

Ending Gender Discrimination in Succession to Traditional Ruler-ship in Nigeria

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Abstract

Traditional Rulers are vital part of the institutional structure of Nigeria. They feature as titular heads of their communities and are formally recognized in all 36 states of Nigeria and the federal capital territory. They are involved in several activities which are central to the lives of the Nigerian people, including political, social, economic, developmental, security matters and customary arbitrations. In most communities, the method of succession to traditional ruler-ship is essentially patrilinear by which only a male member of a ruling family succeeds to the position. In a number of those communities, the male primogeniture system of succession prevails. The system has gone unchallenged for so long despite its patent discrimination against women in contravention of the gender non-discrimination clause of the Nigerian constitution. In two cases decided 2014, the Supreme Court of Nigeria voided the custom of male primogeniture operative in some Igbo communities of Southeast Nigeria. These decisions appear to establish legal principle for assessing the validity of customs in Nigeria which are discriminatory against women. The paper extrapolates the full amplitude of the Supreme Court gender non-discrimination doctrine as it relates to succession to traditional ruler-ship and arrives at novel conclusions.

Keywords: Discrimination, gender, patrilinear, traditional ruler-ship

1. Introduction

In April, 2014 the Supreme Court of Nigeria gave two significant judgments both on the male primogeniture custom of the Igbo people in Southeast Nigeria. In each of the cases, the court struck down the custom and held it to be unconstitutional and repugnant. In the first case, *Ukeje v. Ukeje*,² the court struck down the custom on ground that it conflicts with the non-discrimination clause of section 42(1) and (2) of the 1999 Constitution of Nigeria which expressly prohibits gender discrimination. In the second case, *Anekwe v. Nweke*,³ the court struck down the custom on ground that it is "repugnant to natural justice, equity and good conscience".⁴ Heartening as these decisions are it is doubtful if they finally put to rest the problem of gender discrimination against women in Nigeria, especially as it relates to age-long chieftaincy practises include succession to traditional or natural ruler-ship. The relevant question is whether the two decisions are good authority to establish a case for women to succeed to traditional ruler-ship positions in the face of customs which clearly disqualifies them from such positions. In this paper, we examine the two decisions of the Supreme Court of Nigeria and extrapolate their implications for discrimination against women in respect of traditional ruler-ship. We argue that at a perfunctory level, the decisions may be thought to have broken the shackle of gender discrimination against women for all purposes and in all communities, given the far-reaching legal principles established by the Supreme Court in the cases.

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²(2014) 234 LRCN 1.

³(2014) 234 LRCN 34.

⁴Ibid at 64 - 65.

However, there appear to be some sticking points whether the decisions are applicable to women's claims to traditional ruler-ship whenever such claims do arise. This dilemma may be due to the proper construction of the derogation portion of the non-discrimination clause in the 1999 Constitution of Nigeria which might be thought to affect such chieftaincy claims. However, it would be further argued that unless the Supreme Court's non-discrimination doctrine is interpreted as constrained by the derogation portion to exclude women's claim to traditional ruler-ship, a woman can now stake a sustainable claim to traditional ruler-ship having regard to the principles established in the *Ukeje* and *Anekwe* decisions. The paper is organized as follows: in the next rubric we outline the title of traditional ruler and its relevance in Nigeria. We note the recognition accorded traditional rulers and the strategic role they continue to play despite the intervention of colonial and post colonial rule. We also discuss the customary methods of succession to the position and their gender based nature. In the third rubric, we examine the non-discrimination clause of the 1999 Constitution and the Supreme Court doctrine endorsing the clause. In the fourth rubric, we expound the scope of the doctrine to succession to the position of traditional ruler using the principle established in the *Ukeje* and *Anekwe* decisions. Here, we also offer a critique of the derogation provisions in the non-discrimination clause of the 1999 Constitution and query its limitations on the Supreme Court doctrine. In the fifth and final rubric, we conclude.

2. Traditional Ruler-Ship in Nigeria

Before Nigeria came under British Colonial rule, the various communities of the country were governed by one form of traditional institution or the other. Of the various traditional institutions, the system of kingship rule was far more prevalent and applicable (Lloyd, 1960, Afe & Adubuola, 2009, Amusa & Ofuafo, 2012, Idonije, 2008, Misawa, 2006). Succession to the position of a king was essentially patrilinear and usually founded on family ancestry. Only a male member of a ruling house could succeed to the position through the system of male primogeniture or other defined customary method. The Yoruba people of Southwest Nigeria and most communities in Northern Nigeria generally practised the method of choosing a qualified member of a ruling house (Salami, 2006, Lenshie & Ayokhai, 2013). The Edo people of Midwest Nigeria mainly practised the system of male primogeniture (Edo, 2008). Among the Igbo people of Southeast Nigeria, gerontocracy appeared to have been prevalent (Onyeozili & Ebbe, 2012, Muo & Oghojafor, 2012). The eldest man in the community usually emerged as head of a council, but often without the overriding and commanding force of a king. Hence, the system has been described as egalitarian in nature (Adegbulu, 2011). During the colonial period, traditional ruler-ship was preserved in existence. The colonial government did not distort the method of succession nor did it alter their gender-based nature. It was perhaps only in Igbo land that the colonial government introduced a new system of traditional ruler-ship with the creation of the position of Warrant Chief. By the new system, the previous system of traditional ruler-ship largely based on gerontocracy was discarded. Instead, the Colonial government appointed individuals who double as head of a native court and head of the community through a warrant conferring such enormous authority. The appointment was often made without reference to members of the community (Adegbulu, 2012).

Traditional ruler-ship has survived in the post-colonial period, although without much of the influence wielded by traditional rulers. One writer has remarked that this action has created the invidious situation whereby traditional rulers and the relatively organized customary institution of administration have been made irrelevant since the colonial days to contemporary Nigeria (Idonije, 2008). Thus, unlike the pre-colonial period, traditional rulers no longer have overriding authority or any authority whatsoever in land tenure. On the contrary, in the colonial era, many traditional systems of land tenure and administration were recognized by the colonial administration subject to the overriding interest of the colonial government. For instance, in Benin the Oba was still able to sustain the traditional system which confers the status of a trustee over all land in Benin on him for the overall benefit of the Benin people. As a result, the Oba had final customary law authority to make grant of ownership over land after necessary formalities. Needless to say, this was with deference to the overriding powers of the colonial government, which could declare any area crown land and make grant thereof (Kirk & Adokpo-Migan, 1994). The authority of traditional rulers over land tenure was finally abrogated along with other system of land tenure in 1978 when the military administration promulgated a degree which effectively vested ownership of land in the states on their Governors as trustees of the land.⁵

⁵See Section 5, Land Use Degree 1978 a law preserved in existence by section 315 (5) (d) of the 1999 Constitution of Nigeria.

Despite this diminution, traditional ruler-ship institution has remained a significant part of the social, political and cultural lives of the Nigerian people and continues to be revered due to the enormous roles traditional rulers still play in their respective communities and in the country as a whole. They are known to play active role in rural development (Agalamanyi, 2009). They are known to be politically influential and their support or lack of it could affect the political fortunes of politicians (Amusa & Ofuafor, 2012, Reed, 1982). They are known to be quite effective in preventing and managing social conflicts (Nweke, 2012). Indeed, conflicts over chieftaincy and land tenure based on traditional claims could have very serious adverse effect on the peace and order of communities almost to the point of overwhelming government security capability (Nlerum, 2011). They play significant role in resolving civil disputes over land, marriage, succession, chieftaincy and sundry matters. Their role in resolving civil disputes has received judicial endorsement through the Supreme Court of Nigeria by the Court's affirmation of the validity of customary arbitration conducted by traditional rulers.⁶ To be sure, traditional rulers are fully recognized authorities in Nigeria even by statute. For instance, in the former Bendel State of Nigeria (now Edo and Delta States), under the Traditional Rulers and Chiefs Edict of 1979, a law which still applies in both states, traditional ruler-ship institution is given full recognition as an integral part of the customary way of life of the people.⁷ In that statute, a traditional ruler is recognized as such where a declaration is made in writing by a traditional council in the affected community which regulates the selection of a person to be the holder of a traditional ruler title.⁸ Under the said law, a person shall qualify as candidate to fill a traditional title if proposed by a ruling house; or if by succession based on age, he is the oldest person qualified in accordance with customary law; or where succession is based on a hereditary system, he is the person entitled under customary law to succeed to the title.⁹ The Edict also tacitly recognizes succession to traditional ruler title through the primogeniture system when in section 16(1) it provides for appointment of a regent "where a traditional title which is hereditary by primogeniture is vacant and the heir-apparent to the title is a minor". In reality, succession to most traditional ruler titles in the former Bendel State and across the country is not just by primogeniture but by male primogeniture. Thus, only the eldest surviving male child of the immediate past traditional ruler is qualified to succeed to the throne. This system is fully entrenched among the Benin people of present Edo State (Edo, 2008, Yakubu, 2005). Even in other methods of succession listed in the Edict, only a male can qualify for selection as traditional ruler recognized by the law (Akinfenwa, 2014).

3. The Non-Discrimination Clause of the Constitution and the Supreme Court Doctrine

Fundamental rights guarantee became a feature of Nigeria's constitutional framework following the recommendation of the Sir Henry Willink Commission of 1959 (Ekwueme, 1999). The commission recommended their inclusion as one of the ways of assuaging the fears of the minority groups in Nigeria against the likelihood of dominance by the three major ethnic groups in the run-up to the country's attainment of independence from British Colonial rule. Thus, in the 1960 Independence Constitution, the third chapter was especially devoted to setting out certain fundamental rights guaranteed by the constitution. One of such rights was the right to non-discrimination. Nonetheless, in listing the nature of discrimination abolished by the constitution, gender as a protected category was not listed. Section 27 (1) (a) of the said constitution guaranteed the right to freedom from any restriction or disability for a citizen of Nigeria where the cause of discrimination is founded on the citizen being of a "particular community, ethnic group, place of origin, religion or political opinion". Section 28 (1) (a) of the same constitution further guaranteed the right of a Nigerian from gaining a privilege or advantage over other Nigerians on account of being a "particular community, ethnic group, place of origin, religion or political opinion".¹⁰ These provisions were reproduced in the 1963 Constitution.¹¹

⁶See *Agu v. Ikewibe* [1991] 3 NWLR (Pt. 180) 358; *Ohiheri v. Akabeze* [1992] 2 NWLR (Pt. 221) 1; *Eke v. Okwaranyia* [2001] 4 SC (Pt II) 71.

⁷See Edict no. 16 of 1979.

⁸*Ibid*, Section 3 (1).

⁹See Section 13 (1) a – d of Edict no. 16 of 1979.

¹⁰It is important to note that the use of the word "he" in the section includes "she". Therefore women are definite beneficiaries of the freedom. See section 14 (a) of the Interpretation Act Cap I23, Laws of the Federation of Nigeria, 2004, which provides that where a section introduces a masculine word it includes the female gender.

¹¹Section 27 (1) (a), 1960 Constitution and section 28 (1) (b), 1963 Constitution.

In the 1979 and 1999 Constitutions, similar freedoms have been guaranteed but with the significant inclusion of "sex" as a protected category. It is noteworthy that in addition to the above guarantee against discrimination, all constitutions of Nigeria from 1960 till date have made general provision guaranteeing freedom from being subjected to disability or deprivation merely on account of circumstances of birth. For clarity, it is important to set out the full amplitude of the non-discrimination clause of the current constitution of Nigeria. Thus, section 42 (1) (a) (b) and (2) of the 1999 Constitution provide as follows:

42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

- (a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not subject; or
- (b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religions or political opinion.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

For a fairly long time, this provision was not decided on by the Supreme Court of Nigeria as no matter came directly before it on the proper scope of the section. However, the Court of Appeal which is immediately subordinate in hierarchy, in a few cases, has had the opportunity to decide on discrimination on ground of sex. The cases of *Mojekwu v. Mojekwu*,¹² *Muojekwu v. Ejekime*¹³ and *Timothy v. Oforka*¹⁴ are particularly noteworthy. In each of the cases, the Court of Appeal considered the validity of customs which discriminated against women and held them repugnant and unconstitutional having regard to the non-discrimination clause in section 42 of the 1999 Constitution. Instructively, however, when the *Mojekwu* case was appealed to the Supreme Court as *Mojekwu v. Iwuchukwu*, the court frowned on the aspect of the Court of Appeal decision which declared repugnant, unconstitutional and against the provisions of international instrument to which Nigeria is signatory, a custom of the Nnewi people of Southeast Nigeria which discriminates against the right of female children of a deceased man to inherit their father's property in the absence of a male sibling. Although the Supreme Court still held in favour of the Respondent on other grounds, however the court was of the view that the issue of repugnancy did not arise since the parties never canvassed the validity of the custom as a legal issue before the court. In a curious attempt to restrict the broad application of the Court of Appeal decision, Uwaifo JSC said:

I cannot see any justification for the court below to pronounce that the Nnewi native custom of oli-ekpe was repugnant to natural justice, equity and good conscience ... the learned Justice of Appeal Court was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. 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 traditions 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.¹⁵ The dictum of Justice Uwaifo appears to restrict the broad reach of the non-discrimination clause of the 1999 Constitution in two ways. First, it suggests that the clause is not to be raised *suo moto* (of its own accord) by any court of law where the issue has not been raised by a litigant. Second, even where such an issue of discrimination is raised especially in respect of all customs and traditions including those "of some communities which do not permit women to be natural rulers or family heads", the communities have to be heard since such customs are "fundamental custom and tradition" practised by them in running "their native communities". We are unable to agree with Justice Uwaifo's reasoning as it appears to be motivated more by atavistic sentiment than by the clear and unambiguous provisions of the non-discrimination clause or established rules of justice administration recognized even by the Supreme Court itself.

¹²[1997] 7 NWLR (Pt. 512) 288.

¹³[2000] 5 NWLR (Pt. 657) 402.

¹⁴[2008] 9 NWLR 1091 204.

¹⁵[2004] All FWLR (Pt. 211) 1406. The Respondents, Mrs Theresa Iwuchukwu was substituted for her mother, Mrs Caroline Mojekwu, the original Respondent who died while the matter was pending.

In fairness to Justice Uwaifo, in a number of cases, the courts have urged against a judge unilaterally raising an issue and deciding on it without hearing parties. In one instance, the Supreme Court of Nigeria held “that on no account should a court of law raise a point *suo motu*, no matter how clear and proceed to resolve it one way or the other without hearing the other parties”.¹⁶ However, the same court in *Nkpuma v. State* held that it has power to raise an issue of law *suo motu* “not raised at the Court of Appeal and High Court if the end of justice will be served”.¹⁷ Obviously, the non-discrimination clause of the constitution is an issue of law, being a constitutional matter. Therefore, a court of law can of its own motion raise and determine the question of validity of customary law which is thought to violate the clause. On the second huddle placed by Justice Uwaifo, which requires hearing of affected community when an issue of discrimination of custom is raised, it is our view that this requirement is a strange importation into the unambiguous provision of the non-discrimination clause. The provision of section 42 of the constitution is quite clear. It does not admit of taking evidence from any community to, perhaps, justify or clarify the rationale of a custom which is patently discriminatory. It is a settled aspect of our justice system that in interpreting a constitutional provision, the literal meaning of the words used must be strictly applied, except to do so would lead to a manifest absurdity.¹⁸ Since the non-discrimination clause is clear and does not admit of any absurdity of interpretation, a requirement to take and admit evidence to explain the purpose or otherwise of a discriminatory custom is unwarranted. Consequently, a custom which does not permit women to be “natural rulers” or “family heads”, as posited by Justice Uwaifo need not be justified, explained or rationalized in any way even by hearing the affected community before its constitutionality is determined by a court of law, more so as such a custom seeks to restrict or disable a woman from attaining those positions simply because she is such a person. Such a custom cannot withstand the test of constitutionality, being discriminatory against a woman.

Any doubt about the full breadth of the non-discriminatory clause now appears to have been erased by *Ukeje* and *Anekwe* judgments which the Supreme Court decided in April 2014. Although neither of the cases directly touched on the issue of succession to traditional ruler-ship, the principles they affirmed and established bear on the proper implication of any customary law which restricts or disables women, including those that bar them from becoming traditional rulers simply because they are women (Okafor, 1993). The force of these Supreme Court decisions is premised on the extant law in Nigeria which prescribes that where a legal principle is endorsed by a superior court, it becomes the precedent on which a lower court decides a subsequent case based on the principle. Where in fact the decision is of the Supreme Court, all other courts have a strict judicial obligation to take the principle as conclusive on the matter unless the Supreme Court itself decides otherwise using clear parameters.¹⁹ In explaining the rationale and the force of a legal principle decided by a court, the Supreme Court in *Adegoke Motors Limited v. Adesanya* held that earlier decisions establish principles and those decisions inspire and strengthen other subsequent decisions by the facts which framed the issues in the matter.²⁰ The principle established in a case is therefore not a mere trifle to be casually cast aside at the whim of a court. It constitutes a judicial precedent, although not everything stated by a judge while deciding a matter constitutes a legal principle. Only those considered as the reason for the decision are relevant to establish binding legal principle. In light of the foregoing, it is now meet to set out the facts of the *Ukeje* and *Anekwe* decisions and the legal principle established by the Supreme Court in the two cases as they concern not merely the issue of gender discrimination in property, which the cases directly dealt with, but the broader issue of gender discrimination in respect of other matters, including succession to traditional ruler-ship title or position which is the primary focus of this paper.

4. Traditional Ruler-ship Title and the Implications of Ukeje and Anekwe Decisions

In *Ukeje*, the Respondent, as Plaintiff, filed a suit in the High Court of Anambra State of Nigeria stating that she is a daughter of one Lazarus Ukeje (deceased) and that her paternity was acknowledged by the deceased in his life time.

¹⁶*Abimbola v. Abatan* [2001] 9 NWLR (Pt. 717) 662. See also *Ugo v. Obiekwe* [1989] 1 NWLR (Pt. 99) 566 at 581.

¹⁷[1995] 9 NWLR (421) 505.

¹⁸*Amobi v. Nzegwu* [2014] 2 NWLR (Pt. 1392) 510 at 545-546.

¹⁹See *Johnson v. Lawanson* (1971) 1NMLR 380 and *Mobil Oil Ltd. v. Coker* (175) 3 SC 175 for instances where the Supreme Court overruled itself.

²⁰See [1989] 3 NWLR (Pt. 109) 250 at 275.

She further contended that in her capacity as a daughter of the deceased, she is entitled to the estate or one of the persons entitled to the estate of the deceased. The Appellants opposed her assertion that she is a daughter of the deceased. At the lower court, the Appellant relied on the male primogeniture custom in Igbo-land which disentitles the Respondent to a share of the deceased estate, even if recognized as his daughter. The Respondent succeeded in both the High Court and in the Court of Appeal with both courts declaring the custom void. On further appeal to the Supreme Court, the apex court unanimously upheld the decisions of the two previous courts. Citing the non-discrimination clause, the court declared (*per*, Rhodes-Vivour, JSC, who delivered the lead judgment):²¹ No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the constitution.

On his part, Okoro, JSC also made the following remark:²²

I also agree that by virtue of section 42(1) of the 1999 Constitution of the Federal Republic of Nigeria (then section 39(1) of the 1979 Constitution) any customary law which says or tends to suggest that a female child cannot inherit the property of her father is not only unconstitutional but also null and void. In *Anekwe*, the Appellant relied on the custom of Awka people also in Igbo-land which excludes female children from inheritance to their deceased father's estate. The Respondent's case was that her late husband was a beneficiary of family property and that upon his demise she and her children for the deceased (all female) were entitled to the deceased share of the family property. The Supreme Court upheld the decision of the lower court and declared the said custom of Awka people null and void as "to perpetuate such a practice as claimed in this matter will appear anachronistic, discriminatory and un-progressive. It offends the rule of natural justice, equity and good conscience".²³ It is important to point out that while the provision of section 42 (1) and (2) of the constitution was the basis upon which *Ukeje* was decided, the provision did not feature at all in *Anekwe* case. Rather, the latter case was decided on the basis of the stricture of "natural justice, equity and good conscience" the threshold of which is required to be passed by a custom before being accepted as valid in Nigeria.²⁴ Nonetheless, the Supreme Court reached a similar conclusion by upholding the right of a woman to the benefit of non-discrimination although on different premises. What is undoubtedly clear is that the Supreme Court has effectively established a principle of law which constitutes a judicial precedent voiding any customary law founded on gender discrimination or which seeks to restrict or disable a woman from any right on account of sex.

What impact does this principle then have on a claim of entitlement to a traditional rulers-ship position mounted by a woman? Given the entrenched system of traditional ruler-ship and the age long practise of gender discrimination against women for succession to such position, an inquiry into its discriminatory nature might appear a frightful endeavour. Yet, it is a necessary expedient to traverse the issue in order to clarify any possible doubt that might remain about the ambit of the Supreme Court non-discriminatory doctrine as it relates to human rights jurisprudence in Nigeria. Perhaps, it is the fear of the cultural opprobrium which a judicial pronouncement rendering void all vestiges of discrimination against women may elicit which forced Justice Uwaifo to try to limit the reach of the normative bar against all forms of gender discrimination against women.²⁵ We have already expressed the view that Justice Uwaifo's effort is an unsuccessful attempt in light of clear constitutional provisions and the applicable rules of the adjudicatory process in Nigeria which permits a court to raise an issue of law, including its constitutionality and decide on it without more. Despite the foregoing, there remains the nagging but significant question of what to make of the derogation clause in section 42 (3) of the constitution which provides as follows: Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria

²¹ *Ukeje* (note 1 above) pp. 26-27.

²² *Ibid*, p. 33.

²³ *Anekwe* (note 2 above) p. 65.

²⁴ *Ibid*.

²⁵ *Iwuchukwu* (note 14 above).

Does this derogation clause, for instance, preserve the entrenched system of gender discrimination for succession to traditional ruler position in Nigeria? Is a traditional ruler an appointee to an "office under the state" to be covered by the derogation clause? The clause seeks to preserve "any law" which violates the non-discrimination provision of section 42 (1) even where the law imposes "restriction" on appointment of any person to any office under the state". The constitution does not explain or define what constitutes "office under the state" and neither does the Interpretation Act do so. At best, section 318 (1) of the constitution interprets "office" only in relation to validity of an election which it says means "any office the appointment to which is by election under this constitution". Therefore, it is our view that traditional ruler position, not being an elective position or "office" under the constitution, is not envisaged as part of the offices referred to in the derogation clause. In point of fact, traditional rulers currently occupy titular positions and not "office under the state" even as the states do have the prerogative to recognize the position or refuse recognition. To secure such recognition, the position must be declared to exist by the relevant traditional body in accordance with the customary law of the affected community and such declaration becomes effective when approved by the state government. The state merely endorses what is already the accepted customary law of the community. It cannot impose its will on the community or abrogate the right conferred on a body to select or appoint a traditional ruler if that would undermine the customary law of the community.

In *Ndayako v. Dantoro*²⁶ the stool of the Emir of Borgu in Niger State of Nigeria became vacant. The state government directed that the position be filled. At the material time, there were three surviving kingmakers out of the total five required by Borgu customary law, but all three could form a quorum to select an Emir to fill the vacancy and they proceeded to do so, picking the Respondent as Emir. By the provision of the Chiefs (Appointment and Deposition) Law 1989 of the state, the approval of the state government was required to endorse the selection. Instead, the state government issued a fresh directive pursuant to a Law titled "Appointment and Deposition of Chiefs' (Appointment of Emir of Borgu) Order, 2000" reconstituting the body of kingmakers and appointing the certain persons as kingmakers in replacement of the two deceased kingmakers. The state government also directed that a second selection exercise be conducted with the three surviving kingmakers and the two new kingmakers participating. The second exercise was conducted and the Appellant emerged as the new choice. In its judgment affirming the decisions of the lower courts, the Supreme Court of Nigeria held that kingmakers have vested right in a chieftaincy stool (traditional ruler position); and also to take part in the selection or appointment of a successor to the stool in the event of a vacancy. Therefore, no amendment to the Chieftaincy Declaration where this vested right derives could be made to abrogate that right after it has accrued. The court annulled the second selection exercise and declared the first exercise lawful. The court also affirmed the Respondent as the rightful choice of the kingmakers in the first selection exercise.

The power of the state is therefore limited only to according recognition to an established customary law for succession to a traditional ruler title. To stress the point, section 2 of the Traditional Rulers and Chief's Edict of the defunct Bendel State (still applicable in Edo and Delta States of Nigeria) is relevant. In that section, a traditional ruler is defined as the traditional head of an ethnic unit or clan who is for the time being the holder of the highest traditional authority within the ethnic unit or clan and whose title is recognised as a traditional ruler title by the government of the state. As titular heads of their communities, traditional rulers do not exercise any state function beyond recognized customary matters, such as customary arbitration, conferment of chieftaincy titles and advisory function to government, where the traditional ruler title holder is a traditional ruler duly recognized to function in that capacity. Therefore, these functions cannot by any stretch of imagination translate a traditional ruler title to an office "under the state" to be covered by the derogation clause of section 42 (3) of the 1999 Constitution. Finally, it is our view that following the legal principle established in *Ukeje* and *Anekwe* cases, the prevailing customary law which restricts or disables a women from succession to the position of traditional ruler by reason only that she is such a person, is discriminatory and unconstitutional. The position taken by Justice Uwaifo in *Mojekwu v. Iwuchukwu* is unsupportable as it only seeks to pander to age-long customary law practises which at first encounter appear immutable but when confronted with the dictate of modern reality cannot be rationalized except on the strength of their intrinsic discrimination against women. Therefore where a traditional ruler position becomes vacant a woman who is otherwise disqualified simply because of her sex should be able to stake a claim.

²⁶[2004] 13 NWLR (Pt. 889) 187.

This might go against the grain of the customary norm of the community, but this would not be the only time customary law practises have been struck down for failing the test of validity even where such customs were held by a vast majority of the affected communities to be sacrosanct. As the cases of *Ukeje* and *Anekwe* illustrate, many such offensive customs still exist even now in several communities across Nigeria, but their existence cannot be justified merely because they reflect the "fundamental custom and tradition" by which such communities run their native affairs, as Justice Uwaifo seems to suggest. Where they conflict with the constitution or are unable to scale the repugnancy huddle, as in the case of succession to traditional ruler position, their fate is inevitable. They "must fade out and allow equity, equality, justice and fair play to reign in the society."²⁷

5. Conclusion

In this paper, we examined the doctrine of the Supreme Court of Nigeria on the non-discrimination clause of the constitution. We further examined the court's doctrine of non-discrimination in the context of the repugnancy huddle which customary law is required to scale in Nigeria before being enforced as valid. We reviewed two judgements of the apex court which establish the current law on the issue of gender discrimination against the women folk and argued that the principle established in the two cases seems to have broad application even to those matters such as chieftaincy claims which did not feature at all in the cases. One of such matters is customary law for succession to traditional ruler title in Nigeria. We noted that in most, if not all communities in Nigeria, succession to traditional ruler-ship position is either by male primogeniture or by other means all of which are patrilinear and therefore discriminatory against women simply because of their sex. We further examined the derogation clause of the constitution and queried whether it has the effect of saving the patrilinear aspect of customary law for succession to traditional ruler title. Our conclusion is that the derogation clause, without more, cannot absolve that customary law from the fate of all other aspects of customary law which contravenes the constitutional prohibition against discrimination on ground of sex. Consequently, a customary law which restricts or disables a woman from succession to the position of a traditional ruler only on ground of sex when she otherwise qualifies on all other ground contravenes the non-discrimination clause of the constitution and cannot scale the huddle of statutory validity, being repugnant to natural justice, equity and good conscience; normative parameters which have been given a huge boost by the extant doctrine of the Supreme Court of Nigeria.

²⁷Muhammad, Justice of the Supreme Court in *Anekwe* (note 2 above) p. 65.

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