

**THE INCOMPATIBILITY OF CUSTOMARY LAW AND
WOMEN'S RIGHT. A REALITY OR AN OVERLOOKED
LEGACY: NEW THOUGHTS ON AN OLD DEBATE**

Mary Arthur-Jolasinmi*
Florence Olubumi Akaakar**

Abstract

Ensuring women's right is fundamental to determining gender parity in Nigeria. To achieve this, several treaties, covenant and laws have been ratified. Although, regrettably, this treaties, covenant and laws seems unproductive as dehumanization of women and deprivation of their rights persist in the present civilization. This culture of denial has persistently hamstrung the actualization of women's right due to negative customary norms simply because certain practices are acceptable to particular societies most of which has deep negative psychological effects on women, the article examines the shortcomings and ineffectiveness of the Nigerian law ensuring women's right and the ratified treaties and covenant to that effect alongside the cultural acceptance of women's right in general. The article which seeks to ascertain the position/ practices in reality on issues of women right argues that the several developments that appears as new thoughts is an over flocked debates on equality due to cultural impediment which contravenes best practices of human rights. The article concludes that the unfortunate scenario of sustaining repugnant cultural norms irrespective of the constitutional guarantees prohibiting gender-based discrimination persist due to enhanced patriarchal structure and the non-availability of a uniform legal system in the Nigerian customary law. The article recommends that customs, being the living pattern of a group of people should

* BA (Hons) LLB (Hons), LL.M, PhD, Barrister and Solicitor of the Supreme Court of Nigeria, Lecturer, Faculty of Law, Philomath University, Kuje, Abuja. Email: faithjolas@yahoo.com,maryfaithj@philomath.edu.ng

** LL.B (Hons), LL.M, Ph.D, Barrister and Solicitor of the Supreme Court of Nigeria, Lecturer, Faculty of Law, Department of Public Law, Rivers State University, Nkpolu-Oroworukwo, Port Harcourt. E-mail: akaakar.oluby@ust.edu.ng

be transformed to fit novel best practices which are deliberately human rights friendly and more desirable.

Keywords: Incompatibility, Customary, Women' Right, Overlooked Legacy

1.0 Introduction

The elevation of women's status is determined by the development of their rights.¹ Laws have indeed been an effective mechanism for actualising women's right, although some laws are disadvantage to women²; it has been vital tool for challenging discriminatory cultural norms which undermines the full realization of women's right.³ The disadvantageous socio-cultural attitude of the Nigerian state towards issues of women's rights and the contradiction between laws and the reality has endured the persisting structure of inferiority and subordinate status on women. This undermines their dignity.

Over the years, discourse on the concepts of human rights appears to be a globally accepted political-moral notion⁴ with diverse interpretations. To some human rights has become the dominant moral concern in international affairs, a subject of global moral dialogue.⁵ While to another⁶, it is a contemporary apparatus of revolution in the pursuit of respect for human dignity. They are legal rights in municipal and international law. These rights are inalienable rights to which a person

¹ 'Women, Law and Development in International and Human Rights Watch, Women's Right Project: A Practical Guide to Using International Human Rights Law and Mechanisms to Defend Women's Human Rights' (1997) 32 *Women Law and Development International*. 2

² Penal Code LFN, 2004, s 55(1)

³ Brophy, J and Smart, C., *Women-in-Law :Explorations in Law, Family and Sexuality* (Routledge & Kegan Paul , 1985) 2

⁴ Louis Henkin, *The Age of Rights* ix (1990).

⁵ . Martin Shupack, 'The Churches and Human Rights: Catholic and Protestant Human Rights Views as Reflected in Church Statements', [1993] (6) *Harvard Human Rights Journal* , 127.

⁶ Irwin Cotler, 'Human Rights as the Modern Tool of Revolution' in Kathleen E. Mahoney & Paul Mahoney (eds) *Human Rights in the Twenty-First Century* (Cambridge, 1993) 7

is inherently entitled simply because he or she is a human being. They are non-discriminative universal rights which are not extinguishable by derogations⁷. These rights are inherent in all human beings regardless of their nations, location, sex, language, religion, ethnic origin or any other status.

2.0 Theoretical Framework

The relevance of enhancing the rights of women has been on the front burner of public debate and policies globally, dominating government resolutions and giving rise to several initiatives by both government and non-governmental agencies. In alliance with the world order on enhancing the frontiers of human rights, without much ado, the Nigerian government have enacted several laws, ratified resolution, covenant and instruments guaranteeing the rights and equality of all citizens.

Interestingly, women are still subjugated and segregated due to firm cultural norms as the Nigerian state still grapple with the challenges of translating these treaties and conventions into the country's municipal policies and legal systems due to Constitutional requirements.⁸ This constitutional requirement stipulated in section 12(1) of the constitution renders any treaty non-binding without force of law until such is enacted into law by the Nation's national assembly. Hence, any treaty whatsoever, irrespective of its benefits remains a mere document and unenforceable until same is enacted into the Nigerian law. This position was concisely expressed by the court of appeal in *Nnaji v Nigerian Football Association*.⁹

The inherent dignity of human¹⁰ involves the equality of human beings irrespective of their sex, status and colour.¹¹ This natural dignity is derived from the inalienable right from man's humanity. These rights

⁷⁷ M. Arthur-Jolasinmi, 'Closing the Gender Gap in The Work Place: A Panacea to Societal Development' (2023) 13, *Nigerian Journal of Legal Studies*. 1 <https://www.nigerianjournalonline.com> accessed 28 November 2024

⁸ 1999 Constitution of the Federal Republic of Nigeria (as amended) s 12 (1)

⁹ (2010) 11 NWLR (Pt.1206) 443: *Abacha v Fawehinmi* (2000) 6 NWLR (Pt.660)228

¹⁰ 1999 Constitution of the Federal Republic of Nigeria (as amended) Section 34

¹¹ Article 26 of the ICCPR 1976

are those essential inalienable privileges which are normatively fundamental ethical necessities owed to every individual irrespective of the flaws and patriarchal tone of the 1999 Constitution and others couched in discriminative tone¹² which disenfranchises and discriminates against women on the basis of gender, an outright contravention of *section 42 of the 1999 Constitution of the Federal Republic of Nigeria*, which unambiguously cautions against discrimination of any citizen on the basis of gender. Globally, gender based social injustice have hamstrunged the full realization of women's right, prominent amongst such injustice is the gender roles imposed on women by cultural practices and norms, some of such are laced into official roles as critiqued by the court in *Incorporated Trustees of the Nigerian Bar Association v Attorney General of Federation and 2 Ors*¹³ that the *Police regulation 127* said to guide and protect work morality and discipline in the police force were erroneous, basically because the facts averred held no inhibition or restriction to male police officers. Discountenancing their submissions, the court submitted that morality and discipline do not have gender bias. These practices have led to deprivations, and in some cases denial of equal rights, due to male dominance values which have been ingrained into the moral fabrics of our social life. The outcome of these deprivations due to patriarchal societal norms affects the social and psychological interests of women.

As the world evolves, novel ideas are raised on the essence of recognizing the rights of citizens and the effective relevance of balancing the gender scale and sustaining same generally within the Nigerian state. This awareness raises critical issues of re-examination of the legal framework viz-a-viz the cultural norms which has tactically enhanced barbaric practices of inequality in spite of the constitutional guarantee of equality.¹⁴ The Constitution is the supreme law upon which

¹² Police Establishment Act 2020, Regulation 126 and 127

¹³ *Incorporated Trustees of the Nigerian Bar Association v. Attorney General of Federation and 2 Ors* CA/ABJ/CV/454/2002

¹⁴ 1999 Constitution of the Federal Republic of Nigeria(as amended) Section 42

all other laws relay on¹⁵ and where there is any law that contradicts or that is inconsistent with the provision of the constitution such other law shall to the extent of the inconsistency be void¹⁶. The Constitution guarantees equality of all citizens irrespective of gender, and cautions against express discrimination of any kind leaning on any other law.¹⁷ Interestingly, *section 55* of the penal Code leaves much to be desired¹⁸ in the light of *section 42* of the 1999 Federal Republic of Nigeria Constitution guaranteeing equality to all citizens.

Despite the well-articulated provision in *section 42 of the Constitution*, firm customary practices still enhance discriminatory cultural norms which disadvantaged women and further perpetuate a culture of silence, often wrongly interpreted as a mandate to endure. This silence has led to the stigmatisation of those who dare to speak out against abuses despite the alarming prevalence of emotional, physical, mental and sexual trauma within the supposedly sanctified space called family due to the firm patriarchy which objectify women by enabling male dominance and placing women as a piece of property as a result of family obligations and societal restrictions.

It would be appropriate therefore to state that achieving the rights of women under the Nigeria customary law cannot be described as a work in progress as gender discrimination and denial begins from the family.¹⁹

3.0 An Overview of Customary Law

¹⁵ 1999 Constitution of the Federal Republic of Nigeria (As amended) Section 1 (1) .This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

¹⁶ *ibid* section 1 (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

¹⁷1999 Constitution of the Federal Republic of Nigeria (as amended)Section 42(10 (a)

¹⁸Penal Code LFN,2004, section 55 – legalises wife's brutality, in subsection 10 “ it is not an offence in as much as it does not lead to infliction of grievous harm upon her, and such is done by her husband with the intension of correcting her”

¹⁹ Olomojobi, Y. Human Rights on Gender, Sex and the Law in Nigeria (Princeton & Associate Publishing Co., 2015) 40

Customary law largely encompasses customs which have been in long usage in a given community which arises from traditional practice of a people in a given community, which by communal acceptance and consent on their part, and by long and unwavering practice, has acquired to some extent, element of compulsion and force of law with reference to the community. Because of the element of compulsion, it has acquired over the years by continuous, unswerving and communal usage, it attracts sanction of different kind and are enforceable.²⁰ Customary law are practice that by its common adoption and long, unvarying habit have come to have the force of law.²¹

Norms, values, rules, beliefs and cultures which guides the relationship and morality of members of any society are commonly regarded as their customary law and generally accepted by the community, obeyed willingly, without coercion. These customs are binding on the people and it reflect the people's natural ways of life. It is flexible as it adapts to changing circumstance while the character remains.²²

4.0 The Universality of Human Right

The universality of human rights and their validity in a given local context have often been contested through relativist discourses that brand them as foreign ideas incompatible with local culture. Human rights standards have been thoroughly well defined over time and properly codified in regional and international legal documents. These rights constitute a set of performance standards against which duty-bearers at all levels of society and organs of government can be held accountable, by fulfilling commitments under international human rights treaties noting that all human rights are equally important.²³

Interrogating the challenges in closing the wide divide in addressing universality of human rights in a world of extensively variable cultures

²⁰ *Nwaigwe v. Okere* [2008] NSCQR 1325, Pt.2, 1363-1364

²¹ Bryan A Garner, *Black's Law Dictionary* 9th edn. 442

²² *Lewis v. Bankole* [1908] NGSC 1

²³ M. Arthur-Jolasinmi, 'Homosexuality, Universalism and Cultural Relativism- A Review' (2023) (13) *Nigerian Journal of Legal Studies* 134 <https://www.nigerianjournalsonline.com> accessed 29 November 2024.

has always been a recurring subject in international legal theory and practice over time, since the universal declaration of human rights in 1948.²⁴ Even after the guarantees, ratifications and validated pledges by States, the issue of universality of human rights has often been faced with blocks when States attempt to defend stereotypes and cultural norms which violate women's rights under the guise of culture.

The concern and blockages surrounding the universality of human rights and cultural diversities encircles numerous unanswered interrelated questions. Prominent amongst such questions are: Are the human rights norms formulated at international level since 1948 universally valid? If yes, to what extent does the cultural setting affect the way in which they are upheld by states around the world?.²⁵ Notably, the fundamentals of today's human rights structure precisely, the United Nations Charter of 1945 and the Universal Declaration of Human Right of 1948 can be said to have been formulated at a time when the norms in question were not yet considered universally valid in all areas.²⁶

More so, as numerous deep-rooted societal norms contest with the universality of human rights and limits same by unceasingly expanding the scope relativism hereby weakening the rights of women by persistently upholding obsolete societal values which are dependent on cultural and social context of the society. As a critical path in human rights discourse, the need to revisit and promulgate fortified conversation on the reality of the overlooked narrative on the universality of human rights based on the concept of equal human dignity, since every human being shares the same nature and accordingly should enjoy equal moral status in the society, which will reduce inequality and strengthen the concept of indivisibility.

5.0 Women's Rights and Relativism

²⁴ ibid

²⁵ M.Arthur-Jolasinmi, Homosexuality, Universalism and Cultural Relativism- A Review (2023) (13) *Nigerian Journal of Legal Studies*. 135 <https://www.nigerianjournalsonline.com> accessed 29 November 2024

²⁶ ibid at 35

Though we are in the era of rights,²⁷ culture remains a significant challenge to the improvement of human rights. Discourse on the rights of women was acknowledged internationally for the first time in the United Nations Charter 1945.²⁸ After which a plethora of international covenant, treaties and instruments were enacted under the United Nations reaffirming the relevance of women's right and the need for equality.²⁹

Relativism is the idea that ethical beliefs and values are dependent on the specific cultural, social and local political context of each human community. This portends that different culture produces diverse principles; consequently, trying to universalize a particular norm is altogether non-natural and theoretically hegemonic.³⁰ Relativist review issues of rights from the concept of each culture, they opined that human rights are western ideals targeted diming societal moralities and values in the guise of universally shared beliefs. The strong relativist argued that all values are culturally relative, hence inappropriate to impose them on other cultures with compulsion. To them, universality of human rights is an illusion. The weak relativist in contrast argued that even when values are actually culturally relative in value, ethical structures frequently intersect and accordingly crates a meeting point for possible shared ethical considerations. Analytically, human rights may perhaps be viewed as a mixture of the commonalities amongst diverse principles, or even a socially resolved principle that should idyllically be available to complementation by other standards. The weak relativist critiquing the ideals of universality of rights opined that the mainstream aspirations of universal human rights are not actually available to complementarity rather to impose principles of other norms on another. The fast-evolving trends of human rights in Nigeria and the nations ratification of almost all the fundamental international instruments,

²⁷ Louis HENKIN, *THE AGE OF RIGHTS* (1990). 62

²⁸ Fraser A.S. 'Becoming Human: The Origins and Development of Women's Human Rights' [1999] (21) *Human Rights Quarterly* 853-906

²⁹ Wallace.R, *International Human Rights: Text and Materials* (London: Sweet & Maxwell,1997) 64

³⁰Dembour,M.B, 'Critiques' in D.Moeckil, S.Shah and Sivakumaran (eds),*International Human Rights Law*,2nd edn,(Oxford University Press,2013) p.63

resolutions and treaties on human rights has intensified the general awareness of human rights and the constitutional provision in *section 42 (1)*³¹ cautioning on discrimination on the grounds of gender and the safeguard from cruel, obsolete and repugnant customary practices that deprives women's rights. Women's right, which encompasses robust entitlements pertaining to women by virtue of their humanity naturally, should surpass the restrictions of rights recognised in any precise culture³² because human rights are universal, inalienable and indivisible.³³ This was also acknowledged by the world conference on women and Vienna declaration that women's rights are unchallengeable, essential and inseparable part of the universal human rights.³⁴ The greatest significant challenge to universality of rights tend to be somewhere between the interpretation of the word universal. Particularly when it comes to analysing nation's autonomy vis-à-vis international law.

In furtherance to that, was the outcome of the Beijing Conference of 1995 whose major concern was to improve on women's right globally by initiating a platform for action primarily aimed at expediting the implementation of the Nairobi forwarding-looking strategies³⁵ and the removal of all blockages including outmoded practices which disallows the full actualization of women's right in reality.

Women rights are protected under various international and regional instruments including declaration, covenants and treaties.

³¹ 1999 Constitution of the Federal Republic of Nigeria (as amended)

³² Bunch. C., 'Women's Right as Human Rights : Towards a Re-vision of Human Rights' [1990] (12) *Human Rights Quarterly* 486

³³ UNFPA, Human Rights Principles <https://www.unfpa.org> accessed 18 December 2024

³⁴ Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, A/CONF 157/23 12 July 1993 Para 18(1)

³⁵ Nairobi Forward-Looking Strategies were the outcome of the 3rd World Conference held in Nairobi, Kenya in 1985 which adopted the ' Forward-Looking Strategies for the advancement of women' the strategies called for sexual equality , women's autonomy and power , recognition of women unpaid work and improvement in women's paid work; Fraser, A.S, *Becoming Human: The Origin and Development Women's Human Right*[1999] (21) *Human Rights Quarterly* 853-906

Most of which are not enforceable in Nigeria³⁶ due to the criteria set out in the Constitution³⁷ which is the bedrock upon which all other laws derive validity. Hence the enforceability of any treaty or covenant ratified by Nigeria is dependent on such treaty or covenant being enacted into law by the National Assembly. Typical of such is the covenant on the Elimination of all forms of violence against women (CEDAW) which was unanimously adopted by the United Nations General Assembly on the 18th December 1979³⁸ and has been described as all-encompassing as it is universal in scope, comprehensive with binding force on domesticated nations.³⁹This convention was ratified by Nigeria without reservation in 1985 but has not attained the status of law in Nigeria till date. Being the first globally recognized treaty equipped to fully protect women in all facet of life as it recognizes the existence of human rights for women and female children, considering the evolving development of gender specific rights and the need to strengthen traditional norms, which are offensive and unfavourable to women and girls, some of which classify women as chattels and property of their husbands, this disenfranchises the woman's bargaining power and self-esteem.

Despite the visibility of International law and covenants at enhancing the scope and binding character of women human rights, the cleavages of glowing cultural norms still prevail thwarting the global efforts at sustaining woman's human right with discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.

³⁶ CEDAW is not enforceable in Nigeria because it has not been incorporated into national law in Nigeria as provided for in Sec 12(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

³⁷ 1999 Constitution of the Federal Republic of Nigeria (as amended) Section 12 (1)

³⁸ Res 34/180, UN GAOR 34th Session, Supp No 46, UN Doc A/34/36 (1980)(entered into force 3 September 1981)

³⁹ Cook, R.C., Reservation to the Convention on the Elimination of all Forms of Discrimination Against Women [1990] (30) *Virginia Journal of International Law* 634

Obviously, the inability to sustain the norms of human rights and women rights protection and implementation could serve as a pointer to the relevance of sustaining and re-energizing global commitment to continuance of the doctrines of human rights. Irrespective of the United Nations Charter on the Universal Declaration of Human Right which stipulates that:

“All human beings are born free and equal in dignity and rights”⁴⁰

As such, women's right of inheritance is an essential right which guarantees their socioeconomic and political empowerment. Ensuring gender equality is a necessitating component towards attaining overall institutional and social development, allowing room for diverse behaviour, aspirations and needs of women and men to be appreciated and deliberated upon equally without inhibition on the grounds of gender. It is a state of equal ease of access to opportunities and choices without restraint. This regrettably is hamstrung by multifarious societal limitations, persisting cultural stereotype, religion, patriarchal social structures and barbaric traditional norms.

Despite various provisions of the laws and treaties concerning equality of all persons and the global bent on gender equality as a human right, women have remained vulnerable in virtually all spheres of life, especially in issues of inheritance, which involves passing on of legacies as it were. Arguments still persist that the United Nations norms vis-à-vis gender equality discourse and human rights pursuit replicates the imposition of western ideals which are unusually, anti- family and are contrary to the religious and cultural norms of our societies.

6.0 Summary of Findings

Summarily, it is an undeniable reality that the present legal regime in Nigeria is characterized with significant enforcement flaws with respect to the scope and magnitude of liabilities for the violations of laws intended to protect women's rights. The afore said laws are never complied with and the ensuring institutions are weakened by firm societal

⁴⁰United Nations Charter on Human Right, 1948, Article 1

patriarchy, which demean issues of women sovereignty in general. The article argues that the protection of women's right to inheritance is fundamental in ensuring and enhancing gender parity, hence the relevance of the law as an imperative tool in attaining and sustaining this balance will change the narrative. The article therefore opine that effective utilization of the laws and enlightenment will ensure significant improvement on issues of women's right to land inheritance.

7.0 Conclusion

Despite the transformative discuss on this issue, this article confirmed that there is a gap between law and reality as it pertains to women's right to inherit land. The sustained obnoxious practice which has persisted seems to diminish the legal guarantees. This is further enhanced by illiteracy and inefficiency on the part of government institutions for enforcing these rights and inaccessibility of funds on the part of the women that have been significantly undermined.

The article examined the challenges of gender equality globally and posits that the right to inheritance is the fundamental right of every citizen irrespective of sex, although the reverse is the reality due to cultural stereotype and patriarchal social structures which has created a very difficult terrain for women. It emphasised the essence of equality as a panacea to achieving sustainable, economic and positive societal advancement, as women are key agents of change.

8.0 Recommendation

The article recommends the following:

- i. Overall ideological re-appraisal of gender issues, considering gender parity as a blueprint to achieving sustainable equality, by expanding social inclusion, having anti-discrimination and gender equality bill on the front burner of government policies and discourse, incorporating the right based approach as an antidote to repugnant cultural norms which constraints the girl child and women generally from inheriting land.
- ii. The need for an overhaul of the legal framework to redress all legal loopholes, inadequacies, and the repugnant concerns of

customary law on issues of women right to land inheritance should be emphasised.

- iii. There is need for judicial activism through the revocation of repugnancy doctrine in deserving cases.
- iv. The reconceptualization of customary laws to accommodate the present reality of gender parity, particularly women's right to inherit land. With firm strengthening of legal and enforcement mechanism.
- v. A thorough analyses of the immediate, underlying and structural causes of women's right denial should be considered with specific strategies to address the cause