold in the face of the glaring atrocities of the Nazi government.

In 1946, the Judges of the international Military Tribunal in Nuremberg had to face the issue of who, among the alleged criminals of the Axis, should be tried for the horrible crimes committed during National – Socialism?[11] Should the individuals be held accountable, or groups and organizations that had made such atrocities possible be declared crimi- nals? How should the accused be charged for crimes from which they had been physically distant[12]. The tribunal indicted twenty four defendants on charges ranging from conspiracy, crimes against peace, war crimes and crimes against humanity. These convictions[13] were termed a watershed and became fairly established in international criminal law that senior of- ficials within a state will be answerable for breaches of international law; that high office will not confer immunity and that there will be no general defence of superior orders. The Nuremberg Tribunal also held that states can no longer be held responsible for international crimes by stating that States were abstract entities and only by holding individuals liable would

9 1939 - 1945

10 Several accounts have been published about this sad episode that has come to be known as the Jewish Holocaust. See Gilbert, M. The Holocaust 1986, A.G Israel v. Eichman (1961) 36 ILRS 10.

11 Manacorda Stefano. "International Criminal Justice" (2007) Journal of International Criminal Justice Vol.5, Issue 4, Pp 913 – 915.

12 Ibid

13 O' Brien. Supra note 1,Pp 784 -787.

the provisions of international law be fulfilled. The Tokyo tribunal sat as a result of the fallout of the war and convicted two former Ministers of Japan and a host of senior government officials. After incidents, it became established that people who commit atrocities armed conflicts will be brought to book. Ad hoc tribunals have been up through the instrumentality of the United Nations to try breaches the law of war as a result of the conflicts in Yugoslavia, Rwanda, and Leone respectively. For over sixty years now, one must admit that the sue of criminal responsibility still constitutes the Gordian Knot in the practice and theory of International Criminal Law. It is undoubtedly true that from a Legal perspective, the principle of International Criminal responsibility shows a certain ambiguity. And this is despite the apparent clarity of the Concept and its long term historical developments[15].

The International Legal provisions on war crimes and crimes against humanity have been adopted and developed within the framework of International humanitarian Law, or the Law of armed Conflict, which has its own peculiarities and which has gone through an intense period of growth, evolution and consolidation in the last 60 years.[16] The rules of humanitarian Law[17] with respect to International Crimes and responsibility have not always appeared sufficiently clear. One of the problems is that relating to the Legal nature of International Crimes committed by individuals and considered as serious violations of the rules of humanitarian Law and the traditional tripartition: Crimes against peace, war crimes and crimes against humanity. The doctrine of individual criminal responsibility would not be complete without a discourse on command responsibility.

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14 Which was also established as a fallout of the second world war sat from May 1946 to November 1948.

15 In its original meaning, dating almost a century, the principle focused on the Criminal Liability of physical persons in International Law, which is beyond the notion of state responsibility. In its minimal form, the principle is unsatisfactory from a penal point of view: stating the physical persons can be held accountable for International Crimes but this has failed to answer the question of the conditions under which such attribution of Criminal Liability can take place, rather, it has opened a series of complex questions that are not without implications in the spheres of morality, philosophy and most importantly the general theory of crime.

16 Greppi Edwarda. "The Evolution of Individual Criminal Responsibility under International Law" International Reviews of the Red Cross, No. 835, 1999. http://www.icrc.org/eng/resources/documents/misc/57jq2c.htm. Accessed 27/01/11

17 Bassiouni M.C and Nanda P.A. Treatise on International Criminal Law. Springfield, 1973. http://www.icrc.org/eng/resources/documents/misc/57jq2c.htm. Accessed 27/01/11

COMMAND RESPONSIBILITY

This is the doctrine of hierarchical accountability in cases of war crimes[18]. The doctrine of command responsibility was established by the Hague Conventions[19] and applied for the first time by the German Supreme Court in Leipzig after the First World War in the 1921 trial of Emil Mul[20]. This doctrine also known as the "Yamashita or Medina standards" is based on the precedent set by the United States Supreme Court in the case of Japanese General Tomoyuki Yamashita. He was prosecuted in 1945, in a still controversial trial, for atrocities committed by troops under his Command in the Philippines. Yamashita was charged with "unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes"[21]. The "*Medina standard*" is based upon the 1971 prosecution of US Army Captain Ernest Medina in connection with the My Lai Massacre during the Vietnam War[22]. It was held in that case that a Commanding Officer, being aware of a human rights violations or a war crime will be held liable when he does not take action.

Command responsibility can be said to be an omission mode of Individual Criminal Liability. This means that the superior will be held responsible for crimes committed by his subordinates and for failing to prevent or punish them as opposed to crimes he ordered. In *Re Yamashita*[23] before a US Military Commission; General Yamashita was the first to be charged solely on the basis of responsibility for an omission. He was Commanding the 14th Area Army of Japan in the Philippines when some of the Japanese troops engaged in atrocities against thousands of civilians. By finding him guilty, the Commission adopted a new – standard, stating that

18 Allison, M.D and Martinez J.S. Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, September 15, 2004. See also Rowland Robin. Command, Superior or Ministerial Responsibility. CBC News Online, May 6, 2004.

19 Hague Conventions IV (1907) and X (1907).

20 Bantekas I. "The Contemporary Law of Superior Responsibility" American Journal of International Law, No 3, July 1999.

21 The Yamashita Standard. See Rowland R. "Sugamo and the River Kwai" Paper presented to Encounters at Sugamo Prison, Tokyo 1945 – 52, The American Occupation of Japan and Memories of the Asia – Pacific War, Princeton University, May 9, 2003

22 The Medina Standard. See Mc Caffrey B. Human Rights and the Commander, Autumn 1995. See also Raimonda T. "The My Lai Massacre: A Case Study". Human Rights Programme, School of the Americas, Fort Benning, Georgia.

23 *Re Yamashita* 327 US 1 (1946)

where "*vengeful actions are widespread offences and there is no ... attempt by a commander to discover and control the criminal act... Commander may be held responsible, even criminally liable*". How... ambiguous wording resulted in a long standing debate about the ... of Knowledge required to establish command responsibility. The ... was appealed and the US Supreme Court in *Re Yamashita* affirm... decision of the Military Commission[24]. After Sentencing, Yamash... executed. In this case the Courts, clearly accepted that a Comm... actual knowledge of unlawful actions is sufficient to impose ind... criminal responsibility.

In the *High Command Case*[25], the United States Military Tribunal ... that in order for a Commander to be criminally liable for the acti... his subordinates "there must be a personal dereliction" which "can ... occur where the act is directly traceable to him or where his fail... properly supervise his subordinates constituted criminal negligen... his part" based upon "a wanton, immoral disregard of the actions o... subordinate amounting to acquiescence"[26]. In the *Hostage Case*, the ... Military Tribunal seemed to limit the situations where a Commander ... a duty to know to instances where he has already had some inform... regarding subordinates unlawful actions[27]. After World War II, the ... rameters of Command responsibility were thus increased, imposing ... ability on Commanders for their failure to prevent the Commissio... crimes by their subordinates.

These cases, the latter two parts of the Nuremberg Tribunals, discus... explicitly the requisite standard of *Mens rea*, and were unanimous in fin... ing that a lesser level of knowledge than actual knowledge may be su... ficient[28].

24 Ibid. Full text on FindLaw.Com

25 Supra note 20 .

26 Stuart, Elendin E. "Commanding Responsibility and Superior Orders in the Twentieth Century ... A Century of Evolution" Murdoch University Electronic Journal of Law.

27 Ibid

28 Levine E. "Command Responsibility: The Mens Rea Requirement". Global Policy Forum, Febru... ary, 2005.

COMMAND RESPONSIBILITY FOR UNLAWFUL ORDERS

Commanders and other superiors are criminally liable/responsible for war crimes committed pursuant to their orders[29]. The Canadian Court Martial Appeal Court considered an Appeal in the *Seward Case*[30], with regard to the Sentence imposed by a General Court Martial on the officer Commanding the 2 Commands unit of the Canadian Airborne Regiment present in Somalia as part of Operation Deliverance. The accused had been charged, inter alia, for having "negligently performed a military duty imposed on him in that he ... by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise Command over his subordinates, as it was his duty to do so". The Court declined to increase the sentence from a "severe reprimand" to three months imprisonment with dismissal.

In 1945 a German Commander[31] was accused of having ordered in March 1944, the shooting of 15 American Prisoners of War (POWs) in violation of the 1907 Hague Regulations, the US Military Commission at Rome held that the Commanders were responsible for the orders they gave and therefore if the orders were unlawful, they were responsible in law as those who carried out the orders.

Commanders and Other Superiors are criminally liable/responsible for war crimes committed by their subordinates if they knew, or had reasons to know or believed that their subordinates committed or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons reasonably[32]. The International Criminal Tribunal for the Former Yugoslavia, held that the doctrine of Command responsibility, as a principle of Customary International Law, also

29 Article 49, Geneva Convention I, Article 50, Geneva Convention II, Article 129, Geneva Convention III and Article 146, Geneva Convention IV of 12 August 1949. see also Article 7 (1) of the 1993 International Criminal Tribunal for the Former Yugoslavia and Article 6 (1) of the 1994 International Criminal Tribunal for Rwanda.

30 Seward Case, Canada, Court Martial Appeal Court, Judgment 27 May 1996.

31 Doetler Case, US Military Commission at Rome, Judgment 8 – 13 October, 1945.

32 Article 86 and 87, Protocol I, Protocols Additional to the Geneva Conventions 1977, Article 28 ICC Statute and *Akayesu's Case*, ICTR, Judgment, 2 September 1998.

applies with regard to non-international armed conflicts[33] . In the ... *istu and Others Case*[34] in 1995 concerning the trial of Colonial ... Haile Mariam and former members of the Dreg for allegedly ... ting crimes against humanity and war crimes during the former ... between 1974 and 1991, the Special Prosecutor of Ethiopia sta... "Heads of State and Other higher responsible government offici... form of government are all required and obliged to know inter... crimes there under. They are also obliged to prevent the Comm... these acts (i.e. of International Crimes) and to ensure the obser... the International norms".

RESPONSIBILITY FOR SUPERIOR ORDERS

Every Combatant or soldier has a duty to disobey a manifestly ... ful order. The rule is that military orders can and must be obeyed ... they are manifestly unlawful[35]. An order is manifestly unlawful ... offends the conscience of every reasonable, right thinking person, ... be an order which is obviously and flagrantly wrong. The order can... in a grey area or be merely questionable; rather it must be patently ... obviously wrong .[36]

In *Sergeant W*[37] , case, the Belgium Court Martial of Brussels senten... sub officer to three years imprisonment for the willful killing of a civ... The accused was serving in the Congolese Army within the frame... of Military Technical Co-operation between Congo (DCR) and Bel... The Court held that the Sergeant's interpretation of the orders he ha... ceived, i.e. to kill an unarmed person in his power, was manifestly un... ful; the accused therefore had a duty to disobey the order. The U... States Court of Military Appeals in *Calley's Case*[38], opined that Mil... effectiveness depends upon obedience to orders. On the other hand, ... obedience of a soldier is not the obedience of automation. "*A Soldier* ...

33 *Hadzihasanovic and Others Case*, ICTY, Decision on Joint Challenge to Jurisdiction, 12 Nove... ber, 2002.

34 Ethiopia, Special Prosecutor's Office, *Mengistu and Others* Case. Reply submitted in response ... the Objection filed by Counsel for defendants, 23 May, 1995.

35 Israel, District Military Court For the Central Judicial District, *Ofer, Malinki and Others Case*, Judgment, 13 October 1958.

36 *Finta's* Case, Canada Supreme Court, Dissenting Opinion of one of the Judges, 24 March, 1994

37 Belgium, Court Martial of Brussels, *Sergeant W. Case*, Judgment of 18 May, 1996

38 *Calley's Case*. US Army Court of Military Appeals. Judgment, 21 December, 1973

agent, obliged to respond not as a machine, but as a person". The takes these factors into account in assessing criminal responsibility acts done in compliance with illegal orders. The ICTY also dealt with subject[39].

soldier receives an illegal order, he should draw the attention of his ander to the illegality of the same. If the Commander insists on his tion, the Soldier should abide by the order and implement it, unless legality is clear, and the order forms a crime e.g. if the military com- der orders a subordinate to forge papers, embezzle funds, murder human being or torture him, the duty of obedience is turned into the of refusal[40]. It can safely be concluded that a superior order does not pate a subordinate of criminal responsibility if the subordinate knew the act ordered was unlawful or should have known because of the festly unlawful nature of the acts ordered[41]. However, there is an ex- ive practice to the effect that obeying an order to commit a war crime be taken into account in mitigation of punishment, if the court de- mines that Justice so requires. Thus the 2000 UNTAET Regulation No. 00/15 provides that "*the fact that an accused person acted to an order of government or of a superior shall not relieve him of criminal responsibil- but may be considered in mitigation of punishment if a panel determines Justice so requires*" [42].

INDIVIDUAL CRIMINAL RESPONSIBILITY: PRE NUREMBERG

Individuals are criminally responsible for war crimes they commit. In the ordinance for the Government of the Army, published in 1386 by King Richard II of England, limits were established to the conduct of hostili- es and on pain of death, acts of violence against women and unarmed

39 Article 7 (3) ICTY Statute. Prosecutor v Delalic, Prosecutor v Blaskic. The concept of command responsibility has developed significantly in the Jurisprudence of the ICTY. One of the most re cent judgments that extensively deals with the Subject is the Halilovic Judgment of 16 November 2005, Para 22 - 100

40 Fellah Awad AL – Anzi. "The Accomplishment of Duties and The Execution of Mili tary Orders, Their Limits and Constraints". Homal AL – Wanton. No. 149, P 61

41 Article 33, ICC Statute, Article 7 (4) ICTY Statute, Article 6 (4) Statute of the Special Court for Sierra Leone, 2002.

42 Section 21 of the UNTAET Regulation No 2000/Article 8 of the 1945 IMT Charter (Nuremberg) Article 6 (4) Statute of the Special Court for Sierra Leone.

priests, the burning of houses and the desecration of churches were [illegible] hibited[43]. Provisions of the same nature were included in the codes [illegible] by Ferdinand of Hungary in 1526, by Emperor Maxmilian II in [illegible] and by King Gustavus II Adolphus of Sweden in 1621[45]. Article 100 [illegible] Articles of War decreed by Gustavas II Adolphus established that no [illegible] should "tyrannies over any churchman, or aged people, men or women maydes or children".

The earliest trial for war crimes seems to have been that of Peter [illegible] Hagenbach, in the year 1474[46]. At that time, as during and after the Nuremberg trial, punishment of the accused hinged on the question of Compliance with superior orders[47]. Charles the Bold, Duke of Burgundy[48] known to his enemies as Charles the Terrible, had placed Landvogt Peter Von Hagenbach at the helm of government of the fortified city of Breisach, on the Upper Rhine. The governor over zealously followed his masters' instructions, introduced a regime of arbitrariness, brutality and terror in order to reduce the population of Breisach to total submission. Murder, rape, illegal taxation and the wanton confiscation of private property became generalized practices. All these violent acts were also committed against the inhabitants of the neighboring territories, including Swiss merchants on their way to the Frankfurt fair. When a large coalition[49] put an end to the ambitious goals of the powerful Duke, the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbachs' defeat, as a prelude to Charles' death in the battle of Nancy in 1477[50].

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43 Supra note 16, page 1.

44 Article 8 and 9 contained Humanitarian rules

45 Schwarzenberger G. International Law as Applied by International Courts and Tribunals, Vol II The Law of Armed Conflict, (Stevens: London: 1968) p 15 as cited by Greppi Eduardo, Supra note 4.

46 Ibid, P 462.

47 Dinstein Y. The Defence of 'Obedience to Superior Orders' in International Law, Leyden, 1965.

48 1433 – 1477.

49 The coalition was made up of Austria, France, Bern and the towns and Knights of the Upper Rhine.

50 Greppi E, Supra note 16, p.2. According to Schwarzenberger, in a framework of quasi-international Law, whose characteristics is "a state of defacto equality in which entities conduct their mutual relations as if they were subjects of International Law," the Holy Roman Empire "had degenerated to such an extent that – relations between its members were conducted on a footing hard to distinguish from International relations. Supra note 16, page 10.

the death of Charles, the Arch Duke of Austria, under whose au- Von Hagenbach was captured, had ordered the trial of the bloody Instead of remitting the case to an ordinary tribunal, an ad hoc was set up, consisting of 28 judges of the Allied coalition of States towns. In his capacity as Sovereign of Breisach, the Arch Duke of appointed the presiding Judge. Considering the State of Europe time, the Holy Roman Empire had degenerated entities which had on a properly international nature, and Switzerland had become pendent even though not yet formally recognized. It can be con- that the tribunal was a real International Court. Several centuries before the foundation was laid for incriminating individuals for crimes considered as grave violations of the law applicable in interna- armed conflicts.

the American Civil War[51], President Abraham Lincoln issued the Code[52] prepared by Francis Lieber[53] and revised by the board of this text represents the first attempt to codify the Laws of war. Lieber Code provides that: *"all wanton violence against persons in aded country, all destruction of property, all robbery or sacking and pe, wounding, maiming, or killing of such inhabitants are punishable are strictly war crimes)"*[54]. It went further to state that; *"crimes pun- ble by all penal codes" like "arson, theft, burglary, fraud, forgery and* committed by an American Soldier on the territory of an enemy are considered as if they had taken place "at home" and are severely ished"[55]. In the 20th Century, after the First World War, another leap achieved in the Treaty of Versailles[56]. This treaty established the right the Allied Powers to try and punish individuals responsible for "viola- s of the Laws and Customs of war"[57]. Article 228 particularly provides that: "the German government recognized the rights of the Allied and

1861 – 1865.
Instructions for the Government of Armies of the United State in the Field, General Orders No. 100 of April 1863.
Professor of Law at Columbia College in New York.
Article 44, Lieber Code 1863.
Article 47, Lieber Code 1863. Even if the Code was destined for American Soldiers and only binding on them, the Lieber Code had an important influence on military regulations of other armies as well.
Treaty of Versailles, 28 June 1919.
Articles 228 and 229, Treaty of Versailles.

Associated Powers to bring before military tribunals persons ac... having committed acts in violation of the Laws and customs of wa...

The Hague Conventions of 1899 and 1907 and the Geneva Con... of 1929 Relative to the Treatment of Prisoners of War had no pro... on the punishment of individuals who violated their rules[59]. C... 1929 Geneva Conventions for the Amelioration of the Condition... Wounded and Sick in Armies in the Field had such a provision in ar... ticle 30.

THE NUREMBERG AND TOKYO TRIBUNALS

Two main events occurred midway through this last century which ... great impact on International Criminal Law. The first milestone wa... trial of the major war criminals held in Nuremberg and Tokyo in the ... of the Second World War. They highlighted the principle of indiv... criminal responsibility for certain serious violations of the rules of in... national Law applicable in armed conflict; the terms "crimes against ... Peace", "war crimes" and "crimes against humanity found formal rec... tion[60] ". The Second event was the adoption of the four Geneva Con... tions of 12 August 1949 for the protection of war victim[61].

It was after the Second World War that a movement started within the ... ternational Community which clearly began to shape a deeper consci... ness of the need to prosecute serious violations of war[62] with regard ... to the traditional responsibility of States and to the personal respons... ity of individuals. The horrible crimes committed by the Nazis and ...

58 The German government therefore had the duty to hand over "all persons accused", in order ... permit them to be brought before an Allied Military Tribunal. In the case of an individual "... of criminal acts against the nationals of more than one of the Allied and Associated Powers", ... possibility of setting up an international tribunal was provided for.

59 Schindler and Toman J. The Laws of Armed Conflict. A collection of Conventions, Resolution... and Other Documents, (Martimes Nijhoff / Henry Dunant Institute: Dordrecht/Geneva 198... 3rd ed. P 5. See also Scott J.B. The Hague Conventions and Declarations of 1899 and 1907. (Ca... egie Endowment for Int'L Peace. New York: 1915) p 130.

60 Graditzky T, "Individual Criminal Responsibility for Violations of International Humanitari... Law Committed in Non-international Armed Conflicts", IRRC, No. 322, (1998). http://www... org/eng/resources/documents/misc/57JP4L.htm . Accessed 27th January, 2011.

61 These instruments established a specific framework for the prevention and punishment of the ... most serious of the provisions they contain: the technical term "grave breaches" was coined.

62 Greppi Edoardo opined that "Serious violations of the Laws and customs of war" is a broader ... concept than that of "grave breaches".

Japanese led to a quick conclusion of agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals "for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities [63]" Those special jurisdictions also took into account the new categories of crimes against humanity and crimes against peace[64]. The Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts[65] : Crimes against peace, the planning, preparation, initiation or waging of a war of aggression, or a war of International treaties[66] , agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

War Crimes: Violations of the laws and customs of war which includes *inter alia*, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruction of cities, towns or devastation not justified by military necessity.

CRIMES AGAINST HUMANITY: This includes: Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, during the war, or prosecution on political, racial or religious grounds in execution of or in connection with any crime within the Jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated[67].

The jurisdiction of the tribunals was quite enlarged[68]. These well known

63 Article 1 of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945. As cited by Schindler D and Toman J. supra note 65 p 911.

64 Schwelb E, "Crimes Against Humanity" BYIL, 1946, P. 178.

65 Articles 6 and 17 of the 1943 International Military Tribunals (IMT) Charter, (Nuremberg).

66 There is no longer any reference of the "Sanctity" of treaties, as compared with Article 227 of The Versailles Treaty.

67 A similar provision (with fewer specification) as to be found in Article 5 of the Tokyo Tribunal.

68 It covered "leaders, organizers, instigators and accomplices" who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for "all acts performed by any person in the execution of such plan".

developments covered only International armed conflicts[69]. In 1949, it was generally considered that an extension of the system of grave breaches to cover internal conflicts would be viewed as an unacceptable encroachment on state sovereignty. When the Protocols Additional to the Geneva Conventions of 1977 were adopted, states had not changed their stance in this respect. Furthermore[70], newly independent countries feared that their new partners would take advantage of any potential opening provided by the adoption of Protocol II (relating to Non International Armed Conflicts) to justify excessive interest in their internal affairs. However the majority of armed conflicts are non international, and there is nothing to suggest that the classification of a conflict as International or non International under International Law has any effect on the conduct of the parties involved[71].

History offers us too many examples of wantonly destructive behaviour in civil wars, with Cambodia, Somalia, Rwanda, Sierra Leone, Liberia, Sudan springing to mind. Faced with such events, the International Community can no longer turn a blind eye. There is a growing determination to see all perpetrators of atrocities committed in this course of armed conflicts held responsible for their acts; and development in Human Rights Law have already made in roads into the argument of sovereignty which has blocked such aspirations in the past[72]. This eventually led the International Community –UN to set up ad hoc tribunal to try perpetrators of war cries in non international armed conflicts.

IMPACT OF THE NUREMBERG AND TOKYO TRIBUNALS

The Nuremberg trials produced a large number of judgments, which have greatly contributed to the forming of case Law regarding Individual Criminal responsibility under International Law[73]. The Jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process

69 With the exception of the Internal dimensions of crimes against humanity.
70 Graditzky T. Supra note 60, p.1.
71 Ibid. p.2
72 Ibid.
73 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946. Official Documents and Proceedings, Nuremberg 1947 as cited by Greeppi E. Supra note 4, p11.

precise formulation and Consolidation of principles and rules during which states and international organizations launched initiatives to bring about codification through the adoption of treaties. In 1946 the UN General Assembly adopted Resolution 95 (1)[74]. Having taken note of the London Agreement[75] and its annexed Charter, the General Assembly took two important steps[76].

Through this resolution the UN confirmed that there were a number of general principles belonging to customary Law, which the Nuremberg Charter and Judgment had recognized and which appeared important to incorporate into a major instrument of Codification[77]. In 1950, the ILC adopted a report on the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal[78]. After Nuremberg, other tribunals had come up following the footsteps of Nuremberg while modifying and increasing the scope of offence and crimes that individuals can be held responsible for under International Law.

AD HOC TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT IN NON INTERNATIONAL ARMED CONFLICTS.

An important step in the process of developing rules on individual criminal responsibility under International Law was taken with the setting up of the two Ad Hoc Tribunals[79] for the prosecution of crimes committed in non international armed conflict in the former Yugoslavia and Rwanda. These tribunals represent major progress towards the institution of a kind

74 Entitled Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.

75 London Agreement of 8 August 1945

76 The first one was of considerable Legal importance. The GA affirmed the principles of International Law recognized by both the Charter and Judgment of the Nuremberg Tribunals. The Second was a commitment to have those principles codified by the International Law Commission; a subsidiary organ of the UN General Assembly.

77 This can be done either by way of a general codification of offences against the peace and security of mankind or even as an international criminal code.

78 Article 6 of the Nuremberg Charter has since come to represent general International Law". See BrownLie, I."Principles of Public International Law"(Oxford: OUP; 1991) p 562. See also Shaw M. International Law, (Cambridge: Cambridge University Press 2006)

79 The Tribunals include the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda (ICTY and ICTR respectively).

of permanent jurisdiction. They have also provided clarification as regards the substance of what is becoming a sort of International Criminal Code, in the sense envisaged by the UN General Assembly in its Resolution 95(1)[80]. The various UN Security Council resolutions on the establishment of tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda contain provisions on acts punishable under International Law[81].

The statute of the International Tribunal for the former Yugoslavia enumerates the different crimes coming under the jurisdiction of the court. Article 2, on grave braches of the 1949 Geneva Conventions, gives the Tribunal the power to prosecute persons "committing or ordering to commit such grave breaches". Article 3 enlarges the scope to cover violations of the laws and customs of war. Article 4 reproduces Article 2 and 3 of the 1948 Genocide Convention. In the *Furundzija Case* in 1998[83] the ICTY Trial Chamber found the accused guilty of violations of the laws and customs of war[84] , under Article 3 of the ICTY statute. It held that both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Individuals all personally responsible whatever their official position, even if they are heads of state or government minister. It is immaterial whether the breach occurs within the context of an International or Internal Armed Conflict.

Article 5 authorized the Tribunal to prosecute persons responsible for crimes committed against civilians in armed conflicts 'whether International or Internal in character'. Article 7 gave a wide scope to individual criminal responsibility covering all persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning

80 Schindler D and Toman J., Supra note 65 p. 921.

81 Statute of the International Tribunal for the prosecution of persons responsible for serious violation of International Humanitarian Law Committed in the territory of the former Yugoslavia since 1991, adopted 25 May 1993 by S.C Resolution 827 /1993; text in UN Doc. S /25704 (1993). See also Roberge M., "Jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide", IRRC, No. 321. Nov – Dec 1997, Pp. 605 and 651 respectively.

82 Articles 2, 3, 4 and 5 of the Statute of ICTY.

83 *Furundzija Case*, ICTY judgment, 10th December 1998.

84 These include torture, and outrages upon personal dignity including rape.

...or execution of a crime"[85]. The responsibility of a person with ...official position[86] and the effects of superior orders were treated in ...7 along the same lines in the Nuremberg Charter and the ILC ... Reference is made to the possibility of mitigation if the Inter... Tribunal determines that justice so requires[88]. The ICTY Trial ...in 1999 noted that the "accused was held responsible under Ar... 7(1) of the 1993 ICTY Statute not only for the crimes that he alleged... committed himself but for those committed by others which he is said ...personally ordered, instigated or otherwise aided and abetted"[89].

...the ICTY published a list of five successes which it claimed it had ...plished[90], viz:

Spearheading the shift from "impunity to accountability" point... that, until very recently, it was the only court judging crimes com... as part of the Yugoslav conflict, since prosecutors in the former ...slavia were as a rule reluctant to prosecute such crimes;

Establishing the facts, highlighting the extensive evidence – gath... and lengthy findings of fact that tribunals judgments' produced;

Bringing to justice thousands of victims and giving them a voice ...ing out the large number of witnesses that had been brought before ...bunal;

The accomplishment in international law, describing the fleshing ... of several international criminal law concepts which had not been ...on since the Nuremberg trials; and

Strengthening the rule of law, referring to the tribunal's role in ...oting the use of international standards in war crimes prosecution ...rmer Yugoslav Republics.

Article 7 of ICTY provides that individuals are not only criminally responsible for committing a war crime, but also for attempting to commit a war crime, as well as for assisting in facilitating, aiding or abetting the commission of a war crime. They are also responsible for planning or investigating the Commission of a war crime. See also Article 25 ILC statute, Article 6, Statute of Special Court for Sierra Leone.

Head of State of Government and Government officials.

Principles III and IV.

Article 8 of the IMT Charter (Nuremberg) Article 6(4) statute of the Special Court for Sierra Leone and Section 21 of the 2000 UNTAET Regulation No. 2000.

Aleksovski Case, ICTY Judgment, 25 June 1999.

ICTY " The Tribunal's Accomplishment in Justice and Law". http://www.icty.org/x/file/outreach/view_from_hague/jit_accomplishment_en.pdf. Accessed 14th May, 2012.

The Statutes of the International Criminal Tribunal for Rwanda (ICTR) and of the Special Court for Sierra Leone explicitly provide that individuals are criminally responsible for war crimes committed in non international armed conflicts[91]. The adoption of the Statute of the International Criminal Tribunal for Rwanda is another matter. Indeed, in the latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject matter jurisdiction of the Rwanda Tribunal International Instruments regardless of whether they were considered part of Customary International Law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime[92]. With the adoption of Article 4 regarding serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol 11, the Security Council effects what could be regarded as an act of faith in respect of the existence of a law attributing individual criminal responsibility. This sudden development could very well have been anticipated in the light of the preliminary report by the Commission of Independent Experts for Rwanda, which readily classified the situation as a non- international armed conflict, going on to address the issue of individual responsibility[93]. The Statute of the Rwanda Tribunal appears slightly different, but the global approach of its provisions does not reveal major differences[94].

THE INTERNATIONAL CRIMINAL COURT

The Corpus of principles and rules has now been codified in a single instrument, the Rome Statute[95] of the International Criminal Court. The Rome Statute deals with the definitions of the crimes coming under the jurisdiction[96]. They constitute the most serious crimes and are of con-

91 Article 6 of the 1994 ICTR and Article 6 of the 2002 Statute of the Special Court for Sierra Leone.

92 United Nations, Report of the Secretary General Pursuant to Para 5 of Security Council Resolution 955 (1994), 13 February 1995, UN Doc. S/ 1995 / 134, Pp. 3-4, Para 12. As cited by Gradinsky T. Supra note 77.

93 United Nations; Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), UN Doc. S/ 1994/ 1125, 4 October 1994, P. 20. Para 12. As cited by Gradinsky T. Supra note 60.

94 The statute list Genocide and Crimes against humanity in the first place and adds a reference to Art 3. Common to the Geneva Conventions of 1949 and the 1977 Additional Protocol II. The peculiar context of the Rwanda conflict explains these differences.

95 Adopted by a UN Diplomatic Conference on July 17, 1998, but came into force in 2002.

96 Article 5-8 ICC Statute

...to the International Community as a whole[97]. It is a comprehensive ...which covers both grave breaches and serious violations of the ...Conventions and of the Laws and Customs of war. The ICC stat... ...adopted a new typology of crimes, with four categories as opposed to ...[98]. The ICC Statute also confirmed, the provisions of the 1948 Geno... ...Convention[99] and represents a further step towards the codification ...principles and rules which appear to be generally accepted[100].

...major evolution took place in respect of crimes against humanity and ...crimes[101]. Detailed provisions were made and thus replacing Article ...of the Nuremberg Charter. Crimes against humanity[102] belongs to gen... ...Customary International Law and has been defined in several instru... ...subsequent to the Nuremberg Charter and its Article 6[103]. There is ...close look to the Martens Clause[104] which in its preamble refers to "*the ...principles of the law of nations, as they result from the usages established ...among civilized peoples, from the laws of humanity and the dictates of pub... ...conscience*".

...Rome Statute also dealt with the traditional Concept of War Crimes[105] ...this has developed enormously and led to an enlarged and more de... ...codification[106]. Generally, War crimes come under the Jurisdiction ...the ICC, particularly when it is "committed as a plan or policy or as

97 Article 5 ICC Statute.

98 They include: the crime of genocide; crimes against humanity; war crimes; and the crimes of aggression, Article 5(1) (a) –(d).

99 Article 6 ICC Statute which deals with Genocide.

100 Greppi E. Supra note 16, p. 8.

101 Articles 7 and 8 ICC statute.

102 Articles 7 defines it as an "act committed as part of a wide spread or systematic attack directed against any civilian population, with knowledge of the attack.

103 The ICTY in *Eudemovic* Case defined crimes against humanity as serious acts of violence which harm human beings by striking what is most essential to them. Like their life, liberty, physical welfare, health and or dignity. They are inhumane acts by their extent and gravity go beyond the limits tolerable to the International Community, which must perforce demand their punishment. But crimes against humanity also transcends the individual because when the individual is assaulted, humanity comes under attack and negated. It is therefore the concept of humanity as victims which essentially characterizes crimes against humanity.

104 As codified by the Hague Convention No IV of 1907 and confirmed by Article 1 of 1977 Additional Protocol I

105 Article 8.

106 Jescheck H.H. "War Crimes," Encyclopedia of Public International Law, 4, p 294 as cited by Greppi Eduardo Supra note 16, p 10.

part of a large scale commission of such crime[107]. This simply mea... the ICC is also given Jurisdiction over acts committed by indivi... Several categories of crimes were dealt with[108]. Another important p... sion of the ICC Statute to be considered is Article 25". Article 25 ... ICC Statute at first glance gives the impression that it contained all e... tial requirement for the criminal responsibility of an individual and ... thermore, it enables the delimitation of the individual from other ... of responsibility, such as that of the state. But on a closer look it w... appear that Article 25 merely regulates in details the various form... perpetration of and participation in an international crime (paragra... (a) – (e) and attempts thereof (Para 3 (f))).

Those provisions are situated in the Context of other regulations wh... on the one hand, establish the Jurisdiction of the International Cri... nal Court over natural persons (Paragraph (e)) and, on the other ha... leave the responsibility of States under the International Law unaffe... while neither clearly including nor excluding their responsibility u... the ICC Statute (Para (4)). On the whole it seems fair to say that Art... 25 by no means contains a comprehensive and definite compilation o... requirements essential for individual criminal responsibility as the ... of the Article suggests. Never the less, it is equally fair to say that in ... respect, Article 25 is not worse but rather better than earlier drafts of ... International Criminal Code which contained even less explicit rules ... International Criminal responsibility[109].

107 Article 8 (1) ICC Statute

108 The first is the grave breaches established by Geneva Conventions in Articles 50, 51, 130, 147 of ... I – IV respectively. Art 85 (3) and Art 51 (2) Additional Protocol I. the Second comprises other serious v... tions of the Laws and Customs applicable in international armed conflict within the established frame... of International Law. The third category refers to serious violations of Article 3 common to the Geneva C... ventions, which relates to armed conflict not of an international character and covers acts committed ag... persons taking no active part in the hostilities (such as violence to life and person, in particular murders of ... kinds, mutilation, and treatment and torture; and outrages upon personal dignity, in particular humil... and degrading treatment, the taking of hostages and refusal to grant judicial guarantees recognized as ind... pensable. The fourth is related to other serious violations of the Laws and customs applicable in armed conf... not of an international character. The last two categories are followed by clauses excluding the ICC Jurisdict... to acts committed in situations of internal disturbance and tensions, such as riots, isolated and sporadic a... of violence or other acts of similar nature. The general right of states to maintain or establish Law and or... to defend their unity and territorial integrity by all legitimate means is expressly recognized. The fourth c... egory also applies to situat ons of protracted armed conflicts between governmental authorities and organi... armed groups or between such groups.

109 Eser Albin. 'Individual Criminal Responsibility : Mental Elements – Mistake of fact and Mistak... of Laws'. http://www.freidok.uni-freiburg.de/volltexte/3909/pdf/Eser-Individual-Criminal-responsibility.pd... Accessed 27th January, 2011.

...ERNATIONAL CRIMINAL COURT (ICC)
...CRIMINAL RESPONSIBILITY

...g several ad hoc tribunals[110], the ICC codified the doctrine of ...nd responsibility[111].The jurisdiction of ICC covers war crimes, ... against humanity and genocide[112] Under the Rome Statute, mili... ...manders are imposed with individual responsibility for crimes ...ted by forces under their effective command and control if they ei... ...ew or, owing to the circumstances at the time, should have known ... forces were committing or about to commit such crimes[113]. It uses ...ter "should have known" standard of *mens rea*, "instead of had ... to know" as defined by the ICTY Statute[114]. The Bush Adminis... ...had adopted the American Service members Protection Act and ...d in Article 98 agreements in an attempt to protect any US citizen ... appearing before the ICC. As such it interferes with implementing ...mand responsibility principle when applicable to US citizens[115].

...e War in Darfur

... Human Rights Watch, commented on the conflict by stating that: ...dual commanders and civilian officials could be liable for failing to ... any action to end abuses by their troops or staff ... the principle of ...nand responsibility is applicable in internal armed conflicts as well ...nternational armed conflicts[116]. The Sunday Times in March 2006, and ... Sudan Tribune in March 2008, reported that the UN Panel of Ex... ...determined that Salah Gosh and Abel Rahim Mohammed Hussein ... committed "command responsibility" for the atrocities committed

ICTY, ICTR, Special Court for Sierra Leone etc

Article 28 (a) ICC Statute.

Articles 5, 6, 7, and 8 of the Rome Statute of ICC.

Article 28 (a) ICC Statute.

The ICTY Statute in Article 7 (3) establishes the fact that crimes "were committed by a Subordinate does not relieve his superior of criminal responsibility if he knew or "had reason to know" that the subordinate was about to commit such acts or had done so and the superior failed to take reasonable and necessary measures to prevent such acts or to punish the perpetrators".

American Service members Protection Act, 2000. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment calls for prosecution. UN torture investigator calls on Obama to charge Bush for guantanamo abuses. Jurist, January 21, 2009

Bashir indicted. Darfur Genocide charges for Sudan President Omar Al-Bashir. The Guardian, July 14, 2008. See also Dominik Z. "ICC Prosecutor seeking arrest Warrant for the President of Sudan". International Law Observer, July. 14, 2008. See also "Entrenching Impunity – Government Reponses for International Crimes in Darfur. Human Rights Watch, Dec. 2005, vol 17, No 17 (A)."

by the multiple Sudanese Security Services[117]. Following an inquiry by the UN, regarding allegations of involvement of the government in genocide the dossier was referred to ICC[118]. On 2nd May, 2007, the ICC issued arrest warrants for militia leader Ali Muhammed al-Abd-al-Rahman of the Janjaweed, aka Ali Kushayb, and Ahmed Mohammed Haroun for crimes against humanity and war crimes[119]. To this day Sudan has refused to comply with the arrest warrants and has not turned them over to the ICC[120]. The ICC Chief Prosecutor, Luis Moremo – Ocampo, announced on 14th July, 2008, ten criminal charges against President Omar-Al-Bashir, accusing him of sponsoring war crimes, genocide and crimes against humanity.[121] The Prosecutor charged Al Bashir with genocide because he "master minded and implemented a plan to destroy in substantial part three tribal groups in Darfur because of their ethnicity[122].

Zimbabwe

For his Conduct as President of Zimbabwe, including allegations of torture and murder of political opponents, it is suggested that Robert Mugabe may be prosecuted using this doctrine[123]. Because Zimbabwe has not subscribed to the International Criminal Courts Jurisdiction, it must be authorized by the UN Security Council. The precedent for this was set by its referral to bring indictments relating to the crimes in Darfur[124]. Otherwise a Zimbabwean regime following Mugabe's would have Jurisdiction over his alleged crimes in the absence of any amnesty Law[125] as would be numerous countries with universal Jurisdiction over torture including Britain.

117 Times and Sudan Tribune report on UN Panel. See Hala Jaber. "Massacre suspect let into Britain" The Sunday Times, March 12, 2006. See also Suleiman M.A "Darfur, the $64 Question", Sunday Tribune, March 3, 2008.

118 Ibid.

119 Ibid.

120 Jurand D. "Sudan President refuse to turn over war crimes suspects wanted by ICC". JURIST; June 08, 2008

121 Supra note 115.

122 Ibid.

123 Mugabe unlikely to pay for his crime. Brisbane Times April 4, 2008.

124 Ellis M.S. "We can do something about Mugabe. The International Criminal Court has every right to demand justice and accountability". Mark Ellis is the Director of International Bar Association. Times Online, April 30, 2008.

125 In its Judgment in the Barrios Altos Case in 2001, concerning the Legality of Peruvian Amnesty Laws, the Inter American Court of Human Rights held that Amnesty measures for serious human rights violations such as torture, extra judicial, summary or arbitrary executions and enforced disappearances were inadmissible because they violated fundamental rights.

Uganda

The Ugandan case before the ICC is a direct result of the referral by the government of Uganda headed by Yoweri Museveni requesting the ICC to commence investigations into the situation in Western Uganda. Five arrest warrants have been issued, the most prominent being that issued against Joseph Kony, leader of the Lords Resistance Army (LRA). The progress of the case is however stalled by the ongoing peace processes between the government and the rebels. The accused has refused to sign any agreement until the arrest warrants against him and his senior commanders are withdrawn. This has led the government of Uganda to make desperate measures to exclude the ICC in order for peace to return. The ICC[126] has however rejected the contentions of the Ugandan government stating that it is for the ICC and not the government of Uganda to determine admissibility of a case. The ICC further stated that:

The scenario against which the admissibility of the case has to be determined remains therefore the same as at the time of the issuance of the warrants, that is one of the total intention on the part of the relevant national authorities [127].

Kenya

Following the disagreement by political opponents in Kenya immediately after the presidential election in that country, violence erupted. The violence is believed to have been sponsored by politicians and several lives were lost. It again presented an opportunity for the Prosecutor to initiate investigations *propriomotu* in accordance with powers conferred on the office. On 31st March 2010, the pre trial chamber by majority ruling decided to authorize an investigation into situation in Kenya in relation to crimes against humanity[128].

Libya and Egypt

At the turn of 2011, the Arab Nations witnessed massive civilian demonstrations against regimes that have perpetrated themselves in power for

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[126] *Prosecutor v Joseph Kony & Ors*, Decision on the Applicability of the case under Article 9(1) ICC Statute (ICC 02/04-01/05 10th March 2009.

[127] Ibid. Paragraph 51.

[128] ICC 01/09, 31 March 2010, Judge Hans Peter – Paul Dissenting.

several years without any recourse to democratic practice or [illegible]. Tunisia and Egypt, the regimes crumbled and presently the former [illegible] dent of Egypt Mubarak is standing trial for crimes committed [illegible] struggle. In Libya, the situation was different. Moummer Gadaffi [illegible] ruled since 1969 unleashed his military might against the civilian [illegible] ers in his country. As a result of this, the United Nations Security [illegible] by Resolution referred the matter to the ICC on February 26, 2011. [illegible] investigations commenced on 3rd of March 2011. The Libyan crisis [illegible] a deadly turn which necessitated the intervention of the international community. By Resolution 1973, the Security Council allowed the [illegible] vention of the North Atlantic Treaty Organisation (NATO) to protect civilians. The crises ended in August 2011 and Moummer Gadaffi died in the process. The ICC investigation indicted the Libyan President and [illegible] sons for war crimes and crimes against humanity. Presently, one of the surviving sons is facing trial in Libya under the supervision of the ICC for his alleged involvement in the crises that saw the death of thousands of civilians.

HYBRID COURTS

In addition to the temporary and geographically limited international criminal tribunals and the ICC, a new style of judicial institution has made an appearance recently in which international and national elements co-exist in varying degrees[128]. Such institutions are termed hybrid courts for convenience and they exist primarily to enhance legitimacy and increase acceptability both locally and internationally, especially in difficult post-conflict situations where dependence upon purely domestic mechanisms carries significant political risk or costs.[130] Some of these hybrid courts would be examined.

THE SPECIAL COURT FOR SIERRA LEONE

The Special Court for Sierra Leone was established by an agreement between the United Nations and Sierra Leone in January 2002 by virtue of Security Council Resolution 1315 (2000), to prosecute persons bearing the 'greatest responsibility for serious violations of IHL and Sierra Leo-

129 Shaw, M.N. Supra note 1, p 417
130 Ibid.

committed in the territory of Sierra Leone from 30th November on the basis of individual criminal responsibility[131]. The jurisdiction court covers crime against humanity, violations of common article Geneva Conventions and of Additional Protocol II; other serious of IHL[132] and certain crimes under Sierra Leonean Law[133]. The court has concurrent jurisdiction with the national court, but the court has primacy over the national courts, and at any stage of the dings, it formally request a national court to defer to its compe-[134]. Between March and September 2003, thirteen persons were in-Of these number, nine were in custody, one dead, one still at large two indictments were withdrawn[135]. Of particular interest is the trial Charles Taylor, the former President of Liberia. His claim to immunity rejected in 2004 by the Appeal Chambers and he stood trial in the at the premises of the ICC. He was subsequently convicted in 2012 he is currently awaiting sentence.

THE IRAQI HIGH TRIBUNAL

the Coalition Provisional Authority of December 2003, the Govern-Council of Iraq was authorized to establish the Iraqi Special Tribunal hear crimes alleged against the former regime of Saddam Hussein[136]. revised Statute was enacted in 2005 and the tribunal was named Iraqi Tribunal. It had jurisdiction over the crimes of genocide, crimes inst humanity and war crimes[137] committed between 16th July 1968 1st May 2003. The Tribunal had concurrent jurisdiction with the na-nal courts but had primacy over them. Persons accused of committing mes within the jurisdiction of the tribunal bear individual criminal sponsibility[138].

131 Article 1 of the Agreement contained in S/2002/246, Appendix II, and articles 1 and 6 of the Statute of the Special Court, contained in S/2002/246, Appendix III. See also Security Council resolution 1436 (2002) affirming strong support for the court. See Cryer, R. 'A "Special Court" for Sierra Leone' (2001) ICLQ, Vol. 50, p 435, as cited by Shaw, M.N supra note 1, p 418.

132 Articles 2 - 4 of the Statute.

133 Article 5 of the Statute.

134 Article 8 of the Statute.

135 The Annual Report of the Special Court for 2006 – 2007. Trial of the nine in custody began in 2004 and 2005 in three joint trials.

136 Order No. 48.

137 The definitions of these crimes are as contained in the provisions of the Rome Statute and were incorporated into Iraqi Law.

138 Article 15.

THE SERBIAN WAR CRIMES CHAMBER

The Serbian National Assembly adopted a law establishing a spe War Crimes Chamber within the Belgrade District Court to i and prosecute crimes against humanity and serious violations national humanitarian law as defined in the Serbian Law. This L adopted on the 1st of July, 2003. The Prosecutors office was esta Belgrade[139]. This court is essentially a national court.

Apart from the tribunals discussed, there were other hybrid co international tribunals such as: The Extraordinary Chambers of C dia; Kosovo Regulation 64 panels; East Timor Special Panels for Crimes; The Bosnia War Crimes Chamber and The Special Tri Lebanon. All these were set up as effort towards actualizing ind criminal responsibility.

However, it should be noted that part of the rapidly developing national law with respect to individual responsibility for inter crimes relate to the protection of the human rights of the accused cles 21 ICTY Statute, 20 ICTR and 55 of the ICC Statute contains th visions for fair trial. Article 66 of the ICC provides for the presu of innocence and the fact that it is for the Prosecutor to prove the g the accused beyond reasonable doubt. Article 67 ICC contains the sion for public and fair hearing conducted impartially and which ensure that the minimum guarantees are observed.

139 Shaw, M.N. Supra note 1, p 428.

CONCLUSION

The Charter and Judgment of the International Military Tribunal (IMT) in Nuremberg set the pace for Individual Criminal responsibility in International Law. Prior, to this tribunal, states and not individuals were held accountable for acts committed by their citizens. But, it is an established fact that in International Law, States are abstract entities and only by holding individuals responsible for their acts would the principles of International Law be achieved. From Nuremberg, the ad hoc tribunals in Yugoslavia and Rwanda were set up and these tribunals tried and convicted individuals for war crimes, crimes against humanity and the crimes of genocide. All the rules of the tribunals have been merged into one document – the ICC Statute. The International Criminal Court is vested with jurisdiction to try individuals for crimes contained in its Charter. The Geneva Conventions have been of immense help in determining the culpability of offenders.

Finally, the Laws of humanity and the dictates of public conscience, today as well as in the past, call for exceptional efforts aimed at promoting principles and rules designed to ensure effective protection of individuals, who is to a dramatically increasing extent the victims of acts of generalized violence. The peace and security of mankind, together with the protection of human rights and severe sanction for serious violations and grave breaches of humanitarian Law applicable in armed conflicts, are among the international community's major assets.

CHAPTER 7

PROTECTING HUMAN RIGHTS IN TIMES OF CIVIL PROTESTS: - WHAT ROLE FOR NATIONAL HUMAN RIGHTS INSTITUTIONS?

BY

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PROTECTING HUMAN RIGHTS IN TIMES OF CIVIL PROTESTS: - WHAT ROLE FOR NATIONAL HUMAN RIGHTS INSTITUTIONS?

INTRODUCTION

The right to peaceful protest is a fundamental part of democratic society. It is recognized in many international human rights treaties[1] and national laws. Many of the human rights valued today are a direct result of protests by people who were prepared to go onto the streets to make their opinions known and bring about needed changes in the current political system or policies and laws in any society.

On the 1st day of January 2012, Nigerians woke up to find out that the fuel subsidy had been removed and that the price regulating body under the Nigerian National Petroleum Corporation (NNPC), the Petroleum Products Pricing Regulatory Authority (PPPRA) had more than doubled the price of petrol overnight. Nigerians kicked against the increase through massive demonstrations and protests across the country[2]. After the collapse of negotiations, an indefinite general strike was organised by a coalition of two of the largest unions in Nigeria, the Trade Union Congress (TUC) and the Nigeria Labour Congress (NLC). They were supported by a cluster of other unions such as the Nigerian Bar Association, Nigerian Medical Association, Nigeria Union of Journalists, the religious groups and other key stakeholders in civil society and social media-based activists and organizations. The protests were characterised by civil disobedience, civil resistance, well co-ordinated public rallies, demonstrations and online activism. The use of social media websites such as Twitter and Facebook, sms messages and gsm telephone calls, featured prominently in these protests. The law enforcement authorities were mobilised and set out to quell the protests.

Protests with similar characteristics had in the recent past sprung up across North Africa and into the Middle East. These protests now are col-

1 Universal Declaration on Human Rights 1948, International Covenant on Civil and Political Rights, 1966

2 Nigerians Protest at removal of Fuel Subsidy. BBC Mobile News Africa – bbc.com/future 3 January 2012 Last updated at 16:40 GMT, accessed 25th February 2012 at 12.15pm

lectively referred to as "Arab Spring". The year 2011, can be said to be a defining year in the fight for the advancement of fundamental human rights and good governance through peaceful protests. The first of this series of protests began in Tunisia in December 2010, when a university educated street vendor, Mohamed Bouazizi, set himself on fire to protest his ill treatment and the disrespect by the police [3]. In what became known as the Jasmine Revolution, a sudden and explosive wave of street protests began and security forces shot at protesters with many protesters losing their lives. The protests however led to the ousting of the president, Zine el-Abidine Ben Ali[4]. On Oct. 24, 2011, Tunisians cast votes for an assembly to draft a constitution and shape a new government on the way to democracy.

The above protests triggered a number of popular protests by citizens against their governments in nations around the world[5] and also against unpopular policies / laws[6] and therein creating a network of diffusion.

This paper proposes to examine whether the right to peaceful protest is a fundamental human right in a democracy through an analysis of the international, regional and domestic instruments and legislation with special reference to Nigeria. It also addresses what the role of the National Human Rights Institutions (NHRIs) should be in ensuring that in the clash of conflicting and competing interests between the government and its citizens all sides have an obligation to respect and observe human rights, and particularly highlights the intervention or otherwise of the NHRIs in protests that took place in their countries. The paper concludes

3 Holly Pickett (30 January 2012) "Tunisia". The New York Times. Retrieved 24 March, 2012. accessed 28th March 2012 at 11.00pm.

4 Tunisian President for 23 years. On Jan. 14 2011, Ben Ali left the country after trying unsuccessfully to placate the demonstrators with promises of elections.

5 As of February 2012, governments have been overthrown in four countries. Tunisian President Ben Ali fled to Saudi Arabia on 14 January 2011 following the Tunisian protests. In Egypt, President Hosni Mubarak resigned on 11 February 2011 after 18 days of substantial protests, ending his 30-year rule. The Libyan leader Muammar Gaddafi was overthrown on 23 August 2011, after the National Transitional Council (NTC) took control of his main base and he was killed on 20 October 2011, after the NTC took control of the city of sirte. Yemeni President Ali Abdullah Saleh signed the GCC power-transfer deal in which a presidential election was held, resulting in his successor Abd al-Rab Mansur al-Hadi formally replacing him as the president of Yemen on 27 February 2012, in exchange for immunity from prosecution.

6 On Sunday, 1 January 2012, President Goodluck Jonathan announced fuel subsidy removal by the Federal Government of Nigeria. This sparked off protests in major cities of the nation.

examining the raison dêtre and outcome of the Advisory on right to protest issued by the Nigerian National Human Rights Commission prior to the January 2012 Subsidy removal protests and strike in Nigeria.

2. LEGAL FRAMEWORK ON CIVIL PROTESTS

The right to protest peacefully is an integral part of the right to freedom of expression and freedom of association and these rights are provided for clearly in existing international, regional and domestic legal framework, albeit with some limitations. This part highlights the provisions of key conventions and laws that guarantee the right to peaceful protest or otherwise. It also highlights some Nigerian case law on the right to protest.

2.1 INTERNATIONAL FRAMEWORK:-

The International Standards concerning freedom of assembly and other associated rights derive mainly from the Universal Declaration on Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR), and the key provisions pertaining to peaceful protests are as follows:-

• Universal Declaration on Human Rights (UDHR) 1948[7]

Art. 19 –(1) *Everyone shall have the right to hold opinions without interference.*

(2)*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, ...*"

Art.20 (1) *Everyone has a right to freedom of peaceful assembly and association.*

• International Covenant on Civil and Political Rights. (ICCPR) 1966[8]

Art 19 (2)- *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".*

7 http://www.un.org/en/documents/udhr/

8 http://www2.ohchr.org/english/law/ccpr.htm

Art 21 - *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order , the protection of public health or morals or the protection of the rights and freedoms of others.*

ii) REGIONAL FRAMEWORK: -

• **African Charter on Human & Peoples Rights (ACHPR) 1981**[9].
Articles 9 (2) – *"Every individual shall have the right to express and disseminate his opinions within the law."*

Art.11 - *Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.*

• **American Convention on Human Rights 1969**[10] .
Article 15:- *The right of peaceful assembly without arms is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.*

• **European Convention on Human Rights (ECHR).1950**[11]
The Convention established the European Court of Human Rights (ECHR). Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court.
Article 10:-
Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

9 http://www.africa-union.org/official_documents/treaties /banjul -charter.pdf (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.) The African Charter on Human and Peoples Rights is adopted as Ratification and Enforcement Act - Cap.A9, Laws of the Federation of Nigeria, 2004.

10 http://www.hrcr.org/docs/American_Convention/oashr.html.

11 http://conventions.coe.int. http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Article 11(1) :- *Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

(2):- *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

iii) NATIONAL FRAMEWORK (NIGERIA):-

- **Constitution of the Federal Republic of Nigeria 1999**[12].

Section 39 (1)- *Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.*

Section 40 – *Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.*

- **Public Order Act**[13]

Section 1(1):- *For the purposes of the proper and peaceful conduct of public assemblies, meetings and processions and subject to section 11 of this Act, the Governor of each State is hereby empowered to direct the conduct of all assemblies, meetings and processions on the public roads or places of public resort in the State and prescribe the route by which and the times at which any procession may pass.*

Section (2):- *Any person who is desirous of convening or collecting any assembly or meeting or of forming any procession in any public road or place of public resort shall, unless such assembly, meeting or procession is permitted by a general licence granted under subsection (3) of this section, first make application for a licence to the Governor not less than 48 hours thereto, and if such Governor is satisfied that the assembly, meeting or procession is not likely to cause a breach of the peace, he shall direct any superior police officer to issue a licence, not less than 24 hours thereto, specifying*

12 CAP C23,Laws of the Federation of Nigeria, 2004.
13 CAP 382, Laws of the Federation of Nigeria -LFN 2004.

the name of the licensee and defining the conditions on which the assembly, meeting or procession is permitted to take place; and if he is not so satisfied he shall convey his refusal in like manner to the applicant within the time hereinbefore stipulated.

Section:- (3):- *The Governor may authorise the issue of general licenses to any superior police officer mentioned in subsection (4) below setting out the conditions under which and by whom and the place where any particular kind or description of assembly, meeting or procession may be convened, collected or formed.....*

Section:- (6) *The decision of the Governor under subsection (5) of this section shall be final and no further appeal shall lie therefrom*

The Public Order Act directs that any person proposing a procession, meeting or assembly on a public road or a place of public resort, must apply to the Governor for license. The Governor exercises this power through the Commissioner of Police or the Divisional Police Officer. Section 1(6) categorically provides that the decision of the Governor on the grant of license or otherwise is final and therefore, ousts the jurisdiction of any court. The U.K Public Order Act 1986[14] does not place a blanket ban on public procession. It provides for the sort of procession that must require license, thereby expressly protecting the right of citizens to assembly freely. In the United States[15], police interference with personal liberty including the freedom of movement requires valid criminal cause and the showing that the legitimate state interest to be realized by such interference far outweighs the private benefit of exercise of right and there are no least interruptive manner of realizing this overwhelming state interest.

• **Nigerian Police Force Order 237**[16]

Force Order 237 allows the police to use lethal force against any "riotous crowd of 12 or more persons whether they are armed or not. The Force Order further directs police personnel to shoot demonstrators below the knee and neutralise group ring leaders. The Force Order raises concerns

14 Review of the Nigerian Police Act 1943 – Legal Diagnosis and Draft Bill – 2009 - CLEEN FOUNDATION, p25 – 27.

15 Ibid.

16 http://www.amnesty.org/en/library/asset

clearly inconsistent with human rights conventions and principles especially, the UN code of conduct for law enforcement officers, guidelines on use of force[17], African Charter provisions highlighted above and the fundamental human rights provisions of the Nigerian constitution.

NIGERIAN COURTS PRONOUNCEMENT ON RIGHT TO PROTEST:-

Inspector General of Police (IGP) VS All Nigeria Peoples Party & 11 ors 2007.[18]

This was a 2007 Nigerian Court of Appeal judgement that upheld the right to peaceful protest. The respondents, registered political parties in Nigeria applied to the police for permits to hold unity rallies throughout the country to protest the rigging of the 2003 elections. The police refused the permit and the respondents instituted action in the federal high court contesting amongst others, that the Public order Act prohibiting processions, rallies without police permit is unconstitutional with regards to section 40 of the Nigerian constitution as well as Article 11 of the African charter on Human and Peoples Act. The trial court granted the reliefs of the respondents, and aggrieved by the judgement, the appellant, IGP appealed to the court of Appeal. The Appeal court unanimously dismissed the appeal. The Court held amongst others that the right to freedom of assembly and freedom of expression are guaranteed by the Constitution and the African Charter on Human and Peoples Rights[19] and that they are the bone of any democratic form of government.

Justice Adekeye JCA[20] in notable pronouncements made amongst others in the lead judgement stated that:-

"I am persuaded.....that Nigerian Society is ready to be liberated from our oppressive past. The incident captured by the Guardian Newspaper edition of October 1st 2005 where the federal government had in the broad-

17 Paragraph 7 of the UN Basic Principles on the use of Force and Firearms by Law Enforcement Officials provides that 'Governments shall ensure that the arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law'

18 2007, 18 NWLR PART 1066@ P437 -502.

19 CAP. A9. LFN 2004

20 Supra,note 18 at pages 498 -500, paras B-F

cast made by the immediate past president of Nigeria, General O... Obasanjo publicly conceded the right of Nigerians to hold public ... or protest peacefully, against the government on the increase in the ... of petroleum products. The Honourable President realised that de... admits of dissent, protests, marches rallies and demonstrations. Tru... mocracy ensures that these are done responsibly and peacefully witho... lence, destruction or even unduly disturbing any citizen and with the ... ance and control of law enforcement agencies. Peaceful rallies are re... strikes and violent demonstrations of the past. If this is the situation, ... long shall we continue with the present attitude of allowing our society ... haunted by the memories of oppression and gagging meted out to us b... colonial masters through the enforcement of issuance of permit to e... our rights under the constitution..... The Public Order Act - relati... the issuance of police permit cannot be used as a camouflage to stifle the ... zens fundamental rights in the course of maintaining law and order. ... right to demonstrate and the right to protest on matters of public co... are rights which are in the public interest and that which individuals ... possess, and which they should exercise without impediment as long as ... wrongful act is done....

3. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS) :- ROLE IN PROTESTS?

In 1993, the World Conference on Human Rights held in Vienna[21], re... firmed the important and constructive role played by National Insti... tions for the promotion and protection of Human Rights, in partic... their advisory capacity to the competent authorities, their role in reme... ing human rights violations, the dissemination of human rights inform... tion and education in human rights.

The world conference on human rights encouraged the establishme... and strengthening of National Institutions (NHRIs), having regard to ... 'principles relating to the status of National Institutions[22] ' (Paris princ... ples) and recognizing that it is the right of each state to choose the fra...

21 http://www2.ohchr.org/english/law/vienna.htm

22 Adopted by General Assembly Resolution 48/134 of 20 December 1993. (www2.ohchr.org/English/law/parisprinciples.htm)

which is best suited to its particular need at the national level. Since the world conference, human rights institutions have played active roles in the international, regional, and national human rights arena. They provide support and encourage democratic processes in different parts of the world as well as support basic democratic institutions such as the legislature, the executive and the judiciary.

Specifically, on competence and responsibilities of NHRIs, the Paris Principles[23] , provides amongst others, that it is the responsibility of NHRIs to draw the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government.

What roles if any, did the Tunisian, Egyptian and Syrian human rights institutions play in the protests and crisis that occurred in these States?

TUNISIA:- HIGH COMMITTEE ON HUMAN RIGHTS AND FUNDAMENTAL LIBERTIES.

The Tunisian High Committee of Human Rights and Fundamental Liberties was a state-appointed body established in 1991[24] . The Tunisian High Committee on human rights and fundamental freedoms has over the years been described[25] as a state appointed body that handles human rights complaints from the public and reports them privately to the president. In 2008, the UN Human Rights Committee of the ICCPR[26] in consideration of reports submitted by Tunisia under article 40 of the Covenant on Civil & Political Rights, expressed the following concern regarding the need for a competent national human right institution in Tunisia:

"The Committee regrets the fact that the State party has still not established

23 paragraph 3 (a)(iv), Principles relating to the status of National Institutions (The Paris principles).

24 http://www.hrw.org/sites/default/files/reports/tunisia0704.pdf.

25 "Tunisia . 'Crushing the person. Crushing a movement'Human Rights Watch. April 2005, Vol 17.no 4(E). accessed 23rd March 2012 at 8.33pm.

26 http://www.ohchr.org/2008/CCPR - The Human Rights Committee fifth periodic report of Tunisia (CCPR/C/TUN/5) at its 2512th, 2513th and 2514th meetings on 17 and 18 March 2008. It adopted the following concluding observations at its 2527th meeting (CCPR/C/SR.2527) on 28 March 2008

a national institution with competence in the area of human rights in accordance with the Paris Principles, even though the delegation indicated that bringing the High Committee on Human Rights and Fundamental Freedoms into conformity with the Paris Principles was currently the subject of a bill before Parliament following a recent decision by the Council of Ministers in that regard."

The above does facilitate an understanding of the position of the Tunisian High Committee of Human Rights and Fundamental Liberties vis a vis the protests and crisis in Tunisa. The High Committee clearly had no independent powers or requisite mandate in line with the Paris Principles to intervene in any crisis. It was an integral part of the executive arm of government. However, with the positive developments after the protests the Tunisian Transitional Government in partnership with the Office of the High Commissioner on Human Rights (OHCHR) is paving the way for the improvement of the human rights situation in the country and one of the major steps being taken is the establishment of a strong and independent national human rights institution. The former High Committee on Human Rights and Fundamental Liberties is undergoing reforms to become more independent and consistent with international standards relating to national human rights institutions. OHCHR is playing a key role in developing the new draft law to establish and strengthen the institution. As at September, 2011, a draft law relating to the establishment of a High Council for Human Rights and Liberties had been developed for consideration by the Chairman of the High Committee, and the preamble emphasises that the street protests were against injustice and the need for promotion of human rights and fundamental freedoms[27].

EGYPT:- NATIONAL COUNCIL FOR HUMAN RIGHTS (NCHR)

The National council for human rights is the Egyptian national human rights organization established in 2003 with a mission of promoting and

27 http://www.droitsdelhomme.org.tn/wp-content/pdfs/project-law-2012.pdf - The Preamble states that "Given that the enhancement of Human Rights and Fundamental Liberties is part and parcel of the democratic transition process witnessed by Tunisia. This is a humanitarian and cultural message that came as a result of the revolution of January 14th, 2011, since the Tunisian people took to the streets to protest against injustice, dictatorship, corruption, the violation of individual and collective freedom and lack of respect of the institutions"

ing human rights in Egypt. The NCHR was established in line Paris Principles, and has a former Secretary General of the United- as its President - Dr Botros Botros Ghali. While the NCHR that it operates independently, other organizations, such as Cairo Institute for Human Rights Studies[28] , have expressed scepti- the NCHR's affiliation with the Shura Council[29] and the govern- role in selecting members in the organization. In its 2009 Human Report on Egypt, the United States State Department described CHR as a "consultative subsidiary of the Shura Council," but recog- that the NCHR's 2008/2009 annual report highlighted the human abuses by the Egyptian government, such as the imposition of a of emergency, mistreatment of arrested citizens, weak counterter- laws, and restrictions on political parties and NGOs. A fact find- committee formed by the National Council for Human Rights in the of the 2011protests, held ousted president Hosni Mubarak, former ior minister Habib Al-Adly and National Democratic Party (NDP) ders responsible for killing peaceful protestors during the popular re- that ousted Mubarak[30] .The NCHR Council also issued a number of releases condemning human rights violations of various groups in pt and also commissioned several on-site fact finding teams to inves- and report on findings[31] . Apart from finding Mubarak culpable, the report also accused official media of inciting public opinion against ceful protesters which implicated it in the crimes committed against em. The above analysis shows that the Egyptian human rights institu- did take some independent steps publicly with regards to the pro- ts / crisis and drew out the human rights implications of the actions omissions of the various players to relevant authorities. This clearly within the purview of the competence and responsibility functions as ovided in the Paris Principles.

[http://www.cihrs.org/About_en.aspx]) accessed 23rd March 2012 at 10.33pm.

This is the upper house of Egyptian bicameral Parliament. The Council is composed of 264 members of which 176 members are directly elected and 88 are appointed by the President of the Republic.

Tamim Elyan /Daily News. March 23, 2011. 11:36 pm /Fact finding committee accuses Mubarak, Al Adly of killing protesters/ Thedailynewsegypt.com. accessed 27th March 2012 at 6.30am http://www.nchregypt.org/en/index.php. The press release of the Ombudsman Office on Maspero Incidents, The press release by the Nchr on the incidents of saints church at Alexandria, The Council Press _release of Imbaba _incidents, etc.

YEMEN:- MINISTRY OF HUMAN RIGHTS

The Yemen Ministry of Human Rights[32] was established in 2001 and is responsible for addressing human rights issues, including women's rights. The Ministry is charged amongst other functions with the task of proposing policies, plans and programmes to strengthen, protect and promote women's rights in coordination with the competent authorities, receiving and examining complaints and reports filed by citizens, agencies and institutions, and takes action on those that fall within the Ministry's competence in coordination with the relevant parties, as well as raising the consciousness of citizens by alerting them to their constitutionally and legally guaranteed rights, and disseminating a culture of human rights throughout society by various means of awareness-raising.

At the 2009[33] Universal Periodic Review, the Human Rights Council Periodic Review Working Group reviewed the fulfilment of human rights obligations by Yemeni and raised a number of issues pertaining to the human rights situation in the country. A major recommendation included: To continue to pursue plans to set up a national human rights institution in compliance with the Paris Principles.

The situation in Yemen in 2011 was linked to the Arab Spring events. There were mass uprisings against unemployment, corruption and deteriorating economic prospects in Yemen and prospects had pushed President Ali Abdullah Saleh to resign after 33 years of power. According to Hooriya Mashhoyr Ahmed, who took over as Minister of Human Rights after the Yemeni 2011 crisis, *"...young people were demanding change - a civil State that would preserve and protect their rights. They were looking forward to a State that respected their freedom, equality and dignity in a democratic environment.."* . While the protests had started peacefully, she confirmed they had been marred by armed confrontations and serious human rights infringements, and the ministry of Human Rights

32 UN secretary Generals Database on violence against women – sgdatabase.unwomen.org , accessed March 28th 2012 at 7.00am.

33 http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights11May2009PM.aspx. Human Rights Council – Universal Periodic Review – 11 May 2009 (afternoon).

34 'Yemen ready for Dialogue about Human Rights after 2011 Protests demands Government that respects Freedom, Equality and Dignity', Human Rights Committee told' GENERAL ASSEMBLY HR/CT/74, 14 March 2012
www.un.org/news/press/docs/2012/hrct741.doc.htm. accessed 28th March 2012 at 8.00am

throughout the crisis, incacpacitated by lack of competence and independence.

the creation of an independent human rights institution, Yemeni national government in consultations with the European Union were 2011 working towards creating that body, and the draft basic law for being developed for possible creation within a year.

The above analysis shows that the Yemen ministry of human rights was unable to take any steps regarding the protests / crisis in Yemen in as it lacked the powers and mandate to do so as well as the requisite independence as provided by the Paris Principles.

NIGERIA:- NATIONAL HUMAN RIGHTS COMMISSION (NHRC).

The National Human Rights Commission was established in 1995. The Commission was established during the military dictatorship era of General Abacha in Nigeria and therefore was viewed with suspicion by the international community and civil society organisations. The Act establishing the Commission[35] (hereafter "the principal Act") gave it wide powers to promote and protect human rights but without prerequisite power to sanction persons adjudged as violators. Due to this challenge, and many others, the Commission was referred to as a 'toothless bulldog' over the years. For instance, the Act gave the Commission the power to amongst other things:-

- *Monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions, as it may deem expedient in each circumstance.*
- *Assist victims of Human rights violations and seek appropriate redress and remedies on their behalf.*

But, the Commission has over the years had serious challenges in getting its recommendations acknowledged by government not to speak of

35 Decree 22 of 1995, reprinted as CAP N46,LFN 2004

implementation. Private organisations, government institutions and individuals also generally ignored or dared the Commission to do its worst. With no teeth to bite, the Commission usually resorted to persuasion. In 2011, the National Human Rights Commission Amendment Act was signed into law by the President. The amendments go a long way towards strengthening the work of the commission, and particularly gives it independence in the conduct of its affairs.

From inception to date, the Commission has been in operational existence for about sixteen (16) years, and three years of this period was under the military regime of Generals Abacha and Abdulsalami Abubakar. Within this 16 year period there has been a number of protests and industrial unrests arising from the perception of government's economic and political policies as being anti-people. The Commission's role in these protests have been rather low keyed or nonexistent. The protests by the organised labour unions and civil society organisations against the removal of fuel subsidy by the government remain the most overwhelming and comprehensive in terms of dimension and impact and some are as follows [36] :-

• **1998** – Abdulsalami Abubakar increased fuel price from N11 to N20 but after days of sustained protests, it was reduced to N20 on January 6, 1999. During the protests, the Nigeria Police shot at and used tear gas to disperse protesters trying to gain entry into the National Assembly complex in Abuja. The demonstration was called by the Nigeria Labour Congress to protest against the price increase.

• **2000** – The Obasanjo regime tried to effect an increment in fuel price to N30 but protests and mass rejection by the populace, forced it to reduce the increment to N25 on June 8, 2000 and further down to N22 on June 13, 2000

• **2003** – During the April 2003 election, Nigeria was engulfed by four nationwide stoppages over fuel subsidies. It witnessed a legal battle over the extent of the right to strike.

• **2004** – Fuel price hike affected international and domestic flights in the

36. A history of protests against subsidy removal, January 2, 2012 by Akeem Lasisi and Jayne Augoye http://www.punching.com/news/a-history-of-protests-against-subsidy-removal/ accessed 28th March 2012 at 9.50am

...ria as many airlines were hit by a shortage of aviation fuel, with planes ...able to leave the commercial capital, Lagos.

- 2005 – Prof. Wole Soyinka described the government's increase of the ...ces of petroleum products – at a time that Nigeria has been making so ...uch money from oil sales in the international market as cruel.

- 2009 June – Fuel price increased to N70:00 a litre

- 2012 January - Petroleum Products Pricing Regulatory Agency, an...nced the removal of the subsidy and Petrol prices leap from N65 to ...41 per litre. Massive protests and strike action were held under the ...spices of the NLC, TUC, NMA, NBA and civil society organizations led ...e government to reduce fuel price to N97 per litre.

...the protests highlighted above from 1998 to 2009, the Nigerian Na...nal Human Rights Commission , given the fact that it was not an in...pendent institution as recommended by the Paris Principles and given ...s various operative challenges including that of being directly under the ...ntrol of the Justice Ministry[37] did little or nothing in the way of advis...g the government of the day on the human rights implications of such ...otests and how to address the issues. With the 2011 National Human ...ights Commission Amendment Act, the Commission has been given ...erational and financial independence as envisaged by the 'Paris Prin...ples[38] ' in the conduct of the affairs of the Commission and specifically, ...e funds of the Commission are no longer tied to the 'envelope' from the ...Ministry of Justice. The funds of the Commission are to be a direct charge ...on the Consolidated revenue fund of the Federation.

With the strengthening of the Commission by the NHRC Amendment Act 2011, and with the looming national protests against the January 2012 fuel subsidy removal, the Commission by virtue of Section 5(b)(o) of the Amendment Act, which empowers the Commission to *"on its own initiative.... report on actions that should be taken by the Federal, State or Local Government to comply with the provisions of any relevant inter-*

37 Bukhari Bello, a former Executive Secretary of the Commission, was reportedly removed in 2006 on account of his criticism of the 3rd term ambition of President Obasanjo and the inhuman and degrading treatment meted out to some journalists who reported the 3rd term agenda amongst other issues.

38 Principles Relating to The Status of National Institutions. Adopted by General Assembly resolution 48/134 of 20 December 1993.

national human rights instruments.", issued an Advisory to the [illegible] government and all parties to the protest on the human rights [illegible] derpinning protests and recommendations on how to engage [illegible] other peacefully. The text of the Advisory is as follows:-

" NHRC Compliance Advisory No. 1, 2012[39]

For Immediate Release
National Human Rights Commission Urges Respect For Human Rights By All With Regards To Exercise Of Free Expression, Assembly And Association Rights, Including The Right To Protest.

ABUJA, 3 JANUARY 2012: This Advisory is issued in exercise of the responsibilities conferred on the National Human Rights Commission under Section 5(b)(o) of the National Human Rights Commission Act as amended by the National Human Rights Commission (Amendment) Act, of 2011, which empowers the Commission to "on its own initiative.... report on actions that should be taken by the Federal, State or Local Government to comply with the provisions of any relevant international human rights instruments."

The National Human Rights Commission affirms that the right to assemble freely and to protest or demonstrate peacefully is a human right recognized and guaranteed within Sections 39-40 of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 9-11 of the African charter on Human and Peoples' Rights, which is domestic law in Nigeria.

In addition, under Article 21 of the International Covenant on Civil and Political Rights, to which Nigeria is also party, "no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

Peaceful protest is a duty of citizens and an essential characteristic of an open and democratic society. Article 13 of the African Charter on Democ-

39 http://www.nigeriarights.gov.ng

Elections and Governance, which Nigeria has ratified, requires government to "take measures to ensure and maintain political and social dialogue as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace."

In implementing this obligation, government has a duty to encourage its citizens to channel or express their grievances in a peaceful manner. Therefore, individuals or groups should be free to express their views, offer their criticisms, canvass their ideas for democratic change and improvement, and assemble or protest for these purposes provided they do not seek to propagate these ideas by violent means or in a manner that disturbs public peace, safety or security.

At all times, it remains the obligation and responsibility of security agencies and law enforcement agents to ensure equal protection of all persons, including groups, within Nigeria and afford all the protections they require to exercise their constitutional rights. The Commission reiterates that law enforcement agents must at all times respect and protect the human rights of all persons; avoid use of excessive force, arbitrary arrests and detention or resort to "third-degree" methods of policing.

The effective exercise of the right to protest entails co-operation between public authorities, security agencies and civil society. This is particularly important given the current context of enhanced safety and security consciousness in Nigeria.

Persons organizing or participating in any protests or demonstrations have an obligation to respect the laws of the land, comply with lawful directives of law enforcement agents and express their views in a manner devoid of violence or breakdown of law and order.

At a time such as this, there are many pressures and demands on the attention and assets of the security and law enforcement agencies. To enable them to manage limited assets and enhance the effective protection of persons or groups exercising the right to protest, it is good practice for persons seeking to exercise the right to protest or demonstrate to notify or invite the Police or

other responsible authorities in the areas in which a protest is pla... will enable the agencies to monitor the activities proposed, offer ... as may be required and ensure that there is no breach of the peace.

Intending protest organizers should designate leaders, whose cont... should be communicated to the Police or law enforcement. It is ... practice to designate Marshalls who would work with law enforce... maintain peace and order. In return, the Police and law enforcement ... designate a team of personnel in all Commands who should liaise ... ganized civil society and ensure that they are adequately trained and ...

In keeping with its statutory responsibilities, the National Human ... Commission will offer good offices to the law enforcement and ... agencies as well as organized civil society to inform and mediate ... putes or disagreements as to the management of the exercise of the ... protest or demonstrate."

ANALYSIS OF THE NHRC COMPLIANCE ADVISORY.

National Human Rights Institutions (NHRI) are bodies establish... countries under their national legislation or constitutions to pro... and protect human rights. NHRIs have responsibility for promoting ... monitoring the effective implementation of international human ... standards at the national level. The role and functions of NHRIs ... out in the United Nations Principles Relating to the status of Na... Human Rights Institutions (Paris Principles) which list the require... for independence and the broad mandate of NHRIs.

The Nigerian National Human Rights Commission was established ... 1995 by a Presidential Decree of the Military government of Ge... Abacha. The Act was not in full compliance with the internatio... recognized standards in the Paris Principles and the Commission co... therefore not assert its full independence in its operations[40]. The pro... sions of the NHRC Amendment Act 2011 widely strenghtens the Co...

40 Under Section 4(2) of the NHRC Act, the President had the power to remove members of the Governing Council, including the Executive Secretary, *"if he is satisfied that it is not in the ... of the public that the member should remain in office"*.

mission to ensure it guarantees operational and financial independence amongst others and protect it against interference from the executive The new NHRC is therefore expected to be dynamic and more effective, using its powers to the full potential to have or make an impact.

Foundation of the Advisory:-

Paragraph 1 of the Advisory lays down the basis for the issuing of the document. Paragraph 3 of the Paris Principles portrays the centrality of NHRIs are to human rights promotion and protection in states. It provides support for the Advisory issued by the Commission on the right to protest . It states:

"A national institution shall, inter alia, have the following responsibilities: (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; ------"

Section 5(b)(o) of the National Human Rights Commission Act as amended by the National Human Rights Commission (Amendment) Act, of 2011, empowers the Commission to "on its own initiative.... report on actions that should be taken by the Federal, State or Local Government to comply with the provisions of any relevant international human rights instruments."

This section clearly enjoins the Commission to play a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level; a role which is increasingly recognized by the international community.

With the clear signs that the subsidy removal would ultimately lead to a confrontation between the government and the unions / civil society, it fell on the Commission, in line with the above provision to state in clear terms the position of human rights vis a vis the issues raised by all sides to the conflict, and proffer recommendations on ways to peacefully engage

without loss of lives and property.

• **Affirmation of the Rights To Assemble Freely, Protest Or Demonstrate Peacefully in the Advisory.**

Paragraphs 2,3 and 4 of the Advisory are directed at the government and the generality of Nigerians. Those paragraphs categorically identifies the extant legal framework[41] and regional/ international human rights instruments to which Nigeria as a member is obligated. They clarify the content of the provisions of those instruments and the implications of being parties to them. Sections 39 - 40 of the Constitution of the Federal Republic of Nigeria, as a national law guarantees freedom of expression and assembly and the right to protest peacefully can be said to be inextricably embedded in these two rights. Articles 9 -11 of the African Charter on Human and Peoples Rights (ACHPR) also corroborates the importance of these rights. Article 21 of the International Covenant on Civil & Political Rights (ICCPR), an International instrument to which Nigeria is a party is also enunciated in those paragraphs to further draw attention to the above rights which Nigeria has guaranteed. The restrictions placed on those rights by the instruments are also highlighted. Article 13 of the African Charter on Democracy Elections and Governance to which Nigeria is a party which also enjoins the government to engage in dialogue with the people in order to consolidate democracy and peace, was also highlighted to guide the government on suggested ways to address conflicting issues in a democracy.

The said paragraphs affirms the right to freedom of peaceful assembly and of all individuals to engage in peaceful protest. These rights underpin the realisation of a broad range of rights, be they civil and political or economic, social and cultural. While the right to protest does not constitute a directly formulated right; it is rather a fusion of a number of rights, in particular the right to freedom of expression and to freedom of assembly, two rights which are themselves strongly interlinked and interdependent.

• **Duty of Government and Security Agencies in the Advisory.**

Paragraphs 5, 6 and 7 of the Advisory focuses on the duty of government

41 See Chapter 2 of this paper on Legal Framework on Civil Protests.

and security agencies in handling conflicts between it and the citizen-
Paragraph 5, enjoins that there should be a presumption in favour of holding assemblies, with the government having a positive obligation to facilitate and protect peaceful protests. Enjoyment of the right must be the rule, while significant restrictions must be the exception. The paragraph clearly explains that the approach of a government to peaceful assembly is an indicator of its commitment to human rights generally. Paragraphs 6 centres on responsibility of the security agencies and law enforcement agents during protest situations. It enjoins security forces to ensure protection of all persons while they exercise their constitutionally guaranteed rights as well as urging them to respect and protect the human rights of all persons. The use of excessive force, arbitrary arrests and detention are to be avoided. Domestic laws related to demonstrations should meet international standards on the right to peaceful assembly, and should be implemented effectively by security agencies and Law enforcement agents. The paragraph recognizes that Law enforcement officials are often granted very wide powers and discretion in policing assemblies and their level of professionalism, knowledge and equipment form key elements of practical response to protests, including in terms of possibilities of officers to resort to the proportionate use of force. Also that knowledge of crowd behaviour and appropriate training, including in human rights, play an important role in ensuring that responses to protests do not lead to escalated violence and human rights violations, including loss of life. The paragraph explains that the government is obligated to protect all persons under its jurisdiction and if there is non-compliance with the law in the course of a protest, provided the law fully respects international human rights standards, offenders should be prosecuted under criminal law provisions and not extra judicially dealt with. Paragraph 7 enjoins security agencies, public authorities and civil society to work together at keeping the protests peaceful.

• Duty Of Persons Organizing Or Participating In Protests.

Paragraphs 8,9 and 10 are clearly advice directed at the protests organizers and the protesters. They are being urged to protest within the laws of the land and in peace. The paragraphs reminds protests organizers of the present security challenges being experienced in Nigeria and the in-

volvement of Nigerian security agencies in managing the challenges and therefore it would be in order for the protests organisers to notify the police and other relevant government authorities of the planned route for the protests to enable the police adequately plan for and provide protection . There is no doubt that continuous communication and interaction between the organisers of a protest, the public authorities, and the police can help diffuse tension and prevent dangerous escalation. Therefore a balance of trust needs to be generated to ensure peaceful demonstrations with police security.

• Role of the National Human Rights Commission.

In the concluding paragraph of the Advisory, the Commission offered its good offices to security agencies, law enforcement agencies and civil society organisations for facilitating discussions and the mediation of disputes or disagreements that may arise from the management of the exercise of the right to protest or demonstrate. The paragraph sends the clear message that National human rights institutions may play a role in monitoring protests, and also facilitate contact between the authorities and protesters[42] .

42 http://www.osce.org/odihr/73406. GUIDELINES ON FREEDOM OF PEACEFUL ASSEMBLY. 2ND EDITION. 2010. Prepared by the OSCE/ODIHR panel of Experts on the Freedom of Assembly. The Guidelines should be a working guide and toolkit for all institutions in a democracy, the executive, legislature and the judiciary regarding the issue of protests and how they may be regulated in practice at domestic level.

CONCLUSION

The Commission's advisory was disseminated widely and thereafter positive feedback were received. The Nigeria Police Force, the State Security Services and other law enforcement agencies responded positively to the advisory. So did the NLC,TUC, NMA, NBA and the CSO community. The Commission held several meetings with some of the above agencies and associations urging tolerance and peaceful management of the protests so as to eliminate loss of lives and properties. The Nigerian Police through the then Inspector General of police, Hafiz Ringim[43] , said in a statement that Nigerians had the right to engage in peaceful protest to seek to influence government policy and promised "adequate security for life and property" if the planned strike went ahead. The protests and strike did go on, and unfortunately some lives were lost in the process, but a novel thing the Commission did was to monitor the protests and strike. Staff of the Commission geared up in neon highlighted jackets clearly depicting the Commission's name and logo walked alongside the protesters in Abuja and some of the states of the federation, monitoring the protests and making the law enforcement agents notice their presence. This is the first ever civil protest that the commission has taken bold steps to intervene in, and advise the government and other sides of the conflict on their rights and responsibilities without fear or favour.

43 http://www.reuters.com/article/2012/01/06/nigeria-protests- UPDATE 1-Nigerians protest fuel price before planned strike. By Camillus Eboh and Afolabi Sotunde. accessed 28th March 2012 at 11.30am

RE-INVENTING PRE-TRIAL PRACTICE IN NIGERIA: A REFLECTION ON THE POLICE DUTY SOLICITORS SCHEME.

ABSTRACT

This article reflects on the *Police Duty Solicitors Scheme* (PDSS), a project of the Open Society Justice Initiative, Rights Enforcement & Public Law Centre (REPLACE) and Legal Aid Council of Nigeria (LACON). It provides the appropriate context and background for the project; identifies factors sustaining high prevalence of pre-trial detention in Nigeria; recommends steps to address the problem and distils interesting lessons from the operation of the PDSS over seven years. In the final analysis, the article advocates a complement of national and regional efforts to overcome the crisis of pre-trial detention.

INTRODUCTION

Of the four indices for measuring the scope of pre-trial detention [illegible] geria only fares well in one – number of pre-trial detainees as a [illegible] tion of the country's total population but this is because relative [illegible] population, Nigeria is probably the most under-imprisoned [illegible] the world.[2] In terms of the other three indices - duration, number [illegible] viduals in detention and percentage of all detainees in pre-trial stage [illegible] country is a pace-setter in a negative sense! In 2008, crime suspects [illegible] an average of 3.7 years awaiting trial.[3] Two years later, 50% of awaiting trial persons had been detained for between 5 and 17 years.[4] By 31 March 2012, the official website of the Nigeria Prisons Service indicated that [illegible] of 47,284 detainees have not been convicted of any crime.[5]

Regrettably, Nigeria's awaiting trial population has been on a steady increase in the last 20 years despite several prison decongestion interventions by governmental and non-governmental actors.[6] A review of these interventions reveals consistent focus on palliatives e.g. getting people out of the prisons. Regrettably, scant attention has been devoted to checking the influx of crime suspects into the criminal justice system. To address this, Open Society Justice Initiative (Rights Enforcement and Public [illegible]

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1 The Socio-Economic Impact of Pre-trial Detention (Pre-publication Draft) (New York: Open Society Institute, 2010), p. 10 available at http://www.unrol.org/files/Socioeconomic%20impact%20of%20PTD_Sept%2010%202010_Final.pdf (last accessed on March 10, 2011).

2 By March 31, 2012, Nigeria had 36,879awaiting trial prisoners of a population estimated at [illegible] a ratio of 22 per 100,000 persons.

3 Nwazu A "Building and Sustaining Change: Pre trial Detention Reform in Nigeria" Justice Initiatives, Spring 2008, pp. 86-102, 86

4 Speaking at a Quarterly Roundtable on Prison Reforms in August 2010, Comptroller General [illegible] Olusola Ogundipe confirmed that up to 50% of total awaiting trial population – 17,164 persons – have been on remand for between 5 and 17 years awaiting conclusion of their cases. See Nwosu K. "Nigerian Prisons Rising Population" (October 2, 2010) ThisDay Newspaper, available at http://www.thisdaylive.com/articles/nigerian-prison s-rising-population/77570/ (last accessed on March 10, 2011).

5 http://www.prisons.gov.ng/about/statistical-info.php accessed on June 13, 2012

6 In 1990, a survey of Nigerian prisons found 53% awaiting trial population. See Odinkalu A & Ebonwa I., Behind the Wall: A Report of Prison Conditions in Nigeria & The Nigeria Prison System (1990, Civil Liberties Organization). By 2004 and 2007, the figure had risen to 63% and 70% respectively despite attempts at prison decongestion by governmental and non governmental institutions. See Agbakoba O & [illegible] S. Travesty of Justice: An Advocacy Manual against the Holding Charge (2004, Human Rights Law Service) and Amnesty International Report 2010: The State of the World's Human Rights (2010, Amnesty International). Awaiting trial figures grew to 77% in 2010 according to official figures released by Nigeria's Prisons Service.

(REPLACE))[7] and the Legal Aid Council of Nigeria (LACON)[8] a pilot Police Duty Solicitors Scheme (PDSS) in 2004. The PDSS part of a Pre-trial Detention Project aimed at reducing the number inees awaiting trial, the duration of pre-trial detention, and turnaround time for legal advice as well as ensuring proper coordination between different institutions in the criminal justice system. This paper reviews the PDSS and distils some lessons from this experience for the rest West Africa.

BACKGROUND & CONTEXT

operates a federal system with a central government, 36 states a federal capital territory) and 774 recognized local governments.[9] federal government makes laws under the *exclusive legislative list*[10] shares law making responsibility with states for matters under the

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REPLACE's founding directors coordinated a "Legal Aid and Pre-trial Detention Project" under the auspices of the Open Society Justice Initiative from 2004-2006. REPLACE was formally registered in December 2006 as a non-profit, non-political and non-governmental organization committed to promoting best practices in criminal justice administration across Africa. For more on REPLACE's current work, please visit http://www.replaceportal.com

The Legal Aid Council of Nigeria is the statutory body with responsibility "for the operation of a scheme for the grant of free legal aid in certain proceedings to persons with inadequate resources." See preamble to Legal Aid Act, 2011, which repeals Legal Aid Act, Chapter L9, Laws of the Federation 2004. Under Chapter L9, legal aid may be given in respect of the following crimes – murder, manslaughter, malicious/wilful wounding or inflicting grievous bodily harm, assault occasioning bodily harm, common assault, affray, stealing, rape, culpable homicide punishable with death (under the Criminal Code applicable in Southern Nigeria), culpable homicide not punishable with death and criminal force occasioning actual bodily harm (under the Penal Code applicable in Northern Nigeria), aiding or abetting, counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit any of the offences listed above, civil claims in respect of accidents and civil claims to cover breach of Fundamental Rights guaranteed under Chapter IV of Nigeria's 1999 Constitution (2nd Schedule to the Legal Aid Act). The 2011 Legal Aid Act significantly adds armed robbery as one of the crimes for which legal aid will now be available. Before 2011, LAC could not provide legal aid for armed robbery cases even though most of the applications received were on account of armed robbery. The 2011 Act also adds the offence of "wounding or inflicting grievous bodily harm" and "civil claims arising from criminal activities against persons who are qualified for legal aid under this Act" (2nd Schedule, Section 8(1)). By Section 6(1), legal aid is available to persons "whose income does not exceed the national minimum wage". The Board of LAC may however grant legal aid in exceptional circumstances for persons whose income exceeds the national minimum wage. Nigeria's current minimum wage is N216, 000 ($1,440) per annum.

9 The First Schedule to the 1999 Constitution sets out all the states and local government councils

10 There are 68 items on this list including citizenship, naturalization and aliens, external affairs, passports and visas, police and other government security services established by law and prisons. See Second Schedule to the 1999 Constitution, Part I.

concurrent list.[11] Legislative competence over matters in the [illegible] resides in state houses of assembly.[13] The legislative competence [illegible] governments is provided for in the 4th Schedule to the 1999 [illegible] tion.[14]

The *concurrent list* includes offences, the jurisdiction, powers [illegible] and procedure of courts of law. Therefore, the federal and state [illegible] ments exercise jurisdiction to make laws regulating these. Consequently, the federal government and states maintain institutions and laws in the field of criminal justice. There are federal laws regulating criminal procedure just as each states maintains its set of laws on the same subject. There are ministries of justice in the states, as at the federal level. However, there is one police force and also a federal prison system.[15] Without effective coordination, it is often difficult to arrest, investigate, prosecute and convict/acquit criminal suspects within the time stipulated by law. To put this in proper perspective, letus examine how a typical criminal process operates.

The criminal process begins upon an arrest by a federal institution, the Nigeria Police Force (NPF). The police also interrogate suspects, investigate crimes and more often than not, detain suspect(s). By [illegible] sign, most states have remand laws which permit indeterminate [illegible]

11 The concurrent list draws a fine line between federal and states legislative competencies. See Second Schedule to the 1999 Constitution, Part II. Section 4(5) of the 1999 Constitution provides that enacted by the National Assembly (federal legislature) shall take precedence over a law made by a state assembly on the same subject matter.

12 Matters which neither fall within the exclusive legislative list nor the concurrent legislative

13 In Attorney General of Abia State & 35 Others v Attorney General of the Federation [illegible] 3/2002 available at http://www.nigeria-law.org/Attorney-General%20of%20Abia%20State%20&%20Ors%20%20V%20%20Attorney-General%20of%20the%20Federation.htm (accessed on June 18, 2[illegible] Supreme Court of Nigeria held that the house of assembly of a state has legislative competence over matters to the offices of chairperson, vice chairperson and councillors of a local government council. The state assembly has no competence whatsoever.

14 The local government council controls and regulates, amongst others: "outdoor advertising, boardings movement and keeping of pets of all description; shops, restaurants, bakeries and others [illegible] the sale of food to the public; laundries; and licensing, regulation and control of sale of liquor." Section [illegible] (i-vi).

15 Both items are on the exclusive list and therefore federal prerogative.

16 The NPF does not have exclusive powers of arrest or detention. Law enforcement agencies [illegible] as the State Security Service, National Drug Law Enforcement Agency, Economic and Financial Crimes Commission and Customs and Excise also have powers of arrest, investigation and detention under their founding laws. For example, Section 23 of the Immigration Act, Chapter II, Laws of the Federation of [illegible] 2004 empowers the Immigration Service to detain persons liable to deportation while Section 45 gives Minister responsible for immigration authority to order detention of certain persons in lieu of deportation

detention.[17] Fully cognisant of these laws, police officers charge suspects with offences bearing capital punishment[18] before magistrates' courts. These courts do not exercise jurisdiction over such offences. However, state remand laws confer jurisdiction on them for purposes of remand until conclusion of police investigations. In the absence of clear guidelines as to duration of pre-trial detention, suspects remain in prison for as long as 18 and 21 years as the following cases illustrate.

In 1990, Ernest N was an 18 year old with a bright future ahead of him. Then the police arrested him and got him held in jail on suspicion of robbery. The problem was, the alleged victim of the robbery did not exist and there were no witnesses to it. The only facts the police had were Ernest's statement denying the allegations of robbery. In 2008, after 18 years in detention without trial, Ernest was finally released following the intervention of lawyers from the Legal Aid Council and the non-governmental organisation, REPLACE. While he was in detention, Ernest's father and mother died. No one told him. When he came out in 2008, Ernest did not know how to get home. So much had changed while he was unjustly detained. Even if Ernest had been convicted for the crime of robbery, the sentence would have been a fraction of the years he spent rotting in jail for a trial that would not happen.

Oliver M's experience was not much different. In 1985, the police in Owerri arrested Oliver, then a 19 year old, on suspicion of murder. No trial ever took place and he was never charged to a competent court for this allegation of serious crime. Rather, he was left to rot in detention waiting endlessly for his day in court. It never came. 21 years later, in July 2006, Oliver finally regained his freedom as a broken 40 year old.

Ernest's and Oliver's are not isolated experiences. In 2006, a high level committee of the federal government reported that the average period of

17 See for example, Section 236(3) of the Criminal Procedure Law of Lagos State, 1994. The remand procedure is designed to take care of cases where investigations cannot be concluded within the constitutionally stipulated 24-48 hours time frame. Unfortunately, many magistrates do not insert return dates on their remand warrants thereby unwittingly authorizing indeterminate pre-trial detention. In 2007, Lagos State enacted the Criminal Justice Administration Law, which repeals the 1994 Law and inserts provides for a maximum of 60 days remand for suspects. More on this later.

18 Examples include murder, armed robbery, treason etc

pre-trial detention in Nigeria was nearly four years.[19] Awaiting trial population is also high and rising. In June 2010, Nigeria's Interior Minister, Emmanuel Iheanacho, a retired Navy Captain, reported that over 30,000 persons out of the total population of nearly 46,000 persons in prisons in the country - over 65% of the entire prison population - were held in detention while awaiting trial across the country. Speaking at a one day Quarterly Roundtable on Prison Reforms in August 2010, Comptroller-General of Prisons, Olusola Ogundipe, reported that pre-trial detainees constituted about 77% of the prison population.[20] Most of them were held for minor offences for which bail is available. For many of these detainees, there are no case files.

The practice of keeping persons suspected of committing crimes to rot in pre-trial detention defines law enforcement in Nigeria. It wastes public resources, undermines the rule of law, endangers public health, safety and security and is unconstitutional. Section 35(4) of Nigeria's 1999 Constitution requires that any person arrested on suspicion of committing a crime (a suspect) "shall be brought before a court of law within a reasonable time" In the case of persons arrested for offences for which bail is not ordinarily available (such as murder or armed robbery) the Constitution requires that they should be tried within two months of being detained. In other cases involving offences for which bail is available, such persons must be tried within three months of being arrested. If not, in both cases, the Constitution requires that they should be released either unconditionally or upon such terms as are reasonably necessary to ensure that s/he appears for trial at a later date. This does not happen and there are many reasons why.

FACTORS SUSTAINING HIGH PREVALENCE OF PRE-TRIAL DETENTION

There are four main factors that encourage the high prevalence of pre-trial detention. First, most victims of long and indeterminate pre-trial detention are poor and unable to afford the three essential "Bs" of the

19 In January 2006, the Nigerian Prison Service confirmed that overall average duration of pre-trial detention was 3.7 years. See A Nwapa (n.3 above) citing a Press Briefing by then Attorney General of the Federation & Minister of Justice, Chief Bayo Ojo (a Senior Advocate of Nigeria).

20 See K Nweze (n. 4 above).

criminal justice system – bribe, bail or Barrister. If they could pay a bribe, the police would probably not detain them. Even if arrested, those who can pay for it buy their way to bail (even though bail is free). In any case, those who can pay for a lawyer will be able to challenge their detention and would, in most cases, regain their freedom in no time. Indeterminate pre-trial detention most often targets poor people unfairly.

An audit of the prison population undertaken under the Federal Ministry of Justice in 2005 concluded that about 85% of pre-trial detainees in Nigeria were too poor to pay for a lawyer.[21] The lack of access to legal advice and representation at the point of arrest and detention by the police is a key factor that sustains both pre-trial detention and wider forms of police abuse. Of course, there are exceptions. Major Al-Mustapha, the Chief Security Officer to Nigeria's former Maximum Ruler, Sani Abacha, was in pre-trial detention for 11 years even though he had access to the best lawyers.[22]

The poverty level in Nigeria increased significantly from 54.7% of the population in 2004 to 60.9% of the population in 2012[23]. As a result, most of those who come in contact with the police cannot pay their way out of detention. In 1976, the Federal Government created the Legal Aid Council of Nigeria (LACON) to address this situation by providing publicly -funded legal aid service. LACON is, however, inadequately funded and its resources are insufficient to meet the needs of the people who need it most.

Secondly, the allocation of responsibilities among the institutions of law enforcement in the country is very confused, confusing and lacking in co-ordination. Most crimes are state offences. Yet the police or some other federal institutions have exclusive responsibility to investigate crimes.

21 Report of the National Working Group on Prison Reforms and Decongestion (Abuja: Federal Ministry of Justice, 2005), p. 6.

22 For more on this, please see 'Court Frees Al-Mustapha, Others of Attempted Murder of Ibru', Nigeriannewsservice, available at http://www.nigeriannewsservice.com/nns-news-archive/lead-stories/court-frees-al-mustapha-others-of-attempted-murder-of-ibru (last accessed on March 16, 2011).

23 'Nigerians Living in Poverty Rise to nearly 61%,' BBC News Africa (quoting Nigeria's National Bureau of Statistics), 13 February 2012 available at http://www.bbc.co.uk/news/world-africa-17015873 (accessed on 15 June 2012).

Evidence is similarly federal responsibility, as is the Prison service. The Attorney-General at the State level is the chief law officer of the state and has primary control of all criminal proceedings in his/her territory. However, the police often charge suspects to court without informing or notifying the Attorney-General. When they do, it is often long after the suspect has been remanded in custody. The police claim that they do not have the money or communications capabilities to inform the Attorney-General promptly or at all. Often, however, they just do not care to do so. The police do not have any mandatory responsibility to report to the State Attorney-General in respect of their work. This loophole creates a crippling lack of co-ordination in law enforcement.

Thirdly, the law requires the police to investigate complaints or allegations before arresting anyone. In Nigeria, the reverse is the case – the police arrests people before investigation has even begun. After arrest, investigation, if ever, often takes weeks, months and years. The detained suspect is then reduced to bargaining with the police for his/her own freedom.

Fourthly, the criminal procedure laws in most states allow the police to secure indefinite pre-trial detention orders from magistrates courts even in respect of charges (such as homicides or armed robbery) over which they do not have trial jurisdiction. This is known as the *Holding Charge*.[24] In 2007, the Supreme Court ruled that the Holding Charge is constitutional.[25] Most victims of indefinite pre-trial detention are held under the holding charge.

Indefinite pre-trial detention does not serve much purpose. On the contrary, its human and other adverse consequences are unimaginable. Many of the victims will lose their jobs; families are broken; several routinely die in detention often for allegations in respect of which there has been no

24 'A holding charge arises where a person brought before a magistrate or area court for a criminal charge is remanded in prison custody to await commencement of his prosecution. It is the outcome of police inability to investigate crime within the time stipulated by the law.' See 'Towards a Humane Prison System', a presentation of the Civil Liberties Organization to the National Human Rights Commission (Nigeria), July 16 in Tabiu M (ed.) Administration of Criminal Justice and Human Rights in Nigeria, Chapter 5, p. 67 cited in Agbakoba O & Ibe S (n.7 above).

25 In Mrs. E.A. Lufadeju v Evangelist Bayo Johnson. Suit No. SC 247/2003 available at http://www.nigerialaw.org/Mrs%20E.A%20Lufadeju%20&%20Anor%20v%20Evangelist%20Bayo%20Johnson.htm (last accessed on March 14, 2011).

investigation or proof and for which they may even be entirely innocent. Many victims will contract infectious or contagious ailments in detention. Others will learn or begin criminal careers in detention that then escalate into more serious problems for the society. Many of them rot in detention for much longer than they would have stayed if they had in fact been proved guilty and sentenced for the acts alleged against them.

Indefinite pre-trial detention is the main cause of prison congestion.[26] High congestion rates put incredible pressure on resources – both human and material – required for the management of the prisons and increase the risks of insecurity in prisons, including jail-breaks and violence. Pre-trial detention on the Nigerian scale prevents the prison system from playing its primary role of protecting the public and incapacitating dangerous criminals. When most people in prisons are awaiting trial, it means that the criminal justice system does not work to ensure the trial and conviction of those who belong in jail. This is even more worrying in Nigeria which has an inordinately low prison population.

Because of the crisis of an ineffective criminal justice system of which indeterminate pre-trial detention is evidence, police officers sometimes set themselves up as vigilantes, abusing suspects and summarily executing them,[27] rather than ensuring that every suspect is treated properly in accordance with the law and evidence.

DEALING WITH THE CRISIS

To adequately respond to the crisis of a criminal justice system that does not work in Nigeria, governments at state and federal levels (as well as non-governmental organisations) must begin to take co-ordinated action. There is an existing legal framework for bringing actors together – the Administration of Justice Commission (AJC) Act of 1991.[28] This

26 The Presidential Commission on the Reform of the Administration of Justice in Nigeria reported in 2006 that "the most pressing problem in the prison system is the level of overcrowding caused by the majority of prisoners awaiting trial." See Proposals for Reform of the Administration of Justice in Nigeria (2006, Federal Ministry of Justice), p. 19.

27 For a record of police involvement in torture, abuse and extrajudicial killings, see Criminal Force: Torture, Abuse, and Extrajudicial Killings by the Nigeria Police Force (2010, Open Society Institute), chapter VI.

28 Chapter A3, Laws of the Federation of Nigeria 2004, Vol. 1.

Act requires co-ordination among the institutions of the criminal justice system, including the judiciary, public prosecutions, police, LACON, and the Bar at both federal and state levels. At the federal level, the AJC is to be chaired by the Chief Justice while state chief judges are to head State Administration of Justice Committees. The AJC has, however, not yet been active at any level. If activated and used effectively, the AJC (at the centre) and Administration of Justice Committees (in the states) have the potential to reduce needless conflicts amongst actors.

For the Police, government urgently needs to improve forensic capacities and tackle corruption within the Force. For their part, officers will have to change habits and learn new skills.

Lagos State has taken the lead in responding to the challenge of arraigning suspects before courts without trial jurisdiction by reviewing its Criminal Procedure Law to ensure that magistrates make a determination as to *probable cause* to remand suspects before making any remand orders.[29] The review also places a maximum of 60 days limit on remand and directs the Police Commissioner to make periodic returns to the Attorney General on arrests made within the state. Although these initiatives are commendable, they need to be tested over time to ensure effectiveness. The challenge of access to legal advice and representation requires cooperation between NGOs, ministries of justice (and associated institutions) and the Nigerian Bar Association (NBA). Early access is critical. Therefore, lawyers must be available to offer service to suspects at the point of arrest. Together with REPLACE and LACON, the Open Society Justice Initiative has developed and deployed specific tools to address the challenges outlined earlier in this piece. The Police Duty Solicitors Scheme is one such tool.

29 The State's Criminal Justice Administration Law of 2007 repeals its Criminal Procedure Law of 2003 and introduces far-reaching reform proposals, including the requirement for presiding magistrate to make a determination as to probable cause to remand and the cap on remand orders – 60 days.

BACKGROUND & MECHANICS OF THE POLICE DUTY SOLICITORS SCHEME

The Police Duty Solicitors Scheme is a component of a broader "Legal Aid and Pretrial Detention Project" (hereafter Legal Aid Project) established in 2004 as a collaboration between Open Society Justice Initiative and LACON. The project was conceived with a view to responding to the gaps in coordination within the criminal justice system. Agreed objectives included reduction in the number of detainees awaiting trial as a proportion of the prison population, the duration of pretrial detention, and the turnaround time for legal advice on pending prosecutions and complaints; improved coordination between LACON, Nigeria Police Force and the prosecutorial authorities in ensuring prompt decisions on arraignment and prosecution.[30] The Police Duty Solicitors scheme was one of the tools created to realize the aforementioned objectives. Advocacy for the activation of Administration of Justice Commission/Committees at the federal and state levels; advocacy for judicial practice directions limiting duration of pretrial detention; and Criminal Justice Information Management Software (CRIMSYS) were the other tools.

The project began with a national inter-agency consultation under LACON's leadership. The Nigerian Police Force, National Youth Service Corps (NYSC), National Human Rights Commission, the judiciary, prisons, directorate of public prosecutions and legal services NGOs attended the consultation and provided the support for smooth take off of the project in the four focal states – Imo (south east), Kaduna (north west), Ondo (south west) and Sokoto (north east). The consultations produced a draft practice direction for possible adoption by the Chief Judges of designated states. Thereafter, two law experts from South Africa facilitated a training programme for duty solicitors on such topics as criminal case flow/management, basic legal skills for duty solicitors, ethical issues in legal aid service delivery, amongst others. The deployment of duty solicitors to police stations received the greatest boost following a written directive from the Inspector General of Police to Police Commissioners in the focal states to allow duty solicitors'[31] access to detainees in designated police stations.

30 Project Document (on file with author).

31 A duty solicitor is a graduate of law who has been admitted to practise and is assigned to the Legal Aid Project under the one year compulsory National Youth Service Corps Programme in Nigeria.

The scheme makes available duty solicitors in the focal states[32] at designated police stations on an 8-hour rotational basis to render legal advice and assistance to detainees. Duty solicitors interview and counsel detainees, contact their families/friends, apply for bail on behalf of detainees, and arrange for sureties. They also defend detainees/suspects when their cases are eventually brought before courts of law.

The Police have agreed under a Memorandum of Understanding (MOU)[33] between the Nigeria Police Force, LACON, and the Open Society Justice Initiative (now incorporating REPLACE), to allow access to its cells to lawyers working under this scheme. The result of this experiment has been dramatic. In the first year of the PDSS[34], the project got 1255 awaiting trial persons out of detention.[35] The project also achieved 30.47%, 88.41%, 86.26% and 60.97% reduction in duration of pre-trial detention in Ondo, Imo, Kaduna and Sokoto states respectively.[36] In 2008 alone, 16 lawyers in these four states had access to 3,200 detainees and suspects, diverting or releasing 2,857 suspects from detention. On the average, each detainee spent seven days as against a national average of 46 months. Increasing the pool of lawyers/paralegals[37] and footprint of police stations to be covered[38] would potentially eliminate the likelihood of a repeat of stories like Oliver Madu and Ernest Nwagbo, both of whom were clients of the PDSS. The French organization, *Avocats sans Frontiers* (Lawyers without Borders) has also recently begun a project to ensure early access for detainees in police cells in four states in Nigeria - Kaduna, Kano, Lagos and Plateau.

32 Now expanded to Kebbi (north west) and Edo (south south).

33 Mr. Sunday Ehindero, Inspector General of Police; Mrs Uju Hassan-Baba, Director-General Legal Aid Council and Mr. Chidi Odinkalu, Senior Legal Officer for Africa, Open Society Justice Initiative signed the MOU on behalf of their respective institutions. The MOU took effect from June 14, 2006 and embodies the guiding principles for the implementation of PDSS, including a statement of mutual benefit and interest, duties and responsibilities of parties, and statement of ethics and service delivery responsibilities of duty solicitors.

34 2005

35 (representing 41.68% decrease in the baseline number of 3001 at the beginning of the project)

36 Specifically, baseline average duration of pre-trial detention in the states moved from 627, 1061, 291 and 228 days to 436, 123, 40 and 89 days in Ondo (South West Nigeria), Imo (South East Nigeria), Kaduna (North West Nigeria) and Sokoto (North West Nigeria) states respectively.

37 REPLACE has begun discussions with Justice Initiative partners, Network of University Legal Aid Institutions (NULAI Nigeria) and the Nigerian Bar Association to incorporate law students and practising lawyers in the scheme.

38 The project operates in a few designated police stations. However, the success of existing efforts has led to formal requests for assistance in setting up similar projects in four more states.

Besides PDSS, REPLACE has developed and deployed a Criminal Justice Information Management Software (CRIMSYS) in six states.[39] CRIMSYS will capture and manage information available within the criminal justice system on a state-by-state basis. Essentially, the software will provide information necessary to take important reform decisions.[40] Additionally, it could potentially address the prevalence of detainees locked up interminably based on missing case files.

The Project has also developed judicial practice directions which effectively cap the duration of pre-trial detention. In Sokoto and Ondo states, these practice directions require magistrates to indicate return dates on remand warrants to ensure that detaining authorities do not keep criminal suspects beyond 90 days.

IMPLEMENTATION CHALLENGES

One of the most significant challenges PDSS confronts on an on-going basis is personnel changes. Since the MOU was signed in 2006, the project partners, Nigeria Police Force and LACON have witnessed several changes in leadership at the highest levels. Changes have also occurred in the ministries of justice in the six states in which the PDSS operates. With changes come fluctuations in priorities. While some leaders might be interested in the project and therefore offer the highest possible support, some others might be less enthusiastic. Unfortunately, there is very little that can be done to stop these changes. The main implementing institution, REPLACE, has largely dealt with frequent personnel changes by visiting, updating and informing new personnel about the project as often as the changes occur.

Personnel changes are not limited to criminal justice institutions. Duty solicitors change every year. Service under the NYSC is one year long so although there will always be duty solicitors attached to the scheme,

39 Imo, Ondo, Sokoto, Kaduna, Edo and Kebbi.

40 CRIMSYS was designed to benefit stakeholders in the criminal justice system in a variety of ways. As a reliable databank detailing charges, location of suspects, witnesses, complainant, court, officers responsible at the directorate of public prosecutions (DPP), stages of processing and duration of the case in the system, CRIMSYS serves as an early warning system to the DPP and by extension, the Attorney General to raise questions about suspects whose cases are delayed unduly.

deepening skills and expertise is often impossible. At this stage of the project, it seems the scheme will have to continue with this pool of personnel. Project partners are exploring the possibility of having lawyers in private practice join the scheme under the auspices of the Nigerian Bar Association. If this succeeds, it will enlarge the pool of lawyers available to provide this service, encourage continuity and deepen expertise.

The project has managed to keep some records as evidenced by the data provided above. However, there are gaps in the existing data collection template. The template does not adequately elicit background information about the detainee and his/her case. This needs to improve and become more systematic. REPLACE and LACON are currently considering a revision to the existing template and have got a richer template from a partner organization operating a similar project in Sierra Leone to work with.

Ignorance of the laws regulating pre-trial detention by detainees and police officers often militates against effective implementation of the scheme. Even when they know, some police officers are uninterested in applying the law. REPLACE and LACON continue to provide regular training for officers to improve their understanding of their roles under the law and crucially, under the scheme. Consistent public enlightenment by project partners as well as governmental and non-governmental agencies on the issue will hopefully change perceptions.

Funding is a significant challenge. Although the Open Society Foundation has provided support for this scheme and by extension the legal aid project from inception, it cannot support the project forever. LACON, as principal institution responsible for the provision of legal aid and assistance, has the primary responsibility of ensuring financial sustainability of this scheme through adequate resource allocation.

LESSONS LEARNT

In the seven years since the Pre-trial Detention Project took root in Nigeria, several lessons have been learnt and might be useful for countries looking to adopt this. The first lesson re-echoes Malcolm Sparrow's admonition: "define your indicators before deciding on your intervention."[41] Before defining indicators, it is important to do a context-specific analysis of the pre-trial problem. Different countries may have different problems and therefore divergent approaches to tackling those problems. Nigeria, for instance, is the only federal state in West Africa. Thus, to the extent that the problems identified in Nigeria are associated with its federal structure, the diagnosis will differ with countries that are not federal. While it is useful to make the best of lessons from other places, it is imperative to decide, at the outset, whether the lessons fit your peculiar socio-legal traditions. Clear indicators help to keep reforms on track.

The second equally important lesson relates to constituency building. Without an organized constituency the pre-trial detention project could not have succeeded. It is impossible to change much in the criminal justice system without the active participation of government. Civil society activity in this enterprise is no substitute for government. At best, it will seek to show how and why government needs to be involved. It is important to mention that constituency building is not an event, it is a process and it continues throughout the life span of the project. At the time of conception, the Nigerian Bar Association and NULAI[42] did not figure prominently in planning propositions. However, the passage of time has shown that both organizations have incredible potentials to improve the reach of this project. With the NPF and LACON, REPLACE has made attempts with each change of leadership to provide updates and request cooperation.

Closely connected to constituency building is training. Considering the fluid nature of public service in Nigeria, project partners have had to pro-

41 Remarks at a Seminar "Measuring Impact in Human Rights: Models for a Path Forward" (2006, Carr Centre for Human Rights).

42 Network of University Legal Aid Institutions is a non-profit, non-political and non-governmental organizations committed to promoting clinical legal education, reform of legal education, legal aid and access to justice in Nigeria. For more on NULAI's current work, please consult its website www.nulainigeria.com

vide training for the police and judiciary every year since inception. Although this is labour and capital intensive, it is nonetheless essential to the success of the project. The nature of their jobs requires that police officers are moved around often, sometimes away from states in which they have been trained. It is therefore imprudent to assume that training once organized is effective for all seasons. Besides, things change very quickly in the system and operators need to be updated.

Fourthly, "old habits do not go away quickly". Reforms affecting the police and the criminal justice system in general, take time. It is unreasonable to expect results in one year. Therefore, projections should be multi-year interspersed with monitoring and evaluation. The PDSS will be reviewed this year to evaluate inputs and outputs with a view to enhancing this intervention.

Fifthly, it is never safe to assume that related agencies know what the others are doing. Our training for magistrates and police officers clearly show that some stakeholders do not necessarily appreciate what others do. Indeed, in a bid to "protect their turfs", some actors are wont to arrogate to themselves the responsibility of assigning tasks to other actors without consulting them. It is therefore good practice to bring different actors together to understand their different roles and agree a common agenda in the interest of justice.

In a federal state, like Nigeria, the state authorities are critical to any successful reform effort. Indeed, winning one state might spur others to accepting your point of view. Lagos is a model to most states in terms of reforms; therefore, any initiative pushed through that state stands a better chance of replication elsewhere. In addition, the state's influence might be useful in pushing federal agenda.

Finally, success-measuring indicators should be designed in such a way as to capture interventions that are sustainable given the instability in political environment in most countries this side of the world. It is no use to have an intervention 'succeed' the first year only to be scrapped the next. Although this is a difficult metric to construct, it is however necessary, in

building constituencies, to ensure we reach out to state institutions whose buy-in could ensure sustainability in the long run.

CONCLUSION

Improving pre-trial practice is not a short term goal. Poor pre-trial practice takes time to develop. It is therefore inevitable that reversing this will take some time. Patience and doggedness are vital ingredients in the long walk to change. The road to change is so bumpy and often lonely. Therefore, it makes sense to get as many stakeholders involved as would make the risk worth taking. Cultivating these relationships will come at a cost – sometimes resentment, disapproval or outright contempt. These moments offer invaluable opportunities to re-evaluate our options, seek counsel, drop ineffective ideas and get back on the course of change. It is only a matter of time before people understand and appreciate the necessity for this.

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