

# Cultural authoritarianism, women and human rights issues among the Esan people of Nigeria

*Christopher E Ukhun\**

Senior Lecturer, Department of Philosophy, Faculty of Social Sciences, Ambrose Alli University, Edo State, Nigeria

*Nathaniel A Inegbedion Esq\*\**

Senior Lecturer and Head of Department, Department of Public Law, University of Benin, Benin City, Edo State, Nigeria

## Summary

*This paper seeks to address discrimination against women on cultural grounds. The issues of human and women's rights in African countries have always been complex. This is so, not because of a lack of recognition of these rights, but rather because of cultural barriers and practices that have made the realisation of these rights a rather more difficult task in Africa than is the case in the western world. These cultural barriers are termed 'cultural authoritarianism' within the context of this paper. This paper deals in particular with two such cultural barriers, namely burial and inheritance culture amongst the Esan people of Nigeria. The paper advances the argument that, in spite of its feeble attempts to do so, the state has not succeeded in putting in place sufficient measures to eliminate cultural practices that discriminate against women and has rather displayed an attitude of reluctance or lack of commitment or at other times, prevarication on women's rights.*

## 1 Cultural authoritarianism

Wiredu argues that any human arrangement is authoritarian if it entails

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\* Phd (Ambrose Alli); ebeagbor@yahoo.com

\*\* LLB, LLM (Ambrose Alli); natlaw80@yahoo.com

any person being made to do or suffer something against his or her will.<sup>1</sup> Though a broad definition, Wiredu emphasises that authoritarianism is the unjustified overriding of an individual's will.<sup>2</sup> His definition is a consequence of the importance he places on the value and ultimacy of the individual's 'will' within the context of human communities. According to Wiredu, the 'will' forms the benchmark of human value. Wiredu suggests that there should be unimpeded development of the individual's 'will', and that such development is impeded by authoritarianism, involving manipulation by others.

An important element of authoritarianism is that it is agency-predicated. The agency could be an individual or a group of individuals. Authoritarianism is a conscious and deliberate phenomenon; it is teleological or purposeful. The teleological underpinning of authoritarianism most, if not all the time, has negative effects. Wiredu argues that education should enable the individual to exercise her will in competing situations or alternatives, it must aim at enabling a person to perceive the relevant alternative (in the context of evidence) with respect to a given set of issues so that she can make a rational choice on the basis of the perceived alternative.<sup>3</sup> As such, any means that omits or conceals a set of relevant alternative *ipso facto* vitiates the possibility of a rational choice in decision-making.<sup>4</sup> According to Wiredu, education trains the mind, enabling people to make deliberate rational choices.<sup>5</sup> Indoctrination, on the other hand, moulds the mind, and this leads to built-in choices.<sup>6</sup> Indoctrination is epiphenomenalistic of authoritarianism, and hinders or impedes the individual's ability to make conscious, autonomous and rational choices or to accept beliefs based on her own consideration of the evidence.<sup>7</sup>

Wiredu states 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.<sup>8</sup> Apart from this, the individual is left with no room to make rational choices with regard to the evidence at her disposal. African cultures act as constricting elements of the individual's rational capacity. In other words, the authority of culture holds sway against the individual's independent and rational choices. As much as Wiredu, Appiah is of the view that the African mode of thought and belief is supported on the basis of the

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<sup>1</sup> K Wiredu *Philosophy and an African culture* (1980) 3.

<sup>2</sup> n 1 above, 2.

<sup>3</sup> P Ikenobe 'A defence of epistemic authoritarianism in traditional African cultures' (1998) xxiii *Journal of Philosophical Research* 419-420.

<sup>4</sup> n 2 above.

<sup>5</sup> Ikenobe (n 3 above) 419.

<sup>6</sup> As above.

<sup>7</sup> Wiredu (n 1 above) 2-3.

<sup>8</sup> Wiredu (n 1 above).

authority of culture.<sup>9</sup> Ikuenobe<sup>10</sup> contends that to justify belief by saying it has the authority of tradition<sup>11</sup> is one of the practices demarcating traditional cultures from formal philosophy.<sup>12</sup>

Wiredu and Appiah believe that African tradition or culture stands in opposition to critical and rational inquiry, which are necessary preconditions for the attainment of 'justified beliefs'. Wiredu argues that the disinclination to entertain questions about the reason behind an established practice or institution is a sure mark of authoritarian mentality.<sup>13</sup> He further reiterates that there is, in African cultures, the principle of unquestioning obedience to superiors, which often means elders. Hardly any premium is placed on curiosity in those of tender age, or independence of thought in those of more considerable years.<sup>14</sup>

The authority of culture is not a matter of arbitrariness; it rests squarely on elders who are designated the repositories of practical knowledge. Such knowledge, it is acknowledged, stems from the age, influence, integrity and life experience of the elders. Even though there is a cultural harmonisation of the feelings and aspirations of all individuals within African culture, such are underwritten by what the elders say. As Ikuenobe rightly observes, elders in the community play an important role as repositories of moral principles and tradition, which have some rational pragmatic basis.<sup>15</sup> One cannot challenge one's culture in Africa. To do this is equivalent to challenging the elders and the risks of doing this are high. Any person who challenges the authority of elders is likely to be reprimanded, and the repercussions are either paid in cash or kind. In African cultures, no one wants to be stigmatised as disrespectful of elders. The reasoning is that it is the desire of everyone to live to be called an elder and be respected as such.

Making specific reference to the Akan of Ghana, Wiredu compares the respect the youth in Akan society accord elders with the attitudes of youth in America.<sup>16</sup> According to him, American youth would likely consider the demands of traditional Akan society nothing short of groveling docility. Wiredu attempts to show that American or Western environment encourages the individual to exercise his or her freedom and rational capacity in investigating and justifying beliefs, while African culture stifles the individual's autonomy.

<sup>9</sup> Ikuenobe (n 3 above).

<sup>10</sup> Ikuenobe (n 3 above) 419.

<sup>11</sup> 'Tradition' has a similar connotation as 'culture' or 'custom'. They are words that are generally used interchangeably.

<sup>12</sup> A Appiah *Necessary questions: An introduction to philosophy* (1989) 203.

<sup>13</sup> Wiredu (n 1 above) 4.

<sup>14</sup> As above.

<sup>15</sup> P Ikuenobe 'Moral thought in African cultures? A metaphilosophical question' (1999) 12 *African Philosophy* 111.

<sup>16</sup> Wiredu (n 1 above) 4.

Wiredu's analysis of cultural authoritarianism in Africa is summarised as follows by Ikuenobe:<sup>17</sup> It prevents questioning, inquiry, and the rigorous analysis of evidence that could bring about growth and progress in knowledge, thus perpetuating superstitious beliefs. It further prevents the exercise of freedom of the will with respect to choice and decision-making. It prevents the use of reason in deliberation and the consideration of relevant alternatives that are necessary for decision-making. It also prevents creativity, ingenuity, and curiosity that are necessary for critical inquiry.

Ibhawoh also examined cultural authoritarianism in Africa.<sup>18</sup> He compares power or relations in state (formal) and traditional (informal) settings. In making particular allusions to the power or authority of 'tradition', he argues that tradition derives its legitimacy from the sheer force of culture.<sup>19</sup> The power of chiefs or elders in the community, a household head in the family, a traditional priest or the Islamic Sheikh is as authoritarian as that of state officials.<sup>20</sup> He further claims that the sanctions wielded by these authorities are effective and authoritarian.<sup>21</sup> As is the case with fear of stigmatisation, Ibhawoh admits that for the most part, the ostracism accompanies the exercise of such non-formal authoritarianism.<sup>22</sup>

Admittedly, cultural authoritarianism is male-elder authoritarianism. In African cultures, male elders decide what should count as a cultural value, and in what direction the community should go. According to this scenario, women and children are subservient to men. At least 90% of African cultures subjugate women and give men unqualified authority over them.<sup>23</sup> In the case of contemporary Nigeria, Bony Ibhawoh argues that, apart from the attitudes towards women, specific cultural traditions have further served to undermine the status of women. Many of these traditions affect the rights and liberties of women within the communities where they live directly.<sup>24</sup>

Within the context of this paper, the expression 'cultural authoritarianism', therefore, connotes the overbearing negative influence of culture on women. It is on the basis of cultural authoritarianism in Nigeria that we shall shortly shift our discussion to negative cultural phenomena as they affect women among the Esan people of Southern Nigeria.

<sup>17</sup> Ikuenobe (n 3 above) 420.

<sup>18</sup> B Ibhawoh *Between culture and the Constitution: The cultural legitimacy of human rights in Nigeria* (1999).

<sup>19</sup> Ibhawoh (n 18 above) 15.

<sup>20</sup> Ibhawoh (n 18 above).

<sup>21</sup> As above, 15.

<sup>22</sup> As above.

<sup>23</sup> Ibhawoh (n 18 above) 45.

<sup>24</sup> n 22 above.

These cultural practices are the burial and inheritance rights of women.<sup>25</sup>

## 2 Discrimination against women in Africa

Chinweizu is critical of gender relations in Africa. His thesis, *Anatomy of female power*, analyses sexism against African women.<sup>26</sup> In opposition to Chinweizu, a plethora of perspectives exist that reject the claim that African women are unequal players in the affairs of Africa. Chinweizu argues that feminism is a movement of bored matriarchists, frustrated tomboys, and natural termagants, who, infuriated by the façade of patriarchy, revolt against male domination and female privilege.<sup>27</sup>

Chinweizu makes no distinction between Western and African societies and his understanding of the public and private sphere is limited to age-old male forms of thought that restrict women to the private realm.<sup>28</sup> Chinweizu also ingeniously reduces the male subject to an insipid, libido-crazed, womb-obsessed, mother-worshipping moron to support his argument that female power is supreme.<sup>29</sup> Many would see Chinweizu's treatise as an unfortunate demonstration of a lack of understanding of the actual situation of women in Africa. There is no doubt that African women are oppressed. Ali Mazrui acknowledges the burden of African women. He accepts that African women face insidious malignant sexism. He suggests a programme of action for the advancement of the dignity of African women. His programme of action encompasses liberating and empowering women. Furthermore, he posits that women can be at the centre without being empowered: A woman may be liberated without being either centred or empowered. There exists different degrees of even malignant sexism.<sup>30</sup>

Pamela Abuya asserts that the Lou society of Kenya accords women subordinate status in the scheme of things in society.<sup>31</sup> She blames the patriarchal nature of Lou society which relegated women to lower levels of society. The subservient status of women in Lou culture partly hinges on their inability to inherit land. She further remarks that, under Lou

<sup>25</sup> The Edo people speak Edo language but with different dialectical variations. They can be found in Edo State, in mid-western Nigeria. The state is an administrative region named after the people. It has its administrative headquarters in Benin City.

<sup>26</sup> Chinweizu *Anatomy of female power: A masculinist dissection of matriarchy* (1990) 34.

<sup>27</sup> As above.

<sup>28</sup> A Ogundipe 'Power in gender discourse' in CE Ukhun (ed) *Critical gender discourse in Africa* (2002) 35.

<sup>29</sup> As above.

<sup>30</sup> AA Mazrui 'The black woman and the problem of gender: Trials, triumphs and challenges' The Guardian Lecture Series 6.

<sup>31</sup> P Abuya 'Women in need of liberation: An African experience' in Ukhun (n 28 above) 105.

customary law, women are not allowed to own land and are never apportioned any land upon distribution and consequent inheritance. They cultivate land which they neither have any control nor rights over.<sup>32</sup> Chimaka Tarisaye identifies three instances where sexism against Zimbabwean women could be illustrated. Irrespective of classifications such as age, sex, marital status, ethnicity, etc, women are subjected to emotional or psychological and physical violence.<sup>33</sup>

The judiciary in Zimbabwe also reinforces oppression of women. Customary law — a prodigy of the judiciary — oppresses women. Women are not beneficiaries of inheritance. Tarisaye recalls the Supreme Court's verdict over land inheritance involving a daughter older than 18 years and her younger brother in a determination of who was to inherit their deceased father's estate. The court ruled in favour of the boy.<sup>34</sup>

The thrust of the previous part of this paper was to demonstrate that the oppression of African women is a widespread phenomenon. Particular attention will now be directed at the Nigerian situation in respect of the nature of discriminatory practices of inheritance and burial among the Esan people.

### 3 The Esan people

The Esan people are a minority ethnic group in Nigeria. Going by the 1991 population census figures (the latest figures), the Esan people are spread across five local government areas in Edo State with a combined population figure of 372 122. By the same census figures, Nigeria had a total population of 88 992 220, spread across 774 local government areas. The entire population is dominated mainly by Hausa/Fulani, Yoruba, Ibo and Ijaw ethnic groups, with a sprinkling of other minority ethnic groups.<sup>35</sup> However, the Esans are a major ethnic group in Edo State. They live in the north west of Benin City, the capital of Edo State. This group is sometimes called Ishan, which is a corruption of Esan. The word Esan is derived from Esafua, meaning 'those who fled'. Many of the Esan communities and immigrant elements claim to have been founded by the people who left the Benin kingdom to evade justice

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<sup>32</sup> As above.

<sup>33</sup> C Tarisaye 'African gender in Zimbabwe: Some historical and philosophical reflections' in Ukhun (n 30 above) 120-121.

<sup>34</sup> n 33 above, 121.

<sup>35</sup> See the population census figures as released by the National Population Commission, Abuja. The population figures were obtained from the Commission's office in Benin City, Nigeria.

or escape oppression from the Binis.<sup>36</sup> Okogie contends that the word Esan came from the Benin word Esan meaning 'to jump or flee'.<sup>37</sup>

The Esan people can be found in the tropical area of the northern axis of the Nigerian forest zone. Located on a plateau, the people share boundaries with Benin City on the North-East, on the North-West with the Owan people, on the South-West with Orhionmwon and Ika, while on the South and South-East with the Aniocha and Oshimili areas respectively. The River Niger terminates her Eastern borders.<sup>38</sup> The Esan people have distinguishing linguistic, cultural and social characteristics. They speak a series of closely related dialects, commonly called Edo and not far removed from the language of the Benin kingdom.<sup>39</sup> Their culture has organising principles and institutions. These cultural institutions have inherent qualities capable of sustaining an enduring bond in the people's lives. According to Olumese, the social institutions reveal that, although the Esan people appear politically autonomous, they have considerable social inter-relations, which provided peaceful co-existence and stability in the pre-colonial society.<sup>40</sup> Even though the organising principles and institutions of Esan culture brought about harmonious living among the people in the pre-colonial period, these principles and institutions could be anachronistic, bringing about negative consequences. Such anachronisms, with their negative carry-over, are still discernable in contemporary society.

Given that a comprehensive discussion of Esan culture is beyond the scope of this paper, we attempt a description of some practices that form part of Esan culture.

#### 4 Inheritance rights among the Esan people

In native Esan law and custom, men are the receivers of inheritance. In Esanland, female children have no status or position in the family. As Okogie points out, Esan idioms state that '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'.<sup>41</sup>

<sup>36</sup> PI Abumere 'Atukhiuki among the Esans in Bendel State. A case study of the belief system in the customary law as a means of social control' in B Ajibola KBE (ed) *Towards a restatement of Nigeria customary laws* (1991) 197.

<sup>37</sup> CG Okojie *Esan native laws and customs* (1994) 1.

<sup>38</sup> AI Okoduwa 'A geography of Esan' in AI Okoduwa (ed) *Studies in Esan history and culture: Evolution of Esan politics* (1997) 1.

<sup>39</sup> Abumere (n 36 above) 97.

<sup>40</sup> PS Olumese 'Socio-cultural relations in pre-colonial Esan' in AI Okoduwa (ed) *Esan history and culture: Evolution of Esan politics* (1997) 45.

<sup>41</sup> *okhuo ile aghada bhe uku; ei bie omo khuo he ole iriogbe*; CG Okogie *Esan native laws and customs* (1994) 124.

Two issues — the economic and the spiritual — validate the law of disinheritance of women and girl-children. In Esanland, it is believed that when a woman marries, all her possessions go to her husband, thereby draining the family's wealth. Admittedly, it is on the basis of this economic consideration that a man, while alive, acts with restraint when sharing his property among his children. Sometimes, it does happen that because of his love for his daughter, he disproportionately gives his assets to his daughter at the expense of the eldest son. In this case, 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 yi yi obe egbele khuale* ('bad laws made by a dead man can be reversed by the living'). A spiritual dimension is employed to validate the disinheritance of Esan women. It is believed that women are inferior to men in both the physical world and the spiritual realm. Such may be the consequences.<sup>42</sup>

A man while alive gave the family house to the first daughter; in no distant future, the house collapses under mysterious circumstances. Many other calamities could happen if the decision or law is not reversed. The woman herself may begin to experience grave misfortunes. Her misfortunes are invariably linked to spiritual forces at work. She is reminded that her spiritually induced woes could continue unless such property was handed over to the first son.

Indeed, what a woman gets is not by right, but as an act of goodwill. No matter her status, she herself is an inheritable property, especially in widowhood. In many Nigerian cultures, widow inheritance is prevalent. In Esanland, women are losers in matters of inheritance; they have no rights.

The Esan culture places a premium on the superiority of the first son.<sup>43</sup> 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

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<sup>42</sup> CE Ukhun 'Sexism in philosophy: An African perspective' unpublished PhD thesis, 1998 199.

<sup>43</sup> For a detailed discussion of this custom, see IO Usi *The customary law of the 'Binis'* (2000) 36-54.



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.

Second, after the final burial rites of the deceased are performed, the elders of the extended family of the deceased distribute the properties of the deceased. Again, the first son occupies a prominent place in the affair. As a matter of right, he takes the house of the deceased.

Given the above scenario, a female child of the deceased has very little role to play. She has little or no inheritance rights, as the major assets of the deceased are shared among his sons. Here, also, lies the discrimination against women. Yet, the Nigerian Constitution prohibits discrimination on the ground of sex. The very Constitution that gives this protection also provides for the establishment of Customary Courts of Appeal<sup>44</sup> with jurisdiction to hear appeals on questions pertaining to customary law<sup>45</sup> including by extension, those discriminatory customs on inheritance and burial rights. Such appeals will normally emanate from the Area Customary Courts, specifically established for that purpose by a law of a State House of Assembly. The customary laws of inheritance and burial rights are unduly beneficial to the first son and discriminatory against the female child.

## 5 Burial rights of the Esan people

In Esan culture, the burial of one's departed parents is an important event in the lives of the living and of the dead in their spiritual abodes. He who buries his departed parents is a substantial person in the family and the public sphere. Burial rites are a way in which an Esan person may be valued; it confers respectability and responsibility on a person. The performance of burial rights and the inheritance of the deceased's properties are inter-linked. In Edo State, generally, particularly amongst the Bini and Esan people, the performance of burial rites is a prerequisite for the inheritance of the deceased's estate.

The woman's right to bury her parents is clearly defined in Esan culture. They may not bury their fathers. There is an economic motivation in disallowing a woman to bury her father. The economic motivation is aimed at disinheriting as, should she be allowed to bury her father, his wealth automatically goes to her and her husband. This is an attempt to retain the family's wealth.

But what happens in a situation where the daughter or woman feels

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<sup>44</sup> See secs 265 & 280 1999 Constitution.

<sup>45</sup> See secs 267 & 282 1999 Constitution.

the need to bury her father? In this case, she asks the Egbele (elders) to grant her permission to bury her father. However, such permission is granted on the understanding that she is helping her younger brothers or minors in the matter, that her intention is not to inherit the family's wealth. According to Okogie, 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. If she is very influential and her brothers minors, she could prevail on the Egbele to allow her to perform these ceremonies, strictly on the understanding that she is only doing so because she does not want their father to remain unburied and that she is doing everything on behalf of her brothers.<sup>46</sup>

Given some historical antecedents or instantiation, were she the only child of her father, what is her position or role in the burial ceremony? In this case, the next male in line of succession performs the burial ceremonies; the woman and her wealth (and influence) obscured so that after the ceremony she cannot lay claim to property.<sup>47</sup> If burial rights confer substantiability on a person in Esan tradition, then women in Esan culture are not substantial because they have no burial rights. Only the men do. Herein then lies the authoritarian nature of the culture.

## 6 State influence and cultural authoritarianism

What has been the role of the state in these cultural practices? The issues of legislative intervention and judicial intervention will be examined next.

### 6.1 Legislative intervention

Legislative intervention in this area of the law has vacillated between outright prohibition of discrimination against women and passive encouragement of it. The 1999 Constitution of the Federal Republic of Nigeria clearly prohibits any form of discrimination against a citizen on the grounds of ethnicity, sex, religion or political opinion, either expressly or in the practical application of any law in force in Nigeria.<sup>48</sup> Yet, cultural issues of inheritance and burial among the Esan speaking people have always imposed discriminatory practices obviously infringing on this constitutional prohibition. Similar constitutional protection can be found in section 21 of the Constitution. This section provides that 'the state shall protect, preserve and promote the Nigerian cultures

<sup>46</sup> Okogie (n 41 above) 124-125.

<sup>47</sup> As above, 125.

<sup>48</sup> See sec 42(1).

which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter'. It may then be contended that any culture that is discriminatory against women within the context of section 42 does not enhance human dignity and is therefore not worthy of protection, preservation and promotion under section 21. The problem, however, with this section is that judicial intervention cannot be sought to interpret or enforce the provision, since the Constitution<sup>49</sup> has ousted the jurisdiction of the courts in respect of any issue involving this provision and others, as found in chapter 2 of the 1999 Constitution. Therefore, section 21 is of little value in advancing the cause of human rights.

In Nigeria, inheritance rights are regulated by statute and by customary law, particularly in Edo State. Two statutes call for consideration here, that is, the Wills Law<sup>50</sup> and the Administration of Estates Law.<sup>51</sup> While the former deals with testate succession, the latter deals with both testate succession and intestate succession. The Wills Law, rather than promote women's rights as an aspect of human rights, or at least guarantee the equality of both sexes on inheritance rights, inadvertently enhances cultural discrimination against women in issues relating to inheritance. For example, section 3(1) of the law provides as follows:

Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator.

While this provision recognises the right of any person to dispense with his property by testamentary disposition,<sup>52</sup> it also curtails such a right by subjecting it to the applicable customary law. Thus, any disposition made which is not in accordance with the prevailing customary law is liable to be set aside, even where such custom infringes women's rights. This kind of provision defeats the spirit and philosophy behind a law on wills so long as such a law seeks to confer a right on a person to dispose of his property upon death, in the way, manner and to whom he desires. The provision does not only curtail the right under section 42 earlier referred to, but it also discriminates against women. Section 42(1) of the 1999 Constitution provides as follows:

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

<sup>49</sup> See sec 6(6)(C) of the 1999 Constitution. See also the case of *AG Bornu State v Adamu* (1996) 1 NWLR [Part 427] 681 (CA).

<sup>50</sup> Cap 72, Laws of Bendel State of Nigeria 1976 as applicable in Edo State. The old Bendel State has been split into Edo and Delta States.

<sup>51</sup> Cap 2, Laws of Bendel State of Nigeria 1976 as applicable in Edo State.

<sup>52</sup> In accordance with sec 44 of the 1999 Constitution.

person be subjected either expressly by, or in the practical application of, any law in force in Nigeria or in any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject.

The object of the above-quoted constitutional provision is to accord equal rights to every citizen irrespective of gender. This objective, however, appears to have been defeated by the customary law of inheritance and burial rights of the Esan speaking people of Edo State in mid-western Nigeria. For instance, any disposition of property which seeks to confer ownership rights on a female child, to the detriment of a male child, in respect of real property where the deceased lived and died, is liable to be set aside on the grounds that it is against the custom of the Esan speaking people.<sup>53</sup>

Within the realm of customary law, special courts have been created to enforce the judgments of local customary courts of the different tribes that make up the Esan speaking people. For example, the Bendel State Customary Courts Edict No 2 of 1984 as applicable in Edo State, established District and Area Customary Courts<sup>54</sup> with the jurisdiction to try matters pertaining to, *inter alia*, inheritance upon intestacy under customary law and to grant power to administer the estate on an intestacy under customary law. While the District Customary Courts have a monetary limit of N5 000,00 on customary matters dealing with intestacy, the Area Customary Courts have unlimited jurisdiction on the sum it may award with respect to inheritance matters. The Constitution in fact empowers the states to create customary courts and practically all the states in the southern region have created these courts with the jurisdiction to hear and determine cases involving the customary law of the location of the courts.<sup>55</sup> The significance of the establishment of customary courts is that, and as shall be seen shortly, the courts do in fact determine issues and enforce them in favour of the male gender.

The Administration of Estates Law earlier referred to suffers from the same defects as the Wills Law. For example, section 1(3) provides:

Nothing in this law affects the administration of the estates of deceased persons by or under the authority of any customary court nor unless otherwise expressly provided the distribution, inheritance or succession of any estate where such distribution, inheritance or succession is governed by customary law whether such estate is administered under this law or by or under the authority of a customary court.

The legal implication of this provision is that, just like the Wills Law, the Administration of Estates Law is subject to the prevailing customary law

<sup>53</sup> See *Lawal-Osula v Lawal-Osula* [1995] 32 LRCN 291 (SC).

<sup>54</sup> See sec 3(1) of the Edict.

<sup>55</sup> See sec 6(5)(i) & (j) of the 1999 Constitution.

of the area. Thus, where the deceased was subject to customary law during his lifetime, an application may be brought before a customary court to administer his estate under the prevailing customary law. The court will usually grant such an application even where it discriminates against a female child. Indeed, it is common in legal practice in Edo State, to apply to a customary court, on behalf of the eldest surviving male child of the deceased, to administer the estate of the deceased under customary law and to the exclusion of any female child. The court usually grants such applications.

Recently, the Edo State House of Assembly, a regional legislative body in Nigeria, enacted a law to prohibit the customary practice of female circumcision or genital mutilation.<sup>56</sup> Though not falling within the scope of the discussion, it is, however, evidence of a growing awareness of the cultural practices that are no longer in tune with international human rights law. The law prohibits the circumcision or mutilation of the genital organ of any female, whether or not the female's consent was obtained.<sup>57</sup> The problem with this legislation is that it is a state effort, applicable only in the state and therefore not binding on other states in the Nigerian Federation where some of these objectionable cultural practices are still prevalent. Even then, it remains to be seen whether these legislative efforts have been matched by sufficient judicial intervention. However, at a sub-regional level, the Ghanaian parliament has gone a step further than Nigeria in this direction. In 1994, the Ghanaian parliament passed an Act to amend the Criminal Code of Ghana. The Act, Criminal Code Amendment Act No 484 of 1994, inserted a new section 69A in the Code. The section prohibits female circumcision in whatever form and prescribes a three-year minimum sentence for any person found guilty under the section. Being national legislation, it is a marked improvement over the Nigerian situation. It is, however, hoped that the Edo State legislation will be amended to include other negative cultural practices such as the burial and inheritance.

## 6.2 Judicial intervention

Depending on the culture or custom that is at issue, the Nigerian superior courts have prevaricated women inheritance. This statement will be elucidated with reference to case law recently decided by the Courts. The first is the case of *Lawal-Osula and Others v Lawal-Osula and Others*.<sup>58</sup> The issue to be determined here was whether a testator could will his property, irrespective of the Bini<sup>59</sup> custom of Edo State

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<sup>56</sup> See the Female Circumcision and Genital Mutilation (Prohibition) Law 1999.

<sup>57</sup> See sec 3 of the Law.

<sup>58</sup> n 43 above.

<sup>59</sup> Bini is another dialectical variation of the Edo language.

applicable to such matters. The testator in this case, a traditional Bini chief, wrote a will devising his real and personal properties in the manner specified in the will. The effect of the disposition was to completely shut out the first son from the provisions of the will. The first son and some other children were not mentioned in the will at all. The testator's will favoured his wife and her child, as he bequeathed his important assets, including where he lived and died, to his wife. Under Bini customary law, a man cannot will his *Igiogbe*.<sup>60</sup> Fearing that he might be caught with this custom, the deceased added a special declaration in the will that read thus:

I DECLARE that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that the native law and custom of Benin shall not apply to alter or modify this will.

The plaintiff, who claimed to be the first son of the deceased testator, brought an action to set aside the provisions of the will on the grounds, *inter alia*, that it violated Bini customary law. The contention of the plaintiff was upheld in the Supreme Court, which is the highest court in Nigeria. The Supreme Court held that, when a hereditary chief dies, whether 'testate' or 'intestate', he will be buried according to native law and custom at his usual place of abode in the traditional way by performing certain rites. After this burial, the eldest son, in trust up to such a time when he can perform the second burial, holds all his properties. Then he takes the *Igiogbe* and other items of his estate can be shared. The Court went further to define the *Igiogbe* as the house or houses where the deceased hereditary chief lived or used as seat or seats as a Bini chief. This cannot be taken away and perhaps this includes the paraphernalia of office.

The Court then opined that the provisions of the Wills Law, referred to earlier in this article, was subject to the Bini custom. The effect of such an opinion is that, despite the provisions of the Wills Law, permitting a testator to devise his property in a way and manner he thinks fit, it cannot derogate from the Bini custom that only the first son of the deceased inherits the *Igiogbe*.<sup>61</sup> The Court then concluded that the custom satisfies the test for the validity of customary law in that the said custom is not repugnant to the principles of natural justice, equity and good conscience.<sup>62</sup> The judgment clearly excludes a woman from inheriting the *Igiogbe*, irrespective of the wish of the testator.

However, the 'pendulum' swung in favour of women's rights in the

<sup>60</sup> The 'Igiogbe' is a 'Bini' language which means the house or houses where the deceased lived and died.

<sup>61</sup> See also *Abudu v Eguakun* [2003] 36 WRN 1 (SC).

<sup>62</sup> For a full discussion of the validity tests, see AD Badaiki *Development of customary laws* (2001) 31-55; AO Obilade: *Nigerian legal system* (2000) 100-111.

case of *Ukeje v Ukeje*,<sup>63</sup> where the Court of Appeal, Lagos Division, adopted a progressive approach to the issue of whether women have inheritance rights at all under the Ibo customary law of South-Eastern Nigeria. In a study done by the Project Alert on Violence Against Women, a non-governmental organisation (NGO), the NGO found that under Ibo custom, the deceased sons and every other member of the family (including the females) presume that all landed properties are for the boys. The study also revealed that neither a daughter nor a wife could inherit.<sup>64</sup> Unlike the Esan<sup>65</sup> custom, which is only restrictive of the inheritance rights of women, the Ibo custom completely excludes women from benefiting from the estate of the deceased. The plaintiff in this case brought an action before the Lagos High Court, challenging this custom. Judgment was given in her favour by the High Court, upon which the respondent appealed to the Court of Appeal. At the Appellate Court, one of the issues that had to be determined was whether the Ibo custom was not unconstitutional in view of the provisions of sections 39(1)(a) and 39(2) of the 1979 Constitution, *in pari materia* with sections 42(1) and (2) of the 1999 Constitution. The Court held that this custom was indeed unconstitutional.<sup>66</sup>

This decision is an affirmation of the earlier decision of the Enugu Division, in the case of *Mojekwu v Mojekwu*.<sup>67</sup> This case concerns the situation when a man and his only son and brother die. According to custom, the first son of the deceased brother will inherit all the property to the exclusion of any female child. He is called *oli-ekpe*.<sup>68</sup> The *oli-ekpe* inherits the land, the wives of the deceased and if the deceased had daughters, he will give them away in marriage.<sup>69</sup> The Court, *per* Niki Tobi JCA, did not hesitate to declare this custom to be repugnant to natural justice, equity and good conscience. Particularly, Niki Tobi JCA<sup>70</sup> noted that:<sup>71</sup>

Nigeria is an egalitarian society where the civilised society does not discriminate against women. However, there are customs, all over which discriminate against the womenfolk, which regard them as inferior to the men folk.

<sup>63</sup> [2001] 27 WRN 142.

<sup>64</sup> Project Alert on Violence Against Women *Beyond boundaries: Violence against women* (Lagos) 109.

<sup>65</sup> This ethnic group includes the 'Bini', the Esan, the Etsako and the Ora, being separated by dialectical variations in language only.

<sup>66</sup> 160. See also the case of *Mojekwu v Mojekwu* (1977) 7 NWLR [Part 512] 288.

<sup>67</sup> (1997) 7 NWLR (Part 512) 283 (CA).

<sup>68</sup> Meaning he inherits the property of his relation.

<sup>69</sup> See also the case of *Alajemba Uke & Another v Albert Iro* [2001] 17 WRN 172, where the Court of Appeal also held that any custom that seeks to relegate women to the status of a second class citizen is unconstitutional. A custom that precludes women from being sued or being called to give evidence in relation to land subject to customary rights of occupancy is unconstitutional.

<sup>70</sup> JCA is the official abbreviation for Justice of the Court of Appeal.

<sup>71</sup> 305.

That should not be so as all human beings, male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex. Thus, any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy. The Oli-ekpe custom, which permits the son of the brother of a deceased person to inherit his property to the exclusion of his female child, is discriminatory and therefore inconsistent with the doctrine of equity.

The judgment in *Mojekwu v Mojekwu* was revolutionary and represented a definitive pronouncement on the status of some of Nigeria's cultural practices that promote gender inequality. The judgment was well received within the human rights community and formed a benchmark for the assessment of other cultural practices that are perceived to be discriminatory. However, the euphoria generated by the pronouncement of Niki Tobi JCA was short-lived. The appellant was dissatisfied with the decision and appealed to the Supreme Court. While upholding the conclusions reached by the Court of Appeal, the Supreme Court watered down the significance of the judgment by rejecting the definitive pronouncement of Niki Tobi JCA. The Court was of the opinion that the pronouncement was completely unnecessary since it did not flow from an issue arising for determination before the Court. In other words, the issue whether the *Oli-ekpe* was repugnant to natural justice, equity and good conscience was not before the Court of Appeal and therefore it was not necessary for the lower court to have declared it to be so. Uwaifo JSC pronounced that he could not 'see any justification for pronouncing that the Nnewi native custom of *oli-ekpe* was repugnant to natural justice, equity and good conscience'.<sup>72</sup> In his reasons for this finding, Uwaifo JSC observed that 'the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi *oli-ekpe* custom and that is quite understandable'.<sup>73</sup> He then added the following:<sup>74</sup>

But the language used made the pronouncement so general and far reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance, the custom and tradition of some communities, which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practise by the system by which they run their native communities. 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, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.

The cases examined above show inconsistency on matters dealing with

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<sup>72</sup> 3576.

<sup>73</sup> As above.

<sup>74</sup> This extract tends to suggest that under certain circumstances, the Justice of the Supreme Court supports some form of discrimination against women.



cultural discrimination against women. Apparently clear provisions of relevant human rights instruments, including the 1999 Constitution, should be the overriding guide. These decisions defy logic and are evidence of cultural authoritarianism on human rights issues. While the decision in *Ukeje v Ukeje* rejects cultural discrimination against women, *Lawal-Osula v Lawal-Osula* and *Mojekwu v Iwuchukwu* appear to endorse such discrimination. In Africa, the influence of traditional customary practices is still strong. Judges have been indoctrinated in their formative years in these discriminatory cultural practices, and their judgments are tainted by their beliefs, even when such practices are inimical to the advancement of human rights. Perhaps judges still believe in the relativist theory of human rights as opposed to the current trend towards universalist notions of human rights. That explains why Uwaifo JSC does not see anything wrong with the idea that only men may be traditional rulers.

## 7 Cultural authoritarianism and international human rights law

There is no basis for the attitude of Nigerian courts in the light of international human rights instruments to which Nigeria is a party. Those instruments enhance the principle of equality between the genders. There is no reason why courts cannot use these instruments to advance women's rights. The African Charter on Human and Peoples' Rights (African Charter or Charter) is one such instrument.<sup>75</sup> Article 18(3) of the Charter contains provisions meant to protect the rights of women. It provides that the state shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of women and children as stipulated in international declarations and conventions. Even though section 42 of the Nigerian Constitution prohibits discrimination against women, it is clear that neither the Nigerian state nor the regional governments have put in place a programme of action to eliminate cultural discrimination against women, especially in burial and inheritance matters, thus violating the provisions of the African Charter.

The Charter has been incorporated into state law in Nigeria. It has also been the subject of judicial interpretation by Nigerian courts. In *Fawehinmi v Abacha and Others*,<sup>76</sup> the Court of Appeal held that the provisions of the African Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria. The Court

<sup>75</sup> Domesticated as a municipal law in Nigeria under cap 10 of the Laws of the Federation of Nigeria 1990.

<sup>76</sup> (1996) 9 NWLR [Part 475] 996; [1998] 1 HRLRA 541.

held further that no government is allowed to exclude, by local legislation, its international obligations. The Charter, even though it has been domesticated by the Nigerian National Assembly, is legislation with international flavour, the provisions of which cannot be ousted by local legislation. The implication of this revolutionary judgment is that a statute such as the Wills Law must be struck down since it is inferior to the African Charter. Viewed in this context, customs denying women inheritance and burial rights cannot stand. Every custom that does not meet the goal of the Charter must be struck down.

However, and despite the provisions of the Charter and other international human rights instruments, women in Africa continue to be victims of cultural discrimination. In order to eliminate incidents of discrimination against women on cultural grounds and to address the special needs of women, the African Union, at its summit in Maputo, Mozambique, held on 11 July 2003, adopted the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Article 25 of the Protocol provides that it shall enter into force 30 days after the deposit of the fifteenth instrument of ratification. The Protocol has not yet come into force. Articles 2 and 20 of the Protocol prohibit discrimination against women. While article 2 requires state parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures, article 20 specifically confers the right on women to have an equitable share in the inheritance of their parents' and husbands' property.

The Protocol is not substantially different from the provisions of the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that was adopted by the UN General Assembly on 18 December 1979. Though the Convention seeks to prohibit different kinds of discrimination, articles 2 and 5 are particularly relevant. Article 5(a), for instance, provides that state parties to the Convention shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. It is believed that when this Protocol comes into force, it will strengthen the provisions of the African Charter on the elimination of cultural practices against women, including the discrimination against women on burial and inheritance rights in the name of custom.

## **8 Conclusion**

In this paper, we have attempted an examination of the status of Esan women from the standpoint of human rights via burial and inheritance rights. This consideration was provoked by the pervasive declarations

by some scholars as indicative of Chinweizu, that African women are no victims of sexism. In our analyses, we realised that African women, especially Esan women, are clearly victims of sexism in terms of the denial of their rights as they pertain to burial and inheritance rights, orchestrated and accentuated by cultural and governmental policies or constraints. We posited that the courts have not been firm in eliminating cultural prejudices against women and have rather displayed an attitude of prevarication. We further submitted that one way of making the courts more pro-active on issues of women's rights is to use international instruments, as was demonstrated in the landmark case of *Abacha v Fawehinmi and Others*, to override domestic legislation and government policies that may be inimical to women's rights.

In the final analysis, we submit that the adoption of the Protocol may be a recognition by African leaders of the failure of CEDAW to address the cultural prejudices against African women. While CEDAW may have succeeded in Europe and America, in Africa it has failed to eliminate the various forms of cultural discrimination against women. The African response to this problem is the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. However, unless African leaders show a serious commitment to the realisation of the goals of the Protocol by putting in place the necessary legislative and institutional measures to ensure its success, the Protocol may fail to advance women's rights. One way of demonstrating this commitment is the quick ratification of the Protocol by at least 15 African states. If the necessary measures are put in place, respect for women's rights in Africa (including the elimination of the cultural barriers) will substantially increase.