

**THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES
RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA: ISSUES AND CHALLENGES
IN IMPLIMENTATION IN NIGERIA**

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INTRODUCTION

Women including girls in Nigeria, Africa and the world at large constitute a very significant population whose future, rights and developments must not be ignored, neglected and or deprived for the development and progress of any society. However, women in Nigeria and other Africa countries often than not suffer from series of neglect, abuse, harmful and discriminatory practices and violence from the members of the society for one reason or the other ranging from economic, social but most importantly, cultural and or religions values, beliefs and considerations. In other words, women do not get proper fair and equal treatment with respects to their inherent rights by virtue of being human beings, compared with men. Therefore, human rights organizations at national, regional and international levels, especially, gender based organizations, such as Women's Rights Advancement and Protection Alternative (WRAPA), Women Advocates Research and Documentation Centre (WARDC), Women in Law and Development in Africa (WILDAF, Nigeria) and the Solidarity for African Women's Rights Coalition (SOAWR), have continued to fight for and ensure the protection and promotion of women's rights in Nigeria and the African continent in accordance with international standards. Nigeria being a member of various international and regional organizations, like the United Nation (UN), the African Union (AU) (formerly OAU) etc has signed and ratified several and treaties that seek to guarantee, protect and promote women's rights in the world. Therefore, Nigeria is bound to respect and promote women's rights in accordance with the international standards set out in such treaties, conventions¹ and protocols. However, under International Law and the Constitution of the Federal Republic of Nigeria, such protocols and

¹ Roselyn Musa, Faiza J., Firoze, M. (Edited). Breathing life into the African Union Protocol on Women's Rights in Africa. (2006), solidarity for African Women's Rights (SOAWR) and African Union Women, gender and Development Directorate. Appareled, PP 112-113. for the list of Countries which have ratified the AU Protocol on the Rights of women in Africa

conventions may not be effectively enforced and applied in the country, without subjecting same to the process of domestication in a form of local legislation made by the National Assembly. This domestication is necessary to give women in Nigeria full rights to secure municipal courts protection in the event of any violation and or denial of their inherent and fundamental rights.

The protocol to the African charter on Human and peoples Rights on the Rights of women in Africa (the protocol) is one of the most important treaties, protocols and or agreements that Nigeria has ever ratified quickly for the protection and promotion of women's rights. Nigeria's ratification of the protocol on women's rights on 16/12/2004¹ is an important break through for the improvements of its domestic laws or legislation for greater respect and enforcement of women's rights, their inclusion in decision making structures, as well as, the enhancement of their reproductive health rights, equality in marriage and economic rights including rights to inheritance.

The protocol addresses specific problems and issues that have significantly hindered African (Nigerian) women's rights and well-being in the past. Although it can be argued correctly that the protocol on women's rights in Africa provides a strategic platform for advocates seeking to bring women's human rights to the attention of citizens organizations, (cultural, religious and traditional institutions), government and policy makers² in Nigeria in particular and Africa in general, yet, there is a significant need to understand the protocol in its relationship with some traditional and religious values and beliefs in Nigeria, a country that operates dual legal system for the protocol to be successful and effective in terms of its objectives.

In the light of the above this paper primarily aims at:

- Making an overview of the protocol on women's rights in Africa with special emphasis on its rational significance and benefits,

² Ladan, M.T: 'The Protocol on the Rights of women in Africa and the Islamic Perspective on Gender Equality and Justice' being a paper presented at a Seminar organized by solidarity for African Women's Rights (SOAWR) (A coalition of Human Rights NGOS) During the African Union summit, held at Ahfad University for Women, Khartoum, Sudan on 16th-24th January 2006, P.2.

structure and contents (especially the key rights issues for women), and implementation and domestication mechanisms and processes.

- Identifying and discussing some of the perceived and or real corresponding contentious matters that may arise therein especially in relation to socio-cultural and religious values, practices and beliefs in Nigeria. For example, issues relating to gender equality and justice in marriage, divorce, inheritance, reproductive health rights including abortion, etc.
- Concluding with some possible suggestions and clarifications that can allay the apprehensions and secure the support of some Nigerians, especially religious and cultural leaders for the successful and effective domestication and implementation of the protocol in Nigeria.

1.0 AN OVERVIEW OF THE AU PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA.

This part of the presentation highlights the followings:

- The Rationale and significance behind the elaboration and adoption of the protocol.
- Structure and contents of the protocol here key rights issues upheld will be outlined.
- Domestication and implementation mechanisms and processes of monitoring and amendment of the protocol.

1.1 The Rationale and Significance of the AU protocol.

On July 11, 2003, during their second ordinary summit held in Maputo, Mozambique, the Assembly of Heads of States and Governments of the African Union (AU) adopted a land mark treaty known as the protocol on the Rights of women in Africa.³

The protocol on the Rights of women in Africa is adopted pursuant to the provision of article 66 of the African Charter on Human and Peoples' Rights (ACHPR or the Charter) to supplement the provision of the Charter and give impetus for the consideration and subsequent formulation of the

³ Saudatu Mahdi, Anne I, Oby O, Chizoba. O: Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa. Abridged version and Policy Brief, for Implementation (2004) Women Rights Advancement and Protection Alternative (WRAPA) Abuja Nigeria P.1 See also Ladan M T (2004) p.3

women's rights protocols. The African Charter itself, being a regional human rights instrument was adopted in June 1981 and came into force in October 1986.

The African Charter seeks to combine African values with international norms by promoting individual duties and collective rights in addition to internationally recognized individual rights. It reflects the history, values traditions and development of Africa⁴.

The protocol on women's rights which entered into force on 25th Nov, 2005 after securing the ratifications (indeed as at January 2006, it has 17 ratifications)⁵ by African governments, addresses a broad range of human rights concerns and advances the human rights of African women through creative substantive and detailed language.⁶ The protocol provides broad protection for women's human rights, including gender equality and justice.⁷

The rationale behind the elaboration of the protocol on women's rights in Africa is best seen from the preamble of the protocol itself. The preamble noted that 'despite the ratification of the African charter, women in Africa still continue to be victims of discrimination and harmful practices.

Therefore, the African charter notwithstanding its primary significance as a treaty providing a frame work for human rights in Africa, its provision on women's right remain largely ineffective and inadequate and must necessarily be supplemented and or reinvigorated by adding rights that were missing from the charter and clarifying governments obligations with respect to women's rights as ratified in other international, regional and national instruments and laws.

Consequently the preamble of the protocol situates women's rights in Africa within the context of the African charter on Human and peoples'

⁴ Saudatu Mahdi et al, Op cit P. 1

⁵ Roselyn Musa et tel, Op, cit, Appendix 3, Pp. 113 and Fariza J. M. African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign: Op. cit P. 17.

⁶ Roselyn Musa et tel, Op, cit, Appendix 3, Pp. 113 and Fariza J. M. African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign: Op. cit P. 17.

⁷ Ladan M.T., Op. cit p. 3

rights, the Universal Declaration of Human Rights, the International Covenant on Economic, social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women and its optional protocol, the African charter on the Rights and welfare of the Child, the United Nations plan of Action on the Environment and Development in 1992, on Human Rights in 1993, on population and Development in 1994 and on social Development in 1995, the African plat form for action, the Dakar Declaration of 1994 as well as the Beijing plat form for action of 1995. Theses are among other international, regional, sub-regional instruments, resolutions, declarations, recommendations, decisions and conventions aimed at eliminating all forms of discrimination, and promoting equality between women and men, in accordance with international standards and against cultural and religious practices and values that attempt to deprive women such fundamental rights.

In fact, some of the shortcomings of the African Charter as it pertains to women's right which must be addressed properly justify the rationale for the adoption of the protocol. According to Prof. M. T. Ladan, the key shortcomings, of the African Charter are⁸:

- (a) its failure to define explicitly discrimination against women,
- (b) its lack of guarantees to the rights to consent to marriage and equality in marriage, divorce and inheritance, and
- (c) Its emphasis on traditional values and practices that have long impeded the advancement of women's rights in Africa.

The significance, benefits and potentials of the protocol on the rights of women in Africa are many and go well beyond Africa. The protocol sets a number of global records in a more articulate and detailed language for the protection and promotion of women's rights. Some of the significance and benefits of the protocol are as follows:

- (a) It for the first time in international law, explicitly sets forth the reproductive right of women to medical or safe abortion when pregnancy results from rape, sexual assault, incest, or when the

⁸ Ibid. P.4.

continuation of pregnancy endangers the health or life of the mother or the fetus⁹

- (b) The protocol explicitly calls for the legal prohibition of harmful practices against women such as female circumcision and or female genital mutilation (FC/FGM)¹⁰, which has unjustifiably caused the death of many young women in Africa.
- (c) The protocol commits the states which sign and or ratify it like Nigeria to eliminate all forms of discrimination against women and to ensuring, for example, their equal rights in marriage, divorce, inheritance and to education and employment. Consequently the protocol can facilitate women's and human rights advocates, like WRAPA, WARDC etc who had been fighting for the protection and promotion of women's rights in Nigeria to pressure governments to address the underlying social, economic, political and health care issues that contribute to the dismal state of women's conditions by the protocol's domestication.¹¹

The Structure and Contents of the Protocol

1.2.1 The Structure of the Protocol.

The draft of the protocol in April 1997 and its subsequent adoption six years later was informed by the weakness recognized by advocates for women's rights like SOAWAR in the African Charter as well as other international instruments on women's rights and the need to address them in a better form and manner, that helped in the structure of the protocol. The protocol certainly serves as a supplement to the Africa charter and other international instruments but in a more specific and direct response to persistent challenges women face in Africa.

The protocol has not been specially structured into parts. It is rather structured according to titles given to each Article, and even that without any specific order of preference. This has given room for writers to use their discretion to explain its structure.

⁹ Ibid, P.3, See also Faiza J. M. Op.cit P. 14.

¹⁰ Ibid. See also Article 5(b) of the Protocol .

¹¹ See Articles 2, 6, 7, 12 and 13 of the Protocol.

Accordingly, Saudatu Mahdi and her co-contributors in the abridged version of the protocol decided to divide the protocol into three sections or parts. The first section covers the rationale behind its elaboration, making reference to both regional and international commitments regarding women's human rights. The second section outlines the rights to be upheld by the protocol, whilst the third section covers implementation by addressing the manner in which it is to be adopted and monitored, as well as the process through which it may be amended.

It is evident that the protocol has a total number of 32 Articles covering several or multiple clusters of rights and their protection regarding women in Africa including Nigeria. The protocol no doubt from Articles 1-25 provides key rights issues upheld by it in favor of women. These rights are however not arranged or listed in order of priority but rather stated at random. Hence, such rights may be broadly divided into four subheads: Civil and political rights, economic, social and cultural rights, the rights to development and peace, and reproductive and sexual rights¹². Another form of categorization of the key rights issues upheld by the protocol is that, the protocol provides four clusters of rights of women in Africa, focusing on survival development, protection and participation. This is a useful device, to help structure and interpret the wide range of specific rights included in the protocol.

1.2.2 The contents of the Protocol

This part of the paper is intended to highlight the key rights issues included in the protocol. This means that, it will provide an overview of the scope of women's rights under the protocol. Therefore, the discussion will be structured in accordance with the four identified or categorized clusters of rights focusing on survival, development, protection and participation.

However, before discussing each of the categories of rights mentioned above, it is relevant to note the significance of Article I which provides definitions of some terms relating to women's rights under the protocol. Three terms among others can be reproduce here due to their relevance for the understanding of the contents of the protocol.

¹² Saudatu Mahdi et tel, Op cit P. I.

Therefore, Article I provides that; for the purpose of the present pr

'Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

'Harmful practices' means all behavior, attitudes and /or practices which negatively affect the fundamental rights of women and girls, such as rights to life, health, dignity, education and physical integrity.

'Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

'Women' mean persons of female gender, including girls.

1.2.2.1 Survival Rights of Women.

Survival rights are in a sense the most fundamental in so far as life is a prerequisite for the realization of any other human rights. In the context of the present protocol as guided by other women's rights conventions and treaties, CEDAW, the survival rights issues of women in adolescence and in Africa including Nigeria comprises the following:¹³

- Rising HIV/AIDS prevalence linked to behavioral factors and inadequate awareness;

¹³ Ladan M. T, Op. cit 6, See also Anthony Hodges (edited) Children's and Women's Rights in Nigeria: A call situation Assessment and analysis 2001, National planning Commission Abuja and UN (2001) P.4.

- Early pregnancy and associated risks, especially in the 19 Northern States of Nigeria,
- Poor reproductive health services (low access to contraceptives services, counseling, ante-natal care, delivery in health facilities, referral services). This also covers High fertility rate; and low utilization of family planning services.
- Unsafe, clandestine abortion and related legal issues
- Impact of armed conflict and violence on women.

The life expectancy of women and girls in Africa are generally very low in the light of the above identified indicators. Hence, Africa is said to have the prevalence of the worst indicators of women's quality of life and health, particularly of reproductive health, of any world region.¹⁴ The ability of a woman to make her own decisions regarding her body and her reproductive life are seen by the protocol as key to improving these indicators.

Against the above background, the protocol under Articles 4, 5, 11, 14 and 18 provides for respect and protection of women's rights to survival. Consequently, Article 4 of the protocol vested African women with rights to life, integrity and security of her persons. The article further requires state parties to prohibit all forms of exploitation, cruel or degrading punishment and treatment. The states parties are required in the implementation of this article to take appropriate and effective measures, including legislative, administrative, social and economic to prohibit, punish, educate and eradicate all forms of violence against women including unwanted or forced sex done privately or publicly.

The provision of this article 4 is important in that, it will ensure the physical integrity of women, the punishment of violators, and the rehabilitation of and reparation for victims of violence against women (VAW)¹⁵.

Article 5 of the protocol seeks to eliminate all forms of harmful practices, which negatively affect the human rights of women and falls short of international standards. The state parties are required to take all measures to create public awareness against all forms harmful practices and make

¹⁴ Ibid, Ladan M. T. P. 6, Anthony Hodges, P. 4

¹⁵ Ibid Ladan P.6.

legislation prohibiting harmful practices such as female genital mutilation (FGM) as well as punishing the violators.

Article 11 deals with the protection of women in Armed Conflicts. It enshrines respect for the rule of international humanitarian law applicable in armed conflict situations, which affect negatively the population and life particularly of women and children. Therefore, all forms of violence against women and girls during wartime, such as rape and sexual violence or exploitation are prevented and perpetrators are brought to justice before a competent court of criminal jurisdiction.

Article 14 is one of the most significant articles in the protocol that seeks to protect and promote women's rights to survival, through health and reproductive rights. This Article 14, required states parties to ensure the protection of women's right to health including sexual and reproductive health. Women in Africa and Nigeria therefore, under this Article 14 have rights to control their fertility, to decide whether to have children, the number of children and the spacing of children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices; and the right to have family planning education¹⁶.

Further, Article 14(2), required the state parties to take all appropriate measures to:

- Provide adequate, affordable and accessible health services including information, education and communication programmes to women especially those in the rural areas.
- Establish and strengthen existing pre-natal, delivery and post-natal health and nutrition services for women during pregnancy and while breast feeding¹⁷.
- Protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the

¹⁶ Saudatu Mah'd et al, Op. cit P. 4.

¹⁷ Saudatu Mahdi et al, op. cit. p.9

continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus¹⁸.

The significance of this Article is that it is the first legally binding human rights instrument to expressly articulate women's reproductive and health rights as human rights. Women are now allowed to control their fertility, to do family planning and in a specified circumstances medical abortion¹⁹. This is informed by the argument that the woman is neither a minor nor incapable of determining what is good for her. Hence, the article allows the woman to voluntarily decide what is good for her health and makes it mandatory for governments (state parties to provide structures and facilities that will make the woman enjoy her right to health and reproductive rights.²⁰

Equally relevant is the provision of Article 18 which gives women right to live in a healthy and sustainable environment.

1.2.2.2 Development Rights of Women

Development rights issues in the case of adult women, in Nigeria and Africa focus on equal opportunities for employment, acquisition of skills, ownership of property and access to other assets and resources²¹. However, within the context of the protocol, development rights issues for girl-child and adult women in Africa include the following:

- Continuing disadvantages in educational access for girls especially in the Northern states of Nigeria,
- Premature withdrawal of girls from school in favor of early marriage, especially in Northern Nigeria, even though it has substantially reduced in the present condition through various effort of governments, religious leaders and NGOs.
- High rate of female illiteracy
- Heavy burden of domestic labor

¹⁸ Saudatu Mahdi et al, op. cit. p.9

¹⁹ Ladan M. T., Op. cit P. 7

²⁰ Ibid.

²¹ Saudatu Mah'd et al. op.cit p. 9

Extensive participation in agricultural and the informal sector, but much less so in the formal sector, especially in professional technical and management jobs.

- Large income disparities with men
- Lack of title to land, limited or no property/inheritance rights under customary law, lack of capital and of collateral for access to credit.

The protocol on women's rights in Africa has adequately made provisions that address the above development rights issues by requesting states parties, like Nigeria to take all appropriate measures including legislation, Administrative policies, e.t.c to uphold and promote such rights without any form of discrimination against women. Women should also be given equal opportunities to education, employment and access economic and social welfare services and or facilities in the country. In this regard, Article 12, provides for right to education and training of women and girls; Article 13 deals with the economic and social welfare rights of women, which requires states parties to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities; are very relevant and important for the development of women. Also Article 15, on right to food security, Article 16, right to adequate Housing, Article 17, right to positive cultural context, Article 18, right to a healthy and sustainable environment and Article 19 right to sustainable development made far reaching provisions, safeguards and protections for the development of women. For instance the protocol requires states parties to take all appropriate measures to, among others, introduce gender perspective in their national development planning procedures; promote women's access to land and control over productive resources such as land and guarantee their right to property; promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty in women ²².

1.2.2.3 Protection Rights of Women

Generally speaking, protection rights concern protection from abuse, negligence, violence and exploitation as well as rights to special assistance

²² Anthong Hodges, Op. cit. P.13-14.

measures in the case of women who suffer disabilities, are marginalized deliberately excluded or secluded or are otherwise specially vulnerable.²³

Within the context of the protocol protection rights issues for girl-child and adult women in Africa including Nigeria may be identified as follows:

- Protection against all forms of discriminatory, harmful and exploitative (economic, labor and sexual) practices
- Protection from physical or moral danger and all forms of violence Against women (VAW) including domestic or home violence
- Protection of elderly women, women with disabilities and or in distress and protection of women in Armed conflicts
- Access to justice and equal protection before and benefit of the law.
- Gender equality in marriage, divorce and inheritance including widowhood.

The protocol has made extensive provisions that aimed at dealing with all of the above enumerated protection rights issues relating to women in Africa, Nigeria inclusive. For example, some harmful traditional practices like female circumcision which is more pronounced in the southern states of Nigeria, forced or child marriage which is more pronounced in the Northern states of Nigeria are prohibited and states parties are required to take all appropriate legislative and otherwise measures to protect the rights of women who may be victims of such harmful and discriminatory practices (see Article 2,5 and 6(a) and(b) of the protocol.)

The protocol has specially provided women with protection against gender based violence, in whatever form whether in the public or private sphere, including domestic abuse, like sexual exploitation of girls, trafficking in girls and women for commercial sex or labor; forced labor and marital rape etc. Women therefore, under the protocol can now rely on its provisions for protection of their rights against threats of both physical and verbal violence.

Article 3, rights to dignity provides that every woman shall have rights to dignity inherent in a human being and to the recognition and protection of

²³ Ladan M. T., Op. cit P. 13-14

her human and legal rights. Thus states parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women, including protection of women from all forms of violence, particularly sexual and verbal violence. See also articles 4,(2) (a) and (b) and article 5 (d). Article 5 in particular prohibits and condemns all form of harmful practice or other forms of violence abuse and intolerance against women.

It is also significant to state here that the protocol further affirms and reinforces the language of CEDAW, which also requires state parties to take all appropriate steps to eliminate and eradicate all forms of discrimination against women.

Furthermore, the protocol provides clearly for the protection of women in armed conflict situations elderly women, women with disabilities and women in distress against all forms of abuse and violence. The protocol places an obligation on states parties to ensure that such women are treated with dignity and that their special needs are adequately provided for. (See Articles, 11, 22-24 of the protocol.)

Article 8 of the protocol covers the rights of women to equal protection and benefit of the law. The state parties are required to take appropriate measures to ensure women's right to access to justice including judicial and or legal services or aids. The states parties are also required to ensure effective promotion and enforcement of gender equality rights. Article 25 is related to article 8 and infact it generally seeks to oblige states parties to provide appropriate remedies to any woman whose rights or freedoms, as included in the protocol are violated. The states parties are also to ensure that such remedies are determined by competent judicial, administrative or legislative authorities provided for by law. This is significant as it will compel the ratifying states of the protocol to do everything necessary to domesticate the protocol for its local or domestic courts to assume jurisdiction over complain for violations of the women's rights under the protocol.

It is however important to give special look at the protocol regarding gender equality in marriage, divorce, widowhood and inheritance. This is necessary because it could be an area that can generate apprehensions by many Nigerians especially Muslims, since Islamic law has made abundant

provisions and guides relating to family and succession matters or rights based on the teachings of the Holy Qur'an and Sunnah of the Holy prophet. The relevant Articles of the protocol here are Articles 6(a)-(g) (Marriage), Article 7 separation, divorce and annulment of marriage, Article 20 (widow's rights) and Article 21 (Right to inheritance).

By the combined effects of articles 6, 7 and 21 (1) and (2) the protocol states that states parties shall ensure the enjoyment of the equal rights of women and men in marriage, divorce and inheritance the states parties are to enact appropriate national legislative measures to guarantee that no forced marriage takes place. Therefore, all marriages must be done with the free and full consent of both parties. This is followed by the requirement that 18 years shall be the minimum age of marriage of a woman notwithstanding her religious and or cultural values and or persuasions to the contrary. This is important in affirming girls' and women's right to be protected from early or child marriage. Similarly the protocol by the provision of Article 6 can be described as the first in current global human rights protection by prohibiting child marriage and forced marriage as practiced in some communities in Nigeria and elsewhere in Africa. It articulates a woman's right to decide herself on matters of marriage and family.

Very relevant also to state that the protocol is the only international human rights treaty that identified 'monogamy' as the 'preferred form of marriage'. This means that, both monogamy and polygamy are recognized under the protocol but monogamy is encouraged and polygamy discouraged. The protocol also required that every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized. This brings us to the question of the legal position of marriages concluded verbally according to the custom and religion of the parties.

The protocol prohibits and or regulates other discriminatory practices against women during and upon the dissolution of marriage. Article 6(j) provides that during her marriage a woman shall have right to acquire her own property and to administer it and manage it freely. While married a woman is free to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname.

By virtue of Article 7 which covers separation, Divorce and annulment of marriage, states parties are required to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment. Consequently, the states parties shall ensure that separation, divorce or annulment of a marriage is effected by judicial order. This seems to suggest that spouses may not mutually without going to court dissolve their marriage notwithstanding it is a free contractual relationship.

This is provided in order to prevent discriminatory practices that are common in case of non-judicial separation or dissolution of marriage especially relating to the guardianship, and custody of children as well as woman's right to her property or property jointly acquired with the husband during the subsistence of the marriage.

According to Prof. Ladan M.T.²⁴ this protocol is also unique in its articulation of widows' right to equality under international law.

Article 20 on widows' rights expressly oblige states parties to take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions.²⁵

- That widow is not subjected to in human, humiliating or degrading treatment.
- That a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this in contrary to the interests and welfare of the children.
- That a widow shall have the right to remarry, and in that event to marry the person of her choice.

This article 20 saves widows in Africa and Nigeria in particular the double pain of losing their husbands and being denied their children as well as their rights to remarry a person of their choice.²⁶

Article 21 provides generally for right to inheritance. Hence it provides that 'a widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue in the matrimonial house. Incase of remarriage, she shall retain this right if the

²⁴ Anthony Hodges, *Op. cit.* p 4.

²⁵ Ladan M. T., *Op. cit* P 12-13.

²⁶ Saudatu Mahdi et al. *Op. cit* P. 12.

house belongs to her or she inherited it. Women and men shall have the right to inherit, in equitable share, their parent's properties.'

Certainly the above articles of the protocol relating to gender equality in marriage, divorce, widowhood and inheritance clearly show the protocol's reach into the spheres of family, community, tradition and religion. They may generate a lot of contentions.

1.2.2.4 Participation Rights of women

The participation rights issues of women in Africa and within the context of the protocol include the following.

- Absence of consent inherent in girl-child betrothal and marriage.
- Female seclusion and exclusion,
- Patriarchal notions of male responsibility for decision making and leadership, within the family, in the community and in the wider society,
- Low levels of female participation in politics administration, government and peacemaking processes or activities.²⁷

These participation rights issues itemized above are clearly provided for under the protocol. Particularly Articles 6 on marriage, Article 9 on Right of women to participate in the political and decision making process; Article 10 which deals with women's right to peace and participate in the promotion and maintenance of peace, Article 17 provides women right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. Article 18 states that women shall be involved in the planning, management and preservation of the environment and the sustainable use of resources at all levels and Article 19, vested women with the right to fully enjoy their right to sustainable development. Hence women shall be allowed to participate at all levels of government in the conceptualization, decision-making, implementation and evaluation of development policies and programmes.

The above provisions of the protocol show that it has guaranteed women right to participate in the political and decision making process without

²⁷ Ladan M. T., Op. cit P.14-15

discrimination whatsoever. The protocol requires State parties to promote women's effective and equal participation through affirmative action, enabling legislation and other appropriate measures, including participation in the political life of their countries.

1.3 The Domestication, implementation, monitoring and other related matters under the protocol.

The above matters relating to the operation and effectiveness of the protocol for the promotion of women's rights in Africa are provided for in Articles 26-32 of the protocol.

Article 26 provides for the implementation and monitoring of the protocol at national levels. This cannot be achieved without its domestication in form of a national law. The protocol vests the power of interpretation of the protocol on the African court on Human and people's rights under Article 27. While dealing with the procedure for signing, ratification and accession of the protocol by the states parties, Article 28 requires that it shall be done in accordance with their constitutional procedure. This means that domestication shall be made in accordance with the provisions of the constitution of for example, Nigeria. This necessarily means that the provision of section 12 of the 1999 constitution of the Federal Republic of Nigeria must be a guide towards Nigeria's efforts at domesticating this very important protocol.

Article 29 says that the protocol shall enter into force thirty (30) after deposit of the fifteenth (15) instrument of ratification. This deposition of the instruments of ratification is to be made with the chairperson of the commission of the African Union (AU). Nigeria and other 16 African Countries who are members of AU have since ratified and brought into force the provisions of the protocol in their countries.²⁸

The protocol is not unmindful of the changing circumstances and conditions in the African continent regarding its provisions, hence it allows for its amendment and revision. Article 30 of the protocol states the procedure for

²⁸ For the list of countries that have ratified, signed and or yet to do anything on the protocol as at January 2006 See SOAWR'S Publication, titled: Breathing life into the African Union Protocol on Women's Rights in Africa. appendix 2 pages 112-113.

the amendments and or revision where necessary. As a safeguard, the protocol in Article 31 made a provision ensuring that where higher standards of rights exist in national, regional or international laws, those would then prevail over its provisions. Finally, Article 32 provides for transition. It states that pending the establishment of African Court on human and people's rights, the African Commission on Human and People's Rights is vested with the power of interpreting the protocol relating to its application and implementation.

It is evident from the totality of our discussion on the overview of the protocol that, African governments and peoples, including Nigeria are firmly convinced that any practice, policy or law that hinders or endangers the normal growth and affects the physical and psychological development of women including girls should be condemned and eliminated or outlawed.

They are also determined to ensure that the rights of women are promoted, realized and protected in order to enable them enjoy fully all their human rights. It is also to be noted that notwithstanding the quick and prompt response by the African leaders to ratify this landmark protocol on Women's Right in Africa, there could have greater challenges and difficulties ahead against SOAWR members, including WRAPA, WARDC and WILDAF Nigeria for the protocol to attain Universal ratification, and the rights as contained therein to be domesticated into national laws for the benefit of the African Women²⁹

Hence, it is said that although the protocol covers abroad range of women's human rights issues and can serve as a good mode in advancing the human rights of African Women, it is not flow less³⁰ and so can face a lot of challenges and difficulties especially at the domestication and implementation levels, possibly because of some socio-cultural and religions perceived and or real apprehensions of its provisions.

²⁹ Faiza, J.A., Op. cit P. 18

³⁰ Roselyn Musa.: 'The provision of the Protocol, Op. cit p. 19.

2. DOMESTICATION AND IMPLEMENTATION OF THE PROTOCOL IN NIGERIA:- SOME OF THE CHALLENGES.

It is the humble understanding and view of this writer that substantial or most parts and or provisions of the protocol on women's right in Africa are not strictly speaking against socio-cultural and religious values of Nigerians, particularly Muslims, However, the protocol is not totally free from provisions that can be vehemently contended by some religious and traditional leaders for offending and or challenging the fundamentals of their beliefs, values and faiths. In other words, there are some material provisions in the protocol which can be a source of contention if it comes to the question of its domestication and implementation in Nigeria. This is just an aspect of some of the problems and or challenges the domestication processes and or campaign is likely to face. Therefore, it is observed that although the protocol provides clear divisions of responsibilities in the domestication, implementation and monitoring of its provisions, and it majority of its provisions are not contrary to the well established religious injunctions of Nigerian people, particularly Muslims, yet, the protocol can encounter challenges in the following matters and or issues:

(a) The provisions of the protocol that seeks to promote a number of measures which for sometimes have been resisted in a number of national and local context, due to socio-cultural and religious values and practices.

Therefore, in particular, those provisions and or measures provided in the protocol prohibiting harmful and cultural practices, that seek to promote property ownership rights and more seriously in the perception of Muslims, those provisions and measures entrenched in the protocol for the promotion and protection of sexual, health and reproductive rights of women are very contentious. The health and reproductive rights provisions and measures are far reaching landmark of the protocol, for they call for states parties like Nigeria, as a matter of obligation to enact enabling national or local legislation and appropriate measures, and policies, facilities for the protection and enjoyment of women's reproductive health including right to control her fertility, right decide whether to have children, the number of children and the spacing of children, right to choose any method of contraception, right to have family panning education and right to medical abortion.

Another area of the protocol that can be in contention, particularly in the Muslims perspective due to their religious understanding of the teachings of Islam which is a divine religion can be identified under the protocols provisions that seek to protect the rights of women in marriage, separation, divorce, widowhood and inheritances. For instance the prohibition of child marriage, and betrothal, the fixing of 18 years as the minimum age of marriage for a woman, the recognition of monogamy as the preferred form of marriage etc can be a source of apprehension to Muslims. Equally, Muslims may raise fears regarding the provisions of the protocol on women's right to inheritance, particular, as it seeks to provide that 'women and men shall have the right to inherit, in equitable shares, their parents properties.'

The fears and or apprehensions of the Muslims regarding the protocol's provisions on health and reproductive rights of women as well as their concerns on the protocol's promotion and protection of women's rights in marriage, separation, divorce and inheritance, could be informed by the nature of their religions or faith in Islam. Islam and or Sharia to a Muslim is very fundamental and are taken very seriously. It is a divine law of Allah, the creator based on the divine teachings of the Holy Qur'an and traditions of the Holy prophet.

The Holy Qur'an and traditions of the Holy prophet have made abundant provisions regulating family and marital rights of women and men based on what is just and fair in the sight of Allah. Therefore some will understand that, the sexual and reproductive rights of a woman will defeat some of the fundamental objectives of marriage and family as stated in the Qur'an and traditions of the Holy prophet.

For example, chapters 7:189 and 16 :172 of the Holy Qur'an made procreation of human race as one of the object of marriage. Equally, marriage is seen as the only legitimate means by which a Muslim can satisfy his sexual desires.

Regarding women's right to inheritance, the protocol will be understood to have requested for the abrogation of the express provision of the Holy Qur'an regarding rules of distribution of estate of a deceased. To say that women and men shall have the right to inherit in equitable shares, their

parent's properties, is a direct challenge to the provisions of the Holy Qur'an 4:11. The Holy Qur'an here stipulates the principle of Lilzakari

"Allah commands you as regards your children's (inheritance): to the male a portion equal to that of two females..."

Some people thought that the above verse of the Holy Qur'an and principle of inheritance is discriminatory against women³¹. It is however, with due respect submitted that such views are misconceived, because the issue of inheritance under Islamic law is sacrosanct Islamic law in the Nigeria legal system has the best rules for the protection and promotion of women's rights including rights to inheritance. This was clearly explained by Justice Muntaka Commassie, JCA (as he then was) in case of Muhammad V. Muhammad (2001)6 NWLR pt 708, p. 104.

In this case, two sisters instituted an action against their brothers at the trial court for their own shares in respect of the estate of their deceased father. The brothers initially excluded at home their sisters from the inheritance. The trial court in accordance with what Allah said in Qur'an 4:11 gave the sisters their prescribed shares. Same was affirmed on appeal at the Sharia Court of appeal and the Court of Appeal, in Kaduna. In his lead judgment, Muntaka-Coomassie JCA, stated that in pre-Islamic period of Arabia females were not seen with value and so not regarded as entitled to inheritance. However Islam came and destroys such practice. He then held that under Islamic law "daughter or female heirs are allowed to per take like their male counter parts in a modified manner, namely a daughter can have as her share half of what the son will get as his share. This is what is popularly known as the Lilzakari formula. That is to say a male person would get twice of the female share.

His Lordship then further explained the religious nature of Islamic Law of inheritance as follows.

"The issue of inheritance under Islamic Law is sacrosanct. It could be clearly seen that Allah the Most High did not leave it in the hands of human

³¹ The view held by Justice Nweze quoted by Ladan M. T. Op. cit P. 43.

beings. He the Almighty under took to explain its rule, conditions and classification of the heirs and stated same as the Holy Quranic heirs i.e. their shares were specifically entrenched in the Holy Qur'an; therefore, nobody or institution can deny them shares which God gave them³².

(b) Other challenges to the domestication and implementation of the protocol include:

- The slow process of change especially when it comes to legislation and policy. In fact, Nigeria which operates the British model legal system must take such protocols and or international instrument ratified, for the due process of law making at its National Assembly.
- Lack of awareness, especially at local levels of the protocol and what it seeks to address. Many religious scholars may not be well informed of values of certain provisions especially if they are new and yet may conclude against it.
- Weak institutional mechanisms for implementation, especially, ministries vested with powers to promote gender initiative are poorly funded.
- Lack of implementation may be due to lack of political etc.

3. CONCLUSION AND SUGGESTIONS

It is evident from the above examination that, the protocol on women's right in Africa is not materially opposed to Islamic law except in some few areas where for instance, Sharia places high reservations for family and marital relations. Therefore, provisions which seek to promote and protect women's rights not directly in conflict with the Holy Qur'an and sunnah of the prophet should be harmonized with that of the Sharia before domestication. While those that may likely be in conflict with Islamic law should not be rushed and forced on the Muslims by use of legislation but rather through the process of dialogue and proper understanding of the values and belief of the people in whose favor such international standards are sought to be applied. Again, Muslims jurists should be encouraged to make Ijtihad (independent mental deduction of rules from the Qur'an and Sunnah) on matters that are new for the development of Muslims particularly women.

³² Quoted by Ladan M. T., Op. cit P 47

Again, how men and women especially political and religious and community leaders, gender sensitive so formulators and implementers perceive women's rights the their decisions and behavior concern over such rights require:- continuing human rights education, enlightenment campaign, multi-disciplinary research approach to the understanding, articulation and protection of rights as human rights in civil, political social, economic development context.³³

³³ Ladan M. T., Op. cit P 55.