



AKUNGBA LAW JOURNAL

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The Legal Perspective of the Protection of Women and Children in Edo State

OSUNTOGUN ABIODUN JACOB*

Abstract

Protection of women and children has been the international challenge that the world has been battling to surmount. As a result, gender issues have become a recurrent theme in local, national and international gatherings. In spite of the efforts that have been dissipated so far to combat this menace, particularly at the global level, the challenge still remains. This is due to the fact that most gender issues are deeply rooted in the cultures of the people and that should demand for a grass root approach to address them. In light of that recognition, this article examines how the law of Edo State protects women and children from unfair customs and discriminatory practices. It discusses the cultures of Edo State people, their peculiarity and how those cultures violate the rights of women and children. Thereafter, different mechanisms adopted to protect them are also discussed and recommendations are made on how the challenge can be addressed.

1. Introduction

This article examines the extent to which the law of Edo State protects women and children from unfair customs and discriminatory practices. An inquiry into the law of Edo State is essential because of three reasons. Firstly, Edo is rich for its cultural background which is gender biased and does not promote the course of women and children. Secondly, Edo State Government is aware of the cultural peculiarity of the state and has been taking some steps to address the lopsidedness in the cultural background of the state. Thirdly, Nigeria is a federation consisting of 36 States in which Edo State is one.¹

Nigeria operates a presidential system of government where power is divided between federal government under an executive president at the centre and 36 state governments headed by executive Governor over each of its constituent units,² while the Federal Capital Territory is presided over by one of the Federal Ministers.³ Indeed, the principle of federalism makes it possible for each state to have its own legal system to administer criminal and civil administration of justice in its area of jurisdiction. The consequence of that privilege is that each state can

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¹ S3 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.

² *Ibid*, S.5 .

³ *Ibid*. S.302.

adopt the best legal system that is suitable and convenient to its people in its jurisdiction. It is in that regard that the law of Edo State is important.

2. A peep into the plight of Edo Women and Children

Women and children are the most vulnerable people not only in Nigeria but in Edo State. Their plight is horrible. At the beginning of this article, it is important to summarize what they have been forced to go through in this part of the society. To start with the children, as weak vessels they were forced to hawk instead of going to school. Thus, their right to education is being violated.⁴ They are also forced to work in mining sites and agricultural firms like plantations, where their right to dignity is violated, since they are subjected to a slave like existence and work under unbearable conditions.⁵ In some situations, they are forced into marriages without their consciences.

Indeed, their plight is not limited to harsh conditions they are subjected with in Nigeria. The foreign employers have been complicit in the injustice meted to them, as they are forced to work in unbearable labour conditions not only in Nigeria but also in abroad. This occurs due to the handiworks of some Nigerians who trafficked them across the territorial boundaries of foreign countries under the disguise of helping them only to force them into prostitution and slavery. With regard to women, it is obvious that women are the worst culprits, when it comes to the unfair practices and crimes associated with our cultures and traditional religions in Nigeria. They have been turned into destitute, having been deprived of their rights, homes, properties and inheritances.

Unfortunately, these cultures and traditional religions have become institutionalized as customary law which has been defined as 'a body of customs and traditions which regulate the various kinds of relations between members of a given community'.⁶ It has also been aptly described as 'a mirror of accepted usage',⁷ or 'the organic or living law of the indigenous people of Nigeria' which regulates 'their lives and transactions'.⁸

⁴ Note that it has been held by the Federal High Court that the combined effect of section 18(3)(a) of the 1999 Constitution and section 2 (1) of the Compulsory, Free Universal Basic Education Act, (UBE) 2004, provides the right to free and compulsory primary education and free junior secondary education for all qualified Nigerian citizens. On this, see *Legal Defence and Assistance Project (LEDAP) GTE & LTD v Federal Ministry of Education & Anor* (Judgement) (FHC/ABJ/CS/978/15)[2017] NGHC 2 (1 March 2017).

⁵ Forced labour is defined in the International Labour Organization (ILO) Convention No. 29, as work that is performed involuntarily and under coercion. See, P029 - Protocol of 2014 to the Forced Labour Convention, 1930 which entered into force on 09 Nov 2016. The protocol is available at <http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/ILO_P_029.pdf> (last visited 8 May 2017).

⁶ Okany, M.C., *The Role of Customary Courts in Nigeria* (Fourth Dimension Publishers, Enugu, 1984) 39.

⁷ Bairamian F.J. in *Owonyin v. Omotosho* (1961) 1 All NCR 304 at 309.

⁸ Obaseki J.S.C. in *Oyewumiv. Ogunesan* (1990) 3 NWLR (Pt. 137) 182 at 207.

The area covered by this customary law is not infinitesimal, it is so wide in scope, since it covers cases dealing with contract (mainly debt), torts, land, family law and succession. Indeed, it is important to note that there is nothing wrong with the adoption of customary law as a law if not for its harsh treatment of women as insignificant members of the society and its attendant violation of human rights. Notable writers, jurists and scholars have captured most of these unfavorable practices under our customary law in succinct manner that we have no choice but to quote few of them.

One of them painted the picture of unfair treatment from the conception of a woman till adulthood. He said:

“Women suffer all forms of discrimination right from birth, some of it inflicted by other women. The female child at birth is regarded as inferior to the male child and boxed into stereotypes, she does all the chores, useful as she is, her mother risks being thrown out of her matrimonial home if she is unable to produce a male child even though it has been biologically and scientifically proven that the choice of the sex of the child is hinged on the male spermatozoa....At old age, she is branded a witch and stoned to death if married and childless...In the Southern part of Nigeria, if her husband dies even at the ripe old age of 90, she is the first suspect. To prove her innocence she is compelled to go through certain obnoxious widowhood practices such as, must shave her hair, must sleep on the floor with the corpse for days, must drink the water used in bathing deceased. Whereas, men don't go through any of these horrendous mourning experiences when they lose their wives. Widowers re-marry much faster than widows do.”⁹

Of course, Akande argues in similar vein but with more emphasis on the concept of male superiority over women under our traditional system:

“Women were non-persons. When they were not making babies or performing domestic chores and tilling the soil, they faded into anonymity. They could not own land. They could not hold titles in a society where titles were the ultimate testimony of self-actualization, they were merely pieces of property owned by the men and thus subject to whatever use they were put to. Some of these our traditions and customs permit the parents of a girl of very tender age to sell her into permanent servitude in the guise of marriage without the child's consent and there are still laws which deny a woman the right to share in her father's estate and a host of other such discriminatory laws.”

⁹ See, Carol Ajie, ‘Introduction to Women's Human Rights Law and Human Right Systems’ a paper presented under the auspices justice and Equality Programme (JEP) on 1st, June, 2009.

Ironically, the reason behind these discriminatory acts against women is because of a myth that can hardly be substantiated. As noted by a distinguished Jurist, Hon. Justice G.I.U. Udom Azogu:

“The discriminatory practices against women appear to be conceptualized even as the baby is in the mother’s womb. There is a strong traditional belief that where a pregnant woman has a very long labour, she will deliver a female child, but if the labour is short, then the result will be a male child — the explanation being that a male child takes his sword and comes out without wasting time while the female child busies herself collecting cooking utensils, brooms and the like for the servile life spelt out for in the world.”¹⁰

Since this article is about Edo State, it is important to be specific and mention few discriminatory practices against women and children in Edo State.¹¹ Of course, four of such practices should be sufficient. One, the law of inheritance under the native law and custom was not in favour of women and female children. Under the custom of Esan people, men are the natural beneficiaries of inheritance and not women. The implication of the custom of Esan people is that female children have no status or position in the family. This is due to the fact that a female child is expected to bear the name of her husband after marriage. A proverb of Esan people illustrates this as it provides that “*okhuo ile aghada bhe uku; ei bie omo khuo he ole iriogbe*” which means ‘a woman never inherits the sword’; or, ‘you do not have a daughter and name her the family keeper — she would marry and leave not only the family, but the village, a wasted asset’.¹²

¹⁰ See, Hon. Justice P.O. Isibor, Women’s Right and Status under Edo Native Law and Custom: Myth and Realities available at <<http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/WOMEN%20RIGHTS%20AND%20STATUS%20UNDER%20EDO%20NATIVE%20LAW%20AND%20CUSTOM,%20MYTHS%20AND%20REALITIES.pdf>> (accessed 23/01/2018).

¹¹ Note that in Edo State, the *Esan* people are the predominant. They live in the north west of Benin City, the capital of Edo State. For a brief history of *Esan* people of Edo State, see, Okojie, C.G., *Esan Native Laws and Customs* (Ilupeju Press Ltd, Benin, 1994).

¹² *Ibid* at 124.

In some situations, where men love their daughters more than their first born¹³ who are the trustees of the family properties, they often attempt to sidetrack this customs but often their efforts to bypass the native custom has always been futile. For example, it is possible to bestow family properties on the daughters at the expense of the eldest son. But, the elders of the land (*Odionweles*) will immediately reverse the action of the dead or living man. This is why it is said in Esanland that *olimin yiyi obe egbele khuale* ('bad laws made by a dead man can be reversed by the living').¹⁴

Two, in Esan culture, the burial of one's departed parents is a befitting duty and obligation which every person is entitled to do. It confers not only responsibility but also respectability on a person.¹⁵ He who buries his departed parents is an enviable person in the family and the public sphere. Indeed, Burial rites are a way in which an Esan person may be valued but women are not permitted to do this.¹⁶ The reason why women were not allowed to bury their parents is because the performance of burial rights and the inheritance of the deceased's properties are inter-linked.¹⁷ In Edo State, generally, particularly amongst the Bini and Esan people, the performance of burial rites is a condition precedent for the inheritance of the deceased's estate. However, in some circumstances, women can be permitted to bury their fathers if they seek the permission of Egbele (elders) but such permissions are granted on the ground that the burial rites are not to be used to inherit the family's wealth.¹⁸ In fact Okojie, argues that it is this 'attempt to keep property in the family that led to the custom where a woman, however wealthy, is not allowed to bury her father', since he who performs the burial ceremony inherits the property.¹⁹

¹³ On this, see, Christopher E Ukhun & Nathaniel A Inegbedion, 'Cultural authoritarianism, Women and human rights issues among the Esan people of Nigeria' (2005)5 *African Human Rights Law Journal*, 129 – 147. They argue rightly that 'The Esan culture places a premium on the superiority of the first son. Thus, where a man dies *intestate*, and there is evidence placed before a customary court that the deceased was subject to the customary law of his place of origin or where he lived and died, any application before the customary court for an order to administer the estate of the deceased will normally be granted in favour of the first son and other children of the deceased. An application brought by the other children of the deceased without the support of the first son will not succeed. There are two reasons for this. First, under the customary law of the Esan speaking people, if a man dies *intestate*, the first son becomes a trustee of the estate of the deceased pending the time the final burial rites of the deceased are performed by the first son. In the interim he administers the estate for and on behalf of himself and the other children. Therefore, and based on this custom, an application to the customary court to administer the estate of the deceased is a mere formality that will be granted as a matter of course, except where there are other extenuating circumstances that may prevent the court from making such a grant; for instance, where the legitimacy of the first son is in dispute'.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Three, women are made to undergo the degrading and humiliating widowhood rites at the death of their husbands. As soon as a man dies, the wife is expected to mourn him publicly for at least seven days. As soon as the body is taken away for burial, the widow is armed with "Ikhimin".²⁰ She is also armed with a bow and arrows to protect her from the husband's spirit. Earthenware pot with fire glowing from within is left at the door of the room where the widow is.²¹ During the mourning period, she is expected to take her bath at the burial ground. She will shoot the arrow into the bush and the implication of this is that the spirit of her dead husband will not come to her.²² She is subjected to seclusion during this period; 'she must eat alone with her left hand'. She must sleep on the floor with a mat since anything she comes in contact with during that period will be thrown away on the 7th day.²³ On the night preceding the 7th day, the woman must keep the vigil as she must not sleep. She is not allowed to enter into the main house, most of the time; she can hang about at the corner of the living room.²⁴ After she has been through with all the rites for 7 days, she now enters the usual 3 months mourning periods. During this period, she has to use charcoal to smear her forehead and wear black clothes continuously.²⁵

The Fourth one is the Female Genital Mutilation (FGM) which is a cultural practice that has been with the Edo People from time immemorial. The cultural belief is that FGM prevents sexual promiscuity and promotes chastity in women.

3. Repugnancy Doctrine a fair attempt to check the excesses of customary law

The Supreme Court ordinance of 1876 provided a solid foundation to the British Jurisdiction in West Africa.²⁶ However, the emergence of colonial regime did not put an end to the relevance and significance of customary law in Nigeria. In fact, section 19 of the Supreme Court Ordinance of 1876 provides for the enforcement of customary law provided such custom is not repugnant to natural justice, equity and good conscience, nor incompatible with the existing law.²⁷

²⁰ *Ibid.* Ikhimin is a many-sided fruit from a tree which looks like the oil bean tree and believed among the Edos to be much shunned by spirits.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ On this custom, see, Ethel E. Idialu, 'The Inhuman Treatment of Widows in African Communities' (2012) 4(1) *Current Research Journal of Social Sciences*, 6-11.

²⁶ British annexed Lagos in 1861.

²⁷ It provides that "Nothing in this ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such Law or Custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature".

Although, there has been difficulty with the interpretation of the three pronged test to which customary law is being subjected to,²⁸ the fact is that the repugnancy test has contributed in some significant way to alleviate the plight of the children and women from what it has been referred to as cultural authoritarianism.²⁹ This view can be substantiated by making reference to two out of many cases where repugnancy test has been used for this purpose. In *Mojekwu v Mojekwu*³⁰ the Court of Appeal Enugu held that the “*Oli-ekpe*” custom of Nnewi in Anambra State under which male children only inherit their father’s property is unconstitutional. Niki Tobi J.C.A delivering the lead judgment posited the following questions;

“Is such a custom consistent with equity and fair play in an egalitarian society such as ours? Day after day; month after month and year after year, we hear of and read about customs, which discriminate against women in this country. They are regarded as inferior to the men. Why should it be so?”

According to the learned Justice of the Court of Appeal:

“All human beings – male and female – are born into a free world, and are expected to participate of freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on ground of sex, apart from being unconstitutional is antithetical to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi “Oli-ekpe” custom are not consistent with our civilized world in which we all live today. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Accordingly, for a custom or customary law to discriminate against a particularly sex is to say the least an affront, I have no difficulty in holding that the “Oli-ekpe” custom of Nnewi, is repugnant to natural justice, equity and good consciences.”

²⁸ For example, see, Speed Ag. C. J. in *Lewis v Bankole* (1909) 1 N.L.R 82. 798. He noted that “As to the second essential, I am not sure that I know what the term “natural justice and good conscience” mean. They are high sounding phrases and it would of course not be difficult to hold that many ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a struck and accurate definition of the term”. Similarly, in *Mojekwu v Ejikeme*, (2000) 5 NWLR 402, the Court of Appeal admitted that there is difficulty in giving a precise legal definition to the words natural justice.

²⁹ See Wiredu, K., *Philosophy and an African Culture* (Cambridge University Press, U. K, 1980) 3. He argues that, within the African context, some cultures are authoritarian because they involve the manipulation of the individual’s ‘will’ through the process of the individual’s indoctrination.

³⁰ [1997] 7 N.W.L.R 283.

Similarly, in *Mojekwu v Ejikeme (supra)* the Court of Appeal held that a female child could inherit from the deceased father's estate in Igbo land without the performance of the *Nrachi* ceremony. *Nrachi* is a ceremony in which a man keeps one of his daughters at home unmarried for the rest of her life to raise issues, especially males, to succeed him. After a daughter performs this rite, she takes the position of a man in her father's house. The court examined the "*ili-ekpe* or *Oli-ekpe* custom" of Nnewi that does not recognize female inheritance unless *Nrachi* ceremony has been performed on the female in line with the Constitution and held that by Section 42 (1) of the Constitutional of the Federal Republic of Nigeria, 1999 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, be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.

In light of that, the court held that the custom clearly discriminated against the daughter of the deceased who did not perform the ceremony and is therefore unconstitutional by the provisions of section 42 of the Constitution of the Federal Republic of Nigeria, 1999. The Court was held to be repugnant to natural justice, equity and good conscience in that it legalizes fornication and encouraged prostitution, as the women remains unmarried procreating outside the bounds of marriage.

4. Protection under the Constitution

There is no doubt that customary law is the law of the land. As a law, it is enforceable irrespective of its contents. Thus, in *Onwuchekwa v Onwuchekwa*³¹ the Court of Appeal refused to reject as repugnant, a custom in which a husband is said to own the wife along with her properties. However, it is important to note that there is hierarchy of law and the Constitution of Nigeria is the *Grundnorm*.

Section 1 of the Constitution provides for supremacy of the Constitution amongst the prevalent of other laws in the country. It provides that the 'Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria'.³² As a result of that supremacy, it provides further that 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'.³³

³¹ (1991) 5 NWLR (Pt. 194) 739.

³² S. 1(1) of the 1999 Constitution of Nigeria.

³³ S. 1(3) of the 1999 Constitution of Nigeria.

In *Nigerian Army v. Yakubu*³⁴ the Supreme Court held that the Constitution of the Federal Republic of Nigeria is supreme law of the country and it overrides all other laws in the country. It held further that where any conflict exists between the constitution and any other statute, the court or tribunal has the duty to interpret or apply such statute in such a way as to bring the statute in line with the letters and intendment of the Constitution.

The effect of the supremacy of the constitution in line with the subject matter of this article is that if any custom is inconsistent with the rights of women or children protected by the Constitution, such customs will be declared null and void. That was the reason for court's decision in *Mojekwu v Ejikeme, and Mojekwu v Mojekwu*.

It is important to mention some of the rights protected by the Constitution, they are the Right to life,³⁵ Right to dignity of the human person,³⁶ Right to personal liberty,³⁷ Right to fair hearing,³⁸ Right to private and family life,³⁹ Right to freedom of thought, conscience and religion,⁴⁰ Right to freedom of expression and the press,⁴¹ Right to peaceful assembly and association⁴² Right to freedom of movement⁴³ Right to freedom from discrimination⁴⁴ and the Right to acquire and own immovable property anywhere in Nigeria.⁴⁵

5. Protection by the Parliament.

S4 of the 1999 Constitution gives the power to the parliament to make law. This power has been utilized by some states in Nigeria to some extent to make some laws that could protect women and children in their various jurisdictions. With respect to Edo State, Edo State has domesticated the Child Rights Act, 2003.⁴⁶ The Act does not only confer rights on children. It demands corresponding duties of obedience and respect from them.⁴⁷ It emphasizes the best interest of the child as the primary consideration in administrative, adjudicative, legislative measures, etc relating to children.⁴⁸

³⁴ [2013] 8 N.W.L.R. (Pt. 1355) 1.

³⁵ Section 33 of the CFRN. 1999.

³⁶ *Ibid.* s34.

³⁷ *Ibid.* s35.

³⁸ *Ibid.* s36.

³⁹ *Ibid.* s37.

⁴⁰ *Ibid.* s38.

⁴¹ *Ibid.* s39.

⁴² *Ibid.* s40.

⁴³ *Ibid.*,s41.

⁴⁴ *Ibid.*s42.

⁴⁵ *Ibid.*s43.

⁴⁶ This was done in 2007.

⁴⁷ Part 2 which covers s3 to 20 deals with rights and responsibilities of a child.

⁴⁸ S1 of the 2003 Act.

The rights of the children protected by the Act are the right to survival and development,⁴⁹ the right to a name,⁵⁰ the right to freedom of association and peaceful assembly,⁵¹ the right to freedom of thought, conscience and religion,⁵² freedom of movement subject to parental control which is not harmful to the child.⁵³ It also includes the right to free, compulsory universal basic education.⁵⁴ Consequently, parents are to ensure that their children attend and complete primary and junior secondary schools. Fine or imprisonment awaits any parent who refused to enrol his/her wards. This law, however, exempts children who are suffering from mental disabilities from its purview.⁵⁵

Right to health and health services (covering the unborn child), is also protected.⁵⁶ Similarly, right to parental care and, protection⁵⁷ It is duty upon any person having the care of a child less than 2 years to surrender him/her for full immunization, failure to do that makes the person liable to imprisonment or fine. The Act entitles the child the right to claim damages for any injury caused to him willfully, recklessly, negligently or through neglect during, before and after birth.⁵⁸

Furthermore, the Act also protect right to freedom from discrimination,⁵⁹ right to leisure, recreation and cultural activities,⁶⁰ right to dignity of the child⁶¹ and the right of every child to privacy.⁶² The Acts provides effective m mechanism for its protection. In the first instance, it guides against abuse by subjecting the exercise of the rights in some situations to parental guidance, direction, control and supervision. Thus, most of the rights are not absolute. The Act also imposes on the parents the duty of providing guidance, discipline, education, socialization and training. The reason behind that imposition of duty is whittle down parental control, thus, the parents are saddled with the duty of maintaining their children according to their means. Failure to maintain the child is actionable at the instance of the child.

⁴⁹ S4.

⁵⁰ S5(1).

⁵¹ S6 which is in conformity with s40 of the 1999 Constitution.

⁵² S7(1).

⁵³ S9(1).

⁵⁴ S15(1).

⁵⁵ *Ibid*, see s15.

⁵⁶ S13.

⁵⁷ S14(1).

⁵⁸ *Ibid*.

⁵⁹ S10.

⁶⁰ S12.

⁶¹ S11.

⁶² S.8.

possible outcome in child rights' cases in accordance with the law and best global practices".⁶⁹ There is no doubt that Of course, the establishment of the family court is a dream fulfilled.⁷⁰

7. Conclusion

In conclusion, while there are customs and traditions which are harmful and detrimental to the interest of women and children, there is no doubt that the negative effects of such customs have been mitigated to the point of non-existence by the constitutional provisions which guarantee the protection of fundamental human rights to all including women and children. However, for the rights protected by the Constitution to be enforced, the people concerned must be aware of the laws that protect them. If they are not aware, the whole essence of law will be defeated. Consequently, this article recommends that women and children should be conversant with the laws that protect them. Furthermore, the government of Edo State should ensure that adequate compensation is paid to women and children who are victims of unfair customs and discriminatory practices and should also take effective measures to prevent and eliminate such unfair customs and discriminatory practices in the best interest of justice and fairness.

⁶⁹ *Ibid.*

⁷⁰*Ibid.* The Chairman, Nigerian Bar Association, Edo State Branch, Mr. Ede Asenoguan argues that "we are happy that today, our collective dream of caring for the rights of our children has been given a boost by this inauguration. Certainly, our children deserve the best and I believe that no effort shall be spared in ensuring that the rights of children are protected and enforced whenever or wherever same is breached or violated,".