



RIGHTS OF WOMEN TO CUSTODY OF CHILDREN IN NIGERIA: A LEGAL APPRAISAL

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Abstract

In Nigeria, the legal framework governing women's rights to custody of children is primarily outlined in various statutes that aim to address parental responsibilities and child welfare. The legal framework governing child custody in Nigeria reflects a complex interplay between statutory law, customary practices, and international human rights standards. The essence of custody, as articulated in various judicial interpretations and legal definitions, revolves around the care, control, and maintenance of a child, emphasizing both physical and legal aspects of custody. The overarching principle in the consideration of child custody, is the child's best interest, which transcends the specific circumstances of the custody dispute. This paper seeks to appraise the provisions of the law and practices in consideration of child custody in Nigeria, and the impact on the welfare and development of the Nigerian child. This is in view of the fact, that the child is mentally and physically immature, and needs proper development and care. The work found that in many decisions of child custody, though factors such as conduct of parents, parental wishes, age of the child, child welfare are put into consideration, the child usually bears the brunt at the end of the day. It is recommended that custody decisions be made with a focus on the child's best interests while balancing the rights and responsibilities of both parents.

Keywords: Women, Custody, Children, Rights, Nigeria.

1. Introduction

The Black's Law Dictionary⁴ defines custody as the care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding.¹ The Court of Appeal also defined custody in the case of *Otti v. Otti*,² as: essentially concerning control, preservation and care of the child's person, physically, mentally; it also includes responsibility for a child in regard to his needs, food, clothing, instruction and the like...More recently in *Nwosu v. Nwosu*,³ custody was defined as the care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision making authority) and physical custody (care giving authority), and an award of custody usually grants both rights. Irrespective of the type or form of marriage, wherein a child is born into, the custody of the child is considered as a matter of children's rights. The first and only golden principle is that any decision must be made only in the best interest of the child. Child custody procedures in Nigeria are governed by various laws, such laws include the Child's Rights Act, the Matrimonial Causes Act, and customary law etc depending on the state and the particular circumstances of the case. The custody of a child is a sensitive and complex issue, and the primary consideration is always the best interest of the child.⁴

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¹The Black's Law Dictionary, 8th ed. (2004).

²(1992) 2 NWLR (Pt. 252) p. 210.

³(2012) 8 NWLR (Pt. 1301) 1 p. 32 paras F-G.

⁴ <https://www.verazadvocates.com.ng/procedure-for-child-custody-in-nigeria/>.



Custody in its literal sense means control or possession of something or person.⁵ However, child custody refers to the care, control and maintenance of a child which a Court may award to either of the parents following a divorce or separation proceeding. Custody is not just physical custody of a child but includes care of a child and decision-making which has the psychological impact on such a child. When a marriage has produced children, both parents have equal responsibilities and rights over their children, including the right to raise, influence and make decisions for and on behalf of their children⁶. Important decisions about a child must be made regarding health, education, and religion. A distinction lies between custody and access. The parent the child lives with and who is legally responsible for care of the child is said to have custody while the time the child spends with the parent other than the one with the custody is referred to as access. For this present study, custody connotes both physical custody and access. The determination of custody provisions for children before and after divorce is crucial to all parties involved. This is because the future outcome of children is greatly determined by the quality of parental care they receive during their childhood.⁷

Any determination of child custody must be done bearing the welfare of the children in mind and must be in the best interest of the child. Any discrimination in the granting of custody that does not align with the welfare and best interest of the child is invalid, unlawful and can be challenged in Court. In *Buwanhot v. Buwanhot*,⁸ “the welfare of a child of a marriage, in terms of their peace of mind, happiness, education and co-existence is the prime consideration in granting custody. *Odusote v. Odusote*,⁹ “the interest of the child includes welfare, education, security and overall wellbeing and development.

2. Customary Law and Child Custody

Customary law makes provision for custody of children in the event of dissolution of marriage by customary court. In most cases, the law grants the father custody of the offspring of the marriage. In instances where the children are still young, they may be kept in the custody of the mother until such a time when they have become older and can be separated from their mother.¹⁰ According to Obi-Okoya J.¹¹ in Nigeria, a father, reserves an exclusive right of custody of children and even ownership of same. As a matter of fact, the dominant position of the Nigerian man in both domestic and economic spheres ensures that the husband enjoys custodial rights over the children of the marriage. It is immaterial that the woman is rich and comparatively better placed to care for her children.¹² In *Mesike v. Mesike*,¹³ the court after granting the husband-petitioner custody of the four older children, gave the child of one year and six months to the respondent (mother) until the child has attained three years, after which the child should be returned to her father, the petitioner.¹⁴

In other words, custody of children under the dissolution of customary law marriage is mostly

⁵ Leslie Rutherford and Sheila Bone, Osborne’s Concise Law Dictionary, (8 th edn. Sweet and Maxwell) 104 2 Kelly, Joan *Nwosu v. Nwosu* (2012) 8 NWLR).

⁶ C P Iloka and J A Eze, “Breaking the Culture of Silence on Rape: A Cry for Justice” (2022) (9) (4) *Journal of Commercial and Property Law, NAUJCP*, 43; also available at Google Scholar https://scholar.google.com/scholar?oi=bibs&cluster=1799067546122464513_&btnI=1&hl=en accessed 19 December 2024.

⁸ (2011) FWLR Pt 566 p552

⁹ (2012) 3 NWLR pt 1288 p. 478

¹⁰ B E. Oniha “Dissolution of marriage and custody of children under customary law in Nigeria” available on <https://dnllegalandstyle.com/2017>.

¹¹ *Abiakam & Ors. v. Anyanwu* (1975) 5 E.C.S.L.R. 305

¹² M C Onokah. *Family Law*. (Spectrum Books Limited 2007) at p. 179

¹³ Suit No. 82/67/ 1968

¹⁴ C P Iloka, “Advancing the Rights of Women beyond their Challenges in the Nigerian Political Scene: A Focus on the Affirmative Action” (2022) (6) (1) *Chukwuemeka Odumegwu Ojukwu University Law Journal*, 23; also available at Google Scholar

https://scholar.google.com/scholar?oi=bibs&cluster=17742611863979042170_&btnI=1&hl=en accessed 20 December 2024.



contentious as it relates to the parent who has the right to get the child. The father has the absolute right to the custody of the children of the marriage and upon his death, the male head of the father's family is vested with the right but the day-to-day care of the children may be the responsibility of the mother but she may not have full control of the children. Where however, the children are still of tender age in need of motherly care and affection, the children are kept in the custody of their mother, temporarily, until they can be properly and safely separated from their mother and returned to their father.¹⁵

3. Statutory Marriage and Child Custody

In order to determine the interest of the child in making a custody order, the court will take into consideration the age of child; the arrangements made for their accommodation, education, welfare and general upbringing, as well as the conduct of the relevant party/parent applying for the child's custody. The court in the case of *Alabi v Alabi*¹⁶ stated thus: Certain relevant criteria must be considered in the determination of the welfare of the child as in this case and they include: the degree of familiarity of the child with each of the parents (parties); the amount of affection by the child for each of the parent and vice versa; the respective incomes of the parties; education of the child; the fact that one of the parties now lives with a third party as either man or woman; and the fact that in the case of children of tender age custody should normally be awarded to the mother unless other considerations make it undesirable etc.¹⁷

Usually, the court prefers that the mother of a child of tender age ought to be granted custody. This is usually not a rule of thumb as there are situations where custody has been granted to the father or any other person in loco parentis, if it is in the interest of the child. In the case of *Oladetohun v. Oladetohun*¹⁸ although the court found the mother of the child to be an unsatisfactory wife, and that she was given to the practice of juju and also that she has been shown to be a bad mother, it nevertheless granted her the custody of the only child of the marriage (who was three years old) on the ground that doing so, albeit temporarily, was in the best interest of the child. Even at that the court made provisions for a review of the issue of custody when the child becomes little older. However, in the case of *Lafun v. Lafun*¹⁹, the court stated that it is generally presumed that a child of tender years will be happier with the mother, and this presumption would only be vitiated by clear evidence to the contrary, such as immorality of the mother, infectious diseases in the mother, insanity and cruelty to the child, which are matters to be tried. It was held that owing to the moral degeneracy of the respondent (mother) it would not be in the best interest of the child for the respondent to have access to the child who was in her formative years and could easily be negatively influenced.²⁰ Furthermore, It is generally believed that girls should be in the care of their mothers whilst boys their fathers. There is however no rule of law which buttresses this belief hence Courts are not bound. It is believed that the best interest principle will suffice in this respect. In *Bibilari v. Bibilari*,²¹ the high court of FCT in considering the question of custody a girl child who was 7 years old followed the decision of the Supreme Court in the case of *Williams v Williams*. The Court observed as follows:

¹⁵ M C Onakah, op.cit, at p. 179-180; *Eborah v. Eborah* Suit No. 10/68.

¹⁶ (2007) LPELR-CA/IL/17/2006

¹⁷ C P Iloka, "Affirmative Action and the Role of Lawyers in Fostering Women's Participation in Election Processes in Nigeria: A Critical Analysis" (2023) (4) (11) *African Customary and Religious Law Review, ACARELAR*, 15; also available at Google Scholar <https://scholar.google.com/scholar?oi=bibs&cluster=14738547023638795274&btnI=1&hl=en> accessed 20 December 2024.

¹⁸ Suit No: HD/111/20 of 6/7/71 unreported

¹⁹ (1967) NMLR 401

²⁰ C P Iloka, "Affirmative Action and the Role of the Legislature in Promoting Women Participation in Election Processes in Nigeria" (2022) (4) *International Journal of Comparative Law and Legal Philosophy, IJOCLLEP*, 8; also available at Google Scholar <https://scholar.google.com/scholar?oi=bibs&cluster=9692119633994661529&btnI=1&hl=en> accessed 20 December 2024.

²¹ Suit No: FCT/HC/PET/176/11



“In *Williams v Williams*, the Supreme Court grappled with a scenario not markedly dissimilar from the present. In that case, both parents were at daggers drawn over the custody of a six (6) years old girl child. His lordship, Oputa, JSC opined at p. 92 of the Report that ‘there are periods in a girl’s life when she is undergoing the slow advance to maturity, when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological.’”

I reckon that the above observation applies with equally force to who is presently seven years old and will need her mother to discuss and answer her many questions about herself when her slow advance to maturity sets in a few years from now. In *Oyelowo v. Oyelowo*,²² both parents applied for the custody of their two male children aged ten and nine years respectively. The children had lived with their mother for two years since the separation of their parents. The trial judge held that: ‘As male children, their rightful and natural place is their father’s home. It does not matter how long they stay away from it they will one day long for it.’ The Court of Appeal agreed with the opinion of the trial judge. The Court per Nnaemeka-Agu drew attention to the importance of the sociological background in the interpretation of section 71 of Matrimonial Causes Act. This decision has been widely debated; however, the general concession favours the pre-eminence of the child’s best interest.²³

Also, at times the court may take the child into confidence to ascertain his/her wishes. This happens when the child has attained the age of reasoning which is usually between ages 6 - 17 should the child be younger, the court may resort to welfare reports to determine where the interest of the child will be better served. The Supreme court in the case of *Odogwu v Odogwu*,²⁴ that the court could consult the child’s wishes in considering what order to be made. It was also held that custody proceedings could be adjourned to Judge’s chambers where in an informal hearing; the children’s view could be assessed along with those of the parents. A part from the considerations, implied by law and practice discussed above, the court also considers the adequacy of the arrangement proposed by the party seeking the child’s custody this include the proposed arrangement for accommodation, welfare, education upbringing and other arrangements of the child. If the party fails to set out these facts, the court will be reluctant to consider the question of custody. It is to be noted that, the fact that, a spouse is more affluent does not necessarily assure that a child’s best interest will be better served.²⁵ Rather the fact that one parent is in a much better position to bring up the child and to provide a better accommodation is usually a decisive factor. In *Dawodu v. Dawodu*,²⁶ the Court refused to grant custody to a mother who had no home of her own or private means to bring up the child because it was not in the best interest of the child to do so. However, where both parties have made equally good arrangement for the welfare of the child the court will consider the misconduct on the part of the each or either of the parties. In *Alabi v Alabi*²⁷ the court held that ‘Although misconduct on the part of the party to the suit is not the paramount consideration, where parties have made equally laudable arrangement for the welfare of the child and its upbringing, misconduct may tilt the balance in favour of the other party.

²² (1987)2 NWLR (pt.56)239

²³C P Iloka, “Analysis of Child Marriage in Nigeria and the Legal Imports” (2021) (2) *Journal LASJURE*, available at Google Scholar https://scholar.google.com/scholar?oi=bibs&cluster=12120766721555825_779&btnI=1&hl=en accessed 10 December 2024.

²⁴ (1992) 2 NWLR (Prt.225) 539 at 560

²⁵C P Iloka, “Appraisal of the Legal Framework of the Sexual and Reproductive Health Rights of Women in Nigeria” (2023) (4) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*, available at Google Scholar https://scholar.google.com/citations?view_op=view_citation&hl=en&user=st6bmz4AAAAJ&citation_for_view=st6bmz4AAAAJ:hqOjcs7Dif8C accessed 19 December 2024.

²⁶ (1976) CCHCJ 1207

²⁷ (2007) LPELR-CA/IL/17/2006



In determining issues pertaining to custody and access, the court treats both parents equally. Equality of parents presupposes that either parent is entitled to the custody of the child. The court is not expected to prejudge which party will have custody before considering the interest of the child. In *Williams v. Williams*, the Supreme Court held inter alia that with regard to the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable be either without the other. Equality of right is therefore the basic premise upon which court considers custody cases. In the case of *DSD v Sera Igwalah & Bolaji Philips*,²⁸ however, the Yaba Magistrate court fell short in this respect when without balancing the equal rights of both parties prejudged the father with whom the child had maintained a stable life over the years by promptly awarding custody to the mother on the sole ground that the child is a girl. It must be re-emphasized that courts should always have the interest of the child as paramount consideration. The conduct of the parents towards the child is a matter the court will put into consideration while determining the best interest of the child.²⁹

In *Okafor v. Okafor*³⁰ the court refused to grant custody of a child of the marriage to a mother who had not seen the child physically for almost six years other than through photographs. In like manner the court in *Kolawole v. Kolawole*³¹ refused to grant custody to a mother who had once tried to kill the child. Also, where there are persistent acts of misconduct and moral depravity by one of the parties this may be evidence of unsuitability of that party to be entrusted with the custody of the child. In *Lafun v. Lafun*, the court not only refused custody to a child's mother but also refused her access to visit. The court held that: 'owing to the moral depravity of the respondent (mother), it will not be to the best interest of this child for the Respondent to have frequent access to him in his formative years when he could be influenced. When the child attains the age of 14 years, the Petitioner may allow the respondent access if he so wishes. However, a parent may not be deprived of custody merely because of his or her conduct which might have contributed to the breakdown of the marriage. The Supreme Court in *Williams v. Williams* held that the adultery of a party is not necessarily reason for depriving that party of custody unless the circumstance of the adultery makes it undesirable.

4. The Statutory Frameworks

Custody of children under statutory law is governed by the Matrimonial Causes Act and the Child's Rights Act which provides that the custody of the children is not automatically bestowed on any person but will be determined based on the best interest of the child.³²

a. Constitution:

Chapter IV the 1999 Constitution of the Federal Republic of Nigeria (As Amended) provides for the Fundamental Human Right of every citizen of Nigeria. Section 42 of the Constitution provides for the right to freedom from discrimination of any citizen which states as follows: Section 42 (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of

²⁸ UNREPORTED SUIT NO: MISC/MCY/46/114

²⁹ C P Iloka, "Challenges and Prospects of Child Adoption in Nigeria: A Focus on the Child's Rights Act" (2022) (6) *African Journal of Law and Human Rights*, *AJLHR*, available at Google Scholar <<https://scholar.google.com/scholar?oi=bibs&cluster=1524998865557164273&btnI=1&hl=en>> accesses 11 January 2025.

³⁰ (1976) 6 CCHCJ 1972

³¹ Suit No. HCL/45D/81/of 1/7/82 (Unreported)

³² C P Iloka, "Contemporary Issues on Reproductive and Sexual Health Vis-À-Vis the Rights of Women in Nigeria" (2022) (13) (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, *NAUJILJ*, 77; also available at Google Scholar https://scholar.google.com/citations?view_op=view_citation&hl=en&user=st6bmz4AAAAJ&citation_for_view=st6bmz4AAAAJ: FxGoFyzp5QC accessed 19 December 2024.



the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions. (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. (3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

The custody of a child of a customary marriage is given to the father of the child.³³ The provisions of the constitution now render these customs invalid, particularly, if granting custody to the father will not be in the best interest of the child as it was decided in the case of *Febisola Okwueze v. Paul Okwueze*,³⁴ where the Court held inter alia:

"Under most systems of customary law in Nigeria, the father of a legitimate or legitimized child has absolute right of custody of the child. Though the superior right of the father is recognized, this right will not be enforced where it will be detrimental to the welfare of the child. The only proper manner in which custody of a child under customary law can be determined is by specifically taking evidence to establish what is in the best interest and welfare of the child."

Also, under Islamic law, a wife only retains custody of a child when the child is a toddler, or less than the age of seven for a male child and nine for a female child, after which custody goes to the father. However, the welfare of children will be considered in awarding custody. In the case of *Bilyamin Bishir v. Suwaiba Mohammad*,³⁵ the Sharia Court of Appeal held that the first thing to be considered in child custody matters is the child's best interest, health, proper training, and the child's education. The interest of the child should not be considered based on the gender of the parent but what is in the best interest of the child, the court in the case of *Alabi v Alabi*³⁶ stated thus: Certain relevant criteria must be considered in the determination of the welfare of the child as in this case and they include: the degree of familiarity of the child with each of the parents (parties); the amount of affection by the child for each of the parent and vice versa; the respective incomes of the parties; education of the child; the fact that one of the parties now lives with a third party as either man or woman; and the fact that in the case of children of tender age custody should normally be awarded to the mother unless other considerations make it undesirable etc. Child's Rights Act³⁷ section 68 (1) provides thus; where the father and mother of a child were not married to each other at the time of the birth of the child- the Family Court established under section 153 of this Act may- on the application of the father, order that he shall have parental responsibility for the child; or on the application of the mother, order that she shall have parental responsibility for the child; or the father and mother may by agreement have joint parental responsibility for the child. Section 69(1) of the Child's Right Act³⁸ provides thus; the Court may- on the application of the father or mother of a child make such order as it may deem fit with respect to the custody of the child and the right of access to the child of either parent, having regard to, the welfare of the child and the conduct of the parent; and the wishes of the mother and Father of the child, (2) The power of the Court under subsection

³³M C Onokah (2003) Family Law in Nigeria

³⁴ (1989) 3 NWLR Pt. 109, p. 321

³⁵ KTS/SCA/KT/39/2019

³⁶ (2007) LPELR-CA/IL/17/2006

³⁷ Child's Right Act, 2004

³⁸ *ibid*



(1) of this section to make an order as to the custody or a child and the right of access to the child may be exercised notwithstanding that the mother of the child is at that time not residing with the father of the child,(3) Where the Court makes an order under subsection (1) of this section giving the custody of the child to the mother the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, may, having regard to the means of the father think reasonable. For children born to parents who were not married at the time of birth. Either parent can apply to the Family Court to be granted parental responsibility (the legal right to make decisions about the child's upbringing). The court can award parental responsibility to either the father or the mother based on their application. As regards joint custody, parents can mutually agree to share parental responsibility for the child. The court can make decisions about the custody of the child and the access rights of either parent based on, the child's welfare and the conduct of the parents the wishes of both parents. The court can make these orders even if the parents are not living together. If custody is granted to the mother, the court may also order the father to provide financial support for the child's maintenance, considering his financial capacity.³⁹

b. **Matrimonial Causes Act**⁴⁰

Section 71(1) of the Matrimonial Causes Act,⁴¹ provides thus; (1)in proceedings with respect to the custody guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage, (4)Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be. The position of the laws stipulating that before a court makes an order for a child's custody, both parents have an equal right to the custody of their children was decided by the court in the case of *Nwosu v Nwosu*,⁴² the court of appeal held on the right of parents over custody of children of a marriage. The Court held both parties have equal rights in matters of custody of the children. In other words a mother has equal rights with the father over the children. In the instant case the appellant had equal legal interest in the children of the marriage and a right to protect that legal interest. A case for the custody of a child can be brought before a Magistrate Court or a High Court.⁴³ Furthermore, It is generally believed that girls should be in the care of their mothers whilst boys their fathers. There is however no rule of law which buttresses this belief hence Courts are not bound. It is believed that the best interest principle will suffice in this respect. In *Bibilari v. Bibilari*,⁴⁴ the high court of FCT in considering the question of custody a girl child who was 7 years old followed the decision of the Supreme Court in the case of *Williams v Williams*. The Court observed as follows:

“In *Williams v Williams*, the Supreme Court grappled with a scenario not markedly

³⁹C P Iloka, “Discriminatory Practices and Policies Inimical to Women’s Right in Nigeria” (2021) (3) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Commercial and Property Law journal*, 106; available at [Google Scholar](https://scholar.google.com/scholar?oi=bibs&cluster=16417092559272951671&btnI=1&hl=en) <https://scholar.google.com/scholar?oi=bibs&cluster=16417092559272951671&btnI=1&hl=en> accessed 10 December 2024.

⁴⁰ Matrimonial Causes Act Chapter 220, Laws of the Federation of Nigeria 1990.

⁴¹ *ibid*

⁴²(2012) 8 NWLR pt 130.

⁴³C P Iloka, “Domestic Violence: Cryptograms, Propellers and Repercussion” (2022) (3) *LASJURE*, available at *Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=4576645602330523460&btnI=1&hl=en>> accessed 10 December 2024.

⁴⁴ Suit No: FCT/HC/PET/176/11



dissimilar from the present. In that case, both parents were at daggers drawn over the custody of a six (6) years old girl child. His lordship, Oputa, JSC opined at p. 92 of the Report that ‘there are periods in a girl’s life when she is undergoing the slow advance to maturity, when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological’.

5. International Frameworks

Nigeria is also a signatory to many international, regional and sub regional human rights instruments and has ratified some of these instruments that protect and guarantee the rights of women; amongst which are conventions touching on the rights of women and the child.

i. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979⁴⁵

Article 16(1)⁴⁶ States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

ii. Universal Declaration of Human Rights (UDHR) 1948

Article 7 of the Universal Declaration of Human Rights (UDHR)⁴⁷ provides thus; “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” The Convention on the Rights of the Child adopted in 1989 and ratified by Nigeria in 1991 and steps were taken to domesticate it into national law, which is culminated in the Child Rights’ Act 2003.⁴⁸ Article 9⁴⁹ states, The child has the right not to be separated from its parents, except in its best interests and by a judicial procedure.

iii. Protocol to the African Charter on the Rights of Women in Africa, 2004

There is also the Protocol to the African Charter on the Rights of Women in Africa, which was signed in 2003 and is a unique piece of legislation which takes into consideration the provisions of other international instruments on human rights that touch on women’s rights and the need for equality and freedom from discrimination.⁵⁰ Article 2 provides; (1) States parties shall combat all forms of Discrimination against women appropriate women through appropriate legislative, institutional and other measures. In this regard they shall (a) Include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and

⁴⁵ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) ratified by Nigeria in December 1979. CEDAW provides that the same rights and responsibilities as parents irrespective of their marital status, in matters relating to their children.

⁴⁶ Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979

⁴⁷ Universal Declaration of Human Rights (UDHR) was adopted in 1948

⁴⁸ However, it is only 26 states out of 36 states in Nigeria that has adopted the Act into State laws.

⁴⁹ The Convention was adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

⁵⁰ C P Iloka, “Exposition of the Incidences of Sexual Violence against Women” (2023) (4) (1) *Journal of Commercial and Property Law, COOUJCP*; also available at *Google Scholar*

<<https://scholar.google.com/scholar?oi=bibs&cluster=1690831884788324962&btnI=1&hl=en>> accessed 20 December 2024.



ensure its effective application; **(b)** Enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women. **(c)** Integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other sphere of life **(d)** Take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; **(e)** Support the local, national, regional and continental initiative directed at eradicating all forms of discrimination against women. 2. States parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices 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 women and men.⁵¹ Article 3; (1) every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. **(2)** Every woman shall have the right to respect as a person and to the free development of her personality. **(3)** States parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from violence, particularly sexual and verbal violence.

Article 7 of the charter; States parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: separation, divorce or annulment of a marriage shall be effected by judicial order; women and men shall have the same rights to seek separation, divorce or annulment of a marriage; in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights, and responsibilities towards their children. In any case, the interest of the children shall be given paramount importance; in case of separation, divorce or annulment of marriage, women and men shall have right to equitable sharing of the joint property deriving from the marriage.

By virtue of some of the provisions as laid down in the protocol, women are guaranteed the right to dignity;⁵² the right to life, integrity and security of persons;⁵³ freedom from harmful practices which negatively affect the human rights of women;⁵⁴ equal rights in marriage;⁵⁵ equal rights in cases of separation, divorce and annulment;⁵⁶ the right to equal protection and benefit of the law;⁵⁷ the right to participate in political and decision making process.⁵⁸ Despite the provisions of the protocol recognising and guaranteeing rights and the obligation of the Nigerian government, there is still a lot to be done in the lives of such women in Africa.⁵⁹

Conclusion

In customary law, traditionally, the father holds the predominant right to custody, though practical considerations sometimes favour the mother for very young children. This customary presumption, however, must yield to the best interest of the child, especially as recognized by constitutional and

⁵¹ C P Iloka, "Factors That Escalate Gender-Based Violence in Nigeria: A Critical Analysis" (2022) (4) *International Review of Law and Jurisprudence*, IRLJ, 68; also available at Google Scholar <<https://scholar.google.com/scholar?oi=bibs&cluster=4752988172140500143&btnI=1&hl=en>> accessed 20 December 2024.

⁵² African Charter on the Rights of Women in Africa, article 3, *ibid*.

⁵³ *Ibid*, article 4.

⁵⁴ *Ibid*, article 5.

⁵⁵ *Ibid*, article 6.

⁵⁶ *Ibid*, article 7.

⁵⁷ *Ibid*, article 8.

⁵⁸ *Ibid*, article 9.

⁵⁹ C P Iloka, "Gender Mainstreaming in Digital Legal Education" (2023) (4) *International Journal of Law and Clinical Legal Education*, IJOLACLE, 21; also available at Google Scholar <https://scholar.google.com/scholar?oi=bibs&cluster=10130888051588080947&btnI=1&hl=en>. accessed 20 December 2024.



statutory reforms. The Nigerian Constitution and the Child's Rights Act challenge entrenched customs by mandating that custody decisions must prioritize the welfare of the child over traditional biases, ensuring gender equality and fairness in legal proceedings.⁶⁰

Statutory laws, such as the Matrimonial Causes Act and the Child's Rights Act, reinforce the principle that both parents have equal rights to custody and emphasize that decisions should be made based on the child's needs rather than parental status or gender. These laws are designed to ensure that decisions are grounded in the best interests of the child, including considerations of the child's age, the quality of care, and the ability of each parent to meet the child's needs.⁶¹ Internationally, Nigeria's commitments under conventions like CEDAW and the Convention on the Rights of the Child further underscore the necessity of upholding the best interest of the child and gender equality in custody matters. These international frameworks call for the elimination of discrimination and the implementation of protective measures for children's rights, reinforcing the principles enshrined in Nigerian law. While Nigeria's legal system provides a robust framework for child custody decisions, ensuring that they are made with the child's best interests at heart, challenges remain. The persistence of traditional practices and the unequal application of laws necessitate continued reform and vigilance. It is imperative for the judiciary, lawmakers, and society at large to uphold and enforce legal principles that safeguard the welfare of children, ensuring that custody decisions are fair, equitable, and truly in the best interests of the child. As Nigeria progresses towards greater gender equality and child protection, the harmonization of customary practices with statutory and international standards will be crucial in fostering a just and supportive environment for all children.⁶²

⁶⁰C P Iloka, "Hurdles to Women Political Participation and Advancement in Nigeria: The Legal Leeway" (2021) (2) *LASJURE*, available at *Google Scholar*

https://scholar.google.com/scholar?oi=bibs&cluster=107228324756_68997951&btnI=1&hl=en accessed 10 December 2024.

⁶¹C P Iloka, "Migration, Internal Displacement, Public Disorder and the Role of Crisis Management Framework: A Focus on Women and the Minority Rights in Nigeria" (2023) (5) *International Review of Law and Jurisprudence (IRLJ)*, 45; also available at *Google Scholar*

<https://scholar.google.com/scholar?oi=bibs&cluster=7154779261620939056&btnI=1&hl=en> accessed 20 December 2024.

⁶²C P Iloka, "Precision Attack and Reparation of the Vulnerable under International Humanitarian Law: An Appraisal" (2022) (7) *African Journal of Criminal Law and Jurisprudence, AFJCLJ*, 131; also available at *Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=44546273869034706&btnI=1&hl=en>> accessed 20 December 2024.