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Equity, the Panacea of All Legal Wrongs: Achievements and Challenges of Equity in Recent Times in Nigeria and Other Jurisdictions

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Abstract:
The viability of law to achieve its aim is due to the fact that every case presents different problems; and law being applicable to definite situations has no room for unforeseen situations, neither does it permit variations in peculiar circumstances. This position subsists because the uniformity in the application of law does not admit of any exception. The inability of the common law to carry along itself, human values, prompted the expansion of the chancery Division (Court of Equity) as it recognized the basic principles of social justice. The practice of modern equity faces a lot of challenges due to the multifaceted nature of law itself in recent times and the emerging, divergent concepts due to globalization and the changing world, all which have to be controlled by law. In some areas, equity has made impact, in others the challenges still subsist. This paper will look at the development of equity, its impact, and challenges in the ever changing society.

Keywords: *Equity, achievements, challenges, recent times, Nigeria, other jurisdictions.*

1. Introduction

In judicial administration, a large measure of consistency must be secured in order to ensure that the law affecting any given situation is reasonably predictable but this should not be done to the extent of blind imitation of the past, and consistency ought not to be magnified, at the expense of common sense and human values (Cooper 1949-50). Ames (1908) is of the opinion that primitive law regards the word and the acts of the individual; it does not search the heart of man because the thought of man should not be tried… for the devil himself knoweth not the thought of man.

Early law was formal, immoral and without a human face. There was therefore the necessity to find it a supplement that will fill the gaps left by the rigidity of the common law. This supplement was equity. Equity's jurisdiction bridged the imperfection of the law and the changing and progressive society which the law was supposed to checkmate. Equity in its scope created new remedies where the common law did not recognize such remedies, updated or supplemented the remedies of common law where , inadequate and also created new procedures in search of integral justice. In formulating its principles, equity always presupposed the existence of the law which was a self-sufficient system and only reared its head where the law was found wanting. It was therefore, seen as a panacea of all wrongs, and this was encapsulated in one of the maxims "Equity will not suffer a wrong to be without a remedy". The society is ever changing and law of necessity should also change if it should perform its function as an agent of social change. Equity must also continue to sniff around law in its bid to give it a human face where this is lacking. The achievements of equity and the challenges facing it in this regard, and in recent times are the focus of this paper with special reference to Nigeria and some incidences in other jurisdictions.

2. The Birth and Growth of Equity

Equity is generally based on a judicial assessment of fairness as opposed to the strict and rigid rule of common law and indeed municipal law in general. The origin and existence of equity also lie in the deficiencies of the common law. The supervisory and eventual complementary role of equity over common law can never be over emphasized. Equity is commonly said to mitigate the rigidity, harshness and rigor of common law, allowing Courts to use their discretion and apply justice according to the tenets of natural justice. Many authors have proffered definitions of equity, and a few of them will give an insight into the protective role equity played and still plays over the common law.

For Hudson (1999), equity is an ethical response which English Courts will deploy in circumstances in which other legal rules would otherwise allow a defendant to benefit unconscionably. Hanbury (1997) sees equity as the branch of the law which before the Judicature Act of 1873 came into force, was applied and administered by the Court of Chancery. Jegede (1981) postulates two senses; the general juristic sense which for him, means; the power to meet the moral standards of justice in a particular case by a tribunal

having discretion to mitigate the rigidity of the application of strict rules of law, so as to adapt the relief to the circumstances of the particular case or;

A liberal and humane interpretation of law in general so far as that is possible without actual antagonism to the law itself. There is also the technical juridical meaning of the legal concept of equity, and in this sense, equity means a special and peculiar department of the English legal system which was created, developed and administered in the Court of Chancery before 1875. It is submitted boldly that equity is a body of rules created by English Court of Chancery to give a moral response to the inadequacies of the common law, and which has developed up to the present time to be administered at the discretion of the Courts in their quest to do substantial justice to litigating parties. Following from this, the Courts in Nigeria have also made judicial pronouncements on what amounts to Equity. The Court of Appeal in allowing the appeal of the plaintiff in FDB financial Services LTD vs. Adesola (2000) unanimously held on the nature of equity thus;

- Equity is a correction of the law in the part where it is defective. Equity as it were, favours true quality both of rights and liabilities dividing the burden and benefits in equal shares ----.

In Ejigini vs. Ezenwa (2003) the Court of Appeal stressed that equity is not a warlord determined to do battle with the law. The Court also stressed the fact that equity is a part of the legal system and has been mixed with the law for the purpose of achieving justice. The Court further held that the rules of equity prevail over rules of law since the Judicature Act but it does not mean equity intends to challenge law as it is, but to complement it, and ensure due dispensation of justice. In Adebo vs. Omisola (2005) in dismissing the Appeal the Court of Appeal unanimously reiterated the nature of equity as a mitigating factor in law thus;

- Equity which is a source has always retained the fundamental characteristic of infusing elements of fairness or justice into the legal system as a whole, by the very process of mitigating the strict legal rules…

In 1066 A.D. after the Norman Conquest, one of the great achievements of the Norman Kings was the inception and growth of the common law which was applicable to the whole of England. The hallmark of the common law was its strict adherence to the rule of precedence. The proceedings were commenced by writs which were only available for specified causes of action. This meant that a plaintiff would obtain no remedy if he or she could not bring an action within the specified categories, and eventually the issue of new writs was prohibited in 1258. The high level of corruption in the in the common law system was such that the high and mighty could get away with practically anything in the system. Consequently, many decisions of the common law Courts were considered to be harsh and unjust (Cockburn setal 2001). Aggrieved litigants only option lay in petitioning the King who as a sovereign was seen as the 'fount of justice' and responsible for the just treatment of his subjects.

The king began to regularly delegate the hearing and resolving of such petitions to the Chancellor, an important member of the King's Council (Worthington 2006). The early Chancellors were mostly Clergymen who acted as the King's Confessor and keep of his conscience. As a result of their theological training, Chancellors were well versed in Latin and French languages. They were also knowledgeable in the area of classical Roman Civil and Canon Law which heavily influenced Equity. The petitions were soon to be addressed to the Chancellor, when the King finally receded. The Chancery which was actually the Crown's secretariat began to assume the sameness of a judicial body and became known as the Court of Chancery. This heralded the birth of Equity as the Court's decisions were based on principles of equity.

By the 15th century, the judicial power of the Court of Chancery was recognized even though equity as a body of rules varied from Chancellor to Chancellor. Early equity had no fixed rules. There were no precedents and the remedy obtained depended on he, who was the Chancellor, and who at this time was a clergy man, who appealed to the conscience of parties rather than apply core legal precepts. This position of equity was highly criticized. The most famous of the criticisms was from John Seldon (1984) where he accused equity of being a roguish thing and is according to the conscience o0f him who was the Chancellor. Equity at this time was firmly established and operated alongside the common law but in different Courts. As the law of equity developed; litigants would often seek prohibitive injunction in equity against the common law order. Some defendants still evaded attendance and the Court of equity tried to overcome this by directing the defendant's attendance to respond to petit0ions which were not backed by royal writs, and this was a problem. The Chancellor however devised a means of securing the defendant's presence through sub-poena, which is an order addressed specifically to the defendant directing him to appear before the Chancellor failing which will result in forfeiture of a sum of money. In the proceedings, the defendant was also required to swear an oath to the plaintiff's complaint. This was the origin of both the subpoena and the testimony on oath. Where the defendant was found to have acted unconscionably, an order was issued against him but such orders were only enforceable in personam, and not in rem. The era of systematization was heralded by the drawing of the Chancellors from the rank of common law practitioners, rather than from the clergy, the appearance of seminar works on equity and initiation of appeals to the House of Lords from the Court of Chancery. The gradual appearance of these events and circumstances grounded equity in the arena of modern rules culminating in acceptance of the doctrine of *stare decisis* which formed the bedrock of the common law. In effect equity which came to redeem common law from technicality became technical itself. While equitable remedies are still said to be discretionary, the discretion is on well-established and unavoidable principles. The source of conflict stemmed from well acclaimed common injunction usually granted by the Court of Equity. The overwhelming jurisdiction exercised by the Chancery which was neither endured by Statute nor by Common law, the more progressive and realistic jurisdiction by the Court of equity, and the hardship created on litigants by the duality of Courts. The common law Courts were constantly expressing their disdain over the first four issues. The hardship caused to litigants by the duality of Courts came to a head in the case of Marguis of Waterford vs. Knight (1844), where after 14 years litigation in Chancery, the plaintiff was told that his claim of title is rooted in legal title. He was then asked to go to the Common law Court which has jurisdiction in matters of legality. After this, efforts were then made to circumvent this hardship on litigants. In 1854, the Common Law Procedure Act empowered the Common

Law courts to grant prohibitory injunctions and even to compel discovery of documents and interrogatories in certain cases, which before then were the exclusive preserve of the Court of Chancery. The Chancery Amendment Act of 1852 also empowered the Court of Chancery to exercise certain powers that were originally exercised by the common law Courts, such as the award of damages (1858). The Court of Chancery was now also allowed to take oral evidence in Court, for before then, evidence in the Chancery was by bill. These two Acts paved way for the Judicature Act of 1873, which brought the two Courts together thereby resolving the conflicts. All remedies whether legal or equitable, came to be granted by the same Court.

3. Equity the Panacea of all Wrongs

One of the reasons for the birth and growth of equity was the inability of common law to provide adequate remedy in some cases and in other cases; it did not recognize any remedies at all. Equity on the other hand provided alternative forum to parties who are aggrieved on account of the above situation. Equity was able to achieve this feat through its exclusive, concurrent and auxiliary jurisdictions. Under these jurisdictions equity recognized and enforced certain rights where common law failed to do so, for example beneficial interest in trust, equitable interest arising out of estate contracts and restrictive covenants. Equity also provided better remedies where those of common law were inadequate such as remedies of injunction, equity of redemption, and equitable mortgages. It also provided better procedures in the judicial process such as discoveries and interrogatories. In formulating its principles equity relied on the fact that there was a pre-existing self-sufficient system (the common law) which it has not come to destroy, but to fulfill. Using its three jurisdictions, equity seemed to cover the field in almost all the areas where the common law failed. The precepts and roots of its principles were sayings that depicted the standard acceptable in the field of equity. One maxim of equity that portrayed it as a panacea of all wrongs is the maxim, "Equity will not suffer a wrong to be without a remedy" expressed in Latin as *Ubi jus Ibi Remedum*. In this Latin expression, is embodied the whole jurisdiction of equity for it is the duty of the Court to provide a remedy for a plaintiff, even if none had been prescribed in the Statute book. As enunciated in (Ewhrudge vs. Warri Local Government Council 2005), In Equity's bid to remedy the obvious wrongs and defects associated with the common law, it encountered some limitations and bottle necks and so early equity did not give attention to unfair trade competitions, and issues of defamation when unpublished.

4. Achievements and Challenges of Equitable Practices in Recent Times

The practice of modern equity faces challenges due to the emerging, divergent concepts, the changing nature of the society, globalization and changes in the activities of man, all which have to be controlled by law. As long as law changes to control all these, equity must of necessity be agile to checkmate the changing laws. The impact of equity is obvious in some areas, but it still faces challenges in others.

5. General Impact of Equity in Nigeria and other Jurisdictions

5.1. Corporate Practice

When a company is duly incorporated and registered under the Company and Allied Matters Act (2004), or any other previous act, it retains its status of a legal entity distinct from its members (Union Bank (Nig.) Ltd. vs. Penny-Mart Ltd (1992). In other words, in the eyes of the law, a company is a legal person and separate from the individual members. This concept was established under the common law in Salomon vs. Salomon & Co Ltd. (1897) and subsequently in Macaura vs. Northern Insurance Ltd. (1925). The principle of separate personality of the company was also extended to subsidiary of a corporation in EBBW Vale UDC vs. South Wales Traffic Area Licensing Authority (1951). In Lee vs. Lees Farming Ltd (1961), it was held that Lee who was a beneficial owner and governing director was still a separate entity from his company and could give orders to himself as a servant on behalf of the company. The legal personality concept affects the structure capacity, structure, power rights and liabilities of the company. Although a company is a legal entity and has an independent legal personality, it is of course an artificial person or entity. Therefore, all the operations and activities of the company have to be carried on by its organs and agents (Onojo 2008). Denning LJ in Bolton (Engineering) Co. Ltd. vs. Graham and Sons (1957) explained the position thus;

- A company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does…

In Adeniji vs. the State (1972) the Court reiterated that the law draws a distinction between the company as the artificial person, and the natural person with life and limb who operates it. The import is that the company may own property in its own right giving the members no insurable interest in the property. The separate entity of the body corporate from its members led to the use of the phrase 'the veil of incorporation, which is said to hang between the company and its members, and in law at least act as a screen between them. This position can cause injustice, difficulties and real hardship on the shareholders and members of the company. This has necessitated that in certain exceptional circumstances that the law disregards the corporate entity and pays regard instead to the economic realities behind the legal façade (Onojo 2008). In such instances, guided by the principles of equity (justice and fairness) the law has lifted this veil so that the human and commercial reality behind the corporate personality can be realized. This veil may be lifted either by the judiciary or the Court. For the judiciary, it is a flexible way to counter fraud, sharp practice, oppression and illegality (Keenan 1993). With the general meaning of equity as a mitigating factor to the injustice, rigidity and harshness of the

general law, this remedy could be described as a form of equitable remedy enmeshed in a law guided by equitable principle of what is fair and just.

5.2. Equity and Cohabitation

Today the perception of the world as a global village is real, and everywhere around us, as this is affecting every facet of life. At this stage in man's civilization, there is the growing and unchecked tendency for couples to live together without a formal marriage. In such union between the opposite sex where they so live together, raise children and even have properties and share responsibilities, the situation is known as cohabitation. Some who cohabit eventually end up with the paper formalities of a valid marriage. In many instances, intending formal marriage partners also begin with short periods of cohabitation. The term cohabitation was defined by the English Statute of Domestic Violence and Matrimonial proceedings Act (1976) as; "A state where a man and woman are living together with each other in the same household as husband and wife". This is to be contrasted with concubine-age whichis transient and based only on sexual desires and also with marriage which was defined in Hyde vs. Hyde (1861-73) as "Voluntary union for life of one man and woman to the exclusion of all others". Apart from the fact that marriage has an indefinite duration and must be to the exclusion of all others, some distinguishing factors between marriage and cohabitation are that;

1. The breakdown of marriage and the distribution of assets and custody of children (if any) are controlled and settled by the Matrimonial causes Act (1973) of England and Whales and Matrimonial causes Act (M_7 2004) of Nigeria.

In Nigeria cohabitation is not common. However globalization has also caught up with us in this area, all be it not in an all-embracing manner. Strictly speaking real cohabitation is alien (or at best rare) in Nigeria. The targets in Nigeria according to Ewherido (2004) are not all people cohabiting, but hose who cohabit with the intention of getting married later (putting the cart before the horse). He reiterated that the reason they give is that they want to find out if they are compatible before getting married. Some say they are scared of making mistakes. The question is how one succeeds if you are scared of making mistakes. The situation in Nigeria is that at the point of cohabitation, the parties have no rights, duties or obligations, as African and indeed Nigerian societies were organized along family lines, and marriage rites were performed before girls left their parents' homes. Even in jurisdiction that have cohabitation as a frequent practice, there have been negative judicial attitude to cohabitation. This reflects the society's view of marriage and the family as the unit and bedrock of the society, thus; in Uphill vs. Wright (1911), Darling J reflected the disapproving tone of the society in the issue of cohabitation thus:

- I do not think it makes any difference whether the dependent is a common prostitute or whether she is merely the mistress of one man.

And in Fender vs. St. John-Milde judicial displeasure on the issue was x-rayed by Lord Wright in the following words;

- The law will not enforce an immoral promise, such a promise between a man and a woman to live together without being married or to pay a sum of money to give some other consideration in return for immoral association.

For these reasons, most legal systems have condemned cohabitation but law must give way to the yearnings of societal changes, and so a new equity was imminent. This was celebrated in Grant vs. Edwards (1986). In this case, plaintiff cohabited with defendant and their child. The issue for consideration was whether the plaintiff's right was nonexistent in the property the defendant bought which got burnt and was repaired out of insurance money. While defendant paid the mortgages, the plaintiff contributed greatly to household expenses. The real issue was whether she had no right in the property signifying that no rights, duties and obligations existed before marriage or whether equitable principles will now be aligned with law to satisfy social realities. The Court unanimously held in favour of plaintiff. The Court declared that she was entitled to half share based on constructive trust. The Court recognized the relationship between the parties as cohabitation yet, no suggestion of immorality was made. The case was judged on its own merit and this signified a new equity for people cohabiting. Similar decision were made in James vs. Thomas (2007) and reinforced in Thompson vs. Humphrey (2009).

5.3. Issues of Acquisition of Property through Inheritance in Nigeria

Property is generally acquired either by dint of hard work or by inhabitance. Women have no inhibition in acquisition or disposal of real property under the Land Use Act (1978) of Nigeria, as its provisions do not give men the exclusive right to do so. The English system of succession does not discriminate against the sexes with respect to inheritance and succession. This is not the position under customary law which forms part of Nigerian Legal system. In some parts of Nigeria, especially the South East occupied by the Igbos, females do not inherit real property as they are regarded as chattels themselves and liable to be inherited.

A changing tide in the fortune of the Ibo daughters with respect to inheritance was witnessed in the celebrated cases of Mojekwu vs. Mojekwu (1997) and Mojekwu vs. Ejikeme (2000). The issue was whether the female children of a deceased who had no male issue could inherit their father's landed property. Guided by the principles of equity the Court of Appeal made an activist decision in the matter. In the custom of the area of the parties, a female child can only inherit her father's property if a ceremony called *nrachi* is performed on her, which now enables her to live in her father's compound and produce children with whomever all in her father's name. The intention is ultimately for her to produce male children who would succeed her father. In both cases the Court frowned at a custom that bars the female children from inheriting their father's estate. The Court per Niki Tobi J C A (as he then was) viewed such a custom as not only repugnant to natural justice, equity and good conscience, but also unconstitutional and contrary to democratic values in the following words;

- All human beings-male and female are born freely without any inhibition on grounds of sex, and that is constitutional. Any form of societal discrimination on ground of sex, apart from being unconstitutional is antithetic to a civil society built on the

> tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs including the Nnewi 'Oli-Ekpe' custom relied upon by the appellant are not consistent with our civilized world in which we all live today including the appellant.

These cases have since gone to the Supreme Court where even though the *Oli-Ekpe* and its *nrachi* were held not to be repugnant, there was a unanimous agreement by the judges that female children had the right to inherit their father's real property. There is no doubt that this decision marked a new equity for women east of the Niger in relation to customary inheritance in Nigeria.

5.4. Customary Law Marriage in Nigeria

Generally until recently, women do not inherit property (especially real property). This problem exists in varying degree in the various commo0unities. The Yoruba communities do no exclude their daughters in inheritance. The daughters share their father's property equally with their brothers and can also become the Dawodu (head of the family) but the Yoruba wife has no right of inheritance in her husband's family (Dosunmu vs. Dosunmu 1952-55). The Muslim girls get ½ what their brothers are entitled to. The Muslim wife has inheritance rights in her marital home. If she has children, she gets $^{1}/_{8}{}^{th}$of her husband's property but if she has no child, she gets $^{1}/_{4}{}^{th}$ of her husband's property. In this score, it would seem that the Muslim widow is better provided for, than her Ibo and Yoruba counterparts. A changing tide in the fortune of the Ibo daughters with respect to inheritance was witnessed in the decisions in Mojekwu vs. Mojekwu (1997) and Mojekwu vs. Ejikeme (2000). As discussed earlier, the Court relied on equity to make the activist decisions that changed the status quo for female children of the south East with respect to inheritance.

In the Customary marriage procedure, there is the send forth (Idu Uno) of the Ibo girls. This is a ceremony where the entire family sends the girl off to her matrimonial home with gifts. In the very distant past the gifts used to comprise of kitchen utensils for her cooking. This gradually increased with time to sowing machine, bed, fridge, gas cookers etc. In recent times it has graduated into everything earlier mentioned, plus cars and landed property according to the financial strength of the family. Certainly, since the girls do not inherit landed properties at least until very recently, the inclusion of the Idu uno ceremony in the customary marriage celebration, and the type of gifts now given, is certainly an equitable precept. The financial strength of the family determines the gifts to be given to the girl. This same strength will determine if a girl feels disinherited or not, because those whose family have nothing to give out can hardly complain of being disinherited. This is equity at play.

5.5. Rights in Same sex Marriage

This is a purported marriage between two people of the same sex. It is two people in a homogeneous sexual relation as against a heterogeneous one. With the legalization of same sex marriage in countries like South Africa Netherlands, Spain, Canada and Belgium the quest to redefine 'marriage' has heightened in these countries. In Johannesburg (South Africa), a constitutional Court ordered a redefinition of marriage as a union between two persons and in Lawreen vs. Texas (2003) the Court defined marriage as spouses to the exclusion of all others. Two women Paula Schoenwe there and Nancy Wilson once filed a Federal Law suit in America, asking a judge to force the state to recognize their marriage but a professor of law opined that there is much at stake than recognizing their marriage. There are many statutory provisions in which marital status is a factor in determining or receiving benefits, rights and privileged.

These benefits include collecting part of a spouse's social security at death, estate taxes, probate rights and protections that come with divorce such as equitable distribution of property. 'Contract' and 'Will' allow same sex couple to accomplish some of these benefits but even then they get only a fraction of the rights and benefits available to married coupled of heterosexual marriages. Equity has not helped the gay couples to have equal rights in this regard and this is a challenge. Same sex marriage is not recognized in Nigeria, so the issue of equality of rights with married couples on heterosexual relationship does not apply.

5.6. Issues of Consent between Spouses

In many circumstances, the mutual consent of spouses in issues has been a necessary issue. Where a spouse is to undergo surgery but is not is a position to give consent, the consent of the other spouse is enough to enable the surgery to be carried on. In everyday life consent of spouses, whether in a legal issue or ordinary issue is a common practice. Sometimes violators have used this to undermine the human rights of others. A typical example is where a citizen of Nigeria is asked for her husband's (Nigerian too) consent before she can get a Nigerian passport which ordinarily should be her right as a citizen. A typical example of where spousal consent can be unfair is in the twin issue of euthanasia and physician assisted suicide. Euthanasia is the deliberate killing of a person for the benefit of that person. In most cases, it is carried out because the person asked for it and such a person must be terminally ill. In a few other cases the person may not be able to give consent and in all such cases, the person who dies is so terminally ill that it is just a question of time before actual death strikes.An illustration of this situation is the Terry Schiavo's case (2005). In this case Terry Schiavo was on a life support machine. She was technically dead but the machine kept her going. The consent to remove the support machine was required from her husband but her parents refused, contending that the husband had a motive to want the tube removed. After a long debate, arguments and counter arguments, the husband gave the consent and had the tube removed. The issue here is, if really the husband had a motive and his consent was required by law as against that of her parents,was it fair and equitable in the circumstance to seek the consent of the husband? If not, what did equity do to remedy the apparent injustice and in-equity of the situation? This is one area where equity is handicapped and did not strive to extend its frontiers of protection.

6. Conclusion

Early equity achieved the feat of creating remedies where non either existed or was inadequate. However equity was soon to assume the same technicality which it came to remove in the common law. The doctrines of equity became firmly rooted in *stare decisis* after the golden age and systemization of equity. The miles of equity got improved and refined as shown in Re; Hallet's case (1879). With this also, what is fair and just which formed the basis for equity also disappeared. Equitable remedies are still discretionary and exercised on ascertainable and well-settled principles. The reason for the inability of equity to remedy obvious wrongs like unfair trade competition and unpublished remark intended to do fame is not because such wrongs were not suitable for judicial enforcement but because equity also got as rigid and technical as the common law it came to salvage – Day vs. Browning (1878). It is humbly submitted that since 'equity was not presumed to be of an age past child bearing', its frontiers should expand to cater for the inevitable evolution of new laws to steer the affairs of the ever changing and dynamic society.

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