Child Ownership Under Igbo Customary Law: Resolving the Paternity Conundrum

Patrick Uchenna Uhuo*

Abstract

Like other parts of the Nigeria, customary courts in Ebonyi state are established to administer the customary law prevailing in the area of jurisdiction of the court binding upon any of the parties, so far as it is not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law in force in the state or inconsistent with public policy. The effect is that once a custom is challenged in a court of law by anyone who is interested or adversely affected by its application, the court will examine such custom diligently in order to discover whether the custom has passed the validity test. Using the doctrinal methodology as its analytical framework, this article examines the validity of Izzi customary law on the paternity of a child in relation the position of the Supreme Court on the subject matter. The article found that the paternity regime under Izzi customary law as part of the larger Igbo land does not pass the test of validity as required by law and the pulsations of civilization for which it should be abandoned as anachronistic and atavistic.

Keywords: Repugnancy, Customary law, Child, Paternity, Court.

1. Introduction

It has long been settled that customary law is the law that captures the norms, traditions and rules of behavior of the people of a given society. It is an organic law propelled by beliefs, philosophies and value system of a people. In *Ogolo Vs. Ogolo*[1], the Supreme Court following its earlier decisions in *Oyewundu vs. Ogunesan*[2], *Taiwo Vs. Dosunmu*[3]and *Otogboluvs Okeluwa*[4]defined customary law as "the organic or living law of the people

* Hon. Justice Patrick UchennaUhuo is the President, Customary Court of Appeal, Ebonyi State. E-mail: patrickuhuo@gmail.com

[1](2004) 115 LRCN 3099 at 3101

[2](1990) 3 NWLR (pt. 137) 182 at 207

[3](1966) NMLR 67

[4](1981) 6 – 7 SC 99

of the indigenous people of Nigeria regulating their lives and transactions. It is a mirror of the culture of the people".

A preliminary point has to be made here and now that customary law is not inferior to received English law. Part of the received English law is "English common law" which is an aggregate of customs, norms and traditions of different counties and communities of the English people common to majority of them. On account of the fact that some of their customs became static, dogmatic and failed to grow and move with time, the English people appealed to the conscience of their Kings and Queens to provide remedies or compensations where their customs, that is their common laws killed integrity, failed to provide remedies or will inflict injustice in its unfettered application in line with their basic principle of "Ubi Jus, Ubi Remedium"[5].It is from the interventions from their Kings and Queens Bench that a body of Rules and Principles of Equity arose, controlling the application, modification and even outright elimination and extinction of certain customs that have become atavistic and a clog to the growth of that society.

The point being made here is that though our customs and their application are subjected to certain tests[6], that does not make them inferior to the common laws of England and other received English laws as those received laws were customs and traditions of our colonial masters which also failed same test of applicability.

It is, therefore, absurd and wrong thinking laced with inferiority complex to rank foreign customs higher than our own indigenous customs as is perceived even among a cross section of our elites in Nigeria.

In Nigeria, as in Igbo land of Ebonyi State, for a custom to be recognized and applied as a customary law binding on the people, it must undergo three validity tests. That custom must not be:

i. Repugnant to Natural Justice, Equity and good conscience,
ii. Incompatible with public policy; or
iii. At variance with any provisions of a statute or written law in force.

[5]This principle is to the effect that wherever there is a right, there is also a corresponding remedy.
[6]s18(3), Evidence Act 2011 (as amended).

The crux of this article is to consider whether the custom of majority of the people of Ebonyi State and in particular the Izzi clan that if you are not customarily married to a woman, the children of that relationship without proper customary marriage belongs to the father of that woman or to the man she is customarily betrothed to is actually in accord with the three tests listed above.

Generally, to prove paternity under customary law, what is needed is evidence of a subsisting marriage. Thus, nothing else is needed to prove paternity if there is a clear evidence of a valid and subsisting marriage under customary law. It seems to me that the underlying reason for this custom is to protect the marriage institution, protect family bond, privacy rights and to guide against promiscuity in the society.

2. Test Case of Izzi Customary Law on Parternity

A test case on the subject of child paternity which inspired this write up came up on appeal from the judgment of Iziogo Customary Court in 2012. While I shall keep the facts of the case real, the names of the parties shall be kept incognito in order to protect the parents and the children involved from any embarrassment that exposure may subject them.

In that case, *John Oduburu Vs*. *Celestine Adonwe*[7] came to my panel on appeal from Iziogo Customary Court in Izzi Local Government Area of Ebonyi State. The suit which gave rise to this appeal was instituted at the lower court by Celestine Adonwe (now deceased) claiming paternity and custody of two (2) children namely Ekene Adonwe (male) and Nwazunku Adonwe(female) who were with the Defendant John Oduburu, now the Appellant before us, as the children of his late uncle, Igweonye Oduburu.

The case of the Plaintiff at the lower court was that his late uncle Igweonye Oduburu married one Alice Oduburu about 6 years before the commencement of this action at the Iziogo Customary Court in 1990 and that a cow was given to the parents of Alice as her bride price. Shortly after the marriage, Alice informed the husband that she was going to visit her parents. She was allowed to pay her parents a visit but she never came back to her customarily betrothed husband.

[7](Appeal No: CCA/100A/12)

After about two years of her failure to return to her husband, the Plaintiff and his uncle, Igweonye Oduburu went in search of her to her parents place in Ndiokeda village in Izzi Local Government Area but she was not seen. While they were still looking for her, her husband Igweonye Oduburu died. After the burial rites of her late husband, the Plaintiff went back to the parents of Alice after another 4 years and discovered that Alice had been found already living with the Defendant/Appellant and had given birth to two children Ekene Adonwe (Male) and Nwazunku Adonwe to the Defendant/Appellant. The Plaintiff's claim at the lower court was that the two biological children of the Defendant/Appellant John Oduburu are the children of his late uncle since the bride price paid for Alice had not been returned by her parents to his late uncle Igweonye Oduburu.

At the trial, the defendant claimed that he married Alice (6) six years ago and paid N4, 200 as her bride price to her parents. That Alice stayed with him one year after the marriage before she became pregnant for their first child and later had another child which she was still weaning when this action was brought against him. He claimed that he paid the bride price of Alice to Nwankwegu Agashi, the half-brother of Alice in the presence of Titus Ome and Ibina Nwalo.

The lower court gave judgment to the Plaintiff and ordered that the two biological children of John Oduburu (the Defendant/Appellant) "be awarded" to Celestine Adonwe who sued on behalf of his late uncle, the 1st husband to Alice the mother of the two children.

The reason for the judgment of the trial court was that even if the sum of ₦4, 200 which was said to have been paid to Awoke Eguji as the bride price of Alice by John Oduburu was actually paid, it was paid after the two children in dispute had been born and up till the date of the judgment, the live cow[8] and ₦1, 000 paid by the PW1's uncle as the bride price of Alice has not been refunded. The basis for the decision by the Iziogo Customary Court is that:

> The Custom and tradition of Izzi is that if one marries a woman who had been married to

[8] Cow and other customary items are parts of the incidents of traditional marriage in the Izzi area of Ebonyi State.

> someone else, he must be sure that he had paid the bride price of the woman to the in-law for onward refund to the former husband, so that he can claim the children born by her. But in this respect, the DW1 did not do so. He waited till the DW2 Alice gave birth to two children before it came to his mind that he would go to pay the bride price of a woman he has married for more than 6 years.

Not satisfied with the judgment of the lower court, the Defendant/Appellant, John Oduburu appealed to the Customary Court of Appeal of Ebonyi State.
From the evidence and findings of the lower court, it was clear and obvious that the two children were the biological children of the Appellant. The only contention at the court below was that the Appellant did not pay the Bride Price of Alice and or that the bride Price of cow paid on her head by Celestine Adonwe, her 1st husband, was not returned before those two children were born to the Appellant.
In a split decision of two to one, the Panel II of the Customary Court of Appeal, presided over by myself affirmed the judgment of the lower court on three grounds.

i. That the decision of Iziogo Customary Court is a true reflection of the custom of Izzi people in such circumstance.
ii. That the appropriate Customary Court law enjoins all customary courts to note and apply customs prevalent in their area of jurisdiction in the settlement of disputes brought before the customary courts; and
iii. That the proper customs of the people in respect of the matter was properly applied by Iziogo Customary Court.

I agreed with my two brothers that the facts of the case were clear and aptly captured by the lower court and the lead judgment of the court.
I also agreed with my learned brothers that the lower court applied the custom prevalent in Izzi land at the time of considering and delivering of the instant judgment appropriately but not correctly.

My point of "dissent", however, was whether that izzi custom as applied to the facts of this case is repugnant to natural justice, equity and good

conscience. It is true that the Customary Court Law of Ebonyi state provides that[9]:

> "Subject to the provisions of the constitution and the provisions of this law, a customary court shall administer:
>
> a. The customary law prevailing in the district or area of jurisdiction of the court binding upon any of the parties, so far as it is not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law for the time being in force in the State;
> b. The provisions of any written law which the court may be authorized to enforce;
> c. The provisions of any enactment in respect of which jurisdiction is conferred on the court by the enactment"

However, it is trite even from the provisions of the law that for a customary law to be valid and binding on the people and enforceable against them either by the courts or the society, it must pass three tests known as validity test. These three tests have earlier been listed in this article. Once a custom is challenged in a court of law by anyone who is interested or adversely affected by its application as in the instant case, the court will examine such custom diligently in order to discover whether the custom has passed the validity tests[10] as outlined previously.

Customary Courts, especially in Ebonyi State, are established to administer the customary law prevailing in the area of jurisdiction of the court binding upon any of the parties, so far as it is not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any written law in force in the state or inconsistent with public policy[11]. In *Okonkwo vs. Okagbue* (*supra*) Ogundare(JSC) adopted the Oxford English Dictionary definitions of "repugnant" to mean:

[9]section 12 (1) (a)-(c), Ebonyi State Customary Court Law, 2009.
[10]*Okonkwo vs. Okagbue*(1994) 9 NWLR (pt. 365) 301 Ratio 4 eloquently illustrates the scope of the validity test applicable to customary usages.
[11]section 12 (1) (a) – (c), Ebonyi State Customary Court Law, 2009.

"Contrary or contradictory to, inconsistent or incompatible with, distasteful or objectionable to". The phrase "repugnant to natural justice, equity and good conscience" has never been interpreted disjunctively by our Courts."Equity" in its broad sense, as used in the repugnancy doctrine, is equivalent to the meaning of "natural justice" and embraces almost all, if not all, the concept of "good conscience".

The equity is not used in its technical sense but in its broad sense. Also natural justice is not used in the modern technical sense, but synonymous with natural law[12]. Using this broad interpretation of "repugnancy", it is clear that it will be against the principle of natural law or justice, good conscience and reason to allow the natural and biological children of the Appellant to be given to another man because a cow and N1,000 bride price paid on the mother of those children was not refunded to the respondent.

Consequently, the custom of Izzi people that will "award" the biological children of a man to another man because a bride price was not refunded to the first husband of the mother of the children is repugnant to natural justice, equity and good conscience. To apply this custom on the appellant will not only offend the natural and biological law and rights of the appellant, it will also prick the good conscience of a reasonable man that the biological children of another man are forcefully taken away from him.

It will also be unconscionable to forcefully separate the children from their biological parents because of the failure of their father to refund the bride price of their mother. Men of good conscience and reason will certainly condemn this custom as distasteful, harsh and brutish against the appellant, the children and their mother.

Furthermore, in *Edet Vs Essien*[13], which has similar facts as the instant case, the Appellant was married to his wife, under native law and custom. His wife left him and went to live with the Respondent. Two children were born of the Union between the Respondent and the wife. The Respondent did not pay to the Appellant the money which the Appellant had paid in dowry on the wife. The appellant therefore claimed that the children were his. It was

[12]*Okonkwo Vs. Okagbue* (supra).
[13](1932) II NLR 47

held that it was contrary to natural justice, equity and good conscience to allow the appellant to claim the children of another man merely because the other man had deprived the appellant of his wife without paying dowry for her.

Just as the facts in *Edet Vs Essien*, the only reason the family of the deceased first husband of Alice is claiming the two children of the Appellant is that the dowry paid by the first husband was not refunded.

This nature of claim was rejected by an appellate court 81 years ago.The Judgment of that Court has not been condemned or set aside by our superior Appellate Courts. Rather, it has been cited with approval till date whenever customs are subjected to the repugnancy tests.

3. The Collateral Implications of the Subsisting Case Law on Izzi Paternity Custom

If this custom of claiming the children of another man merely because the other man had deprived the man of his wife without refunding her dowry to the 1st husband was condemned 81 years ago, I am of the strong view that it should be condemned, buried and forgotten as archaic and atavistic in this modern time. The people of izzi cannot hold on to these fixed mores which are harsh, brutal and contrary to and inconsistent with natural justice, equity and good conscience. It is also not in tandem with good reasoning.

Suffice it to say that this custom has not been fair to the children at all. They have been forcefully taken away from their biological parents whom they grew up to know as their father and their mother with all the care and love parents give to their children to another family unknown to them, without any filial or biological relationship.

Again, in *Mariyama Vs Sadiku Ejo*[14], the Court of Appeal declared a custom of the area which stipulates that a child born within 10 months of a divorce belonged to the divorced husband as repugnant to natural justice equity and good conscience. Sections 12 and 13 of the Ebonyi State Customary Court Law have subjected the Customary law to be recognized, applied and enforced to the same repugnancy tests as also enunciated in Section 14 of the Evidence Act and a plethora of other authorities. Upon the examination of

[14](1961) NRNLR 81

the Izzi custom applied by the Iziogo Customary Court to decide the case before her, it is apparent that the said custom ordinarily ought not to have been recognized, applied and enforced by the trial court as the custom is repugnant to natural justice, equity and good conscience.

To this end, in *Daniyan Vs Iyagin*[15], the Court of Appeal, Abuja Division has warned that a custom which is repugnant to natural justice, equity and good conscience should not be given recognition. It is therefore clear to me that, the trial Court and the majority judgment of the Customary Court of Appeal in view of the authorities cited above, were wrong when they gave recognition and applied the Izzi custom of giving out biological children of a man to another man because a bride price of a cow and N1, 000 was not refunded before those children were born to their father, which custom is repugnant to natural justice, equity and good conscience.

There is a further reason to disagree with majority judgment in the instant case. At the beginning of this article, we established that custom is organic because it is not static due to the fact that customs of a people must cohere in time and civilization with the people of a given society. Customs and traditions must not draw the society backwards. That is why any custom that does not liberate and improve the people, modernity must improve the custom or such custom must be abandoned as archaic and atavistic.

The custom under review did not impact justice on the Defendant/Appellant. Even when the Appellant volunteered to refund the bride price, both the parents of the bride and the children of the deceased 1st husband rejected the offer in the alter of a harsh and uncompromising custom on the ground that the real grain of the custom is that those two children were born when the bride price paid on Alice was still subsisting. The bitter complaint of the appellant yielded no fruit.

The situation invites all persons of good conscience and rationality to enlist in the campaign for the total annihilation of this obnoxious custom notwithstanding whatever reason our elders had then in evolving and practicing this custom which have been overtaken by modernity and civilization. We are no longer in the era of inter-tribal wars when children

[15](2002) 7 NWLR (pt. 766) 346 at 359

are forcefully taken as slaves from their parents. Any custom that re-incarnates this era must be rejected. It is not in tandem with good reason. It offends natural law. It cannot emanate from good conscience.

What about the children? Has this custom been fair to them? I would insist otherwise. They have been forcefully taken away from their biological parents whom they grew up to know as their father and their mother with all the love and care parents give to their children to another family unknown to them without racial or biological relationship.

In the case of *Mariyama vs. Sadika Ejo*[16], where the order for the custody of a child by a lower court was awarded to a former husband of a divorced woman because a custom of the area stipulates that a child born within 10 months of a divorce belongs to the divorced husband was upturned on appeal. The Appellate court held that:

> In the very exceptional circumstances of this special case and considering that the child's benefit was of paramount importance, it would be contrary to natural justice and good conscience to enforce the observance of the native law and custom applicable in the case.

The cases of *Daniyan vs. Iyagin*[17]and *Ojiogu vs. Ojiogu*[18] are also apposite to this discourse. It is to be emphasized that it is not only this custom that has been declared null and void on account of failure of the three tests of validity.

For instance, the "nrachi" system of retaining one of the daughters by parents who have only female children in the family to produce male children for the family which is of wide application in Igboland has long been shot down by the Supreme Court on various occasions. The other archaic custom that daughters cannot inherit their father's property even if they were born out of wedlock has also been declared null and void by the Supreme Court.

[16](1961) NRNLR 81
[17](2002) 7 NWLR (part 766) 346 at 359
[18](2010) 9 NWLR (part 1198) 1 at 5

The case of *Ukeje vs. Ukeje*[19]is instructive as such custom was declared void for being contrary to Section 42(1) (a) and (2) of the 1999 Constitution (as amended).

4. Conclusion

The corollary of the foregoing is that all customs that do not pass the validity tests are customs that are dogmatic, static and retrogressive and ought to be and should be discarded as they distort and hamper the growth of the societies which still cling to these customs with iron pits of traditions.

[19](2014) Vol. 234 LRCN 1 at 7 through to 11