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The Supreme Court has cleared the customary law inhibitions on the inheritance rights of women in Nigeria

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Abstract
The paper reflects on the Supreme Court opinion in some cases in which the apex court declared the customary laws and practices which denies women inheritance rights as repugnant to natural justice, equity and good conscience; and unconstitutional and evaluates the implication of these pronouncements for protection of women's rights in Nigeria. This is particularly important, because these views have provided further normative and thematic platforms for the actual enforcement and execution of the non-discrimination provisions of the Constitution and the National Gender Policy. In spite of the constitutional provisions on non-discrimination and the national gender policy, the protection of inheritance rights of women has remained an unresolved issue in some Nigerian communities under the customary law. The legislative provisions remained mere declarations and intentions without enforcement and execution. This contribution commends the judicial pro-action and court based advocacy in these cases for the protection of women's rights in Nigeria. It therefore calls for judicial sustainability of this emergent judicial activism and sustained thematic actions in the protection of women's rights.

Keywords: Supreme Court, Customary Law, Inheritance Rights of Women, Nigeria

Introduction

The need for gender equality and equity in socio-economic relations has remained a burning issue in national agenda. This is because of the gender apartheid against women in the society. Women are generally considered inferior to men and discriminated against in so many ways (Oputa, CA, 1989; Ukhum CE, 2005; Ogugua VC Ikpeze, 2009; Worugji, INE, 2011; Mlambo-Ngecuka P, 2014 & 2015; Nwufo, CC & Okoli, CK, 2016) [1]

In some communities, women cannot own property nor do they have any formal property rights. The customary law in some places does not recognise the concept of matrimonial property as the woman is regarded as part of the estate of the man. They cannot inherit property including their husband's property (Fisher, BAO, 1997; Nwoye KN, 2000; Edu, OK, 2004; Ogugua, VC Ikpeze, 2009; Worugji INE, 2011; Worugji, INE & Ugbe, RO, 2013; Nwufo, CC & Okoli, CK, 2016) [2]. It is in response to these and some other practices that some well-meaning gender activists sponsored and presented to the National Assembly in 2010 certain Bills to domesticate the international conventions and declarations aimed at promoting and enforcing gender equality and non-discrimination in socio-economic relations in Nigeria. Prominent among these is the Gender and Equal Opportunities Bill is yet to be passed by the National Assembly. It is within this context of reactions against cultural authoritarianism (Ukhum CE, 2005) and gender discrimination against women that this contribution analyses the Supreme Court opinions in some cases and their implications for the protection of women's right in Nigeria. The Supreme Court declarations of focus are in Anekwe v. Nweke (2014) [3] and Ukeje [5]. Ukeje (2014) [4] respectively.

Apart from the introduction, the paper starts by highlighting the legal and policy framework upon which the protection and enforcement of women's right in Nigeria is advocated. It further sets out the background and the judgements in the cases under reference; and discusses same within the context of their implications for the protection of women's rights in Nigeria. There is no doubt that the Supreme Court opinions in these cases, to a great extent, provides further legal anchor for effective judicial pro-action and advocacy in the protection of inheritance rights women as well as a further platform and legitimacy for continued advocacy for gender equality and non-discrimination generally. The paper therefore calls for the sustainability of the emergent court based advocacy in the protection of women's rights in Nigeria.

Legal and Policy Framework

Apart from the international and regional declarations, conventions and norms for the promotion, protection and implementation of human rights of women, the Nigerian Constitution is replete with provisions on gender equality and protection of women's rights. There is also the National Gender Policy and other laws directed towards the promotion and protection of women's rights and gender equality in Nigeria. These include the Child Rights Act and the Violence Against the Persons (Prohibitions) Act, 2015.

Specifically, Section 17(1) of the Constitution of the Federal Republic of Nigeria (as amended) provides that "the state social order is founded on ideals of social objectives, freedom, equality and justice". Subsection (2) maintains that "in furtherance of social order (a) every citizen shall have equality of rights, obligation and opportunities before the law"; and Subsection (3) provides that

''The state shall direct its policies towards ensuring that-All citizens, without discrimination on any ground whatsoever,

have the opportunity for securing adequate means of livelihood...''

Even though these provisions are not enforceable, they provide the plank for the promotion of human rights and the direction of state policy on protection of human rights generally. Women's rights are, no doubt, human rights (Boutros-Ghali, B. 1995; Okagbue I, 1996) [5].

Besides these policy strides, the fundamental rights provision of the Constitution in Section 42, provides the right to freedom from discrimination. Section 42(1) provides thus:

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 political 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 their communities, ethnic groups, place of origin, sex, religious or political opinions.

Subsection (2) emphasizes that:

No citizen of Nigeria shall be subjected to any liability or deprivation merely by reason of the circumstances of his birth.

Better still, Section 43 of the said Constitution also guarantees the right to acquire and own property anywhere in Nigeria. This applies to all, irrespective of sex or circumstances of birth. These provisions are justiceable and also provide the legal basis upon which violations of women's rights generally could be challenged. Moreover the Constitution is the *grundnorm* in Nigeria and any other law inconsistent with it is void to the extent of that inconsistency (see Section 14(3) Evidence Act, 2004).

Furthermore, Nigeria as part of its commitment to the promotion and protection of women's rights, has formulated the National Policy on Women, 2000 and the National Gender Policy 2006 respectively (Federal Ministry of Women Affairs and Social Development). These National Policies draw heavily from the international initiatives relating to women in development and aims at ensuring, among other things, the elimination of all forms of discriminations against women. The National Gender Policy (NGP) 2006 in its introductory paragraphs emphasizes that:

Promoting gender equality is now globally accepted as a development strategy for reducing poverty level among women and men, improving health and living standards and enhancing efficiency in public investment. The attainment of gender equality is not only seen as an end in itself and human right issue, but as a prerequisite for the achievement for sustainable development.

It has been repeatedly emphasised that the opportunity for securing adequate means of livelihood cannot be achieved and sustained when the women folk are discriminated against and denied rights to property under the customary law as practiced in some communities (Boutros-Ghali B,1995).

Although customary law and practice is a major source of law in Nigeria, but the application of any customary rules and practices within the legal system is dependent upon their being in consonance with natural justice, equity, good conscience, and public policy; and not in conflict with any written law for the time being in force (see Section 14 (3) Evidence Act, 2004 & Section 1(3) of the 1999 Constitution, as amended). Moreover, section 21 of the Constitution is emphatic that the state shall protect, preserve and promote the Nigerian culture which enhance human dignity and are consistent with the fundamental objectives provided in it. In effect a customary law and practice that discriminates against and disinherits women, without any equivocation, cannot be said to enhance human dignity and consistent with the fundamental objectives thus cannot be a valid law.

The fundamental rights provisions of the Constitution and the National Policy on Gender as well as the international human rights standards ratified by Nigeria, generally provide the anchor upon which judicial protection of women's rights in Nigeria stands. Moreover, the justice, equity, good conscience and public policy of the present time, is not only in favour of reforming the customary laws and practices but greatly insisting on the protection of women's rights in the society [6].

The need for Nigeria to also ensure the elimination of discriminations against women as assumed under international treaties to which they have acceded, cannot be over-emphasized. It must be emphasised that Nigeria has ratified all the international and regional instruments on women's rights including the CEDAW.

Non-discrimination against women and gender equality cannot be achieved without the active participation and involvement of the judiciary no matter the elegance of legislation and policy. Legislative provisions are mere declarations of policy and intentions. The actual enforcement and execution of such provisions are dependent on the existence of certain human institutions. This is where the court becomes relevant. It is through the active participation of the courts that the issue of protection of women's rights can be taken beyond law making and policy formulation. The judiciary in some other African countries have also relied on their national Constitutions and influenced by the international human rights standards to protect women's rights in their national jurisdictions (see Chinkin C, 1999; Rehman Javaid, 2010 & Commonwealth Human Rights Law Digest, 2010) [7]. It is within this context that the call for judicial pro-action for the protection of women's rights in Nigeria is being advocated.

It is of note however that in Nigeria, except where there is a will, the extent to which the courts have interfered to guarantee the protection of inheritance rights of women has depended largely on the customary law applicable in the various communities (Nwoye KN, 2000; Edu OK, 2004; Ogugua VCI, 2009; Muna Ndulo, 2011; Worugji, INE & Ugbe RO, 2013) [8]. This has remained so, in spite of the constitutional provisions on non-discrimination, the national policy on gender equality and equity and the fact that Nigeria has ratified the international conventions in favour gender equality and non-discrimination generally. The inhibitions of the customary laws and practices in the protection and enforcement of women's rights has remained prevalent in spite of the international human rights law and the Constitution, largely due to the patriarchal nature of the society (Edu OK, 2004; Ukhum CE, 2005; Muna Ndulo, 2011; Nwufo, CC & Okoli, CK, 2016) [9].

It is against this background that the Supreme Court judgements under review that insists on gender equality and non-discrimination are of considerable importance. These cases

border on protection and enforcement of women's right of inheritance in family relations.

It must be noted that the protection of rights of inheritance is an aspect of protection of property rights. Lack of property rights for women under the customary law is one of the fundamental challenges hindering active participation of women in economic development. And it has been emphasised that the continued denial of the property rights to women has great negative implications for the progress, development and wellbeing of the nation (Boutros- Ghali B, 1995;Jack B, 1997; Ogugua V.C.Ikpeze, 2009; Worugji INE, 2011; Worugji INE & Ugbe RO, 2013; Nwufo,CC & Okoli, CK,2016) [10]. It is against this that the continued need to guarantee property rights to women under the customary law and non-discrimination against women generally that the two Supreme Court judgements are welcome developments in law. The backgrounds of and some extracts from the judgements under review are set out hereunder.

The Facts of the Cases and Extracts from the Judgements

(1) Onyibor Anekwe & ors v. Mrs Maria Nweke (2014)

This is an appeal against the concurrent judgement of the High Court, Awka, Anambra State and the Court of Appeal, Enugu. The Respondent/ Plaintiff in this case, at the High Court, challenged the action of the Appellants/ Defendants in attempting to disinherit her of her diseased husband's property in her matrimonial family on the ground that she has six female children without a single male child. The Appellants/ Defendants in their oral testimony at the court maintained that she is not entitled to inherit the property in issue under the customary law. They stated categorically that the reason why their custom forbid the respondent from entitlement to inheritance of any land or landed property in her matrimonial family was the fact that she has six female children without a single male child.

The Supreme Court while upholding the concurrent judgements of the lower courts in favour of the respondent was unanimous in condemning and declaring the customary law in this case as repugnant to natural justice, equity and good conscience. For emphasis, Ogunbiyi J.S.C who read the lead judgment maintained thus:

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilisation. It is punitive, uncivilised and only intended to protect the selfish perpetration of male dominance which is aimed at supressing the right of womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.

It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned appears comfortable in identifying, endorsing and also approving of such a demeaning custom (LPELR-22697(SC) pp 36-37).

Similarly, I.T Muhammad J.S.C., invoking natural law argument puts it thus:

It battles one to still find in a civilised society which cherishes equality between the sexes, a practice that disentitles a woman (wife in this matter) to inherit from her late husband's estate, simply because she had no male child from the husband. This practice I dare say, is a direct challenge to God the Creator who bestows male children only; female children only (as in this matter) or an amalgam of both males and females, to whom He likes. He also has the sole power to make one barren. There is nothing virtually one can do if one finds oneself in any of the situations. To perpetuate such a practice as is claimed in this matter will appear anachronistic, discriminatory and unprogressive. It offends the rule of natural justice, equity and good conscience. That practice must fade out and allow equity, equality, justice and fair play to reign in the society (LPELR-22697 (SC) p 38).

In similar vein, Nwali Sylvester Ngwuta, J.S.C maintained:

My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, and the hand that rocks the cradle.

The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realities of today's world. Children, male or female, are gifts from the creator for which parents should be grateful.

The custom of Awka people of Anambra State pleaded on and relied upon by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished (LPELR-22697 (SC) p42).

In the words of Ariwoola J.S.C., still adopting the natural law appeal puts it thus:

In the oral testimony, the appellants had stated that the reason why their custom forbid the respondent from entitlement to inheritance of any land or landed property in her matrimonial family was the fact that she "has six female children without a single male child". By this, it meant that the said six female children of this respondent were denied their entitlement to inherit their father's property simply because of their gender. There is no doubt, this custom pleaded and canvassed by the appellants against the respondent, is to say the least repugnant to natural justice, equity and good conscience. It is even barbaric. One wonders whether it was the respondents making what sex the pregnancy that her late husband made with her will come out with. Indeed such a custom that discriminates against female children is a challenge on God Almighty who is the maker and producer of children. He (God) alone determines what pregnancy will produce, what type of sex- male or female. It will therefore be inhuman and injustice to discriminate against a female child on her father's property or a widow on the ground that she has only female children for her late husband (LPELR 22697 (SC)p 44).

There is no doubt that their Lordships in this case, without any equivocation, applying the repugnancy test declared any custom which disinherits a woman property rights in a family as repugnant to natural justice, against the will of God and also not in keeping with modern days realities. The court went further to caution lawyers who propagate the sustenance and enforcement of such customary laws and practices in any society, instead of condemning such retrogressive practices.

(2) Mrs Lois Chituru Ukeje & anor v. Gladys Ada Ukeje (2014)

The respondent in this case is one of the four children of one Lazarus Ukeje who died intestate. The case originated from the Lagos High Court. When Lazarus Ukeje, an Igbo man, died without a Will, Gladys Ada Ukeje his daughter, instituted an action against Lois Chituru Ukeje (the deceased's wife and the plaintiff's step mother) and Enyinnnaya Lazarus Ukeje (the deceased's son and plaintiff's half-brother) before the Lagos High Court. The defendant/appellants in this case had applied for and obtained a letter of administration in respect of the estate of Lazarus Ukeje to the exclusion of the plaintiff/Respondent. The plaintiff, in the main, sought to be included among the persons eligible to be entitled and to administer the estate of Lazarus Ukeje, the deceased.

The Court upheld the plaintiff's claim and declared the Igbo customary law which excluded female children from inheritance as unconstitutional. Dissatisfied with this judgement, the defendants appealed to the Court of Appeal. The Court of Appeal upheld the decision of the high court, whereupon the defendants/appellants then proceeded to the Supreme Court. The Supreme Court in a unanimous decision confirmed the decisions of the two lower courts which had declared unconstitutional the Igbo customary law of inheritance which excludes female children from eligibility to inherit the property of their fathers.

The Supreme Court, in the words of Rhodes-Vivour, JSC, who read the lead judgement, while acknowledging that what was in issue is largely the paternity of the respondent declare thus:

agreeing with the High Court, the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting in her late father's estate is void as it conflicts with section 39 (1) (a) and (2) of the 1999 Constitution as amended. This finding was affirmed by the Court of Appeal. There is no appeal on it. The finding remains inviolate. … No matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her late father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42 (1) and (2) of Constitution, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution (2014) LPELR-22724(SC) pp32-33**.**

Concurring with this finding, Ogunbiyi, JSC re-emphasised the unconstitutionality of the custom thus:

The trial court I hold did rightly to declare unconstitutional the law that disinherit children from their deceased father's estate. It follows, therefore, that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefits of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 as amended (((2014) LPELR-22724(SC) p37).

The Implications for Protection of Women's Rights

The Supreme Court opinions in these appeals are quite commendable. They have provided stronger judicial and thematic platforms for the protection of women's rights and inheritance rights of women in particular. The opinions have finally settled the contention over the inheritance rights of women under the customary law. It has become clear and settled that any customary law and practice which disinherits a woman is repugnant to natural justice, equity and good conscience and also in conflict with section 42 of the Constitution and therefore unconstitutional. This covers widows and other female children of the family. It does not matter whether the female child is born out of wedlock. The Supreme Court emphasized that this finding of the lower courts in favour of women in this regard is "inviolate".

The Supreme Court applying the repugnancy test in Anekwe's case emphatically stated that any culture that disinherits a daughter from her father's estate or wife from her husband's property is repugnant to natural justice and that the perpetrators of the culture and custom should be punitively and decisively dealt with to serve as a deterrent. It went further to express its worries about 'counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving of such a demeaning custom.'

The Supreme Court in Anekwe's case has not only given further impetus to the use of repugnancy test in dealing with issues of customary law and practices which impugn on women's rights and gender equality generally but has also tacitly cleared the uncertainty in the application of this test by an earlier Supreme Court opinion in Mojekwu v. Iwuchukwu (2004). In Mojekwu's case, the Supreme Court while reaffirming that the court will not in validate and enforce a customary law and practice which is repugnant to natural justice, equity and good conscience, maintained that the Nnewi native law and custom of *Oliekpe* which disinherits women was not repugnant to natural justice, equity and good conscience. Thus the Court of Appeal in that case was wrong in making such a finding and reaching the conclusion that the custom of *Oliekpe* is repugnant to natural justice. It cautioned that the court should be cautious in declaring such customary laws repugnant to natural justice based merely on the repugnancy principle influenced by what it considered to be extraneous considerations.

Similarly, in applying the constitutionality test the Supreme Court in the Ukeje's case emphasised that:

No matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her late father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42 (1) and (2) of Constitution, a fundamental right provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution ((2014) LPELR-22724(SC) 32-33)

In effect, the opinions have given tacit legitimacy and validity to the pathway being charted by the Court of Appeal in some earlier cases, where it declared the customary laws and practices which discriminate against women repugnant to natural justice, equity and good conscience; and also void as it is in conflict with section 42 (1) and (2) of the Constitution [11]. The two tests can therefore be used simultaneously or

alternatively to question the validity of any customary laws and practices that impugn on women's rights.

On the thematic side, these judgements have provided a further platform and legitimacy for continued advocacy and awareness creation activities and campaign against gender discrimination and in favour of women's rights. This is clearly captured in Anekwe's case where Ogunbiyi,J.S.C. unequivocally emphasised thus:

I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby outrightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilisation. It is punitive, uncivilised and only intended to protect the selfish perpetration of male dominance which is aimed at supressing the right of womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over (2014) LPELR-22697(SC) p36).

Ngwuta, J. S. C in the same vein expressed it thus:

My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, and the hand that rocks the cradle.

The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realities of today's world. Children, male or female, are gifts from the creator for which parents should be grateful.

The custom of Awka people of Anambra State pleaded on and relied upon by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished (2014) LPELR-22697(SC) p42).

Conclusion

The Supreme Court pronouncements in these cases are commendable and remain a fundamental step in the protection of women's rights in Nigeria. It has provided an unequivocal readiness of the court to protect and safeguard the women's rights in Nigeria. The pronouncements represent a definitive judicial opinion on the status of customary laws and practices that cultivate gender inequality. It has provided a benchmark for the evaluation of customary laws and practices that are considered discriminatory or inimical to the enjoyment of women's right using constitutional parameters and repugnancy principle.

The issue of protection of inheritance rights of women therefore is no more that of want of law as the Supreme Court has cleared the customary law inhibitions. What is needed now is awareness creation in respect of the existence of such rights generally and the peoples readiness to enforce and execute such rights in case of any violation or threat thereof. This involves social policing. This is where some institutions like the churches, the Nigerian Bar Association and the women's rights NGO's may be again relevant.

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