

**LEGAL FRAMEWORK FOR THE PROTECTION OF
POLYGYNOUS REPRODUCTIVE HEALTH RIGHTS
OF WOMEN IN NIGERIA**

BY

OMOLADE OLUNIKE OLOMOLA

LL.B. Hons., LL.M (Ibadan), B.L

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OMOLADE OLUNIKE OLOMOLA
MATRIC NO: 65407

UNIVERSITY OF IBADAN

CERTIFICATION

I hereby certify that this Ph.D. research is an original and independent research work undertaken by Omolade Olunike OLOMOLA65407 in the Department of Private and Business Law University of Ibadan, under my supervision.

.....
Supervisor
Professor Oluyemisi A. Bamgbose
Department of Private and Business Law
Faculty of Law, University of Ibadan, Nigeria.

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DEDICATION

This research is dedicated to ‘Giver’ of all grace, to Him who is able to do immeasurably more than all we ask or imagine, to Him be all glory and honour and adoration. And also to Zelophehad’s Daughters of Numbers 27:1-8 (New King James Version) from whom the inspiration to do this work came. They asked for their rights and they were accorded and it became the law in Israel.

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ABSTRACT

Polygyny, where a man has more than one wife, resulting in the suppression of the reproductive health rights of women, is a relatively common marital practice in parts of the world. These rights have been recognised in many countries of the world, backed up with a legal framework, but their status in Nigeria is yet to be determined. Existing studies on polygynous reproductive health rights in Nigeria have addressed the connection between human rights and health, but have not evaluated the availability and implementation or otherwise of a legal framework for women's reproductive health rights. This study, therefore, examined the legal framework for the protection of the reproductive health of women in polygyny in Nigeria and assessed the content and operation of the laws and policies.

The study adopted the theory of universality of human rights. The primary sources were the Constitution of the Federal Republic of Nigeria, eight purposively selected Statutes on reproductive rights, 19 International laws and instruments which include 17 Conventions and treaties as well as judicial precedents. Secondary sources were 46 relevant legal texts on reproductive health and marital practices. Data were subjected to interpretive analysis.

There was no definitive law or policy on reproductive health rights in Nigeria. The various laws in force in Nigeria addressed different areas of reproductive health but did not protect the reproductive health right of women in polygyny. For example, the National Health Policy restricts its provision to family planning, maternal and child healthcare, and neglects comprehensive reproductive health issues. Similarly, the National Adolescent Health Policy failed to meet the desired standard because it does not integrate contraception provision into adolescent health programmes. Thus, many of the regulations did not reflect the reproductive health concept and so were inadequate to meet the needs of actualising reproductive rights as contemporarily understood. Though, The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) otherwise, known as the Women's Convention, was signed and ratified by the Nigerian Government, it has not yet been domesticated as part of Nigerian laws, thus impairing the reproductive health rights of women. The provisions of CEDAW are adjudged to be adequate, and they stipulated that all State parties should take appropriate measures to eradicate polygyny and to

prohibit same by legislation. Nigeria has however, not implemented any of these measures largely because of the patriarchal structure of Nigerian societies. Legal writers agreed that culture is dynamic as it provides lenses of perfection and standards of evaluation. Thus, any law that contravenes the cultural order will lack acceptability.

Lack of a precise legislation regulating polygyny and the non-domestication of the Women's Convention have created a lacuna in the implementation of *de jure* and *de facto* equality and thus hinders the protection of the reproductive health rights of women in Nigeria. Therefore, a reproductive health legislation which takes into cognisance the cultural diversities of Nigeria and protects women from polygyny-related human rights violations should be enacted. In the alternative, the Women's Convention should be domesticated in Nigeria.

Key words: Reproductive health rights in Nigeria, Human rights, Polygyny, Women's rights, Women's convention.

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Child Rights Act, Cap C50 Laws of Federation of Nigeria, 2004
Constitution of the Federal Republic of Nigeria 1999,
Criminal Code Act C38 Laws of the Federation of Nigeria 2004
Marriage Act, Cap M6 Laws of Federation of Nigeria 2004
Penal Code (Northern States) Federal Provisions Act Cap P3

POLICY DOCUMENTS

National Gender Policy 2006
National Health Policy and Strategy of 1988, 1998(and revised in 2004)
National Reproductive Health Policy and Strategy, July 2001

FOREIGN STATUTE

Edmunds-Tucker Act of 1882

INTERNATIONAL INSTRUMENTS AND DECLARATIONS

African Charter on Human and Peoples' Rights ACHPR 1981
African Union Protocol on the Rights of Women in Africa, 2003
American Convention on Human Rights ACHR
Charter of the United Nations 1945
Child Rights Convention CRC
Convention Against Torture CAT
Constitution of the World Health Organization, 1948
Convention on the Elimination of All forms of Discrimination against women CEDAW
Convention on the Elimination of Racial Discrimination CERD
European Convention on Human Rights ECHR
Fourth World Conference on Women, Beijing, China, 4-15 September 1995(New York: UN, 1995), Paragraph 94 (FWCW Platform for Action)
International Covenant on Civil and Political Rights (ICCPR) 1976
International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976

Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Platform for Action and Beijing Declaration.

UN International Conference on Population and Development (ICPD) Programme of Action.1994

Universal Declaration of Human Rights 1948

United Nations Declaration of Commitment on HIV/AIDS 2001

Vienna Declaration and Programme of Action

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ABBREVIATIONS

A.C	Appeal Cases
ACHPR	African Charter on Human and Peoples' Rights
AIR	All India Reports
CRC	International Convention on the Rights of the Child
FMOH	Federal Ministry of Health
HIV/AIDS	Human Immune-deficiency Virus/ Acquired Immune Deficiency Syndrome
HRC	Human Rights Committee
HSV2	Herpes simplex Virus 2
ICCPR	International Covenant on Civil and Political Rights.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ICPD	International Conference on Population and Development
IGO	International Governmental Organisations
JSC	Justice of the Supreme Court
LFN	Laws of the Federation of Nigeria
LR PD	Law Reports, Probate and Divorce Cases
MDG	Millennium Development Goals
NGO	Non-Governmental Organisations (NGO),
N.W.L.R	Nigeria Weekly Law Report
N.S.C.	Nigeria Supreme Court Cases
PHC	Primary Health Care
RB	Rights Based Approach
RH	Reproductive Health
SC	Judgments of the Supreme Court
SCR	Supreme Court Reports
S.C.N.L.R	Supreme Court of Nigeria Law Reports
UN	United Nations
UNHRCOR	United Nation Human Right Committee on Rights
VVF	Vesico Vagina Fistulae
WHO	World Health Organisation
ZWHHC	Zimbabwe High Court.

CHAPTER 1

INTRODUCTION

“A woman is not a womb, but has a womb thus health for women is more than reproductive health. There is no area of health in which inequity is as striking as in reproductive health”...¹

1.1 Background to the Study

The issue of Reproductive Health was not properly delineated until the United Nations Conference on Population and Development held in Cairo in 1994. Prior to this conference the major focus was on family planning programmes. The essence of reproductive health is that it puts women at the centre of the process and recognizes the needs of women as a special category.² At the 1994 conference,³ a comprehensive definition of ‘Health’ was adopted and expanded thus:

Health is defined in the WHO Constitution as a ‘state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’. Reproductive health, in the context of this positive definition, would have a number of basic elements. It would mean that people have the ability to reproduce, to regulate their fertility; and that women are able to go safely through pregnancy and child survival and well-being. To this may be added that people are able to enjoy and are safe in having sex.⁴

The above definition of health laid the foundation for the definition of Reproductive Right adopted in the Platform of Action. Section 94⁵ states that reproductive health is:

astate 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 to its functions and processes.

¹Cook J. R., Dickens M. B. and Fathalla F. M., 2003, *Reproductive health and human rights*. New York. Oxford University Press, pp. 13.

²*Ibid.*

³ The International Conference on Population and Development (ICPD) held in Cairo in 1994.

⁴This is the definition adopted in the Programme of Action developed at the Conference. UN, Population and Development, Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994 (New York: United Nations, Department for Economic and Social Information and Policy Analysis, ST/ESA/SER.A/149, 1994) (hereinafter Cairo Programme), paragraph 7.2.

⁵ICPD Platform for Action.

The above definition is what ought to be applicable globally. This definition is acceptable in most developed countries where the issue of polygyny is not a matter of patriarchy but an inherited problem from the immigrants' population⁶ of those countries.⁷ In the African context of reproduction, a woman cannot be said to be independent of a man and all issues relating to a woman's reproductive life follow the dictates of the husband whether in monogamy or polygyny. However, African societies acknowledge the inbuilt dangers and conflicts of polygyny as a marriage institution⁸ and this is exhibited in the philosophical compendium of the Yorubas⁹ referred to as *Ifa*¹⁰ as follows:

It is only one wife that brings pleasure to any man.
When there are two wives, they become rivals,
When they increase to three, they destroy the wine,
When they increase to four, they laugh one another to scorn,
When they increase to five, they will accuse someone amongst
them of monopolizing their husband's property.
When they increase to six, they become wicked people,
When they become seven, they become witches"¹¹.

Thus, the prevalence of the practice of polygyny is as a result of patriarchal family setting in Africa. It is therefore submitted that any effort to protect or assert the reproductive health and rights of women must confront and dismantle underlying cultural beliefs and social structures that perpetuate infringement of women's reproductive rights. While there is insistence on premarital chastity (virginity for the girls) and marital fidelity for the woman, on the other hand a man is not subjected to these traditional expectations¹². *Ifa Corpus*¹³ does not encourage polygyny in anyway; it is therefore a matter of choice and the decision of an individual.

Reproductive rights component gives a woman the ability to exercise her rights whether to have a child or not, when to and when not to have more children. These rights also allow a woman to establish her autonomy in a marital/sexual relationship. It is rather disheartening

⁶The challenge of polygyny being faced in Canada is primarily from their immigrant population whereas; in Nigeria it is a residue of the patriarchal system.

⁷For instance Canada and Britain.

⁸Ibidapo-Obe A.2005, *A Synthesis of African Law*. Lagos: Concept Law Series. Pp. 159.

⁹*Ibid.*

¹⁰ The corpus of Ifa literature has been referred to as a veritable database where the ideals of Yoruba culture are derived. The Yoruba divinity called *Eleriipin* which means a witness to creation and believes to be the second in command to *Olodumare* (the Supreme God).

¹¹Abimbola W. 1975, *Sixteen Great Poems of Ifa*. UNESCO. Pp 1

¹²Ibidapo-Obe A. 2005 *op cit* at pp. 159.

¹³Ibidapo-Obe A. 2005 *op.cit* at pp. 158.

that a woman cannot assert or insist on rights in a patriarchal system which is practised generally in Africa and particularly in Nigeria. Thus, Polygyny¹⁴ is a practice that is a component of patriarchy which is imbedded in the African marriage custom in Nigeria. The practice of Polygyny exposes the relationship between a woman's fertility and reproductive health as she is under a subtle compulsion to have children. The issue of pregnancy, when and how often and the circumstances within which it is done has substantial effects¹⁵ on the health of women. While maternal mortality¹⁶ and morbidity¹⁷ are risk factors of reproduction, the inability of a woman to be autonomous in polygyny might infringe her constitutional right¹⁸ and contravenes the provisions of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁹ This practice affects the reproductive rights of women in polygynous relationships and as a result it calls for concern.

Historically, women have been objects of discrimination by men and the laws men make. This discrimination is inbuilt in the culture and tradition of many human communities. Among the Yorubas for example, many adages in Yoruba oral poetry depict women as devilish and as a 'necessary evil' in the society, more so, that a woman is not trustworthy; e.g. 'ObirinL'esu' which literally mean that 'women are devils' and 'Obirinl'odale' which means 'women are traitors and betrayers. These descriptions of women are neither fair nor justified as it further perpetrates discrimination and oppression against them.

Similarly in Greek mythology, a woman was regarded as a creature of an evil fascination made into a human being. She was sold and bought like any other article or merchandise likewise under our customary law, a woman does not have inheritance rights in the property of her husband.

The French Conference²⁰ in 856 A.D resolved that women were human beings but were however created to worship men! This myth about women's nature is a major reason why

¹⁴This is one of the major issues analysed in this work and which would be discussed at length in the course of this work.

¹⁵Maine D., Freedman L., Shaheed F. & Frautschi S, 1994 "Risk, Reproduction and Rights: The Uses of Reproductive Health Data" *Population and Development: Old Debates, New Conclusions* Ed. Robert Cassen. Washington, D.C.: Overseas Development Council pp. 207.

¹⁶Chronic health problems related to pregnancy and childbirth.

¹⁷Death that occurs in pregnancy, abortion and childbirth.

¹⁸ Section 42(1) of the 1999 Constitution of the Federal Republic of Nigeria provides for right to freedom from discrimination.

¹⁹ It is on record that Nigerian Government has signed and ratified this Convention but it is yet to be domesticated into our laws in Nigeria.

²⁰Fraser A.S. 1999 "The Origins and Development of Women's Human Rights." *Human Rights Quarterly*, Volume 21, No.4 pp 853-906.

women are faced with depravity at the home front where they are supposed to be protected. It was not until the United Nations Decade for Women²¹ that the “woman question” started to enter the political agenda in Nigeria. Various National Development Plans (Pre and Post Independence), were gender-blind, and gave no specific place to gender issues. However, in response to the United Nations Decade for Women²² and the subsequent global awareness drawn to the “woman question”, various African Governments, International agencies, Non Governmental Organizations (NGOs) and activists, became concerned with the need to raise the socio-economic status of women through access to functional education, economic opportunities, and health facilities, among others.

Owing to the novelty of Reproductive Rights generally i.e. since 1994, the impact is yet to be felt by Nigerian women and in reality there is still a lacuna in the law. The crime of bigamy²³ as distinguished from polygyny is a reflection of the patriarchal society and thus creates a serious challenge for women which need a remedy as they are always the ‘recipient’ of both practices.

1.2 Statement of the problem

Reproductive rights are issues of life and death for women and not mere matters of choice. Sexual and reproductive health and rights, along with Women’s empowerment, have been acknowledged worldwide as essential elements in promoting poverty alleviation and moving towards sustainable development.²⁴ Critical areas of concern for the protection of reproductive rights include HIV/AIDS prevention, reaching out to adolescents and youths; promotion of gender equality, empowering women and making motherhood safer by reduction of maternal mortality rates, amongst others.

Research on reproductive rights is still very scanty, however, the available ones emphasized on legislation and case law which do not necessarily take our society into cognizance. This

²¹That was the period between 1975 and 1985.

²²1975-1985.

²³Defined under Section 370 of the Criminal Code Act C38 as Any person who, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for seven years.

This section of this Code does not extend to any person whose marriage with such husband or wife has been dissolved or declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time.

²⁴Adewole I.F, 2008 Reproductive Health and Sustainable Development: The Missing MDG in Popoola et al (eds) *Contemporary Issues in Sustainable Development: Lessons For, and Challenges to Nigeria*. Chapter 2 Volume 1 Ibadan the Postgraduate School at pp 48.

view, according to a writer²⁵ is further justified by the typical traditional values and societal norms generally associated with sexuality and in view of the fact that many Africans viewed reproduction and sexual practices as very private issues, it was more or less seen as a “taboo” to advocate for sexual rights, safe abortion and reproductive choice. The government on the other hand deals with the issue primarily through the public health sectors of government hospitals and management boards, and were not regarded as ‘rights’ *per se*. Very few groups such as Non-Governmental Organisations (NGO), IGOs, and private concerns, are involved in advocacy and awareness programmes associated with reproductive and sexual rights.²⁶

The protection of reproductive right of women in polygyny in Nigeria can only be effective if it is done in the context of patriarchy. Thus, the problem sought to be addressed by this work is the identification of the potential challenges of polygyny and the protection of reproductive right of women in that context without offending the traditional framework of chastity. The implication then is the challenge of protecting individual reproductive rights of every wife in polygynous relationships.²⁷ The problem of polygyny that is created by patriarchy affects the reproductive rights of women and the law as it is has not been able to help. Thus, if the language of the legislation is couched in a way that does not erode the social order then it would become acceptable. The ‘all or none’ language of CEDAW otherwise known as ‘Women’s Convention’ has affected its acceptability²⁸ in Nigeria. For instance Article 2 of CEDAW reads:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

²⁵Aniekwu N. I. 2006 (En) Gendering Sexuality: Human Rights Issues in Reproductive and Sexual Health Paper presented at the 2006 ARSRC Sexuality Leadership Development Fellowship (SLDF) July 2006. Retrieved on 23/2/2012 from www.arsrc.org/downloads/features/aniekwu.pdf.

²⁶Ibid.

²⁷This is in view of the fact that Polygamy is allowed under Nigerian Family/ Marriage Laws.

²⁸It is on record that several attempts have been made to present a bill for the protection of the reproductive rights of women and the manner of approach had always been to legalize abortion. This move was met with stiff opposition at the two federal legislative houses.

- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.²⁹

The sections of this Article 2 do not give room for any derogation at all and total acceptance of such may be difficult to achieve in the light of different religious backgrounds and beliefs.

Polygyny is a relatively a common marital practice in some parts of the world, Nigeria inclusive and anywhere it is practised the reproductive health rights of women are grossly suppressed. These rights have been recognised in many countries of the world and backed up with a legal framework, but their status in Nigeria is yet to be determined. Existing studies on polygynous reproductive health rights in Nigeria have addressed the connection between human rights and health, but have not evaluated the availability and implementation or otherwise of a legal framework for women's reproductive health rights.

The question for this work therefore is "To what extent does the rampant cultural practice of polygyny constitute serious threats to the reproductive rights of women in Nigeria?" and whether there is a legal framework protecting women from such harms.

1.3 Research Questions

This research would help to answer the following questions:

1. What is the extent of asserting one's autonomy in any relationship?
2. What are the short-term or long-term and remote effects of polygyny on the reproductive rights of a woman in such marital relationship?
3. To what extent is the definition of reproductive health and rights attainable or achievable within the context of culture?
4. How can a model reproductive and sexual health rights law be adopted in Nigeria?

²⁹Article 2 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

1.4 Objectives of the Study

The general objective of the study is to examine the reproductive rights of women in a multicultural society like Nigeria. The specific objectives are to:

1. Examine from the legal perspective the traditional customary rights of a wife on the issue of reproduction;
2. Examine cultural relativism and reproductive rights in the light of the incidences of polygyny.
3. Examine the gap in practice with relevant international legal instruments on Reproductive rights and law with a view to suggesting the adoption of a Reproductive Rights law which takes cognizance of our traditional and religious beliefs in order to make it acceptable.

1.5 Research Design and Methodology

This study will utilize exploratory research design. This is due to the data to be collected which are basically qualitative. These data include the Constitution, archival materials, existing literatures, decided cases and legislations. Legal research methodology would be used to gather the data. Methodology can either be through primary data or secondary data. However, this Research work will be using both primary and secondary data; primary data from Nigeria's Constitution, statutes, International laws and Conventions and relevant decided cases. Secondary data would come from relevant law books, journals, articles and the Internet. Nonetheless references shall be made to a number of interviews conducted by other researchers in this area of law through desktop review. The data would be subjected to interpretive analysis.

In short both primary and secondary sources are used in gathering information for this work. There is also an attempt to do some qualitative research in this write up. According to Berg³⁰ qualitative research refers to the meanings, concepts, definitions, characteristics, metaphors, symbols and description of things. In contrast, quantitative research refers to counts and measures of things.³¹ Right –based approach is also adopted as a methodology because reproductive health rights are an off-shoot of human rights.

³⁰Brayton J, 1997 What Makes Feminist Research Feminist? The Structure of Feminist Research within The Social Sciences. Pp.1

³¹*Ibid.*

1.6 Research Setting and Population

The study will focus particularly on the female population as the issue of polygyny and reproductive rights affects them. There is a cold mixture of different ethnic tribes living and making a living in Nigeria. There is also religious diversity in Nigeria. The choice of Nigeria for this work is not farfetched. Nigeria is the African nation which is the host base of this research work. There is no doubt that Nigerian culture is far from being perfect. Culture is dynamic and the barometer for gauging any society's progress is the extent to which it can decide on what to borrow and what to retain or throw away. By and large, every culture needs to be liberated³².

It is very important that we continue to sensitize ourselves and our people about new ideas that are emerging and imposing new consciousness and demands on the society particularly in the ambit of the female gender. Reproductive Right as an area of research is just evolving and there are many aspects that are yet to be looked into. Polygyny as an aspect of reproductive right is thus the focus of this work. This thesis will examine the reproductive right of women in polygyny and the right to self determination in such unions. In essence this work will examine reproductive rights as a distinct concept under human rights.

1.7 Significance of a Right-based Approach

According to Youth Incentives International Programme on Sexuality,³³ much has been written about rights-based approaches, and different people and/or organisations will have different understanding of a rights-based approach and how it should be put into practice. Nevertheless, it is believed that accountability, empowerment, non-discrimination and participation are some key principles of rights-based approaches that come forward in all definitions and applications.

A Rights-based approach to sexual and reproductive health is a conceptual framework promoting the protection, empowerment, and equality of all people, including young people, in all aspects of their lives, including their sexual lives.³⁴

³²Kukah M. H., 1995, Discrimination, Religion and Culture. *Eliminating Discrimination Against Women* Lagos C.R.P. pp 21.

³³Rights based approach retrieved from http://www.youthincentives.org/rutgersnisso_groep/youthincentives/Rights-based_approach/Rights-based_approach on 14/9/2011.

³⁴ *Ibid.*

Researchers in the areas of health and reproduction in recent times have focused their discussion on rights perspective ordinarily referred to as Right Based Approach (RBA).³⁵ The objective of this approach is to empower individuals and grant them access needed to enhance their own lives, strengthen their own communities and influence their own destinies. Many countries have laws that guarantee sexual and reproductive health and rights.³⁶ The rights-based approach to sexual and reproductive health adopted at the ICPD in 1994 reflects a new global policy consensus on the relationships between population policy and sexual and reproductive health and right. If women are empowered and people's needs for sexual and reproductive health and rights are met, population stabilization will be achieved by virtue of choice and opportunity, and not coercion and control. The rights-based approach built on existing international human rights agreements recognise sexual and reproductive health and rights as important ends in themselves³⁷ and they also provide tools to hold governments accountable to implement these rights at the national level.

However, in practice it is not always easy and straight forward to implement a Rights Based Approach in the field of sexual and reproductive health and rights. Limitations and challenges to the implementation of a RBA exist due to political, social, cultural, economical and religious reasons. For example, it is difficult to address the accountability of governments. This is just an example of a whole range of dilemmas that may occur. In that circumstance, this thesis adopts the right based approach to identify and discuss the protection of polygynous reproductive rights of women.

The core of the RBA is a way of thinking about and approaching sexual and reproductive health that is informed by and grounded in internationally agreed upon human rights. A rights-based approach towards the sexual and reproductive health of young people gained momentum during the 1990s when for the first time young people were internationally recognized as sexual beings with a right to education, information, youth friendly services, protection and participation. A number of key human rights instruments and United Nations conferences were driving forces in the emergence of a human rights framework for

³⁵For instance, writers like Cook R.J, Ezeilo J.N and Ladan M.T in some of their works (used in the course of this research) have all adopted the rights based approach.

³⁶*Ibid.*

³⁷Ezeilo J.N (ed.), 2006 *Law, Reproductive Health and Human Rights*. Lagos WACOL & LRRDC at pp. xvii.

addressing sexual and reproductive health³⁸ including the International Convention on the Rights of the Child (1989), the International Convention on the Elimination of All Forms of Discrimination Against Women (1981) and the International Conference on Population and Development (ICPD) (1994).³⁹

A rights-based approach is based on the ethical ethos that all human beings have certain rights to which they are entitled. A rights-based approach distinguishes between needs and rights. An unmet need implies the absence of something which is useful or desirable, while an unfulfilled right is a violation of an individual's entitlements. A human rights approach not only meets immediate health needs but empowers women. It also publicly promotes equality between women and men, for example, in relation to sexual and reproductive decision-making.

A focus on rights carries with it a greater sense of urgency, responsibility and obligation for action to ensure that an individual's rights are respected, protected and fulfilled. A right is described as something to which one has a just claim. The power or privilege to which one is justly entitled. Something that one may properly claim as due.⁴⁰ It is also defined as an interest which will be recognized and protected by a rule of law, respect for which is a legal duty, violation of which is a legal wrong.⁴¹

Accordingly, human rights are those rights which are essential to life as human beings – basic standards without which people cannot survive and develop in dignity. They are inherent to the human person, inalienable and universal⁴²

Sexual and reproductive rights have been articulated in different ways. While the precise phrasing varies, there is general agreement that sexual and reproductive rights include the right to health care services; the right to information and education; the right to make decisions, including decisions about marrying and planning a family; the right to sexual enjoyment and the right to be free from violence and discrimination.

³⁸ See generally WHO – World Health Organization www.who.int/en accessed on 09/10/2011. UN, Department of Public Information, Platform for Action and Beijing Declaration. Fourth World Conference on Women, Beijing, China, 4-15 September 1995 (New York: UN, 1995), Paragraph 94.

³⁹ Youthincentives/Rights-based_approach@www.youthincentives.org/rutgersnisso_groep/

⁴⁰ Merriam-Webster Online dictionary retrieved from <http://www.merriam-webster.com/> on 09/10/2011.

⁴¹ Curzon L.B. & Richards P.H, 2007. *The Longman Dictionary of Law* Seventh Edition England Pearson/Longman

⁴² UNICEF Website retrieved from on 29/1/2012. <http://www.unicef.org/>

Rights Jurisprudence is a phrase used to describe a school of legal philosophy developed since the 1960s, associated generally with political philosophers like Robert Nozick and John Rawls and, specifically in legal philosophy, with the work of Ronald Dworkin.⁴³

Regulating reproductive and sexual capacities have an historical antecedent which is patriarchal and over the years governments have tried to use criminal laws as a primary instrument to express and control morality, particularly through the prohibition of abortion or through penalising ‘unacceptable’ forms of sexual behaviour.⁴⁴ There is however a gradual shift with the spread of democratic governance, a realisation has emerged of the harmful effects on the health and rights of individuals caused by punitive control of reproduction and sexuality.⁴⁵ This has fostered an approach to laws and policies designed to promote people’s rights in their sexual health and welfare. Thus, a more recent approach challenges national laws by advocating increased access to reproductive and sexual health services as a matter of human rights and social justice.⁴⁶ Some countries have used a health and welfare rationale to legalise and provide or subsidise reproductive and sexual health services by reforming laws and policies facilitating the provision of these services.⁴⁷ This is as a result of a growing recognition of the importance of women’s human rights in general and reproductive and sexual health rights in particular.⁴⁸

Focusing on government obligations as regards the reproductive rights of women the following facts are relevant:

1.7.1 Respecting the right means the state cannot violate the right directly. A government violates its responsibility to respect the right to health when it is immediately responsible for providing medical care to certain populations, such as prisoners or the military, and it arbitrarily decides to withhold that care.

⁴³ Robertson D, A 2004, *Dictionary of Human Rights* Second Edition. The emphasis on this school is the rejection of positivist legal philosophy as originated by Jeremy Bentham and with most of the arguments of Utilitarian philosophy in general. To a large extent the theories are a return to a position associated with John Locke and other social contract theorists of the 17th century, who were themselves the originators of the whole tradition of civil liberty and human rights thinking in constitutionalism. The main difference from other schools of legal thought is an insistence that **rights** are real, and in some senses absolute.

⁴⁴ Aniekwu N.I, 2011 “Gender and Human Rights in Sexual and Reproductive Health Research” in Wijma B. et al (eds) *Centre of Gender Excellence – GEXcel Work in Progress Report Volume XI* at pp. 40-41.

⁴⁵ Ibid.

⁴⁶ World Health Organisation, 2002

⁴⁷ An example is South Africa. See, South African Choice on Termination of Pregnancy Act, 1996.

⁴⁸ Aniekwu N.I, 2011 “Gender and Human Rights in Sexual and Reproductive Health Research” op. cit. pp 40.

1.7.2 Protecting the right means the state has to prevent violations of rights by non-state actors, and offer some sort of redress which people know about and can access, if a violation does occur. This means the state would be responsible for making it illegal for anyone (private or public practitioner, insurance company) to automatically deny insurance or health care to people on the basis of a health condition. It would be responsible for making sure some system of redress exists and that people know about it and can access it.

1.7.3 Fulfilling the right means the state has to take all appropriate measures – including but not limited to legislative, administrative, budgetary and judicial measures – towards the fulfilment of the right, including promoting the right in question. A state could be found to be in violation of the right to health if it failed to incrementally allocate sufficient resources to meet the public health needs of all of the communities within its borders⁴⁹.

Thus, the rights-based approach to sexual and reproductive health adopted at the ICPD in 1994 reflects a new global policy consensus on the relationships between population policy and sexual and reproductive health and right.

1.8 Justification of the Study

This study is significant because the concept of reproductive rights and health has recently emerged in response to the fragmentation of the existing services related to health in reproduction, and to their orientation. Reproductive health is not just a major health issue; it is a developmental issue, and a human rights issue. Due to reasons of impact, urgency, and inequity, reproductive health is a global concern. It is an important component of health for women and men; however, it is more critical for women.

In Nigeria, the significant increase of maternal mortality rate in the country has become a serious cause for worry to the Federal Government, especially as it appears to pose a threat to the achievement of the Millennium Development Goals by 2015. Maternal mortality and morbidity levels in Nigeria remain among some of the highest in the region and worldwide.⁵⁰

⁴⁹ WHO, 2001 *Transforming health systems: gender and rights in reproductive health. A training curriculum for health programme managers*. Geneva, World Health Organization, WHO/RHR/01.29 pp.142.

⁵⁰ UNFPA, *State of the World Population 2005*, “Reproductive Health Fact Sheet,” http://www.unfpa.org/swp/2005/presskit/factsheets/facts_rh.html. See generally Aniekwu N.I. (2006) *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria*. American University Washington College of Law,

Critical factors contributing to this situation include traditional and religious systems that support early and/or forced marriage, early and excessive child bearing, (which is indirectly a component of polygyny) and different forms of gender based violence directly and indirectly limit reproductive choices and rights and seriously compromise women's health.⁵¹ Inadequate legal and policy framework for the protection of reproductive health and rights is another relevant factor. The wide gap between policies and action and the absence of genuine political will remain a challenge to the protection of women's health.⁵² This study fills the gap between the law as it is and our culture as it were. Reproductive rights are special rights that affect the very existence of a woman, so efforts should be directed towards its achievement in Nigeria.

The choice of Nigeria for this work is not farfetched. Nigeria is the African nation which is the host base of this research work. There is no doubt that Nigerian culture is far from being perfect. Culture is dynamic and the barometer for gauging any society's progress is the extent to which it can decide on what to borrow and what to retain or throw away. By and large, every culture needs to be liberated⁵³.

It is very important that we continue to sensitize ourselves and our people about new ideas that are emerging and imposing new consciousness and demands on the society particularly in the ambit of the female gender. Reproductive Right as an area of research is just evolving and there are many aspects that are yet to be looked into. Polygyny as an aspect of reproductive right is thus the focus of this work. This thesis will examine the reproductive right of women in polygyny and the right to self determination in such unions. In essence this work will examine reproductive rights as a distinct concept under human rights.

Human Rights Brief (Center for Human Rights and Humanitarian Law) Volume 13, Issue 3 (Spring 2006) page 35. The maternal mortality rate in Nigeria was approximately 800 per 100,000 births in 2000, which is one of the highest figures in the world. World Health Organization, *Maternal Mortality in 2000: Estimates Developed by WHO, UNICEF, UNFPA* (World Health Organization 2004) http://www.who.int/reproductive-health/publications/maternal_mortality_2000/mme.pdf

⁵¹Aniekwu N.I. 2006, *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria.* American University Washington College of Law, *Human Rights Brief (Center for Human Rights and Humanitarian Law) Volume 13, Issue 3 (Spring 2006) pp.35.*

⁵²Ibid.

⁵³Kukah M. H., 1995, *Discrimination, Religion and Culture. Eliminating Discrimination against Women* Lagos C.R.P. pp 21.

1.9 Expected Outcomes of the Study

As with most theses; this study is set to fill the lacuna created by absence of a comprehensive legislation which protects the reproductive health rights of women generally. Furthermore, awareness would be created to discourage polygyny and its attendant consequences.

Summarily the following are the expected outcomes of this research: -

1. Legal framework for dealing with polygyny.
2. Identified parts of our culture to be inculcated into Reproductive Right Law.
3. Foundation is also laid for further research into this area (reproductive health rights) of the law.

1.10 Limitations of the Study

Literature on this aspect of the law is just gathering momentum in Nigeria however, there are a number of extensive refereed reports, refereed conference reports and a few textbooks on the subject of Reproductive rights. The reason for this is not farfetched as this area of law came to lime light in 1993, thus the major limitation of this study is lack of specialised books on this area of law. While the right to health has been an internationally recognised human right since its affirmation as such in the International Covenant on Economic, Social and Cultural Rights in 1966⁵⁴, it was only in 1993 that there was a formal acceptance of the right to reproductive health when the International Conference on Population and Development (ICPD) held in Cairo in 1993 affirmed reproductive rights as human rights.

Another limitation is that women's rights were usually categorised as general human rights which makes their implementation difficult. In time past, literature on this aspect of the law is usually categorised with other aspects of human rights and major works in this field come from developed countries where the subject of human right and human rights of individuals are well rounded and fully developed. This is however, not the same situation for Nigeria.

This study makes an attempt to criticize polygyny which is rooted in patriarchy which brings into limelight the challenges of cultural relativism and therefore hampers the reproductive rights of women in such marital relationships.

Polygyny, being a common practice in Nigerian society, it was quite difficult to conceptualize it in order bring out the ills involved. There are a number of literatures on the

⁵⁴Article 12 of ICESCR 1966.

concept of polygyny however only very few of them actually brought out the challenges of the practice as they relate to women generally and about one or two on reproductive health. Finally, access to relevant materials from other jurisdictions outside Nigeria is financially demanding.

1.11 Clarification of Concepts

At this juncture it is necessary to do a clarification of concepts that will be used throughout this thesis.

1.11.1 Reproductive health

Within the framework of World Health Organization's definition of health as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, reproductive health addresses the reproductive processes, functions and system at all stages of life. Reproductive health, therefore, implies that people are able to have a responsible, satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

Implicit in this are the right of men and women to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant⁵⁵. Thus reproductive health is not just a concern during a woman's so-called 'reproductive years', customarily defined as ages 15-45. Rather reproductive health is a lifetime concern for both women and men, from infancy to old age.⁵⁶

In line with the above definition, reproductive health care is defined as the 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 care and counselling relating to reproduction and sexually transmitted diseases.⁵⁷ It should be noted that there is not just one reproductive right but a host of recognized human rights have

⁵⁵ WHO – World Health Organization www.who.int/en accessed on 09/01/2009 UN, Department of Public Information, Platform for Action and Beijing Declaration. Fourth World Conference on Women, Beijing, China, 4-15 September 1995 (New York: UN, 1995), Para. 94.

⁵⁶ Civil Resource Development and Documentation Centre (CIRDDOC) *Nigeria Public Education Series No. 7* www.cirddoc.org accessed on 09/01/2010.

⁵⁷ *Principle 7.2 of the International Conference on Population and Development 1993 (ICPD)*.

positive implications for the protection of reproductive health.⁵⁸ In essence, reproductive health contributes enormously to physical and psychological comfort and closeness and to personal and social maturation while poor reproductive health is frequently associated with disease, abuse, exploitation, unwanted pregnancy and even death.

According to Rebecca Cook, two areas in reproductive health have, in particular, such a major impact: the ability to regulate and control fertility and safety from sexually transmitted diseases (STDs). Inability of individuals, and particularly of women, in developing countries to regulate and control fertility is not only affecting the health of the people immediately concerned, but has implications for global stability and for the balance between population and natural resources and between people and environment, and is a violation of women's human rights.

1.11.2 Reproductive rights

Reproductive rights are not new rights but have helped to push for additional accountability under the traditional human rights framework for issues that are relevant to reproductive and sexual health. The inequity in reproductive health is also a compelling reason for international concern about social injustice. There is no area of health in which inequity is as striking as in reproductive health. Reproductive rights rest on the recognition of the basic right of every couple and individual to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence⁵⁹. Reproductive rights relate to an individual woman's or man's ability to control and make decisions about her or his life which will impact on her or his reproductive and sexual health.

The total constellations of rights that together make up what is referred to as reproductive rights have been identified from within the existing human rights documents. Reproductive rights are understood to be entitled to protection for their own sake, but also because they are essential as a precondition for the ability to exercise other rights without discrimination. Recognising reproductive rights indicate that governmental obligations under

⁵⁸ Ibid. *Principle 7.3 of the ICPD Document* acknowledges that...reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.

⁵⁹ *Principle 7.3 ICPD Programme of Action paragraph.*

the human rights documents would be considered in a whole new light. For example, considering the rights to education, health and social services in relation all of the well-known causes of maternal mortality. A government which fails to provide education, health and social services to young women of reproductive age could well be found to be in violation of these rights now recognized as part of reproductive rights.⁶⁰ This is likely not to have been the case before the Cairo conference.

1.11.3 Sexuality

This is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.⁶¹

1.11.4 Sexual health

It is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.⁶²

1.11.5 Sexual rights

Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus statements. Sexual rights include “the human right of women to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence”⁶³. They include the right of all persons, free of coercion, discrimination and violence, to:

⁶⁰ Curzon L.B. & Richards P.H, 2007 *op.cit.*

⁶¹ World Health Organization (WHO) Draft Working Definition, 2002.

⁶² *Ibid.*

⁶³ FWCW Platform for Action, paragraph 96.

- a) the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
- b) seek, receive and impart information related to sexuality;
- c) sexuality education;
- d) respect for bodily integrity;
- e) choose their partner;
- f) decide to be sexually active or not;
- g) consensual sexual relations;
- h) consensual marriage;
- i) decide whether or not, and when, to have children; and
- j) pursue a satisfying, safe and pleasurable sexual life⁶⁴

1.11.6 Polygyny

Polygyny is derived from the two Greek words- Poly (Many) and Gynaika (Woman)⁶⁵. It is essential to note that what is generally referred to as polygamy is actually polygyny. Whilst polygamy is a generic term which implies multiple relationships like polyandry, polyamory and polygyny. Polygyny on the other hand is a multiple relationship where a man is married to more than one wife. Polygamy includes polygyny, polyandry or group marriage or may just simply mean polygyny.⁶⁶ Often this type of marriage comes as a result of war, plague or disaster. Women left with children and no husband to provide for them were taken as second wives to other adequate care provider.⁶⁷ However reactions differ in communities. Polyandry is marriage of one woman to multiple men. This is more restricted than polygyny in its geographical distribution. It is found mostly in India and parts of Tibet, Ladakh in India (where men outnumbered women).⁶⁸ It can safely be assumed that Polygyny is the form of marriage practised in Africa not polygamy. The concept of polygyny shall be discussed in details later on in this work.

1.11.7 Human rights

⁶⁴*Ibid.*

⁶⁵wordiQ.com retrieved on 16/10/2011.

⁶⁶Nyanseor S., *Polygyny (Polygamy) is already a Practice.(The Perspective)* www.theperspective.org/polygyny retrieved on 15/09/2011.

⁶⁷This was the initial basis for the practice of polygyny in the Holy Quran.

⁶⁸Otite O. and Ogiwo W. 1989, *An Introduction to Sociological Studies*. Heinemann Books Plc Ibadan. Pp. 81

Human right has been described as right one has simply because he or she is human.⁶⁹ Dworkin asserts that rights “trump other moral considerations”. In other words, in a ‘confrontation’ rights argumentation should have the effect of knocking out other argumentation such as public interest. Some provisions of international human rights instruments have become part of Nigerian law through constitutional entrenchment and legislation such as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement Act)⁷⁰. The Constitution includes civil and political rights in its chapter four and their infringement can be subject to legal action.

1.11.8 Patriarchy

This has been described as a social system where men dominate⁷¹ and are regarded as the authority within the family and society. The power and possessions are passed on from father to son. Patriarchy is a component of many societies across Nigeria and this institution is commonly practised.

1.11.9 International Treaty [ies]

These are often referred to as ‘Conventions’ but also called Covenants. They are international instruments which define human rights concepts and set standards for government conduct. In doing so, they educate the public and help create conditions for external and internal pressures for improved human rights enforcement. There are basically two modes of becoming a state party to a treaty or a convention- Accession and Ratification. In circumstances where countries merely sign a Treaty, they are referred to as signatories with minimal responsibilities. However when a country signs and then ratifies, the country becomes a State party. Accession is a direct contract with the Treaty, making a country a State party. Being a State party means that a country is contractually bound to propagate the spirit and the letter of the treaty.⁷²

While States can pick and choose which Convention to ratify, they are obligated to report regularly on their compliance with those they embrace. It should be noted as a matter of fact that ratification of Treaties may have little to do with actual observance. Domestic institutions

⁶⁹ “*Droits de L’homme, Men Schenretchte.*” Donnelly J. and Howard R.E., 1987, *International Handbook of Human Rights* pp 7.

⁷⁰ Cap A9, Laws of the Federation of Nigeria 2004.

⁷¹ Otite O. et al, 2003 *op.cit.* Pp. 81.

⁷² Ratifying a treaty binds a member state to a dual obligation; first to apply its provisions and second to accept a measure of international supervision.

may pay lip service to International standards in principle and then ignore them altogether in practice.

At times a treaty may create rights in favour of the individual while creating obligations with which states must comply. Human right treaties fall within this category. The states agree to guarantee specific human rights for every individual within their respective jurisdictions and to comply with corresponding obligations. Countries are supposed to adopt internal legislation and policies to implement application of human rights standards. Countries that fail to abide by the set standards should be held accountable. However, some human rights treaties create mechanisms for monitoring and reporting on state compliance. Others provide avenues for individuals whose rights are violated to seek redress. It is important to note that domestic schemes of countries differ.

1.12 Structure of the thesis

Chapter one of this thesis is the general introduction and it laid the foundation for the content of the work. The background to the study is succinctly discussed outlining the objectives and not failing to justify the need for the work. This research work examines the basic customary rights of a wife on the issue of reproduction, from the legal perspective; the impact of customary law and the strength of that impact on the reproductive rights of women in polygynous relationships. This chapter further clarifies reviews relevant literature in the area of law which this study is located. A general conceptualisation of issues is done and a premise is laid for the research work.

The rest of this study is organized as follows:

Chapter 2- This chapter examines Legal Framework for Reproductive Health Rights in Nigeria and the International concern for Reproductive Rights in terms of Laws and Policies. A general overview is done on a comparative basis having regard to the available laws and policies in different jurisdictions and drawing conclusions.

Chapter 3 deals with the Concept of Polygyny and its Attendant Challenges. The institution of polygyny was discussed highlighting the advantages and challenges of such marital unions on the reproductive health of women.

Chapter 4 is devoted to the discussions on the reality of polygyny in Nigeria and exposes the implication of the neglect on the reproductive health status of women, which in turn affects

the fulfillment of the millennium development goals. Reproductive rights dimensions of polygyny were brought into limelight.

Chapter 5 concludes the study with the discussion of findings and its implications, recommendations arising from the findings of the study, and suggestions for further research.

Summarily this work examined comparatively whether customary law allows either party to impose reproductive tendencies on the other, the stereotypic roles of women; and in addition an analysis of relevant international legal instruments on Reproductive rights is done.

UNIVERSITY OF IBADAN

CHAPTER 2

LEGAL FRAMEWORK FOR REPRODUCTIVE HEALTH RIGHTS IN NIGERIA.

“Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”⁷³

2.1 Introduction

Reproductive health rights are founded on a number of international agreements, including human rights instruments. Reproductive rights are central to individuals' control over their lives. Reproductive health and rights issue has been accepted as a global problem⁷⁴, thus there are a number of international instruments directly and indirectly protecting the reproductive rights of women. The legal Instruments are aimed at influencing the thinking of people for change and general re-orientation. International laws and treaties are the powerful tools that can direct government agencies, individuals and institutions towards influencing changes in their laws and practices. The objective of International law is to empower the protection of legitimate interests of persons. Government agencies would use the instrument to propagate social justice for its people.

International human rights forms part of Nigerian laws once the document is signed and domesticated. Every treaty or International Convention that Nigerian government is a party to or has ratified or acceded to, contractually becomes part of our laws, some of these laws are yet to be domesticated⁷⁵. International human rights standards are generally couched in gender neutral terms. The very term “human” is inclusive of both men and women and it is often therefore assumed that these standards provide automatic protection to women in the same way that they do to men. However, this neutrality often amounts in practice to a disregard of women and a failure to respond to women's distinct experiences of injustice⁷⁶. The issue is not so much that there is a distinct category of “women's rights” warranting

⁷³General Comment No. 28: *Equality of rights between men and women (Article 3)*, UNHRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at paragraph. 24.

⁷⁴Cook J. Rebecca et al 2003 pp. 12.

⁷⁵Cap A 9 - African Charter on Human and Peoples' Rights (Ratification And Enforcement) Act, Laws of the Federation of Nigeria 2004.

It should be noted that a ratified treaty is not legally enforceable in Nigeria unless the legislature makes law to incorporate it into the law of the country. This is as provided by Section 12 (1) of the 1999 Constitution of the Federal Republic of Nigeria. It is also worthy of note that of all the ratified human Rights treaties and conventions, only the African Charter on Human and Peoples Rights has been incorporated into the domestic law. The Women's Convention CEDAW is yet to be domesticated.

⁷⁶Okagbue I, 1996, *Women's Rights are Human Rights*. Lagos, NIALS. Pp.20.

special treatment, as much as that, human rights norms must be made fully applicable to women as human beings. What is needed, therefore, is a critical re-characterisation of international human rights so that women's distinctive concerns are not marginalised and the implementation of the human rights of women becomes part of the central agenda of human rights work⁷⁷. This can however be done by incorporating gender sensitivity into the interpretation and application of human rights norms and domestication of the Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW) otherwise known as the Women 'Convention' into the Nigerian laws. It is worthy of note that the Nigerian government has domesticated the Child's Rights Act (CRA 2003) and a number of States has adopted same.⁷⁸ This chapter will discuss the available statutes protecting the rights of women generally and a cursory approach is used to bring out the gaps as related to reproductive health rights. There are several policies on women issues in Nigeria, many of which remains in the book. By and large, CEDAW seems to be the most comprehensive document protecting the entire rights of women all over the world.

2.2 Components of Reproductive Health Rights

Black's Law dictionary has defined Reproductive right simply as the right to reproduction and reproductive health.⁷⁹ Reproductive health is central to the total well-being of an individual and it implies that people are able to have safe and fulfilling sexual lives. It impliedly gives one the capability to reproduce and the freedom to decide if, when and how often to reproduce, it also implies that people especially women are able to have access to extensive health care, before, during and after reproduction.⁸⁰ Reproductive health is contiguous to maternal health which is a state of women's health especially in the significant reduction of maternal mortality and morbidity and their impacts on infant mortality.⁸¹

Article 4(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women states that every woman has "the right to have her life respected". Furthermore the Human Rights Committee states that the "inherent right to life" as guaranteed by Article 6 of the International Covenant Inter-American Convention on

⁷⁷ Cook J. Rebecca, 1993, Women's International Human Rights Law: The Way Forward *Human Rights Quarterly* 15.Pp. 239.

⁷⁸Only 25 states out of 36 states in Nigeria have adopted the Child's Right Act 2003 retrieved on 26/07/2012 from <http://allafrica.com/stories/201006300063.html>

⁷⁹Garner B.A. 2004, *Black's Law Dictionary*8th Edition.

⁸⁰Ladan M.T.2003, "Overview of Reproductive Rights and Health" *Journal of Economic Social and Cultural Rights* vol. 1 No. 7 Lagos, Pp.20

⁸¹*Ibid.*

the Prevention, Punishment, and Eradication of Violence against Women “cannot properly be understood in a restrictive manner” and that its protection “requires that States adopt positive measures”. To prevent maternal mortality, national legislation must, as a minimum, provide for the possibility of abortion in cases where, for example, the health of the mother is in danger, and in cases of rape or incest. States have a legal responsibility under international law to take positive measures to reduce infant mortality and increase life expectancy by dealing with the root causes and providing women with equal access to food and health care⁸². It is essential to note at this juncture that one of the ‘root causes’ as mentioned by the Human Committee is polygyny. It hampers and affects the general well being of women in such unions.

Equal rights within marriage were among the earliest set of human rights pertaining to women’s status to be explicitly recognized under international law.

The Nigerian government has subscribed to these International Instruments but there is yet to be a proper implementation through domestication of these statutes.

One of the basic principles governing marriage under human rights law is that no one may be forced to enter into a marriage against his or her will.⁸³ Moreover, according to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, men and women have equal rights when they enter into marriage contract, during marriage, and at its dissolution.⁸⁴

While the terms of the various human rights treaties vary to some extent, their common basic rule is that women, like men, have the right not to be arbitrarily deprived of life.⁸⁵

Another issue that is germane to the present discourse is the general belief and cultural dictates as regards family life and child bearing. The rights of a woman within a marriage and in the family setting are greatly limited; the direct consequence of which is, her ability to control her life and make voluntary, informed reproductive choices. One of the consequences of entering into marriage in this part of the world is child bearing and forming large families

⁸²*Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers. See Chapter 11 on Women Rights in Administration of Justice.* P 457, 460 – 461. Retrieved on 10/ 09/ 2011.

⁸³Universal Declaration of Human Rights, adopted Dec. 10, 1948, Art. 16 UN Doc.A/810 (1948); International Covenant on Civil and Political Rights, Article 23, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 entered into force March 23, 1976), International Covenant on Economic, Social and Cultural Rights Art.10(1), U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force March 23, 1976)

⁸⁴ Universal Declaration, Article 16, Civil and Political Rights Covenant, Article 23.

⁸⁵ Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 4 of the African Charter on Human and Peoples’ Rights, Article 4 of the American Convention on Human Rights and Article 2 of the European Convention on Human Rights.

that can serve as defence and labour support on farmlands. Thus, a family that is childless will go to great length to get one that will perpetuate the lineage; as succession is an integral part of the African custom. The right to marry and found a family is a recognized human right, because this right extends to all persons, the benefits of marriage should not be denied arbitrarily. One of such benefits of marriage is procreation and raising a family through the wife.

It has been argued that reproductive health is the missing MDG (Millennium Development Goal) in sustainable development in Nigeria.⁸⁶ In order to be able to realize sustainable development, reproductive health must be adequately provided for. This is because there is always a link between reproductive health and underdevelopment. Reproductive health is crucial to general well being, it is central to human development and it is also the cornerstone to sustainable development.

No woman deserves to die as a result of pregnancy, because pregnancy is not a disease but a physiological transfusion that occasions a gestation period and the result of which is supposed to bring joy to families.

Reproductive health of women in Nigeria is being challenged by a myriad of problems. In the first place, the traditional perception of pregnancy and childbirth is that, it is a natural condition, not requiring special health care, and due to the fact that it is a normal facet of life, so, there is much neglect of the women's health for the duration. Secondly, women tend to be the major clients of the traditional healers. While others who are partially educated will visit quacks and some will become attendants at faith healing homes or even traditional birth attendants thus preferring them to orthodox medicine and hospitals. In emergency cases and complications, the woman is then transferred to a clinic and in most cases it is too late. The resulting death or uncontrollable complications are then consequently associated with the service providers at the clinic, hence the negative attitude towards it.⁸⁷

Basic medical antenatal care is inaccessible to the majority of Nigerian women living in the rural areas. Though there are a few scattered maternity centres at the local government secretariat, there is however the problem of inadequacy or total absence of required health workers. It therefore follows that only a few that can afford the financial burden of reaching

⁸⁶Adewole I.F, 2008, Reproductive Health and Sustainable Development: The Missing MDG in Popoola et al (eds) *Contemporary Issues in Sustainable Development: Lessons For, and Challenges to Nigeria*. Volume 1 at Pp. 57-58.

⁸⁷Ibid.

the hospitals in the urban centres have access to the health care. Thus, hindrance of access to healthcare facilities can be categorized into geographical and financial. It is also sad that even some of the women living in the urban areas cannot afford the basic health care services on account of finance; the regrettable consequence of this situation is foetal death and maternal death.

The issues of religion and culture play very fundamental roles in ensuring the reproductive health rights of women in Nigeria. The right to freedom of religion is a constitutionally guaranteed fundamental right in Nigeria; by virtue of Section 38 of the Constitution, 'every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his 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.' It then becomes a matter of judicial construction or interpretation whether the right to freedom of religion can be curtailed in any way in order to guarantee equal rights for men and women alike under customary and Islamic laws.

2.3 National laws and Policies on Reproductive Health Rights in Nigeria

2.3.1 The Constitution of the Federal Republic of Nigeria (1999)

Section 42 of the 1999 Constitution⁸⁸ provides that nobody should be discriminated against by virtue of sex, race, tribe and circumstances of birth and a painstaking reading of Section 34 and 37 of the Constitution of the Federal Republic of Nigeria⁸⁹ guarantee the right to dignity of human person and right to privacy, be that as it may it presupposes that Nigerian women will have the autonomy to decide on how to deal with their bodies as far as their reproductive status is concerned. Section 37 states that:

The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

Also section 17(3) (c) of the Constitution⁹⁰ though under Chapter II on Directive Principles of State Policy which are not justiciable state that:

⁸⁸Cap C 23 Law of the Federation 2004.

⁸⁹Supra.

⁹⁰Supra.

The State shall direct its policy towards ensuring that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused.

The Nigerian Constitution encourages the government to ensure that the health and welfare of its citizenry is adequately protected but does not directly guarantee a right to health for all citizens. This is contained in Chapter II of the Constitution which embodies the Fundamental Objectives and Directive Principles of State Policy. This Chapter has been present in almost every Constitution promulgated in Nigeria since her independence; however, for the purposes of this study, it is only examined under the 1999 Constitution.

Sections 17 (3) (e) and (d) enact that:

- (3) The State shall direct its policy towards ensuring that-
- (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
- (d) there are adequate medical and health facilities for all persons;;

Over the years, the provisions of the Chapter have become termed as non-justiciable. The wordings of Section 6 (6) (c) of the same Constitution is religiously quoted as the rationale for such conclusion. The section enacts thus:

- 6. (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
- (6) The judicial powers vested in accordance with the foregoing provisions of this section –
- (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

It has been generally thought that Section 6 (6) (c) of the Constitution as ultimately negating whatever rights may have been guaranteed by the provisions of the Chapter. The legal implication of this position is that the rights which could be traceable to the provisions of the Chapter, including the right to health, were at best cosmetic dressings on the Constitution as a legal document. Furthermore, the rights enshrined in Chapter II cannot assume the same status as the rights enshrined in Chapter IV which embodies the Fundamental Human Rights.

Domestically, the 1999 Nigeria Constitution being the supreme law of the land contains provisions under sections 17 and 33 to 45 that are relevant for the promotion and protection of reproductive health and rights in Nigeria.

This is a great distinction between the African Charter and the Nigerian Constitution in that the Constitution shrinks the rights guaranteed in the African Charter. The implication of this position could also mean that when a person desires to enforce his right to health, the African Charter (Enforcement and Ratification) Act would assume priority for such litigant since the Charter makes no such distinction between rights and is also enforceable in Nigerian courts.

It however, appears that Chapter II has received a fresh boost since the decision of the Supreme Court in the case of *Attorney General Ondo State v. Attorney General Federation*.⁹¹ In that case, the constitutionality of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) was contested in a law suit by the Attorney General of Ondo State as a reaction to ICPC's first corruption case in May 2001; he queried the powers of the Federal government to legislate on corruption and the constitutionality of the ICPC Act. The plaintiff had contended that the National Assembly had no authority to enact the Act, because corruption is not enumerated in the Exclusive or Concurrent Legislative Lists as contained in the Second Schedule to the Constitution and that corruption was a residual matter, which only State Houses of Assembly could legislate on.

The new Commission was not operational until June 7, 2002 when the Supreme Court upheld the validity of the Act. In the judgment of the Court, Uwais CJN stated that:

...it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act, which contains provisions in respect of both, the establishment and regulation of ICPC and the authority of the ICPC to enforce the observance of the provisions of s.15 subsection (5) of the Constitution.⁹²

The above position is in direct conformity with the provisions of S.15 (5) of the 1999 Constitution⁹³ which provides that “the State shall abolish all corrupt practices and abuse of power”...

Furthermore, the Court held that ICPC by the provisions of Item 60 (1) is to promote and enforce the observance of the provisions of Chapter II, which requires legislation and only the National Assembly can legislate. Chapter II can only be made justiciable by legislation;

⁹¹2002, 9 Nigeria Weekly Law Report, (N.W.L.R)(part 772) Pp. 222.

⁹²Ibid at pp.226.

⁹³Cap C28, Laws of the Federation of Nigeria, 2004.

consequently, if the National Assembly has enacted specific laws on any of the provisions of the chapter, the court can enforce those laws. The above decision is a boost on the rights guaranteed in Chapter II and they can now be enforced through legislation. In the light of the decision, Nigerian law which borders on the right to health, reproductive health rights inclusive can be enforced in Nigerian courts.

2.3.2 The National Gender policy (2006)

The National Gender policy 2006⁹⁴ which emanated from the Federal Ministry of Women's Affairs and Social Development is a demonstration by the Nigerian government to build a nation devoid of gender discrimination, guaranteeing equal access to political, social and economic wealth creation opportunities for women and men; and developing a culture that places premium on the protection of all including children. The goal of the policy is to "build a just society devoid of discrimination, harness the full potentials of all social groups regardless of sex or circumstance, promote the enjoyment of fundamental human rights and protect the health, social, economic and political well being of all citizens in order to achieve equitable rapid economic growth; evolve an evidence based planning and governance system where human, social, financial and technological resources are efficiently and effectively deployed for sustainable development."

One of the objectives of the policy is to incorporate the principles of CEDAW and other global and regional frameworks that support gender equality and women empowerment in the country's laws, legislative processes, judicial and administrative systems.

In addition to the Constitution, the provisions of the National Reproductive Health Policy and Strategy of 2001, the National policy on HIV/AIDS, 2003, the National Health Policy, 1998 and 2004, National Policy on Women, 2000 and 2004, National Policy on the Elimination of Female Genital Mutilation, 1998 and 2002, the National Adolescent Health Policy, 1995, National Policy on Maternal and Child Health, 1994, and the National Policy on Population for Development, Unity, Progress and Self-reliance, 1988 and 2004, constitute the key policy frameworks that seek to achieve quality reproductive and sexual health for all Nigerians.

⁹⁴Federal Ministry of Women's Affairs and Social Development, 2006, *National Gender Policy*, Abuja, Federal Ministry of Women's Affairs and Social Development, retrieved on July 5, 2012 from http://www.aacoalition.org/national_policy_women.html

According to Ladan,⁹⁵ there are two broad components of the sources of international instruments relevant to reproductive health and rights. These are the legally binding instruments and the non-binding standards/instruments on Nigeria. He described the legally binding ones as those that are already signed and ratified which Nigeria is bound legally to ensure the effective promotion and protection of the provisions and state obligations contained therein that are relevant to reproductive health and rights.⁹⁶ It should be noted that a ratified treaty is not legally enforceable in Nigeria unless the legislature makes law to incorporate it into the law of the country.⁹⁷ The ratified ones are:

- a. The Protocol on the Rights of Women in Africa: - ratified on 16-12-2004.
- b. The African Charter on Human and Peoples' Rights: - ratified on 22-6-1983.
- c. The African Union Charter on the Rights and Welfare of the Child: - ratified on 23-7-2001.
- d. UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): - ratified on 13-6-1985.
- e. UN Convention on the Rights of the Child (CRC): - ratified on 19-4-1991.
- f. UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CAT): - ratified on 28-6-2001.
- g. International Covenant on Civil and Political Rights (ICCPR): - ratified on 29-7-1993.
- h. International Covenant on Economic, Social and Cultural Rights (ICESCR): - ratified on 29-7-1993.
- i. International Covenant on the Elimination of all forms of Racial Discrimination (ICERD): - ratified on 16-10-1967.
- j. The Universal Declaration of Human Rights, December 10, 1948, though not a treaty, has nevertheless today acquired the character of binding nature as customary rules of international law and *Jus cogens*⁹⁸ especially the core provisions relevant to reproductive health and rights.

⁹⁵Ladan M.T., 1999, *Introduction to International Human Rights and Humanitarian Laws*, Zaria A.B.U. Press, Nigeria, Chapter 2.

⁹⁶Ibid.

⁹⁷This is as provided for under Section 12 (1) of the 1999 Constitution of the Federal Republic of Nigeria.

⁹⁸Peremptory norms of general international law. Brownlie I., 1990, *Principle of Public International Law* 4th Edition ELBS with Oxford University Press. Pp. 4.

2.3.3 Consensus Statements

The non-binding instruments relevant to reproductive health and rights that are applicable to Nigeria are as follows:

- a. The 1993 Vienna Declaration and Programme of Action.
- b. The Programme of Action of the 1993 UN International Conference on Population and Development (ICPD).
- c. The 1995 Beijing Declaration and Platform for Action, UN Fourth World Conference on Women.

In Nigeria, the Federal Ministry of Health (FMOH) is vested with the power to formulate health policies. The Nigerian government adopted the National Health Policy and Strategy to achieve health for all Nigerians, which articulates the goal of enabling all Nigerians to achieve socially and economically productive lives.⁹⁹ According to the National Health Policy, “health” is an essential component of social and economic development as well as being an instrument of social Justice and national security. The Health Policy establishes Primary Health Care (PHC) as an integral part of the national health system and a priority for national development. PHC is defined in the policy in accordance with World Health Organisation (WHO) guidelines to include general health services, preventive, curative, promotive and rehabilitative care. It is important to note that the National Health Policy does not specifically provide for reproductive health care. Primary Health Care (PHC) encompasses basic treatment, maternal and child health, and family planning services, the prevention and control of infectious diseases, and the provision of essential drugs and supplies, this indirectly takes care of reproductive health.

A lacuna is thus created as the National Health Policy restricts its provision to family planning and maternal and child healthcare and neglects comprehensive reproductive health issues. Similarly, the National Adolescent Health Policy¹⁰⁰ fails to meet the desired standard because it does not integrate contraception provision into adolescent health programmes.

The National Policy on Population for Development, Unity Progress and Self-reliance¹⁰¹ and the National Health Policy continue to be the guiding documents on population and family

⁹⁹National Health Policy and Strategy of 1988, 1998 and revised in 2004.

¹⁰⁰This was adopted in 1995.

¹⁰¹Initially adopted in 1988, revised in 2004.

planning. Whilst the population policy centres on the principle that couples and individuals have the right to determine the number and spacing of their children, which focuses on the impact of rapid population growth on economic development.¹⁰²

The National Health Policy was adopted before the International Conference on Population and Development in 1994¹⁰³ and the five-year review in 1999. The Nigeria's Population Policy fails to account for emerging concerns in family planning and reproductive health, including the rapidly increasing spread of HIV/AIDS and complications from Female Genital Mutilation (FGM) and Cervical Cancer. In 2001, National Policy on Reproductive health and Strategy was adopted to achieve quality reproductive and sexual health for all Nigerians.¹⁰⁴ This policy, adopted by the Federal Government of Nigeria was intended to supplement the National Health Policy and to correct some, if not all, the inadequacies identified above. This policy document acknowledges the necessity for every nation to promote quality reproductive health services in the interest of the well-being of the people, enhanced social life of the community, national development and the future of the human society. Furthermore, the policy obviously states the commitment of the government and peoples of Nigeria to effectively address the major reproductive health challenges and reverse the existing trend of poor reproductive health status and services.

In essence, the Reproductive Health Policy notes that while the various laws in force in Nigeria address different areas of reproductive health, many of these laws, however, do not reflect the reproductive health concept and so are inadequate to meet the needs of actualizing reproductive rights as contemporarily understood. While the provisions of many of the policies in the health sector are relevant to promotion of reproductive health, their targets are sometimes contradictory or outdated or both. The resultant effect of this is that the Policy is not comprehensive enough to tackle the challenge of poor reproductive health.

Summarily, the Reproductive Health Policy provides for thirteen specific objectives and targets for 2001-2006 as follows:

- a) To reduce maternal mortality and morbidity due to pregnancy and childbirth by 50%.
- b) To reduce pre-natal and neo-natal morbidity and mortality by 30%.

¹⁰²Ladan M.T., 1999 op.cit.

¹⁰³ It was adopted initially in 1988.

¹⁰⁴ This was adopted in May 2001.

- c) To reduce the level of unwanted pregnancies in all women of reproductive age by 50%.
- d) To reduce the incidence and prevalence of sexually transmitted infections including the transmission of HIV infection.
- e) Limit all forms of gender-based violence and other practices that are harmful to the health of women and children.
- f) To reduce greater imbalance in availability of reproductive health services.
- g) To reduce the incidence and prevalence of reproductive cancers and other non-communicable diseases.
- h) To increase knowledge of reproductive biology and promote responsible behaviours of adolescents regarding prevention of unwanted pregnancy and sexually transmitted infections.
- i) To reduce gender imbalance, in all sexual and reproductive health matters.
- j) To reduce the prevalence of infertility and provide adoption services for infertile couples.
- k) To reduce the incidence and prevalence of infertility and sexual dysfunction in men and women.
- l) To increase the involvement of men in reproductive health issues.
- m) To promote research on reproductive health issues.

Moreover, the Reproductive Health Policy provides for strategies and institutional framework for policy implementation as well as monitoring and evaluation of policy implementation at all levels of government that is, federal, state and local.

2.4 An Outline of Islamic Law and Polygyny in Nigeria.

Islamic Law guarantees right and freedom that are fundamental and necessary to everybody; male and female inclusive.¹⁰⁵ The rights include:

- a. Right to life.
- b. Right to personal liberty.
- c. Equality before the law
- d. Right to freedom of thought and conscience
- e. Freedom of expression and speech

¹⁰⁵ Quran 2: 189 “Allah desires for you ease; He desires no hardship for you.”

f. Right to health and healthy living conditions.

The state under Islamic law is under a duty to take all measures to ensure that these rights are not only promoted, but protected and provided for.¹⁰⁶ With respect to the concept of reproductive health rights Islam has not unequivocally rejected or decreed against teaching or researching into it.¹⁰⁷ This is evident as there is no clear statement on it from the Quran, the Sunnah, the Ijmaa, and Qiyas.¹⁰⁸ According to Haruna¹⁰⁹ contemporary research on the issue of reproductive health right seems to favour the protection of women's right in Islam. The approach of Islam to reproductive health right is within the marital context. The rights exist where there is a lawful and legal relationship which is marriage. The issues that pertain to reproductive health rights that may coextend to all Muslims regardless of status are dealing with female genital circumcision and child or forced marriage.

The concept of reproductive health and rights is recognised and promoted by Islamic law; however some jurists admit that there is enough evidence in Islam to warrant further research and dialogue in the field, even though there are different opinions among Muslim jurists as to the applicability of the concept.¹¹⁰ There are basically two divergent views on this issue. The first set of views are those who are completely against the whole idea of reproductive health rights and the second one are those though not wholly favouring the idea accept that there is enough in Islam to warrant further research into the field.¹¹¹ The first view that is against the idea based their reasoning on the fact that the content of reproductive health right is a segment of knowledge which Allah has not disclosed and so nobody can venture into it. This concept is also viewed by these scholars as a means of corrupting and polluting young unmarried youths thereby giving the wife the unfettered right to refuse bearing children, for which she is purposely meant for and eventually make her disobedient to Allah and her husband's authority.¹¹²

¹⁰⁶ Quran 4: 28 "Allah desires to lighten your burden, for she was created weak".

¹⁰⁷Haruna B.A. 2006, "The Concept and Philosophy of Reproductive Rights In Islam" in Ezeilo J.N. ed. *Law, Reproductive Health and Human Rights*. Lagos WACOL and LRRDC. Pp.7.

¹⁰⁸ All these are sources of Islamic Law.

¹⁰⁹Haruna B.A. 2006, Op.cit at pp. 5-6.

¹¹⁰Chiroma I. H.2007, "Reproductive Health and Rights Issues: Perspectives from Islamic Jurisprudence" being a paper presented at a two- day Capacity Building Workshop For Law Lecturers on Reproductive Health Rights Organized by Legal Research and Resource Development Centre(LRRDC) held at the Golden Gate Hotel, Abuja on 24-26 October, 2007.

¹¹¹Haruna B.A. 2006, op.citatPp. 8.

¹¹²Op.citatpp. 10.

The second proponents believe that there is an idea of reproductive health in Islam as Allah has left nothing untouched. It is therefore the view of this group that research is needed to explore the issue further. This second group is further divided into divergent view. The first one stipulates that reproductive health rights are to be studied within the traditional confines and limits provided by Islam whilst the other is of the opinion that whatever the idea of reproductive health is, it must be comprehensively studied.

By and large in furtherance of Prophet Mohammed several utterances on health¹¹³ Islam seeks to promote healthy well being. For instance it was reported in a Hadith that:

The Bedouin Arabs came to the prophet and said, “O messenger of Allah, should we treat ourselves?” He replied, “yes, O servants of Allah, you must treat (yourselves): for verily, Allah has not created a disease without providing a cure for it, except for one disease.” They asked him: “which one is that?” He replied, old age.¹¹⁴

It is therefore submitted that reproductive health rights are permitted in Islam within the marriage context. Thus, seeking for medical attention is not prohibited in Islam. The position under Islamic law is that as long as contraception or family planning does not entail a radical separation between marriage and its reproductive function, it is valid. The holy Quran does not prohibit birth control, nor does it forbid a husband or wife to space pregnancies or limit their number.¹¹⁵

2.5 International Concern for the Reproductive Health Rights of Women

It has been asserted that the significance of reproductive rights is evident in its entrenchment in international law under four broad health-related categories: the right to found a family; the right to decide the number and spacing of children; the right to family planning information and services; and the right to benefit from scientific advancement.¹¹⁶

¹¹³ It has been reported by Ahmad ibn Hanbal in his *Musnad* that Prophet Mohammed said, “when plague is rampant in locality do not go inside...but if you are already inside then do not come out of it. Volume 1: 192

¹¹⁴ See Abu Dawud Sulayman ibn al As'ab Al Sijistani, *Sunnan Abu Dawud, 'Khitab al Tibb'*, Beirut: Dar Ihya al Sunnah al Nabawiyyah, Volume 4:3.

¹¹⁵ Quran 7:89 It is who has created you from a single soul and there from did not make his mate, that he may dwell in tranquility with her”. See also Quran 9: 71-72 “The believers, men and women are protectors of one another: they enjoin what is just and forbid what is evil...” See also Al-Gazali “Fear too many problems because of too many children, and guarding against want and unlawful living for absence of difficulty helps one to practice one's religion well”.

¹¹⁶ Washenfelder C, 2003, “Regulating a Revolution: The Extent of Reproductive Rights in Canada” *Canada, Health Law Review*, No. 12, Vol. (2), Pp.44-52.

2.5.1 African Charter on Human and Peoples Rights –1981

The Charter is virtually the only International treaty ratified by Nigeria as it relates to reproductive health and it has been incorporated into the local legislation by virtue of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1981.¹¹⁷

Thus, the African Charter is enforceable in Nigerian courts.

Fundamentally, the Charter quite early enough in Article 2 enacts the principle of non-discrimination thus:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The above is in tandem with the provisions of Section 42 of the 1999 Nigerian Constitution.

The provision of Article 16 of the Charter further guarantees to every individual the right to health and the quality is set by the Charter as “the best attainable”

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The Charter delineates the family as the cradle of the African society and as such imposes additional obligations on State Parties to protect the physical health of the family and also to eliminate every form of discrimination against women as follows:

the family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical health and morals....the State shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in International declarations and convention.¹¹⁸

¹¹⁷ Cap A9 LFN 2004. This is in conformity with the provisions of Section 12 of the 1999 Constitution of the Federal Republic of Nigeria.

¹¹⁸ Article 18 of African Charter.

It is imperative to note that the Charter does not divide rights into civil and political, fundamental or economic, social and cultural rights. The legal implication of the absence of distinction is to make the right guaranteed in Articles 16 and 18 as important and worthy of protection and enforcement just as the right to life or human dignity enshrined in Articles 4 and 5. Furthermore, the clear wordings of Article 2 of the Charter are to the effect that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

A combination of the absence of distinction amongst rights and the gender-neutral language of the Charter places the guarantee and importance of the reproductive rights of women above dispute.

The implications of a combination of the provisions of Article 2 which guarantees equality of all persons and Article 18 which endorses the family as a critical unit of the society are that the right of women in a family is violated in a polygynous relationship. This is simply because a family unit basically consists of the couple and the biological children, if any, and where there are more than wife in the marriage relationship, the equality is thereby eroded.

As a major part of the administrative and legislative measures to accelerate equality as envisaged in the Charter, the National Gender Policy 2006 was evolved by the Nigerian Government and it provides the framework for ensuring the acceleration of equality between men and women. The document specifies guidelines for the promotion of gender equality in all sectors of the economy.¹¹⁹ However, the Federal Ministry of Health has also identified the multi-ethno-religious-cultural character of the Federation coupled with its tripartite systems of law and administration of justice as one of the key challenges in the effective implementation of the Charter in Nigeria.¹²⁰ Another important challenge identified by the ministry is the low level of literacy and high percentage of poverty among Nigerians.¹²¹

In addition to the problems of implementation in Nigeria identified above, the enforcement mechanism of the Charter leaves a lot to be desired. Besides obligating State Parties to submit a report every two years, the judicial organs created under the Charter have no power

¹¹⁹ Federal Ministry of Justice, 2008, *Nigeria's 3rd Periodic Country Report: - 2005-2008 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria*, Abuja, Federal Ministry of Justice. Pp20.

¹²⁰The Federal Ministry of Health, Abuja.

¹²¹Ibid.

whatsoever to enforce their decision within State Parties. The African Commission on Human and Peoples Rights is created under the Charter “to promote human and peoples' rights and ensure their protection in Africa”¹²² while the African Court of Justice and Human Rights (which is the result of a merger of the African Court of Justice and the African Court of Human and People’s Right)¹²³ is the organ of the African Union which is in charge of civil matters particularly with regards to the protection of human rights and consolidation of good governance in Africa.

The few communications involving Nigeria which have emanated from the African Commission, on the violation of several rights including the right to health, have been obeyed more in their breach. In *SERAC & Anor v. the Federal Republic of Nigeria*,¹²⁴ the plaintiffs alleged the violations of the rights of the Ogoni People of the Niger Delta region of Nigeria by the Nigerian Government with Nigerian National Petroleum Corporation (NNPC) and other transnational corporations. Among the rights allegedly infringed were the right to healthy and satisfactory environment guaranteed by Article 24 of the Charter, the right to adequate standard of health guaranteed under Article 16 and property and housing guaranteed under Article 14.

The enforcement mechanism laid out in the Charter is at best crying for amendment. In the SERAC Communication, the Commission merely appealed to the government to ensure protection of the environment, health and livelihood of the Ogoni people and urged the Government to keep the Commission informed of the steps taken to redress these violations. Despite the decision of the Commission in the case above, gas flaring (which is a major environmental issue) continues in the Niger Delta unabated, and this singular fact makes the judgments of the African Commission and their enforceability a matter in the prerogative of the State Parties. It may safely be concluded that given the above lack of power to enforce its decisions, a subsequent communication bordering on the right to reproductive health may suffer the same fate of unenforceability.

In keeping with Article 66 of the Charter which enacts that ‘special protocols or agreements may, if necessary, supplement the provisions of the present Charter,’ the Protocol to the

¹²²Article 30.

¹²³ This was done at the African Union Summit of Heads of State and Government on 1st July 2008 in Egypt.

¹²⁴*Social and Economic Rights Action Center (SERAC) and another v. Federal Republic of Nigeria*, Communication 155/96, Decision of the African Commission on Human and Peoples’ Rights, done at the 30th Ordinary Session, held in Banjul, Gambia, 13th to 27th October 2001, retrieved on July 01, 2012 from http://www.escri-net.org/caselaw/caselaw_list.htmlpage_num=11

African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹²⁵ also known as the Maputo Protocol came into effect on 11 July 2003 at the African Union second summit in Maputo, Mozambique.

It is imperative to reproduce the rationale for the Protocol. The Protocol recalled that women's rights have been recognized and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights

The Protocol noted that:

women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995 and further recalled the United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security.

It also reaffirmed the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development.

The Protocol also declared that:

the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women.

¹²⁵ African Union Protocol On the Rights of Women in Africa, 2003, retrieved on July 05, 2012 from <http://www.africaunion.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>

The Protocol recognised the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy; bears in mind related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men.

It further expressed the concern that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

Summarily, any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated. Thus, State parties are to ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights and this being the major reason the Protocol was made.

The equality guaranteed by the Charter¹²⁶ is also guaranteed by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) since it guarantees the right of every "citizen of Nigeria" to equality and dignity. By this emphatic use of a gender-neutral term, males and females alike have a constitutionally guaranteed right to be free from discrimination. The provision of Section 42 of the Constitution is reproduced below:

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 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, religious or political opinions.

One very critical aspect of the Nigerian customary law which usually negates the above constitutionally guaranteed right is in the area of property devolution and inheritance rights of

¹²⁶Article 2 of the African Charter on Human and Peoples' Rights.

women. In the renowned case of *Mojekwu v. Mojekwu*,¹²⁷ the *Oli-Ekpe* custom of the Onitsha people in the Eastern region of Nigeria which allowed the brother of a deceased to inherit his property where the deceased died without a surviving male son. The deceased in the case, however, was survived by two daughters who were excluded from inheriting property under the *Oli-Ekpe* custom. The appellant, Augustine Mojekwu, relying on the *Oli-Ekpe* custom of some parts of southeast Nigeria, had instituted action against the respondent, Caroline Mojekwu, claiming that he was entitled to inherit her deceased husband's property. The basis for his claim was that the deceased, his paternal uncle, was survived by Mrs. Mojekwu and two daughters, who, as women, were excluded from inheriting property under the *Oli-Ekpe* customary laws. Mr. Mojekwu argued that the *Oli-Ekpe* custom allowed that if the deceased had no son, the closest male relative was to inherit the property; therefore, he was the rightful owner of the deceased's house situated in the town of Onitsha. Mrs. Mojekwu claimed that her son Patrick, who had predeceased his father (her husband), had fathered an infant son who should inherit the property. Disputing this fact, Mr. Mojekwu claimed that Patrick had died without a son.

The Court of Appeal determined the *Oli-Ekpe* custom to be repugnant to natural justice, equity and good conscience.¹²⁸ The court also pronounced the custom to be contrary to human rights guarantees in the Nigerian Constitution¹²⁹ and in CEDAW¹³⁰, which prohibit discrimination on the ground of sex. The Court of Appeal's decision was further upheld by the Supreme Court.¹³¹

2.5.2 Universal Declaration of Human Rights – UDHR 1948 and Others

The earliest efforts at establishing a foundation for human rights laid were made by the United Nations through a collection of international instruments that is referred to as the Bill of Rights, which consist of the Universal Declaration for Human Rights (UDHR), the International Covenant on Political and Civil Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nigeria has signed and ratified these instruments (treaties).

¹²⁷*Mojekwu v. Mojekwu*(1997) 7 N.W.L.R. Pp.283.

¹²⁸Supra.

¹²⁹ Section 42 of the 1999 Constitution of the Federal Republic of Nigeria

¹³⁰ Articles 1 and Article 2 of CEDAW.

¹³¹*Mojekwu v. Iwuchukwu*(2004) 4 S.C. (Part. 2) Pp.1.

The Universal Declaration of Human Rights adopted in 1948, till date, stands out as the most elaborate statement of the fundamental human rights to which all humans are entitled without any qualification. It is the first human rights instrument which emanated from the United Nations shortly after the end of the Second World War. Article 1 summarizes all of the subsequent articles and succeeding treaties and conventions when it says, "All human beings are born free and equal in dignity and rights."

Article 5 of the UDHR states that:

No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.¹³²

In some matters, such as marriage rights, the declaration goes into some detail in specifying the ways in which men and women should be treated. It specifies that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."¹³³ The import of the equality embodied in the phrase "equal in dignity and rights" stated in Article 1 is that, not only do men and women have equal rights, but also equal enjoyment of these rights. It is imperative to note this point, because the practice of polygyny assumes that while man can exercise his right to marry several women, a woman cannot so do.

Furthermore, the Declaration envisages that marriage shall be entered into only with the free and full consent of the intending spouses.¹³⁴ This position is in clear contrast to the circumstance surrounding marriages in Nigeria, particularly the marriages contracted under customary law. In some cultures for example, some brides are given away as settlement for debt, at an infant age and to much older men, all against the bride's consent (if she is matured enough).¹³⁵ In another vein, the provision may also be construed as requiring only the consent

¹³²Article 5 of UDHR.

¹³³Article 16

¹³⁴Article 16 (2)

¹³⁵ In Yoruba land, for example in the earlier times a woman can be given as a bride to a creditor to settle a debt. See generally, Ibidapo – Obe A.2005, *A Synthesis of African Law Lagos Concept Law Series*. Child marriage contravenes the position of the Child's Rights Act, Cap C50, Laws of the Federation of Nigeria 2004.

of the intending couple and as such dispensing with parental consent which is a requirement for contracting valid marriages under customary and Islamic laws.¹³⁶

The family is the natural and fundamental group unit of the society and is entitled to protection by society and the state¹³⁷. According to the Declaration, everyone has a right to life, liberty and security of person¹³⁸; there is equality before the law¹³⁹; right to a standard of living adequate for the health and well-being...motherhood and childhood are entitled to special care and assistance¹⁴⁰; and the right to education is also guaranteed.¹⁴¹

More than 20 years after adopting the Universal Declaration of Human Rights, the international community agreed on two covenants spelling out in more details the rights embodied in the declaration. These were the International Covenant on Civil and Political Rights¹⁴²(often referred to as the political covenant) and the International Covenant on Economic, Social and Cultural Rights¹⁴³ (often referred to as the economic rights covenant). Both entered into effect in 1976. These are legally binding on State Parties which have ratified them. Both covenants incorporated understandings based on the UDHR, many of which have important implications with regard to gender and reproductive rights. They include the right of women to be free of all forms of discrimination, the right of freedom of assembly and association, and family rights. The political covenant, among other things, recognizes the rights to "liberty and security of the person"¹⁴⁴ and "freedom of expression", including "freedom to seek, receive and impart information and ideas of all kinds"¹⁴⁵ and affirms that "no marriage shall be entered into without the free and full consent of the intending spouses."¹⁴⁶ Both ICCPR and ICESCR reaffirm the equal right of women and men to enjoyment of all rights set forth in the instruments.¹⁴⁷ Article 6 of ICCPR affirms the inherent right to life of the individual. Thus, a Covenant spells out clearly and in details the content of a Declaration.

¹³⁶ The father under Islamic law has the right of Ijbar over her virgin daughter. See generally Al-Tirmidhi Jannah.org Islam Peace retrieved on 21/4/2010.

¹³⁷ Article 16 (3)

¹³⁸ Article 2

¹³⁹ Article 3

¹⁴⁰ Article 25

¹⁴¹ Article 26

¹⁴² Ratified in Nigeria in 1993

¹⁴³ Ratified in Nigeria in 1993

¹⁴⁴ Article 9 of ICCPR

¹⁴⁵ Article 19 of ICCPR

¹⁴⁶ Article 23 of ICCPR

¹⁴⁷ Article 3 of ICCPR and Article 3 of ICESCR

In reviewing the scope of obligations created by this provision in the ICCPR, the Human Rights Committee has expanded the right to life to obligate states to take steps to reduce maternal mortality and morbidity.¹⁴⁸

The Political Covenant further provides that no-one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment.¹⁴⁹ This provision may be invoked to protect women against harmful traditional practices such as female genital mutilation and widowhood practices. Similar to this provision is the right to liberty and security of person¹⁵⁰ which may be invoked to protect women against forceful genital mutilation, protection against forced pregnancy, sterilization, abortion, sexual slavery, abuse, rape, etc. This Political Covenant further provides for the right to freedom of thought, conscience and religion.¹⁵¹ This right could be asserted by persons challenging laws based on particular moral values and religious beliefs. Article 19 affirms the right to freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers. This right may be used to challenge laws, policies and practices which restrict access to contraceptive information and contraceptives. This Covenant also seeks to protect family life with emphasis on its importance as the germane unit of the state and insists on the freedom of matrimony, the need for both spouses' consent and the equal rights of both partners from marriage to (a possible) divorce.¹⁵²

The ICESCR also known as the Economic Rights Covenant makes useful contributions to the protection of the reproductive rights of women. It provides that special protection should be given to mothers during a reasonable period before and after child birth. It also contains general observations on maternity benefits and maternity leave.¹⁵³ It further affirms the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹⁵⁴ According to the Committee on Economic, and Social Rights, health is a fundamental human right indispensable for the exercise of other human rights. Every human

¹⁴⁸ General Comment No. 6 adopted by the Committee in 1982, "the right to life" has often been too narrowly interpreted. The expression "right to life" cannot be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. In this connection, the Committee considers it would be desirable for states to take all possible measures to reduce infant mortality, to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

¹⁴⁹ Article 7 of the ICCPR

¹⁵⁰ Article 9 of the ICCPR

¹⁵¹ Article 18 ICCPR.

¹⁵² Article 23 of ICCPR.

¹⁵³ Article 10 ICESCR.

¹⁵⁴ Article 12(1) ICESCR.

being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments.¹⁵⁵ Reiterating and expanding on this right, the ICPD Programme of Action mandates States to take all appropriate measures to ensure, on a basis of equality between men and women, universal access to health care services including those related to reproductive health care, which includes family planning, and sexual health. Reproductive health care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and have the information, education and means to do so.¹⁵⁶ Article 15(1) b requires State Parties to recognize the right of every one...to enjoy the benefits of scientific progress and its application. What this implies is that everyone has the right to scientific progress, government giving high priority to conducting reproductive health research and the use/application of the research findings to improve the lot of men and women. This also entails a right to information. The General Comment No. 14 of the Committee of ICESCR affirms that state parties have an obligation to ensure the observance of the right to health. They dealt with the issue in details as a topic of 'Core' obligations on the part of the states. It is worthy of note that the Articles cover the highest standards of health tenable for human beings.

Apart from listing reproductive health issues as core topics, the convention enjoins State Parties to respect, protect and ensure the observance of the provisions and obligations. States are also to mount the legal and administrative structures as well as remedies for breaches of these provisions. Therefore the treaty is directed to the relief of injustices that individuals may suffer. States parties are obliged to report implementation and the steps they have taken to address preventable conditions.¹⁵⁷

¹⁵⁵CESCR, General Comment 14, UN ESCOR 2000, UN Doc.E/C/12/2000/4,11 August 2000 cited in Cook J.Rebecca et al; 2003 Pp. 477.

¹⁵⁶Principle 8 of the ICPD Programme of Action.

¹⁵⁷ See generally Part 3 of the Committee's General Recommendation.

2.5.3 Convention on the Elimination of Discrimination against Women – CEDAW 1979

The preamble to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explains that, despite the existence of other instruments, women still do not have equal rights with men. Discrimination against women continues to exist in every society. In November 1967, the General Assembly of the United Nations (UN) adopted the Declaration on the Elimination of Discrimination against women.¹⁵⁸ Between 1972 and 1975 the possibility of an international instrument on the human rights of women was considered and thus, the Commission on the status of Women began drafting a Convention on the elimination of discrimination against women.¹⁵⁹ The CEDAW was therefore adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. The Convention that was adopted unanimously by the United Nations General Assembly on December 18, 1979 entered into force on September 3, 1981 following the receipt of the 20th ratification in accordance with Article 27 (1) of the Convention. As the Convention came into force, the Committee on the Elimination of Discrimination against Women was formally established under Article 17 of the Convention. The function of the Committee is to oversee the implementation of the Convention by States parties. To make sure that the convention is respected, this monitoring committee which is made up of twenty three (23) independent experts meet in January of each year at the United Nation headquarters in New York to review country reports on the status of women submitted by countries that have agreed to and signed the convention. CEDAW is an international human right document that establishes international standard of equality between women and men as it provides a framework for development and application of equality norms to address specific conditions in every country and legal system.¹⁶⁰ In July 2001, 168 countries had become contracting parties to the Convention.¹⁶¹ However by November 2006, 185 countries had ratified CEDAW and these member states are required to report to the CEDAW Committee every four years on progress made in the implementation of CEDAW at National level.¹⁶² It is important to state at this juncture that Nigeria signed the convention on 23 April

¹⁵⁸Holmstrom, Land Karlbrink, L.1998,*United Nations Human Rights Fact Sheets No 1-25*. 6th edition (Lund. Raoul Wallenberg Institute) Pp. 438.

¹⁵⁹Ibid.

¹⁶⁰Olomola O., 2008 “Adoption of Convention On The Elimination Of All Forms Of Discrimination against Women (CEDAW) And Women’s Rights In Nigeria” – A Wild Goose Chase? *African Journal for the Psychological Study of Social Issues* Volume 11 (1) Pp. 92-104.

¹⁶¹Wallace R.M.M., and Dalerisk K., 2001,*International Human rights; Text and Materials*.Second Edition London (Sweet & Maxwell) Pp.20

¹⁶²www.un.org/womenwatch/daw/cedaw/members.htmlretrieved on 10/11/ 2011.

1984 and ratified it without any reservations on 13 June 1985 and so she is under obligation to implement its provisions. There is also the Optional Protocol to the CEDAW which permits individual complaints from citizens of States parties to the Protocol and to CEDAW and also allows the Committee to conduct independent inquiry into grave or systematic violations of the rights under the convention. This Protocol was adopted by the General Assembly of the UN unanimously (without a vote) on 6 October 1999 and the required 10th ratification was obtained on 22 September 2000.¹⁶³

Article 5 of CEDAW mandates States to take steps to modify social and cultural patterns of conduct, to eliminate prejudices based on the idea of inferiority or the superiority of either sex or on stereotyped sex roles. It states:

State parties shall 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.¹⁶⁴

This is a subtle approach to the persistent issue of culture and social orientation in the quest for reproductive health rights of women in Nigeria.

Article 10 (h) obligates state parties to ensure access to specific information relating to healthcare, well – being of families and advice on family planning. It states that:

State parties shall ensure access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning.¹⁶⁵

Article 12 mandates elimination of all forms of discrimination against women in healthcare and family planning matters and also to ensure equality of men and women as follows:

State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.¹⁶⁶ Notwithstanding the provisions of paragraph 1(supra), State parties shall ensure to women appropriate services in connection with

¹⁶³ Olomola O., 2008,*op.cit.*

¹⁶⁴ Article 5 of CEDAW.

¹⁶⁵ Article 10h of CEDAW.

¹⁶⁶ Article 12(1) of CEDAW.

pregnancy, confinement and the post – natal period, granting free service where necessary, as well as adequate nutrition during pregnancy and lactation.¹⁶⁷

Article 16 affirms the right of women to equality in marriage and family relations and this includes the right to enter or refuse to enter into a marriage, the right of women to decide the number and spacing of children. Furthermore the Convention prohibits child marriage and betrothal; and also enjoins states to specify a minimum age of marriage and to make the official registration of all marriages at the marriage registry compulsory. This Article 16 forms a major substratum on which this research is premised thus:

(1) State 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;
- b) 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;
- e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2) The betrothal and the marriage of a child shall have no effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in official registry compulsory.

¹⁶⁷Article 12(2) of CEDAW.

Article 14 is quite significant in that it takes cognizance of the peculiar circumstances of women in rural areas who are mostly the partners in polygynous relationships and imposes an obligation on the State Parties to take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and to take all appropriate measures to ensure the application of the provisions of the Convention to rural women.

It is worthy of note that despite the ratification of CEDAW by the Nigerian government, it is yet to be domesticated. It is important to note that a ratified treaty is not legally enforceable in Nigeria unless the legislature makes law to incorporate it into the law of the country.¹⁶⁸

Even though a number of countries have ratified the Convention on the Elimination of All Forms of Discrimination against women, the goal of universal ratification by the year 2000 was not achieved and there continues to be a large number of reservations to the Convention.¹⁶⁹

Women have the same right as their spouse to family planning services¹⁷⁰ and they also have the right to the highest attainable level of physical and mental health and the right to equal access to health services, including family planning.¹⁷¹

The eleventh to thirteenth Preamble Paragraphs of CEDAW connect national and world development and world peace to equal rights for both men and women. This is premised on the fact that it recognizes the family as the core unit of society.¹⁷² CEDAW does not however assume the position which the Universal Declaration of Human Rights does. This is because UDHR is a general declaration in which human rights of men and women are lumped together unlike CEDAW which is a more definite Convention. CEDAW further employs a more subtle approach by noting that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.

¹⁶⁸Section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria.

¹⁶⁹ Reservations entered to Article 5(a) on "... 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" by the Governments of India (9 July 1993) and Niger (8 October 1999); Objections filed against the reservation of Niger by France (14 November 2000).

¹⁷⁰CEDAW 12:1, 14:2b, 16:1e

¹⁷¹ CEDAW 12, DEVAW 3f

¹⁷² This is also embodied in Article 18 of the *African Charter*, First Preamble Paragraph and Article 16 (3) of the Universal Declaration of Human Rights, and Chapter II of the 1999 Constitution.

2.5.4 United Nations Declaration on the Elimination of Violence against Women –DEVAW 1993

Unlike Treaties, Declarations and Recommendations as well as Guidelines do not have the binding legal force although they are of strong persuasive authority in their respective subjects. They are ‘broadly accepted’ principles of International Law and in many cases reflect the first attempt to codify Customary International Law before its final evolution into a treaty.¹⁷³ Article 1 of this Declaration describes the term ‘violence against women’ as:

any act of gender – based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

This Declaration recalls the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings.¹⁷⁴ The Declaration did not weave any new theories or principles of women’s rights, rather it restated that the effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women and that the Declaration on the Elimination of Violence against Women, would strengthen and complement that process.

Furthermore the Declaration extended the definition of violence against women in Article 2 as follows:

‘Violence against women’ shall be understood to encompass, but not limited to the following:

- a. Physical, sexual and psychological violence occurring in the family, including battering sexual abuses/ of female children in the household, dowry – related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non- spousal violence and violence related to exploitation;
- b. Physical sexual and psychological violence occurring within the general community, including rape, sexual abuse, , sexual harassment and intimidation to work, in educational institutions and elsewhere trafficking in women and forced prostitution;
- c. Physical sexual and psychological violence perpetrated or condoned by the state, where it occurs.¹⁷⁵

The provision of Article 4(a) of the Declaration is worthy of careful note; and it is to the effect that States should condemn violence against women and should not invoke any custom,

¹⁷³ See generally Nwankwo .O, 2005. *Human Rights of Women: A Compilation of International Human Rights Treaties and Instruments*. CIRDDOC Lagos. Pp. 2

¹⁷⁴ First Preambular Paragraph.

¹⁷⁵ Article 2 of United Nations Declaration on the Elimination of Violence against Women –DEVAW 1993.

tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention. This implication of this position is that the respect for the rights of women should supersede cultural or religious considerations which operate to undermine the rights of women.

The Declaration employs the long term approach by imposing an obligation to State Parties to develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions. This is laudable, in circumstances of abuse of right and victimization of women in the public sector.¹⁷⁶

The Declaration also emphasizes the need for the adoption of all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.¹⁷⁷ This is critical in view of the fact that the (2008) third Periodic Country Report on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria by the Federal Ministry of Justice named illiteracy and ignorance as obstacles to full and successful implementation of the Charter.¹⁷⁸

2.5.5 Convention on the Elimination of all forms of Racial Discrimination- CERD-1969

The Convention considers that “all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination”¹⁷⁹

The Convention mandates State Parties to eradicate racial discrimination in order to have equal access to health care and social services. The Committee on the Elimination of Racial

¹⁷⁶Article 4 (f)

¹⁷⁷Article 4 (j)

¹⁷⁸Federal Ministry of Justice 2008, Third Periodic Country Report on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria.

¹⁷⁹Second Preambular Paragraph.

Discrimination in April 2000 adopted a general recommendation which recognized that some forms of racial discrimination have unique and specific impacts on women. The committee resolves to take gender factors into account when examining racial discrimination.¹⁸⁰ The Committee also notes that racial discrimination does not always affect women and men equally or in the same manner. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life. Furthermore the Committee notes also that certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. Racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies women victims of such rape may also be ostracized. Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.¹⁸¹

Even though the main thrust of the Convention is the elimination of racial discrimination, it must not escape notice that it is founded on the Charter of the United Nations and the Universal Declaration of Human Rights which are based on the principles of the dignity and equality inherent in all human beings.¹⁸²

2.5.6 The Convention against Torture and Other Cruel and Inhuman & Degrading Treatment – CAT 1984

This Convention defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

¹⁸⁰CERD, General Recommendation 25, UN GAOR 2000, UN Doc. A/55/18, Annex V Pp. 152.

¹⁸¹ Supra, see also Cook J. Rebecca et al; 2003 Pp.508.

¹⁸²First Preambular Paragraph.

capacity.¹⁸³ The Convention makes provision for the right to be free from torture, cruel, inhuman, and degrading treatment or punishment.¹⁸⁴ Thus, any act of cruelty and healthcare deprivation to women contravenes the provision of this Convention.

Similarly, in the case of *Uzoukwu v. Ezeonu*¹⁸⁵ the Court of Appeal Enugu Division defines “torture” to include mental harassment, as well as physical brutalization, while inhuman treatment characterizes any act “without feeling for the suffering of the other”. Degrading treatment was seen as “the element of lowering the societal status, character, value or position of a person”. From the perspective of HIV/AIDS it means that segregation and stigmatization of person living with HIV/AIDS because of their sero-positive status violates their right to dignity.

2.5.7 The Vienna Declaration and Programme of Action 1993

It was during the United Nations World Conference on Human Rights which was held in Vienna, Austria in 1993 that human rights of women were for first time declared as inalienable, integral and indivisible part of universal human rights. This position calls for full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community¹⁸⁶. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care and social support¹⁸⁷. The conference urged governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child. Soon thereafter, a Special Rapporteur on violence against women was appointed.¹⁸⁸

¹⁸³Article 1, Convention Against Torture.

¹⁸⁴Articles 1, 4 and 16 of CAT.

¹⁸⁵(1991) 6 NWLR Part 200 at 708 Pp. 764-778.

¹⁸⁶CIRDDOC Public Education Series 2002 No.7- Reproductive Health and Rights in Nigeria.Pp. 8.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

2.5.8 The International Conference on Population and Development (ICPD) 1994

When the International Conference on Population and Development was held in Cairo, Egypt in 1994, it adopted a Programme of Action for the next 20 years.¹⁸⁹ This Programme of Action includes a set of specific objectives for all countries on health, status of women and social development.

It provides that reproductive health programmes should include the widest range of services –

Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education, and means to do so.¹⁹⁰

Also the Programme of Action stipulates that individuals should be able to have safe and satisfying sex life without fear of unwanted pregnancies, thus States are to provide effective and affordable family planning methods. Reproductive health implies first, that people are able to have a satisfying and safe sex life, and secondly, that they have the capability to reproduce and thirdly, the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely to pregnancy and childbirth and provide couples with the best chance of having a healthy infant.”¹⁹¹ Another related Action Plan is that the States should adopt ways to eliminate female genital mutilation.¹⁹²

In 1999, five years after Cairo Conference, the United Nations General Assembly convened a special session to review progress since the International Conference on Population and

¹⁸⁹1994 to 2014.

¹⁹⁰Principle 8 of the ICPD Programme of Action.

¹⁹¹Principle 7.2 of the ICPD Programme of Action.

¹⁹²Principle 5.5 of the ICPD Programme of Action.

Development. Governments agreed on a set of key actions to further implement the ICPD Programme of Action and new benchmarks were set to measure progress.¹⁹³

2.5.9 The Beijing Platform of Action 1995

This Declaration is the document of the Fourth World Conference on Women (FWCW) which was held in Beijing, China in 1995. The Beijing Declaration and Platform for Action set as goals gender equality, development and peace and an agenda for women empowerment. The Declaration identified twelve (12) critical areas for priority action to achieve the advancement and empowerment of women including Women and Health, Violence against women, the Girl Child and Human Rights of Women.

A most fundamental statement is contained in Paragraph 14 of the Declaration and is to the effect that Women's rights are human rights and the Participating Governments noted their determination to promote and protect all human rights of women and girls.¹⁹⁴ It further enunciates issues on Health of Women including reproductive rights of women.¹⁹⁵ Paragraph 96 of Beijing Platform of Action states as follows:

the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence.¹⁹⁶

Paragraph 89 of Beijing Platform of Action states that:

Women have the right to the enjoyment of the highest attainable standard of physical and mental health¹⁹⁷

Furthermore, the Platform of Action stated that women's right to the enjoyment of the highest standard of health must be secured throughout the whole life cycle in equality with men.¹⁹⁸

¹⁹³ UN, General Assembly, *Report of the Ad Hoc Committee of the Whole of the Twenty-First Special Session of the General Assembly: Overall Review and Appraisal of the Implementation of the Programme of Action of the International Conference on Population and Development*, A/S-21/5/Add.1 (New York: UN, 1999) 1-23. Cook R. et al 2003, op.cit Pp. 31.

¹⁹⁴ Paragraph 31

¹⁹⁵ Para 94, 95 and 96 of Platform for Action – this document cites Principle 8 of the ICPD Programme of Action in paragraph 223. It also enjoins governments to deal with the health impact of unsafe abortion as a major public health concern.

¹⁹⁶ Paragraph 96 of Beijing Platform for Action.

¹⁹⁷ Paragraph 89 of Beijing Platform for Action.

¹⁹⁸ Paragraph 92 of Beijing Platform for Action.

The Declaration in Paragraph 17 grants explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their fertility which is paramount to their empowerment. It is expressed that in polygynous relationships where a woman has to share a man with one, two or several other women, and probably put her health at risk in order to bear a particular number of children for diverse reasons ranging from the need:

- a) To impress their husband to win his preferential treatment (in other words, compete for his love).
- b) To have a particular sex (in Nigeria, this is usually a male child, given the traditional or cultural importance that is attached to the male child; much to the disadvantage of the female child).
- c) To be entitled to a greater allowance (either in cash or in kind), since in most polygynous relationships, the maintenance allowance which a particular wife is entitled to is usually determined by the number of children she has.
- d) To outdo the other wives in the marriage; as the number of children a particular wife can bear usually adds to her perceived importance and fertility within the marriage.

The Fourth World Conference on Women reaffirms that reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so.¹⁹⁹ In addition to the autonomy granted to couples, the Platform also states that State Parties should prohibit and eliminate any harmful aspect of certain traditional, customary, or modern practices that violate the rights of women.²⁰⁰

Governments are compelled to enact laws to ensure that marriage is only entered into with the free and full consent of the intending spouses. Also State Parties are to strictly enforce the minimum legal age of consent and the minimum age for marriage and possibly raise the age of marriage where necessary.²⁰¹

Paragraph 19 notes that it is essential to design, implement and monitor, with the full participation of women, effective, efficient and mutually reinforcing gender-sensitive policies and programmes, including development policies and programmes, at all levels that will foster the empowerment and advancement of women. One good example of this specie of

¹⁹⁹ Paragraph 223 of Beijing Platform for Action.

²⁰⁰ Paragraph 224 of Beijing Platform for Action.

²⁰¹ Paragraph 274(e) of the Beijing Platform for Action.

policies is the National Gender Policy, 2006 of the Federal Republic of Nigeria. Although the Declaration has not been domesticated in Nigeria, it is however important to draw attention to the fact that the Policy which emanated from the federal Ministry of Women Affairs and Social Development is intended to guide administrative action.

This position gives impetus to the felt need to domesticate the Declaration in Nigeria.

In June 2000, the United Nations General Assembly convened a special session to review the progress made on the implementation of the Platform for Action. After comprehensive appraisal during this meeting, the session recognized that the goals and commitments made in the Platform for Action have not been fully implemented and achieved thus, an agreement was reached for further actions and initiatives at local, national, regional and international levels to accelerate its implementation and to ensure that commitments for gender equality, development and peace are fully realized. The review agreed that although there is now increased attention to sexual and reproductive health, increased knowledge and use of family planning and contraceptive methods as well as increased awareness among men of their responsibility in family planning and contraceptive methods. There is an increased attention to sexually transmitted infections, including human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) among women and girls and methods to protect against such infections. Besides, there is also increased attention to breast-feeding, nutrition, infants and mothers' health. Summarily, the introduction of a gender perspective in health and health related educational and physical activities; there is still a lot to be done.²⁰²

2.6 Conclusion

In spite of its obligations, Nigeria has not modernized its legal framework for the protection of women,²⁰³ due to a number of constraining factors. The first is a federal constitutional arrangement that does not situate issues concerning children and women within the legislative purview of the National Assembly but with state legislatures, thereby making it difficult to establish an adequate legal framework applicable throughout the country. A second factor is the overbearing influence of cultural tradition, which tends to treat women as appendages of men and also fails to recognize the individuality of children beyond seeing them as gifts from God. Poverty, illiteracy and ignorance tend to perpetuate discriminatory practices in Nigeria's traditionally patriarchal society. In these conditions, it has proven difficult for Government

²⁰² CIRDDOC Public Education Series 2002, No.7- *Reproductive Health and Rights in Nigeria* page 11

²⁰³ For example, neither the Constitution nor any of the various States Children and Young Persons Laws (CYPL) is women and girl-child rights specific or even CRC and CEDAW.

to introduce laws, policies and programmes to uphold the rights of women. Consequently, the broad picture is one tokenistic legal and policy provisions that lack uniformity or real impact. Actual practice is driven more by cultural sentiments than by constitutional, legal or international obligations.²⁰⁴

It is evident from the above review of relevant and key national policies and legislation as well as international instruments related to Reproductive Health and Rights in Nigeria, that efforts are being made to realize a comprehensive document on reproductive health. However, a lot more needs to be done by exploiting the windows of opportunity that exist in Nigeria.

From the above examination of the international framework on reproductive health rights, it may safely be concluded that there is an undeniable right to reproductive health. However, in Nigeria, most of the international instruments have only succeeded in reaching the ratification stage without any further efforts to incorporate them into municipal law as required by the Constitution.

The problem then becomes one of domestication and enforcement rather than one of lack of vibrant law. Domestication takes the form of law making thus, it is necessary and enforcement of already existing laws on the area is more apt.

²⁰⁴Ladan M.T. 2006, Philosophy and Concepts of Reproductive Health and Rights: Issues in Jurisprudence and Contemporary Patterns of Violations of Women's Reproductive and Sexual Health Rights in Selected Countries" in Ezeilo J.N (ed.) 2006 *Law, Reproductive Health and Human Rights*.Lagos WACOL & LRRDC at Pp 32.

CHAPTER 3

THE CONCEPT OF POLYGyny AND ITS ATTENDANT CHALLENGES.

“The polygamist’s wife is one of several, sometimes many, women among whom her husband must divide his time. She is sexually deprived, lonely, jealous, given to intrigue, and (particularly if she is the first wife) degraded”²⁰⁵

3.1 Introduction

There is an infringement of women’s rights where polygyny is practised. According to Martin Luther King Jr.²⁰⁶ injustice anywhere is a threat to justice anywhere and whatsoever affects one person directly is always sure to affect all indirectly.²⁰⁷

Reiterating the same fact indirectly, Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal.²⁰⁸ This is in apposite to the discussions on polygyny and its attendant challenges in this chapter.²⁰⁹ Where a practice favours only a fraction of people (and in this case the men) then it becomes discriminatory and morally wrong.

For St. Thomas Aquinas,²¹⁰ an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just and any law that degrades human personality is unjust.²¹¹ Polygyny degrades the very personality of the woman which she may not have control over. This chapter thus elucidates on polygyny and its consequences.

3.2 Definition of Polygyny as distinguished from other marital practices

There are many wrong articulations of the meaning of the word “Polygyny.” This is because it is assumed generally, that once a man has more than a wife he is a polygamist and this seems to be the prevalent idea. However, it is needful to do a proper clarification of the term “polygyny” as it is the main thrust of this chapter. The challenges posed by this practice

²⁰⁵Posner R.A, 1992, *Sex and Reason* cited in von Struensee V.2005, The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for its Prohibition, *Murdoch University Electronic Journal of Law* (2005), retrieved from www.austlii.edu.au/au/journals/MurUEJL/2005/ on 02/11/2011.

²⁰⁶King M. L. (Jr.) 1963, retrieved from <http://www.mlkonline.net/jail.html> on 20/03/2012.

²⁰⁷King M.L, 1995, Letter from Birmingham Jail ‘The Moral Obligation to Obey the Law’ in Feinberg J and Gross H., *Philosophy of Law*, 5th ed., Wadsworth Publishing Company at page 113.

²⁰⁸Feinberg J and Gross H., 1995 *Philosophy of Law*, 5th ed., Wadsworth Publishing Company, Connecticut U.S.A. at Pp. 114.

²⁰⁹Feinberg J and Gross H. 1995 *Op.citat* Pp. 115.

²¹⁰St. Thomas Aquinas as quoted in King, op.cit, at Pp. 116.

²¹¹Ibid.

would be highlighted to lay a foundation for the protection of women in such a relationship and as well as to discourage the practice in Nigeria.

It is quite appropriate at this juncture to submit that polygamy is a wider concept; it encompasses both polygyny and polyandry. Polygamy consists of plural marriages whilst polygyny is a marital practice in which a man has more than one wife simultaneously. There are a number of other multiple relationships apart from polygyny but as stated earlier on in this work, polygyny is the commonest practice. Other forms of marriage include polyamory, polyandry and monogamy. Each of these concepts will now be examined.

3.2.1 Polyandry

Polyandry is when a woman married to many husbands or multiple men. The practise is the direct opposite of Polygamy which is the practice of having more than one wife or husband at one time. It is submitted that polygyny is the form of marriage practiced in Africa not polygamy.

3.2.2 Polygamy

Polygamy includes polygyny, polyandry or group marriage or may just simply mean polygyny.²¹² Often this type of marriage comes as a result of war, plague or disaster. It has been reiterated that there appears to be a trend in modern scholarly work that emphasizes the secular reasons behind decisions to participate in polygyny rather than religious ones. In a study by Essam Fawzy²¹³ which surveyed two hundred (200) Egyptians in four governorates in order to assess their attitudes on family and social laws, when asked for the reasons they used to justify polygyny, men responded with “religion allows it” least often (see Table 2.0 below). The most common reason was that the first wife could not have children, and thus, could not produce heirs. The study also questioned the women in the survey about relationships between co-wives: “[in] the relationship between the first and subsequent wives, a large proportion of the female respondents said that in most cases it was hostile”.²¹⁴ These results seem to imply that polygyny is beginning to be looked upon in terms of its social utility, rather than its religious function.

²¹²Nyansor S., *Polygyny (Polygamy) is already a Practice*, (The Perspective) retrieved from www.theperspective.org/polygyny on 29/11/2011.

²¹³ See generally, Fawzy E., 1988, Study on Egyptian Families Welchman L. ed., *Women's Rights and Islamic Family Law – Perspectives on Reform*, New York & London, Zed Books Ltd.

²¹⁴Ibid.

Table 1.0 Reasons for Justifying polygyny (% of total) (males)

Reasons	Rural	Urban	Total
‘Wife can’t have kids’	12	9.5	21.5%
Wife has chronic illness	8.5	5	13.5%
Husband’s high capabilities	5	2	7%
‘Religion allows it’	8	4.5	12.5%
Wife is irritable & troublesome	2.5	1.5	5%

Source: *Women’s Right and Islamic Family Law*²¹⁵

3.2.3 Polyamory

This is a blanket term to cover many forms of non-monogamy, sometimes it is used to include what is referred to as swinging (a practice where individuals move from one partner to the other). It generally has the properties of honesty (all partners know what is going on, so adultery is excluded) and there is also consent between the partners so coercion is also excluded.

Polyamory was invented because “polygamy” could be too easily construed as Biblical patriarchal polygyny.²¹⁶ Furthermore, once a person steps outside the bounds of monogamy, there is a bewildering buffet of choices, and there is need for a generic term. “Non-monogamy” was not used because it had the sense of being against something, and negative, instead of being in support of something, and being positive. Polyamory has also been described as a multiple – partnered marriage whereby the partners get together out of love.²¹⁷ This form of marriage was sometimes practised in the Polynesian Islands prior to the advent of the missionaries and their stodgy ideas of Christian marriage.²¹⁸ In these areas, the

²¹⁵Fawzy E.,1988, Study on Egyptian Families Welchman L. ed.,*Women’s Rights and Islamic Family Law – Perspectives on Reform*, New York & London, Zed Books Ltd. Pp. 52.

²¹⁶Landman H., retrieved from Howard@polyamory.org on September 14, 2011

²¹⁷Ibid.

²¹⁸Thompson J., *Sex Scrolls – A brief history of marriage*, retrieved on September 14, 2011 from eNaturist.com.

expression of sex and desire was a gift given by the gods to ensure a strong race. Partnering with one person was entirely foreign to this area, as with many areas of the world.²¹⁹

3.2.4 Monogamy

Monogamy is the most natural form of matrimony. In monogamy the spirit of special exclusiveness exists, that is to say, of individual and particular “having”, which is, of course, different from the feeling of the possession of material things. In monogamy both the wife and the husband consider the sentiments, affections and sexual advantages from the other as his or her own and special to him or her.²²⁰

Monogamy is a relationship of a man and a woman or the more extended definition of same sex in a relationship. Critically looking at this type of marriage, it is one man and one woman strictly as same sex is not envisaged in Nigeria.²²¹ Thus, the definition in the case of *Hyde v Hyde*²²² still represents the position of the law in Nigeria. In that case, (*Hyde v Hyde*) marriage was defined as “the voluntary union of life of one man and one woman to the exclusion of all others during the continuance of the marriage.”²²³ Marriage under the Marriage Act²²⁴ is monogamous in nature, being a union of one man and woman to the exclusion of all others. Consequently, a party to a subsisting statutory or customary law marriage has no capacity to enter into another statutory marriage with another person. Failure to adhere to this law is punishable by imprisonment for seven years.²²⁵

3.3 History and crux of Polygyny

The history of polygyny cannot be extricated from its traditional location which ordinarily is the family setting. The concept of family itself refers to different levels of social organization in different cultures. In many, if not most, Euro-American societies, a family consists of a man, his wife and children.²²⁶ This type of family which is also found in other parts of the world is called the nuclear family and is also known as the elementary family.²²⁷

There is also the conjugal family or the family of procreation where one is a father/husband or mother/wife; and natal family, which is sometimes; referred to as the family of orientation

²¹⁹ Ibid.

²²⁰ *The rights of women in Islam*, Part Eleven, polygyny. [Http://www.al-islam.org/rightsofwomeninislam/30.htm](http://www.al-islam.org/rightsofwomeninislam/30.htm) retrieved on 29/11,2011.

²²¹ Bamgbose O.A.

²²² (1866) LR 1 P & D 130 at Pp.133.

²²³ This is per lord Penzance in the celebrated case of *Hyde V Hyde* (1866) Vol. 14 LT 188.

²²⁴ Cap M6, Laws of Federation of Nigeria 2004.

²²⁵ Section 370 Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.

²²⁶ Nwogugu E.I., 1990, *Family Law in Nigeria* Ibadan Heinemann Educational Books.Pp. 1xxvii.

²²⁷ Ibid.

i.e. the family where one was born.²²⁸ An extended family consists of two or more nuclear families.

Families could also be described as monogamous and polygynous reflecting the kind of marriage contracted. Both can lead to extended families but whereas we can get one nuclear family from monogamy; a polygynous family has many (as many as there are wives) nuclear families, each centred on a wife/mother and shares in one father/husband²²⁹. Each of these mother-centred families according to Otite and Ogionwo is often called matricentric or matrifocal family²³⁰. This type of family operates as one and individuals interact with other members of the polygynous family.

It should be noted that the number and kinds of women or men involved in a marriage would dictate the type of family that is formed.

Historically, polygyny has been socially acceptable in the majority of cultures.²³¹ In spite of this subtle acceptance; most human marriages have been monogamous at the onset.²³² The reasons for human beings maintaining unique relationships with one mate have varied, including demographic, economic, and even religious reasons.²³³ Circumstances often resulted in polygyny being advantageous to the maintenance and development of particular societies.²³⁴ However, the most consistently successful form of human sexual relationship, leading to the greatest satisfaction for men and women as well as their offspring and society as a whole, has been monogamy.²³⁵ Where there is polygyny, the world around is that which is dominated by man,²³⁶ this is because historically man is also engaged in breadwinning activities and in hazardous tasks and defence, women tend to outnumber men so a vacuum is somewhat created that is quickly filled by the practice of polygyny.

Polygyny might be a mark of distinction for a man, but polyandry has never been, and could never be, a distinctive mark of respect for a woman. The cause of this difference is that man is in quest of the person of a woman, while the woman is in need of the heart and the love of a man and of his devotion. A man takes charge completely in polygyny thus having the

²²⁸ Otite & Ogionwo 1989, *op.cit* at Pp.89.

²²⁹ *Op.cit* at Pp. 89-90

²³⁰ *Ibid.*

²³¹ Retrieved from <http://www.newworldencyclopedia.org/entry/Polygyny> on 29/11/2011.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ In agrarian societies where it is more economical to have more wives to work on the farm rather than hired labourers.

²³⁵ Welchman L., 1988, *Women's Rights and Islamic Family Law – Perspectives on Reform* at Pp. 51-52

²³⁶ *Ibid* at Pp.53.

woman under his control whether she is emotionally involved in the relationship or not.²³⁷ This is why in polygyny little importance is attached to matters of the heart and emotional feelings. But for a woman the heart and love of a man is the real thing. If she is bereaved of that, she loses all.²³⁸

There are some important differences in polygyny between humans and other animals. Some anthropological studies²³⁹ have revealed that if a classification is forced to be done on human beings according to the mating system, then it would be difficult to describe human beings as “somewhat” polygynous or somewhat monogamous.²⁴⁰ These studies also suggest that the minority of marriages are polygamous, even though the majority of societies permit polygyny.²⁴¹ This dominance of monogamy within human society may be indicative of the dominance of thought over biological drive in human beings, leading to decisions based on psychological, social, economic, and religious enthusiasms, rather than purely biological factors.²⁴²

While polygyny has been a widespread historical occurrence, it has never been a majority experience or complete norm within any society. It was accepted in ancient Hebrew society²⁴³ in classical China²⁴⁴ and in Islam.²⁴⁵ Polygyny has also been accepted in many traditional African societies²⁴⁶ and Polynesian²⁴⁷ cultures.

Polygyny is also a challenge in some regions in the Northern America and Southern America.²⁴⁸ In India, polygyny was practised from ancient times onward,²⁴⁹ though

²³⁷ *The rights of women in Islam*, Part Eleven, polygyny. [Http://www.al-islam.org/rightsofwomeninislam/31.htm](http://www.al-islam.org/rightsofwomeninislam/31.htm) accessed on 29/11/2011

²³⁸ *Op.citat* Pp. 32.

²³⁹ Murdock G.P., 1981 *Atlas of World Cultures*. Pittsburgh, University of Pittsburgh Press. See also White, D.R. Rethinking Polygyny: Co-wives, codes, and cultural systems, 1988 *Current Anthropology* 29.

²⁴⁰ White, D.R. 1988, Rethinking Polygyny: Co-wives, codes, and cultural systems, *Current Anthropology* 29.

²⁴¹ Approximately 80% of societies permit polygyny.

²⁴² Welchman L., 1988, *op.citat* Pp. 52.

²⁴³ *The Holy Bible*, (Authorized King James Version), 1970, Exodus Chapter 21, Verse 10, at Pp. 68, it is stated: "If he takes him 'another wife', her food, her raiment, and her duty of marriage shall be not diminish." It is evident that in the Old Testament that not only is polygyny permitted but also practised, and that regulations for that have been stipulated in the Scriptures.

²⁴⁴ Welchman L., 1988, *op.cit* at Pp.32-33.

²⁴⁵ *Quran* Chapter 4 verse 3.

²⁴⁶ Retrieved from <http://www.newworldencyclopedia.org/entry/Polygyny> on 29/11/2011. It should be noted that Polygyny is embedded in Patriarchy.

²⁴⁷ People from an Island of the central or southern Pacific.

²⁴⁸ Polygyny was practised by the Mormons of the Latter Days Sect in the State of Utah in the United States of America. Furthermore polygyny is gradually becoming a serious challenge the Government of Canada and this they are trying to curb through the instrumentality of the constitution. it is worthy of note that Section 229 of the Criminal Code of Canada had made it an offence and in spite of this fact, the practice is still prevalent hence

historically only kings were polygynous in practice. For example, the Vijanagar Emperor Krishnadevaraya had multiple wives.²⁵⁰

It has been stated that polygyny²⁵¹ asserts not a right to love several others but a right to marry them all. This is because a marriage licence is a state grant; polygamy is a matter of public policy, not just of personal preference, so to hide under the guise of individual choice is ruled out

Wright reiterates that polygyny, unlike gay marriage, has been a common form of marriage since at least biblical times, and probably long before.²⁵² He notes further that a "huge majority" of the human societies for which anthropologists have data have been polygynous. It is important to note that virtually all of those who have been polygamous: that is, one husband, multiple wives or the other way round, polyandry (one wife, many husbands) is vanishingly rare. The real world practice of polygyny seems to flow from men's desire to marry all the women they can have children with. Moreover, in America today the main constituents for polygamous marriage are Mormons.²⁵³

Furthermore, the practice of polygyny in America has always been relegated to those persons in religious groups, Native American Cultures or isolated groups of individuals²⁵⁴. The more notable practitioners were the Mormons. Beginning in the 1830's, Latter Day Saints Church leaders secretly practiced what both they and their detractors called "polygamy," a self-consciously patriarchal marriage system in which men were encouraged to take more than one wife.²⁵⁵ In 1852, after they had relocated to Utah, the church leaders brought polygamy to the public sphere.²⁵⁶ The Mormons' polygamous practices were not accepted by the

the resort to constitutional review by the government, see generally In the Supreme Court of British Columbia, The Constitutional Question Act, R.S.B.C. 1986, c68. And in the Matter of The Canadian of Rights and Freedoms and in the Matter of a Reference by the Lieutenant Governor in Council set out in order in Council NO.533 dated October 22, 2009 concerning the Constitutionality of S.293 of the Criminal Code of Canada, R.S.C., c. C46

²⁴⁹WordIQ Dictionary, *Encyclopedia and Thesaurus* wordIQ.com retrieved on 12/11/2011.

²⁵⁰ Ibid.

²⁵¹ Rauch J. 2006, *One Man, Many Wives, Big Problem; The social consequences of polygamy are bigger than you think* retrieved from <http://reason.com/archives/2006/04/03/one-man-many-wives-big-problem/1> on 29/11/2011.

²⁵² Wright R. 1994, *The Moral Animal: The New Science of Evolutionary Psychology* retrieved from <http://www.amazon.com/exec/obidos/ASIN/reasonmagazineA/> on 29/11/2011.

²⁵³ Posner R.A., 1992, Sex and Reason cited in von Struensee V. 2005, The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for its Prohibition, *Murdoch University Electronic Journal of Law*, retrieved from www.austlii.edu.au/au/journals/MurUEJL/2005/ on 02/11/2011.

²⁵⁴ Gibbs T. and Campbell J., 1999, Practicing Polygyny in Black America: Challenging Definition, Legal and Social Considerations for the African American Community, *Western Journal of Black Studies*, Volume 23. Pp2.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

American Protestant churches and thus between 1852 and 1882 the Mormons were under attack by evangelical Protestants.²⁵⁷ Further attacks on this practice came from the federal government of the United States of America and this led to the enactment of the Edmunds - Tucker Act of 1887.²⁵⁸ This Edmunds-Tucker Act²⁵⁹ proposed by Senator George Edmunds of Vermont was one of a series of bills designed to end the Mormon practice of polygyny.²⁶⁰ The Edmunds-Tucker Act of 1887 was passed in response to the dispute between the United States Congress and the Church of Jesus Christ of Latter-day Saints (LDS Church) regarding polygamy. This Act prohibited the practice of polygamy and punished it with a fine of from \$500 to \$800 and imprisonment of up to five years. It dissolved the corporation of the church and directed the confiscation by the federal government of all church properties valued over a limit of \$50,000. The Act was enforced by the United States marshal and a host of deputies. It is named after its sponsors, Senator George F. Edmunds of Vermont and Congressman John Randolph Tucker of Virginia. The Act was however repealed in 1978.²⁶¹

Many Americans during the 19th century opposed polygamy because of its association with Native American Cultures considered to be primitive and undomesticated. As much as societies and governance are tending toward democracy, it seems as if the drive in other things being equal, when one man marries two women, some other man marries no woman. When one man marries three women, two other men don't marry. When one man marries four women, three other men don't marry. Monogamy gives everyone a shot at marriage based on equal number of men and women. Polygyny, by contrast, is a zero-sum game that skews the marriage market so that some men marry at the expense of others.²⁶²

For the individuals affected, losing the opportunity to marry is a grave, even devastating, deprivation. But the effects are still worse at the social level. Sexual imbalance in the marriage market has no good social consequences and many unpleasant ones. When there is artificial scarcity of women (which is possible) men of means will be at an advantage over and above those ones who are not so fortunate thus a permanent subclass is created in the

²⁵⁷ Ibid.

²⁵⁸ This was when *Edmunds - Tucker Act of 1887* was passed into law in the United States of America.

²⁵⁹ *Edmunds-Tucker Act of 1887*.

²⁶⁰ *Supra*.

²⁶¹ E-legal definitions legal terms dictionary retrieved from US legal.com

<http://definitions.uslegal.com/e/edmunds-tucker-act/> on 12/06/2012.

²⁶² Gibbs T. and Campbell J., 1999*op.citat* Pp.2

society.²⁶³The criticisms of this form of marriage are done from the perspective of it being exploitative to women. To Africans, the institution of polygyny is nothing strange. Polygyny was the acceptable form of marriage in Africa prior to the arrival of the Colonialists and Christianity. In some parts of the Western world most especially, the Great Britain, the institution of monogamy is the order of the day while polygyny is being practiced in a subtle way²⁶⁴. In January of 1996, the New York Times ran an article about more than 100,000 polygamists (in one form or the other) living in Paris, France alone.²⁶⁵ It was also reported that a former Prime Minister of France was a practicing polygynist.²⁶⁶ Americans practice what some call serial polygyny, with their easy divorce and remarriage laws²⁶⁷. In Asia, mistresses have largely replaced concubines, because the men found it better for themselves. Mistresses have much fewer rights than formally recognized concubines, so men copied the people in Europe and Americas so that they would get the great pleasure with little or no responsibility or commitment.²⁶⁸ Accordingly ladies again lost that round in the ‘war of the sexes.

In short, polygamy in one form or another is being practised on every continent. The question now is, “what can be done”? Should we just pretend as if it is not there, or come to terms with it by rejecting the practice entirely and negotiating a way out.

3.3.1 African Customary Law on Polygyny

Before probing further into the origin of polygyny, we need to know the role culture plays in a given society. In order to do this, it is appropriate to look at the explanation given by Ali A. Mazrui²⁶⁹. He states that:

Culture provides lenses of perception, the way of looking at reality, a world view; culture provides standards of evaluation; what is good and what is evil; what is legitimate and what is illegitimate are rooted in criteria provided by culture. Culture conditions motivations; what motivates individuals to act or refrain from acting, what inspires individuals to perform well or to really exert themselves; is partly inspired by cultural factors. Culture is the medium of

²⁶³ *Ibid.*

²⁶⁴ Tyler L. 1995, *Christian Polygyny, Christian Concubines & Jesus: Another look for Christians*, retrieved from Polyboy@delphi.com on 14/05/2011.

²⁶⁵ “Polygamists” New York Times of January 1996.

²⁶⁶ *Ibid.*

²⁶⁷ Tyler L, 1995, *Marriage, Divorce, Remarriage, Concubines, Polygyny & Jesus; Another Look For Christians*. Copyright San Diego, California.

²⁶⁸ *ibid*

²⁶⁹ Mazrui A. A., 1980, *The African Condition*. New York: University of Cambridge. pp. 47-48.

communication; the communicative aspects of culture range from language in the literal sense to physical gestures and modes of dress. Culture provides a basis of stratification, a pecking order to society. Status, rank and class are partly the outcomes of a cultural order.

In the light of the explanation given above, it is submitted that cardinal responsibilities are placed upon culture in creating institutions to address certain needs in society. From our understanding of culture, it is safe to say that one of the key responsibilities of culture is the establishment of social institutions, which will maintain the orderly existence of a society. Secondly, these institutions serve to promote “a system of values” and these values are a set of ideas, concepts, and practices to which strong sentiments are attached.²⁷⁰

Furthermore on Customary law, it has been stated that a marriage performed under traditional rites is potentially polygynous though not necessarily so.²⁷¹ Thus Ibidapo-Obe in his book on African Law²⁷² which is a collection of articles on the jurisprudence of African law and the contemporary legal systems touched virtually every aspect of African culture and there is also a good attempt to synthesise African law with international human rights law. He noted further that there is no compulsion to marry more than one wife, even though the need for manpower in a basically agrarian society made polygyny attractive and inevitable.²⁷³

In view of the above, it is easy to understand how polygyny became the ideal institution of marriage in Africa. However, the rationale given for the practice of polygyny in Africa is provided by two schools of thought that is the Social and the Economic. Proponents of the social school explained that at the time polygyny was established as the legal form of marriage, the ratio of women to men in Africa was about 10 to 1. As a result, those who were responsible for establishing social institution who are the elders, including women, decided to come up with a marriage system that would address this problem. Their aim at that time was to provide a balance and equal distribution of social, material, security and economic benefits to both women and men.²⁷⁴ Furthermore, these social architects or elders felt that if the problem regarding the needs of unmarried women were not addressed, what would eventually happen was the snatching away of other women’s husbands, or the unmarried women would, for example, engage in prostitution since as human beings, their sexual, social, psychological and economic needs had to be taken care of.

²⁷⁰Nyanseor S; *op.cit*

²⁷¹Ibidapo-Obe A. 2005, *op.cit* at Pp. 158

²⁷²Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

On the other hand, the proponents of the Economic School reasoned that polygyny was established to address the prevailing economic issues of the period.²⁷⁵ They explained that during the pre-colonial era in Africa, the economic activities were centred on subsistence agriculture. This type of farming requires a lot of manpower.²⁷⁶ In order to establish the mode of production that was going to be beneficial to the entire society, the polygynous form of marriage was preferred. Since this form of marriage emphasized collective responsibilities, communal ownership of farms, wealth and the economic benefit of the extended family, this marital practice was encouraged. The major concept of both the social and the economic schools was centred on the male marrying more than one wife depending on the amount of dowry (bridal price) he or his family could afford. In the traditional African society where this arrangement was prevalent, a man who had four wives was obliged to provide farm for each of his wives.²⁷⁷ The children and the relatives of each wife were required to work and attend to the operation and maintenance of the farm. The husband on the other hand, was responsible in providing periodic assistance as well as supervision to each farm.²⁷⁸

The resources derived from these farms were pooled together to provide material and economic benefits for the entire extended family. With this type of arrangement all members of the extended family were better cared for.

Polygyny among African societies has been deeply entrenched for three basic reasons most often indicated by anthropologists²⁷⁹ as follows:

- i. as a means of obtaining and demonstrating social status;
- ii. as the main source of securing an appropriate labour force;
- iii. as a sexual necessity since intercourse during pregnancy and post partum is frequently forbidden by customs and taboos.

It is also important to note that scattered explanations indicate male infanticide, higher male infant and child mortality, higher male mortality due to warfare, the importation of females as a conquest trophy, as factors accounting for practicing polygyny. All these factors are however related to heavy distortions in the sex ratio and should be considered as abnormal

²⁷⁵Nyansor S; *op.cit.* See also Radcliffe – Brown A. R. and Forde D. (ed.) 1960, *African System of Kinship and Marriage*, London, Oxford University Press, pp.89.

²⁷⁶ Radcliffe – Brown A. R. and Forde D. 1960, *op.cit* at pp 90.

²⁷⁷ Otite O. & Ogionwo W. 1989, *op.cit* at pp 86.

²⁷⁸ *Ibid.*

²⁷⁹ Nyansor S; *op.cit.* See generally Radcliffe – Brown A. R. and Forde D 1960, *op.cit* at pp 89.

divergences on a historical trend with more or less a balanced sex ratio.²⁸⁰ In agrarian traditional societies like Nigeria, the labour factor is a critical factor for polygyny. African societies predominantly based on a subsistence type of economy have been self sufficient and reliant upon the family unit as the major institution in the social structure. Naturally, polygyny is a major means to evolve a large family, since the latter expand only through marriage and reproduction.

Polygyny offers a variety of intellectual, emotional and physical contacts through which needs left unsatisfied by one spouse may be met by others²⁸¹. This practice has several other advantages; it offers the economic opportunities of increased division of labour within the family and of per capita reduction of expenses like homes, cars and appliances. In the event of the death of one of the wives, there is emotional and financial security for the children of the deceased than can be obtained from a monogamous setting.

In any form it is practised, polygamy (i.e. polygyny and polyandry) is the only lifestyle that can provide choices that are regarded as unavailable in any other relationship format. One of the so-called benefits of polygyny is its potential for child rearing. Studies of the Israeli Kibbutzim show that it is really psychologically healthier for children to have multiple adult role models.²⁸² And as Heinlein²⁸³ noted, in an extended family it is nearly impossible for a child to become an orphan. In modern American society,²⁸⁴ where the support systems of extended family, neighbourhood, and community are no longer generally available and quality childcare is in short supply and often unaffordable to a single parent, multiple parenting inside a group marriage could become an increasingly attractive option. In a Libertarian society,²⁸⁵ where parents would no longer have to surrender their children to monolithic school systems, the children, instead of being absorbed into large impersonal social institutions, could grow up in smaller, more intimate groupings.

However, if the nuclear family represents the last stronghold of patriarchal values, the alternative value to polyfidelity (i.e. polygamous marriage lifestyle in which all partners are of primary value to all other partners and the sexual fidelity of each is to the group) may be the solution from the alienation and social despair created by the current way of life in

²⁸⁰Ibid at Pp. 90.

²⁸¹Ibid.

²⁸² Paul L. G. 1973, The Ethics of Polygamy Reason.com retrieved on 16/02/2012.

²⁸³ Heinlein R; The Moon is a harsh mistress us.macmillan.com/themoonisaharshmistress/ accessed 16/02/2012.

²⁸⁴Ibid.

²⁸⁵ Ibid.

American societies.²⁸⁶ As noted earlier on, polygyny offers greater scope for value-achievement than does monogamy. A polygynous person may be more selective, more discriminating, than any monogamist. A polygynist is free to choose relationship among partners and select the ones who best satisfy his specific needs – not frozen into an emotional/intellectual/sexual *status quo* wherein his freedom to select is delimited by his sole spouse's range of interests and capabilities.

3.4 Polygyny within the contexts of Religion

3.4.1 Polygyny and Christianity

Usually, the control of sexual response has been a very significant issue of concern for many religious organizations at different periods and in diverse cultural settings.²⁸⁷ The extent to which any religious group will legislate to control sexual behaviour and even marriage and marital unions depends largely on whether the religious group is sectarian and consequently totally unacceptable in its response to the prevalent societal values or whether the religious group has become established and therefore has become globally accepted.²⁸⁸ This pivotal distinction determines not only the perspectives on sexuality but also the response of the religious group to the society in which it finds itself.²⁸⁹

Although evangelical and Pentecostal groups have commonly been conservative in their approach to sexual behaviour and have sought to control the manner and process by which sexual rights could be exercised, a few religious groups have broken away from the traditional norm.²⁹⁰ For example, the Oneida community of New York in the mid-nineteenth Century practised free love and made available all women and wives freely to their male members.²⁹¹ Members trusted that they belonged to a single family, and monogamy was considered as exerting selfish control and ownership over women.²⁹² Consequently, every man was married to every woman in the group and exclusive relationship was not allowed. Likewise, the Mormons practised a form of polygamy that encouraged mating to populate

²⁸⁶Nearing R, 1989, *The New Faithful: A Polyfidelity Primer* book, www.worldcat.org/title/new-faithful/accessed 16/02/2012.

²⁸⁷Ojo M.O, 2005, *Understanding Human Sexuality Seminar Series 4-Religion and Sexuality: Individuality, Choice and Sexual Rights in Nigerian Christianity*, Nigeria, Africa Regional Sexuality Resource Centre (ARSRC).Pp2.

²⁸⁸Op.cit at Pp.4

²⁸⁹Op.cit.

²⁹⁰Op.cit.

²⁹¹Lawrence F., 1984, *Religion and Sexuality: The Shakers, the Mormons, and the Oneida Community*, Urbana and Chicago, University of Illinois Press at Pp. 4.

the world with godly children.²⁹³ Likewise in Nigeria in the early 1950s to 1980s, one Olufunmilayo Immanuel Odumosu, the Jesus of Oyingbo, founder of the Universal College of Regeneration (UCR) with a large commune in Maryland, Lagos²⁹⁴ possessed sexual privileges over any female member or the wives of his converts. Women who submitted themselves to Odumosu and even had children for him regarded such as part of their religious obligations to the group.²⁹⁵ Another example is the case of Reverend King who was alleged to have committed several atrocities with women in his so-called church.²⁹⁶ King was sentenced to death by hanging, in January 2007, by Hon. Justice Joseph Oyewole of the Lagos High Court, Ikeja, for the murder of one Ann UzorEzeugo, a member of King's church.²⁹⁷ An attempt by Rev. ChukwuemekaEzeugo (popularly known as Rev. King) to challenge the judgement of an Ikeja High Court, which sentenced him to death by hanging for murder, has been dismissed by the Court of Appeal.²⁹⁸

What is evidently clear about the aforementioned relationships between the leader and their faithful is the practice of polygyny in whatever form whether it is under influence or consensual. Thus, religion has neither curbed nor reduced the rate at which polygyny is practised; it therefore shows the tenacity of the practice in Nigeria.

From the Biblical point of view, polygyny is a red-hot issue that divides, excites, enrages and outrages Christians on every continent today. Although monogamy is implicit in the story of Adam and Eve, since God created only one wife for Adam, however, polygyny is adopted from the time of Lamech²⁹⁹ and a number of individuals did practice it. Polygyny continues to the present day among the Jews, Moslem, Hindu, Buddhists, Asian, Oriental, and African countries. Polygyny was not definitely forbidden among the Jews till the time of R.Gershom,³⁰⁰ and then at first only for France and Germany. In Spain, Italy, and the East it persisted for some time longer, as it does still among the Jews in Islamic countries,³⁰¹

²⁹²Op.cit.

²⁹³Ojo M.O, 2005 op.citat Pp. 4.

²⁹⁴“How JesuOyingbo’s children dislodged their father’s disciples.” National Mirror Newspaper online edition of 28 February, 2012 Retrieved from nationalmirronline.net/features/6746.html.on 28/02/2012.

²⁹⁵Ibid.

²⁹⁶Reverend King’s appeal suffers set back. dailytimes.com.ngaccessed on 23/2/2012.

²⁹⁷Ibid.

²⁹⁸Ibid.

²⁹⁹1970,The Holy Bible, (Authorized King James Version).Genesis 4: 19.

³⁰⁰A.D 1000.

³⁰¹Hastings Dictionary of the Bible 1852-1922, www.archives.org Cornell University Libraries p. 583ff.

Eugene Nida's³⁰² book Customs and Cultures documents the practice of polygyny by Christians in non Western countries, and how it is still practised in China, South East Asia, India, Africa and parts of South America. He points out that when polygamists become Christians they are told of their limitations in church offices and are asked not to take additional wives because it makes the western Christians to stumble.³⁰³ However, in Old Testament times, a Jewish polygynist's marriage was fully recognized as marriage and was protected by the law and the elders.

Legally speaking, a woman who marries under this system was already aware of the fact that she is entering into a potentially polygynous relationship. This brings some sanity into the home as the wife may not be disappointed when the husband takes more wives. Traditionally, this has a lot to do with the culture of the people involved and without prejudice to parties marrying from two different backgrounds. Polygyny is an offshoot of patriarchy which is a practice where males dominate. African traditional religion supports polygyny whilst the European society supports what can be termed as "polygyny at will" as the rate of divorce is very high and can be obtained very quickly.³⁰⁴

In examining the issues raised in the several discussions in support of the practice, the disadvantages far outweigh the advantages. For instance, conflict is always inevitable among the families because a large number of children and wives are competing for a small and finite amount of resources.

3.4.2 Polygyny and Islam

The Islamic position is very clear on this issue. The religion sanctions and recognises polygyny but limits it to a certain number, that is, the man should not marry more than four wives at a time and he should take only the number of wives he can love and cater for equally.³⁰⁵ Polygyny is widely practised amongst the Hausas of northern Nigeria. A man who wants to marry more than one woman is supposed to do so with the knowledge that he is responsible for treating his wives with kindness and dignity as well as for providing for their material needs. It is not, as many imagine, a game or some type of fantasy life to be married

³⁰² America Bible Society, 1954, Harper & Brothers, New York, www.americanbible.org retrieved on 22/12/2011.

³⁰³ *Ibid.*

³⁰⁴ It is a known fact that divorce laws in the West are not as stringent as what is obtainable in Nigeria.

³⁰⁵ *Quran* Chapter 4 verse 3.

to more than one woman. Furthermore, women who do not wish to enter into such marriages are free to accept or reject them.³⁰⁶

Marriage is a religious sacrament in Islam. It is recommended for every Muslim, and there are multiple examples in the Quran and Sunna that demonstrate the Prophet's support of the institution.³⁰⁷ Islamic marriage law interprets matrimony in a specific, legalistic way.³⁰⁸ In order to better understand how the issue came to be constructed this way, scholars have studied marriage in pre-Islamic societies.³⁰⁹ In the pre-Islamic Arab societies, polygyny was a common practice.³¹⁰ There was no limit to the number of wives allowed at any one time. The actual quality of life for women in pre-Islamic times is not easy to gauge and probably well before the coming of the Prophet.³¹¹ During Prophet Mohammed's time, he inculcated certain rights specifically for women into the religion, which were not there, right before the time of the Prophet.³¹²

The rights granted to women by the Prophet in the Quran are purely legal³¹³. This is the case with polygyny. The practice is mentioned only once explicitly in the Quran:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.³¹⁴

While this is the only verse that explicitly refers to polygyny, many jurists use a second verse to interpret its meaning. The second verse is found later in the same Sura:

Ye are never able to be fair and just as between women, even if it is your ardent desire: But turn not away (from a woman) altogether so as to leave her (as it were) hanging (in the air).³¹⁵

³⁰⁶ *Ibid.*

³⁰⁷ The Prophet is reported to have said: "Marriage is of my ways," as well as, "When a man has married, he has completed one half of his religion" (*Faruqi* 56). He was even as explicit as to say, "Whoever is able to marry, should marry" (*Faruqi* 56).

³⁰⁸ It follows strictly the injunctions of the Holy Quran.

³⁰⁹ Jones, R. 2006 "Polygyny in Islam," *Macalester Islam Journal*: Vol. 1: Issue 1, Article 11 page 76. Retrieved 16/8/2011 from: <http://digitalcommons.macalester.edu/islam/vol1/iss1/11>.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² The number of wives to be taken by any is limited to four at any particular time. *Quran* 4:3

³¹³ It is an injunction of the Holy Quran which must be adhered to strictly.

³¹⁴ *Ali: Sura 4, verse .3*

³¹⁵ *Ali: Sura 4, verse 129.*

From these two verses, some conclusions can be drawn. First, polygyny as an institution is allowed by the Quran. The first verse permits men to marry more than one wife. Secondly, what the other verses really do is to give permission for the practice of limited polygyny as it were³¹⁶ but they do not necessarily encourage it. Also, many restrictions are put on the practice of polygyny.³¹⁷ Thirdly, the initial allowance to have multiple wives was originally intended to protect widows and orphans.³¹⁸ Accordingly, the practice was not for an individual's pleasure or indulgence.³¹⁹ In Islamic societies, this treatment entails quite a bit: "this implies that he should be able to give each of his wives an equal share of food, clothing, material comforts and whatever kind of treatment he can provide. It also implies that he should not be partial to one wife at the expense of another."³²⁰ The justification for polygyny seems also to protect barren or sick women who may not be able to give birth to children.³²¹

3.5 Polygyny as a specie of Patriarchy

Although polygyny as it is being practised often perpetuates and strengthens patriarchy within the family, its sociological and religious origins in some contexts reveal that it was designed to provide a protective or remedial function for women and families. Within underprivileged societies, for instance, polygyny was, and is still thought by some, to serve a protective function for poor women. A Visiting Mission that was embarked upon to British Trust Territories in West Africa in 1950 identified polygyny as a form of social security for women within their economic conditions at that time.³²² Similarly, within *Talmudic* law of Israel, a man was believed to have a protective responsibility to his deceased brother's wife.³²³ This is similar to levirate marriage under customary law in Nigeria where direct brother or other male family members are allowed to take the wife of the deceased to

³¹⁶ *Holy Quran* Chapter 4 verse 129.

³¹⁷ Amongst which is the injunction that if the man feels he may not be able to do justice between his wives; he should abstain from taking other wives.

³¹⁸ *Ali: Sura 4, verse 3.*

³¹⁹ Jones, R. 2006 "Polygyny in Islam," *Macalester Islam Journal*: Vol. 1: Issue 1, Article 11. page 76 Retrieved from <http://digitalcommons.macalester.edu/islam/vol1/iss1/11>.

³²⁰ *Ibid.*

³²¹ For example: If the wife is chronically ill, or is barren, or for some other reasons it is not desirable for the couple to live as husband and wife.

³²² Knop K, 2002, *Diversity and Self-Determination in International Law*, United Kingdom Cambridge University Press, Page 339.

³²³ Sivan E. 2000, (under the supervision of Prof. Hillel Shuval), "Study on the Lack of Equality of Women in Israel In Matters of Personal Status-Marriage and Divorce-With proposals on how to achieve freedom of religion and equal rights for women in Israel" Joint Project of the Hebrew University of Jerusalem and Hemdat – Council for Freedom of Science, Religion and Culture in Israel: Jerusalem, Israel, Pp.13.

continue the lineage of the deceased.³²⁴ Some commentators have noted, however, that the practice of *yibum*³²⁵ under Israel's marriage customs was the product of a patriarchal, polygynous society in which male dynasty continuity was central.³²⁶ Today, *yibum* is prohibited according to the Chief Rabbinate of the *Herem De Yerushalayim*.³²⁷

It should be noted that the practice of polygyny has a lot to do with peoples' culture and values. Thus, the practice of polygyny transcends colour or race but it is an offshoot of patriarchy common in African societies.³²⁸ It is thus not a peculiarity of the African man as polygyny can be seen in most religions of the world and it is a way of life borne out of necessity for some people. It is notable that the polygyny is much more widely practiced than any other plural marriages e.g. polyandry³²⁹

Parvez, one of the leading reformists' commentators on the Quran, noted that the revelations regarding polygyny came after the Battle of Uhud, in which over ten percent of the Muslim male population was killed, leaving many vulnerable widows and orphans.³³⁰ Likewise, polygyny was occasionally practised with Protestant religious approval following the thirty years' war in 1648.³³¹ This was because of the loss of a substantial segment of the male population, theologians allowed men to take second wives during the ten-year period following the war. Corresponding to Islamic requirements of fair treatment of wives, Protestant men during this time were instructed to "observe seemly behaviour, to make proper provisions for both wives in order to avoid ill feeling between them."³³² In contrast to the protective origins,³³³ the advancement of polygyny in Mormon teachings initially was premised on patriarchal stereotypes of men and women. Notably in his July 12, 1843

³²⁴ See Aderibigbe M.R. 2004, *Family Law in Nigeria (A Friendly Guide to Rights and Obligations in Marriage and the Family)* Godas Publishing Consult, Lagos. Page 21-22. However this practice has been criticized as being repugnant to natural justice equity and good conscience.

³²⁵ This is a levirate marriage of a widow to her deceased husband's brother in Israel.

³²⁶ Sivan E 2000, (under the supervision of Prof. Hillel Shuval), "Study on the Lack of Equality of Women in Israel In Matters of Personal Status-Marriage and Divorce-With proposals on how to achieve freedom of religion and equal rights for women in Israel"(Joint Project of the Hebrew University of Jerusalem and Hemdat – Council for Freedom of Science, Religion and Culture in Israel: Jerusalem, Israel) page 14.

³²⁷ Ibid at Pp.14-15.

³²⁸ Thompson J. 2009, *Sex Scrolls – A brief history of marriage*, retrieved on September 14, 2011 from Naturist.com.

³²⁹ Schwimmer B. 2011, Department of Anthropology, University of Manitoba, retrieved from <http://www.umanitoba.ca/anthropology/tutor/marriage/polygamy.html> on 23/11/2011.

³³⁰ Khaliq U.1995, "Beyond the Veil?: An Analysis of the Provisions of the Women 's Convention in the Law as Stipulated in Shari'ah," 2 *Buff Journal of International Law*, 1 at page 31.

³³¹ Altman I. & Ginat J., 1996, *Polygamous Families in Contemporary Society*, University of Cambridge Press, Pp. 42.

³³² Ibid at page 42.

³³³ i.e. The permission to practice polygyny under in Islam after the Battle of Uhud and Protestant religious approval following the thirty years' war in 1648.

revelation that solidified the place of plural marriage within Mormon theology until the 1890s, Joseph Smith noted that:

Under the “law of priesthood” a man “cannot commit adultery with that that belongeth to him and to no one else. And if he has ten virgins given unto him by this law, he cannot commit adultery, for they belong to him... If any man have a wife... and he teaches unto her the law of my priesthood, as pertaining to these things, then shall she believe and administer unto him, or she shall be destroyed,” saith the Lord your God.”³³⁴

Polygyny in recent times has been more patriarchal in form.³³⁵ Thus, although the practice was originally conceived in some contexts as a harmless means of protection, it has since taken on oppressive characteristics in many circumstances by encouraging and reinforcing a patriarchal conception of family life.³³⁶ In analyzing this type of patriarchy, Janet Rifkin³³⁷ describes patriarchy as:

any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive.”³³⁸

Polygyny tends to reinforce such gender stereotypes by giving husbands the power to interrupt marital unions where they feel that one wife is not adequately fulfilling their reproductive and general needs.³³⁹

³³⁴General Recommendation 21, Equality of rights between men and women (Article 3), UN HRCOR, 68th Session, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at paragraph. 24. For a discussion of the legal trend toward marital equality and the regulation of marriage generally, see Gautier A., 2005, “Legal Regulation of Marital Relations: An Historical and Comparative Approach,” 19 *International Journal of Law, Policy and the Family* 47.

³³⁵Cook J. C. & Kelly M.K.,(eds.)2006, *Polygyny and Canada’s Obligations under International Human Rights Law*(Report Presented Family, Children and Youth Section Department of Justice Canada, Page 9.

³³⁶ Ibid.

³³⁷ Rifkin J, 1980, Toward a Theory of Law and Patriarchy, 3 *Harvard Women’s Law Journal*, 83.

³³⁸ Ibid.

³³⁹ Cook J. C. & Kelly M.K.,(eds.) 2006, op.cit at page 11.

3.6 Challenges of Polygyny

It has been stated that polygyny violates the dignity of women³⁴⁰. It is also regarded as unacceptable mode of discrimination against women and as a result it should be abolished.³⁴¹

In emphasizing the fact that polygyny hampers women's rights to equality and dignity within marriage, international declarations and convention like CEDAW has noted it.³⁴²

Accordingly, polygyny contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.³⁴³ The General Committee of CEDAW on Marriage and Family Relations note with concern that some States parties, whose Constitutions like Nigeria³⁴⁴ guarantee equal rights permit polygamous marriage in accordance with personal or customary law.

3.6.1 Gender Stereotyping

In juxtaposing the issues raised earlier in this chapter, the main aim is the protection of women's rights particularly their reproductive rights, thus it is needful to highlight international concern for these rights. The idea of reproductive rights and freedoms cannot be considered apart from the exercise of other basic human rights. Reproductive freedom lies at the core of individual self-determination. The principle of "voluntary motherhood" was central to the movement for female emancipation among nineteenth-century liberal feminists, whereas birth control for socialist and radical feminists was more often a means to sexual and social liberation.³⁴⁵

One of the earliest international documents on family planning which is the 1966 Declaration on Population by World Leaders reflected the liberal tradition by defining family planning as a means of "assuring greater opportunity to each person" and of "free[ing] man to attain his individual dignity and reach his full potential."³⁴⁶ The use of word 'man' in the

³⁴⁰ *General Comment No. 28: Equality of rights between men and women (Article 3)*, UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at Paragraph 24. See also Gautier A., 2005 *Legal Regulation of Marital Relations: An Historical and Comparative Approach* 19 *International Journal of Law, Policy and the Family*. Pp.47.

³⁴¹ Gautier A.2005, "Legal Regulation of Marital Relations: An Historical and Comparative Approach" 19 *International Journal of Law, Policy and the Family* 47.

³⁴² *Convention on the Elimination of All forms of Discrimination against women (CEDAW) General Recommendation No. 21 on Equality in Marriage and Family Relations*.

³⁴³ Cook J.C& Kelly M.K (eds.) 2006 op.citat Pp.11.

³⁴⁴ Section 42 of the 1999 Constitution of the Federal Republic of Nigeria. Cap C23. Laws of the Federation of Nigeria 2004.

³⁴⁵ Dixon-Mueller R, 1993, *Population Policy & Women's Rights: Transforming Reproductive Choice*, Westport, London, Praeger Publishers at Pp 5.

³⁴⁶ United Nations 1966 Declaration on Population Document 1975:9.

aforementioned document typically eliminates woman and it is a form of gender inequality. Many features of family life pertinent to polygyny vividly reflect the underlying major determinant of the family unit – the demand for labour. For example, the high preference for male children results from the need to expand the family and enhance its labour force. In the patriarchal societies, girls are regarded as liabilities because as soon as they marry (and this is usually very early) they move into their husbands homes, while the marriage of sons will enhance the family by bringing in wives. Thus, marriage or acquisition of wives is synonymous with acquiring labour. In such situations, a woman is not entitled to her individuality; rather she is forever made to be dependent all her life. In the early stages of her life, she is supposed to be domesticated and docile and accept whoever she is given in marriage to and in the later stages of her life as a married woman under the ‘lock and key’ of a man who is her husband, thus, completely losing her individuality to the relationship.

It is quite difficult for a Nigerian woman to assert her right in a polygynous relationship because doing so will portray her in a bad light in the society. Thus, if she insists on her right, she becomes an outcast and may lose her cultural identity. Among recent explanations for the subordination of women in society is the women’s empowerment model. It is argued that women are disempowered economically, politically, socially and so on. Women are deprived of decision making positions both in the private realm of the family and the public sector. Others make decisions that directly or indirectly affect their lives on daily basis.³⁴⁷ Increasingly, it is being realized that focusing on women in isolation has not yielded much result hence, the need to focus on gender relations and the empowerment of women. The goal of gender analysis is the emancipation of women from their subordination and their achievement of equality, equity and empowerment.³⁴⁸

The issue of polygyny is not helping matters in the Nigerian society; it is a cultural issue and it is pretty difficult to do away with traditions generally. Furthermore, customary law has been described as a mirror of accepted usage.³⁴⁹ Instead of the complete rejection of polygyny, a better option would be the protection of women already in polygyny and dissuading others from getting into it. Whilst the majority of the literature on the subject clearly uphold that the structure of polygynous unions are inherently patriarchal as it

³⁴⁷Longwe, S.H., 2002, “Assessment of the gender orientation of NEPAD” *Journal of International Women’s Studies* Vol. 9 No 3.Pp. 23

³⁴⁸ Moser, C.O.N., 1998, *Gender Planning and Development: Theory, Practice and Training*. London, Routledge. Pp.12.

³⁴⁹Per Bairamian, FJ in *Owonyin v. Omotosho*(1961) 2 S.C.N.L.R.57.

undermines women's reproductive autonomy and is linked to lower autonomy, mental abuse and economic hardship; some women, however, continue to advocate for the cultural and religious importance of this practice, as well as the cultural affinity these unions afford them. Polygyny on its own may seem not to be bad; but what it breeds, its attendant consequences and the danger in it for women. Polygyny becomes a clog when a man is unable to sexually satisfy all the wives. The historical justification for it can no longer hold with civilization and mechanized farming.

3.6.2 Population Increase

The incidence of polygyny in the second half of the 20th century in Africa, a continent with high rates of population growth, is relatively extensive. It varies from about 37 percent in Guinea, against an average of about 20 percent in West Africa as a whole, and to about 3 percent in North African countries like Egypt, Libya, and Algeria.³⁵⁰ The demographic consequences of polygyny, although usually practiced by a fraction of a population, are more pervasive, since they affect the proportion of married females and their age at first marriage in the whole community. Accordingly, a transition from polygynous to monogamous type of unions may have significant effects upon the nuptial pattern of a country and in turn upon the rate of its population increase.³⁵¹

Polygyny among African societies has been practised for centuries. Although the institution is undergoing profound changes under the influence of economic development, it is still perceived as a natural form of union. Even educated Nigerians, who themselves live in a monogamous type of marriage, perceive polygyny as natural, despite the fact that probably never in the past could polygyny be a universal form of union for all male members of a community.³⁵²

Polygyny is the ambition of the tribesmen, an ambition most frequently achieved by aristocrats and wealthy elderly commoners. The king is expected to take more wives than any of his subjects.³⁵³ The more the wives and thus the more children a man is able to attain, the stronger is his economic and social position. The number of wives and children is regarded as a man's greatest asset, and the main indicator of his wealth and status, hence it is a matter of

³⁵⁰Economic Commission for Africa, (1975), *Demographic Handbook for Africa*, Geneva, United Nations at Pp. 86.

³⁵¹Chojnacka H, 1978, *Polygyny and the rate of Population Growth*, University of Lagos Research Bulletin No 78/05.

³⁵²Ibid.

³⁵³Ibid.

pride and honour. This is probably also the major factor of economic and social stratification since it is impossible – in a more or less sex balanced society – for a man to practise polygyny.³⁵⁴ Historically as the polygamous family pattern evolved, men who have been able to acquire more wives found themselves in a more advantageous position, and once in such a position, they were expected to take more wives than men of lower status.

Over-population is the resultant consequence of polygyny and consequently having more children than what one can cater for. This is followed by the resultant social problem. Private and public facilities and resources are overstretched and are not able to deal with the explosive increase in the number of births in Nigeria. It might not be surprising to discover that a good number of children in crime and drugs, delinquency, cultism, trafficking of girls for prostitution and a host of others are the finished products of polygyny. Among many other social issues, keeping them in school is next to impossible as good schools are beyond the reach of the common man.

3.6.3 Health risks

The medical conception of health is based mainly on the ‘germ theory’ of disease. That is health is the absence of any disease in the body and legally speaking it should include right to health, and reproductive rights that is the ability of an individual to be able to control his/her body.

In Nigerian society, a married man does not need the permission of his wife to bring in a second wife if he so wishes.³⁵⁵ Thus, in this era of HIV/AIDS, such nonchalant attitude towards family life/marriage constitutes great health risks to women. Furthermore, a recent survey in Africa, including Nigeria shows that greater social and economic inequality between men and women directly correlated to the HIV risk faced by African/Nigerian women.³⁵⁶

Also, Engels submits that the family as an institution is often the location for the oppression and exploitation of women.³⁵⁷ This is related to the situation of women in Nigeria. In Nigeria, the family (the institution of marriage – role of house-wife, etc.), constitutes a major vehicle for the perpetuation of the oppression of women which invariably has negative impact on

³⁵⁴Ibid.

³⁵⁵Okojie, C.G.1960, *Ishan Native Laws and Customs*, Lagos, John Okwessa Publishers at Pp. 12.

³⁵⁶Obinor, F., 2007, Women’s Rights Key to Africa’s AIDS Crisis, *The Guardian Newspaper*, May 28, 2007, Pp.11.

³⁵⁷Engels, F., 1979, *The Origin of the Family, Private Property and the State*, Perking, Foreign Language Press at Pp. 12.

their health.³⁵⁸ But it is essential to know that the family is only one aspect of the entire social formation that presents an enabling environment for the oppression and exploitation of women. Adolescent pregnancies are on the increase because of lack of access to abortion,³⁵⁹ also the rise in the level of death recorded among the youth on the basis of unsafe abortion is just unpardonable.

The disturbing rise in maternal mortality and morbidity rate,³⁶⁰ Vesico Vaginal Fistula (VVF) incidences as a result of child pregnancies and early marriages are indirect consequences of polygyny. The point here is that physiologically, women are receptors and though it is possible for a man not to show signs or symptoms of any infection for a long time; women quickly suffer the aftermath of a “careless” affair.

The maxim of maintaining only one partner in order to prevent HIV/AIDS is not compatible with the practice of polygyny. Thus, a wife is at risk of contracting infection from all the sexual partners of the husband and vice versa.

In a study³⁶¹ which examines the risk factors for the prevalence of Herpes Simplex V2 seropositivity among women in a polygynous setting in rural Gambia, the findings suggest that polygyny is based on concurrent multiple partners, a man and his wives. When compared with monogamous marriages, each polygynous marriage set includes more people who might introduce HSV2 and, once introduced, more people who are exposed. The implications for behaviour-change programmes aiming to reduce HIV risk in polygynous settings are considered with respect to the usefulness of HSV2 as an evaluation marker. Patterns of HSV2 risk were considered for their implication for the spread of HIV in polygynous West Africa.³⁶² According to this study, the dynamics of polygyny in many sub-Saharan populations is characterized by large age differences between partners and later age at first marriage for men to overcome nearly equal sex ratios at the population level. Simulation models suggest that patterns of sexual mixing that involve concurrent partners and

³⁵⁸ Adetoun, B.A., 1997, *Men, Women and Violence: Conceptualization and Perspective*, Lecture Series Delivered at the Gender Institute of the Council for the Development of Social Science Research in Africa (CODESRIA) Dakar, Senegal.

³⁵⁹ Sections 228-230 of the Criminal Code Act. Laws of the Federation of Nigeria, 2004 criminalise abortion except in a situation where the life of the mother is endangered.

³⁶⁰ United Nations Population Fund, 2005, *State of the world publication; the promise of equality: gender equity, reproductive health and the Millennium Development Goals*, New York, UNFPA.

³⁶¹ Herpes simplex 2 risks among women in a polygynous setting in rural West Africa, From the Medical Research Council Laboratories, Farafenni and Fajara, (2003), The Gambia and the London School of Hygiene and Tropical Medicine, London, UK. <http://journals.lww.com/aidsonline/toc/2003/01030>. January, 2003 Volume 17, Issue 1. Pp. 97-103.

³⁶² Ibid.

large age differences between partners may lead to an accelerated rate of HIV spread relative to settings where the same numbers of partners are involved through serial relationships and where smaller age differences exist between partners.³⁶³ The dynamics of HSV2 transmission in polygynous settings deserve special attention because the institution supports high rates of previous multiple partners and polygynous societies tend to have high rates of marital disruption, through death or divorce.³⁶⁴ In the case of *Itwari v Asghari*³⁶⁵ the Allahabad High Court of India noted that the taking of a second wife into the first wife's original shared domicile often constitutes a "stinging insult to the first... [and] is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances."³⁶⁶ It is very clear that polygyny affects the total being of the first wife whilst it is doubtful that neither a third nor fourth wife will fare any better.

According to the United Nations 2004 – 2005, World survey on the role of women in development, "the differences... between the rich and the poor – both between and within countries – are larger than in any other area of health care" and, worldwide, reproductive health problems are the leading cause of mortality and morbidity among women.³⁶⁷ Every year, more than half a million women die in pregnancy or childbirth, and 99% of those cases are in developing countries.³⁶⁸ Although data on domestic violence are notoriously tricky to interpret, given the universal problem of underreporting. In surveys conducted in various countries, between 10% and 69% of women were reported to have experienced domestic violence.³⁶⁹ The same project concluded that violence against women is a more common cause of ill health among women than traffic accidents and malaria combined.

³⁶³ Anderson RM et al. 1991, The spread of HIV-1 in Africa: sexual contact patterns and the predicted demographic impact of AIDS. *Nature* 1991, **352**:581-589. See also Morris M. & Kretzschmar M. 1997, Concurrent partnerships and the spread of HIV. *AIDS* 1997, **11**:641-648.

³⁶⁴ Pison G, 1986, La Demographie de la Polygamie. *Population*, **41**:93-122 cited in Randall, S. C., E. Coast, et al. (2011). "Cultural constructions of the concept of household in sample surveys." *Population Studies* 65 (2): 217-229.

³⁶⁵ (1960 (A.I.R. 684 (Allahabad))["Itwari"]) Pp.1.

³⁶⁶ *Supra*.

³⁶⁷ United Nations, 2004 – 2005, *World survey on the role of women in development: women and international migration*. Department of Economic and Social Affairs, Division for the Advancement of Women, New York, United Nations, retrieved on August 20, 2006 from, [www.un.org/womenwatch/daw/Review/documents/press-releases/WorldSurveyWomen & Migration.pdf](http://www.un.org/womenwatch/daw/Review/documents/press-releases/WorldSurveyWomen&Migration.pdf).

³⁶⁸ *Ibid*.

³⁶⁹ United Nations Task Force on Education and Gender Equality, 2005, *Taking action: achieving gender equality and empowerment of women*, Earthscan, London, retrieved on August 20, 2006 from www.unmillenniumproject.org/reports/tf_gender.html.

3.6.4 Polygyny as risk factor for mental illness

Women are known to be more emotional and expressive than men thus, when a supposed trust is broken some women break down psychologically.³⁷⁰ Polygyny has long been associated with family stress and mental illness among women.³⁷¹ As stated earlier in this chapter, the practice can lead to co-wife jealousy, competition, and an unequal distribution of domestic resources-all tending to create acrimony among wives and between children of different wives.³⁷² These factors are believed to explain the greater prevalence of mental disorders among women in polygynous families in comparison to those in monogamous marriages and relative to the general population.³⁷³ Among psychiatric patients, polygynous marriages tend to be associated with increased depressive disorders, somatization disorders, and anxiety states.³⁷⁴

For instance, in an outpatient psychiatric clinic study of Bedouin-Arab women³⁷⁵, women in polygynous marriages generally reported greater despair than their monogamous counterparts.³⁷⁶ 58.4% of polygynous women interviewed for the study described feelings of low self-esteem compared to 7.7% of their monogamous counterparts.³⁷⁷ More polygynous subjects also reported poorer relationships with their husbands than monogamous subjects, often because they were physically, emotionally, sexually and materially neglected.³⁷⁸ Thus, while 12.8% of women in monogamous unions expressed a sense of loneliness, 64.1% of those in polygynous unions did.

Another example is what is prevalent in Bountiful, British Columbia in Canada³⁷⁹ within the Fundamentalist Mormon context where there are reports that indicate a similar sense of

³⁷⁰ There are a number of cases at the Women's Law Clinic of the Faculty of Law, University of Ibadan. (Names are not mentioned here to protect the identities of the people involved) where marriages broke down and the wives became psychiatric patients.

³⁷¹ Al-Krenawi A, 2001, "Women from Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic" 38 *Transcultural Psychiatry* at Pp. 187.

³⁷² Al-Krenawi A, 2001, *op.cit* at Pp. 188.

³⁷³ Leighton A.H et al, 1963, *Psychiatric Disorder among the Yoruba*, Ithaca, NY: Cornell University Press at pg 3.

³⁷⁴ Ghubash R.Hamdi E., and Bebbington P, 1992, The Dubai Community Psychiatric Survey, I. Prevalence and socio-demographic correlates- 27 *Social Psychiatry and Psychiatric Epidemiology*, 55.

³⁷⁵ Al-Krenawi A, 2001, *op.cit* at Pp.187.

³⁷⁶ The women in polygyny used in Al-Krenawi's study were all "senior wives" whose husbands had taken another spouse within two years. See also Cook R. J. & Kelly L.M. *op.cit* at Pp.11-12

³⁷⁷ Al-Krenawi A, 2001, *op.cit* at Pp.192.

³⁷⁸ *Ibid*.

³⁷⁹ This part of Canada is notorious for the practice of polygyny because it is enshrined in Fundamentalist Mormonism .An example is the case of Blackmore of the Mormons Religious Sectin Bountiful British Columbia in Canada- *Blackmore v. British Columbia (Attorney General)*2009 British Columbia Supreme Court 1299.

emotional and identity-related harm among polygynous wives. In a particular report,³⁸⁰ a counsellor who worked with former members of the community noted that individuals within the community lacked or demonstrated a low level of personal identity.³⁸¹ Though they are conversant about their social roles, they were often unable to respond to inquiries about their own identities. To a large extent, they felt that their value to the group was not intrinsic, but rather was based on their current social role and their personal connections to powerful men in the community.³⁸² For this set of people there is a loss of identity due to the type of relationship they are subjected to.

3.6.5 Polygyny as a risk factor for child mortality

The Child's Rights Act (CRA)³⁸³ (scope of application is limited to Federal Capital Territory FCT) which is the principal instrument protecting the rights and the welfare of all children provides elaborately for their best interests.³⁸⁴ Sections 8 and 13 of the CRA are of particular importance because both affect the life of a child significantly. Section 8 provides for the right to private and family life, while Section 13 is on the right to health and health services. Section 8 provides thus:

- (1) Every child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in subsection (3) of this section.
- (2) No child shall be subjected to any interference with his right in subsection (1) of this section, except as provided in subsection (3) of this section.
- (3) Nothing in the provision of subsections (1) and (2) of this section shall affect the rights of parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards.

Section 13 provides as follows:

- (1) Every child is entitled to enjoy the best attainable state of physical, mental and spiritual health.

The decision of the President of the Mormons to stop polygamous marriages caused a division which eventually produced the fundamentalist Mormon sect now known as the Church of the Latter Day Saints (LDS Church), which continued to practice polygyny in secret.

³⁸⁰Life is Bountiful 1993, A report on the lifestyle of a polygamous community, Prepared for the Committee on Polygamous Issues, funded by the British Columbia Ministry of Women's Equality (April 1993) at page 46.

³⁸¹Ibid.

³⁸²Ibid.

³⁸³Child Rights Act Cap C50 Laws of the Federation of Nigeria 2004.

³⁸⁴Section 1 of the Child Rights Act, Cap C50 Laws of Federation of Nigeria 2004.

(2) Every Government, parent, guardian, institution, service, agency, organisation or body responsible for the care of a child shall endeavour to provide for the child the best attainable state of health.

(3) Every Government in Nigeria shall-

(a) endeavour to reduce infant and child mortality rate;

(b) ensure the provision of necessary medical assistance and health care services to all children with emphasis on the development of primary health care;

(c) ensure the provision of adequate nutrition and safe drinking water;

(d) ensure the provision of good hygiene and environmental sanitation;

(e) combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(f) ensure appropriate health care for expectant and nursing mothers; and

(g) support, through technical and financial means, the mobilisation of national and local community resources in the development of primary health care for children;

(4) Every parent guardian or person having the care and custody of a child under the age of two years shall ensure that the child is provided with full immunisation.

(5) Every parent, guardian or person having the care of a child who fails in the duty imposed on him under subsection (4) of this section commits an offence and is liable on conviction for-

(a) a first offence, to a fine not exceeding five thousand naira; and

(b) a second or any subsequent offence, whether in respect of that child or any other child, to imprisonment for a term not exceeding one month.

(6) The Court may make, in substitution for or addition to any penalty stipulated under subsection (5) of this section, an order compelling the parent or guardian of a child to get the child immunised.”

The total constellations of rights as provided for in the above sections are to the effect that children have rights to live in families and to be adequately provided for. It is submitted that these rights may remain in the books alone in the situation of polygyny. It is difficult at times for fathers who are the breadwinners to sufficiently provide for their households.³⁸⁵ It has not been proven yet that crime rates are higher in polygynous societies. However, it is instructive that where children are not adequately monitored as can happen under polygyny, then, this is expected. Women are not the only set of people directly affected by polygyny; children from

³⁸⁵In Nigeria, many children would have heard at one time or the other stories from grandparents or parents at times of how they had to stop schooling so that the eldest male or female would continue and after the completion of the eldest's education; he or she will now start to train his younger ones.

polygynous unions sometimes exhibit dysfunctional behaviour. Some of such children may have low self esteem and lower levels of socio-economic status, poor academic achievements than children from monogamous families.³⁸⁶ In a study³⁸⁷ carried out to determine academic achievement of children based on their parents' marital status and relations, whether monogamous or polygynous; the mean achievement score of children from polygynous families was significantly lower than the ones from monogamous families.³⁸⁸ The mean score for children from polygynous homes was 766.11 and for the monogamous children was 1035.62. The researcher explained further that the difference in score is caused by challenges of polygyny ranging from conflict, tension, emotional stress, opposing motives, insecurity, anxiety and the children are prone to jealousy.³⁸⁹ According to him:

This type of emotional stress, anxiety, and insecurity can seriously undermine educational progress. In particular, rivalry and jealousy between co-wives can cause significant emotional problems for children.³⁹⁰

Some other studies have indicated that polygynous respondents exhibit increased stress in the mother-child relationship because of decreased social and economic resources.³⁹¹ The low self esteem of the mothers in such unions also cause behavioural challenges in their children. In polygyny, it may be difficult for the father to give adequate attention to all the children in the union thus reducing emotional security from close contact between their mother and father.³⁹²

According to a report on the Bountiful, B.C. Canada³⁹³ children from polygynous backgrounds are typically deprived of paternal bonding and other associated problems thus violating Article 3 of Convention on the rights of the child.³⁹⁴ In addition, where polygynous marriages involve the marriage of adolescent girls, this can harm their physical and mental health. In either case, failing to prevent and/or remedy such harms is contrary to States'

³⁸⁶ Al-Krenawi A. et al., 2002 Mental health aspects of Arab-Israeli adolescents from polygamous versus monogamous families 142 *Journal of Social Psychology* 446.

³⁸⁷ Cherian V. I., 1989 Academic Achievement of Children from Monogamous and Polygynous Families. 130 *The Journal of Social Psychology* 117.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ Al-Krenawi A, 2001, op.cit at Pp.198.

³⁹² Cherian V.I, 1989 op.citat Pp.118.

³⁹³ Life is Bountiful (1993) at Pp. 46

³⁹⁴ Ibid.

obligations under the Children's Convention.³⁹⁵ Article 24(3) of CRC provides that: "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

Eventually women are more adversely affected by the denial of their children's rights and death.

3.6.6 Polygyny as risk factor for maternal mortality

In Nigeria, the steady rise in maternal mortality rate in the country has become a serious cause for worry to the Federal Government, especially as it appears to pose a threat to the achievement of the Millennium Development Goals by 2015. In recent times, maternal mortality has attracted international comments particularly on Nigeria, which has one of the highest figures.³⁹⁶ Nigeria is reported to have between 1,500 deaths in every 100,000 live births.³⁹⁷ This has been considered too high. Maternal death /or maternal mortality also referred to as obstetrical death is the death of a woman during or shortly after a pregnancy. In year 2000, the United Nations estimated global maternal mortality at 529,000 of which less than 1% occurred in the developed world.³⁹⁸ However, most of these deaths are medically preventable, because treatments to avoid such deaths have been well known since the 1950s.

World Health Organization (WHO) defines maternal death as:

the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes.³⁹⁹

Maternal mortality is a sentinel event to assess the quality of a health care system. The major causes of maternal death are bacterial infection, toxæmia, obstetrical haemorrhage, ectopic pregnancy, puerperal sepsis, amniotic fluid embolism and complications of abortions.⁴⁰⁰ High

³⁹⁵Especially under Article 24 of the Child's Rights Convention (CRC) on the Right to the enjoyment of the highest attainable standard of health.

³⁹⁶ The National Programme Director of the Partnership for the Transforming Health System (PATHS 2), Mike Egboh, has said that Nigeria is the second country in the world, after India, with the highest maternal mortality rate contributes 10 per cent to the world's total maternal death. *Nigerian Tribune* March 13, 2012. Pp. 46.

³⁹⁷*The Vanguard Newspaper* October 23, 2007. See also *The Guardian Newspaper* October 23, 2007, under the caption 'Pregnant Women, Children to get free Medicare'.

³⁹⁸*United Nation on Maternal Death*; www.un.org retrieved 23/03/2011.

³⁹⁹ WHO, 2000, *The World Health Report 2000. Health Systems: Improving Performance*, Geneva, World Health Organization at Pp. 5.

⁴⁰⁰*Ibid.*

rates of maternal deaths occur in the same countries that have high rates infant mortality reflecting generally poor nutrition and medical care.⁴⁰¹

The health care system is one of several differentiated systems that serve the needs of societies. The health care system has a number of other factors such as agriculture (nutrition), education, housing, transportation and the general economic level and all of these have their bearing on health.⁴⁰²In recognition of the role of other systems in health, the World Health Organization uses the term 'health system' to include all the activities whose primary purpose is to promote, restore, or maintain health.⁴⁰³ Social expectations from the health care system vary and are affected by the value system of a society. The highest expectation is the human right to health.

The human right to health is recognized in numerous international instruments and Article 25(1) of the Universal Declaration of Human Rights (UDHR)⁴⁰⁴ affirms that: "everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services".

Also article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) emphasizes the fact that State Parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

Issues of maternal mortality are global issues and so the government of Nigeria must rise up to her responsibilities. Life expectancy at birth has greatly reduced and the life of the unborn is at a greater risk.

The status of health is a strong indication of human development and can also serve as an indicator for poverty. The male-dominated structure of the African family places women in an inferior status, creating a situation of inequality with respect to rights covering most facets of life. In this drama of injustice comes the right of women to health care. They come last in the list of persons seeking medical services, even in the case of pregnancy and childbirth. In addition, they rank at the bottom of the family hierarchy in nutritional concerns. The prevalence of poverty may be an intervening factor in this respect, being responsible for this unequal treatment, when limited financial resources are in action. However, even among the

⁴⁰¹Ibid.

⁴⁰²Cook R et al,2003, *Reproductive Health and Human Rights*, Oxford O.U.P. Pp.36- 37.

⁴⁰³WHO, 2000,*The World Health Report.Op.cit* at Pp.5.

⁴⁰⁴Pt.III, Ch. 4 of the Universal Declaration of Human Rights (UDHR) also known as the Bill of Rights.

better-off families, women are neglectful of healthcare. It is not always their priority.⁴⁰⁵ It follows that they are then denied proper care. The natural outcome of this situation is a higher rate of maternal mortality.

3.6.7 Rivalry challenges Arising from Co-Wife Relationships

The challenges in multiple wives relationships are diverse, ranging from jealousy, envy, oppression of the junior wives, consortium deprivation; the list is endless. A general review of sociological⁴⁰⁶ and anthropological literature suggests that jealousy, tension, strain, and competition are common among co-wives of the same husband.⁴⁰⁷ While there are many examples of cooperative co-wife relationships, the majority accounts emphasize negative feelings and detestation between wives in polygynous families.⁴⁰⁸ According to Altman and Ginat,⁴⁰⁹ cooperative polygynous relationships are evident, however, among the Masai of Africa where co-wives sometimes have close and supportive relationships.⁴¹⁰ Likewise, the senior wife within polygynous unions among the Mende of Africa may nurture a junior wife in an almost maternal fashion.⁴¹¹

In some other polygynous relationships, there is a general understanding in sharing the cooking, joint caring for the children and sharing of the husband's bed. All these are not without some competition and frictions in sharing the husband's wealth.⁴¹² The unequal distribution of polygynous husbands' emotional and material attention amongst their wives tends to be a significant cause of disagreements between co-wives.⁴¹³ Even where there is an expectation of equal treatment amongst wives, the actual inequalities can nevertheless undermine co-wives' emotional health.⁴¹⁴ For the Bedouin of Israel, for example, there is a social expectation that husbands will provide equal time, material resources, and sexual attention to each of his wives. In practice, however, husbands sometimes favour one wife over the other, particularly a newer wife in the early stages of marriage.⁴¹⁵ Similarly, a survey

⁴⁰⁵ Madiha El- Safty 2001, Culture, Public Health and Community Development at www.unpan1.un.org/intradoc/groups/public/documents/.../UNPAN003345.pdf. Retrieved on 10/9/2011

⁴⁰⁶ Otite O. & Ogionwo W., 1979, op cit Pp. 81

⁴⁰⁷ Altman I. and Ginat J, 1996, *Polygamous Families in Contemporary Society* Cambridge: University of Cambridge Press at Pp.341.

⁴⁰⁸ Ibid at Pp. 342.

⁴⁰⁹ Ibid.

⁴¹⁰ Otite O. & Ogionwo W. 1979, Op.cit at Pp. 83

⁴¹¹ Ibid.

⁴¹² An example is the Kung in Africa. Otite O. & Ogionwo W., 1979 at Pp.86.

⁴¹³ Sangeetha M. 2002, Best of Friends and Worst of Enemies: Competition and Collaboration in Polygyny, 42 *Ethnology* Pp.69.

⁴¹⁴ Ibid.

⁴¹⁵ Altman and Ginat, 1996 op.cit Pp. 341.

of Yoruba wives of South-western Nigeria and Benin found that husbands' favouritism of certain wives was a significant source of dissatisfaction among polygynous wives.⁴¹⁶ Significantly, the mistreatment as perceived by wives within developing world contexts often centres on economic and material issues, in addition to the treatment of children⁴¹⁷. Within Mormon Fundamentalist polygynous settings, on the other hand, perceptions of unfair treatment are often connected to both practical and social-emotional factors.⁴¹⁸ Other extreme behaviours that may be exhibited by co-wives are bewitching of children from the other women to favour their own children⁴¹⁹

3.7 Conclusion

The problem of women and reproductive health in Nigeria cannot be resolved unless attempts are made to reduce and eventually eradicate oppression and exploitation in African society. The problems women face are the problems of human beings and thus, everyone including men and women should work together towards the liberation of women in Nigeria. Sexual pleasure is not a taboo and it is perhaps the highest physical pleasure couples/partners could attain; such pleasure cannot be derived from eating or from playing or watching football thus reproductive right needs to be actualized to make it safe. Multiple relationship as in polygyny eventually affects the rights of the women involved, HIV/AIDS is ravaging as well as other deadly infection like hepatitis. It is imperative for Nigeria as a country to re-appraise her value system and negotiate a way out. Particularly, the scourge of HIV/AIDS is challenging common beliefs and it is actually turning around our mentality with regards reproductive health rights. We have to put a stop to its spread and live good lives, with polygyny, the issue becomes more complicated.

Both CEDAW and the Human Rights Committee have condemned the practice of polygyny in their General Comments and Recommendations. In its General Comment No. 28 on Equality of Rights between Men and Women⁴²⁰, the Human Rights Committee (HRC) stated:

It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible

⁴¹⁶Ibid.

⁴¹⁷ In Yorubaland it is often said that the children of the first wife are always the first beneficiary of the husband's wealth and later on, the children of the favourite wife whatever her position is. At times the whole family may be living on a very slim budget. See generally, Ibadapo-Obe A.2005. Op.cit at Pp. 157-159.

⁴¹⁸ Altman I. and Ginat J, 1996 op.cit at Pp.344.

⁴¹⁹ Though our courts and Section 210 the Criminal Code Act C38 Law of the Federation of Nigeria 2004 frowns at such acts, in practice people believe that a person can be bewitched.

⁴²⁰ CEDAW 1979 General Comment No. 28 on Equality of Rights between Men and Women.

with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.⁴²¹

Polygamy as used above in the General Comments is used in the sense of polygyny. Fighting gender inequality with respect to polygyny is about challenging an ideology. The issue of gender inequality is far more complex than men being against women or women having to fight men. It is about challenging the ideology which rates men as superior to women (an ideology which women as well as men may help perpetuate) and vests in them greater power. And it is about challenging the institutions which uphold these values. Polygyny as a form of marriage helps in perpetuating inequality by making women subservient to a relationship which they have no control over. While there is a growing consensus that polygyny violates women's right to be free from all forms of discrimination, this consensus fractures somewhat at the notion of immediate prohibition given the injurious effect this may have on existing polygynous marriages and those unions that may have helped poor women and to a lesser extent children of polygynous marriages.

It is difficult to put pressure on the family to change. The family is one of the most important social institutions which upholds and reinforces gender-based inequalities. And yet, the fact that the family belongs to the private sphere (compared to public sphere institutions like the workplace, schools and state institutions) has helped to keep what happens inside the family isolated from the forces of change and policy pressure towards gender equality. Giving absolute leadership role to a male is a major tool working against the equality right of a woman in a marital relationship. The social construction of sexuality is in fact a major reason for the continuity of polygyny. The cultural dictates and acceptability make it desirable as a class dictating action.

Having highlighted polygyny and its challenges it would be appropriate to examine the reproductive rights dimensions of polygyny and the assertion of the individuality of the women involved, and this would be done in the next chapter.

⁴²¹Supra.

CHAPTER 4

REPRODUCTIVE RIGHTS DIMENSIONS OF POLYGyny

*To this end, customary, religious, or cultural arguments cannot be used to justify practices such as polygyny that may constitute a form of violence against women under international law.*⁴²²

4.1 Introduction

Reproductive rights which means access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making are human rights; they are universal, indivisible, and undeniable. These rights are founded upon principles of human dignity and equality, and have been enshrined in International human rights documents. Reproductive rights embrace core human rights, including the right to health, the right to be free from discrimination, the right to privacy, the right not to be subjected to torture or ill-treatment, the right to determine the number and spacing of one's children, and the right to be free from sexual violence.

Reproductive rights include the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, and the right to have the information and means to implement those decisions free from discrimination, coercion, and violence. Reproductive rights also include the right to the highest standards of sexual and reproductive healthcare.

Sub-Saharan Africa has a high incidence of polygyny.⁴²³ Countries in this region are also characterized by large age gaps between husbands and wives, high fertility,⁴²⁴ and the payment of a bride price at marriage. In countries where monogamous marriages are predominant or the only form of marriage permitted by law, on the other hand, the bride's parents traditionally give a dowry (negative bride price) at marriage. There are instances of dowry in Sub-Saharan Africa too.⁴²⁵ Sub-Saharan Africa is also one of the poorest regions of the world.⁴²⁶ Coping in and with polygyny is always a major task for women in such unions.

⁴²² Cook J. C. & Kelly M.K.,(eds.) 2006op.cit.at Pp.32.

⁴²³ Michele T. 2005, Polygyny, Fertility, and Savings. The University of Chicago *Journal of Political Economy*, 2005, Volume 113, No. 6 Pp. 1341-1371.

⁴²⁴ Guardian Newspaper of Thursday 12th July, 2012

⁴²⁵ Otite and Ogionwo 1979 at Pp 81

⁴²⁶ Ibid.

4.2 Summary of Jurisdictions practicing polygyny in Africa

And other Countries

It is essential to note that of the 1154 human societies in the Human Relations Area Files of Yale University, more than 1000 practice some degree of sanctioned polygamy (polygyny and polyandry), and polygamy is the preferred choice in 70% of those societies.⁴²⁷

In the Central African Republic (CAR) polygyny is legal, consequently the law authorizes a man to take up to four (4) wives with the condition that a prospective husband must indicate at the time of the first marriage contract whether he intends to take additional wives later. Divorce is legal and the law does not discriminate against women in inheritance and property rights. A Family Code to strengthen women's rights was enacted in May 1998.⁴²⁸

Countries like Albania, Angola, Australia, Bahrain, Belgium, Belarus, Bosnia, and Bulgaria essentially give both women and men equal rights to a marriage which is usually monogamous in nature. Marriages in Cambodia and Ireland are strictly monogamous by virtue of Article 45 (3) of the Country's Constitution – Gender Equality for Cambodia and Article 41 of the 1995 Amendment for Ireland. It should be noted that Ireland is very strict on the issue of dissolution of marriage. Other Countries like Canada, Chechnya, China, Congo, Croatia, Eritrea, Estonia, Germany, Greece and Hungary recognised legal marriage in the monogamous form. Marriage style in Iran, Iraq and Kuwait is based on religion, which is basically Islam. Rwanda is another country that stipulates that only monogamous marriages shall be recognized by law.⁴²⁹ In Tibet, there are three types of marriages and they are monogamy, polygyny, and polyandry.⁴³⁰ The Women's Charter in Singapore provides for monogamous marriages.⁴³¹

It is however important to note that although a customary law marriage has the potential of being polygynous, it is not necessarily so.⁴³² It is not compulsory to have more than one wife but for the compelling reason of manpower needs in a basically agrarian society. Farming is a major reason which makes polygyny attractive and somewhat inevitable. In modern day, this is not primary reason for polygyny. The practice of polygyny continues to be prevalent in Africa as a whole and in Nigeria particularly and it is not restricted to customary marriages

⁴²⁷Murdock G.P. 2011 *Ethnographic Atlas* recording the marital composition of 1231 societies from 1960–1980. <http://eclectic.ss.uci.edu/drwhite/worldcul/codebook4EthnoAtlas.pdf> retrieved on 29/11/2011.

⁴²⁸elin.nordhagen@afrol.com retrieved on 22/06/2011.

⁴²⁹Marriage and Family in National Constitutions searchmatrimonial.com retrieved on 16/11/2011.

⁴³⁰Ibid.

⁴³¹Ibid.

⁴³²Ibidapo-Obe A., 2005 op.citat Pp. 158.

alone. There are number of cases⁴³³ where statutorily married wives at times found that they have to share their husbands with either another customary wife or statutory wife. Both circumstances are however prohibited by virtue of Section 33 (1) of the Marriage Act⁴³⁴ and the Criminal Code Act.⁴³⁵ The practice of polygamy throughout Africa with its accompanying absence of equitable means for justly allocating the respective interests of a man's numerous wives present problematic administration of estate laws effectively barring a widow's rights to inherit.⁴³⁶

In Africa, marital relationship is pluralistic with much wider incidents than in Anglo-Saxon or other European or ecclesiastical law. According to Mbiti⁴³⁷ marriage is the focus of existence for the African people. He further stated:

Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. Therefore, a marriage is a duty, a requirement from the corporate society, and a rhythm of life in which everyone must participate. ... Failure to get married under normal circumstances means that the person concerned has rejected society and society rejects him in return.⁴³⁸

It is important to note that the Nigerian law recognises three forms of marriage, any of which a man or woman may contract as a matter of choice. The first one is marriage under the Act, as defined in the case of *Hyde v. Hyde*⁴³⁹, the second one is Islamic marriage⁴⁴⁰ this is potentially polygynous in nature and a man is entitled to marry a maximum of four wives whilst the third one is the traditional marriage where the number of wives is limitless. From all indications, the law in Nigeria recognises all the aforementioned types of marriage therefore it is necessary to address the incidents of these relationships.

⁴³³ A recent example is the case of one Awotoye who got married to two different women under the Statute; this case is still pending at the Magistrate Court sitting at Iyaganku.

⁴³⁴ Marriage under the Marriage Act is monogamous in nature, being a union of one man and woman to the exclusion of all others. Consequently, a party to a subsisting statutory or customary law marriage has no capacity to enter into another statutory marriage with another person. Cap M6 LFN 2004.

⁴³⁵ Section 370 Criminal Code Act C 38 Laws of the Federation of Nigeria 2004.

⁴³⁶ Ewelukwa U., 2002, Post-Colonialism, Gender, Customary Injustice: Widows in African Societies, *Human Rights Quarterly* 24, 424–486 (discussing Nigeria but discussion valid and applicable to Africa generally).

⁴³⁷ Mbiti, J.S. 1969 *African Religions and Philosophy* Ibadan Heinemann at Pp. 133.

⁴³⁸ *Ibid.*

⁴³⁹ (1866) LR 1 P & D 130.

⁴⁴⁰ Popularly referred to as Nikkah.

4.3 Cultural Relativism and Reproductive Health Rights

From anthropological perspective, Cultural relativism is the position that all cultures are of equal value and need to be studied from a neutral point of view.⁴⁴¹ Thus this type of study views any culture with a cold and neutral eye and understands the particular culture on its own merits and not another culture's.⁴⁴² The first use of the term as recorded in the *Oxford English Dictionary* was by the popular philosopher and social theorist Alain Locke in 1924. He adopted the term to describe Robert Lowie's 'Extreme Cultural Relativism.'⁴⁴³

Cultural relativism is a system of social beliefs in the modern world. Several sociological concepts have new significance in the modern world. For example 'Pluralism, 'tolerance' and 'acceptance' have new implications because of the extension of the frontiers of 'culture'.⁴⁴⁴ Whether a culture is good or bad is specific and this cannot be imposed in cultural analysis. Thus what is good in one culture may be categorized as bad in another. This implies that every culture determines its own ethical judgments to regulate the proper behaviour of its members. Cultural relativism maintains that there are differences in ideas, views, values and perception among people of diverse cultures. It is contended that rights and rules about morality depend on cultural context. Culture as employed here goes beyond indigenous and customary practices to include political and religious ideologies and institutional structures. Thus notions of right and wrong necessarily differ throughout the world because the cultures in which they take root themselves differ.⁴⁴⁵

It should be noted that the issue of Cultural Relativism seem to be a well-won debate as the court has laid credence for the issue.⁴⁴⁶

⁴⁴¹ Glazer M.1996, Cultural Relativism retrieved from www.utpa.edu/faculty/mglazer/theory/cultural_relativism.htm accessed on 17/06/2011.

⁴⁴²Ibid.

⁴⁴³OED Online, Sept 2009, OUP <http://dictionary.oed.com/cgi/entry/50055630>, citing Locke's article "The Concept of Race as Applied to Social Culture" *Howard Review 1*(1924): 290-299.

⁴⁴⁴ Cultural Relativism- Illogical Standard, accessed via allaboutphilosophy.org/cultural-relativism retrieved on 18/06/11.

⁴⁴⁵www.oppapers.com/essays/Cultural-Relativism/37092 retrieved on 20/06/11.

⁴⁴⁶ *Igra v. Igra* (1951) All ER 404. This case highlights the need to be receptive of foreign ideas.

In the case of *Igra v. Igra*⁴⁴⁷ the court was conscious of Cultural Relativism where a German divorce which was obtained during the war was recognized at the instance of the Gestapo on what was suspected were racial grounds, Pearce J. held that:

the interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of domicile⁴⁴⁸

In contrast, in the case of *Syndicat North crest v. Amselem*⁴⁴⁹ the Supreme Court of Canada in its critique of freedom of religion and culture made it clear that even where a practice is found to have a religious or cultural essence, courts must still consider how that conduct affects the rights and interests of others. The acceptance of cultural relativism as an ideology believes that nothing is inherently wrong and nothing is inherently good with any cultural expression.

According to James Rachels,⁴⁵⁰ cultural relativism while being useful in helping people to keep an open mind to other cultural practices, it should not be held true in its entirety. Thus the practice of cremating the dead as juxtaposed with eating the recently deceased are both correct according to the community involved and view the other as appalling.⁴⁵¹

4.3.1 Cultural Stereotypes

In Nigeria's patriarchal society, women suffer marginalization even at the family level. Just as girls are excluded from decision-making concerning their choice of spouse, women are often not allowed to take part in decisions on how many children to have or when to have them. Our culture holds that a woman cannot on her own decide what she should do to or with her body. Culture holds it that she is the property of her husband on the basis of the bride price and other matters incidental to the marriage which was borne by the husband, and on that ground she is a chattel owned by her husband. The right to make decisions especially among the Yorubas is seen to be exclusively that of the man.⁴⁵²

⁴⁴⁷*Supra.*

⁴⁴⁸*Ibid.*

⁴⁴⁹(2004) 2SCR 551.

⁴⁵⁰Rachels J. and Rachels S. 2011, *The Elements of Moral Philosophy* retrieved on 18/11/2011 from <http://www.squidoo.com/culturalrelativism>.

⁴⁵¹*Ibid.*

⁴⁵²Fadipe N.A, 1970, *The Sociology of the Yoruba*, Ibadan (Ibadan University Press) at Pp. 1.

4.4 Individuality in Polygynous Relationships and Reproductive Health Rights

The central issue of human rights is justice and fairness between the state, its organs and the individual. The popular assumption is that Africans are not overly concerned with individual but with collective rights.⁴⁵³ This is practically true and indeed, whilst the rights of individuals are subsumed to collective rights, individuality and personhood have an important place in “*ifa*” tradition.⁴⁵⁴ The emphasis on “*ori*” (amongst the Yoruba) or “*chi*” (amongst the Ibo) which is the divinity of the head, adequately illustrates this issue. “*Ori*”/“*chi*” is the embodiment of a man’s past, present and future, and the essence of his personality. It is sometimes referred to as the destiny or preordination. According to Ibidapo-Obe, “*ori*”/“*chi*” is believed to be subject to change by evil forces and it is up to the individual, in exercise of his right to self-determination, to give direction to his life and be singled-minded about his ambitions.⁴⁵⁵ This is in agreement with Section 37 of the 1999 Constitution which states that:

The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.⁴⁵⁶

Asserting the individuality of a woman in a polygynous setting is in doubt as her personality is subsumed under that of her husband and the desires of the husband thus making her to be subjected to a situation she does not have control over. Thus, the U.N. General Assembly’s 2001 Declaration of Commitment on HIV/AIDS included a goal to ensure by 2005 the:

Implementation of national strategies for women’s empowerment, the promotion of women’s full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices...⁴⁵⁷

⁴⁵³ Akinwowo A., 1980, *Ajobi and Ajogbe: Variations on the Theme of Sociation*. University of Ife Press at Pp. 11.

⁴⁵⁴ Ibidapo-Obe A. 2005 op.citat Pp. 63-64.

⁴⁵⁵ See also Abiodun R., 1975, *Ifa Art Objects: An Interpretation Based on Oral Traditions* in Abimbola W. (ed.) *Yoruba Oral Tradition*. Ibadan University Press, at Pp. 422.

⁴⁵⁶ Section 37 of the 1999 Constitution which provides for right to private and family life. Cap C23 of the Laws of the Federation 2004.

⁴⁵⁷ 2001 *Declaration of Commitment on HIV/AIDS: United Nations General Assembly Special Session on HIV/AIDS*, UN Doc. S-26/2.

Despite this, practices such as polygyny continue to be legally permitted in various parts of the world. Women's ability to control their sexual exposure, especially within marriage, is fundamental to limiting the ongoing spread of HIV-AIDS and other infections. This is undermined where polygyny continues to be legally or *de facto* permitted. Within the Nigerian context, polygyny as practised in the society may cause other distinct sexual and reproductive harms to women. In particular, the traditional belief that sexual activity should be limited solely to procreation deprives women of reproductive choice regarding pregnancy.⁴⁵⁸

While a high number of pregnancies can pose physiological risks to women of all ages, the harms to under-age girls in some parts of Nigeria's polygynous context could be particularly serious, given that some girls reportedly enter unions at as young as thirteen or fourteen years of age.⁴⁵⁹ In this way, their age and gender intersect, making them physiologically at risk for early pregnancies and resulting death and disability.

The Nigerian society is such that prefers the cultural identity to individual values and so, girls are easily stereotyped once they try to assert their individualism. There are some extremes where the girl-child is subjected to a particular mode of dressing just to 'conform' to the cultural dictates. Thus, the girl child loses her individual identity right from the teen age and this goes on till maturity. The individual identity is subsumed and choked by the belief system and so the girl child may never be able to assert herself in any relationship.

This is unlike what happens in more developed countries where the society values individuality without identity. Being identified with a particular belief may restrict the ability to find the common good. Some instances of such beliefs include the holocaust of 1950,⁴⁶⁰ several terrorist attacks including several bombings by some sects holding a belief and wanting others to accept such belief.⁴⁶¹

Even today, Politics is dominated by identity, for example in the United States of America it is either you are a democrat or republican. Generally in Nigeria you are either a card carrying member of Peoples Democratic Party (PDP) or Action Congress of Nigeria (ACN) or

⁴⁵⁸ It becomes almost impossible for a woman to refuse her husband's demands for more children even when she is medically unfit to do so.

⁴⁵⁹ This is despite the provision of the Section 21 of the Child Right's Act. Cap C50 Laws of the Federation of Nigeria 2004 prohibiting child marriage. It was reported widely reported in Nigerian Newspaper the story of a Senator who abducted a 13 year old girl from Egypt to be married in Nigeria.

⁴⁶⁰ Led by Adolf Hitler.

⁴⁶¹ An example is the *boko haram* sect in Nigeria whose belief is that western education is a sin.

Congress for Progressive Change (CPC) and so on. The question is whether it is possible to be a little bit of both. When people define themselves in such a way, they lose the ability to think critically and to find common ground.⁴⁶² There is then the tendency to be so wrapped up in the highlighting of differences and forget other underlying similarities. We are different, and that is what makes us interesting. But we are also the same, and that is what bonds us to one another.⁴⁶³ Diplomacy helps in solving disputes; a little here and a little there. In order to be able to adequately take care of the reproductive health rights of women in polygyny, there is a need to do some distinctions between which part of the culture help in the furtherance of the objectives of these rights and which are not.⁴⁶⁴

Individuality has been described severally by different writers but the recurrent fact about the concept is that it is a distinguishing factor for each personality.⁴⁶⁵ Ingersoll states that:

on every hand are the enemies of individuality and mental freedom. If individuality is subjected to custom, then, custom meets us at the cradle and leaves us only at the tomb. The first questions are answered by ignorance and our last by superstition. One is then pushed and dragged by countless hands along the beaten track, and the entire training can be summed up in the word '*suppression.*'

The desire to have a thing, or to do a thing, is considered as conclusive evidence that one ought not to have it, and ought not to do it. Ingersoll further expresses that⁴⁶⁶

at every turn human beings run against cherubim and a flaming sword guarding some entrance to the Eden of their desire. Then they are allowed to investigate all subjects in which they feel no particular interest, and to express the opinions of the majority with the utmost freedom. They are taught that liberty of speech should never be carried to the extent of contradicting the dead witnesses of a popular superstition. Society offers continual rewards for self-betrayal, and they are nearly all earned and claimed, and some are paid.⁴⁶⁷

⁴⁶² These are the words of Ellie a teenage girl in Colorado, United States of America. "This I believe"- Individuality versus Identity. <http://thisibelive.org> accessed on 10/10/2011.

⁴⁶³ Ibid.

⁴⁶⁴ Just like customs that are repugnant to natural justice and equity are rejected.

⁴⁶⁵ Ingersoll R. G. The Concept of Individuality retrieved from www.infidels.org/library/historical/robert_ingersoll/individuality on 16/02/2011

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

Emerson's view of the individual is dynamic.⁴⁶⁸ He reiterates that human beings are creatures of growth and change.⁴⁶⁹ He narrated further that individuals are responsive to the world around them; accumulate experiences, adapt to them, synthesize them, regenerate and renew themselves; and in the process, sometimes contradictions are inevitable.⁴⁷⁰

The idea of reproductive rights and freedoms cannot be considered apart from the exercise of other basic human rights. Reproductive freedom lies at the core of individual self-determination.

It is submitted that it is almost impossible for a woman to enforce her individuality in a polygynous relationship and without individuality in today's society the world would be filled with a population of large amount of followers as opposed to leaders.

4.5 The Principle of Distinction and the Protection of Women's Reproductive Rights in Polygyny

The scourge of the HIV/AIDS and other sexually transmitted diseases and a nonchalant attitude towards family life/marriage constitute great health risks to women. Thus, the principle of distinction should be adopted to protect the reproductive health rights of women in polygynous relationships. Furthermore a recent survey in Africa, including Nigeria shows that greater social and economic inequality between men and women directly correlated to the HIV risk faced by African/Nigerian women.⁴⁷¹ It is therefore imperative for the reproductive health right of women to be protected in order to reduce the spread of HIV/AIDS infection. There are thus several dimensions of reproductive health rights indication of polygyny.

⁴⁶⁸ Emerson W. R.2011, Individuality versus Conformity. <http://brainstorm-services.com/wcu-2005/pdf/emerson-individuality.pdf> retrieved on 17/04/2011.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Obinor F. 2007 "Women's Rights Key to Africa's AIDS Crisis, Says Study" in The Guardian Newspaper, May 28, 2007 Pp.11.

4.5.1 Polygyny As A Violation Of International Human Rights Law

Despite the fact that civil law has banned polygyny in many nations, customary law⁴⁷² still permits it in many countries. In countries with multiple legal systems, the customary law on polygyny allows a man to take many wives and it prohibits a current wife from objecting to her husband's marriage to a new wife.⁴⁷³ This practice treats women as lesser members of their families and as inferior in status to men.

Polygyny itself is a practice that is discouraged under international human rights law;⁴⁷⁴ it hampers other fundamental rights such as the right to dignity, the right to equality within the family and the right to equal protection under the law. It also tends to perpetuate women's low social and economic status by forcing them to share valuable resources with their husbands other wives and children. It also directly impacts a women's health.⁴⁷⁵

The main objective and purpose of CEDAW (Women's Convention) is as stated in the General Recommendation No. 25 which explains that:⁴⁷⁶

States parties to the [Women's] Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to

⁴⁷²Customary law consists of the laws and customs of a particular tribe, or village. They almost invariably are not written, drafted, critiqued, amended or repealed like legislation. Rather village leaders and elders familiar with its application over the years are repositories of the laws and customs of the people. These persons tend to coincide with the institutions that wield significant social influence, in rural and to some extent in urban areas. It has also been described as a "mirror of accepted usage" in the case of *Owonyin v. Omotosho*, by Bairamian, FJ.

⁴⁷³Vanessa von Struensee, 2005 "The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for its Prohibition" *Murdoch University Electronic Journal of Law* MurUEJLPp 2.

⁴⁷⁴CEDAW General Recommendation on Equality in Marriage and Family Relations urges, "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited." CEDAW General Rec. 21, Article 14.

⁴⁷⁵See Human Rights Watch 2004, *Just Die Quietly Domestic Violence and Women's Vulnerability to HIV in Uganda*. The Ugandan government's failure to protect women from domestic violence and discrimination increases women's risk of contracting HIV. This report documents widespread rape and brutal attacks on women by their husbands in Uganda, where a specific domestic violence law has not been enacted and where spousal rape is not criminalized. Many women told Human Rights Watch that a fear of violent repercussions impeded their access to HIV/AIDS information, HIV testing, and HIV/AIDS treatment and counseling. The Human Rights Watch report says that HIV/AIDS programs focusing on fidelity, abstinence, and condom use do not account for the ways in which domestic violence inhibits women's control over sexual matters in marriage. In the report, Human Rights Watch urges the Ugandan government to enact domestic violence legislation, and to make women's health, physical integrity, and equal rights in marriage a central focus of AIDS programming available at <http://www.hrw.org/reports/2003/uganda0803/uganda0803.pdf>; Laurie Garrett, *Polygamy, Poverty, Oppression Of Women Are Fueling AIDS Epidemic In Africa*, July 10, 2000 <http://www.polygamyinfo.com/intnalmedia%20plyg%2085rutz.htm> retrieved on 29/1/2012.

⁴⁷⁶*General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30th Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at paragraphs 5,7,8,10 & 12.

improve their position to one of *de jure* as well as *de facto* equality with men.⁴⁷⁷

Because the object and purpose of human rights conventions evolve over time, the dynamic principle of interpretation is particularly important. In *Marckx v. Belgium*⁴⁷⁸ the European Court of Human Rights applied the principle to enable an unmarried mother to legitimise her child in the same way a married woman could, stating that “the Convention must be interpreted in light of present day conditions.”⁴⁷⁹ The reporting mechanism under the Women’s Convention helps to ensure that the Convention maintains “an elastic or dynamic component” as states report their legislative, judicial or administrative progress in eliminating discrimination against women.⁴⁸⁰ In applying the dynamic principle, it is thus essential to ascertain what constitutes “present day conditions.” One of the most effective ways to do this is to examine how other judiciaries are analysing certain types of practices, particularly within the context of a given treaty. The findings in this research reveal that polygyny is a form of discrimination against women that International treaty law requires states to eliminate. The most specific articulation of this is found in CEDAW General Recommendation on Equality in Marriage and Family Relations.⁴⁸¹ This is further reflected in the General Comments and Concluding Observations of several treaty bodies including CEDAW, the HRC, the CESCR and the CRC, which have stated that polygyny, violates women’s right to equality.

4.5.2 The Right to Equality within Marriage and the Family

Conversion of monogamous marriage to polygynous one has been a serious challenge and it is also an act which clearly constitutes the offence of bigamy under existing laws in most African states.⁴⁸² Unfortunately, the offence of bigamy⁴⁸³ exists only on paper in most African states. In Nigeria, for instance, with the exception of a single prosecution in the early

⁴⁷⁷Ibid at paragraph 4.

⁴⁷⁸<http://www.unfpa.org/icpd/icpd.html>.

⁴⁷⁹521 U.N.T.S. 231, entered into force Dec 9, 1964 retrieved on 12/02/2012

<http://www1.umn.edu/humanrts/instree/o1ccmar.html>; See also Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages Opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962 entry into force 9 December 1964, in accordance with article 6 available at <http://www.unhchr.ch/html/menu3/b/63.html>.

⁴⁸⁰Kerri L. Ritz 2001 *Soft Enforcement: Inadequacies Of Optional Protocol As A Remedy For The Convention On The Elimination Of All Forms Of Discrimination Against Women*, 25 *Suffolk Transnational Law Review* 191 (Winter 2001).

⁴⁸¹CEDAW General Recommendation No. 21 on Equality in Marriage and Family Relations.

⁴⁸²Ewelukwa U. U. 2002 “Post-Colonialism, Gender, Customary Injustice: Widows in African Societies”, *Human Rights Quarterly* 24 at Pps 424-486 (discussing Nigeria but discussion valid and applicable to Africa generally).

⁴⁸³Per A.O. OBASEKI, JSC in *Kuforiji & Anor v. V.Y.B (Nigeria) Limited* (1981) 6-7 S.C. (REPRINT) Pp25.

1960s, no one has been prosecuted for the offence.⁴⁸⁴ Leaders of African nations seem to be more pre-occupied with other economic issues than taking time on banning polygyny, and most likely a political will on the part of governments is lacking as emphasizing gender is relatively recent from the World Bank and other organizations involved with development.⁴⁸⁵ Lack of political will may be due to the fact that some state officials are involved in the practice of polygyny therefore there may not be any pressing interest in doing so.

Right from the beginning, modern international human rights law has called for gender equality before the law and in marriage.⁴⁸⁶ The preamble to the 1947 United Nations Charter indicates a “determination... to reaffirm faith in fundamental human rights... in the equal rights of men and women...”⁴⁸⁷ Article 55 of the Charter states that the U.N. will “promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to... sex...”⁴⁸⁸ In addition, the U.N. Commission on the Status of Women, which first met in 1947, agreed to work for freedom of choice, dignity of the wife, monogamy, and equal rights to dissolution of marriage.⁴⁸⁹

This mandate was reflected in the Universal Declaration⁴⁹⁰ which states that:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family... [and]... are entitled to equal rights as to marriage, during marriage and at its dissolution.

This commitment to gender non-discrimination is also evident in both the Political and Economic Covenants. Article 2(1) of the Political Covenant requires States parties to ensure the rights articulated in the Political Covenant without distinction of any kind including sex. Similarly, Article 3 provides that States parties shall “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present

⁴⁸⁴Supra.

⁴⁸⁵Women issues are still outside the mainstream of World Bank lending in spite of the commitment of its leader, according to a report by the United States chapter of the Women's Eyes on the World Bank campaign) July 28, 1997 <http://www.interaction.org/library/article75.html> accessed on January 21, 2012.

⁴⁸⁶Deller-Ross S., 2002 “Polygyny as a Violation of Women’s Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview” 2002, *24 Delhi LawReview* 22 at 31.

⁴⁸⁷Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7, Preamble.

⁴⁸⁸Article 55 of the Charter of the United Nations.

⁴⁸⁹Harris J. L. and Teitelbaum E. L., 2000 *Family Law: Cases and Materials*, 2nd edition Gaithersburg: Aspen Law and Business at Pps271-279.

⁴⁹⁰Article 16 of UDHR.

Covenant.” Significantly, the Political Covenant also includes a strong commitment to marital equality, building on the Universal Declaration’s commitment by adding equal *responsibilities* within marriage beyond just equal rights.

Article 23(4) of the Political Covenant requires that ratifying States:

shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.

The Economic Covenant also contains a general non-discrimination clause on the basis of sex.⁴⁹¹ In addition, States parties have a positive obligation under Article 3,

to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant.

While the Economic Covenant does not expressly guarantee equality within marriage and family life, it is arguable that the positive obligation to ensure the equal enjoyment of the rights articulated therein imposes a duty on States parties to abolish discriminatory practices such as polygyny that undermine women’s ability to enjoy their rights.

According to Cook,⁴⁹² it is in the Women’s Convention that there is the greatest international commitment to transformative gender and marital equality. The preamble of the Women’s Convention expresses a conviction that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.

Where States parties legally encourage, condone, or simply ignore unequal familial practices of polygyny, they perpetuate male paradigms of power, resulting in women’s *de facto* and *de jure* inequality. In striving to achieve this transformation, particularly within the familial realm, Article 16 of the Women’s Convention requires States parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and

⁴⁹¹Article 2 of the Economic Covenant.

⁴⁹²Cook R., et al 2006 *op.cit.* at Pp.23

family relations and in particular [to] ensure, on a basis of equality of men and women as follows:

- (a) The same right to enter into marriage;
- (b) 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;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

As CEDAW explains in its General Recommendation number 25 on Temporary Special Measures, the position will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.⁴⁹³ It is this commitment to a real transformation of institutions, such as polygyny, that provides the greatest protection for women within the family.

Summarily the CEDAW has put together a detailed equal rights and responsibilities for men and women. It is therefore submitted here that it is the equality being propagated by the Women's Convention that polygyny violates. Corroborating this position, Susan Deller

⁴⁹³ *General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures)*, UN CEDAWOR, 30th Sess., UN Doc. HRI/GEN/1/Rev. 7, 2004 at 282, at paragraph 10.

Ross⁴⁹⁴ has noted that when a husband has multiple wives, each wife essentially has only a fraction of a husband. As a result, spousal maintenance and child-care resources are all divided unequally vis-à-vis individual polygynous husbands and their respective wives whether during marriage or at its dissolution.⁴⁹⁵ Such husbands are able to share only a fraction of their emotional, sexual, and financial attention with each individual wife, meaning that polygynous wives have fewer *de facto* marital rights and their husbands fewer responsibilities.⁴⁹⁶

Based on these premises CEDAW has declared that polygyny violates women's right to equality within marriage. By and large polygyny infringes on the rights of freedoms of women to equality in marriage and harms the rights of children to receive adequate parenting and nurturing. Therefore, a state is clearly justified in banning the practice.

4.5.3 The Right to Private and Family Life

In whatever form polygyny is practised whether patrilocally or separately it infringes the right of the woman to private family life. The Constitution of the Federal Republic of Nigeria guarantees the right to privacy⁴⁹⁷ and this right cannot be asserted in the light of polygyny. This right to Private and Family Life is recognised by the Political Covenant⁴⁹⁸ and the Human Rights Committee noted in its General Comment no. 16 on Article 17 (Right to Privacy) of the Political Covenant that the right to private and family life imports positive obligations beyond a traditional non-interference interpretation.

The HRC stated that:

the obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.⁴⁹⁹

⁴⁹⁴Deller-Ross S. 2002op.cit at Pp 31.

⁴⁹⁵Deller-Ross S. 2002 op.cit at Pp 34.

⁴⁹⁶ Ibid.

⁴⁹⁷Section 37 of the 1999 Constitution of the Federal Republic of Nigeria.

⁴⁹⁸ Article 17 of the Political Covenant states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

⁴⁹⁹*General Comment No. 16: The right to respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)*, UN HRCOR, Sess. No. 23, 1988, Compilation of General Comments and General Recommendations Adopted by HumanRights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 2003 at 142 at paragraph. 1.

The States parties are obliged to prohibit interferences with this right by either State authorities or natural or legal persons,⁵⁰⁰ the right to private and family life can no longer be classified as a purely State-individual concern. Rather, States parties have a duty to prohibit interferences on an individual basis as well as to generally protect this right.

Cook⁵⁰¹ reiterates that there has been insignificant development as to the actual substantive content of the right to private and family life and because of this reason, it is important to articulate some of the interests that may inform this right, namely dignity, security and relational interests in family life. The dignity element of exclusive marital relationships as well as the legal and economic security interests bound up with it is fundamental to family life. In this sense, the high rates of divorce and re-marriage within monogamous legislative frameworks differ from actually polygynous contexts because the latter lack the kind of formal structures around ending marriage and re-marrying that protect those security and property interests.

When practised patrilocally (where wives reside together with a husband's kin group or clan), polygyny violates the right to familial privacy and undermines women's security and relational interests by compounding the inherent difficulties of sharing one's husband.

The words of a woman from a former polygynous union interviewed in prison while serving a life sentence for killing her former husband aptly described the thoughts of a polygynous wife thus:

How can I go to sleep knowing that my husband is lying with another woman just next door? Just knowing that one's husband has another woman makes one crazy enough without having to see her every day.⁵⁰²

In reaction to these types of familial privacy concerns, Article 27(2) of the Ugandan Constitution now guarantees every person the right to privacy. Under Ugandan law, any man who practises polygyny patrilocally, whether he has the consent of the senior wife or not, interferes with her right to privacy.⁵⁰³ In most instances, requiring co-wives to cohabit not only violates their privacy, but also constitutes an attack on their honour, reputation, and dignity.⁵⁰⁴ In the case of *Itwari v. Asghari*, the Allahabad High Court noted that the

⁵⁰⁰*Ibid.*

⁵⁰¹Cook et al 2006 op.cit.Pp.25-26.

⁵⁰²Tibatemwa-Ekirikubinza L.1998 Multiple partnering, gender relations and violence by women in Uganda 4 *East African Journal of Peace and Human Rights* 15.Pp 22.

⁵⁰³*Ibid* at Pp.36.

⁵⁰⁴HRC Article 17 [Right to Privacy] affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end." (*General Comment No. 16: The right to respect*

increasing mobility of Muslim women makes the introduction of another wife into their domicile an even greater insult today than it may have been historically.⁵⁰⁵ Linking this to wives' emotional well-being, the Court observed that bringing another wife into matrimony will eventually affect her psychologically and general well-being will be impossible.⁵⁰⁶ In this case, the Court was clear that patrilocal polygyny not only undermines a wife's right to familial privacy, but can also be extremely detrimental to her personal honour.

Significantly, the HRC has interpreted Article 17 as imposing a positive obligation on States parties to ensure that "the honour or reputation of individuals is protected by law..."⁵⁰⁷ Even where polygynous families maintain separate households, women's relational and security interests in family life are nevertheless violated. The very thought of sharing a property that used to be a personal one with another woman infringes the right to private and family life. Thus, although Article 18 of the African Charter on Human and Peoples' Rights states that:

the family... [as] the natural unit and basis of society... shall be protected by the State which shall take care of its physical health or moral needs.

The Charter's tacit acceptance, though discouragement, of polygyny in Article 6 underscores a tension within the document. Given that subsequent marriages disrupt the family unit of the present husband and wife, the Charter duty imposed on states to protect such families seems to require that states restrict and eventually abolish polygyny.

4.5.4 The Right to the Highest Attainable Standard of Health

A major factor affecting the reproductive health rights of women is lack of assertion for the right to health in Nigeria. Though right to life is provided for under the constitution⁵⁰⁸ the right to health is not a fundamental right. This seems to be an irony as lack of good health can be an indication for loss of life thus, right to health is a pre-cursor of right to life. One of the most important yet elusive rights for women globally and most especially for this research is the right to the highest attainable standard of health. Where traditional practices such as

of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), UN HRCOR, Sess. No. 23, 1988, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 (2003) 142 at paragraph 11.

⁵⁰⁵1960 A.I.R. 684 (Allahabad) at paragraph 15.

⁵⁰⁶*Ibid.*

⁵⁰⁷*General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Art. 17), UN HRCOR, 23rd Sess., U.N. Doc. *Equality of rights between men and women* (Article 3), UN HRCOR, 68th Sess., U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994) at paragraph 11.

⁵⁰⁸Section 33, Chapter IV Cap C23 – 1999 Constitution of the Federal Republic of Nigeria (Promulgation) Act, Laws of the Federation 2004.

polygyny undermine women's mental, physical, and sexual and reproductive health, they not only deprive women of this health right, but also threaten the enjoyment of other human rights, including the right to life, liberty, and security of the person, amongst others.

The right to the highest attainable standard of health has long been recognized as a fundamental human right. The World Health Organization's (WHO) 1946 Constitution stated that:

the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.⁵⁰⁹

This commitment to the right to health has been echoed in subsequent international human rights treaties including the Economic Covenant, the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention), the Convention on the Rights of Children (CRC), as well as various regional human rights instruments.⁵¹⁰ As a matter of fact, according to the WHO, "every country in the world is now party to at least one human rights treaty that addresses health-related rights, including the right to health and a number of rights related to conditions necessary for health."⁵¹¹ The Economic Covenant furthered earlier articulations of the right to health by including a positive duty for States parties to recognize it.

Due to the association between polygyny and various health injuries to women, as well as psychological challenges in children, "recognition" of the right to the highest attainable standard of health requires that States parties prohibit discriminatory practices that are harmful to the health of women and children. While the provision may not impose the same level of positive State obligation that a duty to "ensure" the highest attainable standard of health would, it nevertheless requires States to tangibly "recognize" the right. In order to be meaningful, recognition in this sense requires States parties to prohibit practices such as polygyny that violate the right to the highest attainable standard of health.

⁵⁰⁹*Constitution of the World Health Organization*, adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. World Health Org.*, 2, 100), entered into force 7 April, 1948.

⁵¹⁰Cook R. et al, 2003 op.citat Pp.170.

⁵¹¹"Health and Human Rights" *The World Health Organization* available in <http://www.who.int/hhr/en/> retrieved on 12/6/2011.

The CESCR is aware of the financial concerns of many States in providing adequate health care, it has been clear that:

States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind⁵¹² and the obligation to take steps⁵¹³ towards the full realization of Article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.⁵¹⁴

Accordingly, States parties have a duty to take “concrete and targeted” steps to abolish practices that prevent women from enjoying the right to health. The CESCR has noted that this requirement to take proactive steps toward the full realization of Article 12 includes the shielding of “women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.”⁵¹⁵

In pursuance of this general right to the highest attainable standard of health, Article 12 of the Women’s Convention strives to ensure that women receive adequate and non-discriminatory access to health-care. Article 12⁵¹⁶ calls on States parties to:

take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

This Article has been interpreted by CEDAW in its General Recommendation no. 24 on Women and Health as implying a State obligation to “respect, protect and fulfill women’s rights to health care.”⁵¹⁷ The obligation to safeguard women’s right to health is particularly relevant in the context of polygyny. As CEDAW has noted:

The obligation to *protect rights* relating to women’s health requires States parties, their agents and officials to take

⁵¹² Article 2(2)

⁵¹³ Article 2(1)

⁵¹⁴ *General Comment 14, The right to the highest attainable standard of health*, UN CESCROR, 22nd Sess., UN Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003), at paragraph 30.

⁵¹⁵ *Ibid* at paragraph 21.

⁵¹⁶ CEDAW.

⁵¹⁷ *General Recommendation 24: Women and health*, UN (CEDAWOR), 20th Sess., UN Doc. A/54/38/Rev.1 chapter I (1999) at paragraph 13.

action to prevent and impose sanctions for violations of rights by private persons and organizations.⁵¹⁸

Where polygyny threatens the mental, physical, and sexual and reproductive health of women, States parties are therefore obliged to prevent and subsequently eliminate the practice. Moreover, polygyny can be considered a form of gender-based violence, it is essential that States parties ensure “gender-sensitive training to enable health care workers to detect and manage the health consequences” of polygynous violence.⁵¹⁹

As the 1995 Beijing Platform for Action, Fourth World Conference on Women noted:

Women have the right to the enjoyment of the highest attainable standard of physical and mental health.”

The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life. Health is a state of complete physical, mental and social well being and not merely the absence of disease or infirmity. Women’s health involves their emotional, social and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology.⁵²⁰ This full interpretation of women’s health is particularly relevant for the elimination of harmful familial practices. Practices such as polygyny can, as the above harms section has illustrated, impact women’s health in a variety of ways—physically, mentally, emotionally, psychologically, and sexually. A holistic approach to women’s health illustrates that an interference with any facet of a woman’s health negatively impacts her ability to enjoy a requisite level of private and public well-being. Thus, while the right to health is often examined within the context of access to effective and adequate medical treatment, it has important implications for the elimination of practices that are harmful to women’s health. Indeed, there is a growing international recognition of the noxious health impact of certain traditional practices, particularly with regard to sexual and reproductive health. The 1995 Beijing Platform for Action noted that reproductive health eludes many of the world’s people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory

⁵¹⁸Ibidat paragraph 15.

⁵¹⁹Ibid.

⁵²⁰Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at paragraph 91.

social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives.⁵²¹

In this sense, inadequate education, misinformation, the limited power many women and girls have over their sexual lives, and high-risk sexual practices such as polygyny combine to undermine the health of women and girls.

The right to health is closely related with the right to life enumerated in Article 6 of the International Covenant on Civil and Political Rights.⁵²² According to the Human Rights Committee, the right to life is "the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation." Although the right to life is often equated with protection against arbitrary deprivation of life, the general comment notes that "[i]t is a right which should not be interpreted narrowly." The Human Rights Committee interprets the right to life to require States to undertake positive measures, such as major initiatives "to reduce infant mortality and to increase life expectancy."⁵²³ The failure to take this issue with either religious or medical claims that harmful practices are mandatory for health, religious, and moral reasons can also be considered to be a violation of women's right to health. It is submitted that polygyny is one of these harmful practices.

4.6 Ideological Basis of Reproductive Health Rights

Reproductive health rights raise many challenging issues that border on the origin of the concepts, political ideology, religious beliefs, developmental level as well as sexual orientation. Whilst it is necessary to reinforce the concept of reproductive health as a major human right issue, it is also imperative that the form and content be made to be gender-specific, culture specific and development specific. Economic and social right must be imported into mainstream human rights to link productive with reproductive rights.⁵²⁴ The challenge may be enormous but it is surmountable and it calls for pragmatism.⁵²⁵

The reproductive and health rights are of paramount importance as a vital aspect of general health. It is the central feature of human development as it reflects health as childhood, adolescent and adulthood. The disregard for these rights can be catastrophic. This is so

⁵²¹Ibid at paragraph 96.

⁵²²See Cook et al, 2003 op.cit.

⁵²³Chapman R.A. , Monitoring Women's Right To Health Under The International Covenant On Economic, Social And Cultural Rights, *44 American University Law Review* 1157 (1995) retrieved from <http://www.law-lib.utoronto.ca/Diana/fulltext/CHAP.html> on 23/1/2011

⁵²⁴Agomo C., 2006 "Teaching Reproductive Health and Rights in Legal Education: Issues and Challenges" Ezeilo J.N (ed.) *Law, Reproductive Health and Human Rights*. WACOL & LRRDC at Pp. 86.

⁵²⁵Ibid.

because where there is a mis-management in the reproductive health of an individual, whether male or female, it affects the health of the next generation depending on the level of mis-management. Although reproductive health is a universal concern, it is of special importance to women especially in their reproductive years. Therefore, adequate attention is required as the health of a new born is largely determined by the state of mother's health which includes nutritional status and her access to health care services. Also after the reproductive years (15-45) of a woman, general health continue to reflect earlier reproductive life events during old age notwithstanding that most reproductive health issues arise during the reproduction years.

In addition, reproductive health is highly connected to many of young people's major issues, such as completing education, finding employment securing their economic position, making secure relationships and, eventually, founding a family of their own.⁵²⁶ Thus reproductive right as a right to reproductive health is important to the young as well although there is public reticence as young people themselves do not put sexual and reproductive health high on their list of active concerns. Furthermore, as a result of the fact that reproductive health is such an important component of general health, it is prerequisite for social, economic and human development. This is so because since human energy and creativity are the drawing forces of development, the highest attainable level of health is essential because it is not only a fundamental right for all but also a social, economic and imperative one. Little wonder reproductive health activities constitute a significant part of all World Bank-lending for population, health and nutrition activity.

4.6.1 Reproductive Health Rights as Survival Rights

A survival right has been described as the most fundamental, in so far as life is a pre-requisite for the realization of any other human right.⁵²⁷ Survival rights that are germane for adult women in Nigeria have been identified as follows:

- a) Very high maternal mortality ratio, especially in the northern parts of Nigeria;
- b) Low, but gradually rising, proportion of women receiving ante-natal care from trained health personnel and very low, though rising, proportion of women delivering in health facilities;

⁵²⁶Okpalaobi B.N and Onyi-Ogelle H. O., Global Trend towards the Reproductive Health Right of Nigerian Women: The Health Promotion Perspective. *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* 2 (6) at Pp. 427.

⁵²⁷Ladan M.T. 2006 Philosophy and Concepts of Reproductive Health and Rights: Issues in Jurisprudence and Contemporary Patterns of Violations of Women's Reproductive and Sexual Health Rights in Selected Countries in Ezeilo J.N (ed.) 2006 *Law, Reproductive Health and Human Rights*. Lagos WACOL & LRRDC at Pp.27.

- c) High fertility rate; low utilization of family planning services and very low contraceptive prevalence rate, especially for modern methods.⁵²⁸

For adolescent girls, the following are the key survival rights issues in Nigeria:

- a) Rising HIV prevalence, linked to behavioural factors and inadequate awareness;
- b) Early pregnancy and associated risks, especially in the northern parts of Nigeria;
- c) High maternal mortality ratio and high incidence of VVF/RVF;
- d) Poor reproductive health services (low access to contraceptive services, counselling, ante-natal care, delivery in health facilities, referral services);
- e) Unsafe, clandestine abortion and related legal issues.⁵²⁹

The legal substratum for the aforementioned rights can be found in Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Child (CRC) and other ICPD declarations. Under CEDAW⁵³⁰ Articles 12 and 14 are of special importance as they deal with elimination of discrimination in the field of health care and the rights of rural women to adequate health care facilities whose exercise is intertwined with the survival rights of both women and children. Article 10 on equal rights of women to education, have an indirect link with survival, because of the importance of female education for good health and nutritional practices.

The International Conventions presuppose the fact that States take active measures to ensure protection of survival rights.

4.6.2 Reproductive Health Rights as Development Rights

Development here means the process by which an individual is able to a greater or lesser extent to develop his or her full potential.⁵³¹ Life skills developments are the skills needed by an individual to operate effectively in the society in an active and constructive way. This covers profession or vocational skills, practical health skills, physical skills or skills related to

⁵²⁸ Federal Ministry of Health, Abuja, *National Reproductive Health Policy and Strategy*, July 2001, Pp 4-13.

⁵²⁹ Ibid.

⁵³⁰ The Women's Convention.

⁵³¹ This is a micro-level concept of development, although it reflects and is ultimately a part of the broader, macro process of development of a society.

behaviour and social interaction.⁵³² According to Ladan,⁵³³ development is divided into three major groups namely:

- a) There is the development of self-awareness, which results in enhanced self-esteem and self-confidence and an ability to cope with emotion and stress.
- b) The development of inter-personal relationships includes friendship formation, adjustment to society, the mature handling of emotions such as empathy, love and sexual drive, as well as the ability to resist unhealthy pressures and
- c) Thirdly, there is also development of functional thinking, enabling the individual to make decisions, solve problems and carry out practical task.⁵³⁴

The development of these skills is germane during adolescence, as teenagers mature and prepare for adult life.⁵³⁵ Adult women face numerous developmental challenges, which are mainly social and economic. Thus, all adults face the challenge of getting an adequate standard of living, through access to employment, opportunities e.t.c. However, women generally irrespective of colour, tribe and tongue face special obstacles and disadvantages, partly due to their biological functions in human reproduction but also as a result of overt gender-based discrimination.⁵³⁶

4.6.3 Reproductive Health Rights as Protection Rights

Protection rights concern protection from abuse, violence, negligence and exploitation, as well as rights to special assistance measures in the case of those who are marginalized or deliberately excluded or are otherwise vulnerable. Nigerian women face enormous challenges of disadvantage, discrimination, abuse and exploitation, sometimes in shocking and undesirable circumstances. These problems compound the risks of survival and create formidable obstacles for the development of children and women and are also major challenges in their own right, requiring special protection measures if they are to be

⁵³²Ladan M.T. 2006 op.citat Pp.27.

⁵³³Ibidat Pp 28.

⁵³⁴UN Women 2000: Gender Equality, Development and Peace for the 21st Century, *23rd Special Session of the UN General Assembly, June, UN, New York. See also WHO 1992 Women, Health and Development, Progress Report by the Director General, WHO/FHE/WHO/925. World Health Organization, Geneva. See also Kolo I.A.,(2000) Youth Development Memorandum* submitted to the Federal Ministry of Women Affairs and Youth Development, Abuja, Nigeria.

⁵³⁵Rogers D., (1981) *Adolescents and Youths*, 4th edition, Prentice Hall, Englewood Cliffs, New Jersey, USA.

⁵³⁶ Beijing Declaration and Platform for Action 1995 paragraphs 47-111.

addressed effectively.⁵³⁷ There are a wide range of types of abuse, which have become subsumed in the concept of violence against women. The Platform for Action adopted at the 1995 Fourth World Conference on Women and Development in Beijing defined violence against women as:

any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.⁵³⁸

This definition was composed to encompass but not limited to physical, sexual and psychological violence occurring in the family and in the community, including battering, sexual abuse of female children, dowry-related violence, rape, harmful traditional practices affecting women's reproductive health rights such as sexual harassment of women at work, trafficking in women, forced prostitution and other violence condoned by the state. Other acts of violence include violation of women's human rights in armed conflict situations, in particular systematic rape, sexual slavery and forced pregnancy.⁵³⁹ In polygyny also, the woman is subjected to marital practices that degrade and diminish her humanity.⁵⁴⁰

4.6.4 Reproductive Health Rights as Participation Rights

Participation rights revolve round the right of children (including the girl-child) to express their views, especially on matters directly affecting their welfare, whilst taking into account the child's age and maturity. For adult women, these rights covers the broad range of women's human rights to full and equal participation in all aspects of political, economic, social and cultural life, especially, participation in decision-making on matters directly affecting their reproductive and sexual health rights.

The concept of participation is part of the culture of democracy. These rights are grounded in the idea that all human being are equal and so women should have the opportunity to share in the making of decisions which affect their lives and their community. Thus, early marriage or

⁵³⁷Ladan M.T, 2002 "An Overview of Reproductive Rights and Reproductive Health (Maternal Health) in Nigeria." A Paper presented at a one-day interactive forum on reproductive rights and health, organized by WACOL, Enugu on 16th December, 2002 at the Faculty of Law, Bayero University Kano, Nigeria at Pp 3.

⁵³⁸Beijing Platform for Action at paragraph 113.

⁵³⁹Ibid at paragraph 114.

⁵⁴⁰Ladan M.T., 2001 "An Appropriate Legislative Response to Harmful Practices Affecting the Rights of Women and the Girl-child in Nigeria." Paper presented at a 2-day workshop organized for state legislators by the Social Science Academy of Nigeria, Abuja held at Abeokuta, Ogun State 2001.

forced marriage into a polygynous setting contravenes this participation rights as the victim in this instance is excluded from participating in a crucial decision affecting her life. In the case *Karimatu Yakubu v. Alhaji Paiko*⁵⁴¹ the first appellant Karimatu a 19 year old girl was forcefully given in marriage by her father the first respondent to the second respondent (Alhaji Paiko). She resented the marriage and applied to the Area Court, Minna for its annulment on the ground that the marriage was done without her consent. Karimatu won both at the Area Court and subsequently on appeal at the Upper Area Court. This decision was however reversed on further appeal to the Sharia Court of Appeal, Minna. The court reasoned that since Karimatu was a virgin then, her father had power of Ijbar⁵⁴² under the Maliki School of Islamic Law over her marriage and he (the father) could marry her away to any man of his own choice irrespective of her own preference. Therefore the court held that the marriage was valid. Dissatisfied, Karimatu further appealed to the Court of Appeal where the decision of the Sharia Court was reversed on the ground that the father after dissuading Karimatu from marrying one of her three suitors, permitted her to choose between the second respondent and second appellant and therefore he had lost his power of ijbar. This is an impressive and commendable decision as it has clearly indicated that the need for the consent of a girl or woman in her marriage is either an indispensable one or at least a desirable one.⁵⁴³

4.7 Reproductive Rights As Human Rights

The Programme of Action of the Cairo International Conference on Population and Development (ICPD) set out the context and content of reproductive rights.⁵⁴⁴ Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents.⁵⁴⁵ These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of

⁵⁴¹Unreported Appeal No.CA/K/805/85 at Pp.15.

⁵⁴²Ijbar is the controlling right of a father on an unmarried daughter in Islam. The right is exercised when the daughter is being given in marriage to a man. It is one of the essential elements of a valid marriage under the Islamic law.

⁵⁴³Unreported Appeal No.CA/K/805/85 at Pp 15.

⁵⁴⁴ Hartmann B., *Reproductive Rights and Wrongs: the Global Politics of Population Control* retrieved from 23/1/2012. <http://www.hsph.harvard.edu/Organizations/healthnet/reprorights/poppapers.html>

⁵⁴⁵Hunt P., Hunt, 10th Canadian Conference On International Health Panel Discussion On The Rights To Sexual And Reproductive Health, October 28, 2003 (Paul Hunt is the UN Special Rapporteur on the Right to Health) available at <http://www.acpd.ca/acpd.cfm/en/section/csih/articleid/223> retrieved on 13/11/2011.

discrimination, coercion and violence as expressed in human rights documents. The issue of polygamy is to be addressed in this context.

Currently, part of the African human rights regime is embodied in the jurisprudence of the African Charter on Human and People's Rights (the Charter) which has created as its principle monitoring organ the African commission on Human and People's Rights (the Commission) and established its procedures.

It is observed that human rights of women have only recently gained prominence in the African Commission on Human and People's Rights.⁵⁴⁶ The Charter itself is seriously deficient on the rights of women. Culture was reinforced in the preamble when State Parties based the foundation of the instrument on 'tradition and values of African civilisation' and, gender only appears in the middle of a lengthy list of grounds on which individual rights may not be distinguished.⁵⁴⁷ Furthermore, only one out of the sixty-eight articles expressly makes reference to women and as Oloka-Onyango and Tamale note,⁵⁴⁸ it is placed in an omnibus clause covering family rights and traditional values 'thereby reproducing the essential tension that plagues the realization of human rights by women.'⁵⁴⁹

Recent innovations have brought about marked improvement at the regional level. Active NGO input (for example NGOs like women in Law and Development in Africa (WILDAF), have pushed for improvements in the Commission which as an international body should exhibit a decent catalogue of human rights and effectiveness by setting acceptable international standards with regards to the rights of the Charter and mandate of the commission itself.

4.8 The Protocol to the African Charter on Human and People's Rights Relating to the Rights of Women (The Protocol)

The Protocol is the most recent development in the African Human Rights regime to address rights of women. After a long-drawn deliberation process spanning 8 years, the Protocol on the Rights of Women in Africa was finally adopted by the African Union on July 11, 2003. The document is a supplementary protocol to the African Charter on Human and Peoples'

⁵⁴⁶EwelukwaUché U.2003, Small Victories, but the War Rages On,*Human Rights Dialogue* 2.10 (Fall 2003): Violence Against Women retrieved from<http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/1054>

⁵⁴⁷Ibid.

⁵⁴⁸Oloka-Onyango& Tamale, "The Personal is Political" or Why Women's Rights are Indeed Human Rights an African Perspective on International Feminism Vol. 17 *Human Rights Quarterly*.

⁵⁴⁹Ibid.

Rights, which was adopted in 1981. Advancing the human rights of African women through creative, substantive and detailed language, the Protocol covers a broad range of human rights issues and is a comprehensive legal framework that African women can use to exercise their rights. Among other benefits it offers in promoting the human rights of women, the Protocol will advance gender equality by calling for affirmative action to promote equal participation in policy formulation, political decision-making, the judiciary and other law enforcement agencies.

On the importance of the adoption and domestication of the Women's Protocol FaizaJama Mohamedremarked that:

Once it enters into force the Protocol will be a powerful new tool to achieve equal rights for women in Africa. It could well serve as a model for the rest of the world.”⁵⁵⁰

By adopting the Protocol on the Rights of Women in 2003, the African Union took a significant step forward in promoting the rights of African women--unfortunately individual countries have been slow to follow through. To enter into force the Protocol needs 15 ratifications. One year after the adoption the Protocol had 30 signatories and so far only one country (Comoros) has ratified. Although the African Charter on Human and Peoples' Rights (African Charter) imposes obligations on states parties to eliminate discrimination against women and to ensure the protection of internationally recognized women's human rights, the Protocol provides more comprehensive and specific guarantees with regard to women's human rights than the Charter.⁵⁵¹

Despite the presence of CEDAW and its application to Africa, African women advocated on the need for an African human rights document; one that would directly and more relevantly address their human right needs. In fact, CEDAW which had not made any specific provision for harmful socio-cultural practices could not through its provisions address social issues of violations of human rights by these practices. Worse still in Africa, despite its well-

⁵⁵⁰Statement of FaizaJama Mohamed, Africa Regional Director of Equality Now. <http://www.equalitynow.org>A coalition of civil society organizations including Oxfam GB, Equality Now, FEMNET, CREDO for Freedom of Expression and Associated Rights and FAHAMU announced the launch of an international campaign urging member states of the African Union to ratify the African Protocol on the Rights of Women in Africa without delay. (29 June 2004) retrieved on 29/11/2011.

⁵⁵¹ The Protocol on the Rights of Women in Africa: Strengthening the promotion and protection of women's human rights in Africa available at <http://web.amnesty.org/library/Index/ENGIOR630052004?open&of=ENG-2AF>. See also *The Protocol on the Rights of Women in Africa* (June 5, 2004) AI INDEX: IOR 63/005/2004 retrieved on 29/11/2012.from <http://www.amnestyusa.org/women/document.do?id=51444F4B0A2DDB0780256EA900424658>

articulated articles on women's rights, the drafters of the Charter were only minimally influenced by CEDAW's provisions, incorporating it only by reference and not by name.⁵⁵² Even then, CEDAW has the weakest implementation and enforcement mechanism of any of the international human rights instruments and did not until October 1999 allow for individual petitions.⁵⁵³

In addition, CEDAW has recorded the highest number of reservations, which further weakened its impact.⁵⁵⁴ The reservations made by African Islamic governments to CEDAW (on the basis that it violates the teachings of the Sharia), outnumber all reservations made by such governments to all other human rights instruments.⁵⁵⁵ It is important to note that prior to the Maputo Protocol, women NGOs and human rights activists had continuously drawn the attention of African governments and regional bodies to the plight of African women and girls suffering from harmful religious and cultural practices. The African Committee on Traditional Practices Affecting the health of Women and Children heeded the call. This NGO in cooperation with the Organization for African Unity drafted the '*OAU Convention on the Elimination of All forms of harmful Practices Affecting the Fundamental Human Rights of Women and Girls*'. The draft was eventually integrated with the Draft Protocol on Women to form the current Protocol in which provisions protecting African women from harmful practices feature prominently.

In particular, Article 5 of the protocol calls upon State Parties to condemn all forms of harmful practices which negatively affect human rights of women and which are contrary to recognized international standards. States are to put into place legislative and other measures to combat these practices, offer support to victims and timely protection to those most vulnerable to these practices. In addition, the Protocol in Article 17 guarantees women to live in a positive cultural context and the right to participate at all levels in determining cultural policies.

In addition, the Protocol has made provision for rights ranging from protection from discrimination, rights to dignity and security, family rights, access to justice, economic cultural, health and reproductive rights which are relevant in the fight against harmful socio-

⁵⁵²Article 60 of the Charter.

⁵⁵³Additional Protocol to CEDAW, which came into force on 22 December 2000.

⁵⁵⁴Oloka-Onyango & Tamale "The Personal is Political" or Why Women's Rights are Indeed Human Rights" an African Perspective on International Feminism' Vol. 17 Human Rights Quarterly.

⁵⁵⁵Additional Protocol to CEDAW, which came into force on 22 December 2000.

cultural practices. Some of the rights discussed above were introduced in the African regime for the first time, coming as an elaboration of CEDAW, and also expanding existing rights in the Charter, especially Articles 2 and 18.

4.9 Conclusion

The terms of CEDAW apply only to those countries that ratified or acceded to the Treaty. Thus, those nations engaging in the greatest atrocities toward women continue to do so without repercussion. The right to health is closely related with the right to life enumerated in Article 6 of the International Covenant on Civil and Political Rights. According to the Human Rights Committee, the right to life is "the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation." Although the right to life is often equated with protection against arbitrary deprivation of life, the general comment notes that "[i]t is a right which should not be interpreted narrowly." The Human Rights Committee interprets the right to life to require States to undertake positive measures, such as major initiatives "to reduce infant mortality and to increase life expectancy."⁵⁵⁶

As long as polygyny is allowed, women in such states particularly the poor and uneducated, will continue to live with increased risk for health impairments, impoverishment, and unfulfilled marital relationships. Women's rights advocates must therefore continue to take up legal cases and advance legal arguments that can help eliminate this harmful practice which clearly violates their own national constitutions and international human rights law.

⁵⁵⁶ Chapman A.R. , Monitoring Women's Right To Health Under The International Covenant On Economic, Social And Cultural Rights, 44 American University Law Review 1157 (1995). Retrieved on 29/11/2011 at <http://www.law-lib.utoronto.ca/Diana/fulltext/CHAP.html>

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

“Reproductive freedom is critical to a whole range of issues. If we can’t take charge of this most personal aspect of our lives, we can’t take care of anything. It should not be seen as a privilege or as benefit, but a fundamental human right.”⁵⁵⁷

5.1 Summary

The idea of reproductive rights as human rights is new and challenging but the fact that every individual has indispensable human rights is however paramount; in other words, they are rights that underpin our ability to live with dignity, to enjoy full and equal citizenship, to lead a healthy and fulfilling life. Despite the endless discussions over the relevance of gender-specific rights in Nigeria and other indicators from the level of increasing awareness on the implementation of human rights protection, discrimination in reproductive health have continued. Thus, federal and state governments are gradually taking significant steps towards creating policies and programmes aimed at protecting their reproductive health of women in particular.⁵⁵⁸ These steps are impressive in so far as they take into consideration the socio-cultural milieu of Nigerian society.⁵⁵⁹

Human Rights Key to Reproductive Rights of women have been summarized into twelve and they are:

- a) the Right to Life,
- b) the Right to Liberty and Security of Person,
- c) the Right to Health, including Sexual and Reproductive Health,
- d) the Right to Decide the Number and Spacing of Children,
- e) the Right to Consent to Marriage and to Equality in Marriage,
- f) the Right to Privacy,

⁵⁵⁷Wattleton F. 2011, “Reproductive Right” retrieved from <http://www.Cab.uscourts.gov/opinions.Pdf/0790442906> on 10/02/2012.

⁵⁵⁸For instance, the National Sexual and Reproductive Health Policy and Strategy (2002), the National Policy on Women (2000), the National Policy on HIV/AIDS, the National Reproductive Health Policy and the National Policy on Vesico Vagina Fistulae (VVF) are some national policies with significant relevance for reproductive health. See also Anekwu N.I, 2011 “Gender and Human Rights in Sexual and Reproductive Health Research” in Wijma B. et al (eds) *Centre of Gender Excellence – GEXcel Work in Progress Report Volume XI* at Pp 33.

⁵⁵⁹Anekwu N.I, 2011 “Gender and Human Rights in Sexual and Reproductive Health Research” in Wijma B. et al (eds) *Centre of Gender Excellence – GEXcel Work in Progress Report Volume XI* at Pp.38-39.

- g) the Right to Equality and Non-Discrimination,
- h) the Right to be Free from Practices that Harm Women and Girls,
- i) the Right to Not be Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment, or Punishment,
- j) the Right to be Free from Sexual and Gender-Based Violence,
- k) the Right to Access Sexual and Reproductive Health Education and Family Planning Information,
- l) the Right to Enjoy Scientific Progress⁵⁶⁰

If a woman is to make her own decisions and live the healthiest life possible, her basic human rights must be respected and she must be able to control her reproductive life and obtain good reproductive healthcare and accurate information. There are some sensitive cultural issues surrounding Nigerian women. One of such is polygyny, Sharia legal system, inheritance rights.

Sexual and reproductive health and rights, along with women's empowerment have been acknowledged world wide as essential elements in promoting poverty alleviation and moving towards sustainable development. Critical areas of concern include HIV/AIDS prevention; reaching out to adolescents and youths; promoting gender equality, empowering women and making motherhood safer by reducing maternal mortality rates, amongst others.

The involvement of men, especially young men as active participants in understanding and thus accepting and promoting women's and men's reproductive rights is thought to be crucial to the successful outcome of population policies and programme. The problem of women and health in Nigeria cannot be resolved unless attempts are made to reduce and eventually eradicate oppression and exploitation in Nigerian society. The problems women face are the problems of human beings and thus, everyone including men and women should work together towards the liberation of women in Nigeria.

The social construction of sexuality refers to the process by which sexual thoughts, behaviours, and conditions (for instance, virginity) are interpreted and given cultural meaning⁵⁶¹. It incorporates collective and individual beliefs about the nature of the body, about what is considered erotic or offensive, and about what and with whom it is appropriate

⁵⁶⁰Center for Reproductive Rights, retrieved on 12/04/12 from www.reproductiverights.org.

⁵⁶¹Ortner SB, Whitehead H, eds. 1981 *Sexual meanings: the cultural construction of gender and sexuality*. Cambridge, Cambridge University Press. Vance C S. 1991 Anthropology rediscovers sexuality: a theoretical comment. *Social Science and Medicine*, **33(8)**:875-884.

or inappropriate for men and women (according to their age and other characteristics) to do or to say about sexuality. In some cultures, ideologies of sexuality stress female resistance, male aggression, and mutual antagonism in the sex act; in others, they stress reciprocity and mutual pleasure⁵⁶². The social construction of sexuality recognizes that women's and men's bodies play a key role in their sexuality, but also looks carefully at the specific historical and cultural contexts to gain an understanding of how specific meanings and beliefs about sexuality are generated, adopted, and adapted⁵⁶³.

The social construction of sexuality is in fact a major reason for the continuity of polygyny. The cultural dictates and acceptability makes it desirable as a class dictating action. It is no longer news that more stringent penalties are imposed on women than men and these disparate treatment of men and women are often to the disadvantage of women; one clear example is in the cases of adultery where such is a crime either under valid customary law or Islamic law.⁵⁶⁴ This goes to support the fact that the law privileges male sexuality over female sexuality, and further evident in the widely-accepted practice of polygyny (having more than one wife at a time) without a similar acceptance of polyandry (having more than one husband at a time). Specifically, among countries where Sharia law is practised, including in parts of Nigeria and Sudan, such disparate treatment is rampant. For example, in the Zimbabwean case of *Muyambo v. Bere*⁵⁶⁵ Zimbabwean court found a female defendant who had an affair with a married man liable for adultery, and ordered her to pay monetary compensation.

As may be expected health is high on the agenda of women's issues. The HIV/AIDS epidemic has had a significant impact on women⁵⁶⁶ Many girls enter marriage at a young age and their husbands are older and often have had multiple partners. Such girls are at risk of contracting HIV/AIDS from their husbands. There have been attempts to address the problem of educating young women on their social and sexual rights.⁵⁶⁷ The issue of maternal mortality and morbidity is also another irreconcilable challenge of polygyny. In the 1990s access to primary health care declined. One important indicator of women's health problems

⁵⁶² Standing H & Kisekka M.N. 1989 *Sexual behaviour in sub-Saharan Africa: A Review and Annotated Bibliography*. London, Overseas Development Administration.

⁵⁶³ Extracted from Dixon-Mueller R. The sexuality connection in reproductive health. In: Zeidestein S, Moore K, eds. 1995 *Learning about sexuality: a practical beginning*. New York, The Population Council and International Women's Health Coalition.

⁵⁶⁴ Penal Code (Northern States) Federal Provisions Act Cap P3

⁵⁶⁵ *Muyambo v. Bere* (HC 1010/05) 2007 ZWHHC 30; HH 30-2007 (16 March 2007) Zimbabwe, High Court

⁵⁶⁶ (60% of HIV sufferers are women).

⁵⁶⁷ The Girl's Power Initiative has reached out to several thousand young women in four southern and central Nigerian states.

is the maternal mortality rate. This rate is 1549 per 100,000 live births in the northeast. The lowest rate is in the South-western part of Nigeria at 165 per 100,000 live births. The figures, in the North-east, are among the worst in the world. Lack of access to adequate health facilities is a major contributing factor. Safe termination of pregnancy is also an issue as women are exposed to unsafe abortions. Abortion is illegal in Nigeria and an estimate of 34,000 women die yearly over abortion in Nigeria.⁵⁶⁸ It has also been stated recently that Nigeria is the second country in the world, after India, with the highest maternal mortality rate contributes 10 per cent to the world's total maternal death.⁵⁶⁹

The fundamental basis of reproductive ill health for women is often embedded in discriminatory social structures and stereotypes that can be reformed and remedied by judicial interpretation of enacted laws.⁵⁷⁰ Accordingly, judicial decisions and case law, in particular, have the potential of advancing health and human rights protection for vulnerable groups, especially women. Law can be used by the judicial system to link abuses of reproductive health rights to actions or non-actions for which the State or government is accountable.⁵⁷¹

In the final analysis, reproductive freedom lies at the heart of the promise of human dignity, self-determination, and equality. When a woman is exposed to multiple partners in polygyny; and is denied obstetric care, birth control, the facts about reproductive health, or safe abortion, as is usually the case in polygyny, she is denied the means to direct her own life, protect her health, and exercise her human rights and even the right to life.

The successes in defining and promoting women's rights, including the prohibition of polygyny have generated criticism and reprisals. Social conservatives around the world have responded negatively to efforts to empower women and endow them with enforceable rights within the family, charging that such initiatives constitute an assault on 'family values', traditions, national cultures, among other things.⁵⁷² In spite of these apprehensions, society as

⁵⁶⁸The National Programme Director of the Partnership for the Transforming Health System (PATHS 2), Mike Egboh stated this in the Nigerian Tribune Online Edition of Tuesday, March 13, 2012. Retrieved from www.tribune.com.ng

⁵⁶⁹Ibid.

⁵⁷⁰Aniekwu N. I. 2008 Gender and Reproductive Health: Towards Advancing Judicial Reform in Nigerian Law. Retrieved from <http://www.nials-nigeria.org/journals/Nkoli-AdvancingJudicialReformReproductivRights.pdf> on 2/5/2012.

⁵⁷¹Ibid.

⁵⁷²Welchman Lynn ed. op.citat Pp. 249.

a whole must forge a way for the reproductive rights of women to take the same place as other universally recognized fundamental human rights.

The role of legislations in securing reproductive health rights for women cannot be overemphasized. While it is true that many countries are signatories to international human rights treaties which have recognized the fundamental rights of women and girls, these rights must be enshrined in national-level constitutions, which carry a force of law superior to other parliamentary and executive acts, and to customary and religious law. In Nigeria for example, the distinction between the rights embodied in Chapter II and those in Chapter IV of the Constitution remains intact, at least in practice. It is more critical because reproductive health right which is an embodiment of the right to health is contained in Chapter II of the Constitution which is not justiciable. Despite provisions for human rights in the Nigerian Constitution, there are significant problems for women under the current laws. The punishments under Sharia law for criminal offences, conflict with the constitutional guarantees of human rights. Health problems, such as HIV/AIDS and maternal mortality further add to the plight of women.

Where the rule of law is upheld in a country and same is enshrined in the country's constitution, a negation of the reproductive rights of women thereby becomes an indictment to that country's claim to the rule of law. Where a Constitution falls short of protecting human right, very little hope remains for realizing human rights. This is simply because a Constitution stands out as the *grundnorm* and every other legislation flows from the Constitution. The Nigerian Constitution is a clear example; Section 1 (3) of the 1999 Constitution⁵⁷³ enacts thus:

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.

In Nigeria, international legal instruments which have been signed and ratified by the country must be specifically adopted or domesticated in order to make them a part and parcel of municipal laws. In effect therefore, where international legal instruments which affirm and guarantee the protection of the reproductive health right of women have been ratified by Nigeria, they are of no legal effect in the absence of specific adoption or domestication as enacted in Section 12 (1) of the Constitution.

⁵⁷³Cap C23 of Laws of the Federation of Nigeria 2004.

Whilst the social, cultural and religious dimensions of polygyny cannot be ignored, it is important to note that legislation still stands as a veritable tool for social engineering. Recently, a few number of African and Islamic countries that have traditionally allowed polygamy have also begun to ban the practice. Zaire banned polygamy; Tunisia banned polygamy; Burundi prohibited polygamy. Mauritius banned polygamy in a comprehensive, informed, court decision addressing religious freedom and secular legal concerns. Turkey for instance has banned polygamy completely and Bangladesh has also outlawed polygamy through a judicial opinion.⁵⁷⁴

The health risks involved in the practice of polygyny are also very crucial in the light of the current HIV/AIDS pandemic. Although the spread of the virus may be activated by some other cultural practices like tribal markings and female genital mutilation, it has also been asserted that the practice of polygyny creates a network of simultaneous or "concurrent" sexual relationships that links sexually active people not only to one another but also to the partners of their partners— and to the partners of those partners, and so on—creating a giant web that can extend across huge regions. If one member contracts HIV, then everyone else in the web may, too. Polygamous men generally seek out young women, even as they themselves age. In this way, formal and informal polygyny pumps the virus from one generation to the next⁵⁷⁵In Sub-Saharan Africa; HIV is mainly transmitted through heterosexual intercourse. Variances in sexual behaviours across cultures, age groups, and gender usually influenced by culture and socio-economic circumstances impact on HIV prevention interventions.

Maternal mortality and morbidity levels in Nigeria remain amongst some of the highest in the region and worldwide.⁵⁷⁶ Other issues contributing to this situation include traditional and religious systems that support early and/or forced marriage, early and excessive child bearing, (which is indirectly a component of polygyny) and different forms of gender based violence directly and indirectly limit and impair reproductive rights thus seriously compromising women's health.⁵⁷⁷ Also relevant is the inadequate legal and policy framework for the

⁵⁷⁴ <http://www.austlii.edu.au/au/journals/MurUEJL/2005>

⁵⁷⁵ Ibid.

⁵⁷⁶ See generally, Aniekwu N.I. 2006 *The Convention on the Elimination of All Forms of Discrimination Against Women and the Status of Implementation on the Right to Health Care in Nigeria*. American University Washington College of Law, *Human Rights Brief (Center for Human Rights and Humanitarian Law) Volume 13, Issue 3 (Spring 2006) Pp 35*. See also UNFPA, *State of the World Population 2005*, "Reproductive Health Fact Sheet," http://www.unfpa.org/swp/2005/presskit/factsheets/facts_rh.html.

⁵⁷⁷ Ibid.

protection of reproductive health and rights. The wide gap between policies and action and the absence of genuine political will remain formidable challenges to the protection of women's health.⁵⁷⁸

Indeed, it is true that it has been difficult to translate the normative prescriptions of international human rights instruments into municipal laws to produce practical realities for women; which may be often due to institutional and enforcement problems. These international human rights instruments are nevertheless tools that can be engaged to arrive at a favourable point for the reproductive rights of women. The African Charter on Human and Peoples Rights (Ratification and Enforcement Act) stands as the only domesticated, albeit regional human rights legislation under Nigerian municipal laws, it is still inferior to the Constitution as emphasized by the Supreme Court in the case of *Abacha v. Fawehinmi*.⁵⁷⁹ The leeway provided by the decision in *A.G. of Ondo State v. A.G of the Federation & Ors*⁵⁸⁰ can be leveraged on to ensure that other municipal laws which guarantee the right to health of which reproductive health rights are subsumed can be enforced to secure this right for women.

The Programme of Action agreed to at the ICPD, set a number of interdependent goals and objectives to be attained by 2015. These included universal access to comprehensive reproductive health services, including family planning and sexual health; reductions in infants, child and maternal mortality; universal access to basic education, especially for girls, and gender equality, equity and women's empowerment.⁵⁸¹

To lend further credence to the importance of the reproductive rights of women, the reproductive rights have recently been incorporated into the international development agenda. With the adoption of the UN Millennium Development Goals (MDGs) in 2000, governments have reached the consensus that addressing women's reproductive health is key to promoting development. In the document produced at the 2005 World Summit, leaders from around the world made an explicit commitment to achieving universal access to reproductive health by 2015. As there is close alignment between the MDGs and the human rights framework, the MDG agenda provides yet another vehicle for advancing women's reproductive rights. As 2015 approaches, it behoves individual governments to align their

⁵⁷⁸ Ibid.

⁵⁷⁹ (2000) 6 N.W.L.R. (Part 660) Pp 228.

⁵⁸⁰ (1983) N.S.C.C.512

⁵⁸¹ Shaw D. 2006 Women's right to health and the Millennium Development Goals: Promoting Partnerships to improve access in *International Journal of Gynaecology and Obstetrics*, 94 at Pp.207-215.

legislations to realize this right for women while of course leveraging on international partnerships and co-operation where necessary. A beyond-2015 plan of action is necessary if the results achieved by 2015, even though not as momentous as expected, is to be sustained and increased.

Many societal institutions are crucial to the realization of women's reproductive, sexual, and equal rights. One of these institutions is the judiciary. In the course of interpreting legislation, courts apply constitutional, statutory, and customary legal provisions to uphold or deny women's rights; including reproductive health rights.

In the discharge of the crucial function of the courts, the weakness of the standards that are in place best comes into focus when women are compelled to seek or defend their rights in the courts. Judicial decisions can help point out where the law must be reformed to better guarantee women's equality and to interpret existing standards that uphold women's reproductive rights. The greatest responsibility for the protection of the reproductive health right of women lies on the individual governments; especially in the area of cultural and traditional practices which obstruct this right for women. While the international community can advocate, only national governments can implement.

In assessing Nigeria's obligations under the various treaties that protect the rights of women and children, a lot remains undone. As it has been discussed already in this study, polygyny is a form of discrimination against women which could be mitigated and eventually eliminated if the appropriate international treaties get the backing of Nigeria and the other various states where it is being practised. Article 1 of the African Charter must be recalled and it enjoins parties to the Charter to recognize the rights, duties and freedoms enshrined in the Chapter and undertake to adopt legislative or other measures to give effect to them. By this position, the Charter intends that it ought not to be only the legislative arm of government which should stand up to the task of eliminating all forms of discrimination against women thereby securing their reproductive rights, but all other organs and agencies of government must assume some responsibility. Also, the 2004 Revised National Health Policy specifies national standards for reproductive health, and aims to 'create an enabling environment for appropriate action and provide the necessary impetus and guidance to local initiatives in all areas of reproductive health.' Its objectives include reducing maternal morbidity, unwanted pregnancies, prenatal and neonatal morbidity and mortality; reducing gender imbalance in

matters of sexual and reproductive health; and promoting research on reproductive health issues.⁵⁸²

As long as polygyny is allowed, women in such states particularly the poor and uneducated, will continue to live with increased risk for health impairments, impoverishment, and unfulfilled marital relationships. Women's rights advocates must therefore continue to take up legal cases and advance legal arguments that can help eliminate this harmful practice which clearly violates their own national constitutions and international human rights law.

5.2 Recommendations

This research has made an attempt to discuss the concept of reproductive health rights of women in the light of polygyny. From the work it is glaring that polygyny constitutes an infringement of women's right to reproductive health care. Though there are other factors for instance, child marriage, Female Genital Mutilation, unsafe abortion, family planning, gender inequality/violence that affect the reproductive health status of women in Nigeria, it is important to note that polygyny has never been categorized as one of the factors which affect the reproductive health status of women; it is hereby submitted that it is one of them.

From the identified gaps in the Reproductive Health policies and legislation in Nigeria, as well as the challenges of polygyny the following recommendations are made: -

1. Enactment of a Uniform law on reproductive health- the fact that multiple lawsystems simultaneously exist and have contemporaneous applicability has major significance on the determination of the legal position of reproductive rights of women in Nigeria.
2. Effort should be directed towards the discouragement of polygyny by placing emphasis on the dangers inherent in the practise.
3. Prosecution and enforcement of the law of bigamy to serve as deterrent for others.
4. Chapter II of 1999 constitution should be made justiciable and enforceable.
5. Grassroots and widespread awareness should be created to enable all women know the importance of their reproductive rights and ways of realising same.
6. To improve the policy environment, a vigorous preventive awareness campaign should be mounted like never before to the target populations to inform them about

⁵⁸²Aniekwu N. I. 2008*Gender and Reproductive Health: Towards Advancing Judicial Reform in Nigerian Law*. Op cit.

the health risks of polygyny and the message should be disseminated consistently and sustainably to the remotest corners of the country. This would be achieved by taking into consideration the multi-religious nature of Nigerian society and should not be interpreted to mean an attempt to spread a religious idea.

7. As an halfway measure, to meaningfully enjoy and ensure effective promotion and protection of reproductive health and sexual rights, there is the need for urgent constitutional review to upgrade these rights as fundamental human rights under chapter 4 of the constitution or at least, as part of chapter 2 on fundamental objectives and directive principles of state policy. These rights must be made part of constitutional obligations of all levels and tiers of government to respect, observe, promote and protect because they are human rights founded upon principles of human dignity and equality as well as survival issues.
8. The government should be more proactive to providing the infrastructure where women could easily access their health timeously and efficiently.
9. Other existing windows of opportunity to explore as a way forward in addressing reproductive health concerns and in combating HIV-AIDS epidemic include the large network of civil society groups that should be maximized. All stakeholders, including the government, should ensure that the whole country is effectively covered in the number and diversity of intervention through public awareness campaigns. This would have an effect on the cost implication of HIV treatment in Nigeria.
10. There should provision of free access to reproductive health services
11. In order to curb the exponential increase in population, policies discouraging polygyny should be implemented to determine Nigeria's population for sustainable development.
12. The national response to reproductive health concerns and HIV-AIDS needs to be continuously assessed, to provide all stakeholders with constant feedback on progress with implementation, by identifying actual or potential successes and problems so as to facilitate timely adjustments to implementation. The existing management information system needs to be made more effective by enhancing its capacity (human, technical and financial) with clear statements of measurable objectives in order to serve as an indispensable tool to assess and improve performance.
13. Registration of all marriages- In order to do this, the Constitution should be amended to make provision for all marriages to be registered irrespective of the type that is contracted. It is noted here that despite CEDAW's recommendation that states require

registration, this remains one of the most significant obstacles to prohibiting polygyny.

Most countries, as parties to international human rights treaties, have recognized the fundamental rights of women and girls. These rights must be enshrined in national-level constitutions, which carry a force of law superior to other parliamentary and executive acts, and to customary and religious law. In final conclusion, reproductive health contributes enormously to physical and psychological comfort and closeness and to personal and social maturation while poor reproductive health is frequently associated with disease, abuse, exploitation, unwanted pregnancy and even death. Ultimately, it is only a healthy population that can ensure a sustainable economic development in a stable democratic environment.

If the sanctity and equality which human rights portend must be upheld, then it behoves governments and their numerous agencies to find lasting means to give effect to the reproductive rights of women.

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UNIVERSITY OF IBADAN

APPENDIX I

REPRODUCTIVE HEALTH BILL OF RIGHTS FOR WOMEN OF COLOR

**A PUBLICATION OF THE Institute of Women and Ethnic Studies WOMEN OF COLOR AND THE
EMERGING REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT**

WOMEN OF COLOR AND THE EMERGING REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT

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For more information or additional copies of the Reproductive Health Bill of Rights for Women of
Color, please contact:

INSTITUTE OF WOMEN & ETHNIC STUDIES 1600 Canal Street, Suite 706 New Orleans, LA 70112 Tel:
504/539-9350 ♦ Fax: 504/539-9351 Email: info@iwes.org

1PURPOSE

All people are born free and equal with dignity and rights as set forth in the Universal Declaration of
Human Rights. Historically, women of color across nations, cultures, and different religious and
ethnic groups have been subject to racist exploitation, discrimination and abuse. Manipulative,
coercive and punitive reproductive health policies and practices deprive women of color of their
fundamental human rights and dignity. The purpose of the Bill of Rights is to serve as an advocacy
tool and guide to women of color, health rights advocates, health care providers, policymakers,
biomedical ethicists and researchers. These principles will, therefore, serve:

- To respect and safeguard a woman's right to make responsible and informed choices that affect
her reproductive health;
- To ensure that all women, irrespective of socioeconomic status, race, education, religion or
language be aware of their right to have respect for their values, beliefs and bodily integrity;
- To ensure that women know and understand their basic rights in areas of research activities and
programs and that the potential for abuse or exploitation be minimized;
- To help health care providers, medical administrators, agents of the biomedical and health care
industries, and all policymakers be sensitive to the vulnerability of women of color regarding their
reproductive health and facilitate actions and behavior that serve to protect the reproductive health
of women of color;
- To facilitate women's access to linguistically and culturally appropriate education, information and
technologies that affect their health, in general, and their reproductive health, in particular;
- To promote a common understanding of and respect for the rights, freedoms and dignity of
women of color.

2PREAMBLE

The Reproductive Health Bill of Rights for Women of Color is a declaration of rights based on
principles of ethics and behavior. The Bill of Rights acknowledges the cultural, ethnic and sexual
diversity of women of color and affirms their right to exercise autonomy regarding all decisions
affecting their bodies. Furthermore, this Bill acknowledges and supports that indigenous peoples
have the right to self-determination guaranteed under all international laws and treaties. Moreover,
in this Bill of Rights, all references to Women of Color include indigenous women and all other

women who are discriminated against due to categorization within a particular racial or ethnic group.

These reproductive health principles are based on the premise of choosing right or good behaviors in relationship to others, and are grounded in the following ethical concepts: (1) Do no harm, or, at a minimum, do more good than harm; (2) Respect the basic human rights of individuals to make choices; and (3) Justice and equity for all, regardless of race, ethnicity, gender or socioeconomic class.

The Reproductive Health Bill of Rights for Women of Color endorses the principles and plans of the International Conference on Population and Development in Cairo and the Fourth World Conference on Women in Beijing. This Bill of Rights is the cornerstone of a global partnership that works to ensure that all women, particularly women of color, have access to appropriate health care services, information and education so that they can make informed choices for attainment of the highest standards of sexual and reproductive health.

3BILL OF RIGHTS

I. The integrity of a woman's body must be respected and valued. Every woman has a fundamental right to make informed choices about her reproductive and sexual health.

II. The reproductive and sexual health of women of color must not be compromised nor jeopardized because of their social and economic status; social justice, not economic forces, should drive access to reproductive health services.

III. Reproductive and sexual health is an integral component of the overall health and wellness of women of color and must be integrated within the context of primary health care, so as to improve the total health status of women. This must include full access to accurate, comprehensive education and information about reproductive and sexual health.

IV. A woman's health and rights must be the determinant of all reproductive health services and policies, not demographic targets.

V. Women of color must be involved in all levels of the development of reproductive and sexual health policies. Such policies must reflect and respect the needs of women from all racial, ethnic and socioeconomic backgrounds.

VI. Women must be respected and supported in their choices as to whether or not to have children.

VII. The partners of women of color must be encouraged to share responsibility in the practice of family planning and STD prevention, in order to attain optimal reproductive and sexual health for their families.

VIII. Women of color must have the right to determine their own sexual orientation, expression and behavior, and freedom from discrimination and persecution for such behaviors.

IX. Women of color have the right to full disclosure of information regarding the risks and benefits of proposed medical treatments and alternatives before consenting to any course of action that might have impact on their reproductive and sexual health.

X. Women of color are entitled to full and complete disclosure regarding the full spectrum of contraceptive choices, including the benefits, side effects, and the potential risks of each method.

XI. Women of color have a right to be protected from the potential abuses inherent in the power imbalances that exist within the client-provider relationship, and that oftentimes occur with socioeconomically disadvantaged and disempowered clients. Therefore, the provider has the responsibility to ensure that the woman or girl child unequivocally understands the meaning and action of informed consent.

XII. Women of color should not be subjected to drugs or devices in any context or setting that are used as tools of coercive social policy.

XIII. Safeguarding women's health is of primary concern in the development of all reproductive technologies.

XIV. New reproductive technologies should enhance reproductive choice and be held to the highest ethical standards. All research activities must be subject to review by multi-disciplinary ethics committees whose membership reflect the principles of self-determination and bodily integrity for all women.

XV. All people and organizations engaged in reproductive research must respect the full spectrum of cultural and ethnic diversity among women of color, their values, languages, knowledge, beliefs, attitudes and desires as defined by women themselves.

XVI. New drug development and application processes should factor in socioeconomic and environmental considerations and should take into account culturally appropriate assessments of family and community needs.

XVII. The focus of research and development of contraceptive technologies should include males and females equally.

XVIII. Participation in clinical trials must be voluntary and based on culturally proficient informed consent. The number of women of color in studies should reflect their proportion in the affected population.

XIX. Ongoing monitoring processes should be in place to minimize the potential for the abuse of reproductive technologies as agents of unethical social policies.

XX. Governments, in partnership with women of color health advocates, should increase their collaboration with the pharmaceutical industry in the quest to develop safer, more effective, reliable and affordable contraception.

5 BACKGROUND AND HISTORY

A REPRODUCTIVE HEALTH BILL OF RIGHTS

A. Global Perspectives

1. In 1981, ratifying countries at the U.N. Convention on the Elimination of All Forms of Discrimination Against Women agreed to eliminate discrimination against women in all civil,

political, economic, social and cultural areas, including health care and family planning. The Convention specified that women had the human right to make effective decisions for themselves and their families, including the right to plan their size and structure. It was then the most comprehensive human rights instrument addressing the issues of equality and the necessity for women to have a safe, freely chosen, reproductive life. However, the large number of reservations and declarations whereby some countries restricted their obligations for cultural, religious, legal or other reasons, have limited the effectiveness of that treaty.

2. The Action Plan (Agenda 21) of the 1992 U.N. Conference on Environment and Development (UNCED), referred to as the Rio Conference, for its location, paid little attention to population-related policies. Consequently, a contingent of women organized themselves at local, regional, national and international levels to prepare for the U.N. Conference to be held in Cairo in September 1994. 215 women from 79 countries met in January of that year, and developed the ARio Statement on Reproductive Health and Justice@ which put population policy and sexual health and rights in the context of macro-economic policies, sustainable development, and human rights concerns.

Subsequent conferences have attempted to place the issues of reproductive and sexual health, and the dynamics of power and empowerment for all females - from girl child through womanhood - squarely in the center of population and development priorities.

3. The 1994 International Conference on Population and Development (ICPD), held in Cairo, Egypt, and commonly referred to as the Cairo Conference, adopted a Programme of Action that represented unprecedented international consensus on critical quality of life issues. Its key message is that population issues are development issues; and that reproductive health and rights are integral factors of the human development agenda. The reduction of poverty, improvement of women=s status and the quality of life for all, are essential for sustainable development. The 16 principles proposed to guide the Programme of Action in its implementation unequivocally place reproductive and sexual health at the core of family planning, and the empowerment of women indisputably undergirds population and development priorities. The following excerpt from Principle 4 illustrates the strong ethical values permeating the dialogue: Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility are cornerstones of population and development-related programs. The human rights of women and the girl child are an inalienable, integral and indivisible part of human rights.

The Programme of Action was adopted by consensus of 184 governments, but 17 nations still restricted their endorsement with reservations. Women emerged as a strong moral and vocal force from this landmark meeting. It was clearly established that the efforts of non-government organizations (NGOs) B the private sector, women=s groups and individuals B were critical to successful implementation of the recommendations and action plan of the conference. They had a responsibility to push the action forward and work to create and/or strengthen partnerships with governments.

4. The 1995 China Conference, the Fourth World Conference on Women held in Beijing, and the largest meeting ever convened under U.N. auspices, as well as the independent but related NGO forum held in nearby Huairou, produced a Declaration and Platform for Action that acknowledged and reiterated the work done previously to advance the goals of equality, development, and peace

for all women everywhere. The Declaration recognized the uneven and slow pace of progress on the status of women, with serious consequences for the well-being of all people, and reaffirmed a commitment to ensure the full implementation of the human rights of women and the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms...

The Declaration and Platform for Action from the Beijing meeting made specific reference to the U.N. conferences and summits: the Nairobi Forward-looking Strategies for the Advancement of Women of 1985, the Rio meeting on environment and development, the Vienna meeting on human rights in 1993, the Cairo plan in 1994, and the March 1995 Copenhagen World summit on social development. The Beijing Mission Statement declared the Platform to be an agenda for women's empowerment. The Strategic Objectives and Actions, Chapter IV of the Platform, contain detailed critical areas of concern with concrete actions to be taken that would improve the situation of all women [with] Aspecial attention given to groups that are the most disadvantaged. Chapter IV addresses Women and Health, which involves women's emotional, social and physical well-being and is stated to be determined by the social, political and economic context of their lives as well as by biology. Women's unequal access to basic health resources, lack of emergency obstetric services, gender stereotypes and bias, prevalence of poverty and economic dependence, experiences of violence, racial discrimination, inequitable distribution of food, deficient housing conditions all serve to overburden women and produce a negative effect on their health. Section 94 states that reproductive health is:

Astate 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 to its functions and processes...Measures to prevent and eliminate violence against women are separately and lengthily advocated, as are actions proposed to promote and protect the human rights of women through the full implementation of all human rights instruments, and actions to eliminate all forms of discrimination against the girl child.

5. In 1996, the Canadian Women's Committee on Population and Development published a Bill of Rights as their contribution to the ongoing dialogue on reproductive rights and women's health, and towards the creation of new ethical guidelines on contraceptive technologies. They also acknowledged the tremendous efforts of women's groups from around the world in their work prior to, during and after the Cairo and Beijing conferences. The Bill outlines broad ethical principles concerning women's health, and sets forth guidelines for research and development of reproductive technologies, their testing, approval and monitoring, as well as the implementation, evaluation and monitoring of health services. It also proposes guidelines for planning and priority setting for health program funders.

B. U.S. Women of Color Unite

Common to all the earlier and most recent efforts is an overwhelming concern about the current status of women, their right to lead fulfilling, healthy lives and a determination to ensure that the public and private sectors within and across nations actively take responsibility to make this a reality. Building on the momentum for a comprehensive agenda for women's health rights and choices to elevate the status of women in the new millennium, the Women of Color Reproductive Health Forum was created.

The Institute Of Women and Ethnic Studies Women of Color Reproductive Health Forum

The Women of Color Reproductive Health Forum (WOCRHF) was founded in 1990 by two African American physicians, Dr. Denese Shervington and Billie Jean Pace, while they served as Chairperson and Vice Chairperson of the National Medical Association's Council on the Concerns of Women Physicians. This was in response to the absence of African American physician voices on issues related to reproductive health and choice. The mission of WOCRHF was to facilitate and ensure access to comprehensive reproductive health care for African Americans by increasing the commitment of physicians to the delivery of such services. In 1993, WOCRHF expanded its mission and incorporated as a 501(c)(3) non-profit organization under the name of the Institute of Women and Ethnic Studies (IWES). IWES is a non-profit medical/community-based think-tank whose mission is to improve the physical, mental and spiritual health and quality of life of women, in particular, poor women of color, and their families, through the development of culturally proficient health intervention and research models.

In April 1996, the Institute of Women and Ethnic Studies (IWES) convened the first of five Workshops* to examine the issues and concerns affecting women of color and the emerging reproductive health technologies. Over the next two years, a cross-section of women's health activists, clinicians, research academicians, public health specialists and pharmaceutical representatives came together to articulate their views and experiences of the obstacle that prevented women of color from attaining healthy and fulfilling lives. They became committed participants in reaffirming previous national and international resolutions that supported the critical need for a comprehensive human rights agenda for women, and they sought to build consensus on culturally appropriate and ethical approaches to reproductive health services development, research, promotion and delivery.

The April 1996 Workshop, convened by IWES in Jamaica, was a major attempt to Finding Common Ground: an examination of empowerment vs. coercion issues related to long acting contraceptives. Newly introduced long acting contraception methods were subject to much controversy and suspicion, in some cases dismissed as instruments of class prejudice and eugenic social coercion. Consequently, the goal of the workshop was to develop consensus between consumer advocates and the medical community on cooperative approaches to contraceptive technologies. A diverse group representing Asian, Latina, Native American, and African American women of color in the medical/scientific community and consumer advocate organizations met for three days to build consensus on strategies for research, access to information and education, development, marketing and distribution of contraceptives, in particular those with socio-political implications.

Later, in October 1996, a second Workshop was held to examine the implications of biomedical research and reproductive health technologies. Multi-Cultural Approaches to Research, Development, Distribution and Marketing of Reproductive Health Technologies, convened by IWES, was a follow-up to the earlier workshop to promote constructive dialogue and build a common agenda between research scientists and representatives of targeted communities: leading women's health advocates, pharmaceutical company executives, and representatives of consumer organizations. The concern expressed was that much of the focus on biomedical research was on population control through contraception distribution for pregnancy prevention; that socio-

economically disadvantaged people, predominantly women of color, were too often targets of fertility control through contraceptive technologies; and not enough attention was being given to the safeguarding of women's sexual and reproductive health. Much of the focus at this workshop was on the absence of representation of ethnic groups in the strategic planning, discovery, development, testing and evaluation of new drugs and devices. The following year, in April 1997, IWES convened a third Workshop in the Women of Color and Emerging Health Technologies Series: Marketing and Distributing Reproductive Technologies in Culturally Diverse Markets. Participants in Santa Barbara, California including African American, Asian and Latina women sought to continue the dialogue between women of color health advocates, pharmaceutical representatives and health care providers around culturally appropriate and ethical approaches to distribution of reproductive health technologies. Options for men were encouraged, as well as safe and effective technologies for women. Inclusion of people of color as clinicians in clinical trials were advocated, and the issue of voluntary, informed consent in the U.S. and developing countries were addressed.

The fourth Workshop in July 1997, held at Cambridge University, England was a response to a call for national and international perspectives on the marketing and distribution of reproductive technologies, particularly in developing countries. The task was to build on the Cairo and Beijing findings and develop a more global consensus around the shaping of the discussion on reproductive ethics. Balancing Biomedical Ethics and Need in the Global Reproductive Health Research Agenda was the goal for participant dialogue, and reaffirmation of some of the principles articulated in the ICPD Programme of Action.

The fifth Workshop held in October 1998 in San Francisco, IWES brought together participants representative of the medical provider community and pharmaceutical industry, women health activists, consumer advocates, research academicians, and representatives of federal government and state agencies, to draft a Reproductive Health Bill of Rights for Women of Color. An intense and continuous dialogue ensued over the two days, during which participants shared experiences and reaffirmed their commitment to protect the reproductive and health rights of women, respecting and honoring their differences. Deliberations of the four previous IWES workshops were reviewed, as were Canada's Reproductive Bill of Rights and the more pertinent items from the world summits Calls for Action. Discussion centered on the principles that should be considered for inclusion in a document that addressed the reproductive rights of women of color; how they should be used; whether the Bill's purpose should be primarily to educate and/or guide, and who the target recipients should be. Several attempts were made to articulate ethics and standards that would be inclusive and capable of effective implementation. This resulted in a Reproductive Health Bill of Rights for Women of Color.

During 1999, a draft of the Reproductive Health Bill of Rights for Women of Color was circulated among all workshop participants for comment. Based upon the feedback, the Reproductive Health Bill of Rights for Women of Color was published. In April 2000, a workshop was convened in Geneva, Switzerland to discuss strategies for distribution and implementation of the Bill. The participants of this workshop felt, however, that prior to any distribution efforts, further revision was necessary, particularly to address issues of significance to Indigenous Peoples. In addition, consensus was reached regarding the following Action Items:

- a) Research, Development, and Testing of Contraceptive Technologies: Women of Color advocates should be involved in the entire research and development process of reproductive health technologies from the exploratory phase to post-marketing surveillance to minimize the potential for socially coercive use of these products.
- b) Microbicide Development: Microbicide development has not been prioritized by women's groups and enough resources have not been channeled into its development. Women of Color health advocates must be supported to take a leadership position, with all the necessary resources, in microbicide development and other methods for disease and pregnancy prevention. Strategies to better integrate family planning and HIV/STD prevention programs, services, and policies must be developed and implemented. A broader, more inclusive definition of reproductive health must be incorporated into the women's movement to ensure the individual choices and freedoms of women.
- c) Industry Perspectives on the International Marketing and Distribution of Reproductive Health Technologies Lessons Learned from the Female Condom: New reproductive health technologies should be viewed as part of a continuum of providing expanding options to women and their partners. When introducing these new products, strategies should not be limited to marketing but should include opportunities for training, information, education, and access. The introduction of a new product, therefore, should not be misinterpreted as a reproductive health program in and of itself, but should be incorporated into a larger, more comprehensive reproductive health agenda. It is therefore necessary to look beyond product approval when introducing a new reproductive health product. Advocacy efforts should be broadened to consider funding options in the European Union. As advocates, we should be aware of the real life plight of those affected by the HIV pandemic.
- d) Historical Perspectives of Race and Reproduction: Throughout history and current day practices, manipulation of fertility has been seen as the primary means to resolve and/or satisfy social and economic needs. Women of color should insist that reproduction be seen as an issue of social justice, demanding equality among groups and not solely on the narrow issue of the individual rights, especially those enjoyed primarily by privileged women.
- e) The Food & Drug Administration (FDA) Ethical Issues in Contraceptive Technology: There is a need for more focused attention on the ethics of clinical trials in reproductive health technologies.

11 PARTICIPANTS Workshops 1-5

NAME

Marie Bass Marie Bookman Barbara Bosustow Mary Chung Lyvone Covington Georgia Crawford
 Binaifer Davar Ana Diaz Claudia Dides Linda Dominguez Annette Dula Vanessa Gamble Marlene
 Gerber Fried Sharon Howard Eleanor Hinton-Hoytt Carol Jane Bola Lana Jacqueline Lendsey Lillian
 Lew Donna Lieberman Michele Moore Carla Ortique Dorothy Chan Ouchida Marcy Ouellette Billie
 Jean Pace Aracely Panameno Cindy Pearson Cheri Pies Deni Robey Diana Romero Carol Rutledge Julia
 Scott Denese Shervington

Deborah Smith Ramona Tasco Emily Tynes Jayashree Velankar Carolyn Westhoff Wilma Wooten

Susan Wysocki

ORGANIZATION

Bass &Howes Reproductive Health Technologies Project Orleans Parish Magistrate Archivist, Charles R. Drew University National Asian Women=s Health Organization US Food and Drug Administration Navajo Nation Family Planning Corporation National Asian Women=s Health Organization Hispanic Women=s Health Association Universidad de Santiago de Chile Nurse Practitioner, Planned Parenthood, New Mexico Medical Ethicist, University of Colorado University of Wisconsin Philosopher, Hampshire College Louisiana Office of Public Health Hinton-Hoytt& Associates Wyeth-Ayerst Development Options, Nigeria V.P. Public Affairs, Planned Parenthood Families in Good Health New York Civil Liberties Union Black Entertainment Television Ob/Gyn Practitioner, The Women=s Center, Austin, Texas Pharmacia & Upjohn Director of Women=s Health, Louisiana Office of Public Health Ob/Gyn Practitioner, Orlando, Florida National Latina Institute for Reproductive Health Women=s Health Network Director, Maternal/Child Health, Contra Costa County, California Planned Parenthood, Los Angeles, California Columbia University School of Public Health Ortho-McNeil National Black Women=s Health Project Director of the Division of Health Services, Louisiana Office of Public Health Chair, Ob/Gyn, Howard University Kaiser Permanente International Communications Consortium Govind-Gopal Society, India Columbia Presbyterian Hospital Chair, Council on Concerns of Women Physicians, National Medical Association National Association of Nurse Practitioners in Women=s Health

12 PARTICIPANTS Workshop 6

NAME

Amy Allina Charon Asetoyer Marie Bass Barbara Bosustow Helen Boucher Shelia Clark Sharon Day Anthony DelConte Deborah Fuller Eleanor Hinton-Hoytt Carol Jane Anjali Kumar Maria Lemus Donna Lieberman Jodi Magee Miguelina Maldonado Luz Alvarez Martinez Ruth Merkatz Carla Ortique Cheri Pies Dorothy Roberts Diana Romero Pramilla Senanayake Denese Shervington April Taylor Mitchell Warren Leslie Wolfe Susan Wysocki

Euna August Opal Russell Walker Donna Bartley

ORGANIZATION

Women=s Health Network Native American Women=s Health Education Resource Center Bass &Howes Charles Drew University Pfizer National Black Women=s Health Project Minnesota American Indian AIDS Task Force Wyeth Ayerst First Nations Hinton-Hoytt& Associates Wyeth Ayerst Medical Students for Choice Board Member Consultant New York Civil Liberties Union, Reproductive Rights Project Physicians for Reproductive Choice & Health National Minority AIDS Council National Latina Health Organization Pfizer Obstetrician/Gynecologist Maternal/Child Health, Contra Costa County, CA Northwestern University Law School Columbia University International Planned Parenthood Federation Office of Population Affairs, DHHS Consultant The Female Health Company Center for Women Policy Studies National Association of Nurse Practitioners in Women=s Health

Executive Director, IWES Program Director, IWES Administrative Assistant, IWES

13 CHARTER ENDORSEMENTS

- AVSC International
- Chi Eta Phi Sorority, Inc., Sigma Chi Chapter
- Finding Common Ground Project, Columbia University
- Families in Good Health
- Instituto Pro-Sexo
- MEE Productions, Inc.
- National Asian Women's Health Organization
- National Association of Nurse Practitioners in Women's Health
- National Black Women's Health Project
- National Latina Institute for Reproductive Health
- National Women's Health Network
- Reproductive Health Technologies Project

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