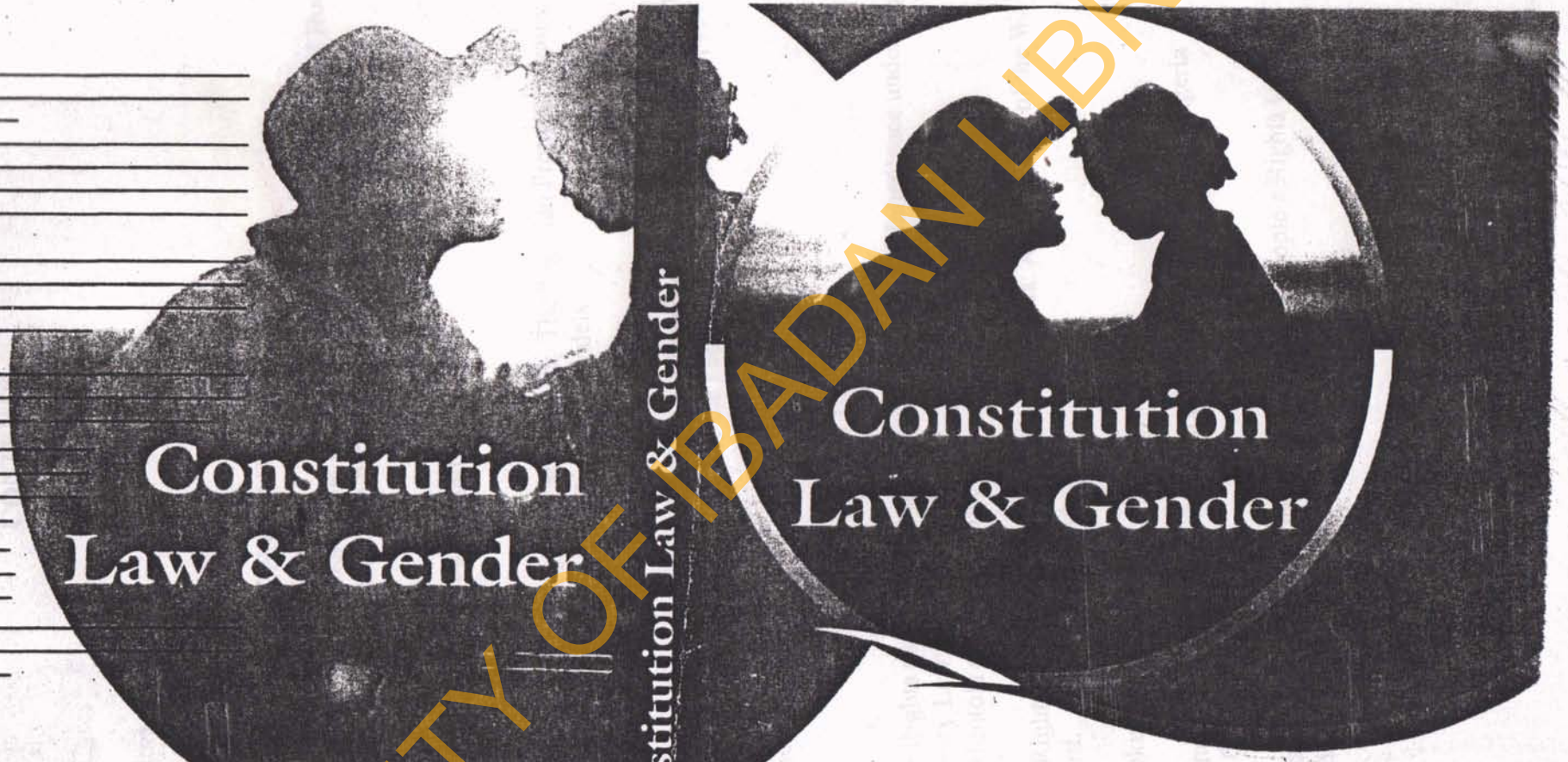

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CONTENTS

PART III GENDER

INTRODUCTION

This Book is the initiative of the CONSTITUTION, LAW and GENDER Group of the Faculty of Law, University of Lagos, this volume is in Honour of Professor Jadesola O. Akande a Professor of Law, a Former Vice-Chancellor, a Former Dean of Law, a Constitutional Law Expert, a Human Rights Advocate.

The Book is in Three parts, Part I Constitution, Part II Law and Part III Gender. Constitution, Law and Gender attempt, to present problems relating to the position of Women in society. It is an array of legal minds on ideas on Women albeit from the Domestic Law perspective. However not all articles focused on women, some articles dwelt.

It on children, which perhaps could be said is akin to women, some articles were silent on women issues, not all the writers agree on the position of women as should be expected in a Legal Discourse.

Dr. Ademola O. Popoola in Chapter 1 of this book explores the possibility of State Constitution to the Protection of Women's Rights, he argued that Domestic Constitution has a Fundamental Role in the Application of International Conventions on Women not withstanding the availability of these standards in the International Arena.

Kehinde Mowoe in Chapter 2 examines Privacy as a concept. She examined European Convention, the African Charter, the 1999 Constitution and the American Constitution, she is of the view that Right to Privacy is near absolute and should be respected. She dwelt on certain issues as it relates to Privacy – Abortion, Homosexuality. She examined

criminal and moral aspects of privacy and concludes that under our law wide interpretation may not be possible as has been done in other Jurisdiction

Rebecca Badejogbin in Chapter 3 discussed the idea of constitutional courts in Nigeria she appraised the Nigerian Constitution, Nigeria Legal System against the Court System in other Jurisdictions. She is of the view that Nigeria do not need constitutional court.

Emmanuel E. Okon in Chapter 4 examined the court in relation to Public Office especially those who are aspiring to the office of Governor, after examining the law, he argued there seems to be controversy in the construction of section 182(1) (b) of the 199 Constitution, he believes that presently the court has created an avenue to circumvent the law.

S. O. Akintola and E. A. Taiwo in chapter 5 examines critically the problem of surviving spouse to Inheritance under our laws, the authors examined mainly Intestate succession. Among the Yorubas, they pointed out inability of wives to inherit because development of property follows blood, they sought solace in the constitution, and found out that the constitution seems to be the only avenue for women discriminated upon through customary law.

Akin Ibidapo-Obe in Chapter 6 examined Women in contemporary times in the threshold of conflicting law, and legal philosophy, he argued that even with the Advent of "civilized laws" customary law will continue to appeal to a greater number of women. not with it attendant effects, however contemporary law will continue to challenge some of the excesses of custom and provide a bench-mark of comparison.

Professor Adedokun Adeyemi in Chapter 7 Traced the History of Child Rights since the end of the Second World War, he examined various conventions and legislations as it

relates to Children, he stated the Nigerian attempt of domesticating the convention of the Child and concludes the various mechanism should be put in place to achieve the Rights of the Child in Nigeria.

N.B. We are happy to state that the convention on the Rights of the child has been domesticated in Nigeria.

Bolaji Owasanoye in Chapter 8 build on the earlier argument of Professor Adeyemi, he further identify impediments on implementation of Child Rights such as: Poverty, illiteracy, Religion, ignorance, he argued that the Government of Nigeria is capable of discharging its responsibilities as regards the Nigerian Child.

Oyelowo Oyewo in Chapter 9 takes a look at the African Charter and State Laws, he examined the difficulties being encountered in enforcing the African charter in the absence of clear Jurisprudence guidance despite the decision in Abacha Vs Fawehinmi He argued that Nigerian Law must accord clear supremacy of the African Charter by adopting the Bangalore principles, he concluded that African states should accord African Charter its place in the protection of African citizens.

Oluyemisi Bamgbose in Chapter 10 discusses the Penal System from a cultural outlook, she focused on impact in which the Penal system have on culture.

Ufuoma Lamikanra in Chapter 11 The Purpose of Law, courts and the role of Judges. She contends that the Judges should therefore be encouraged not to pay undue attention to technicalities to the detriment of Substantive Justice.

Ngozi Udombana in Chapter 12 lamented the Treatment of Women in Workplaces despite numerous International Conventions that are in place in Nigeria. To her, workplace is a haven of sexual harassment. Family life is stifled and women's rights

trampled. She contends that there could be no meaningful development in the society without the inclusion of women, she therefore ask that women be given equal opportunity.

Muhammed Tarofiq Ladan in Chapter 13 elucidates on strategies which women can employ to bring their folk into reckoning. His thesis unlike Ngozi Udombana's workplace is on Governance i.e. Women's Political Participation, he concludes that the inequality of men and women be addressed and that Government should promote an active and visible policy on gender in all policies and programmes.

Asikia Ige in Chapter 14 discuss the problem of Feminist Jurisprudence on the Institution of Marriage in Africa. Using the Kalabari Marriage System she debunked the often peddle views of women marginalization and subordination and agreed that there are a few societies where Women that are oppressed but she contends this is not applicable to all, she offered the Kalabari Model as an exception to the general rule.

Dele Peters in Chapter 15 Takes a look at previous efforts of Women to redress societal imbalances through the law, he concludes that gender issues concerns all and sundry, and lawyers, Judges must acquire adequate knowledge on issues involved this will translate to progressive development in Nigeria.

Nsongurua Udombana in Chapter 16 elucidates on the Jurisprudence of Women inequality in society, he surveyed the journey of Female home sapien he alluded to other Jurisdictions to examine the position of Women, he looked to both Christianity and Islam in addressing the women issue, he dwelt on Mojekwu V. Mojekwu that overturned customary laws that the girl child from inheriting her Father's property. He concluded by agreeing that there is a dire need of reforms on the issue of sex.

CULTURAL REFLECTIONS IN THE NIGERIAN PENAL SYSTEM

*Oluyemisi Bamgbose**

I.0 NIGERIAN PENAL SYSTEM

1.1 Introduction

The penal system in Nigeria, which derived susbtantially from the English penal system, has not witnessed many significant changes in the last few decades. However, it is noted that although English culture has visible influence, Nigerian traditional culture has also played a prominent role in the making of the Nigerian penal system. To this extent, certain cultural dictates are reflected in the law and its workings. Although several years of colonial interaction have, to some extent, affected the impact made by culture on the sytem, but this has not totally eroded its effect on the penal system in Nigeria.

This chapter reviews aspects of the formal penal laws which have cultural connotations and discusses the extent to which culture has affected the administration of criminal justice in Nigeria. It then proffers suggestions on how culture and law can be used for the socio legal development of the society.

1.2 Culture in the Nigerian Society

The word "culture" is from the Latin word *cultura*.[1] According to Coser and Rosenberg, culture is the instrument whereby the individual adjusts to his total setting and gains the means for creative expression.[2] Culture can then be said to be a set of traditions from which a person draws his or her sense of identity. It is a total way or pattern of life created by people and transmitted by people and every person whose ways are shaped by a given culturewill be said to belong to that culture. Every human being is a product of a society, therefore the act of a person under a penal system must be viewed not merely against an abstract ethical or moral framework, but also against the society to which such a person belongs.

Nigerian culture is very rich in many regards. It has many flourishing features that inform its dynamic nature. Indigenous law is one of these many rich aspects as is contained in the body of the Nigerian Law. Nigerian culture is a complex web in the sense that it is made up of the cultures of an estimated 250 autonomous ethinic groups, each with different beliefs, norms and practices. Similarities do occur based largely on historical lineages and geographical contiguity. The similarities are found usually in relation to the general rules but differ on points of details. As pointed out by Asein,[3] the subtle differences may probably be the reason why the Supreme Court in Nigeria gave a warning in the case of *Taiwo v. Dosumu*.[4] The Court held that whatever similarities may have been found between customs of one area and another, the Court can only proceed step by step and consider every alleged culture as the occasion arises.

In Nigeria, the culture of the people existed in the various communities long before the advent of the British. Alluding to the culture of the people in Nigeria, Obaseki (JSC) in *Oyewunmi Ajagungbade III v Ogunsesan* described culture as organic and living. The learned Judge described it as the rules of an indigenous

people in Nigeria, regulating their lives and transactions.[6] Similar decisions were held in *Whyte v. Jack*[7] and in *Nwagbogu v Abadom.*[8] Asein also stated that culture is organic because it is not static and it is regulating because it controls the lives and transactions of the people subject to it and it imports justice to the lives of all those subject to it.[9] In relation to legal culture, communities had their laid down rules and regulations and had tribunals for settlement of disputes among the people and punishment for offenders whose nefarious ctivities tended to disrupt the orderliness of the community.[5]

Culture in Nigeria has, however been significantly impact by its contact with other cultures. The European and Islamic cultures first entered Nigeria through indirect conquest. The European countries that wished to open new trading centers entered Africa to establish trading posts and connection. Through this avenue, a number of European cultural traits infiltrated into Nigeria and, indeed, other parts of Africa. The direct European conquest, which came in the form of colonialism in the second half of the 19th century, brought remarkable cultural changes..For example, the British colonial government brought along its own pattern of administration of justice which it introduced into Nigeria.

Islam has also had its fair share of influence on traditional culture in Nigeria. Islamic law developed in the Middle East, and its present form in Nigeria represents the eleventh century law of the Middle East. Influenced by many elements, Islamic law absorbed rules and codes from the different sources but the Arab culture was significant in the development of Islamic law.[10] At that time, converts had to accept not only the religion but also the culture. While it is true that Islamic law has various sources, many of its provisions reflect the eighth-century Arab convention concerning revenge and the inferior social status of women. The effect of the Arab culture on the Islamic religion is translated into the provisions of applicable penal laws.

The wedlock of the indigenous culture of many communities in Nigeria with the foreign legal systems from the colonial administration and Islamic culture has been difficult and has not, in fact, successfully materialized. In many societies in Nigeria, there was the problem of adapting and integrating colonial laws into the indigenous legal culture. To Olaoba, the consequence is that the foreign legal culture was imposed on the indigenous culture to a significant degree and with the effect that the latter has been undermined and relegated to the background.[11] According to Ifie, the cultural change in the present era can be brought under the transportation theory of the cultural change process described by Malinowski. He further stated that the present Nigerian culture is a mongrel of traditional Nigerian culture on one hand and European and Islamic culture on the other.[13] Without doubt, indigenous culture in Nigeria has undergone a number of changes with only a substraction of the pre-colonial culture remaining and in relation to the penal system, we note that while on a superficial level, one cannot discern a European or mixed culture, on another level there are still some glaring provisions and procedures in the Nigerian Penal laws with cultural connotations.

1.3 Islamic Culture in Nigeria

Neither the issue of culture in the broad sense nor the issue of legal culture in the narrower sense in Nigeria cannot be discussed fully without talking about the Islamic culture. The penal system in the Northern part of Nigeria operates under the Penal Code (hereinafter referred to as P.C)[14] This part of the country is predominantly a Moslem region. The Islamic legal culture that was introduced into Nigeria with the advent of Islam was predominantly into this region and it is notable that the influence of this reflected on the Penal Code.

Sharia, under Islamic law, means the path to follow. According to Lippman, McConville and Yerushalmi,

it is a religious law based upon divine command and revelation and promulgated by Allah through his prophet. It is divine system of law in its sources and primary rules.[15] Commenting further, Coulson says that Sharia law has an existence that is independent of society as it is imposed on society from above.[16] With the acceptance of Islam, Sharia law became integrated into the way of life of the people in those communties to which it was introduced. As stated earlier, the Northern part of Nigerian was one of the areas into which sharia laws was introduced with the predominant acceptance of the Islamic faith. Unlike the difficulties experienced by the colonial administration when English laws were introduced into an indigenous system, Sharia law, which came about as a result of Islamic culture enjoyed better reception in Northern Nigeria and even when the modern law framework dispensed with customary law as a source of penal law, many Sharia-based values became entrenched in the modern penal laws of the northern states of Nigeria. The more recent formal introduction of Sharia-based penal legislation into twelve states in Northern Nigeria attest to the continuing strength of Sharia law. The importance of this law lies not only on its impact on the Moslem society and way of life but in its anticipation of various developments and later reinstatement of ancient practices in western criminal justice system. One significant difference between the colonial English laws and Sharia law is the fact that the former, based on rational decisions, may be altered to suit the changing needs of society, while sharia law is relatively inflexible.

Indeed in Nigeria, the interaction of the indigenous, western and Islamic cultures has created some unique and interesting problems.

2.0 CULTURAL REFLECTIONS IN PENAL LAWS IN NIGERIA

Penal laws in Nigeria, to some extent, synthesize the diverse cultures of the people into the law. This has ensured that the law is not at variance with the Nigerian sentiments and aspirations. Cultural norms and practices have been given the force of law in the civil sphere by means of some local legislations and also the Enforcement Rules of the courts subject only to the qualification that the cultures should not be repugnant to natural justice equity and good conscience or contrary to public policy or inconsistent or incompatible with any law for the time being in force.

The history of the Penal Code applicable in the Northern States in Nigeria and the Criminal Code[17] hereinafter referred to as C.C, applicable in the Southern States attests to this fact. The application of culture *simpliciter* in the field of law of crime has been totally abolished by virtue of Section 35 (12) of the 1999 Constitution of the Federal Republic of Nigeria and the Nigerian case of *Aoko v Fagbemi.*[18] It is noteworthy that generally the attitude of the people is to boycott to a large extent and also to distrust the laws that are at variance with the cultural dictates of the people.

The discussion below highlights cultural norms that are common to most Nigerian societies which are directly or indirectly reflected in the penal laws and the societal reactions to such provisions.

2.1 Polygamy versus Bigamy

The institution of marriage is highly regarded under the Nigerian traditional culture. The meaning ascribed to marriage in the traditional cultures differs from that under English law where marriage is defined as the union of one man and one woman to the exclusion of all others. According to Oyewo and Olaoba, [19] in most cultures in Nigeria, marriage is an agreement between two families. This observation was also made by

Radcliffe and Forde. [20] Marriage under the African culture is a reflection of culture based on social organization and economic activities. Marriage is culturally polygamous in Nigeria. This entails having more than one wife at the same time. The institution of polygamy is a very important cultural trait since the greater the number of wives a man has, the wealthier he is presumed to be and the greater the number of children, the more the unpaid help on his farm. Polygamy is not directly an offence. It was only at the introduction of modern criminal law in Nigeria, derived from English law, that a crime known as Bigamy came into existence.[21]

Bigamy is committed when a man who is legally married under statutory law, marries another wife. Bigamy as a crime is therefore foreign to the society into which it was introduced because polygamy was, and still is, an accepted way of life in the traditional societies in Nigeria. It is therefore not surprising that despite one century of the existence of the offence in the penal laws in Nigeria, only a few cases have been prosecuted under the provision.[22]This is a reflection of the attitude of the people to the enforcement of an offence which does not reflect the culture of the people. An important issue arising from this fact is that provisions of the law that are incompatible with the culture of the people will not be complied with neither will it be effective. Theoretically, such offences exist but practically and in reality, these offences are not reported neither are they brought before the court for prosecution. It is noted however that societal attitude towards Bigamy is changing. Increasing Westernization and Christianity are making bigamy and polygamy less popular.

2.2 Incest

Culturally, incest is an anathema. In many parts of Africa, where two people are related by blood, they are prohibited from getting married to one another. Sexual relations between blood relations are forbidden amongst most of the peoples of Nigeria. This attitude is reflected also relcetd in penal laws in Northern Nigeria where incest is a crime [23] and it is frowned at and not tolerated by members of the society. Though. incest is not a crime in Southern Nigeria, it is also not permitted by the people.

2.3 Juju/Witchcraft

The belief in traditional religion is recognized under the Nigerian Consitution. In the traditional religion, priests and priestesses play an important role in conflict management and resolution. Sacred divinities existed in all traditional societies and devotees consider them as agents for justice and that they have the power to punish offenders and execute judgment.[24] Sorcery and witchcraft in the traditional societies though known and believed to exist were considered to be serious offences and were usually punished with death.[25] The cultural beliefs in the existence of such supernatural powers are reflected in the formal penal laws. There are provisions in both the Criminal and Penal Codes punishing offences relating to witchcraft, juju and criminal charms. 26 It is therefore a crime to represent oneself as a witch or as possessing the power of witchcraft.[27] It is also a crime to represent oneself as having the power to direct or control or preside at or be present at or take part in the worship or invocation of any juju, which is prohiobited, by the state. [28] Apart from these provisions, the practice of whitchcraft is not tolerated in any society in Nigeria and any person caught may suffer in the hands of the public before being handed to the lawenforcement agents. The criminalization of offences relating to thepractice of witchcraft or the use juju is a reflection of cultural beliefs and practices in the formal laws in Nigeria.

2.4 Inferior treatment of women

Some indigenous cultures still function as a brake on female emancipation. In some cultures, females are still considered to be inferior to their male counterparts. Women under such cultures are regarded as chattels that are owned by the male dominant member of the family. This attitude women is reflected in certain provisions of some laws in Nigeria

Wife chastisement is permitted in some cultures. This is predominantly so in the Islamic societies. The practice is said by its defenders to have support from the Islamic law which permits the husband to first admonished an erring spouse and secondly, refuse to share the matrimonial bed with her if the erring act continues and lastly, beat her lightly if the erring act does not cease.[29] This cultural and religious practice is reflected in the Penal Code where a husband is permitted to beat the wife as long as it does not amount to the infliction of grievous harm. [30] The term provision states that where any native law and custom allows a husband to correct his wife by beating her, he may beat her and it will not be an offence under the law as long as the hurt inflicted on her stops short of any of the grievous hurt, which, in turn, is enumerated in Section 241(a)- (g) of the Penal Code. The inflicting of hurt on a married woman in the name of correction is not only repugnant to natural justice, equity and good conscience but also barbaric.

The effect of the Islamic culture on the penal laws in Northern Nigeria and the projection of the inferior status accorded to women have not changed over the past decades. The provisions on adultery and fornication as criminal offences in the Penal Code and their reflection in the Sharia Code in recent times in many states in Northern Nigeria attest to this fact. Recent cases prosecuted under these provisions have led to national and international outcries concerning the partial, barbaric and inhuman punishment ascribed to the two offences. The two offences are frowned at under the Islamic culture and law and carry heavy and severe punishments of stoning to death for married women and one hundred lashes for unmarried persons. Invariably the male partners involved in the crime are usually not prosecuted. In Nigeria, the cases of Amina Lawal and Safiya Hussaini who were charged and convicted for adultery and later sentenced to death by stoning in Sharia Courts in Northern Nigeria brought about reactions from various local, national and international groups. While the case of Amina Lawal is still pending, the Sharia Court of Appeal of Sokoto State heard Safiya Hussaini's appeal in March 2002 and she received clemency on the 28th of the same month.

3.0 CULTURE AND THE CRIMINAL JUSTICE SYSTEM IN NIGERIA: WEDLOCK AND DIVORCE

Despite the fact that Nigerian culture has witnessed tremendous changes in the last decades, on a superficial level, the effect of colonization is seen in the penal laws, and there is still evidence of traditional cultural beliefs. Since the nineteenth century, there has been continued growth in contacts between Islamic, indigenous and western societies and this has resulted in the wedlock of the laws. On the other hand, there are provisions in the penal laws reflecting a total divorce from known cultural values known in the Nigerian society. These two situations are discussed below.

3.1 The Wedlock

A few illustrations in the Nigerian criminal justice system reflecting mixture of both westernized and cultural beliefs are enumerated below.

a) "Ignorance of the Law is not an Excuse" Principle

The principle that states that 'ignorance of the law is no excuse' is not exclusively a western idea. In Nigeria, this principle existed even in the least traditional societies. Information about an existing law or punishment is circulated amongst members of the society through training of the children during story telling time at moon light -an important past time of childhood in every traditional society, public assembly and the announcement by the town crier. The effect is that no member of the society can claim ignorance of any law. This principle is reflected in the formal penal laws.[31]

b) "Presumption of Innocence" Principle

The presumption of innocence is a cultural principle that a person is forbidden from presuming another person guilty without being tried. The principle of fair hearing is entrenched in all cultures in Nigeria. No person is presumed guilty unless it is established by appropriate evidence before a tribunal. This fact is buttressed in Yoruba legal culture by recourse to certain proverbs in judicial proceedings. Cases are seldomly decided without giving both parties to the case an opportunity to present their cases. Hence, the Yoruba proverb "*Agbejo enikan da, agba osika*" literally interpreted, means wicked and iniquitous is that one who hears evidence of one party to the case and makes a decision.[32]

The presumption of innocence principle is a constitutional provision that is also in the line with traditional culture norms which ensure that all criminal cases are approached with an open mind. Adeyemi has criticized the interpretation given to the above provision. According to the learned professor, the interpretation that is given to this provision which is to the effect that the accused person is innocent before trial amounts to taking a decision before the actual trial. He therefore suggested that the interpretation should be that the offender should not be presumed guilty before being duly tried.[33]

3.2 The Divorce

While some cultural beliefs are reflected in the penal laws in Nigeria, there are also some laws that do not reflect the culture of any society in Nigeria. Two of such laws are discussed below.

a) "Right to Silence" Principle

The right to silence is a trial right. In all cultures in Nigeria, silence especially in a criminal proceeding is synonymous to guilt. The right to silence most especially in the face of a serious criminal allegation is considered not "only unusual, but also unnatural" in all Nigerian traditional societies. Thus, it can be said that in the Nigerian context, the right to silence principle is contra-cultural. This trial right is also provided for in the Criminal Procedure Act (CPA) and the Criminal Procedure Code (CPC).[34] It is also a constitutional right found in Section 35 of the 1999 Nigerian Constitution. Under the provision of the CPA, where a *prima facie*

case is made out against the Defendant, the Court shall call upon the Defendant who may not say anything if he so wishes. In the provision of the CPC, the prosecution may not comment on the silence of the Defendant although the Court may draw inferences as it thinks just from the silence.[35]

The Nigerian sentiment which reflects the cultural perspective on the appropriateness of the right to silence is projected by the Supreme Court in *Daniel Sugh v. The State.* The Court held.

> *"It is unnatural and in the ordinary course of event for a person accused of a serious offence spontaneously and instinctively to deny the accusation and give explanation as was capable of exonerating or consistent with innocence than to remain silent and wait for such a time as a rational explanation of innocence offers itself".* [36]

In the same case, Karibe Whyte JSC also stated that

> *"It is unusual that he should keep his mouth shut in such circumstances"* [37]

However, to the extent that this is a constitutional provision, Nigerian courts continue to recognise and uphold it as a cornerstone of of justice but make effort to reflect the cultural notion that silence is suspect in the face of allegations. In *Okoro v State* Agbaje JSC stated as follows:

> *"It follows therefore that no accused person could be convicted for not talking".*[38]

However, he went on to state that:

> *"The prosecution could call on the courts attention in appropriate cases to the accused silence, where evidence linking him to the offence charged exists. Then the irresistble inference of guilt from that evidence linking the accused person with the offence charge might be abundantly"*[39]

c) The Position of the Victim

The traditional cultures in Nigeria emphasize the importance of the victim as aparty in any criminal proceeding. However, this is not to the exclusion of the offender whose interest is also protected. The Islamic culture must be credited in this regard for anticipating contemporary developments on the role of the victim in the administration of justice. Islamic legal culture takes into consideration the issue of compensation for victims while determining criminal liability. This recognition of vitims as parties under the traditional and Islamic cultures served to ensure the maintenance of social equilibrium.[40] However, the formal criminal justice system inherited from the colonialist emphasizes the offender and the state as parties to the processes to the exclusion of the victim who is only relevant for evidentiary purposes. Adeyemi has consistently advocated for the elevation f the position of the victim to the full status of a full party in the Nigeria criminal proceedings. [41] It is suggested that to further enhance the status of the victim (not to the detriment of the offender or State) that the right of the victim should be uaranteed under the Constitution. This has already been done in the United tates of America in the States ofCalifomia,[42] Michigan,[43] and Florida.[44]

4.0 CULTURE AND DISPOSITION MEASURES

Obedience to the rule of law is crucial under the Nigeria culture. All cultures in Nigeria frown at impropriety of manner and abhor wrongdoing. However, all types of punishments under the cultural system are reformative and restituitive.[45] It therefore awards blame and punishment to offences adjudged to be inimical to the development of legal norms. Disposition measures are not divorced from the social and cultural

dictates of the society in which it operates..A feature of traditional legal culture, which shows its dynamic nature, are the disposition measures. The ultimate goal of disposition measures .is to facilitate and enhance peace and harmony in the society. The aims of punishment are reformation, retribution, restitution and restoration geared towards peace and harmony. Lippman added that in the Islamic culture, penal laws are referred to as HUDUD which means prevention hindrance, restraint and prohibition.[46]

There are various disposition methods adopted in different traditional and Islamic communities in Nigeria.[47] These methods are discussed and compared with the methods now adopted under the formal criminal justice system.

4.1 Fines

Payment of fines is a common disposition method adopted in most traditional societies and it is also reflected in the formal penal system in Nigeria. [48]

4.2 Probation

This is a disposition method existing in most traditional societies, This is a system of supervision of an offender by the family or community that can be compared with the present form of supervision by the trained social workers under the modem formal law. [49] By and large, the cultures of nearly all communities in Nigeria have remained essentially communal. This is distinct from the western tradition of individualism. In the traditional cultures, erring family members were placed under the supervision of family members who were interested in reforming the erring member. The modem form of probation has not been a successful disposition method in Nigeria because of lack of human and material resources and the cultural barrier of an average Nigerian that makes him or her not to open up easily to strangers on personal matters.

4.3 Restitution /Restoration

Restitution and restoration orders are the most common and popular measures under the traditional African societies. The use of the restitution measure is reflected in the present formal laws in the CPA [50] and the CPC[51]. The use of restitution as a disposition method under the modem administration of justice has helped in decongesting the prisons. Many writers have enumerated the advantages of the two methods and have advocated that judges should use this method more often. [52]

Restoration is a popular method both under the cultural and the formal penal systems.[53] However it is not in all cases that restoration is possible. In situations where it is possible, it returns the owner property to the original position.

A cultural disposition method that has not been reflected in the formal penal laws is restorative service. This method is imposed usually in cases where property such as land have been destroyed. The offender is then made to assist in the construction or required to provide a service to restore the property.

4.4 Compensation

Compensation is another popular disposition measure under the traditional cultures and the formal criminal justice system. According to Elias, the paymentof compensation by the offender to the offended was customary in many cases and it is a most desirable power imposed on the criminal court but grossly under

utilized under the current criminal justice system. [54] There are no direct provisions for compensation as a disposition measure on its own in Southern Nigeria. The reference to this form of disposition is in Section 435 (2) of the CPA which provides for compensation measure in addition to an order for conditional release of the offender. The amount to be awarded as compensation is limited to a ridiculous sum of twenty Naira. This is equivalent to about fifteen cents.

On the other hand, in Northern Nigeria, compensation is a recognize disposition method in the Penal Code.[55] It is either used in addition to or in substitution for any other punishment. The CPC also provide that compensation may be a measure in addition to a fine or in whole or part for injury caused by the offence committed. [56] In the case of *Jahilel and another v Zaria Native Authority*, the court recognized compensation as a disposition method under the formal criminal justice system. [57]

Compensation as a disposition measure has several advantages. It ensures speedy trial, it helps in decongesting the prisons and it takes into consideration the rights of the victim.[58]

4.5 Replacement

Replacement as a disposition method is peculiar to the African culture. The measure is psychologically more satisfying than compensation. This is because in determining the compensation to be paid, the problem of the actual value of the loss may arise. Replacement is commonly used where a person is convicted of an offence resulting in the destruction, loss, serious deterioration or substantial damage.[59] It is however not reflected in the formal penal laws.

4.6 Banishment and Death Penalty

These two disposition measures were the least used measures in pre-colonial and pre-Islamic societies. The measures were used in extreme circumstances where the society did not have a rational answer to a problem. These include repetitive commision of highly socially disruptive act by means of witchcraft as well as cases of habitual and incorrigible offenders. Such cases seem to imply underlying helplessness and frustation, thereby leading to elimination as penal policy. In the formal penal law, the same principles appliesand it is used in very few offences. Such offences include Murder, [60] Treason [61] and Trial by Ordeal where death results. [62] The death penalty has come under severe criticism from national and international organizations.

5.0 DISPOSITION MEASURES IN ISLAM CULTURE AND THE PENAL LAWS

The introduction of Sharia law in twelve states in Northern Nigeria has necessitated a discussion, albeit a brief one, of Islamic culture and the penal system in Nigeria. Under the Islamic culture, it is believed that the imposition of penalties such as amputation, whipping and stoning encourages offenders to repent in the temporal world. Such severe punishment is also believed tc deter crime and also expresses the desire of the society for retribution. These relatively harsh penalties have been justified by the establishment of laid down rules that ensure certainty of guilt gotten from strict evidentary requirement and the rigidity of Islamic procedure and high standard of proof. However, these justifications have been faulted under the westernized laws that the failure of the traditional Islamic law to provide for judicial appeal is a violation of right.

Two disposition methods adopted under the Islamic culture and the Sharia laws are discussed below:

5.1 Amputation

Amputation is a disposition method ordered in cases of theft. The part of the body to be amputated depends on the frequency of the offence.[63] The justification given by those in support of this disposition method is that it serves as a deterrent to the society. Islamic jurists believe that it promotes the safety of society. Such act it is believed is a humiliation for the convict and a lesson for the public. Amputation as a disposition measure is reflected in the Sharia law applicable to most Northern States in Nigeria.

5.2 Stoning to Death

This is a disposition method used in cases of adultery and fornication under the Islamic culture. The procedure is that after conviction, the accused is taken to an open site. The stoning is done in public. The accused is then buried waist deep in the earth so that he or she is totally helpless. The stones are first thrown by the witnesses of the offence and then by the rest of the community.[64]

This disposition method is now reflected in the penal laws in Nigeria with the introduction of sharia law in about ten States in Northern Nigeria. Many national groups in Nigeria and international bodies have condemned this method and described it as cruel, inhuman, and degrading and a violation of international human right Treatise.[65]

6.0 CONCLUSION AND RECOMMENDATIONS

It cannot be denied that culture in the traditional society is hopelessly inadequate to meet the social and economic requirements of the moden Nigerian society. However, this is not to say that the ideas and ways of traditional societies should be discarded. The culture of the people must remain relevant in dealing with issues that affect members of that society to ensure compliance and effectiveness. If the culture of the people remain vigorous in their lives, and it is flexible enough to adapt to circumstances, the architects of the new penal laws and those to be involved in the reform of the law may prefer to seek means of incorporating it and equipping it with the tools for further evolution, rather than sweeping it away in a burst of legislative enthusiasm.[66]

The disparity between cultural dictates of the people and statute based penal laws has resulted in incompatibility occasioning a large number of people avoiding the formal criminal process and settling for the process compatible. It is suggested that the penal laws should reflect the values and aspirations of the community in which it operates. Therefore, there is the need for a reform of the penal laws of the country to a more realistic set of laws which will bring the culture of the people to the realities of the present century and also an integration of development of a modern and increasingly industrial global society. In an attempt to reform the law, any culture that is no longer relevant to the people should be done away with. For example, in some Islamic societies like Turkey and Tunisia, the effect of weternization has affected the legal status of polygamy and it has now been abolished.[67]

The law in the real sense is a reflection of the way in which people live. Since the Nigerian way of life is changing it is only to be expected that the traditional laws and culture of old in Nigeria must change too.

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