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EVALUATING CONTEMPORARY POLICY MEASURES ON SUSTAINABLE EQUITABLE TENURIAL RIGHTS IN NIGERIA

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ABSTRACT
Developments and policy measures aimed at enthroning equitable and sustainable tenurial regimes within Nigeria's heterogenous and customarily patrilineal society have often centred on the adoption of statutory legal propositions and judicial interventions. These interventions often entail complete reliance on the "repugnancy clause" mechanism for the eradication of perceived customary practices, the provisions and operations of which are perceived to be contrary to the principles of natural justice, equity and good conscience. However, in view of the limitations inherent in legal approaches to customary reformation, and the inability of most preferred reform measures (like land titling and registration) to guarantee sustainable tenure security and equitable land regimes across many African communities, an urgent need arises for the adoption of other proactive, culture sensitive and sustainable approaches to complement the statutory provisions and judicial proscriptions.

Keywords: repugnancy clause; gender equality; reforms; property inheritance

THE NATURE OF THE NIGERIAN LAND TENURE AND TENURE SECURITY

Land remains the major source of livelihood for a large portion of the Nigerian population. The heterogenous nature of Nigerian society has made it practicably difficult, if not impossible, for the adoption of a centralised system of land governance. This has led to the emergence of given rise to multiplicities of land regimes in reflection of the pluralistic nature of the Nigerian legal system. Unfortunately, most of these land tenure systems, particularly customary tenurial rights, have elicited public criticism and outcries owing to their gendered and discriminatory attributes (Onuoha, 2008, pp. 1-30). Inheritance is the most common way of property acquisition in Nigerian. It entails the transfer of the deceased's bundle of rights and obligations to their heirs or successors in line with the deceased written wills (testate cases) or the deceased personal law (intestate cases). In Nigeria, personal law is either the customary law of the *propositus* or Islamic law; see *Tapa v. Kuka* (1945)[2] and *Ghamson v. Wobill* (1947)[3].

Neither the overwhelming consensus on the implications and inherent socioeconomic benefits associated with robust equitable and secure land rights (Gberu and Girmachew, 2017, p. 1), nor the existence of fundamental statutory provisions against all forms of discrimination, has been able to curb the menace of these obnoxious tenurial principles. Section 42 (1 and 2) of the 1999 constitution of the Federal Republic of Nigeria provides that no Nigerian shall be made to suffer any form of disabilities or restrictions on the grounds of their communal affiliation, ethnic background, places of origin, gender, religious belief or political affiliations. The concept of equitable and secure land rights also forms part of the main objectives of the Nigerian Land Use Act of 1978. In addition, Nigeria is co-signatory to many international instruments on Human Rights, tenurial equity and security, some of which have been ratified and domesticated by the Nigerian parliaments in accordance with the

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[2] (1945) 18 NLR 5, p. 18.
[3] (1947) 12 WACA 181, p. 12.

provisions of section 12(1) of the 1999 Nigerian constitution. However, the existence of these legal documents has been unable to guarantee equitable and secure tenurial rights in patrilineal Nigerian communities where customary practices that dehumanise women and deny them all rights of property inheritance still hold sway. Recently, Nigerian courts have risen to the challenge by clamping down on various customary tenurial rights that discriminate and subjugate women's interests. Thus, in *Mojekwu v. Iwuchukwu* (2004)[4], Justice Niki Tobi of what was then the Appeal Court ruled that the *Nnewi* customary right of inheritance denying women's right of property inheritance was unconstitutional and repugnant to natural justice, equity and good conscience. The Nigerian Supreme Court in *Ukeje and Ors v. Ukeje* (2014)[5] ruled against two elements of the discriminatory *Oli-ekpe* customary practice that prevents female children from inheriting their family assets, and *Anekwe and Ors v. Nweke* (2014)[6] ruled against the customary practice disinheriting barren women and widows without male children.

Before these bold and commendable proscriptions against discriminatory customary practices, the majority of rulings by the Supreme Court of Nigeria on matters relating to women's property rights had always been antithetical to social equality arguments and women's emancipation ideology (*Sogunro-Davies v. Sogunro and Ors* (1929)[7]; *Nwugege v. Adigwe* (1934)[8]; *Suberu v. Sunmonu* (1957)[9]; *Yusuf v. Dada* (1990)[10]; *Akinnubi v. Akinnubi*, (1997)[11]; *Nezianya v. Okagbue* (1963)[12] and *Nzekwu v. Nzekwu* (1988)[13]). Various factors readily come to mind as to the probable reasons for the Supreme Court's recent shift in policy. These factors are worthy of examination to determine the level of correlation between them and the Supreme Court's recent positions.

The first factor that readily comes to mind is the promotion of the "activist justices" from the Appeal Court to the Supreme Court. These are Appeal Court and Supreme Court justices whose pronouncements or concurring statements led to the proscription of several discriminatory customary practices in Nigeria. Among the celebrated land rights and equality cases deliberated upon by the Appeal Court of Nigeria are *Mojekwu v. Mojekwu* (1997)[14]; *Mojekwu v. Ejikeme* (2000)[15]; *Ukeje v. Ukeje* (2001)[16]; and *Uke v. Iro* (2001)[17]. The panel of Appeal Court justices that deliberated on the celebrated case of *Mojekwu v. Mojekwu* were Niki Tobi JCA, Ejiwunmi JCA and Ubaezeonu JCA (as they were then known). In *Ukeje v. Ukeje*, the panel of justices consisted of Oguntade JCA, Galadima JCA and Aderemi JCA. *Uke v. Iro* was deliberated upon by Justices Pats-Acholonu JCA, Akpiroro JCA and Ikongbeh JCA, while the panel of justices in the case of *Mojekwu v. Ejikeme* consisted of Justice Niki Tobi JCA, Justice Olagunju JCA and Justice Fabiyi JCA. Out of all the justices mentioned above, only justices Olagunju, Ubaezeonu, Akpiroroh and Ikongbeh did not make it to the Supreme Court; the rest were eventually elevated to serve as justices of the Supreme Court of Nigeria (Aigbovo and Ewere, 2015, p. 20). Even justice Inyang Okoro, one of the three

[4] (2004) 4 S.C 11.
[5] 2014) 3-4 MJSC 149, [2014] 234 LRCN 1.
[6] (2014) 3-4 MJSC 183; (2014) 9 NWLR (pt. 1412) 393.
[7] (1929) 2 N.L.R. 79.
[8] (1934) 11 NLR 134.
[9] (1957) 2 FSC 30-35.
[10] (1990) 4 NWLR (pt. 146) 657.
[11] (1997) 7 NWLR (pt. 512) 288.
[12] (1963) 3 NSCC 277.
[13] (1988) 1 NSCC 581 (1989) 2.
[14] (1997) 7 NWLR (pt. 512) 288.
[15] (2000) 5 NWLR 402
[16] (2001) 27 WRN 142.
[17] (2001) 11 NWLR (pt. 723) 196.

Appeal Court justices that deliberated on the *Anekwe v. Nweke* case[18], has also been elevated to the Supreme Court (Ibid). It is obvious from the foregoing that the elevation of these crops of Appeal court activist justices to the Supreme Court played a significant role in changing the Supreme Court's unfavourable stance towards women's tenurial rights and freedom in Nigeria. However, some scholars have argued otherwise (Omoregie, 2005, p. 146; Aigbovo and Ewere, 2015, p. 20-21). To these scholars, there is no clear correlation between the elevations of these Appeal court activist justices and the Supreme Court's policy shift. Their position is premised on the claim that some of the activist justices who had demonstrated clear commitments towards the eradication of discriminatory customary land rules against women while in Appeal Court could not maintain this position when they were eventually elevated to the Supreme Court, either because they were eventually trapped in the Supreme Court's web of conservatism or because they were not given the needed opportunity to make their marks (Ibid).

It would be difficult to form any cogent reason for why an activist justice who had assiduously stood against sociocultural, statutory and religious injustices while in the lower courts might suddenly jettison all traces of decades-long activist propositions when finally elevated and presented with an opportunity to put a seal of finality against the continued existence of such discriminatory practices. It is true that Justice Pats-Acholonu, one of the Appeal Court's activist justices, was eventually among the Supreme Court justices that overturned justice Niki Tobi (JCA)'s audacious pronouncement against discriminatory customary rules in *Mojekwu v. Mojekwu* (1997)[19]. However, the matter should not be analysed out of context.

The primary issue under contention in the *Mojekwu v. Iwuchukwu* (2004)[20] case was whether a court has the right to raise a point *suo motu* and proceed to give judgement on it without first hearing the parties; it was not the validity or otherwise of the customary rights of inheritance of the Igbos. This matter is settled in law that the courts do have the power to raise issues *suo motu* that none of the parties to a prior case had raised. However, the courts lack the jurisdiction to proceed and determine the case or any matter thereof on the grounds of the issues the court has raised *suo motu* without first hearing the parties or giving them sufficient opportunity to address the issues so raised. It is the duty of the court to invite the parties to address the raised issues before proceeding to determine the case in question or any matter therein. Anything short of this amounts to procedural error in violation of the parties' right to fair hearing and miscarriage of justice; see *Oke v. Nwizi*, (2013, p. 21252)[21]. Earlier in *Obumseli v. Uwakwe* (2009)[22], the Supreme Court established that on no occasion should a court of law raise a point *suo motu* no matter how clear it may appear to be and proceed to resolve it one way or the other without hearing the parties. If it does so, it will be in breach of the parties' right to fair hearing. This point of law was also restated in *Dalek Nigeria Ltd v. Oil mineral Producing Areas Development Commission (OMPADEC)* (2007)[23], *ODD Ltd v. Joseph Odo and Ors* (2010)[24] and in *Ebolor v. Osayande* (1992)[25], where Nnaemeka-Agu JSC stated that

> our adversary system does not permit a court to dig into the records and fish out issues, no matter how patently obvious, and without hearing the parties, use it to

[18] (2014) 3-4 MJSC 183; (2014) 9 NWLR (pt. 1412) 393.
[19] (1997) 7 NWLR (pt. 512) 288.
[20] (2004) 4 S.C. Pt. 11.
[21] (2013) LPELR-21252, CA.
[22] (2009) All FWLR 486.
[23] (2007) 2 SC 305
[24] (2010) 8 NWLR (pt. 1197) 486.
[25] (1992) 7 SCN 217.

> decide an issue in controversy between the parties to the appeal. It runs counter to the impartial status and stance expected of a judge in the system". Therefore, "it is firmly settled in a plethora of decided authorities [in Nigeria] that any issue or issues which is or are not formulated from a ground of appeal, is incompetent and must be ignored or discountenanced and struck out.

It is unfortunate that various legal minds have joined forces with the press and some human rights activists in their simplistic analysis of *Mojekwu v Iwuchukwu* (Aigbovo and Ewere, 2015, p. 22), as they believe the Supreme Court's position in this case is informed more by atavistic sentiments than by the unambiguous provisions of the non-discriminatory clause as enshrined in our statutes (Omoregie, 2005, p. 146), although one ought to, and can obviously relate to the sentiments informing such thinking. There is no doubt regarding the undesirability of the gendered discriminatory elements inherent in the *Oli-ekpe* customary practice of the Nnewi people, and the danger it poses to our society. However, we must also learn to accept that not all means are legally acceptable. Binding judicial pronouncements must be rooted in established principles of rule of law. Thus, there must be a cause upon which judicial pronouncements are founded. It is a dangerous development for the legal community and society at large to accommodate the violation and abuse of judicial processes on the grounds that doing so overtly or covertly yields positive results. Thus, it is wrong for us to vilify the panel of justices on the grounds of their position in the said matter without putting into consideration the unsavoury precedence such a ruling would establish within our legal system if left to stand. These analysts and jurists ought to know that allowing this would set a wrong precedent and leave an indelible scar on the sanctity of Nigerian legal jurisprudence.

Another factor worth considering is the unprecedented emergence of women jurists on the Supreme Court bench, and their increasing assumption of positions of authority and responsibility within the Nigerian judicial system. Justice Mariam Aloma Muktar was elevated to the Supreme Court bench from the Appeal Court on 8 June 2005, thereby making history as the first ever woman justice to be elevated to the Supreme Court of Nigeria. She subsequently creates another precedent when she emerged as the 13th Chief Justice of Nigeria in July 2012, making her also the first woman to ascend to the position of Chief Justice of the Nigerian Supreme Court (Taire, 2012). Justice Zainab Adamu Bulkachuwa, who was sworn in by Justice Mariam Aloma Muktar on 17 April 2014 as the sixth president of the Appeal Court, also made history as the first female Appeal Court president in Nigeria (Tsan and Olasanmi, 2014). Other women who eventually made it to the Supreme Court after Justice Mariam Aloma Muktar's unprecedented achievement are Justice Olufunlola Adekeye, Justice Mary Peter-Odili, Justice Clara Bata Ogunbiyi and Justice Kudirat Kereke-Ekun (Bamgboye, 2016). As the Chief Justice of the fFderation, Justice Mariam Aloma Muktar was responsible for empanelling the justices for hearing any case before the Supreme Court. Thus, it is not surprising that female Justices featured prominently in the recent Supreme Court's rulings outlawing Igbo customary inheritance practices that discriminate against women. Justice Ogunbiyi was a member of the panel of justices that heard the appeal in the Ukeje case, in which she concurred with the lead judgement. She was also present at the Anekwe case, and particularly wrote the lead judgement for it. Therefore, it is obvious from the foregoing that the elevation of female justices to the Supreme Court and their assumption of positions of authority has played a significant role in sharpening the new-found activist zeal of the Nigerian Supreme Court.

RETHINKING THE NEW DAWN IN WOMEN'S LAND RIGHTS IN NIGERIA

The elemental attributes of any comprehensive legal system and its success is highly dependent on the existence of (and the recognition of) enforceable substantive rights for the people, the establishment of robust procedural rights mechanisms that aid claims and redress, and the availability of robust, functional, transparent, accountable and independent institutions for the enforcement of both the substantive and procedural rights. The lack of strong institutions has particularly been identified as a major constraint militating against the effectiveness of all regulatory and reformatory policies of the Nigerian state, and indeed that of various other African states. This fact was elucidated by President Barack Obama in his speech to the Ghanaian parliaments on 11 July 2009, at the end of which he opined: "Africa doesn't need strongmen, it needs strong institutions" (VOA, 2009, p. 23). It is worth adding at this point that beyond the clamour for strong institutions lies the need for serious commitment and decisive resolutions on the side of stakeholders in standing against the beneficiaries of the old order, who would obviously oppose any reform measures threatening the status quo for their personal aggrandisement.

The recent Supreme Court verdicts against discriminatory customary inheritance rules in Nigeria are highly commendable. Expectations are high in various quarters that this new development will significantly open a new vista into the drive for women's emancipation and the alleviation of poverty within rural communities across Nigeria. However, to others, it only represents a glimmer of hope at the end of the long tunnel of generations of depravity and subjugations against Nigerian women in the name of customary norms. There obviously exists palpable scepticism regarding the possibility of successfully implementing and sustaining the judicial propositions. These misgivings arise because the recent paradigm shift has not been precipitated by reforms, but is the result of the goodwill of the current individual personalities in positions of responsibility who have taken it upon themselves to act in ways that might be beneficial to the state and the general public. There are concerns about what becomes of the Supreme Court's new found activist zeal and women's land rights in Nigeria when the present crop of justices with proven activist credentials and "good individuals" cease to be in their current positions of authority and responsibility. This brings to the fore concerns that the Supreme Court will either declare these judgements were given *per-incuriam* or deliver conflicting verdicts on this single point of law in time to come.

It is not unheard of for the Supreme Court of Nigeria to give a conflicting decision on same question of law (Maduka (n.d); pp. 23-27) or to overrule an earlier decision completely, as it is not bound by its previous decisions). Historically the legal jurisprudence contains quite many cases where the Nigerian Supreme Court overruled earlier decisions. In *Amudipe v. Arijodi* (1978)[26], the Supreme Court overruled its earlier decision in *Babajide v. Aisa* (1966)[27]; in *Oduola v. Coker* (1981)[28], it overruled its position in *Mobile Oil Ltd. V. Abolade Coker* (1975)[29]. The Supreme Court's decision in *B.P. Co Ltd v. Jammal Engineering Co Nig. Ltd* (1974)[30] was also overruled in *Bucknor- Maclean v. Inlaks Ltd* (1980)[31]; in *Egboghenome v. State* (1993)[32], the Supreme Court overruled its earlier decisions in *Oladejo v. State* (1993)[33] and in *Asanya v. State* (1991)[34]; and in *Adisa v. Oyinwola* (2000)[35], it

[26] (1978) 2 LRN 128.
[27] (1966) 1 All NLR 254.
[28] (1981) 5 S.C 197.
[29] (1975) 3 S.C 175.
[30] (1974) 1 All NLR (pt. 2) 107.
[31] (1980) 8/11 SC 1.
[32] (1993) 7 NWLR (pt. 306) 383.
[33] (1993) 7 NWLR (pt. 306) 383.
[34] (1991) 3 NWLR (pt. 180) 422.
[35] (2000) 10 NWLR (pt. 674) 116.

overruled *Oyeniran v. Egbetola* (1997)[36]. It is obvious from the foregoing that the present Supreme Court's positive pronouncements against discriminatory customary rules in Nigeria are not iron-cast. They can be overruled by the same Supreme Court should it see reasons for doing so, and that obviously should be enough source for concern to all stakeholders. Hence, to enhance their long-term sustainability, it becomes essential that all states' positive developments become structured and institutionalised in ways that would enable them to outlast the founding actors. This should be the core of every sustainable developmental goal. Unfortunately, the reverse is the case in Nigeria, as a plethora of governmental developmental strides often die upon the exit of the founding actors. The two case studies described hereafter aptly capture the above analogy.

The first was the achievements of the National Agency for Food and Drug Administration and Control (NAFDAC) under the leadership of Dora Akunyili, the Director General of NAFDAC between 2001 and 2007 and the former Nigerian Minister of Information between 2008 and 2010. Prior to her appointment as the Director General of NAFDAC, the food and drug regulatory environment in Nigeria had no clear-cut institutionalised operational structure, leading to avoidable operational laxity, chaos and confusion. Decision-making was highly subjective, corruption was ripe and there was poor understanding of the roles and responsibilities of the members of staff, which gave rise to ineptitude and inefficiency within the organisation (Akunyili, 2012, p. 223). At her assumption of office as Director General, Dora Akunyili introduced new operational guidelines and functional standard operating procedures to ensure transparency and uniformity in the performance of NAFDAC's regulatory functions. The sweeping restructuring and reorganisation of NAFDAC under Dora Akunyili yielded instantaneous results that attracted unprecedented recognition both locally and internationally; agencies, regulatory bodies within and outside Nigeria, and many international organisations at various times within that period embarked on study tours to NAFDAC in an attempt to learn from the successes recorded by NAFDAC in their fight against counterfeit medicine and other substandard sensitive health products (Akunyili, 2015, pp. 251-266). Organisations like the Global Alliance for Improved Nutrition (GAIN) and the Fund Project for Vitamin A Fortification chose NAFDAC as their executing agency in Nigeria.

Despite the weaknesses and contradictions inherent in the available legal framework for the regulation of the manufacturing, importation, distribution and sales of pharmaceutical products in Nigeria, creating lacunae through which offenders circumvent the law (Erhun, Babalola and Erhun, 2001, p. 24), Dora Akunyili's effective and pragmatic leadership revolutionised the sector and brought about unprecedented improvements within it. The results were visible as the volume of counterfeit medicine in circulation in Nigeria dropped from 41% in 2001 to 16.7% in 2006; the number of unregistered and unregulated medicines in circulation dropped from 68% in 2002 to 19% in 2006 (Akunyili, 2015, pp. 251-253). As of June 2006, NAFDAC had secured a total of 45 convictions against counterfeiters, with 56 other cases pending in various courts in Nigeria (WHO, 2006, p. 9). NAFDAC became the cynosure of other international regulatory bodies across African continent, as various organisations made frantic efforts to emulate its operational strategies. For example, the Drug Regulatory Authorities of Southern Sudan embarked on a working tour of NAFDAC in 2006 to study the reasons for the success in its fight against fake and substandard medicine in Nigeria. Also, the West African Regional Programme for Health (WARPH/PRSAO) organised a study tour of NAFDAC for all the Medicines Regulatory Authorities in West Africa with the objective of learning from the achievements of NAFDAC. The Ugandan National Drug Agency (NDA) visited NAFDAC on 3-4 August 2007 with the sole aim of

[36] (1997) 5 NWLR (504) 122.

learning from the reform measures that had brought so much positive results in Nigeria. The same went for the East, Central and South African Programme (ECSA) (Akunyili, 2012, pp. 251-266).

However, things took a turn for the worse at the end of Dora Akunyili's tenure as Director General. The inability of the Nigerian government to institutionalise the reform measures and operational strategies developed under Dora Akunyili led to the collapse of the robust regulatory capabilities of NAFDAC at the end of her tenure. The present-day NAFDAC is more like a revenue generating agency than a regulatory body. Its internally-generated revenue has increased from 2.5 billion Naira in 2011 to 9 billion in 2015 (Orhii, 2016, p. 5). The agency is currently enmeshed in a long list of controversies and allegations of corruption, including contract scams, air travel racketeering, extortion, dodgy recertification of some companies' operational licences, reception of frivolous donations and large expenditure on fictitious publicity, among others (Adewumi, 2016, pp. 11-12).

Similar to the unfortunate scenario narrated above were the achievements of the Economic and Financial Crimes Commission (EFCC) between 2003 and 2007 under the leadership of Nuhu Ribadu. The myriad problems stifling all Nigerian developmental efforts, ranging from misappropriation and theft of public funds, money laundering, bribery, inflated contract prices, fuel subsidy scams and many other fraudulent financial crimes seemed to have found a lasting panacea in the emergence of Nuhu Ribadu as chairman of the EFCC. He championed a successful anti-corruption campaign that culminated in the indictment and arrest of thousands of corrupt individuals and government officials, over 270 convictions and the recovery of billions of Naira from corrupt public office holders (Iweala, 2012, p. 91). Five governors were indicted and two were successfully convicted. The Inspector General of police was also convicted and jailed for fraudulent enrichment (Alli, 2013, p. 1, 4). EFCC's achievements attracted both local and international recognition and commendation. Antonio Maria Costa, the head of the United Nations Office on Drug and Crime (UNODC), unequivocally described the EFCC as "the most effective anti-corruption agency in Africa" while referring to the chairman of the commission as "a crime-buster made of the hardest steel alloy ever manufactured" (UNODC, 2007, p. 3). It also served as an effective deterrent to would-be financial criminals, and was one of the efforts that led to Nigeria's removal from the financial Action Task Force's list of non-cooperative jurisdictions (Akinosi, 2015, p. 2). However, Nuhu Ribadu was fired by the then Nigerian President, Alhaji Musa Yaradua, for non-declaration of his assets while in office, and that marked the end of the success story of the EFCC. The commission remains a ghost of its past. Lately, the commission has been in the news for all the wrong reasons, mostly on corruption charges against the leadership and members of the commission (Premium Times, 2016, p. 1-8). Some of the hard-earned high-profile convictions have been overturned through presidential pardon (Edukugho, 2013, p. 1-3).

The deplorable positions of the two governmental agencies described above illustrate the limits of the achievements of individual icons in the absence of strong and independent institutions. Whereas strong, charismatic and bold individuals are often needed at the centre to act as catalysts for breaking the cynicism of a jaded public and governmental workforce, only strong institutions can guarantee the sustainability of successes and achievements. Conscious efforts must be made not only to separate the "strongman" from the institution, but also to ensure the establishment of robust, durable, self-sustaining and independent institutions that are immune to political meddling, while simultaneously not being powerful to the point of abuse of power (Akinosi, 2015). It is a shame that the same Nigeria that was recently recognised and commended locally and internationally for her anti-corruption drives is today seen globally as a "fantastically corrupt nation". Thus, it is "not yet uhuru" for the

disinherited and subjugated Nigerian women. While commending the patriotic accomplishments of our individual heroes and the unrivalled doggedness of the activist justices for their bold judicial pronouncements, the fact remains that the sustainability of these noble accomplishments depends largely on robust institutional structures. It is unfortunate and disheartening that the latest efforts to consolidate the legal victories through the introduction of the Gender and Equal Opportunities Bills in 2016 suffered a heavy defeat in the hands of Nigerian parliamentarians (Oshi, 2015).

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