

# Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue

Reginald Akujobi Onuoha<sup>1</sup>

## 1.0 INTRODUCTION

The patterns of inheritance and succession,<sup>2</sup> particularly under intestate estate under customary law in Nigeria, have almost as many variations as there are ethnic groups in the country, and many of the variations are discriminatory in practice. The law of succession and inheritance reflects Nigeria's plural legal system. Indigenous customary law developed rules of inheritance for intestacy through the traditional canon of descent, as adapted over the years to changes in the society<sup>3</sup> and the rule of natural justice as applied by the courts.<sup>4</sup> Fortunately, nongovernmental organizations have been active in attempting to rectify the problems of discrimination.

Rather than trying to cover all the patterns of succession, I examine a few of the succession patterns,<sup>5</sup> with particular reference to the discriminatory aspects under customary law. I also propose reforms. Finally, I recognize the important work done by nongovernmental organizations in Nigeria.

## 2.0 STATEMENT OF THE PROBLEM

While the law of inheritance and succession under English law is reasonably settled, the aspect dealing with customary law is not, which breeds conflict and acrimony among heirs. What's more, the law discriminates among beneficiaries. Some are accorded rights of inheritance and others are not. Consequently, this customary law falls under the repugnancy doctrine test and, more important, international conventions against discrimination.

One example is the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), an international document that establishes standards of equality between women and men. The convention was adopted by the United General Assembly on 18 December 1979, and was made binding on ratifying states on 3 September 1981. CEDAW provides a framework for developing and applying equality norms to specific conditions in different countries and legal systems. This international bill of rights for women also stands as an agenda for action to guarantee these rights. In its preamble, the convention states that extensive discrimination against women continues to exist, and it emphasizes that such discrimination violates the principles of equality of rights and respect for human dignity. Article I of the convention defines discrimination against women as "any distinction, exclusion, or restriction made on the basis of sex in the political, economic, social, cultural, civil or any other field."

Article I further defines discrimination against women as anything that can bring about unequal treatment between men and women while carrying out their livelihood. This article groups married and unmarried women together. Article 13 stipulates in part that women have the right to obtain family benefits, while Article 15 states, *inter alia*, that women have equal rights with men in matters of law related to business contracts. Under Article 16, women are empowered to own and give away their property. State parties to the convention are obliged to refrain from acts that would defeat the object and purpose of the convention—namely, the elimination of *all forms* of discrimination against women. Each party must report on its progress to the committee. The implementation of the convention is monitored by the Committee on the Elimination of Discrimination Against Women (CEDAW), which is composed of 23 experts elected by state parties. The Committee meets annually in New York.

Gender discrimination is currently receiving the attention of the world community. The position of women in law and society has attracted public sympathy and interest.

Apart from CEDAW, other documents apply, such as the African charter—a regional bill—and national Constitutions that prohibit discrimination on the ground of sex in all categories of rights. Having ratified the CEDAW treaty, Nigeria is generally bound by its provisions, so any laws or procedures to the contrary must be declared null and void. Unfortunately, Nigerian courts have long sustained some of the customary practices that subjugate women, as demonstrated in the case of *Nwanya v. Nwanya*.<sup>6</sup> The case of *Mojekwu v. Mojekwu*,<sup>7</sup> however, has marked a turning point. The Court of Appeal in that case struck down, as repugnant to natural justice, equity, and good conscience, the Oli-ekpe custom in Ibo land, which bars women from inheriting land.

The law of succession basically deals with testate methods of inheritance, and the rules governing them differ. When a man dies, the devolution of his self-acquired property depends upon whether he has made a will.<sup>8</sup> If he has made a will, the property devolves according to the will.<sup>9</sup> If no will exists—that is, under the condition of intestacy—his property devolves in accordance with the applicable customary law. Discriminations exist in both cases, but especially under intestacy. Discrimination thus exists in the method of distribution under various customary laws. Unfair practices allow some to inherit while others cannot.

The discriminatory aspects of property inheritance under customary law in Nigeria manifests in different forms and scope ranging from primogeniture rules, right of spouses, rights of adopted children and rights of illegitimate child; although it is generally agreed rule under customary law of intestate succession and inheritance that succession goes by blood.

### **3.0 PRIMOGENITURE RULE**

The general rule of customary law where a land owner dies intestate is that his self-acquired property devolves on his children as family property.<sup>10</sup> The head of the family is the eldest male child of the deceased who occupies the family house and holds same as a trustee of the other children, male or female. However, the rule is different in certain localities.

In Bini and Onitsha communities, for instance, the deceased's property devolves to the eldest son exclusively, in accordance with the rule of *primogeniture*, under which the eldest son is expected to look after younger children<sup>11</sup> and may sell the house over the wishes of other children or treat it as his own property.<sup>12</sup> Among the Markis group of the Verbe of Northern Nigeria, the rule of *ultimogeniture* applies, whereby inheritance is by the youngest son, which applies to bar other heirs of the deceased landowner.

The rule of primogeniture is plainly unfair to the younger children of the family, hence it is repugnant to natural justice, equity, and good conscience.<sup>13</sup> Nonetheless, it has been argued that the system accords with native ideas, particularly the role of the eldest son as the "father of the family"<sup>14</sup> who has a legally binding obligation towards the children.<sup>15</sup> Primogeniture or ultimogeniture has also been identified as "a probable solution to the problem of fragmentation in land tenure,"<sup>16</sup> which has hindered large-scale agriculture and economic development.

The right of the eldest surviving son to succeed his father in the headship of the family is automatic and arises from the fact of seniority. Only the father, as the owner and creator of the family property, can deprive the eldest son of this right, by a valid direction made with the aim of ensuring that the affairs of the family are properly managed by a person qualified on the grounds of intelligence and education to do so. In the absence of any such direction by the father, the right of the eldest son cannot be taken away without his consent. But a right that arises by the operation of the law is liable to be abrogated or modified by a change in customs. An example of such right is the right to Igiogbe house, which exists in Benin kingdom.

#### 4.0 THE RIGHT OF SPOUSES

In customary law generally, a husband cannot inherit his deceased wife's share of her family property, for the husband is treated as a stranger who is not entitled to share in property of the family of which he is not a member. In *Caulcrick v. Harding*,<sup>17</sup> the deceased landowner left property for his three daughters, one of whom was the plaintiff's deceased wife. The plaintiff's husband claimed a third share of the property by virtue of his deceased wife's right. It was held that he plaintiff had no such right. *Stricto sensu*, a widow is not entitled to share in the property of the deceased husband at customary law.<sup>18</sup> An exception is where she had occupied an apartment during her lifetime, except where she has taken another husband (other than the brother of the deceased husband), in which case, she loses her right of occupation and may be asked to leave.<sup>19</sup>

This seemingly unfair practice exists by virtue of intestacy, for under native law and custom, the devolution of property follows the blood. Consequently, a wife or widow, not being of the blood, has no claim to any share.<sup>20</sup> An exception to this practice does exist: when a widow chooses to remain in her husband's house and in his name, she can do so even if she has no children. This is to ensure her maintenance. Although she cannot transfer any of the husband's property outright, if the husband's family fails to maintain her, then she has a qualified right to let part of the house to tenants and use the rent to maintain herself.<sup>21</sup>

Her interest in the house or farmland is merely possessory and not proprietary, so she cannot dispose of it. In one instance, a widow remained with her only daughter in occupation of the late husband's house at Onitsha, improved it, let part it to tenants from whom she collected rent, and in all other respects treated the house as her own for 44 years. Upon her death, she devised it by will. The bequest was ruled void against the husband's relations, on the principle of *nemo dat quod non habet*.

This custom offends the principles of natural justice, equity, and good conscience. Why? The widow, during their marriage and during the deceased husband's life, might have toiled to bring about the acquisition of such property. It is therefore not only repugnant to natural justice, but also morally repulsive to deprive her of ownership of such property. Even the Holy Bible states that "a man shall leave his parents and cleave unto a woman and shall become one flesh."<sup>22</sup> How can a mortal alter the creation of God? Husband and wife are truly one body and one blood, hence they should share what belongs to them equally, and should be free to exercise their rights via devise.

On the other hand, a husband's deprivation of inheritance in his deceased wife's share of her family property is justified. The principle of *nemo dat quod non habet* aptly applies here. The same condition exists as regards deceased wife's ante-nuptial property. Nonetheless, his right of inheritance in his deceased wife's real property depends (conditional), first, on whether the wife left any surviving issues; and, second, whether the property was acquired before or during overture; but certainly, wife's ante-nuptial property goes to her children jointly and in default of her children goes to her relatives and never to the husband, though he has a right over personal property. This customary principle was affirmed in the case of *Nwugege v. Adigwe*.<sup>23</sup>

This is an administrative suit from Onitsha in which the claim by the head of the family of a deceased widow for a letter of administration of her estate was opposed by her husband's son by another wife. The latter was held to be the proper person to administer the estate. The court rejected another proposition of the customary law of Onitsha laid down by six redcap chiefs who gave evidence in the case: that where a man marries a woman who has a house and lives with her as a husband and wife there, the house goes to the wife's family on her death. The court gave as a reason for rejecting this proposition that in laying it down, the chiefs explained that under their custom, it was unheard of that a man marries a woman and lives with her in her house, which is equivalent to accepting the custom that a woman should marry a man and not otherwise.

But since there is no express rule of customary law covering the specific point, the court was free to arrive at a decision in accordance with the principle of natural justice, equity, and good conscience; consistent with the general tenor and spirit of customary law. The general principle of customary law is that a wife's property acquired before marriage which is not taken to her husband's house cannot be inherited by the husband or the husband's family. The exception, property taken to the husband's house, contemplates only movable property; since realty cannot be taken, it implies that it cannot be inherited.

As regards ante-nuptial property, the general rule is that such property remains property of the wife unless it is mixed with the property acquired during overture. Property acquired during overture, in a situation where the wife is predeceased by her husband and all her children, will go to the husband's relatives. The inheritance of wife's property by her husband in default of issues contradicts the general principle that devolution follows the blood but is explained by the fact that marriage has the effect of transferring the wife to the husband's patrilineal and subjecting her to the control of her husband and his patrilineal. This principle accords with the customs of Netembe and Kalabari people, where under Iya marriage, the wife and the children have the right of inheritance.

Among the Yorubas, the Idomas, and perhaps a few other communities, a husband cannot inherit (realty) from the wife just as the wife cannot inherit from him. If she dies without issue, her property passes to her siblings. It is also the law that a husband cannot inherit property acquired by the wife during separation.<sup>24</sup> A point which requires clarification and justice is the position of customary law that inheritance follows the blood (general rule) and the issue of property (realty) acquired through concerted efforts of both husband and wife. Should the wife not be accorded a right of inheritance here? It is submitted that this should be an exception to the rule; for to do otherwise amounts to injustice and contravenes the Biblical injunction that "husband and wife are but one flesh."

It also violates section 42(1), which bars discrimination and deprivation on grounds of sex, and section 43, which stipulates that subject to the provisions of this constitution, every citizen of Nigeria shall have the right to acquire and own *immovable property* anywhere in Nigeria.

It also contravenes Article 16 of CEDAW, which empowers women all over the world not only to own immovable property but also to give away such property at will. A similar right is guaranteed in Article 2 of the African Charter:

Every individual shall be entitled to the enjoyment of the right and freedom 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 or social origin, fortune, birth or other status.

Besides, the Charter of the United Nations begins by affirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." In fact, the achievement of international organizations in promoting and encouraging respect for human rights and fundamental freedoms for all, without discrimination on the grounds of, inter alia, sex, constitutes one of the purposes of the United Nations, according to Article 1, paragraph 3. A similar provision is made under Article 13 para. 1(b) while Article 76(c) encourages respect for human rights and fundamental freedom for all without discrimination on the grounds of race, sex, etc. The Universal Declaration, though not a treaty, has with time become a basic component of Customary International Law, binding on all states, and not only members of the United Nations.<sup>25</sup> The Universal Declaration is an authoritative definition of human rights, setting out the principles and norms of securing respect for the right of man everywhere in the world. It has been described as the great charter of liberties and common standard of achievement for all people.

## **5.0 THE RIGHTS OF THE ADOPTED CHILD**

Adoption of children is rare and known mostly in English Law. The position of an adopted child as regards succession is not very clear. It has, however, been established that the right of an adopted child is inferior to that of the legitimate child of the blood.

### 5.1 Procedure for Adoption

Among the Efiks of Nigeria, the procedure for adoption requires the presence of members of the adopter's family, to whom the adopter formerly nominates his/her adoptee. An adoption which fails to conform to this procedure confers no right upon the adopted child. Therefore an adopted child's right to succeed to any property depends on the validity of the procedure.<sup>26</sup> For the Yorubas, it has been stated that an adopted child cannot inherit from his/her adoptive parent. However, in the case of **Administrator General v. Tuwase**,<sup>27</sup> the estate of a Yoruba woman from Ijebu who had died without issues, was claimed by her husband, from whom she had been separated for 44 years before her death; by her adopted child, who had predeceased her, through the child's descendants; and by a number of collaterals descended from her maternal grandfather, including an adopted daughter of an aunt. The claim of the husband was rejected. It was ordered that the descendants, including the adopted children of the deceased grandfather, should take one share each, while her direct descendants--i.e., the surviving adopted child--should share per stirpes. This suggests that the right of an adopted child is inferior to that of a legitimate child of the blood, for the direct descendants, were they of that blood, would have inherited the estate to the exclusion of all these other collaterals. Why this discrimination? Adoption arises either where a couple could not have children of their blood or where they have such children but the condition of the adopted child arouses their sympathy, as when a child is predeceased by his or her parents.

In either of the above cases, that inherent sympathy exists. It is only reasonable that an adopted child be treated as being of the blood of the adopters, otherwise the essence and spirit of the adoption is defeated. Furthermore, since such inferior position or status is accorded the adopted child, he or she is discriminated against, which violates the constitutional provision of S. 42(2) of the 1999 constitution: "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

To be sure, discrimination, when it consists of an ability to differentiate right from wrong and good from bad, is an essential part of everyday life. But discrimination becomes morally unacceptable when it treats a person less favorably than others on account of a consideration which is morally irrelevant.<sup>28</sup>

S. 42(1) of the 1999 Constitution was expounded by the Court of Appeals in the case of **Uzoukwu v. Ezeonu II**.<sup>29</sup> Appellants in the case argued that the respondent referred to, treated, and regarded them as slaves, descendants of slaves, or persons of inferior stock, and for that reason prevented them from enjoying certain rights, such as owning property, taking titles, or taking part in developmental activities of the town. The respondents, it was alleged, required the appellants to observe a practice of "redemption," in order to be recognized as persons of equal status. Under redemption, the appellants would, among other things, slaughter a cow or goat, or make other offerings or sacrifices to the respondents. The appellants at the lower court argued that as citizens of the Federal Republic of Nigeria, they have fundamental rights as guaranteed by section 31 and 39 of the Constitution of the Federal Republic of Nigeria 1979, not to be discriminated against on the basis of whatever circumstances attended their birth, or to be subjected to any human indignity, or to be called or regarded as "second class citizens," "strangers," or any other inferior/lower social class than other citizens of Nigeria. They contended that their constitutional rights guaranteed in sections 31 and 39 of the 1979 Constitution of Nigeria are violated by the practice of "redemption" to appease members of the respondents' family in order to "cleanse" the applicants of their "slave blood" or "inferiority" or "stranger-element" or any other usage, norms, ethos, or other customary practice.

Though the appeal was dismissed, the Court of Appeals held *inter alia* that the discrimination envisaged against a person by S. 39(1) 1979 Constitution must be based on law, stating further that the protection provided by S. 39(1) can be invoked only if the condition therein stated is the *sole* reason for discriminating against the person; it cannot be invoked if other reasons are adduced. Consequently, it is reasonable to invoke this provision to protect the right of a person tagged "adopted child," for it is unconscionable, immoral, and inhumane to pretend that a child is fathered whereas in practice, parental rights are deprived. To this extent, this customary practice is inconsistent and incompatible with the basic norm and should therefore be outlawed. It is hereby submitted that S. 39(1), which deals with discrimination of various types, should not be enforceable solely against the state; it should be made enforceable against individuals as well. This is so because that state may be less likely to discriminate than a vindictive individual.

## **6.0 THE RIGHTS OF AN ILLEGITIMATE CHILD**

An illegitimate child has been referred to as a child born out of wedlock, while a legitimate child is an issue of wedlock. Plainly, a child born out of wedlock whose paternity has been acknowledged by his natural father is as much legitimate as one born in wedlock. That is not the case, however. A child born out of wedlock during a marriage is illegitimate under the Act, whether or not the child is acknowledged by the natural father; unless by custom, someone else has a prior claim to paternity of such a child.

Where a child is born out of wedlock, the first question is who is entitled to the paternity of the child? The question is essential, particularly in a polygamous setting. The controversy as regards paternity has always been between the natural father and the mother's father or the person who has paid the bride price on the mother. Customs vary. A majority of communities favor the claim of the man who had paid the bride price of the mother. This is the position so far as customary practices and principle are concerned.

As for the judicial position, the Supreme Court holds that paternity should go with blood, and that any custom which prefers the provider of the bride price or the mother's father to the natural father is repugnant to natural justice, equity, and good conscience.

It was so adumbrated in ***Edet v. Essien***.<sup>30</sup> But in ***Amakiri v. Good-Head***<sup>31</sup> the custody of an illegitimate child was awarded to the family of the mother's husband. This is a classic situation where the rule of natural justice altered a repugnant customary practice, or a sharp divergence between judges made law based upon advanced ethical values reflecting the facts of social life, for in almost all communities in Nigeria, it is considered an outrage that a man should be deprived of the paternity of a child from a woman on whom he had paid the bride price.

### **6.1 Succession Rights of an Illegitimate Child**

The practice varies among various communities. Among the Yorubas, illegitimate children are accorded equal rights as their legitimate counterparts; the same is true of the Annang, Ibibio, Oron, Aba-Ngwa, and Nsukka, among others. In some other communities, illegitimate children are deprived of succession rights. The courts appear to support this reprehensible practice, as demonstrated in ***Onwudinjo v. Onwudinjo***,<sup>32</sup> where the court rejected the claim of an illegitimate child to share in the intestate estate of his father on the ground that no evidence had been laid in support of such claim, but supported a claim by a child where paternity had been acknowledged. With due respect, this is a miscarriage of justice by **Justice Ainley, C.J.** (as he then was). His decision is contrary to S. 39(2) of the 1979 Constitution, which assimilates into society citizens born out of wedlock who would ordinarily have been disinherited under English Law or their customary law. Similarly, S. 42(2) states, "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth." The Constitution is the foundation of all legalities in Nigeria. It is the duty of the court not only to protect it but also to promote its operation to achieve its

objective of social engineering through articulate and purposeful interpretation of the law. Furthermore, provisions in America and Europe provide for equal rights for children born in or out of wedlock. Though the European Convention does not contain any explicit provision to this effect, the *European Court of Human Rights* held in ***Marckx v. Belgium***<sup>33</sup> that no objective and reasonable justification existed for denying the illegitimate any entitlement on intestacy in the estate of members of her mother's family.<sup>34</sup>

In ***Mojekwu v. Mojekwu*** the Nnewi customary law of Oli-ekpe was struck down under the repugnancy principle by the unanimous judgment of the Enugu Division of the Court of Appeals. The basis of the decision was that the customary law in question which "permits the son of the brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female child" was a clear case of discrimination and hence inapplicable.

By contrast, ***Onwudinjoh v. Onwudinjoh***<sup>35</sup> in effect holds that any custom according a right of legitimacy to an illegitimate child may be repugnant to natural justice or contrary to public policy. The morality behind this reasoning is questionable, to say the least. Although sexual promiscuity may be frowned upon, there is no justification in punishing an innocent offspring.

Consider this viewpoint:

There is nothing morally reprehensible in allowing the illegitimate children of a man to share with the legitimate children in his estate thereby alleviating the many social stigmas from which they already suffer. And as nature would have it, sometimes they become the breadwinners of the family...<sup>36</sup>

As for the obligations of the lawyer, consider this:

Lawyers ... shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.<sup>37</sup>

Necessarily, the duties and responsibilities of lawyers in Third World countries, most of which are under autocratic regimes, should be greater. In the context of a developing country, the lawyer must, in the words of Zambian ex-President Kenneth Kaunda,

be something more than a practicing professional man; he must be more even than the champion of the fundamental rights and freedoms of the individual. He must be, in the fullest sense, a part of the society in which he lives and he must understand that society if he is to be able to participate in its development and the advancement of the economic and social well being of its members.<sup>38</sup>

Similarly, Gower, a renowned jurist, acknowledged that the public responsibilities of the legal profession in a developing country are greater than those in highly developed states. According to him, developing countries need courageous lawyers with the highest ethical standards if the rule of law and personal freedom are to be preserved against corruption, nepotism and elitism, as well as military and police power.<sup>39</sup>

The legal profession therefore ought to be concerned with more than merely its bread and butter. Lawyers should use the law as an instrument of social change. The lawyer should engineer desirable social and economic changes under the law. For the lawyer to perform effectively, however, the bar must be independent. The International Commission of Jurists in the Declaration of Delhi 1959 recognizes that an organized legal profession free to manage its own affairs is essential to the Rule of Law. The independent bar, too, should support and sustain an independent and fearless bench.

## RECOMMENDATIONS FOR REFORM

Since the law of inheritance touches every individual in the society and indeed the community at large, it merits close attention. The law must be reformed to redress the loopholes, the inadequacies, and the harsh consequences of some customary law applications. A society can be socially engineered in an effective way only if the law is fair, just, and humane. Indeed, operation of the rule of law respects the aspirations of all and consequently maximizes the happiness of all. In the spirit of utilitarianism, the greatest happiness for the greatest number, any law that pursues this end is an instrument of social engineering.

In Nigeria, customary law lacks the above-mentioned ingredients of a virile legal system. Moreover, many uncertainties exist in succession and inheritance law, which create conflict and acrimony among contending interests.

The following recommendations are submitted.

### 1. Codification of Customary Law

Codification is essential for a reliable legal system, especially in a developing such as Nigeria, where less regard is paid to the rule of law, even where the law is adequately enshrined (the constitution). Consider the human rights abuses by both the state and group(s), particularly during the military dictatorial regimes.

Codification of the customary law will bring about certainty. A society's law commands respect and obedience where the individual knows the governing law, his rights and obligations, and the punishment for violating it. Our customary law, especially in the area of inheritance, is uncertain as demonstrated by *Dawodu v. Danmole*;<sup>40</sup> where the unsuccessful application of one method of distribution, per stirpes (Idigi), will lead to another method (*Ori Ojori*). This law leaves room for abuse, oppression, and exploitation of the weak, because in most cases, the head of the family as a last resort will be asked to choose a more convenient system of distribution. He will often decide the option that will be more beneficial to his own interest. In this process, he would have breached one of the demands of natural justice: "a man must not judge in his own case."<sup>41</sup> In such a situation, fair judgment cannot be obtained (*nemo iudex in causa sua*).

Codification will weed out all irrelevant areas and uncertainties in the law, leaving certainty behind. Codification respects moral and legal considerations, unlike most aspects of our country's law.<sup>42</sup>

Codification will clarify the multiple systems of customary law, but that is not enough.

### 2. Unification of Customary Laws

The unification of customary laws will apply a single set of laws to all major tribes in Nigeria, eliminating the problems of uncertainty and inconsistency that multiple sets of law impose.

### 3. Harmonization

Harmonization of the laws is desirable, as with the Land Use Act Section 5, which recognizes statutory right and customary right of occupancy. This system has successfully been implemented in Ghana.

### 4. Harmonization of the Principles of Natural Justice with Customary Law



Harmonization of the principles of natural justice with the customary laws is also recommended. This is analogous to the role of equitable principles in the common law, so that natural justice applies where there is a lacuna in the customary law application. Equitable principles and common law can flow in the same channel though their waters do not mix, contrary to the predictions that they would invariably create rancor. Like common law and equity, customary law and principles of natural justice can be harmonized into a single legal system and be applied side by side where necessary, the objective being to supplement the customary law and not to supplant it. According to a judge in a decided case, it is difficult to define "natural justice" and "good conscience,"<sup>43</sup> but since the court was familiar with the doctrines of equity, the rule of native law before him was declared repugnant to English system of equity and hence inapplicable. Happily enough, the decision was overruled on appeal. The court should always engage in philosophical discussion and attempt to give a lengthy exposition of their reasons for their conclusions. The conflicting position in the above case does not end here. In a similar circumstance and specifically in the application of the equitable doctrine, **Uwais C.J.** (as he then was) in ***Osinjugbebi v. Saibu & Ors***<sup>44</sup> stated the following:

Equity is a rule of English law and has not become part of Yoruba native law and custom or indeed any native law and custom in the context of Nigeria, there is nothing in our laws as equity according to Yoruba Law and Custom.

This view of Justice Uwais has received some criticisms as contrary to Yoruba law and custom and indeed Nigerian customary law generally. It was surprising that a judge of the Supreme Court should say that he does not know the meaning of "equity," which simply means fairness, conscience, good faith, and the like—all of which of course are embedded in our laws and customs. It is equally surprising that the trial judge in ***Lewis v. Bankole***<sup>45</sup> could say that it is difficult to define "Natural Justice" and "good conscience" and therefore the concepts need not apply. "Natural Justice" simply means justice based on innate human principles, or justice determined by an innate human sense of justice, or in a broad sense an inherent right to have fair and just treatment at the hands of the rulers or their agents.

It serves as "modern" natural law limitation on the powers of the state. Hence, decisions affecting the rights of the citizens require a fair hearing (*audi alteram partem*), and the decision maker must not be a party to the dispute or interested in the subject matter of the decision or otherwise biased (*nemo iudex in causa sua*). Natural justice cuts across all human endeavors and confronts any judge in any legal system. The principles should be applied without hesitation and reservation. No judge should claim ignorance of this noble weapon, since such a claim is tantamount to recklessness and negligence.

## **5. Application of the Principles of Natural Justice**

To cushion the harsh effect of some of the customary laws and to fill the lacuna created by them, the agencies that implement the law should apply the principles of natural justice where injustice otherwise would result.

Codification, unification, and harmonization will produce certainty in formulating, applying, and implementing the law, leavened as necessary by the natural justice principle. This will shape the customary law in a more civilized manner that respects the interests of all, no matter the status, race, sex or circumstance of birth. This in turn will enthrone law as tool of social engineering for achieving the object of utilitarianism – the greatest happiness of the greatest number, the objective of laws of every civilized state.

Improving the customary law with regard to property inheritance should be a continuous process until the law seeks to produce the greatest happiness of the greatest number. At that point, our law can be compared with its English counterpart and no longer tagged as "barbarous," whether rightly or wrongly.

## 6. Promoting the Role of NGOs

Nigeria and indeed other African countries should encourage and promote the role of non-governmental organizations. Among many other activities, NGOs have been educating, enlightening, and informing women and the society on the need to recognize and eliminate discriminatory gender practices in our customary law. Especially valuable work has been done by such NGOs as Women in Nigeria (WIN), Women's Aid Collective (WACOL), and Women Organisation on Gender Issues. The current changes in the law and practice in some of the Eastern States resulted from the efforts of NGOs such as WACOL.

NGOs wrote to the State House of Assembly concerning the Widows Bill.<sup>46</sup> A letter from WACOL in 2000 stated as follows:

Women's Aid Collective (WACOL) is a non-governmental, non-profit organization registered with Corporate Affairs Commission (CAC) (**No. RC. 388132**) and the Federal Ministry of Justice. WACOL is committed to helping women and adolescents in need. Our vision of a democratic society free from violence and all forms of abuses, where human rights of all, in particular women, children and adolescents are recognized in law and practice.

With regards to our Women's Rights Project, WACOL's programmes are targeted at total empowerment of women. WACOL gives legal assistance and counseling to women, girls and victims of human rights abuses. Under our Legal Aid Project, WACOL has many cases relating to Inheritance and Property Rights, all affecting widows. One of such pathetic cases, evidencing the hardships of widows was brought to your attention during our advocacy visit in commemoration of the "African Women's Day" and "Day of Action for Women's Equal Rights to Equal Inheritance in Africa" which took place on July 31, 2000.

You would recall sir, that the case was that of Mrs. Lucy Ndu, a 79 year old widow whose right to shelter, housing and inheritance was violated by her step-son who removed the entire roofing of a house where she is living just to drive her away from her deceased husband's estate. This is just an example of a heartbreaking story that we as an organization receive on a daily basis.

We hereby, wish to recommend the Honourable House for considering the above bill currently before it.

In solidarity with Women in Enugu State and our sister NGOs in South East Zone, we wish to register our unalloyed support in the passing of the above bill.

We sincerely believe and have the firm conviction that the passing of the bill will to a large extent not only redress the problems of widows, which are very rampant in all the Igbo speaking states of Nigeria but also drastically reduce the cumulative breaches of human rights of women.

**We therefore look forward to the support and co-operation of the House in the passing of the bill on THE PROHIBITION OF INFRINGEMENT OF A WIDOW'S FUNDAMENTAL RIGHTS LAW.**

In 2001, WACOL wrote proposed specific amendments to the bill.

**Niki Tobi JCA** (as he then was) in ***Mojekwu v. Mojekwu***<sup>47</sup> gave a wise decision when he said "we need not travel all the way to Beijing to know that the Nnewi Oli-ekpe Custom is repugnant to natural justice, equity and good conscience." This pronouncement has been rejected by the Supreme Court, however, in **Uwaifo JSC** in ***Mojekwu v. Iwuchukwu***,<sup>48</sup> on the principle of fair hearing.

I cannot see any justification for the court below to pronounce that the Nnewi native custom of Oli-ekpe was repugnant to natural justice, equity and good conscience ... it would appear, for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties. I find myself unable to allow that pronouncement to stand and in the circumstances, and accordingly I disapprove of it as unwarranted.

The above pronouncement would appear to cut short the gender celebration in ***Mojekwu v. Mojekwu***. Apart from reasons of fair hearing, I would not subscribe to **Uwaifo JSC's** pronouncement. Aside from the fact that Nigeria is part of the international community, it is very difficult to rationalize the views of **Uwaifo JSC** with the African charter, protocols, and conventions for the elimination of all kinds of discrimination against women.<sup>49</sup> Still, one can understand his stance in defense of Oli-ekpe. The background of a judge more or less affects his verdict on customary issues. The better approach was that of **Niki Tobi JCA** (as he then was) in forbidding discriminatory inheritance practices in Igbo land against females and burying the Nrachi marriage inherent in that custom.<sup>50</sup>

### Notes

<sup>1</sup> Reginald Akujobi Onuoha, LL.B., LL.M., is former Research Fellow, Office of the Vice-Chancellor, University of Lagos, and now a Lecturer in the Faculty of Law, University of Lagos.

<sup>2</sup> See T.O. Elias: **Nigerian Land Law** (1971) 4 th edn., Sweet & Maxwell London, chapter 8, p. 120. S.N. Obi: **Family Law in Southern Nigeria** (1966) p. 880. C.O. Olawoye: **Title to Land in Nigeria** (1974), University of Lagos/Evans Brothers London, chapter 6. B.O. Nwabueze: **Nigerian Land Law** (1982), Nwamife Publishers, Enugu, p. 86. Smith, I.O.: **Practical Approach to Law of Real Property** (1999), Ecowatch Publications Lagos. Finine Fekumo: **Principles of Nigerian Customary Land Law** (2002), F & F Publishers, Port Harcourt.

<sup>3</sup> A striking example of charges is the evolution of Nuncupative Wills in Customary Law and the use of will in English form to affirm or vary customary rules of inheritance.

<sup>4</sup> All the state High Court Laws in Nigeria provide for the enforcement of only customary laws that are not repugnant to Natural Justice, equity and good conscience. See example of S.3 Cap 60 Laws of Western Nigeria 1959; Cap 49 Laws of Northern Nigeria 1963.

<sup>5</sup> For further illustrative patterns see: Derret, J.O. (ed.), **Studies in the Laws of Succession in Nigeria**, Oxford University Press London, 1965.

<sup>6</sup> (1987) 3 NWLR (pt. 62) 697.

<sup>7</sup> (1997) 7 NWLR (pt. 512) 283.

<sup>8</sup> ***Idehen v. Idehen*** (1991) 6 NWLR at 198.

<sup>9</sup> ***Lawal Osula v. Lawal Osula*** (1995) 9 NWLR (pt. 419) p. 259.

<sup>10</sup> See ***Suberu v. Sumonu*** (1957) 2 FSC p. 33, ***Abeje v. Ogundairo*** (1967) LLR p. 9.

<sup>11</sup> See Oloyede: **Modern Nigerian Land Law** (Evans Brothers) 1989 p. 153.

<sup>12</sup> See Elias: **Nigerian Land Law**, *ibid.*

**13** That was the view of the court of first instance in **Ogiamen v. Ogiamen** (1967) NMLR p. 245 at p. 247.

**14** See **Ehigie v. Ehigie** (1961) 1 NMLR p. 307 at p. 309.

**15** See Obi: **Modern Family Law in Southern Nigeria** (1966) p. 337.

**16** Oloyede, *op. cit* at p. 157.

**17** (1929) 7 NLR p. 48.

**18** See **Nezianya v. Okagbue & Ors.** (1963) 1 All NLR p. 352.

**19** *Ibid.*

**20** **Shogunro Davis v. Shogunro** (1929) 9 NLR at 79/80; (**Okonkwo v. Okonkwo**)

**21** **Nezianya v. Okagbue** (1963) 1 All NLR p. 52.

**22** Genesis chap. 2 verse 24; see also Mark 10: 6-9: "What God has joined together let no man put asunder".

**23** (1934) 11 NLR 134.

**24** **Administrator General v. Egbunasupra.**

**25** Sohn cited by Thomas Buergenthal in **International Human Rights in a Nutshell** pp. 29-32, quoted in Eze, O.: "Democracy, Human Rights and the Nigerian Judiciary" (1993) **JHR** LP. Vol. 3,2,3, pp. 69-70. It also asserts that the Universal Declaration has formed part of the Jus Cogens – Peremptory norms of customary international law considered as binding on all nations.

**26** See **Martin v. Johnson** (1945) 12 NLR p. 46.

**27** (1946) 18 NLR at 88.

**28** Feldman, D. et al.: **Civil Liberties and Human Rights in England and Wales** (New York: Oxford University Press Inc. 1993) pp. 854-855.

**29** (1991) 6 NWLR (Part 290) p. 708 C.A.

**30** (1982) 2 NLR.

**31** (1923) 4 NLR at 101.

**32** (1957) 2 ENLR.

**33** Page 212 Human Rights Laws and Practices in Nigeria.

**34** Series A No. 31, Judgment of 13 June 1979.

**35** (1957) 1 ENLR 1.

**36** Nwabueze B.: **Nigerian Land Law**, *ibid.*, p. 101.

**37** Para. 14 of the Basic Principles on the Role of Lawyers adopted at the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

**38** Address to the Law Society of Zambia on April 24, 1970 (quoted in Orojo, O.L.: **Conduct and Etiquette for Legal Practitioners** (London: Sweet and Maxwell, 1979) p. 45.

**39** Gower: "Independent Africa: The Challenge of the Legal Profession" (1966) p. 102 quoted in Orojo, *ibid.*, p. 46.

**40** (1958) 3 FSC 46 (1962) 1 All NLR 702.

**41** See **State Council Service Commission and Another v. Burugbe** (1984) 7 SC 19; **Metropolitan Properties Ltd. v. Lannon** (1969) 1 QB 577, 599. **Okoduwa v. State** (1988) 2 NWLR pt. 76, 333. Attesting to the universality of natural justice, **Karibi-Whyte JSC** in **Adeniyi v. Governing Council of Yaba College of Technology** (1993) 6 NWLR (pt. 300) 526, 449 stated that the rule is of ancient origin and common to mankind, recognized by the ancient Greeks and Romans, enshrined in the Holy Bible, and recognized as part of African culture and philosophy of justice.

**42** E.g. the Osu Caste, Disinheritance of female child of property right – **Mojekwu v. Mojekwu** and the disinheritance of illegitimate child, to mention but a few.

**43** **Lewis v. Bankole** (1908) 1 NLR 81.

**44** 1982 9 SC 904.

**45** *Supra.*

**46** Joy Ngozi Ezeilo, Legislative Advocacy for Women's Human Rights, *Women's Aid Collective* (2001) pp. 35-36.

**47** *Supra.*

**48** (2004) 7 MJSC p. 165.

**49** See S. 42(1)(2) of the 1999 Constitution, Articles 2 and 5 of the CEDAW, S. 18(1) of the High Court Laws of Anambra State 1987.

**50** See **Mojekwu v. Ejikeme** (2000) 5 NWLR pt. 657 402 where it was testified thus: "The Nrachi Ceremony is done to enable a daughter bear children in her father's compound in order that the children if males will represent the father of the mother. Such children if males, will inherit the mother's father's property." Thus Nrachi may be seen as the customary equitable intervention to cure the mischief in Oli-ekpe, yet it is still repugnant to natural justice, equity and good conscience.