

COMPARATIVE OVERVIEW OF THE CONSTITUTIONAL PROMOTION, PROTECTION AND ENFORCEMENT OF WOMEN'S RIGHTS IN NIGERIA AND KENYA

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Abstract

In undertaking a comparative overview of promotion, protection and enforcement of women's rights in Nigeria and Kenya, the doctrinal research method was adopted to examine relevant international instruments on women's rights and specific provisions of the national Constitutions and laws of both countries. Critical analysis and comparisons exposed that unlike Kenya, where women's rights are clearly protected under the Kenya Constitution, 2010, there is weak and uncoordinated protection and implementation regime for women's rights in Nigeria. It was noted that this dismal record of protection of women's rights exists in Nigeria notwithstanding that the principles of equality of all human beings and the omnibus principle of non-discrimination on account of sex that are engraved in the International Bill of Rights and its Optional Protocols, the African Charter and the Maputo Protocol on the Rights of Women all apply to both Nigeria and Kenya. While Kenya has a robust, clear and progressive constitutional provision for protection and enforcement of women's rights that guarantees affirmative actions which include that not more than two-thirds of the members of elective public bodies shall be of the same gender, the same cannot be said of Nigeria. It was suggested among other things that the Nigerian Constitution should be amended to adopt the Kenyan model of protection and implementation or enforcement of women's rights.

Keywords- affirmative action, comparative, protection, women, rights, justiciability

1.0 Introduction

The preliminary point needs to be made that the plight of women the world over has been one of woes and deprivations culminating in unmitigated discriminations and denials notwithstanding the universal principles of equality and non-discrimination. All nations of the world are, so to speak, guilty of this grievous infraction and gender insensitivity except that while some nations are making a conscious effort at reducing if not eliminating the odious practice through taking constitutional and affirmative actions, others appear nonchalant and insensitive to the need to promote equality of all sexes and eliminate discrimination against women. As noted in the Urban Management Programme Working Paper Series 17:

Although women's contribution in today's societies is essential and indisputable, nowhere is their status on a par with men's. Women are a vulnerable group in all areas...As the United Nations Development Programmes Annual Human Development Report (1995) commented: 'In no society are women secure or treated as equal to men. Personal insecurity shadows them from cradle to grave... From childhood through adulthood, they are abused because of their gender.'¹

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¹ "Violence Against Women in Urban Areas An Analysis of the Problem from a Gender Perspective", @ <http://www.unhabitat.org/downloads/docs/1900-46700.v10lagwomurbnpm-pt2en.pdf>, last accessed 13/8/15.

It is in the light of the foregoing that women, children, the disabled and elderly are vulnerable groups but this paper will be limited to investigation of protection of women's rights in Nigeria with a comparative excursion to Kenya with a view to improving both the promotion and practice of women's rights in Nigeria. This study is divided into segments in order to examine in a comparative sense the extent of protection of women's rights in other jurisdictions especially Kenya under its 2010 Constitution and other allied legislations. It is believed that this will help to highlight the drawbacks in the Nigerian constitution and laws on women's rights. At conclusion of the work, the whole issue of discrimination will be summarized and solutions will be proffered.

1.0 What are women's rights or rights of women and why single them out for protection?

As a general rule, the concept of equality of persons and of rights reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. At the international, continental and national levels, there are many textual provisions on equality of all human beings. What then are “women's rights” or “women's human rights” and why is it necessary to discuss the rights of women outside the general discourse of human rights accruing to all members of the human family? In other words, what is the justification for addressing the group of rights of women outside the general discourse of human rights accruing to all members of the human family? Many in fact argue that it runs against the grain of the concept of human rights to conceptualise women's human rights, women's rights or the human rights of women, however so called outside the general discourse of human rights. Others warn that such conceptualization portends ill for women as it amounts to retrogression for women- taking them full circle back to where they were prior to the affirmation of women and men's equality by the UDHR.

Atsenuwa,² states that a good starting point for answering the questions raised above would be to acknowledge the historical fact of women's inequality with men, with women placed at the disadvantaged. Sex and gender differences between women and men have been given historically as the basis for discrimination against women. The gender gap between the recognition of human rights and the enjoyment of the same is thus the main theses of the women's rights discourse and overcoming the challenges, the focus of the women's movement. With respect to the outstanding concern about what women's rights are and what they mean, Atsenuwa had explained this by saying firstly that it is not unusual to hear such phrases like “women's rights are human rights”, “women's rights as human rights”, “human rights are women's right” and it is also not unusual for these phrases to leave many people confused as to meaning and differences, if any, in them. Whereas they are often used interchangeably, it is possible to distinguish their purport and ideological significance. The affirmation of equality of men and women and recognition of sex and or gender as non-bases of discrimination in the enjoyment of all human rights affirmed in the International Bill of Human Rights and all other human rights instruments suggests that human rights standards are neutral and fair and are to be universally enjoyed. However, equality may not be a synonym for uniformity in the guarantee of rights by the State, but people are not uniform.

Put differently, women's rights are against human rights resulting in manifestation of gendered social construction of reality much to women's disadvantage. The measure of equality was the measure of men. But women are not men and women do not want to become men, they only desire their human dignity as *bonafide* members of the human family be respected. Women are women but no less human for that reason. The gender-bias of traditional human rights conception could not serve women's interest. This is not the same thing as saying that women are seeking special treatment. Women are only demanding that the interests of the other half of the human race be accorded due

² Atsenuwa, A., “Human Rights Protection of Vulnerable Marginalised Groups”, in Constitutional Rights Project, *Text For Human Rights Teaching In Schools* (Lagos, Constitutional Rights Project, 1999) 214.

³ Atsenuwa, A., “Human Rights Protection of Vulnerable Marginalised Groups”, in Constitutional Rights Project, *Text For Human Rights Teaching In Schools* (Lagos, Constitutional Rights Project, 1999) 214.

cognisance in understanding what is human. The discourse on women's rights as human rights can thus be described as gender critique of traditional human rights.³ With the above rational expositions in mind, in this presentation the terms or terminologies “women's rights”, “women's human rights” and or “human rights of women” will be used interchangeably to mean that women are only demanding that the interests of the other half of the human race be accorded due cognisance in understanding what is human.⁴

At the African continental level, there are the African Charter on Human and People's Rights 1981 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa otherwise known as and called the “Maputo Protocol”. Although the African Charter did not target women's rights as a specific agenda, however, *article 2* of the African Charter embodies the omnibus non-discriminatory clause to the effect that-

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

There is specific mention of women's rights in *article 18(3)* of the ACHPR to the effect that the State shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions. The more comprehensive regional instrument dealing with women's rights is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa otherwise known as and called the “Maputo Protocol”. It was adopted by the African Union⁸ on the 11th day of July 2003 at its Second Summit in Maputo, Mozambique. Generally, the Maputo Protocol focuses on the enforcement and protection of women's' rights and provides in clear terms that it is the duty of the State to ensure that women are afforded equal opportunities with men. Prior to the Maputo Protocol, no African instrument relating to human rights proclaimed or stated in a precise way what the fundamental rights of women in Africa are. The Maputo Protocol which consists of a preamble and a total of thirty two articles therefore guarantees women's rights on the continent as the emergence of this Protocol was as a result of concerns for the plight of women in Africa in terms of human rights.⁹

Lately, there are the United Nations Sustainable Development Goals¹⁰ and the African Union Agenda 2063¹¹ all of which make copious declarations on gender equality. Despite these impressive arrays of laws at the international and regional planes that provide for non-discrimination and equality between the sexes, in reality, the gap between law and practice is quite wide. Discrimination against

⁴ Obiaraeri, N.O., “Re-evaluating the Juridical Significance of the Universal Declaration of Human Rights”, *JCCL* Vol. 5 June, 2015, p. 38.

⁵ Made up of the Universal Declaration of Human Rights, 1948 (hereinafter abbreviated and referred to as the “UDHR”); the International Covenant on Civil and Political Rights, 1966 (hereinafter abbreviated and referred to as the “ICCPR”) and its Optional Protocol; and the International Covenant on Economic, Social and Cultural Rights, (hereinafter abbreviated and referred to as the “ICESCR”).

⁶ Hereinafter abbreviated and referred to as “CEDAW”.

⁷ On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. Although Nigeria ratified CEDAW in 1985, it is yet to be domesticated as part of the corpus of justiciable laws in the country. Note that there is also the Optional Protocol to the CEDAW which came into force in 2000 which Nigeria ratified on 22 November 2004.

⁸ Hereinafter abbreviated and referred to as “AU”.

⁹ See *articles 2 to 25* of the Maputo Protocol, 2003.

¹⁰ SDG 5-Gender Equality.

¹¹ Goal 5 of Agenda 2063- Achieve gender equality and empower all women and girls.

women continues to be on the increase hence justifying the necessity for, and occurrence of, the objective of this study which is to suggest pragmatic ways and means to curb the ugly tide.

4.0 Justification for comparative excursion between Nigeria and Kenya

This segment shall examine the rights of women, its protection and implementation regime in Nigeria with a view to comparing it with the equivalent practice on the same subject matter in Kenya. It is thought that this comparative practice will be a useful exercise because apart from Nigeria and Kenya being African nations, they both share some striking economic, political and historical similarities. For instance, both nations were colonised by Britain although Nigeria attained political independence in 1960 while Kenya attained independence in 1963 from the same British colonial masters. Both Nigeria and Kenya are members of the United Nations Organisation and African Union and this means that all the human rights treaties, conventions, Declarations and Protocols of these bodies bind these countries. The current Constitution in operation in Nigeria is the Constitution of the Federal Republic of Nigeria, 1999 as amended¹² which replaced the 1979 Constitution while the current Constitution in operation in Kenya is the 2010 Kenya Constitution which replaced the 1963 Independence Constitution of Kenya. Besides, the respective current performances of both countries on the Global Gender Gap Index¹³ will also be examined. It is against this background that this paper undertakes a comparative analysis of the regime for women's right protection as obtainable under the nascent national Constitutions of Nigeria with that of Kenya with a view to drawing useful lessons for Nigeria from it.

5.0 Protection of women's rights in Nigerian

In Nigeria, the supremacy of the Constitution over all other laws is etched in *section 1(1)* of the CFRN 1999 as amended while *section 1(3)* is to the effect that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void". Hence, every law in the country derives its validity from the Constitution. With respect to protection of women's right, as a first principle, it must be acknowledged that the Nigerian Constitution, in line with international best practices obtainable in such instruments as the UN Charter, the International Bill of Rights, CEDAW and the ACHPR to mention a few restates the principle of equality of all human beings. There are also express provisions in the Constitution and other statutes outlawing gender-based discrimination and violence against women. Some of these laws and policies include but are not limited to the following which are briefly examined hereunder.

(a) Discrimination against all citizens is outlawed under the Nigerian Constitution. The right to freedom from discrimination is a justiciable right protected and guaranteed in *section 42* of the CFRN, 1999 as amended. The said *section 42* which is reproduced in full here because of its direct bearing to elimination of all forms of discrimination based on sex provides that-

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political

¹² Cap hereinafter abbreviated and referred to as "CFRN, 1999".

¹³ The Global Gender Gap Index is a framework for capturing the magnitude and scope of gender-based disparities and tracking their progress. The Index benchmarks national gender gaps on economic, political, education- and health-based criteria, and is based on a total of 14 indicators from these categories.

opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

Although they do not speak directly to women issues, the above provision can be used to curb acts constituting gender discrimination including violence against women in Nigeria. The fundamental right to freedom from discrimination is justiciable and based upon which any woman discriminated against on account of her feminine sex can approach the courts for enforcement of her fundamental rights. In the celebrated 2014 decision in *Ukeje v Ukeje*,¹⁴ the Supreme Court of Nigeria relied on the provisions of section 42 of the CFRN, 1999 as amended to the Igbo customary law which disentitles female child from partaking in her deceased father's estate to be unconstitutional. The apex Supreme Court held that no matter the circumstances of the birth of a female child, she is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in her deceased father's estate is in breach of *section 42(1) and (2)* of the Constitution of the Federal Republic of Nigeria, 1999, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law was declared null and void as it conflicts with *section 42(1) and (2)* of the CFRN, 1999 as amended.

Notwithstanding the omnibus non-discrimination clause, in practical application, women are still discriminated against in the governance spectrum, in cultural and traditional practices. The representation of women in politics remains an area with room for improvement. While the protocol emphasises the importance of women's participation in decision-making, Nigerian politics still faces challenges in achieving gender parity. Despite policy provisions, including the Nigerian National Gender Policy, which stipulates a 35 per cent minimum threshold for women's political participation, women's representation in political offices remains relatively low. A glaring example can be seen in the number of women sworn into the nation's 10th National Assembly shortly after the 2023 Nigerian elections. Currently, in the Nigerian Senate, out of the 109 senators, only three are women, while in the House of Representatives, sixteen women were sworn in out of the 360.

(b) African Charter on Human and Peoples' Rights

Among the many other domestic laws¹⁵ that impact on women's rights in Nigeria, the African Charter and its Optional Protocol on Women's Rights stand out. The ACHPR has been domesticated in Nigeria courtesy of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which provides in *section 1* that as from the 17th day of March 1983, the provisions of the African Charter shall have full force of law in Nigeria subject to the extent of its domestication by the Nigerian Constitution as a receiving law. This was confirmed by the decision of the Supreme Court in the celebrated case of *Abacha v Fawehinmi*.¹⁶

¹⁴ (2014) 11 NWLR (Pt. 1418) 384 at 408 per Rhodes-Vivour, JSC.

¹⁵ Examples include The Child's Rights Act, Cap C.50 LFN. 2004 and the Violence Against Persons (Prohibition) Act, 2015. Note that violence against women is considered a harmful and discriminatory practice. The Criminal Code applicable in the Southern and the Penal Code applicable in the Northern parts of Nigeria respectively contain certain provisions that are intended to protect women from violence committed against them and also punish perpetrators of such sordid offences. An example is the offence of rape under sections 357 and 358 of the Criminal Code, Cap 38, Laws of the Federation of Nigeria, 2004, and section 282 of the Penal Code, Cap P3, Laws of the Federation of Nigeria, 2004. See also Penal Code Law, Cap 89, Laws of Northern Nigeria, 1960. See again Nnadi, I., "Legal Instruments Against Gender Discrimination and Violence Against Women in Nigeria: How Adequate?" Being the text of unpublished Paper presented to the Faculty Board of Faculty of Law, Imo State University, Owerri, (2015), p. 8.

¹⁶ (2000) 6 NWLR (Pt. 660) 228 at 340. See Cap 10 LFN, 1990.

The impact of the ACHPR and its Optional Protocol on Women's Rights in the restatement of the principle of equality of all human beings and the non-discrimination clause plus marshaling out of specific rights for women under the Maputo Protocol do not require to be repeated.

(c) Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003

The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003¹⁷ is another unique Nigerian law promulgated to protect women, girls and indeed everybody from the odious crime against humanity called “trafficking in persons” or “human trafficking”. Nigeria became signatory to the Transnational Organized Crime Convention and its Trafficking in Persons Protocol (otherwise called “Palermo Protocol”) on the 13th day of December, 2000. Under *article 5* of the said Palermo Protocol all countries are enjoined to criminalize practice and conducts that subject human beings to all forms of exploitation which includes in the main, child trafficking and labour exploitation.

(d) Violence Against Persons (Prohibition) Act, 2015

The nascent Violence Against Persons (Prohibition) Act, 2015¹⁸ for the first time provides a legislative and legal framework for the prevention of all forms of violence against vulnerable persons, especially women and girls. Sundry offences are identified and slated for punishment such as spousal battery, forceful ejection from home, forced financial dependence or economic abuse, harmful widowhood practices, female circumcision or genital mutilation, harmful traditional practices, acid baths, political violence and violence by state actors. Victims and survivors of violence are entitled to comprehensive medical, psychological, social and legal assistance by accredited service providers and government agencies, with their identities protected during court cases.

It is significant to point out that in Nigeria the provisions of the UDHR 1948 have acquired the status of soft law as they are often cited in support of human rights applications in courts of law in cases of infringement or violations of its equivalent or analogous provisions in the Nigerian Constitution. The ICCPR and the ICESCR have been ratified by Nigeria but they have not been domesticated into the corpus or body of domestic laws. The effect of non-domestication of these treaties is that no citizen can rely on them even though Nigeria is bound by these instruments under international law. *Section 12(1)* of the 1999 Constitution of Nigeria as amended is explicit that “No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.” In the Nigerian case of *Abacha Fawehinmi*,¹⁹ the Supreme Court as the apex court gave unequivocal judicial approval to the provisions of erstwhile *section 12* of the 1979 Constitution under which that case was decided and which is *mutatis mutandis* with the provisions of the extant *section 12* of the 1999 Constitution as amended. Thus, no matter how beneficial an international treaty to which Nigeria has become a signatory may be to the country or the citizenry, it remains unenforceable in Nigerian courts if it is not enacted into the law of the country by the National Assembly. The provisions of an unincorporated or non-domesticated treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government in its acts affecting them would observe an unincorporated treaty. At best therefore, an unincorporated treaty is of a persuasive authority in the domestic legal order.

¹⁷ Cap. T23, LFN, 2004.

¹⁸ This was signed into law on 25 May 2015.

¹⁹ (2000) 6 NWLR (Pt. 660) 228 at 340.

²⁰ Kariuki, C.G., “Women participation in the Kenyan society”, *The African Executive*, Issue 296 December 22– 28, 2010, pp. 1-2. See online version <http://africanexecutive.com/downloads/Women's%20participation%20in%20Kenyan%20Society.pdf> last accessed 10/2/24.

6.0 Protection of women's rights in Kenya

Historically, the place of women and women's rights in Kenya pre-2010 Kenya Constitution was pretty much similar to that of the experience of women in Nigeria nay Africa as a whole-dehumanised, marginalised, unprotected and openly discriminated against. In theory, women have never been overtly excluded from the concept of human rights but in practice, prior to the Kenya Constitution, 2010, the Kenyan woman was subject to uncountable economic, political, social and legal barriers. According to Kariuki,²⁰ in pre-Colonial Kenya, before the British colonised Kenya in 1890, Kenyan communities were governed by councils of elders, consisting mainly of elderly men in the community. The role of women and girls was to farm the family land, harvest, care for the children, maintain the homestead, and tend to their husbands. Girls were socialized to be homemakers and cultivators. Women were economically empowered as they sold their farm produce in the markets. Colonialism instilled a feeling of superiority over women in Kenya to the extent that after independence in 1963, in post-colonial Kenya, a patriarchal order had emerged, where the male dominated the female. This order suppresses women, restricts the full development of their potential, prevents them from exercising their rights, makes them live for others, forces them to reproduce, and usurps their right to self-determination.

Under the Independence Constitution of Kenya, 1963, the position of women and the protection of their specific rights were not a top priority. The Independence Constitution of Kenya, 1963 provided for only the first generation rights known as civil and political rights.²¹ These rights were general in nature and did not specifically include women's cluster of rights. This Constitution was extremely limited when it came to protection of women's rights as human rights. With this state of affairs, lack of opportunities for political participation, improper education, early marriage, domestic violence and abuse were the order of the day until 2010.²² As will be seen shortly, the Kenya Constitution, 2010 marked a turning point as it is said to have “brought significant and constitutionally assured change in the status of Kenyan women. It led to a rise in female consciousness and self-confidence as women began to speak up and say 'no' to continued social scorn and disrespect. Women today refuse to accept injustice and strive for gender equality.”²³

Significantly, the Kenya Constitution, 2010 contains the “Bill of Rights” which is a comprehensive model enactment containing a range of civil, political, economic, social and cultural rights unlike the earlier Constitution of Kenya, 1963 which dealt with only civil and political rights. The Kenya Constitution 2010 made elaborate and comprehensive provisions for assortment of human rights to be enjoyed equally by all Kenyans irrespective of gender. Specifically, *article 27* of the Kenya Constitution 2010 provides for equality and freedom from discrimination similar to the general import of *section 42* of the CFRN, 1999 as amended. Meaningfully and in a more detailed manner, *article 27* of the Kenya Constitution 2010 provides as follows-

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including

²¹ Under Chapter V from *section 70 to 86* of the 1963 Independence Constitution of Kenya, 1963.

²² Foundation For Sustainable Development, “Gender Equity Issues in Kenya”, <http://www.fsdinternational.org/country/kenya/weissues> last accessed 10/1/24.

²³ *Ibid*, p. 2

race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Notwithstanding that it can be gleaned from the provisions of *article 27(3)* above that “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”, with specific reference to rights of women,²⁴ the following are notable additional safeguards under the 2010 Kenya Constitution reinforcing the rights of women to equality and non-discrimination namely: -

(a) Women's rights are an integral part of Kenya's democratic state and their constitutionally entrenched rights are a framework for social, economic and cultural policies. The purpose of these constitutional gains on the side of women is to preserve their dignity and to promote social justice. Their application,²⁵ implementation²⁶ and enforcement²⁷ are provided for under the Kenya Constitution, 2010. Thus, women's rights are justiciable and enforceable.

(b) Generally, under *article 14(1)* women are able to pass on citizenship to their children regardless of whether or not they are married to Kenyans.

(c) Under *article 45(3)*, parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

(d) Under *article 53(1)(e)*, parental responsibility shall be shared between parents regardless of marital status.

(e) *Article 60(1)(f)* eliminates gender discrimination in relation to land and property and gives everyone including women the right to inheritance and unbiased access to land.

(f) *Article 68(c)(iii)* provides that parliament shall enact legislation for the protection of matrimonial property with special interest on the matrimonial home during, and upon the termination of the marriage.

(g) *Article 81(b)* provides that a in the electoral system, not more than two-thirds of the members of elective public bodies shall be of the same gender. This means that one third requirement for either gender in elective or appointive bodies gives women of Kenya at least 1/3 minimum in elective public bodies. The Supreme Court of Kenya recently held that this particular right for women is progressive in nature. This is in addition to the express provision of *article 27(8)* that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

(h) *Article 91(f)* provides that gender equality is maintained in political parties providing a basic requirement for political parties as amongst other to respect and promote gender equality. Under *article 27(3)*, the constitution ensures that women and men will have the right to equal treatment and

²⁴ See generally, Mugambi, M., “Constitutional Gains By Kenyan Women”, http://www.academia.edu/3408070/CONSTITUTIONAL_GAINS_FOR_KENYAN_WOMEN last accessed 1/2/24.

²⁵ *Article 20.*

²⁶ *Article 21.*

²⁷ *Article 22.*

²⁸ No. 11 of 2010.

opportunities in political, economic, cultural and social spheres without discrimination. The New Constitution accords the right to health including reproductive health to all.

(i) With respect to post-2010 developments on women's rights in Kenya, aside the 2010 Kenyan constitutional developments, various legislations that compliment support for the rights of women have been adopted as law include-

(a) the Alcoholic Drinks Control Act, 2010²⁸ which provides for the control of the production, sale, and use of alcoholic drinks in order to inform and educate the public on the harmful health, economic and social consequences of the consumption of alcoholic drinks. In parts of the country, men who engaged in daily uncontrolled alcohol consumption absconded on their familial, marital and parental duties. Women suffered the extremes of these effects because of the unproductive nature of their men.

(b) The Prohibition of Female Genital Mutilation Act, 2011,²⁹ which prohibits the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation.

(c) The Breast Milk Substitutes (Regulation and Control) Act of 2012 which provides for appropriate marketing and distribution of breast milk substitutes, so as to provide for safe and adequate nutrition for infants through the promotion of breast feeding and proper use of breast milk substitutes.

(d) There is also the Cancer Prevention and Control Act, 2012,³⁰ whose object and purpose inter alia is to extend to every person with cancer full protection of his human rights and civil liberties by guaranteeing right to privacy, outlawing discrimination and ensuring the provision of basic health care and social services.³¹

7.0 How the Kenyan position on women's rights trump the Nigerian Practice

With respect to women's rights, a careful comparison of the textual provisions of the CFRN, 1999 as amended and the Kenya Constitution, 2010 will shockingly reveal the following:

(a) The CFRN 1999 as amended creates a dichotomy between justiciable civil and political rights (found in Chapter IV) on one hand and the non-justiciable economic, social and cultural rights (found in Chapter II) on the other hand whereas under the Kenya Constitution, 2010, there is holistic provision for the justiciability of all the rights be they civil, political, economic, social and cultural rights. This is a big minus for the Nigerian scenario.

(b) *Article 27* of the Kenya Constitution, 2010 dealing with "equality and freedom from discrimination" is broader and more expansive on women's rights than *section 42* of the CFRN 1999 as amended dealing with the right to freedom from discrimination. For instance, the following provisions in *article 27* of the Kenya Constitution are not found or provided in the said *section 42* of the CFRN 1999 as amended or anywhere else in the Nigerian Constitution namely-

(i) Express provision that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.³²

(ii) The provision that the State shall not discriminate directly or indirectly against any person on any ground, including sex, pregnancy, marital status and other factors.³³

(iii) Obligation on the State to give full effect to the realisation of the rights guaranteed in the Constitution and a mandatory duty imposed on the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.³⁴

²⁹ No. 32 of 2011

³⁰ No. 15 of 2012

³¹ See generally, Mugambi, M., "Constitutional Gains By Kenyan Women", http://www.academia.edu/3408070/CONSTITUTIONAL_GAINS_FOR_KENYAN_WOMEN last accessed 11/2/24.

³² *Article 27(3)*.

³³ *Article 27(4)*.

³⁴ *Article 27(6)*.

³⁵ *Article 27(8)*.

³⁶ Immigration Act, Cap 11 LFN, 2004.

(iv) Express and mandatory obligation on the State to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.³⁵

(c) Just like *section 25(1)(b)* of the CFRN 1999 as amended, under *article 14(1)* of the Kenya Constitution 2010, women are able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. However, in Nigeria, *section 9* of the Immigration Act³⁶ and *section 25(2)* of the CFRN 999n as amended combine to give women unequal rights of conferring Nigerian citizenship on their foreign husbands through the same process as their male counterparts.

(d) In Kenya, *article 60(1)(f)* of the 2010 Constitution expressly eliminates gender discrimination in relation to land and property and gives everyone including women the right to inheritance and unbiased access to land. There is however no such equivalent provision in the Nigerian Constitution or the Land Use Act, 1978.

(e) In Kenya, the struggle for affirmative action has duly ended as the Kenya Constitution 2010 provides a legal framework for gender equality and women's empowerment. Notably, affirmative action is guaranteed in the Kenya Constitution, 2010 in a couple of provisions including *article 27(8)* which states that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender and under *article 81(b)* which provides that not more than two thirds of the members of elective public bodies shall be of the same gender. On the contrary, in Nigeria the struggle for affirmative action is still raging as state and non-state actors are still paying lip service to gender equality and women's empowerment. There are no constitutional guarantees of equal opportunities in economic, social and political participation for women in Nigeria as is the case in Kenya.³⁷

(f) Generally speaking, the Kenyan legal position is more receptive and accommodating of international instruments, treaties and declarations espousing women's rights than Nigeria. For example, *article 2(5)* of the Kenya Constitution 2010 provides that "The general rules of international law shall form part of the law of Kenya" while *article 2(6)* thereof enacts that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." This has helped judicial and other authorities to interpret women's rights in progressively and according to international standards. On the contrary, in Nigeria *section 12(1)* of the CFRN 1999 as amended provides that "No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly." In *Abacha Fawehinmi*,³⁸ the Nigerian Supreme Court held that no matter how beneficial an international treaty to which Nigeria has become a signatory may be to the country or the citizenry, it remains unenforceable in Nigerian courts if it is not enacted into the law of the country by the National Assembly.

(g) Nigeria has continued to register the highest gender inequality score in Africa. As of 2021 the country received a score of around 0.68 while Kenya scored 0.51.³⁹ On the 2023 Global Gender Gap Index which benchmarks national gender gaps based on economic, political, education, and health-based criteria, Kenya performed better than Nigeria. Kenya scored 0.7 while Nigeria scored 0.63.⁴⁰

³⁷ Adawo, L., Gikonyo, L.W., Kudu, R.M., and Mutoro, O., "History of feminism in Kenya", <http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf> last accessed 10/1/24. See also Ezeilo, N.E., *Women, Law & Human Rights: Global and National Perspectives* (Enugu, Acena Publishers, 2011) 3-15.

³⁸ (2000) 6 NWLR (Pt. 660) 228 at 340.

³⁹ Statista, Gender inequality index (GII) in Africa in 2021, by country, <https://www.statista.com/statistics/1410747/gender-inequality-index-in-africa-by-country/#:~:text=Nigeria%20registered%20the%20highest%20gender,scores%20on%20the%20African%20continent.>

⁴⁰ Statista, The Global Gap Index 2023, <https://www.statista.com/statistics/244387/the-global-gender-gap-index/#:~:text=The%20global%20gender%20gap%20index%20benchmarks%20national%20gender%20gaps%20on,equal%20countries%20in%20the%20world> last accessed 11/2/24.

8.0 Lessons for Nigeria and way forward

This paper has revealed both an unsatisfactory protection and extremely weak implementation or enforcement mechanism of women's rights in Nigeria when compared to the practice in Kenya. This is owed largely to the lack of express provision of women's rights as justiciable or enforceable rights in the Constitution as applicable in Kenya. To improve on the Nigerian situation, it is strongly recommended that the dichotomy between the non-justiciable Chapter II (fundamental objectives and directive principles of state policy) and Chapter IV (fundamental rights) provisions erected by *section 6(6)(c)* of the CFRN, 1999 should be deleted or abrogated and all human rights provisions expressly accorded justiciability as is the case with Kenya. In the Nigerian case of *Attorney-General Oyo State v Attorney-General of the Federation & 35 Ors*,⁴¹ the Supreme Court held among other things that courts cannot enforce any of the provisions of *chapter II* of the Constitution until the National Assembly has enacted specific laws for their enforcement.⁴²

Furthermore, the Nigerian Bar Association and its Nigerian Bar Association Women Lawyers Forum, the Federation of International Women Lawyers and Civil Society Organisations must redouble their advocacy against gender violence and for inclusion of women in political and governance processes. The present Federal Character Commission should be renamed to Federal Character and Gender Commission and established for states too with mandate to ensure not only federal character but also gender parity or gender mainstreaming.

Finally, there should be more commitment and political will to operationalize the revised National Gender Policy (2021-2026) which commits Nigeria to a bolder and more ambitious vision for gender equality and the empowerment of all children, adolescents, and women.

9.0 Conclusion

The call for women's right is a demand for gender justice. Textual comparisons of the constitutional and legal order in both Nigeria and Kenya reveal that Nigeria is miles away from the status of achieving affirmative action for women unlike the case in Kenya as exemplified clearly under the Kenya Constitution, 2010. No effort should be spared to ensure that women's rights in Nigeria receive clear and express mention, protection and implementation under the constitutional framework. In the absence of clear-cut constitutional protection, women's rights will remain mere tokenism in Nigeria. The Nigerian legal system should be further amended to reflect the already identified shortfalls by generously providing for equality, non-discrimination and other variants of women's rights in terms specifically provided in the Kenya Constitution 2010. While the Nigerian legal position on rights of women is archaic and anachronistic, the Kenya example can be described as a more durable and forward-looking model on rights of women in particular and human rights in general.

⁴¹ (2009) 9 NWLR (Pt. 772) 222.

⁴² See Ogunniran, I., "Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions", (2010) 1 *UNIZIKLJ.I.L.J.* p. 73 at 79.