

WOMEN’S RIGHTS AND STATUS UNDER EDO NATIVE LAW AND CUSTOM – MYTHS AND REALITIES.

A PAPER PRESENTED BY HON JUSTICE P.O. ISIBOR*¹

“The provisions of Fundamental Human Rights in our Constitution will be merely theoretical if they cannot be made to create an environment where no citizen is or feels oppressed. Constitutional provisions will not by themselves create this enabling environment when there still exist customary walls and barriers built over centuries which encourage and sustain gender inequalities.”

- Jadesola O. Akande (Professor of law and Executive Director, Women Law and Development Centre, Lagos, 1999) in Preface to her book “Miscellany At Law and Gender Relations.”

PREFATORY REMARKS

I must express my sincere gratitude to the Chairman, Edo State Law Review Commission for inviting me to deliver a paper on the above topic at this Conference in his laudable effort to chart “a new course for legal development in Edo State.” I consider the invitation a great honour and privilege.

Women’s right and status are currently receiving the attention of the international community. ² The position of women in contemporary society has attracted public sympathy and interest. Under our customary laws, women suffer discrimination in marriage, divorce, property ownership intestate succession etc.

* LL.B. (UNILAG) LL.M. (AAU) B.L., Judge, Edo State Customary Court of Appeal.

² See Article 1 of the United Nations Charter which provides that: “All human beings are born free and equal in dignity and rights.” See also Article 7 of the Universal Declaration of Human Rights..

Indeed, most customs demand that a woman should be seen and not heard on serious family issues even when such issues directly concern her. In other words, a woman must be self-effacing to the point of anonymity.

The topic assigned to me as indicated above posits that myths and realities are discernible in Women's rights and status under Edo customary law. In other words, there are facts and fictions in women's rights and status. This paper would highlight some of these facts and fictions. While the emphasis will be on the position in Edo State, the approach will be largely eclectic. In other words, references will be made to the position in other states of the Federation, where relevant. My exposition will reveal that the facts are more than the fictions.

DEFINITION OF TERMS:

The title of this Paper calls for brief comments of the following: "Rights", "Status" "Edo", "Native Law and Custom," and "Myths."

"Rights" connote just claims. A person is said to have a right, when he is acknowledged to be entitled to something to which he has a just claim under the law. The history of human rights as it is today has been founded upon the theories of early philosophers such as Aristotle, Bracton and Dicey. However, the focus of human rights in developing countries has shifted from civil and political rights to social, cultural and economic rights.³ Salmond's definition of a "right" is an interest recognized and protected by the law, respect for which is a duty and disregard of which is a wrong.

³ P.N. Bhagwati, a former Chief Justice of India.

“Status” is a person’s legal, social or professional position in relation to others. The status of a person is an index to his legal rights and duties, powers and disabilities. “Edo” is one of the states in Nigeria distinguished by the homogeneity of the people as the same cultural and linguistic affinities exist among them. Many of the communities trace their roots to the ancient Benin Kingdom. The major ethnic groups are Benin, Esan {anglicized as Ishan}, Owan, Etsako and Akoko-Edo, who are grouped as Edo-speaking people even though dialects may vary from place to place.

“Native law and custom” or customary law is a body of customs and traditions which regulate the various kinds of relations between members of a given community.⁴ It is a mirror of accepted usage.⁵

The Supreme Court in Zaidan v. Mohssen⁶ defined customary law from the Nigerian perspective as:

“Any system of law, not being common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.”

In Oyewumi v. Ogunesan,⁷ Obaseki J.S.C. defined it as:

“The organic or living law of the indigenous people of Nigeria regulating their lives and transactions....”

⁴ M.C. Okany: The Role of Customary Courts in Nigeria (1984) at page 39:

⁵ Bairamian F.J. in Owonyin v. Omotosho (1961) 1 All NCR 304 at 309.

⁶ (1973) 11 S.C. 1

⁷ (1990) 3 NWLR (Pt. 137) 182 at 207.

It suffices to state that the customary laws of a people form the substratum on which their socio – cultural superstructure rests. The matters with which customary law is principally concerned are simple cases of contract (mainly debt), torts, land, family law and succession.

“Myths” are persons, things etc. that are imaginary, fictitious, or invented.⁸

ENTRENCHED INEQUALITIES/DISCRIMINATION:

Under customary law, the concept of equality of both male and female was not only a mirage but a myth. It is important to stress that when one talks about equality, one does not imply that men and women are the same. Equality prevails when men’s and women’s rights, responsibilities and opportunities do not depend on whether they are born male or female.

The principles of equality and non-discrimination form the cornerstone upon which all human rights are based. Under Edo customary law, discrimination is widespread and perpetuated by the survival of the stereotypes and traditions which are not in tandem with human rights standards. Indeed, discrimination is not the exclusive preserve of Edo customary law but a general feature of Nigerian customary law rooted on myths and prejudices as the following two quotations illustrate

According to Carol Ajie;⁹

“Women suffer all forms of discrimination right from birth, some of it inflicted by other women. The female child at birth is regarded as

⁸ See A.S. Hornby; *The Advanced Learner’s Dictionary of Current English* (2nd Edition) at page 646:

⁹ Executive Secretary, Rules Watch, Lagos in a Paper titled: “Introduction to Women’s Human Rights Law and Human Right Systems” presented under the auspices justice of and Equality Programme (JEP) on 1st June, 2009.

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.”

Again, Professor J.O. Akande ¹⁰ observed as follows:

“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.

¹⁰ See her book titled Miscellany at Law and Gender Relations at page 114.

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”

A jurist, Hon. Justice G.I.U. Udom Azogu,¹¹ postulated an interesting myth to underscore the discrimination against women when he observed as follows:

“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 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.”

There is no doubt that under customary law, women were relegated to the status of second class citizens. There is the old adage which states that a woman’s place is in the kitchen. A woman was not allowed to take employment outside the home. This was tantamount to a denial of freedom of movement.

¹¹ Judge, High Court of Justice, Aba, Imo State in his article titled: “Women and Children – A Disempowered Group Under Customary Law.”

Another custom which highlights the lower status of the Edo woman, in particular, is that a woman is expected to kneel down while presenting her husband with a glass of water or while serving his meals.

One may be tempted to assume that the grim and mind-boggling picture painted above was only true of a distant historical era. However, the reality is that even in this day and age, women still play second fiddle to men. Customary practices are replete with traditions aimed at perpetuating the belief that women are not entitled to the same authority and rights like their male counterparts.

It is, however, salutary to note that in most parts of Edo State, the discriminatory customary practices pin-pointed above have been considerably whittled down in matters concerning property ownership, inheritance/succession, marriage, and divorce. These will now be the focus of this paper.

Under Benin and Esan customary law, a woman has equal opportunity vis a vis a man, to acquire, hold, enjoy and dispose of any personal property. This may include money, goods or articles of trade, bicycles and other motor vehicles, poultry farm and contents, turkeys, goats sawmills, etc.

As regards real property (parcels of land or buildings), a spinster has no inhibition as to the acquisition or disposal of same. The fact that a woman was later married, does not affect her legal title to any real property which she acquired before the marriage. Such property remains hers exclusively. In most parts of Edo State, all personal property not brought by a married woman to her husband's house remains hers. In addition, the husband has no inheritance rights over such property. On the

contrary, where personal properties are brought to a husband's house, the husband has inheritance rights in the absence of children of the marriage.

It is correct to conclude that under the customary law of most parts of Edo State, a woman is not deprived of the opportunity or right to acquire, hold or enjoy property.

Women have been known to institute actions to protect their parcels of land held under Benin customary law. In the case of Madam Agbonifo v. Aiwerioba & Anor,¹² the appellant (a woman) sued and got judgment against the respondents in a Benin High Court for a declaration of possessory title to land held under Benin customary law. In an earlier case of K.S. Okeaya-Inneh v. Ekiomado¹³ Madam Ekiomadeo Aguebor (now respondent) as plaintiff in the High Court instituted an action against the defendant (now appellant). Madam Aguebor's claims were for:

- (1) A declaration of title to a piece of land held under Benin native law and custom;
- (2) ₦100 damages for trespass and
- (3) A perpetual injunction.

In Grace Agboinfo v. Ojo – Egbon & Anor,¹⁴ plaintiff's claims before Obaseki J. (as he then was) were for:

- (a) a declaration of title according to Benin native law and custom to the house at and known as No. 2 Agbado Street, Benin City.

¹² (1988) 19 NSCC (Pt. 1) 237.

¹³ (1970) ANLR 1

¹⁴ (Unreported) Suit No. B/77/70 delivered on 30th May, 1970.

- (b) possession of the said house and
- (c) a perpetual injunction.

INHERITANCE/SUCCESSION

“Succession” and “Inheritance” are often used as synonyms. But as Professor Emiola noted, although they are twin words in English language, they are not Siamese twins. He postulated the distinction as follows:

“Inheritance is an estate or property that a man acquired by descent and can be transmitted to his heir in the same way on his death on intestacy. On the other hand, ‘succession’ includes the devolution of title to land by will as well as accession to office and dignity”¹⁵

Thus, the word “succession” has a broader meaning than “Inheritance.”

We shall here consider the right of an Edo woman to inheritance of estate or property as well succession to titles, offices and dignity. It is, however, also considered appropriate to first consider the obnoxious customary practice of Widow Inheritance.

WIDOW INHERITANCE

This invidious practice affects an Edo woman’s status after the death of her husband. Among the Binis and Esans as well as the other tribes in Edo, marriage is mainly polygamous - a status which is accepted and revered among the rural folk. The net effect is that many deceased Edo men leave a large number of widows to the whims and caprices of their relations. The practice of widow inheritance was

¹⁵ Akintude Emiola – The principles of African Customary Law (1997) at page 92

hitherto the norm. While it is true that the wife or wives of a deceased, Edo man may be inherited by his heir or heirs, who may be the sons of the deceased, or where they are too young, the uterine brothers of the deceased, no son takes his widowed mother as wife

In some respects, equity may be said to have had its impact on this practice in contemporary times as a widow under Benin customary law now has the option of refunding the bride price or dowry after which she could re-marry outside her late husband's family. Dr. Ijewere posited that among the Benins, any widow who has surviving children for the deceased is free to return to her maiden family and to marry any man of her fancy.

It has been argued that the practice of widow inheritance is a form of insurance policy designed to ensure that a widow is not left uncatered for after the demise of her husband. It is, however, salutary to note that many Edo men now take more direct steps to ensure that their wives are provided for after their death. This is usually done by gifts made to such wives inter vivos, a donatio mortis causa, a death-bed declaration or by a Will.

INHERITANCE RIGHTS OF WIDOWS

Under customary law in all parts of Edo State, a widow cannot inherit in the intestate estate of her deceased husband. As noted earlier on, the widow is in fact regarded as part of the estate to be inherited by the son or relative. Indeed, Obi¹⁶ observed as follows:

¹⁶ Obi, S.N.C. – Modern Family Law in Southern Nigeria (1966) at page 280.

“Nowhere in Southern Nigeria does the customary law give a widow the right to inherit, or share in, the intestate estate of her husband.... Even where a husband in his lifetime allots a farm, a house or some other form of landed property to his wife for her use and enjoyment, the latter does not thereby acquire inheritance rights in it.”

Professor Emiola notes that the Courts have declared that under Yoruba customary law, land allocated by the deceased to each of the wives still belong to the family because the allocation conferred no title on the women. They were, however, entitled to remain in the house if they chose subject to good behaviour.¹⁷

Similarly, the widow of a deceased Benin man is not entirely without some rights in her husband’s estate. She has a life interest in the use of a house which is not an “Igiogbe” as long as she remains within the deceased husband’s family even without consenting to marry an eldest son or even when she has no children surviving. But she has no right to dispose of any interest in such house.¹⁸

INHERITANCE RIGHTS OF THE GIRL CHILD

Since all the tribes in Edo State are patriarchal and patrilineal, the sons (especially the first son) enjoy a pre-eminent position in succession matters. The principle of primogeniture applies in its pure form among the Esans. The eldest son inherits all the properties of his deceased father after performing the funeral rites. His obligation is to cater for the infant children (including girls) until they marry. The

¹⁷ Emiola, Op. Cit at pp 106 – 107. See also Oloko v. Giwa (1939) 15N.L.R. 31; Dosunmu v. Dosunmu (1954) WACA 527.

¹⁸ See Obi Op. Cit at page 281

pure principle of primogeniture also applied to the Benins in bygone days. Contemporary customary law among the Benins confines the principle of primogeniture in its pure form to the inheritance of the “Igiogbe,” that is the principal house in which a Benin man lived and died and was perhaps buried. Other properties are shared among the children including girls.

In the book From Birth To Death, A Benin Cultural Voyage, Chief S.O.U. Igbe posited at page 125 thereof that a woman cannot inherit “Igiogbe.” This assertion is oblivious of the fact that deceased might not be survived by male children. Since inheritance follows the blood among the Benins and Esans, a girl child in preference to a relative, may inherit an “Igiogbe” where there is no male child.

Under Benin customary law, the other properties apart from the “Igiogbe” are shared according to “Urho” (door to a wife’s room) where the deceased had more than one wife. The children of every wife are entitled to a share. This is inapplicable under the Esan customary law where the eldest or first son inherits all the properties of his late father after performing the funeral rites.

Among the Owans, the Ibo system whereby brothers of full blood or half blood succeed to the estate of the deceased in the absence of a male child, it still operative.

SUCCESSION TO HEREDITARY TITLES

Female children do not succeed to hereditary titles as these are the exclusive preserve of the eldest surviving sons of the last incumbent. The principle of primogeniture applies, even though the rotational form of succession is practiced as regards some titles. The doctrine of automatic primogenitary succession to Kingship

prevails as regards the mode of succession to the throne of the Oba of Benin.

Hereditary titles among the Esans include Oliha, Ezomo, Iyasele, Edohen, Oloton and Elo.

MARRIAGE/CUSTODY OF CHILDREN

The concept of women as chattels and articles of property to be used and discarded at will dominate the customary laws of most tribes in Edo State as regards marriage.

In some parts of Edo State, a father may express his desire to secure a child, who is still in the mother's womb, if born a female as wife to his son. Our customary laws permit the parents of a girl of tender age to "sell" her to permanent servitude in the guise of marriage without her consent while oblivious of the unwholesome consequences of such a transaction. Early and arranged marriages expose the frail bodies of young girls to pregnancy with attendant risks of complications in pregnancy at child birth such as prolonged and obstructed labour resulting in vesico – vagina fistulae (V.V.F). Part of the attraction of child marriage for parents is economic as they stand to gain material benefits from the groom.

The case of Osadiaye Osamwonyi v. Itohan Osamwonyi¹⁹ has revolutionized Benin customary law of marriage by holding that a daughter could not be married off to a man without her consent even where the parents have already collected dowry or bride price.

¹⁹ (1973) N.M.L.R. 25 at 26.

CUSTODY OF CHILDREN

The father of grown-up children always has custody under our customary law. Where the wife is deserted or divorced, custody of the children remains with the husband.

It has been held that “there is no rule of law that the custody of a child of tender age must necessarily be granted to its mother, each case must be considered and determined on its own facts.” This was the ratio in the case of Gabriel Oladetohun v. Grace Oladetohun.²⁰ It represents the position in most parts of Edo State as the paramount consideration is the welfare of the child.

DEHUMANIZING WIDOWHOOD RITES

In most parts of Edo State, the wife of a deceased husband must perform a host of rites. Thus, she is subjected to taking an oath denying her involvement in the husband’s death. In some rural areas, the oath is administered with insistence that the widow must drink and /or bathe with the water used in washing the husband’s corpse. In Esan land, in particular, a widow must shave all her hairs (both head and pubic), wear same dress or clothes for a year, sleep on bare floor, eat with broken plates and not wash her hands for a number of days or months. It is most disturbing that it is mainly women who insist that these obnoxious rites be performed.

“There are no degrading traditional rites for a widower, rather, his welfare is the paramount concern of both family and friends. In some parts, custom and tradition demand that a widower should not sleep

²⁰ (1972) U.I.I.R. 289

alone but with another woman of his choice until his wife is interred, so that the spirit of the dead wife may not come and disturb his peaceful sleep.”²¹

VIOLENCE AGAINST WOMEN

Violence against women is common in most systems of customary law in Edo State. All sorts of behaviors and abuses that are calculated to hurt or kill women and girls come under this head. Violence against women is gender-based because whatever from it takes – physical, sexual or psychological – they all result from the perception of a woman’s purported secondary position in Nigerian Society. There is nothing under customary law which approves violence against women as a lawful norm. The only exception is wife battery which is justifiable under most customary law in Edo State when applied on grounds of correction or chastising an erring wife. But such a battery must not occasion grievous bodily harm.

CONCLUSION/SUGGESTED REFORMS

The empowerment of women in the context of gender equality has not been vigorously pursued by most Edo women especially under customary law. Traditional practices occupy a central role in the lives of Nigerians, both male and female, and is one of the instruments that perpetuate inequality of the sexes. In marriage, in particular, traditional institutions and customs tend to reinforce the subservient status of women. There is the need to probe and challenge the gaps in traditional jurisprudence that foster entrenched inequalities in the rights and status of both sexes.

²¹ See Akande, Miscellany at law and Gender Relations, Op Cit. at pp 160 - 161.

Poor education and ignorance of the law among most rural women prevent them from taking advantage of their rights as prescribed by the extant Nigerian Constitution and other international instruments. There is a crying need for a redress of all the discriminatory practices highlighted in this paper. Harmful traditional practices like female genital mutilation and forced labour must also be eradicated. So must sexual violence including physical assault and battery. Widow inheritance is obnoxious notwithstanding the facile explanation that it provides some insurance for the widow. Dehumanizing widowhood rites are repugnant to natural justice, equity and good conscience.

The time to break down all traditional practices that enhance the subordination of women is now.

Thank you for listening and God bless us all.