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# KINDLING THE DOMAIN OF SOCIAL REFORM THROUGH LAW: A CASE STUDY

L. Amede Obiora\*

## I. Introduction

Law assumes a time-honored role as an instrument of change. It is, therefore, understandable that recourse is made to it to give women the protection and fulfillment of human rights on equal footing with men. Over the years, there have been significant efforts, at both international and national levels, toward the elimination of sex-based discrimination.<sup>1</sup> The contemporary broad prescription against sex-based discrimination has its origins in the United Nations Charter and in various ancillary commitments.<sup>2</sup> Art. 55(c) of the Charter stipulates that "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>3</sup> The International Covenants on Human Rights (1966) and analogous instruments all reiterate the prohibition against sex-based discrimination.<sup>4</sup> Such understandings of justice and equity have

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<sup>1</sup>See, e.g., United Nations General Assembly (1990) *List of Resolutions and Decisions on the Status of Women Adopted by the General Assembly and the Economic and Social Council, 1946-1989*. Vienna: The Division.

<sup>2</sup>See Claude Welch, *Human Rights and African Women: A Comparison of Protection Under Two Major Treaties*, 15 *Human Rts. Qt.* 549-574 (1993).

<sup>3</sup>See also Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N.Doc. A/810, at 71 (1948).

<sup>4</sup>The International Covenant on Economic, Social and Cultural Rights, G.A.Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N.Doc. A/6316 (1966); & International Covenant on Civil and Political Rights, G.A.Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N.Doc. A/6316 (1966). Also see, e.g., African Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1986); Convention on the Political Rights of Women, G.A. Res. 640 (VII), 27 U.S.T. 8389, T.I.A.S. No. 8289, 193 U.N.T.S. 135 (1954); Convention Concerning Discrimination in Respect of Employment and Occupation (ILO No. 111), 362 U.N.T.S. 32 (1960); and Convention against Discrimination in Education, 429 U.N.T.S. 93 (1960).

equally prompted the consideration of the specificities of development on women as a group.<sup>5</sup>

The norms of gender equity reflected in the international agenda evolved in response to emerging global values, aspirations and principles of the human rights regime and agencies which seek to prevent generic differentiation on the basis of arbitrary traits.<sup>6</sup> The most eloquent expression of these norms is codified in the more recently promulgated United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>7</sup> Although on a continuum with antecedent prohibitions of human rights abuses, CEDAW is the most comprehensive instrument that aims at promoting and protecting the interests of women. The Convention addresses

any distinction, exclusion or restriction made on the basis of sex which has the effect of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Art.1).<sup>8</sup>

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<sup>5</sup>The second and third International Development Decades in 1970 and 1980 explicitly enjoined the "integration" of women into development. In a similar vein, the 1975 International Women's Year Conference in Mexico and the 1980 Copenhagen conference which culminated in the 1985 World Conference of the United Nations Decade for Women in Nairobi delineate the inseparable connection between trends in global political economy and the realities of women. This connection marks the defining theme of the Nairobi conference Forward-Looking Strategy which celebrates equality between men and women, the full integration of women in the total development effort, and the contribution of women to the development of friendly relations and the co-operation among States and to the strengthening of world peace. See United Nations (1986) *The Nairobi Forward-Looking Strategies for the Advancement of Women*. Department of Public Information, Division for Economic and Social Information.

<sup>6</sup>See McDougal, Myers S., Harold D. Lasswell, & Lung-Chu Chen (1980) *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*; & Cassese, Antonio (1986) *International Law in a Divided World*.

<sup>7</sup>The United Nations General Assembly, adopted Resolution 34/180 on 18th December, 1979 approving the CEDAW and immediately opened it up for signature and ratification. As of 1 August 1991, 108 states, including thirty of the fifty-two countries in the African region, were parties to the Convention. See Claude Welch, *supra* note 2.

<sup>8</sup>See United Nations (1980) *Convention on the Elimination of All Forms of Discrimination against Women*. U.N. Doc. A/RES/34/46. The configuration of rights articulated in the Convention emphasizes the means by which women can actively participate in decision-making as well as gain access to adequate resources, services and facilities to ensure their individual and collective development.

In keeping with the tradition of the human rights regime, the primary responsibility for the implementation of the Convention rests on State parties who, by virtue of Article 2(f), undertake to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>9</sup> Several signatory states purport to be making concerted efforts along the lines envisaged by the Convention. Accordingly, constitutions and laws have been modified and aligned to give meaning to the scope and content of equality between men and women. The Constitution of the Federal Republic of Nigeria, for example, specifically prohibits discrimination on grounds of sex.<sup>10</sup> It is remarkable that the fundamental concept and framework for the review of rules, institutions and practices relating to women and the development of measures to improve their status is enshrined in the "supreme law of the land."

Notwithstanding the noble objective of sex equality, discrimination against women remains a persistent phenomenon. The pervasive incidence of gender discrimination is well-documented and the records disclose that even where there has been considerable success in arresting *de jure* discrimination against women, *de facto* discrimination abounds. The persistence of gender discrimination could be attributed to several factors. In this article, however, it will be predominantly located in the inchoate state of pertinent prerequisites for the meaningful implementation of legal objectives. This focus is consistent with the resounding observation that, given the decentralized character of the world arena and the complex origins of sex-based discriminations, more aggressive and autonomous implementation

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<sup>9</sup>The monitoring, consultative and administrative bodies for CEDAW include the Commission on the Elimination of Discrimination Against Women, UN Center for Social Development and Humanitarian Affairs--Division for the Advancement of Women, and the Commission on the Status of Women.

<sup>10</sup>Nigerian Constitution § 39 (1979). Successive Constitutions have abrogated portions of the 1979 Constitution but the provisions of § 39 has been maintained. See also Nigeria (1987) *Initial Country Report*, U.N. Doc. CEDAW/C/5/Add.49, at 30, 36; Ukeje, R. N. (1989) "Fundamental Human Rights and Women," paper presented to International Federation of Women Lawyers (Nigeria); United Nations, Economic Commission for Africa (1990) *Advancement of African Women*; & U.N. Economic Commission for Africa (1985) *The Arusha Strategies for the Advancement of Women in Africa*.

measures are required to achieve the ideals and objectives of equality.<sup>11</sup>

In honing the capacity of international treaties and miscellaneous forms of legal interventions to facilitate the decidedly complicated task of eliminating invidious gender bias, an immediate challenge revolves around the need to engage, understand and harness the attitudes of members of the affected population to the legal system. Thus, the overarching thesis of this article is that a positive shift in a target population's attitude to, or knowledge and perception of, legal and legislative resources generates the requisite impulse for compliance with, and enforcement of, law.<sup>12</sup> This thesis implicates the issue that scholars have come to refer to as the legal culture. An eminent jurist has defined the legal culture as the network of values and attitudes which determines why, when, where and how people employ legal structures and why legal rules work or do not work; in short, it is the legal culture that provides the impetus for the use, abuse or avoidance of the law.<sup>13</sup> Since the invocation of law determines its impact as a normative order, the absence of a conducive legal culture is apt to yield a low level of individual initiative to set the institutional machinery of law in motion. The probability of inertia in such circumstances underscore the pivotal role of the legal culture for legal effectiveness as well as for the holistic integration of law as an apparatus of social ordering. Inducing a transformation in legal culture may be an especially realistic and cost-efficient mode for augmenting the implications and impact of law contexts where the resources for enforcement and popular participation in governance are minimal.

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<sup>11</sup>See Welch, *supra* note 1. See also Ramcharan, B. G. (1991) *Strategies for the International Protection of Human Rights in the 1990s*; & Mahoney, Kathleen & Mahoney, Paul, eds. (1993) *Human Rights in the Twenty-First Century: A Global Challenge*.

<sup>12</sup>This argument is influenced by the empirical evidence presented by theorists who establish a link between a critically transitive consciousness and social change. See, e.g., Paulo Freire (1970) *PEDAGOGY OF THE OPPRESSED*; Freire (1970) *Adult Literacy Program as Cultural Action for Freedom*, 40(2) *Harv. Ed. Rev.* 205; Freire (1970) *Cultural Action and Conscientization*, 40(2) *Harv. Ed. Rev.* 453; Kathleen Weiler, *WOMEN TEACHING FOR CHANGE*; & Patti Lather, *GETTING SMART*.

<sup>13</sup>See Lawrence M. Friedman, *Legal Culture and Social Development*, 4 *Law & Society* 29 (1969); Friedman, *On Legal Development*, 24 *Rutgers L.R.* 11 (1969); Friedman, *Legal Rules and the Process of Social Change*, 19 *Stanford L. R.* 786 (1967); & Friedman, *AMERICAN LAW* 7 (1984).

### A. Outline

Given the critical effects of the legal culture on the marginal deficits and gains of socio-legal engineering, this case study will investigate the attitude of a select population to the efforts to legislate equality in gender relations within a particular social formation. With a view to illuminate the operative conditions or determinants for effective legal intervention, the study demonstrates the extent to which social thought and force constrain the reformative potentialities of law. In the final analysis, the study seeks to explain the correlation between critical consciousness and the efficacy of law as well as the circumstances under which marginalized and disaffected persons can cultivate an empowering predisposition to the law.

### B. Setting

Oguta is a metropolis on the south-eastern arm of the Niger near the head of the Delta in Imo State of Nigeria; it is forty kilometers north-west of Owerri, the State capital. It has an estimated population of about 30,549 persons who speak a unique dialect of Igbo language and are dispersed among twenty-seven wards and several rural farm settlements.<sup>14</sup> Oguta has a tropical climate of high mean annual temperature and seasonal rainfall, with a lush of evergreen vegetation. Situated on an inclined plane which is approximately eighty meters above sea level and between latitude 05042 North of the Equator and longitude 06048 East of Greenwich, it is almost surrounded by water, but for the Egwe and Egbu hillocks on the northern border which afford a vantage point to appreciate the scenic environs.<sup>15</sup> A significant feature of the landscape is a fresh water lake known as *Ogbuide* or *Ohanmiri*.<sup>16</sup> The village communes are based on

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<sup>14</sup>Oguta had a population of 15,310 in 1963. Assuming that the projected annual growth rate of 2.5 percent is reasonable, the population for 1990 was approximately 30,549.

<sup>15</sup>See United States Board on Geographic Names, Nigeria: Official Standard Names Gazetteer, Map no. 311 (map scale is 1 over 100,000); & Seltzer, ed., THE COLUMBIA LIPPINCOTT GAZETTEER OF THE WORLD (1952).

<sup>16</sup>Due to its ready accessibility by water, Oguta has flourished as an artery and depot of trade. By the turn of the century, several European companies had established a presence there transacting principally with enterprising women who had vast experience in the palm produce industry. The Catholic and Anglican missionaries followed suit, setting up parishes and schools. Missionary and mercantile enterprises

contiguous kinship and family organization is typically extended with patrilineal descent.<sup>17</sup> The family head or *Okpara* mediates intra-family disputes; in most instances, however, he convenes and merely presides over an arbitration forum.<sup>18</sup> Marriage is exogamous and potentially polygamous.

## II. Method and Result

Beginning with a presentation of some original data which I collected in 1991, I offer some preliminary analyses of the data as an entry point for exploring the potential role of law as a vehicle for social transformation. The data reported in this study are only a fraction of what I employed in a larger project on the impact and implications of the ideal of gender equality at the dissolution of marriage in Nigeria.<sup>19</sup> For the purposes of that project, I interviewed 192 people who were primarily selected through a snow-ball sampling technique.<sup>20</sup> The 192 persons were categorized according to gender,

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became vehicles of cultural penetration. One of the earliest written records of Oguta described it as a terrain where the Orashi River emerges into an open river like a sea with women who "are said to be palm oil traders, and the rich ones among them wear ivory on their legs & brass bracelets on their arms..." See C.M.S. G3/A3/1890/142, D.C. Crowther, "Journal of a visit to Abonnema and Ndele," 12 August 1890.

<sup>17</sup>Some economic transactions tend to be embedded in kinship relations. The rural inhabitants engage in farming, fishing and trading for the most part, although some earn their livelihood by participating in the more formal sector of the economy. The local farmers plant their crops on shifting cultivation and crop rotation bases in distant fertile outfields located within the forest across the lake. Although a sexual division of labor is not rigidly enforced, men are more likely to clear the bush, till the ground, sow seed yam and ultimately stake the vines. Women plant cassava and subsidiary crops, weed the farm and barter or sell the surplus of the harvest at markets which could be a long distant away.

<sup>18</sup>A disputant can also request the presence of, or refer a case to, his or her maternal family. See Ikenna Nzimiro, *Family and Kinship in Ibo Land: A Study in Acculturation Process* (University of Cologne Ph.D. Thesis 1962).

<sup>19</sup>See L. Amede Obiora, *Law and Social Change: A Perspective on Gender Equity* (Stanford University J.S.D. Dissertation).

<sup>20</sup>The core set of informants comprised of people who were identified by my initial contacts and community elders as having had experiences that would have a bearing on the study. Upon arrival to the research site, I respectively interviewed the local prime minister as well as the oldest persons in five randomly selected villages and their council of elders. These persons were instrumental in helping me compile a preliminary list of informants which I supplemented with the help of some other local contacts. In addition to the members of the community from whom I collected their marriage-related histories, outlook on law, and insights on cultural traditions, I also interviewed certain principal members of the legal profession, officers of the court and academics. Among these were a Supreme Court Justice who used to be the Chief Judge of Imo State, the current Chief Judge of the State, the Attorney-General of the State, a former Attorney General of the State, a Senior Advocate of Nigeria (SAN) who subsequently became

socio-economic status, marital status, type of marriage, and duration of marriage.<sup>21</sup> I designated a cell made up of four persons for the various combination of variables.<sup>22</sup>

The study is informed by the resources of qualitative and quantitative research methodology.<sup>23</sup> Information about institutions, norms and practices as well as significant opinions, preferences, interests, experiences, and value and attitudinal changes were gathered through structured interviews, surveys, questionnaires and unstructured interviews which enabled the respondents to determine the range and content of their input. I also relied on some participant observation to confirm or disconfirm responses to oral inquiries and to gain insight into the degree of congruence (or lack thereof) between ideals and realities. In addition to the ethnographic materials, the study draws upon conceptual analysis and synthesis of archival and contemporary public documents as well as upon inter-disciplinary bibliographic literature to develop and critique extant theories of pertinence.

#### *A. Knowledge and Perception of Law*

Of the series of questions that were posed, the ones that tested for knowledge and perception of the sex discrimination prohibition in the Nigerian Constitution and for attitude to litigation have particular

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the Attorney General of the Federation, the Chair of the Law Reform Commission (LRC), a retired high court judge and state commissioner, a retired court of appeals judge, an officer of the federation of women lawyers who also doubled as an officer of the National Council of Women (NCW), a female high court judge who was actively involved in women's organizations, three accomplished law professors who were recommended as well-versed informants, and four state counsels in the probate and legal aid divisions. I also interviewed the president of the customary court and the officer in charge of the local welfare office, both of whom were not lawyers. All but the SAN, the LRC chair, the state C.J., the professors, the NCW officer and the state counsels come from Ogun.

<sup>21</sup>With the exception of marital status which had three input variables (married, divorced and widowed), all the other variables only had binary components. For example, in terms of gender, there was male or female, SES was either rich (elite) or poor, marriage type was customary or statutory and duration was long or short. The elite were broadly defined to include those who, while not financially buoyant, had attained stature in the community by virtue of their educational credentials or because they are projected as proxies for their wealthy children. Statutory marriage is considered to be inclusive of canonical or "church marriage." Long marriage includes all those that have endured for 10 years or more, although the young age of children may be more a restraint on parents' volition in a 10 year old marriage than in say a 25 year old marriage where the children are presumably grown and independent.

<sup>22</sup>The total number of cells was 48.

<sup>23</sup>The structured and open-ended narratives elicited from legal practitioners and other officials were not subjected to quantitative analysis. See *supra* note 19.



relevance in the present context. Seventy-two interviewees provided information regarding knowledge or the lack of knowledge. Fifty-six percent of them indicated that they had no knowledge of the existence of the constitutional provision.<sup>24</sup> While an additional 8% of the total number of respondents did not explicitly disavow knowledge, the obvious impression from the context of their other views and comments was that they had no knowledge.<sup>25</sup> Twenty-nine percent or 21 of the 72 respondents, including the three female and one male attorneys who were not state officials, were vaguely familiar with the prohibition of sex-based discrimination or with related campaigns and debates; however, they could not readily recollect the gist of the mandate, let

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<sup>24</sup>61% of the women, including 72% of the women who were classified as poor and 50% of the women who were considered rich, were not acquainted with the law. 48% of the men interviewed, including 67% of the poor and 23% of the rich did not know of the law. 38% of the divorced women, 53% of the married women, and 80% of the widows did not know of the law. 57% of the divorced men, 43% of the married men, and 67% of the widowers had no knowledge. 72% of the women married under customary law and 50% of those women married under statute were ignorant of the law. 58% of men married under customary law and 42% of those married under statute did not know of the law. 54% of the women who had been married for less than 10 years and 64% of those who had been married for a longer period professed ignorance of the law. 38% of the men who had been married for less than 10 years and 52% of the men who had been married longer did not know of the law. These statistics are not exhaustive because it was rather typical of many of the participants to ignore or evade the question which sought to ascertain whether or not they knew about the legal provision. Instead of directly responding to the question, these people often proceeded to pontificate or to draw upon predetermined notions of gender relations to volunteer a value judgment on the campaign for equality.

<sup>25</sup>On the opposite end of the spectrum were some other persons who alleged extensive knowledge, but their comments betrayed some confusion, ignorance or recently-acquired general sense.

alone its specific details.<sup>26</sup> Only four persons expressly indicated actual knowledge of the provision.<sup>27</sup>

Many of the legal practitioners whom I interviewed in their official capacity were vehemently opposed to phrasing the inquiry in terms of the stipulation of sex equality, instead of in terms of the prohibition of sex discrimination.<sup>28</sup> A number of them were quick to emphasize that the equality referred to in the Constitution is equality of opportunities that are provided by the state. The chair of the law reform commission pointed out that the Constitution, in sensitivity to indigenous cultures, confines the definition of law to legislative enactments, thereby excluding customary norms which do not emanate from the

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<sup>26</sup>This level of awareness is not surprising since many people became acquainted with the provision through the media or the activities of the "women's liberation [movement]." The efforts and campaigns of the National Council for Women, especially its Better Life for Rural Women's program, seems to be a key factor in increasing the level of awareness. This conclusion is extrapolated from the fact that most people indicated that they came into some awareness of discussions about equality between 1987 to 1991. The period corresponds with the formation and acceleration of the program. The Better Life Programme was initiated in September 1987 to harness the creative energies of women for concrete and achievable goals both as individuals and as a group. As of 1991, the program had registered remarkable gains in political, educational and social mobilization, and in stimulating keen awareness of the capability of the resourcefulness, entrepreneurship and self-reliance of many women to foster socio-economic recovery and development. See Nigerian National Commission for Women (1991) *Report of the Proceedings of the Workshop on Women and Non-Governmental Organisations: Catalyst for the Integration of Women in National Development*.

<sup>27</sup>These persons were an Oxford-trained teacher, the international vice-president of a feminist organization, and two active politicians. In fact, only the teacher stated that he "read [the] Constitution upon its promulgation." It is fair to assume that although the judges and lawyers who were not interviewed in their official capacity did not volunteer information about actual knowledge, they may have been exposed to the specifics in the course of their practice or by virtue of their profession.

<sup>28</sup>The chair of the LRC in fact declined to speak to the issue of sex equality which he described as a question of politics, not law. The Supreme Court Judge who is one of the pre-eminent authorities on issues pertaining to women in the country, stated:

Equality. I don't like that word. First of all, equality is a term of mathematics [more than it is a term of logic, morality, or law]...A thing may be just without being equal.... Treating [persons that are not similarly-situated] equally is as unjust as treating equals unequally.... [W]hen you insist on a rigid mathematical equality, where do you land?... There are certain things that the are essential. The fact that all of us are human being is essential. There are certain things that are accidental: that you are tall and I am short is an accident. In the essential constituents of a human being, we are all equal but in the accidental gifts of nature some may be stupid, others clever; some are fair, others dark; some tall others short. So when you are looking at equality, of essentials yes, but accidental gifts can never be equal...[T]he only value in equality is that it stands against certain things which are wrong: [making arbitrary distinctions where there are none], monopoly, privileges....

legislature.<sup>29</sup> The Supreme Court Justice whom I interviewed differed with this restrictive construction which limited the law within the ambit of the constitutional prohibition to "written law." He substantiated his view by noting that §39 of the Constitution broadly provides that any citizen shall not be subjected to discrimination either expressly or by the practical application of *any law enforced* in Nigeria and that customary courts administered customary law (albeit not necessarily enacted by the legislature).<sup>30</sup>

Forty-eight percent of the people interviewed on their attitude to the notion of gender equality expressed disapproval of the notion in comparison with the smaller proportion of 26% that pledged unequivocal support.<sup>31</sup> In the opinion of one woman, "*oyibo* cannot get us to accept that men and women are equal."<sup>32</sup> No matter how rich a woman is, she is not equal to a man. A woman can solely shoulder

<sup>29</sup>I mentioned that I had been repeatedly informed that there are probably few or no laws on the statute books that are overtly discriminatory against women, but that it is in the customary milieu that discrimination against women abounds. To my inference that a narrow definition of law which exempts the customary milieu undermines the constitutional objective, he countered that anybody who was willing to disabuse his or her mind of sentiments would realize that "custom takes into consideration what [women are] able to do."

<sup>30</sup>He further noted that, even if customary law was not within the purview of the Constitution, problematic customary norms could be expunged by virtue of the CEDAW which Nigeria adopted.

<sup>31</sup>50% of the women interviewed, including 59% of the rich and 41% of the ones in the lower socio-economic status were not in favor of the provision. 63% of divorced women, 62% of married women, and 31% of the widows disapproved. 100% of the divorced men, 44% of the married men and 25% of the widowers also disapproved. 42% of the women who were married for a short time and 55% of the women who had been married longer opposed the notion of gender equality. 67% of the men who had been married for a short time and 41% of those who had been married long disapproved. 56% of the women married under customary law and 44% of those married under statute, and 57% of the men married under custom and 44% of those married under statute were decidedly opposed to the notion.

People variously expressed commendation of the development, skepticism of its prospects, divergent degrees of hope that the provision will deter gender discrimination, acknowledgment of its modest gains and haphazard (as opposed to systematic) implementation. Interestingly, a number of people who had no previous knowledge of the provision were more expressively receptive of it once their misconceptions were dispelled or once the focus shifted from abstract reflection to an explanation of the purpose in concrete terms, particularly as it relates to issues such as comparable worth and equalization of opportunities in general. This trend was also noticed among some people who initially disapproved of the provision.

<sup>32</sup>In the vernacular of the respondent, *Oyibo*, is a word that primarily refers to Caucasians. It is also used as a metaphor to signify colonial and governmental incursions. The invocation of this term by the respondent suggests that equality is an imported Western concept.

the responsibility for her children, like I did. But she is nothing."<sup>33</sup> It was quite commonplace for the respondents to be advisedly resistant to the notion of legislated equality, even when they condemned discrimination and acknowledged that "women do more" (when it comes to industriousness, resourcefulness or faithfulness to familial obligations).<sup>34</sup> Distinguishing between the public and private spheres was also a recurrent pattern of response.<sup>35</sup> Many of the people who displayed somewhat of an acute investment in the public/private divide often argued that any attempt to encroach on the sacrosanctity of

<sup>33</sup>To this particular response, I asked, "What is a man?" The question engendered the following exchange:

A: A man is something because he is the one that impregnates a woman. [Even if a woman has to go through a lengthy period of gestation, what] would she have to carry if there was no man to impregnate her?

Q: I would be inclined to think that the roles are mutual, if anything. How can you determine otherwise? Would there be child birth without a woman? Who would supply the ovum? Who would bear the child upon conception for the man?

A: That is the man's business. The way it is in my town is that male is more important than female. If for nothing else, a man pays bride price and then takes the wife to his patrilineage to procreate. A woman must be submissive and obedient to her husband.

Q: Was it that way between you and your husband?

A: Who would not be submissive to her husband? I went to farm at his initiative, although that was not my orientation. I personally did his cooking. I was submissive to my husband *until we fell out*. Unable to put up with our matrimonial crises, I moved into my mother's with my children. (Hitherto, I had solely fended for my children, so I could not have left them with their father when we separated.) After my mother's death, his relatives insisted that we "bury the hatchet." Despite our reconciliation, I did not move back to his house. Rather, I opted to facilitate his marriage to another woman who would hold fort while I attend to the exigencies of my long-distant trading....

<sup>34</sup>Variants of the reasons for the discerned caution were that "the equality legislation is culturally insensitive and denotes the arbitrariness of State power;" "rapid implementation will culminate in a backlash;" "equality must needs be tempered with respect;" "it will breed irreverence and marital strife;" "equality discourse is redundant in an atmosphere of mutual respect;" "equality discourse is exaggerated, over-rated and unnecessary;" "the notion is a transposed legacy, a Western-influenced formality, or an imposition of Western concept developed to address issues that are culturally-specific to the West."

<sup>35</sup>In the sort of "the law out there" and "the life in here" bifurcation embodied in the responses, indigenous cultural practices and arrangements were frequently categorized along with the domestic realm as "private." In the locality, the association in the most prestigious echelon of the social strata is the *Igbu*, an exclusive male society. With one exception, my female respondents consistently indicated a lack of interest in challenging the male exclusivity of this society, pointing out that they had a comparable society and that there are some values to sex-segregation. Many members of the *Ogbuefi*, the female counter-part of the *Igbu*, maintained that the preferential hierarchization of the *Igbu* was not an issue or a material disadvantage. These women went as far as insisting that they would decline an invitation to join the *Igbu* because their admission will disrupt the complementary order of the traditional structure.

marriage under the pretext of an equality agenda was misguided.<sup>36</sup> A corollary of this argument was offered by a majority of respondents, both female and male, who appeared confounded by the very notion of equality as it is typically conceptualized in mainstream Western legal discourse. Insisting instead that "all fingers are not equal,"<sup>37</sup> some of these respondents suggested that "respect," not "equality," was a more appropriate and realistic paradigm for ordering conjugality.<sup>38</sup>

One of the interviewees, a woman who was an activist and the international vice-president of a women's organization, stressed that "fair partnership" was key and that a sense of unfairness and dissatisfaction develops where unilateral burden obstructs other opportunities or is compounded by disrespect and lack of appreciation.<sup>39</sup> Maintaining that "deference to a husband is half the

<sup>36</sup>The Chief Judge of Imo State and an eminent attorney from Oguta succinctly summarized what was echoed by many of the persons who subscribed to a sphere-specific equality discourse. In their view, marriage is an exchange relation involving reciprocity, compromise and trade-offs; it is a complex relationship not facilitated by arithmetical transpositions; marriage and instrumentality are incompatible; rights assertion is a threat to conjugal relations; assertiveness creates spousal frictions; etc.

<sup>37</sup>According to one participant, "[i]f you look at five fingers they are not all equal but each has its use. So rather than talking about equality, I envisage a situation where both gender are complementary and supplementary, where one cannot be complete without the other." The Supreme Court Justice also offered pointed observation in this context. He remarked as follows:

What is this equality really meant to be? [J]ust like if you are making concrete [for which] you need ten head pans of sand and one head pan of cement; which is more important?...You must have ten of this and one of that to make concrete. [Similarly] you must have a wife and a husband to make a family. Both roles are complementary. The things a man cannot do, the woman does. No man can bear a child; none has; none will.... If you have two captains in one ship, the ship will founder. Somebody must be in charge, a better manager.... If a marriage is to succeed, that families are to be what they are meant to be, then there will be sacrifices on both sides and when there is sacrifice you won't call it inequality.

<sup>38</sup>For example, they respectively stated that "men and women are different, not unequal;" "respect is the recipe for enduring cordial spousal relations;" "human societies are invariably stratified and various groups ascribe different values to difference and approach it differently and within the context of a given situation;" etc.

<sup>39</sup>In this view, women cook and are expected to cook because of present patterns of socialization and division of labor which make deviation from the standard practice a potential source of conflict. A woman who falls short of the cultural expectation may be confronted and her recalcitrance may create tension which may eventually lead to her being perceived as disrespectful. Also, "fair partnership" implies complementarity and while there is no problem in the event of true complementarity. Insisting that the nature of the chore is not necessarily as important as the perception, the interviewee remarked that women in Osamala (a town close to Oguta) do not pound yam (a staple), unlike in Oguta where the saying, *osu nni su gbue onwe ya, onwe nni nwe nni*, depicts the onerousness of the task. One of the male respondents noted that the restaurant business is dominated by male chefs who are reputed to have exceptional culinary

battle won [as] it eliminates strife and deliberate turf protection," she explained that the only way to normalize asymmetric power relations in the domestic realm is to provide opportunities that will enable more women to become economically independent so that through their material contributions to the household budget, they can earn their spouses' respect.<sup>40</sup>

*(1) Factor Analysis: Privileging the Emic Perspective*

It appears that a combination of factors contributed to the existing levels of knowledge about, as well as the attitudes to, the constitutional provision. Lack of formal education was frequently volunteered as a principal reason for the lack of knowledge.<sup>41</sup> Nevertheless, as reported earlier, about half of the women from a higher socio-economic background who were usually, but not always, educated had no knowledge of the law.<sup>42</sup> This, coupled with the fact that many educated persons across the board had minimal knowledge, suggest that education was not necessarily dispositive vis-a-vis familiarity with the

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expertise. When I soliloquized that it will be interesting to see who cooks in the homes of those men, he replied that the "point is that the women themselves don't even allow you to enter the kitchen; they drive you out [as if you are interfering with the integrity of their prerogative]...." In another context, a female informant clarified that, although some women earmark pounding yam or cooking as a critical component of their suffering, the chore has been known to be an empowering bargaining device or tool of resistant for some women. Compare Judith van Allen (1972) *Sitting on a Man: Colonialism and the Lost Political Institution of Igbo Women*, 6(2) *Canadian J. of African Studies* 165.

<sup>40</sup>Several other interviewees, especially men, echoed similar views. One man who ordinarily seemed to believe in gender equality primarily equivocated because his wife "does not do anything" (speaking apparently of his role as primary bread-winner and confirming the explanation that economic dependence undermines the prospects for equality in conjugal relations). Another man who affirmed the equality campaign alluded to his higher income level in designating himself "first among equals" in his relationship with his wife.

<sup>41</sup>This was vividly captured by a woman who remarked on being asked if she knew of the provision:

Do I know which is which. I am not able to monitor such issues. All I know is that I am able to tell the break of dawn and when I should rise up and go about my business. I see signs on the board and I am not able to make head or tail out of them. For all you know, I could be hailing someone who is abusing the life out of me in English.

<sup>42</sup>See *supra* note 24.

law.<sup>43</sup> Another theory sought to establish a correlation between lack of knowledge of the provision and lack of confidence in the system.<sup>44</sup>

A number of respondents related the hierarchical structuration of spousal relations, regardless of the locus of economic power, to patriliney, patrilocality, bride price payment and gerontocracy. Some others noted that gender hierarchy derives from biases in social services and opportunities.<sup>45</sup> The most commonly cited manifestations of bias occurred in education and employment. The case for more inclusion was made because education, to the extent that it attenuated the conditions for economic dependence, was seen as a buffer for the seeming harshness of patriliney and other phallogocentric cultural orientations.<sup>46</sup> Independent of any interrogatory prompting, some of the respondents volunteered the information that they perceived conceptual and judicial interventions for equality superfluous because, in their opinion, the sex-roles transitions and other changes that preceded the constitutional enactment have already made the contemporary society more progressive and egalitarian.<sup>47</sup> One of the

<sup>43</sup>It appears that those who did not tune into pertinent radio or television programs, those who did not read the newspaper, those who spent most of their time in the farm region and did not participate in forums where the issue may have come up, among others, were more likely to be absolutely uninformed of the legislation and the general trend.

<sup>44</sup>Some people were obviously disillusioned by, and disengaged from the system. This is typified by the response of a well-educated medical doctor who denied knowledge of anything about any Nigerian law because "laws are meant to be kept, [but] nobody keeps any law in Nigeria." An instructive insight into sorts of disillusionment that limit some people to isolated and peripheral political participation is conveyed in the cynical remark of one woman who dismissed the government as irrelevant, useless and oppressive. Purporting to distinguish her indifference as a willingness to surrender to governance, she eventually admitted that: "[t]hey are not ruling us well; all my clothes are old and worn, thanks to the mess they have created. In spite of my hard work, I can't generate enough money; I am still struggling to survive."

<sup>45</sup>A Senior Advocate of Nigeria and a former Attorney-General of Nigeria countered this opinion by suggesting that the social disabilities that women confront is more a function of the world view of the people than a function of governmental and institutional policies and practices.

<sup>46</sup>Some proponents of gender-neutral educational policies espoused their proposal in a nationalistic tone and argued that "to train a woman is to train a nation." A sub-set of this group favored meritocracy over equality and passionately disapproved of the consideration of gender, male or female, as a valid basis for preferential treatment.

<sup>47</sup>In other words, social change was identified as the primary vehicle effecting equality while the law was seen as reflecting and reinforcing social change. It is important to note that, in so far as formal education and employment chiefly developed alongside colonialism, the opinion is framed more as a comparison of colonialism and post-colonialism than as a reminiscence of modernity/tradition juxtapositions that suggest that the pre-colonial condition of women was more oppressed.

respondents located this perceived erosion of gender asymmetry in the fact that "[women] of nowadays are already very "open-eyed."<sup>48</sup>

On several occasions, the sub-text for the argument that distinguished the realm of conjugal and familial affairs from the "public" realm disclosed the proponents' strong allegiance to Christian ethics and a concomitant influence of biblical narratives on equality discourses. As one respondent put it, "[equality] laws are at variance with the word of God and introduce disorder and anomaly into the course of nature.... God ordained the mutual dependence of spouses. It is like when hands are literally soiled and it takes one hand to wash the other clean."<sup>49</sup> Some other people propounded the view that an emphasis on sex equality would be misguided, given the socio-economic crises that the entire country is laboring under.<sup>50</sup> The basis for this view is the understanding that there is no point in making orders without the economic resources to enforce or sustain them.<sup>51</sup>

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<sup>48</sup>Like several other respondents, she considered the modern-era as a golden age of opportunities and buttressed her observation by enumerating positive changes that have been effected to improve the participation of women in formal education and employment. In actual facts, however, some of the changes that she listed are more apparent than real, unless relative to previous enrollment and participation of women, i.e., unless the practice relating to women today is compared to the practice relating to women in the past. For example, according to the Federal Ministry of Education Statistics, of the 1,380,722 pupils enrolled in primary education in Imo State in 1988, only 461,868 (approximately 33%) were women and this is an immense improvement from past decades. The total number of students, nation-wide, for 1988 was 12,690,798; 5,382,580 of these were women. Prior to this period, in 1980-81, there was a total number of 42,918 students registered for secondary education in Imo State. Only a paltry figure of 1,303 represented the female students. For the entire country, women were 53,187 out of 117,592 secondary school students. At the university level, women made up only 5.8% of the student population, with zero number of female enrollers in agricultural, civil, chemical and mechanical engineering and plant science; electrical engineering had 1.5% female students; and, presumably in keeping with sex-stereotype in occupational choice, food science and technology had the largest number, 41%, of female students. See Federal Ministry of Education, *BLUEPRINT ON WOMEN IN EDUCATION IN NIGERIA* (1986).

<sup>49</sup>Another respondent who asserted that she did not read any book other than the prayer book remarked: "A man is supposed to be in charge and win the bread because a woman should have the time to rear her children." This respondent is an accomplished member of the community whose pioneering entrepreneurship earned her many accolades and leadership positions. She maintained her immediate and extended family throughout, and after, her husband's terminal pursuit of educational degrees.

<sup>50</sup>Compare Yash Ghai, *The Role of Law in the Transition of Societies: The African Experience*, 35 (1-2) *J.A.L.* 8 (1991).

<sup>51</sup>The Fundamental Objectives and Directive Principles of State Policy in Cap 2 of the 1979 Constitution, including the prohibition against sex discrimination, are merely statements of goals which can be used as indicators and sign posts by the courts in search of social justice. Although they can provide some guidance in the interpretation of enacted law by the judiciary, they are not justiciable.



### *B. Attitudes to Court and Litigation*

Forty of the seventy respondents who expressed their attitude to litigation disclosed that they were generally averse to litigation.<sup>52</sup> Forty-nine percent of the women, including 70% of the poor and 26% of the rich as well as 68% of the men, including 67% of the poor and 69% of the rich, indicated that they were averse to litigation.<sup>53</sup> Of all the 192 interviewees, only thirteen persons had actually been parties to a litigation. Four of the cases appeared before the customary court and involved the repayment of bride-price into a court-established escrow account.<sup>54</sup> In three other cases, women who had been separated for

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<sup>52</sup>These narratives are ridden with vivid imageries that show that going to court is regarded as the equivalent of drawing battle lines or the epitome of spurning the boundaries of social relations. This mindset is illustrated by the comments of two people who flatly averred that "anybody who calls police for [them] is [their] greatest enemy." Even a man who sustained serious injury when his wife brutally attacked him with an axe when he was sleeping was uncompromisingly opposed to litigation; he said that he religiously avoids or ignores conflict and tension. Another respondent whose ex-husband had confiscated her property and deprived her of any visitation rights to her children who were between the ages of 10 months and five years also sincerely refused to avail herself of judicial redress; the husband was a lawyer and much older than her; she had minimal education and no income. Several legal practitioners were also among those that expressed a considerable degree of aversion. Two of the women-lawyers interviewed had divorced and re-married. Both of these women dissolved their previous marriage by living apart from their estranged husbands for statutory period necessary to obtain "automatic divorce." At the expiration of the stipulated period and/or in order to remarry, they merely petitioned the court in a unilateral and less-confrontational mode to fulfill the formality of obtaining a divorce decree. Neither of them requested ancillary awards.

<sup>53</sup>Twenty percent of the divorced women, 60% of the married women, and 57% of the widows attested of some level of aversion. 67% of the divorced men, 69% of the married men and 67% of the widowers also said that they were litigation-averse. 55% of the women married under customary law and 42% of those married under statute, as well as 80% of men married under customary law and 61% of those married under statute said that they were averse to litigation. This was also the situation with 47% of the women who had been married for a short time and 50% of those who had been married longer, in comparison to 73% of the men who had been married for less than 10 years and 65% of those who had been married for longer.

<sup>54</sup>The proceedings for bride-price repayment are almost always unceremonious and uncontested. All the four cases were unilaterally initiated by women (and their natal kins) who wanted to completely sever ties with estranged husbands who were, in turn, uncooperative either because they did not want to "release" their wives or because they paid much more money than they were being offered as repayment. In effect, the women in these cases took advantage of Bride Price Limitation Act of Eastern Nigeria to subvert efforts to forestall their reclamation of freedom. Marriage under customary law is dissolved once the bride-price is refunded. Until then, the parties, no matter how long they had been separated, owe each other certain rights and obligations; for example, there is an expectation that the surviving spouse will pay last respects and perform mourning rites for the one who predeceases. Typically, the refund is effected with the bride-price a new suitor presents on behalf of the woman. Thus, repayment is frequently associated with re-marriage, although a few women in post-menopausal state may repay without the imminence of

the statutorily stipulated period sought formal divorce decrees.<sup>55</sup> Two of my respondents were the parties, petitioner and respondent, to an uncontested divorce.<sup>56</sup> Two other interviewees were both plaintiff and defendant in the most celebrated court-adjudicated domestic dispute known in Oguta.<sup>57</sup> The twelfth case concerned an intestate succession property dispute instituted by a woman against her second (now deceased) husband's other two widows.<sup>58</sup> The last person that I interviewed who had a litigation record was a man who sued a person who assaulted him with a deadly weapon, but eventually dropped his claim when the community rallied to intercede on behalf of the aggressor.

Several participants regarded their attitude to litigation as contingent on the nature of the cause and/or their relationship with the adversary. For example, an elderly widow stated that she is ordinarily opposed to litigation, but that her current experience with an obnoxious (and possibly dangerous) tenant made her more favorably disposed to litigation.<sup>59</sup> Many people were receptive of the notion of litigation for socio-cultural reasons relating to standing, status or reputation in the society. Hence, "disrespect" or "indignity" were commonly articulated as valid grounds for seeking judicial redress. A number of the people who professed a willingness to initiate legal proceedings simultaneously revealed that they had not been previously involved in any dispute, not even before any level of the hierarchies of family-based or native

remarriage in order to negate mourning obligations.

<sup>55</sup>Two of these women were attorneys and third woman was a rather "high-society" and well-educated daughter of a lawyer.

<sup>56</sup>The man who was the petitioner in this case stated that he initiated processes for judicial dissolution after family arbitration failed. He was the only interviewee to assert that the fact that he had a child with his estranged wife was not a source of inhibition. However, he explained that this was because it was mandatory "to save life." Alleged threat to life also featured in another instance as the ultimate cause of action.

<sup>57</sup>The fact that most people cited this as "the" divorce case underscores the infrequency of divorce although research uncovered more uncelebrated cases.

<sup>58</sup>Incidentally, the plaintiff in this case had also been involved in one of the bride-price repayment cases and the first defendant was the respondent who failed to appear in the uncontested divorce case. The second defendant was one of two people who specifically described law as empowering and protective of persons without a strong power-base or privileged kins. Like her, the other proponent of this view had some courtroom experience. Perhaps, being impleaded as a party may have demystified the judicial process.

<sup>59</sup>This tenant had refused to defer to the authority of the native counsel and he was in no way related to her; in fact, he was a total stranger to the community and independent observers acknowledged the peculiarity of the situation.

tribunals.<sup>60</sup> Therefore, save for the divorced and otherwise beleaguered, it remains to be seen how these persons will react if a matrimonial dispute actually arises as it is not always easy to anticipate precise response until faced with an actual situation.<sup>61</sup>

Usually adopting a two-tier analysis in explaining their attitude to litigation, several people established that they were more reluctant to litigate domestic disputes or against relatives than against strangers in matters involving assault or financial dealings. One respondent drove the point home by emphasizing that, given the unity of spouses, suing your spouse was equivalent to suing yourself.<sup>62</sup> Some people contended that their socialization made them inclined to avoid the scandalous and socially-reprehensible unpleasantries of washing their "dirty linens in public."<sup>63</sup> The primary restraint or determinative

<sup>60</sup>Only a couple of the people who were open to litigation have ever been parties to previous litigations. A respondent recognized that she had a good cause of action against her husband, but said that her affinal kins prevailed on her to forebear. One woman who just came out of a very embittered and embattled marriage felt a fierce need for judicial vindication and insisted that she had no qualms about taking recourse to court. On a more sober note, she admitted that, although her ex-husband had prevented her from seeing her children, she had not set any court process in motion and that she would suffer through the stipulated period for "automatic" divorce.

<sup>61</sup>On this note, it is interesting that the defendant in the most notorious divorce case known in Oguta alleged that she will never take anybody to court, although she returned to court several times to protest her ex-husband's violation of court orders. It is quite possible that her present attitude was cultivated in the aftermath of the unpleasant court experience. In her view, "a woman who takes her husband to court is a bad woman; a husband that takes his wife to court is also bad. Left to me, cases should not be settled in court. Lawyers are liars and they distort the truth through cross-questioning." It is also insightful that she continued to accommodate and cater to the needs of her invalid mother-in-law after the divorce until her death.

<sup>62</sup>The deference to family partly explains why terminal separation is more endemic in the community than divorce. Considerations of self-preservation and family name/honor which bar airing grievances in public forum privilege unceremonious separation. In a sense, the general orientation to terminal separation suggests that marriage is not readily seen as irretrievably broken. The preference for separation also probably has to do with the expectation that the children of the marriage will restore relations between their parents when they come of age or that a surviving spouse will pay final respects upon the death of the other. People shy away from obtaining the divorce decrees because it implies a finality that severely constrains the prospects for reconciliation. It appears that there is a high degree of remarriage among premenopausal women and that it is in such cases that bride price repayment (the *sine qua non* for divorce) is often effected. Many of the older generation of women (and men) separated and expressed the desire that their estranged spouse will mournfully honor them upon their death.

<sup>63</sup>Couples were perceived as being more likely to suspend conjugal relations than to stake out claims in court. In the words of one informant, "even statutory marriage can be dissolved extra-judicially by asking her to go." A set of people who affirmed this view were quick to reiterate the inviolability of marriage vow. This set often comprised of Christians, especially Roman Catholics, who are religiously indoctrinated against divorce. Among this group, an alternative course was prayer and intercession, as

consideration against litigation was clearly the interest of the children of the marriage and the concern that parental litigation will bring reproach on them or make them public spectacles.<sup>64</sup> My investigations to ascertain attitudes to ancillary financial awards at the dissolution of marriage revealed the strong influence of an ideology of self-reliance.<sup>65</sup>

A number of people enumerated built-in social control mechanisms which tended to make the role of the court redundant. Peaceful co-existence and friendly relations is believed to revolve around the axis of dialogue and compromise, not fierce competition and adversarial confrontation.<sup>66</sup> Accordingly, several of these people articulated a preference for counselling, mediation, conciliation and invocation of

some of them opined that "vengeance is the Lord's" and that litigation offends God.

<sup>64</sup>Africans are widely presumed to be avid pronatalists who regard parenthood as the ultimate *rite de passage*. In the dominant African world-view, marriage is the legitimizing forum for procreation. As reflected by the saying, "When two elephants lock horns, the grass bears the brunt," it is believed that children are invariably dragged into, traumatized and damaged by parental acrimony. As one woman rhetorically stated, "Why should I take a man that I had children for to court? It is not proper to take your husband to court. I could complain to his family but not to take him to court." Conversely, the centrality of children was also forcefully articulated by persons, men and women, who qualified their putative aversion to litigation by predicting that a custody battle (without an ancillary request for material benefits or awards) was the only cause that will make them contestants.

<sup>65</sup>Many women maintained that they were able, with the grace of God, to fend for themselves. A few of these women suggested that they found it contradictory to supplicate for help from former husbands who had maltreated and/or betrayed them. Two of the women (who happen to be Catholics) were among those that unequivocally condemned spousal litigation. They stated that, even if their spouses confiscated and evicted them from the matrimonial home, they would move into another property rather than litigate their entitlement. Their possession of alternative means and shelter partly explains their reluctance to take recourse to court, but more crucially, it underscores the expedience and empowerment of economic autonomy. However, it is noteworthy that these women's responses was not solely economically determined; it also derived from sources such as religion and cultural imperatives that promote marriage as a *rite de passage*. Also, the availability of options does not totally explain attitude because some persons of humble means are adamantly opposed to litigating property disputes.

<sup>66</sup>As the preeminent legal luminary in the community put it, "[t]he whole idea is to preserve the integrity of the village community, to minimize the chances of dispute. That is why we do not have cut and dry rules as in the formal courts. In a native arbitration, the aim is at compromise that will effect reconciliation; no body is right and nobody is wrong." Compare J. Maquet, *AFRICANITY* 76 (1972): "Compromise is a key word in Africanity. It is a way of settling personal disputes and conflicts of interest by trying to find a solution acceptable to both parties...the antithesis of settlement by compromise is settlement by reference to abstract principles. The application of such principles often result in an extreme solution: one of the parties has to be wrong and the other has nothing." These observations do not quite convey the totality of the situation; in traditional settings, conciliation is not always possible and solutions could be imposed by the stronger upon the weaker in ways that some people perceive as infringing upon their sense of justice and fairness. See Martin Chanock, *Neo-Traditionalism and the Customary Law in Malawi*, 16 *African Law Studies* 80, 85 (1978).

social pressure over adjudication.<sup>67</sup> With regards to domestic dispute, there seem to be about four forms of alternatives to adjudication. These include complaining to the police,<sup>68</sup> appealing to the social welfare office,<sup>69</sup> appearing before a native tribunal,<sup>70</sup> and initiating a kin-based inquest.<sup>71</sup> A former Attorney-General of Imo State who

<sup>67</sup>Many of my informants exhibited some deep resources of humanistic values and overwhelming sense of social responsibility apparently compelled by, and cultivated to weather, frail and extenuating societal forces. The exigencies of face-to-face relations, the conviction that the polarization of conflict is inimical to society, the prioritization of community, and the interest of social equilibrium all combine to discourage impulsive invitations for state intervention. In the dispensation of justice, the mode is oriented toward participation and conciliation, all to the intent that social ties may be restored and the sense of obligation affirmed. Taking recourse to court is said to belie and exacerbate impasse; it is also described as disruptive and annihilating of meaningful prospects for reconciliation. However, activating the judicial process after every other effort has failed is said to exonerate a plaintiff from blame, shame, ostracism and general reprisals. Along similar lines, a number of interviewees intimated that social sanction may be more vindicating than the decree of a judiciary which is not integral to the every day functioning and moral policing of the society.

<sup>68</sup>The police often has jurisdiction where there is an element of violence or crime to the dispute. In many instances, people conflate the structures of the state law enforcement and fail to distinguish between the agencies of the police and court. In the minds of these people, both agencies are equally impersonal, intrusive, and to be avoided. I interviewed two people who had lodged complaints before the police. In one case, a woman, at the instance of her parents, reported her husband to "save [her] life," since he took to beating her while she was pregnant. In the second case, the disputant suggested that he had no apologies about the incident because he had no child with his estranged wife, there was nothing to keep them together. One woman, who had become convinced that "law doesn't exist," noted how the police were prone to dismiss women's complaints under the pretext that it is a family affair. As if in confirmation of this observation, a police officer that I interviewed in an unofficial capacity strongly disapproved of lodging a formal complaint or litigate a "family affair [which] is not supposed to concern the police." In some respects, the officer's remark may be construed as bespeaking his official attitude to domestic disputes.

<sup>69</sup>This forum is universally described as less potentially alienating and disruptive of relationships than police or judicial interventions. However, its clientele was predominantly, if not exclusively, the uneducated and least privileged who dominate the group that resort to this means. While the findings of the welfare officer are not typically binding on the parties, it appears that some courts will recognize its deliberations for evidentiary purposes.

<sup>70</sup>This is different from the customary court which, even though perceived as more accessible than the higher courts, is still relatively avoided. The native tribunal is constituted of indigenous structures of mediation, regulation and authority, ranging from the age-grade groups and other local associations to the Ogenes (oldest man or woman in Oguta) with the executive (Prime Minister or King) in councils the apex. Even persons who have never initiated this tradition-based process welcome it more than the Police and Welfare. Also, the clients tend to be less stratified according to socio-economic status than those who resort to the Police or to the Welfare.

<sup>71</sup>Intervention by extended kins is almost always inevitable in the event of matrimonial strife. Even with the increasing shift of emphasis and initiative to individuals, people often defer to the deliberations of the collective family before resorting to an extraneous forum. It seems to be a condition precedent whose failure paves way for litigation and sort of vindicates or releases the party who was most accepting of its authority from public condemnation. See *supra* note 66.

comes from and practices law in Oguta noted that the people are so conservative that they are reluctant to venture as far as the police station and that they frequently collude to sabotage cases instituted by other people.<sup>72</sup>

*(1) Factor Analysis: Privileging the Emic Perspective*

Some reasons for local attitudes to litigation are referenced in the following interview:

Q: Do you envisage a situation that will make you go to court?

A: God forbid that I should take recourse to litigation. I am not lettered. What will I say in court?

Q: What if you have efficient representation?

A: I will still not go. When my cousin was in practice as a lawyer, some observers giggled while the court was in session and they were locked up for contempt of court.

Q: I see. These are the sources of your inhibition? What if such were done away with, will you go to court?

A: Sure...[although] it is no use taking him to court. I have returned to my natal home.... It is a woman who does not have well-off or helpful relations and who cannot survive on her own that would resort to legal action for maintenance and child support. My father was a successful farmer and was

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<sup>72</sup>Elaborating on this view, he stated:

The average Oguta [person] is not litigious by nature. Probably, they prefer resolving issues at home or in the native tribunals. Some who go to the police or take out a writ in the heat of passion return to withdraw their complaints and claims in their lucid moments or after they have "been begged to forgive." If the [magistrate, customary and high] courts had only jurisdiction in Oguta, they will fold up because they wouldn't have a lot of work to do. About 90% of their business come from neighboring towns; Oguta might only account for 5-10%.

According to a customary court judge, although the court is located in Oguta and Oguta constitutes the largest population under its jurisdiction, less than 25% of the cases are filed by persons from Oguta and only a minuscule fraction of this figure represent domestic disputes. The judge also presented a fascinating perspective on how the community undermines the efforts of litigants. He recounted an incident in which two villages were quarrelling over land and the lawyers they retained from the community reneged to appear on their behalf on the day the case was scheduled for hearing. "This is because Oguta lawyers don't support their people going to court," he concluded.

giving me the money to feed my children and I was doing my best to make ends meet. Of what use could going to court have been [when he] cannot even make any money to feed his [new] family.<sup>73</sup>

These responses demonstrate that educational status, fear (whether well-founded or misconceived) of the system, availability of a safety net, and impracticality of recourse are some of the factors that determine attitudes to litigation. Some people displayed a complex and multi-faceted attitude that separated law as entity from the system of its operation, with the former being seen as empowering while the latter was castigated as corrupt and subsumed in fraud and elitist biases.<sup>74</sup>

After all is said and done, even the cursory interrogation of the voices of some of the interviewees suggest that it remains to be seen that having recourse to the formal court, as it is presently constituted, will necessarily ameliorate the plight of women. A couple of the respondents indicted the predominantly male judiciary as being too steeped in sexist traditions and codes of interpretation to adjust the law in favor of the respective claims of the women that trickle into court.<sup>75</sup> Poverty or sparsity of resources was also identified as a severe constraint.<sup>76</sup> The perceived and actual ineffectiveness of the legal structure caused some people to consider taking recourse

<sup>73</sup>This comment alludes to the fundamental question of how effective law is in the face of contrary economic and social realities. Compare text to *supra* notes 49 & 50.

<sup>74</sup>A participant who intoned absolute contempt for judicial deficiencies said: "The court has a way of thwarting cases. I don't have confidence in the system. That's why I won't waste my time resorting to it." Another respondent who used to live and litigate in Europe equated Nigerian courts to "kangaroos" and remarked: "There is no justice in Nigeria; it is more about who you know."

<sup>75</sup>A couple of women observed that the bench was constituted of a neutral "culprits" whose self-interests made them resistant to gender equity. This view was reiterated by another female interviewee who related lack of enforcement to composition and complicity of judiciary.

<sup>76</sup>The disabling dimension had more to do with human than with financial resources. One woman considered applying for award, but was deterred because she does not have "anybody to help or give [her] light on what to say there or the way to behave." A widow who believed that judicial intervention "will solve" the problems she was having with her deceased husband's family said that she will file a suit, even if she has to borrow money, "if [she] has somebody to help [her]." There were other persons like this widow who asserted that if they found litigation inevitable in the last resort, they will be willing to incur debts to finance cost and fees.

unpragmatic.<sup>77</sup> Some people took particular exception to the dilatory tactics and inordinate delays that were characteristic of many cases.<sup>78</sup> A different category of people highlighted evidentiary problems and problems that relate to the non-enforcement and unenforceability of judicial orders.<sup>79</sup> The infrequent occurrence of litigation in Oguta may also be partly attributable to what could be regarded as the decidedly *laissez faire* and cavalier culture.<sup>80</sup> A competing explanation for the avoidance of the court might be found in the differences between the state-constituted courts and the indigenous dispute resolution system.

## *(2) Locating a Root of Resistance: Indigenous Dispute Resolution Mechanisms*

The court was there: but in point of fact the people did not use it...  
This abstention from the court was at least in part a conscious and,  
so to speak, official policy on the part of the village.

Margaret Green.<sup>81</sup>

It is interesting that the above observation which Margaret Green made more than fifty years ago is consistent with the findings of this

<sup>77</sup>A great deal of the aversion and reluctance emanate from cynicism about the integrity of the institutions of government or from perceptions of the role and reputation of the judicial process. For example, in terms of the prevalent myths of privilege, a respondent of rather humble means disclosed that she thought that judicial mediation of marital relations was the prerogative of persons married under the statute. Additionally, indeterminacy and unpredictability of outcomes tend to operate as double-edged swords; this was illustrated with an account of a contested petition for divorce which ended up with the court ordering the petitioner to pay alimony. One informant argued that it was safer to execute an extra-judicial plan of action because the denial of a petition for divorce could mean that she would be forced to continue cohabiting with her estranged husband. Another woman thought that litigating a domestic dispute may result in the arrest of her husband which will destroy their relationship.

<sup>78</sup>These people noted that they do not care to expend the energy and creativity, that they would rather channel into ends with more assured payoffs, on devising and sustaining strategies of litigation. One woman eloquently stated that litigating would only compound her precarious existence, since the time commitment necessary will detract from her petty trading and that her lost earnings are opportunity costs for pursuing for monetary damages that may not be awarded or ultimately enforced. Stressing the awkwardness of seeking judicial redress in her situation, she concluded that at the end of the day, she may only have dissipated her meager resources to little or no avail.

<sup>79</sup>A powerful Priestess who, while ordinarily assertive, considers court action a very last resort, pointed out that, in order to attenuate the problem of evidence and proof, she would only litigate a well-documented transaction that has already been brought before other panels.

<sup>80</sup>See *supra* note 72.

<sup>81</sup>See Margaret Green (1947) *IGBO VILLAGE AFFAIRS* 104.



study. The reproduction of Igbo mores, values and attitudes towards litigation relates to several factors, including the divergence between instrumental and ideological conceptualizations of law. The salient differences between the indigenous and the state approaches to dispute resolution shed light on some of the attitudes toward litigation expressed by the people that I interviewed.

One issue that is of material import here is the fact that the indigenous approach to dispute settlement is relatively moralistic.<sup>82</sup> This orientation is at variance with the construction of claims in state courts, a construction which is often legalistic and suffused with putatively insular rights-based assertions.<sup>83</sup> Customary norms are not perceived in isolation from their social and religious context; the recognized codes of behavior are internalized, voluntarily accepted and sometimes perceived as sacred and sanctioned by some supernatural power.<sup>84</sup> In the final analysis, the principal means of getting someone to live up to obligations in the realm of custom are reliance on mutual trust, social pressure, denial of reciprocity to defaulters and the enunciation of the merits of compliance with the rules of reciprocity.<sup>85</sup>

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<sup>82</sup>The emphasis is often on duty rather than on right. Ordinarily, most rights derive legitimation from kin recognition and support. Even when the facilitators of the indigenous dispute resolution mechanism affirm that a particular person has a right to something or some service from another, they are more apt to shy away from legalism and to refer instead to the "mutuality of interests," the "strength in unity (*igwebuiké*)" and the "reciprocity of obligations." The implicit concern with the multiplexity of relationships, group cohesion and solidarity often means subordinating both notions of individualism and the letter of rights. Compare Max Gluckman (1955) *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA*; Gluckman (1965) *THE IDEAS IN BAROTSE JURISPRUDENCE*; Rene David (1971) *The Potentialities and Limitations of Legislation in the Independent African States*, in Antony Allott, ed., *INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA* 160; & J.M. Walker, *Bamelete Contact Law*, 1 Botswana Notes and Records 71 (1968). See also Stewart Maculay, *Non-Contractual Relations in Business: A Preliminary Study* 28 *Am. Soc. Rev.* 55, (1964); & John H. Barton, James Lowell Gibbs, Victor Hao Li, John Henry Merryman, *LAW IN RADICALLY DIFFERENT CULTURES* 579, 582-83 (1983).

<sup>83</sup>Martin Chanock suggests that obligations between persons were translated into rights "remedy" as the state, rather than the community, became the guarantor, and as the market gave a meaningful rationale for the institutional framework of the new rights to be used. See Martin Chanock, *A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa*, 32 *J. African History* 65, 76, 78 (1991).

<sup>84</sup>See Colin M. Turnbull, *The Individual, Community and Society: Rights and Responsibilities From an Anthropological Perspective*, 41 *Wash. & Lee* 77, 82 (1984); Peter Sack, ed., *LAW AND ANTHROPOLOGY* 201 (1992); & Robert J. Mundt, *The Internalization of Law in a Developing Country: The Ivory Coast's Civil Code*, 12 *African Law Studies* 60 (1975).

<sup>85</sup>See F.U. Okafor, *IGBO PHILOSOPHY OF LAW* 34 (1992).

Since people have networks of present and future relationships that interact simultaneously, the need to adjust disrupted relationships and reestablish the bases for subsequent harmony discourages the "winner take all" adjudication of disputes.<sup>86</sup> The multiplicity of relationships also tends to elongate the historical boundaries of conflicts and transform them into arenas, not just for the redress of discreet injuries, but for the vindication of esteemed social standards.<sup>87</sup> In such settings, the administration of justice is not conceived as the exclusive prerogative of a select body of impersonal legal experts who concentrate mainly on mending the breached fences of law; it is rather seen as a concerted enterprise to examine an array of conducts and to ascertain what would best restore unity and harmony.<sup>88</sup> True to the Igbo saying, "a case forbids no one," almost every adult is assumed to have some cognizance of operative principles and, therefore, to qualify as a player, either as an assessor or as a complainant, in the judicial process; anyone who can gain a hearing may participate in the proceedings.<sup>89</sup>

Agnates and affines feature as key resources for mediating disputes. Their centrality is most vividly reflected in the idea that marriage is an alliance between two kinship groups for realizing goals that transcend the immediate interests of the spouses. Since marriage is an alliance between kin-groups, the discretion of individuals in matters of dissolution tend to be constrained by the interest of the

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<sup>86</sup>Because going to court is often believed to exaggerate and crystallize antagonistic positions, an adjustment is seen as more easily effected informally. Among the Igbos, the folk wisdom, "ofu aka ruta nmanu, ozue oha onu," which means that it takes just a soiled finger to soil other fingers, speaks of the osmotic or wild-fire implications of feuding. See *supra* note 66. For more general discussions, see Ian Hamnett, ed., *SOCIAL ANTHROPOLOGY & LAW* (1977); John L. Comaroff & Simon Roberts, *RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT* (1981); & Simon Roberts, *ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* (1979).

<sup>87</sup>See J. F. Holleman, *Disparities and Uncertainties in African Law and Judicial Authority*, 17 *African Law Studies* 1 (1979).

<sup>88</sup>*Id.*; Simon Roberts (1979) *Tradition and Change at Mochudi: Competing Jurisdictions in Botswana*, 17 *African Law Studies* 1 (settlement-directed talks, informed by a repertoire of flexible rules, are a common-place in the resolution of disputes).

<sup>89</sup>Margaret Green reports that in the colonial era, the universal right to participate in judicial proceedings became an embarrassment to the British authorities when villages sent a herd of emissaries, in response to official request for community representation at the Native Court. To contain the situation, the colonial administration subsequently stipulated that for practical reasons not more than fifty per cent of the population should come to take part in the trial of cases. See Green, *supra* note 81 at 107.

group.<sup>90</sup> This is confirmed by the report that people are most averse to litigation and seek kin-based recourse when the cause is family-related.<sup>91</sup>

Thus, while domestic relations are a serious frontier of resistance vis-a-vis gender equality, the "family affair" exemption, or notions of privacy and propriety, restrict judicial intervention. The dilemma is further complicated by the fact that the force of kin-based extra-judicial sanctions has become substantially diminished. The substitution of the Western doctrine of individual responsibility for the indigenous doctrine of the collective responsibility of the lineage for the good behavior of its members compromised the power of the kin group to protect and discipline its members.<sup>92</sup> Additionally, the specialization (and secularization) of the judiciary and its composition by strangers, rather than by kith and kin, aggravate distrust, alienation, prejudice and lack of allegiance.<sup>93</sup>

### *III. Discussion: On Law as an Instrument of Social Change*

The outcome of this study supports the proposition that law, to borrow the memorable words of Oliver Wendell Holmes, is not a brooding omnipresence in the sky. Law is, instead, an integral part of the societal order and its efficacy depends on its sensitivity to and

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<sup>90</sup>See Edwin Nwogugu, FAMILY LAW IN NIGERIA; Olayide Adigun, *The Interplay of Conflicting Rules: a Survey of the Customs of the Yoruba and the Effect of Modern Legislation*, in 4 *Law & Anthropology* 281, 300 (1989); T. R. Nhlapo, *The African Family and Women's Rights: Friends or Foes*, in *Acta Juridica*, AFRICAN CUSTOMARY LAW 135 (1991).

<sup>91</sup>See *supra* notes 62-64 and the text thereto.

<sup>92</sup>A person who is under a social duty and who has motives for not performing it, may, in determining his action, take account of the possibility that no penalty will attend a breach or that the penalty may be so negligible as to negate its impact. See Gordon Woodman, *The Family as a Corporation in Ghanaian and Nigerian Law*, 11 *African Law Studies* 1, 3 (1974); & Darryl Forde, *Justice and Judgment Among the Southern Ibo under Colonial Rule*, in Kuper & Kuper 79, 92. It is important to point out that while socio-cultural indicators of change may have eroded the authority and idiom of kinship and affinity, they have not eradicated them entirely. Change has been mainly supplementary, not substitutive of, indigenous values; individuals imbibe values from both the "traditional" and the "modern" to foster situation-determined vacillations between the two regimes. See AJGM Sanders, *How Customary is African Customary Law?* 20 *Comp. & Int'l. L. J. Southern Africa* 405(1987). See also M. Bloch, *The Symbolism of Money in Imerina*, in J. Parry & M. Bloch, eds., *MONEY AND THE MORALITY OF EXCHANGE* 170 (1989); & Elizabeth Colson, *Native Cultural and Social Patterns in Contemporary Africa*, in Charles Grove Haines, *AFRICA TODAY* 79 (1955).

<sup>93</sup>See Turnbull, *supra* note 84; & Peter Sack, ed., *LAW AND ANTHROPOLOGY* 201 (1992).

interaction with cultural and structural variables. While legal regimes do exert some guidance and influence, they are essentially dependent mediums for attaining specific ends. The plethora of dysfunctional laws on the statute books attests to the fact that law has no intrinsic or absolute value and that it is not self-executing.

Researchers have identified three principal variables which define the validity, relevance and public acceptance of a legal regime. They are the degree to which the law conforms to social mores,<sup>94</sup> the extent to which the state enforces the law,<sup>95</sup> and the legitimacy of the lawgiver and of the law itself.<sup>96</sup> Even when undergirded by these variables, legal norms have a limited capacity to compel any particular course of action.<sup>97</sup> Being neither dispositive nor proactive, the derivative role of legal norms is demonstrably determined by its effectiveness which is in turn contingent upon both a conducive legal

<sup>94</sup>See William Graham Sumner, *FOLKWAYS* (1906); & Berl Kutchinsky, *The Legal Consciousness: A Survey of Research on Knowledge and Public Opinion About Law*, in Adam Podgorecki, et al, *KNOWLEDGE AND OPINION ABOUT LAW* (1973). The success of a legal reform can derive, not only from its correspondence with folkways, but, to the degree that it departs from folkways, from the aspirations of those who are traditionally disadvantaged by the folkways.

<sup>95</sup>Individuals may accept legal change out of fear of the sanctions for non-compliance, although there are limitations on the use of coercion as the basis of law enforcement. See Jerome H. Skolnick, *Coercion to Virtue: The Enforcement of Morals*, in Lawrence M. Friedman & Stewart Maculay, eds., *LAW AND BEHAVIORAL SCIENCES* (1968); & Richard D. Schwartz & Sonya Orleans, *ON Legal Sanctions*, in Friedman & Maculay, *supra*.

<sup>96</sup>See Robert J. Mundt, *The Internalization of Law in a Developing Country: The Ivory Coast's Civil Code*, 12 *African Law Studies* 60 (1975); & Leonard Berkowitz & Nigel Walker, *Law and Moral Judgement*, in Friedman & Maculay, *supra* note 95. See generally, Nigel Walker & M. Argyle, *Does Law Affect Moral Judgments?* 4 *British J. Criminology* 570 (1964); Vilhelm Aubert, *Some Functions of Legislation*, 10 *Acta Sociologica* 98 (1966); Gregory J. Massell, *Law as an Instrument of Revolutionary Change in the Traditional Milieu: The Case of Soviet Central Asia*, 2 *Law & Society Review* 179 (1968); Mahoney E. R. Nicholson, *Change Without Conflict: A Case Study of Legal Change in Tanzania*, 7 *Law & Society Rev.* 747 (1973); & Max Rheinstein, *Problems of Law in the New Nations of Africa*, in Clifford Geertz, ed., *OLD SOCIETIES AND NEW STATES* (1963).

<sup>97</sup>The debate regarding the relationship between law and social change is a longstanding one. Several theories of the relationship between law and social change have been postulated and varied approaches have been employed to demonstrate the validity of these theories. The dominant views are those of law as an autonomous aspect of society and those of law as an integral part of society. In these perspectives, law is advanced as a vanguard, a mirror or a monitor of social change and order. While considerable attention has been devoted to the issue of temporality contesting the point of intersection vis-a-vis law and social change—whether law is a reflection or a vanguard of change, there is some consensus, that law is a valuable implement for social change.

culture and meaningful implementation.<sup>98</sup> Meaningful implementation presupposes the availability of material resources and cooperative enforcement agents.<sup>99</sup>

Activating the institutional machinery of law determines the impact of law on society. The courts can only be prompted to enjoin and redress breaches within the framework of a suit; and people can only sue when they know their rights under the law. The earlier discussions already fore-ground several factors that militate against the ability of people to articulate their grievances and invoke the law.<sup>100</sup> It is apparent that these factors are compounded by the prevalence of a conservative appeal to a world-view which forbids the desecration of ancestral cultural traditions. Because custom and tradition symbolize social continuity and authority, they are notoriously resilient to reformative penetration.<sup>101</sup>

In many quarters, gender discrimination is described as being embedded in beliefs, traditions, customs and attitudes.<sup>102</sup> The embeddedness of gender discrimination has two ramifications that have a bearing on our discussion. To begin with, it contributes to the

<sup>98</sup>In other words, compliance with a law is the function of diligent enforcement and/or conducive legal culture. Legal culture encompasses the questions of the source and substance of the law. Positive legal culture and active enforcement are complementary and mutually reinforcing. The former is directly proportional to, although not invariably contingent on, the latter. The need for enforcement is inversely related to the level of enlightenment; an acute or otherwise favorable level of enlightenment affects the mode and degree of enforcement.

<sup>99</sup>Some laws could be "unenforceable," that is, enforceable only with enormous expenditure of effort, time and money, or simply not enforced. See Friedman & Maculay, *supra* note 95 at 366.

<sup>100</sup>Even where there exist the knowledge of the right and the awareness of its breach, a prospective litigant may lack the resolve or wherewithal to initiate a suit; costs of complaining in terms of time, effort and money may outweigh the benefits; or an aggrieved party may have experienced the law in ways that engender indifference and/or skepticism. See *supra* notes and the texts thereto. Besides, as studies of unmet legal needs indicate, citizens may not readily identify their problems as "legal" matters. See generally Roger Cotterrell (1984) *THE SOCIOLOGY OF LAW: AN INTRODUCTION*.

<sup>101</sup>Legislation has had some success in reducing or eradicating some cultural practices. However, the outcome has been borne of a series of complex and interactive processes and events. According to Lawrence Friedman, although law may be able only weakly and slowly to effect change on questions that affect basic mores and values, it does not follow that the law cannot achieve a particular result, within a certain culture, by making use of the tools which work best for that culture. See Friedman, *supra* note 12.

<sup>102</sup>Some regional instruments embody an element of contradiction by recognizing the often conflictual domains of gender equality and "tradition" which admits a double standard and differential treatment for men and women. The African Charter, for example, simultaneously mandates "the elimination of every discrimination against women" and promotes the preservation of traditional values and morals, especially for the cohesion and respect of the family (Article 18 & 29). See Claude Welch, *supra* note 2.

reduction of gender equality laws into a mere *rite de passage* which governments acquiesce to out of formal deference to pressure groups. It also creates the perception that gender equality laws are incongruous with local logic and devoid of organic basis.<sup>103</sup> The significance of this second ramification piques in light of the controversy over how states may best immunize culture from onslaughts associated with universalistic human rights discourses.<sup>104</sup> State parties to international instruments guard their sovereignty jealously and they do not hesitate to resort to reservations for immunity when they suspect that scrutiny is a facade for Western cultural imperialism. In fact, it has been reported that no other treaties have provoked as much substantive reservation as the CEAFDAW.<sup>105</sup>

### A. *Deciphering the Last Frontier: Customary Law*

Due to its colonial experience, Nigeria has a plural legal system constituted of local legislations, received English laws, and customary

<sup>103</sup>Legal changes lack minimal prospect for meaningful enforcement if they ignore the restraints imposed by custom and culture. While a degree of cultural anchorage is germane for the efficacy of law, law is not a mere codification of custom. See Friedman, *supra* note 12.

<sup>104</sup>Justifications of the international human rights regime, from natural law theories to positivist arguments, typically emphasize the universality of human rights. This engenders counter-claims from relativists who assert the primacy of indigenous understandings and meanings, while arguing that most configurations of human rights bear a Western imprint and evince philosophies and values which are more resonant with the West than with Africa. See Polis, Adamantia & Schwab, Peter eds. (1982) *Toward a Human Rights Frame-Work*; Cobbah, Jossiah (1987) "African Values and the Human Rights Debate: An African Perspective." 9 *Human Rts. Q.* 309; Renteln, Alison (1990) *International Human Rights: Universalism versus Relativism*; & Panikkar (1982) "Is Human Rights a Western Concept?" 120 *Diogenes* 75.

<sup>105</sup>These reservations imply that custom and tradition are expedient and inexcusably demonized. A typical reservation is exemplified by Malawi's declaration that

owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Govt. of the Republic of Malawi shall not, for the time being consider itself bound by the provisions of the convention as require immediate eradication of such traditional customs and practices (U.N. Doc. ST/LEG/SER. E/8 (1989).

See Rebecca Cook, "Reservations to the Convention of the Elimination of All Forms of Discrimination Against Women," 30 *VA. J. INT'L L.* 643 (1990); & Hevener, Natalie Kaufman (1986) "An Analysis of Gender-Based Treaty Law: Contemporary Developments in Historical Perspective." 8 *Hum. Rts. Q.* 70; & Hirschmann, David (1990) "The Malawi Case: Enclave Politics, Core Resistance, and 'Nkhoswe No.1 (163-179)'," in Staudt, ed. *Women, International Development and Politics: The Bureaucratic Mire*.

law.<sup>106</sup> Although the colonial moment in Africa precipitated a crisis of accommodation between the competing sources of law, altered the form and meaning of cultural traditions, and reduced gender to a determinative fault-line in the legal arena, contestable concepts which coincided with colonialist predilections were reified and adorned with the patina of age. In the process, formerly fluid norms were crystallized into absolute jural prescriptions and shifts in gender practices and relations were dissimulated by the legitimation of custom.<sup>107</sup>

Lately, notable Africanists have historicized and questioned the commonplace acceptance of contemporary clusters of rules, moralities, expectations that have been endowed with the aura of "tradition" as determinate.<sup>108</sup> Examinations of the extent to which the political economy of European colonialism distorted traditional structures and gender dynamics suggest that extant customary norms which purport to indigenize gender inequality may not necessarily be a legacy of

<sup>106</sup>Customary law is broadly defined to include Islamic precepts and received English laws consist of the common law and statutes of general application in force in England as of January 1, 1900. Since Oguta is predominantly Christian, a dual system of statutory and customary marriage obtains. Most marriages are either celebrated in keeping with the tenets of customary law or under a combination of both customary and statutory law. Consequently, customary law usually governs or has some bearing on most marriage relations. Ordinarily, the application of customary law can be circumvented by contracting a monogamous marriage under the statute. The *Cole v. Cole* (1898) 1 Nigerian Law Report 15 is the classic authority for change of personal law choice. The rule in *Cole v. Cole* was given statutory recognition in Section 36 of Marriage Act, Cap 115 *Laws of the Federation of Nigeria and Lagos*, 1958. See I.E. Sagay, *The Dawn of Legal Acculturation in Nigeria—A Significant Development in Law and National Integration: Olowu v. Olowu*, (1986) J.A.L. 179. The courts have on occasion regulated certain aspects of a statutory marriage by native law and custom. See, e.g., *Nezianya v. Okagbue* [1963] 1 All Nigerian Law Report 353. See also L. Amede Obiora, *New Skin, Old Wine: (En)Gaging Nationalism, Traditionalism and Gender Relations*, 28 (3) IND. L. REV. 575 (1995).

<sup>107</sup>To palliate the consequences of the novel dispensation, courts are statutorily barred from enforcing customary law when it is inconsistent with a written law or repugnant to seemly notions of natural justice, equity and good conscience. Notwithstanding this repugnancy doctrine, norms contorted or contrived to control women's productive and reproductive capacity are pervasive. See L. Amede Obiora, *Reconsidering African Customary Law*, XVII (3) Legal Studies Forum 217 (1993).

<sup>108</sup>Holding that much discourse over customary roles, duties, rights and obligations is really a discourse on domination, subordination, and resistance, these works demonstrate the historically specific circumstances and techniques whereby the concepts of tradition formed, gathered meaning over time and attained its present-day status. See, e.g., Mann, Kristin & Roberts, Richard, eds. (1991) *Law in Colonial Africa*; Moore, Sally Falk (1986) *Social Facts and Fabrications: "Customary" Law in the Kilimanjaro, 1880-1980*; & Mudimbe, V. Y. (1988) *The Invention of Tradition: Gnosis, Philosophy and the Order of Knowledge*; & Chanock, *supra* note. For a detailed discussion of the revisionist perspectives, see generally, Obiora, *supra* notes 106 & 107.

indigenous origins.<sup>109</sup> Thus, the exactions on women under the guise of enforcing custom and tradition may well be predicated on tenuous grounds.

Many of the responses of the interviewees recounted above reveal the degree of conservatism that exists about the status, roles and rights of women. These responses suggest that a cogent step in engineering social reform through law is to deflate the preponderant inclination of women to accept, adapt to and cope with normative codifications or representations of their existential situations. If women either fail to perceive any status differential between the sexes or if they attribute it to some limitation assumed to be innate rather than contingent on social arrangements, they would have little motivation to seek redress in the legal and political arena. Dissipating some of the discernible aversion of women to state intervention requires enduring endeavors to enable them to adopt more critical postures to matters that they have heretofore taken for granted, especially vis-a-vis so-called custom and tradition. Tempering the stronghold of custom involves unmasking relevant aspects of extant "custom" as "new wine in old skin."<sup>110</sup>

*B. Grounding Change:  
The Role of Education for Critical Consciousness*

*Where, after all, do universal human rights begin? In small places,  
close to home - so close and so small that they cannot be seen on  
the maps of the world....*

Eleanor Roosevelt

Education for critical consciousness provides an avenue for women to mobilize and identify the commonalities they share, to explore the

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<sup>109</sup>Several studies unanimously concede that various conditions, including colonialism and the development of private property and exchange economy, restructured traditional economies and created conditions where female and male became increasingly defined as unitary statuses that were hierarchically related to one another. See Henrietta Moore. However, there is considerable controversy about the exact effects of these processes on women's lives. As far back as 1970, Ester Boserup contended that a confluence of capitalist exploitation and Eurocentric ideals about the roles of women vitiated their traditional rights and undermined their economic autonomy. Other scholars, on the other hand, challenge any suggestion that women in had significant autonomy in before the era of colonialism and capitalism. See, e.g., Huntington (1975).

<sup>110</sup>See Obiora, *supra* note 106.



possibilities available to them in the social structure and to engage in constructive self-criticism.<sup>111</sup> It seeks to demystify the status quo by piercing its facade of logic and challenging the ideology of its inevitability and immutability. As a process in which the mortal origins and instrumentality of social practices and institutions are unravelled and understood, education for critical consciousness fosters transformative subjectivity. It prompts participants to interrogate their internalized and commonsensical view of the world, confront their latent motives or indoctrinated assumptions and expectations, negotiate their patterns of behavior and choices more reflectively, and forge a new sense of self and collective purpose. By virtue of the process, participants come to appreciate the nature of the social forces that impinge on the spontaneous unfolding of their potentials and the degree to which they are complicitous in patriarchal hegemony.<sup>112</sup>

The steps by which women emerge from self-redefinition and group consciousness to concretize particular visions of societal transformation are multiple and varied.<sup>113</sup> Although a paradigmatic shift in cognition and ideology is indispensable for self-actualization and social transformation, it is not sufficient.<sup>114</sup> Just as legal reforms require active human intervention to make them material, gender politicization and the precipitation of critical consciousness are optimal when they instigate radical actions that address the structural foundations of gendered inequity.<sup>115</sup> To entrench change, women must couple their solidarity and abstract critiques of the sources of their ambiguous existence with overt socio-cultural, economic and political actions.

<sup>111</sup>See Maren Lockwood Carden, *THE NEW FEMINIST MOVEMENT* 36.

<sup>112</sup>History bears witness to the ability of women to manipulate and overcome objective obstacles. Although women are not simple epiphenomena of culture and structure, in certain instances where women are presumed to be acting as autonomous agents, a sustained examination of the processes that mediate their actions discloses that their seemingly independent range of options and responses are determined by pre-ordained antecedent systemic influences.

<sup>113</sup>See Arthur Miller, Patricia Gurin, Gerald Gurin, and Oksana Malanchuk, *Group Consciousness and Political Participation*, 25 AM. J. POL. SCI. 494 (1981).

<sup>114</sup>While the relationship between a critical consciousness and a transformed reality is not consistently borne out in history, the essential cognitive restructuring that it facilitates promises to provide the impetus for the activation of the legal machinery.

<sup>115</sup>See Elizabeth Croll (1981) *Women in Rural Reproduction in the Soviet Union, China, Cuba and Tanzania: Socialist Development Experiences*, 7(2) *Signs* 360 at 371.

The relevance of these insights for our immediate purposes can be reiterated in terms of the fact that the achievement of substantive equality does not require the mere promulgation of legal mandates. Without the cultivation of a legal culture in which women feel empowered to avail themselves of the benefits of their rights, such progressive initiatives may well be the equivalent of adding to the pile of dead words in the statute books. Existing rights will remain dormant, and gains modest at best, unless women take the initiative to see that they are translated from the abstract realm into concrete remedial advantage.<sup>116</sup> Augmenting the opportunities for women to validate and utilize extant legal resources where the need presents itself, may require effectuating a reconceptualization of litigation as a process that, as opposed to being tantamount to a declaration of war, is in fact not diametrically different from activating the indigenous dispute resolution machinery.<sup>117</sup> The conscientization of women will also be inspired and/or consolidated if they thoroughly understand their relation to the world and the invariable role of gender in the construction of social relations.

A number of responses stressed the importance of economic independence for the empowerment (and conscientization) of women.<sup>118</sup> Although these observations are well-taken, they illustrate the point that available modes of discourse are constitutive of human subjectivity and are powerful constraints on human action.<sup>119</sup> They seem to minimize the correlation between women's domestic roles and their constrained capacity to acquire the prerequisites for optimal

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<sup>116</sup>A litigation-averse culture affords the classic condition for dormancy. Speaking of women's failure to agitate for, establish and appropriate their rights, a Supreme Court judge who is also a son of the soil commented, "Some [women] think what has been has to be. 'It has been like that, it will continue to be like that.' ... Old habits die hard.... [M]ost of the [discriminatory] practices will stop when the women no longer succumb to [them]." One lawyer offered an apt but crude analogy, "You can take a horse to water, but you cannot force it to drink." When I asked if it is not too much of a burden to expect women to avail themselves of laws that they do not know exist, the attorney responded, "What else do you want? The Constitution is sold everywhere." Ironically, he was one of the people who, despite extensive legal training, conceded relative ignorance of specificities of the sex-discrimination prohibition in the Constitution.

<sup>117</sup>Interestingly, some studies depict Africans as very litigious. It is quite possible that these studies are informed by the frequency with which many Africans appeal to indigenous resolution mechanisms.

<sup>118</sup>See *supra* note 40 and the text thereto.

<sup>119</sup>See Hank Bromley, *Identity Politics and Critical Pedagogy*, 39 (3) *Educational Theory* 207 (1989).

income-generation.<sup>120</sup> Reproductive and productive activities within the household are usually surrogates for women's participation in education and in the formal economic structure. Many students of the role of women in development have established a definite inverse relationship between women's household activities and their abilities to avail themselves of officially funded socio-infrastructure facilities and material opportunities.<sup>121</sup> For example, while the domestic responsibilities of the girls and women who overcome several obstacles to register as students is not solely accountable for their high attrition, there are several indications that it is a significant factor.<sup>122</sup> Also, the disproportionate representation of women in informal, non-monetized and under-remunerated occupational ghettos may partly derive from the fact that they are better able to manage role conflict in such enclaves.

Further, opinions that decry women's perceived economic dependence ignore the extent to which inquiries regarding demographics, income, economic activities and schedules, and household budgets and obligations reveal that many women may actually constitute the pillars as well as the uncontested "captains of the ship" in terms of their household survival.<sup>123</sup> In spite of their relative lack of credentials for well-paid employment, in spite of their limited access to productive resources and their often attendant entrapment in symbiotic and self-reinforcing cycles of poverty and low

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<sup>120</sup>A male informant argued that this issue may be more a delicate judgement call than a question of gender-related inequity or power asymmetry. In his analysis, given the current state of the society, the trade-off for, say, an upwardly-mobile woman who chooses to relocate on account of her job in order to advance her career may be estrangement from her spouse.

<sup>121</sup>See Henrietta Moore, *Feminism and Anthropology*.

<sup>122</sup>Unfortunately, I do not have the statistical data that will permit a comparison of the number of female students at the entry level in a class with the number of female students that graduate with that class in Oguta. However, it is on record that in 1980/81, 114,194 girls were enrolled in primary 3 in Imo State. Only 56,840 (49%) of these girls made it to in primary 6 in 1983/84. See Grace Alele Williams, *Education Of Women for National Development*, in Federal Ministry of Education, *THE BLUEPRINT ON WOMEN IN EDUCATION IN NIGERIA* 27, 31 (1986). See also *id.* at 55, 56 (Appendix IV, tables 1 & 2).

<sup>123</sup>There is resounding evidence that women do, in fact, contribute of their meager resources and of themselves, despite skewed computation criteria that occluded or discount their vital contributions and eliminate them from official policies and programs that are intended to enhance productivity and quality of life. See Marilyn Waring, *If Women Counted* (1990).

productivity,<sup>124</sup> and in spite of the relatively modern synonymization of male as bread-winner, these women shoulder the bulk of the burden for the provision of basic needs in the domestic milieu.<sup>125</sup> In many instances, it is a familiar story: women toiling from dusk to dawn, fetching water and wood, preparing food and providing assurances, trekking or riding rickety lorries to near-by and distant markets where they weather the sun and storm in makeshift stalls to vend petty wares.<sup>126</sup>

Finally, at least one interviewee's blatant averment that economic independence may not make much of difference suggests that there is more in operation. The relationship between economic independence and increased social autonomy for women is vexed at best; it seems that women's access to income does not necessarily magnify their autonomy or bargaining power within the household.<sup>127</sup> While certain women (usually, but by no means always, the privileged elite) made a point of minimizing the power and influence of women as individuals and as a collective, an analysis of their life histories and of the traditional milieu in general revealed greater flexibility in systems of power and authority.

Two illustrations demonstrate this point. The first has to do with the collective force of women. On the surface where men and women are differentiated and hierarchically related to each other, it is more commonly believed that women are marginal and subordinate. Deeper

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<sup>124</sup>The disparate deprivations of these women is escalated by austerity. In Nigeria, structural adjustment programs and other austerity measures prescribed by international lending institutions have disrupted the routines and rhythms of the social sector and of life in general. The negative ramifications of these measures are overwhelmingly weighted against women and have increased the chances of their avalanche into poverty. Politicizing women's grievances about the inauspicious circumstances of the growing economic stagnation and distress which jeopardize and pauperize their aspirations for themselves and for their children may heighten the development of a gender group consciousness and identity.

<sup>125</sup>Many of them have major and in some cases, sole responsibility for the welfare of their families. In periods of economic recession and job retrenchments, women are typically known to figure out how to do more with less.

<sup>126</sup>It is arguably a grim picture but a good number of the women do not perceive themselves as being engaged in rounds of thankless chores, nor do their families for that matter. While they welcome efforts to ameliorate the arduousness of the chores and responsibilities, they take pride in their ability to cope, reverse down-ward spirals, and spell the difference between their families' impoverishment and sustenance. An upset is registered, however, when a day of reckoning occurs and their gender is suddenly invoked in a tunnel-visioned and amnesic manner to reconfigure their realities and emasculate their entitlement.

<sup>127</sup>Power and autonomy have been identified more as products of the interaction of cultural stereotypes about appropriate gender roles and behaviors with the ideologies and structures of family and kinship. See Henrietta Moore, *Feminism and Anthropology*; & McCormack et al., 1986; 217-18.

inquiry reveals that women are not without recourse, even when marriage compels them to leave their natal homes and take up abode under the strictures of patrilocal residence.<sup>128</sup> Scholarly commentators have critiqued recurrent discrepancies between what people say and believe they do as opposed to what they actually do.<sup>129</sup> People who romanticize and claim to revere the wisdom of "tradition" may in fact be acting out their own agenda.

In the above study, although the Nigerian constitutional provision presupposes and evinces the existence of sex-based discrimination, many interviewees had a different understanding of what is at issue. My effort to uncover perceptions of the sex equality provision was greeted with orthodox accounts of gender relations. The standard refrains in these accounts were usually that, "the way it is in [Oguta] is that male is more important than female," "a woman is nothing," and so on.<sup>130</sup> Empirical testings disconfirm these allegations and point up discrepancies between ideology and reality. For example, pursuing one of my questions, the eighty-three-year-old woman who asserted that "no matter how rich a woman is, she is not equal to a man...she is nothing,"<sup>131</sup> explained that when a woman attains a certain status, as in the case of someone of her calibre who has "accomplished [even more than] what is expected of men in this society," her sex ceases to be an issue. A copious excerpt from the dialogue that ensued between

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<sup>128</sup>The *otu umuada* which includes all the married, unmarried, widowed, and divorced daughters of a lineage or village group is a mechanism through which dispersed women co-operate with their uterine kins to solve disputes, perform important rituals and act as intermediaries between villages. See Okonjo, *The Dual Sex Political System in Operation: Igbo Women and Community Politics in Midwestern Nigeria*, in Nancy Hafkin & Edna Bay, eds., *WOMEN IN AFRICA* 45, 52 (1976). In addition to maintaining links between marital and natal lineages, the "wives of a lineage" also collaborate to regulate their productive and reproductive labor as well as to discipline those who mistreat their wives or insult women. See Van Allen, *supra* note 39; Moore, *SPACE, TEXT, AND GENDER: AN ANTHROPOLOGICAL STUDY OF THE MARAKWET OF KENYA* 176-7 (1986); Shirley Ardener, *Sexual Insult and Female Militancy*, 8 *MAN* 422 (1973); & Nina Emma Mba, *NIGERIAN WOMEN MOBILIZED: WOMEN'S POLITICAL ACTIVITY IN SOUTHERN NIGERIA 1900-1965* (1982).

<sup>129</sup>According to Fatima Mernissi, the first has to do with the realm of reality; the second has to do with the realm of the psychological elaborations that sustain human beings' indispensable sense of identity. Fatima Mernissi, *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society* (1986).

<sup>130</sup>See, e.g., *supra* note 33 and the text to it.

<sup>131</sup>*Id.*

us underscores the contradiction between the norm that she initially articulated and the reality of her lived experience.<sup>132</sup>

Q: I see that your word is law in your family, how come?

A: People are inclined to defer to me and comply with my instructions because God has blessed me financially.

Q: Why did the man visiting curtsy and salute you "Ogbuzuru?"

A: Oh that's my praise name. It means an all-rounder who has taken all titles. The title is discretionarily conferred by the community in recognition of outstanding stature and accomplishments. Only myself and the [local] Prime Minister share it.... A rich person can rub shoulders with anybody, male or female.

Q: I hear that there was a time that you gave one of the richest men in this town a tough time?

A: Yes, my brother was the king then and this man thought that his affluence bestowed the license for him to subdue my brother. But I dealt with him. He learnt his lessons and we are good friends today.

Q: So you were your brother's spokes person?

A: No my brother had an official spokes person, but I had the money....

Q: Thank you for letting me sit in on your [dispute resolution] session.... Why do they refer their quarrels to you?

A: The woman knows that her husband would be more favorably disposed to my decision than to anyone else's....

Q: I found it quite interesting that in one breath, you promised to reprimand her husband and to help them resolve the dispute. In another breath, however, you tried to dissuade her from complaining to you "because you are a woman."

A: That is part of my reason for saying that a woman is nothing. She has no authority and her power is severely constrained. Had I been a man, my natal family will not be

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<sup>132</sup>Saying that a woman is nothing does not capture the complexity of the issue; it does not effectively acknowledge the relativity of gender or its interplay with socio-economic status. I have analyzed the full text of this transcript in another context. See L. Amede Obiora, "All Fingers are not Equal: (Re)Conceptualizing Equality" (unpublished manuscript).

in the position that it is now because I would be king and ascend to my father's "obi." Well what is the case today? Have I let the government recognize another king? Our opponents...have come to plead with me; they have sent emissaries three times.

Q: In effect, you are the king maker?

A: If you chose to put it that way.

### III. Conclusion

In this article, I have tried to convey the attitudes of women and men in Oguta to the legislative initiative to equalize gender relations in particular and their attitudes to litigation in general. For this purpose, I adopted a two-tier approach. In the first phase of the presentation, I tried as much as possible to preserve the integrity of the voices of my informants. Subsequently, I extrapolated from, and interpreted, their observations to expatiate the thesis concerning the merits of buttressing legal reform with education for critical consciousness. It is evident from the dissonance between the rhetoric of equality and the realities of women's lives demonstrate that abstract formal rights are not a panacea for the specific forms of gender-based discrimination experienced by women.

On the other hand, while law may not be the ultimate instrument of social change, it is by no means an inconsequential vehicle for change. However, in so far as law is a construct of human agency with an internally and externally circumscribed capacity to mediate the processes of social change, the implementation of substantive equality must be undertaken in a broader societal context. A finely tuned legal culture will enhance the potentialities of law vis-a-vis change. By illuminating the experiences, perspectives and agency of women, while refusing to accept gender discrimination as an unchanging element of some determinate and immemorial core of African values and philosophies, a grassroots initiative that restructures the accoutrements and contours of propriety in gender-related tensions and conflicts for critical consciousness may help to attenuate the discrepancy between the promise and performance of the gender discrimination prohibition.