

A CRITICAL APPRAISAL OF THE INHERITANCE RIGHTS OF WOMEN UNDER NIGERIAN STATUTES AND CUSTOMARY LAWS¹

Adebukola Adedolapo Jaiyesimi*

and

Foluke Oluyemisi Abimbola**

Abstract

The Nigerian Legal system is pluralistic in the sense that there are several recognized systems of law governing the conduct of Nigerians. These systems include the civil law inherited from the British during and after colonialism, customary laws/cultural practice which were already in existence before colonialism and religious laws (Christian and Islamic laws). Thus, these different systems can be divided into two major systems of law which are: first, statutory laws enacted by the legislative arm of government along with the received English Law including statutes of general application enacted before 1900 and second, customary laws. Religious laws run parallel with customary laws but are not regarded as customary as customary law is wider and pertains to all from a particular tribe notwithstanding their diverse religious beliefs. As some of the customs tend to subjugate the rights of women to inherit what rightfully belongs to them, this paper aims to examine the statutes enacted by the Legislative arm of government and customary laws of inheritance in Nigeria and propose the eradication of laws that are either archaic or violate the rights of women with respect to inheritance of either their late husband's estate or their late father's estate. This paper will also recommend that as women's rights are human rights, any customary law that deprives a woman of her inheritance rights according to international human rights law should be declared discriminatory and statutes should be enforced in the interest of justice.

Keywords: Women's Rights, Customary Law, Inheritance, discrimination, Statutes

¹ *Adebukola Adedolapo Jaiyesimi, B.A, LL.B, BL, LL.M., Legal Practitioner.

^{**} Foluke Oluyemisi Abimbola, LL.B, BL, LL.M, PhD, Senior Lecturer, Faculty of Law, Lead City University, Ibadan.

Introduction

The word 'customary' means pertaining to a custom, a way of life, a tradition, a generally accepted behaviour or way of doing things.² The Evidence Act³ defines custom as a rule which in a particular district has from long usage obtained the force of law. Customary law therefore, is the law which evolves from the established practices, customs and way of life of a people. A custom is a “rule of conduct, obligatory on those within its scope, established by long usage.”⁴ Customary law as a legal system has been in existence from time immemorial and finds expression in the day-to-day cultural practices, rituals and traditions of a people. In the colonial era, customary law existed side by side with the received systems of law in the context of legal pluralism.⁵ It is an important source of Nigerian law primarily because it governs many issues concerning the people's lives; for instance, marriage according to native law and custom, divorce, succession or inheritance, land tenure and chieftaincy matters. It was the only legal system that existed among indigenous peoples and communities before the advent of colonial rule. As a result of the element of compulsion which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable.⁶

In the case of *Owoniye v Omotosho*,⁷ Bairamian, FJ defined customary law as “A mirror of accepted usage, among a given people.” In addition, in the case of *Oyewunmi v Ogunesan*,⁸ Obaseki, JSC said:

Customary law is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions...it is organic in that it is not static; regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people. I would say that customary law goes further to import justice to the lives of those subject to it.

² Black's Law Dictionary (6th Edition, pp. 299 – 300).

³ Section 2 (1) Evidence Act 2011.

⁴ *European Encyclopedia of Law* (BETA). Available at <https://lawlegal.eu/custom/> accessed 16th November 2022.

⁵ GJ Van Niekerk, “Legal Pluralism” in JC Bekker, JMT Labuschagne and LP Vorster (eds) *Introduction to Legal Pluralism Part 1 Customary Law* (2002) 3-18.

⁶ Niki Tobi, *Sources of Nigerian law* MIJ professional publishers Ltd, Lagos (1996) 103-104.

⁷ [1961] 1 All NLR 304.

⁸ [1990] 3 NWLR part 137 pg. 182 at 207.

The Supreme Court in *Zaidan v. Mohssen*⁹ defined customary law from the Nigerian perspective as:

Any system of law, not being common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.

From the foregoing definitions given by these eminent jurists and scholars; it is explicitly clear that customary law is the accepted customs and culture of a given people or community which after a long usage acquire a legal backing. This position arises from the fact that a judgment under customary law was typically enforceable because of an effective threat of total ostracism by the community. The members of such communities, recognizing the high cost of refusal to conform, now tend to align themselves with the accepted code of behaviour.¹⁰ It suffices to state that the customary laws of a people form the substratum upon which their socio – cultural superstructure rests. The matters with which customary law is principally concerned are simple cases of contract (mainly debt), torts, land, family law and succession.¹¹

Inheritance/Succession in customary Family Law

To inherit means to come into possession by transmission from past generations.¹² Inheritance in legal parlance therefore is the entry of a living person or living persons into possession of a dead person's property.¹³ Thus, succession which is used interchangeably with inheritance is the “process by which one person succeeds another in the occupation of an estate; that is, the process of a person becoming beneficially entitled to a property of a deceased person.”¹⁴

Legal challenges may arise upon the death of a man or woman particularly where the deceased person had dependents that are legally entitled to benefit from what is left behind. Usually, it is expected that the deceased person wrote a Will before his death thereby leaving instruction on how

⁹ (1973) 11 SC 1.

¹⁰ Mordi R, “An Appraisal of inheritance rights of women in Nigeria,” (2017) available at https://www.academia.edu/7187814/AN_APPRAISAL_OF_INHERITANCE_RIGHTS_OF_WOMEN_IN_NIGERIA accessed March 2021.

¹¹ Ibid.

¹² Chambers 20th Century Dictionary Edition 1981.

¹³ Yakubu, M.G, *Property Inheritance and Distribution of Estate under Customary Law*, Lagos (1991) p. 136.

¹⁴ Ajagunna F “Introduction to the Law of Inheritance in Nigeria,” in Olomola O (ed) *Family Law and Succession in Nigeria* (2021) 330.

his properties (both real and personal) are to be distributed upon his death. This is generally known as testate succession. However, where the deceased person did not write a Will it means he/she died intestate. Thus, where there is no Will, other laws can be used to decide who is entitled to the properties.¹⁵ Intestacy is the condition or fact of dying without writing a valid Will disposing of the estate of a deceased person.¹⁶ In such a situation the personal law of the deceased person will be applied in the distribution of the estate of the deceased intestate. Such laws include the Administration of Estates Laws of the various states in Nigeria and customary laws. The type of marriage the deceased contracted before death will be a deciding factor on which law will govern the distribution of the properties. It can be assumed that if the deceased married under the Act, the Administration of Estates Law will govern the distribution whereas if the deceased contracted a marriage under customary Law and he/she lived his life in accordance with the customary law of his tribe, then the custom of that tribe will determine how the property will be divided among family members.

Nigeria has over three hundred and seventy-one (371)¹⁷ ethnic groups and even greater number of customary laws. The distribution of a deceased's estate under customary law can be based on the customary doctrines of inheritance and succession of property. These doctrines are governed by the canons of lineal descent along paternal or maternal lines.¹⁸ Paternal lines are lines of descent traced through the father, while maternal lines are lines traced through the mother. For instance, the line of descent governing inheritance of the people in Yoruba is paternal while that governing the people of Afikpo, Abriba and Ohafia in the Eastern part of Nigeria is maternal.¹⁹ The largest of the ethnic groups are the Hausa (Northern Nigeria), Igbo (South East) and Yoruba (South West). Other than the Hausa that mostly practice Sharia law, each ethnic group has a system of customary law being practiced. The key statutory laws governing testate inheritance include the Marriage Act, the Administration of Estate Laws of 1959,²⁰ the Succession Law Edict of 1987 (as amended

¹⁵Mordi R, "An Appraisal of inheritance rights of women in Nigeria," (2017) available at https://www.academia.edu/7187814/AN_APPRAISAL_OF_INHERITANCE_RIGHTS_OF_WOMEN_IN_NIGERIA . Accessed 25 March 2021.

¹⁶ Ajagunna F "Introduction to the Law of Inheritance in Nigeria," in Olomola O (ed) *Family Law and Succession in Nigeria* (2021) 330 at 347.

¹⁷ Available at <https://infoguidenigeria.com/ethnic-groups-in-nigeria/> accessed 20th December 2022.

¹⁸ Animashaun T & Oyeneyin A, *Law of Succession, Wills and Probate in Nigeria* M.J Publisher Ltd (2003) p.3.

¹⁹ Uche U, *The Matrilineal System of Inheritance. The Nigerian Model in Towards a Restatement of Nigerian Customary Laws* (1991) Federal Ministry of Justice page 174 at 177.

²⁰ Cap 133 Laws of Western Nigeria 1959, as amended by States in the former western region.

by South East States), the English Wills Act of 1837, the Wills Amendment Act of 1852 as well as the Wills Laws of various states in Nigeria. There is no uniformity of inheritance laws in Nigeria.²¹ However, when a deceased dies intestate, his personal customary law may govern the distribution of his estate if he was not married under the provisions of the Marriage Act²² irrespective of where the property is situated or where the death occurred.²³ In *Tapa v Kuka*²⁴ the deceased was a Nupe from Bida who died intestate leaving landed property in Lagos. It was held by Brooke J, that the law to be applied in determining who was entitled to administer the estate was the deceased's personal law of Nupe and not that of Lagos. However, where the deceased during his life time adopted the law of the area of jurisdiction as his personal law, then that law would govern the administration of his estate. In *Olowu v Olowu*²⁵ the deceased was a Yoruba man, Ijesha by birth, who lived all his life in Benin City. He married Bini women and acquired property there. He naturalized as a Bini man. He died intestate and his estate was distributed according to the Bini native law and custom. Hence, the way of life of the deceased person can be in accordance with a culture where the deceased lived and died and not necessarily the culture from his family roots.

Discriminatory aspects of Customary Law

The discriminatory aspects of property inheritance under customary law in Nigeria manifests in different forms and scope ranging from primogeniture rules, right of spouses, rights of adopted children and rights of illegitimate children, although it is a generally agreed rule under customary law of intestate succession that succession follows the blood. Thus, the general rule of customary law where a land owner dies intestate is that his property devolves on his children as family property. The head of the family is the eldest male child of the deceased who occupies the family house and holds same as a trustee of the other children, male or female. This is popularly known as the primogeniture rule. However, the rule differs depending on the tribes and localities. In Bini

²¹ PO Itua "Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance," (2012) 4 *Journal of Law and Conflict Resolution* 36.

²² Cap M6, Laws of the Federation of Nigeria 2004. (The Marriage Act is the primary legislation that provides for the celebration of marriage in Nigeria. The only form of marriage recognized in Nigeria under the Act is monogamous marriage (marriage between one man and one woman).

²³ Section 25(2) of the Customary Court Edict, 1997 of Delta, Section 20(2) Customary Court Law Cap 31 of Western Nigerian 1959, Section 15 Customary Court Edict 1966 of Eastern Nigeria.

²⁴ (1945) 18 NLR 5.

²⁵ (1985)3 NWLR, (PT 13), 372 (1985) 12 SC 84.

and Onitsha communities, for instance, the deceased's property devolves to the eldest son exclusively, in accordance with the rule of primogeniture, under which the eldest son is expected to look after the younger children and may sell the house over and above the wishes of other children or treat it as his own property. Among the Markis group of the Verbe of Northern Nigeria, the rule of ultimogeniture applies, whereby inheritance is by the youngest son, which applies to bar other heirs of the deceased.

Among the Igbo speaking tribes in Eastern Nigeria, the customary law practiced under intestacy ordinarily favours the male child. The cardinal principle of customary law of succession in a family is Primogeniture, that is, succession by the first born of the line. The exception to this rule is in Afikpo and Bende areas of Ebonyi and Abia States which are bilineal,²⁶ where women have full legal capacity to own land and to transmit their rights and interests to others either *intervivos* or death. Under the principle of primogeniture, succession is through the eldest male in the family who is known as *Okpala*, *Diokpala* or *Diokpa*. Under the Igbo Customary Law, females do not possess the rights to inherit, that is, neither the daughters nor the widows of the deceased have the right to the estate of the deceased.²⁷ The philosophy behind it is that women do not stay in the family forever. They get married at a time in their life, and so would not be proper for such persons to inherit property or properties of their deceased fathers and carry such property or properties into another family by virtue of marriage.²⁸ With the above exposition to the background of customary laws and practices governing intestate inheritance, some customary laws as regards the right of inheritance of women in Nigeria, will now be examined which are the Yoruba, Bini and Igbo customary laws.

The Yoruba Customary Law of Inheritance

In the Western part of Nigeria, particularly the Yoruba speaking tribe, the customary rules under intestacy with respect to children of the deceased is equitable in nature as it accords inheritance rights to both sons and daughters. For instance, in the case of *Salami v Salami*²⁹ a case where the

²⁶ Okoro N, *The Customary Laws of Succession In Eastern Nigeria and The Judicial Rules Governing their Application* London (Revised ed) (Sweet and Maxwell (1966) pg. 118-119.

²⁷ Babatunde AO, "Discriminatory Property Inheritance Rights under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms," (2014) 19 *Journal of Humanities and Social Sciences* 30, 34.

²⁸ Garuba JO "Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention" (2018) 26 *U. Botswana L.J.* 84, pg. 87.

²⁹ (1957) WNLR 10.

plaintiff, a female child and the defendants were the only surviving children of one Salami Goodluck of Abeokuta extraction who died intestate leaving a house and farmland in Abeokuta. The plaintiff who was seven years old at the time of her father's death in 1927 was taken by her mother to Cameroon and did not return to Abeokuta till 1953. Apart from a few clothes and chairs allocated to her at the time of the father's death, she received nothing more from her late father's estate as her benefit. In an action against her two brothers for account and partitioning, the Court held that the plaintiff's right to inherit was unaffected by her absence, minority or sex and that the eldest son was not entitled to a greater share than the other children.³⁰ Also, in the case of *Sule v Ajisegiri*³¹ the court held that "among this group of children, there is no distinction between male and female children in the distribution of their father's estate."

On the other hand, the rights of widows to inherit under intestacy are alien to the Yoruba customary law practices. This was stated in the case of *Sogunro-Davies v Sogunro-Davies*³² that in Yoruba native law and custom that the intestacy devolution of property follows the blood, and a wife or widow not being of the blood has no claim to any share of his inheritance. In *Fakoya v. Ilori*³³ where the widow of the deceased Yoruba man transferred a landed property of the deceased husband to a third party, the court held that under Yoruba customary law of intestacy devolution of property follows the blood, and a wife or widow not being of the blood has no claim to any share of the inheritance. In addition, in the case of *Akinnubi v Akinnubi*³⁴ the Supreme Court declared that "it is a notorious principle of Yoruba Customary Law that a widow cannot inherit her late husband's property neither can she be a Co- Administratrix of his estate." In this case the Supreme Court held that:

Now, under Yoruba customary law, a widow under an intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family, she could neither be entitled to apply for a grant of letters of administration nor appointed as co-administratrix of her deceased's husband's estate.

³⁰ Garuba J, "Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention," (2018) 26 *U. Botswana L.J.* 84 pg. 89.

³¹(1937) 13 NLR 146.

³² (1929) 9 NLR 79.

³³ (1983) 2 FNLR 402.

³⁴(1997) 2 N.W.L.R. (Pt. 486) 144.

Thus, under Yoruba customary law a daughter's position is much better than her mother's position concerning inheritance rights.³⁵ This is apparent because the wife of the deceased Yoruba man is part of his properties under custom and tradition and as such his children have more rights to his property despite the fact that he and his wife both labored together to ensure the children have enough to survive and the necessary education and well-being to be able to maintain their inheritance rights.

Bini Customary Law of Inheritance

Succession under Bini customary law in Edo state, Nigeria is governed by the principles of primogeniture. Under Bini native law and custom, the eldest son of a deceased Bini man is entitled to inherit without question the house known as *Igiogbe*, notwithstanding any instruction, disposition in a Will or family arrangement to the contrary.³⁶ The Supreme Court in *Idehen v Idehen*³⁷ defined *Igiogbe* as the principal dwelling house, the family seat. The Benin Traditional Council describes *Igiogbe* as the house in which the deceased lived and died and usually where he is buried.³⁸ The Iyase of Benin defines *Igiogbe* as the house where a Bini Odafen³⁹ lived and died. Going further, he states that the *Igiogbe* is usually where the ancestral shrine is erected and the first son is given the *Igiogbe* because traditionally, he is the one to be responsible for taking care of the deceased's house, shrine or altar, the deceased's gravesite, inherited wife or wives and other such duties that the deceased was saddled with while he was alive. Additionally, for a house to qualify as *Igiogbe*, the house must be located in the deceased traditional hometown, which is the Bini Kingdom. Thus, in *Eghareba v Oruonghe*,⁴⁰ where an eldest son challenged a Will by his late father devising his house in Sapele where he lived and died to his wife for life while leaving the house in Benin to him, the court held that the deceased house at Sapele was not the testator's *Igiogbe*, rather the *Igiogbe* was the house at Benin City.

Under customary law in all parts of Edo State, a widow cannot inherit in the intestate estate of her deceased husband. This is because the widow is in fact regarded as part of the estate to be inherited

³⁵ Abimbola FO, "Inheritance Rights of Women: Till Death do us part," (2013) 5 (2) *Ibadan Bar Journal* 62.

³⁶ *Agidigbi v Agidigbi* [1996] 6 NWLR pt. 454 pg. 300.

³⁷ [1991] 6 NWLR pt. 198 pg. 382.

³⁸ Benin Traditional Council, A handbook on some Benin customs and usages, issued on the authority of Omo N' Oba Erediawa, The Oba of Benin (1994)12.

³⁹ Odafen is a Benin gentleman; an ordinary man who is not a titled chief.

⁴⁰ [2001] 11 NWLR pt. 724 pg. 318.

by the son or relative. The *Igiogbe* practice is so fundamental to the Bini customary inheritance that it is impossible for a testator to sell or give it out as a gift his principal house in which he lived and subsequently died. The Iyase of Benin, Chief Sam Igbe opines thus:

No sane Bini man would sell or make a gift of his *Igiogbe* during his lifetime. If he does and still remains in the house until he dies then the house remains his *Igiogbe* and devolves on his eldest son at his death but if he moves out of the house and lives in another house until his death, automatically the former house ceases to be his *Igiogbe*.

Also, on the authority of Section 3(1) Wills Law of Bendel State, a Bini man cannot dispose of his *Igiogbe* by Will to any other person except his eldest son. The abovementioned law provides that:

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

Under the Bini Customary law, the inheritance of a deceased devolves on the eldest surviving son, not considering the fact that there may be older female children. In *Agidigbi v Agidigbi*,⁴¹ the Supreme Court held as valid the Bini rule of inheritance which provides that the eldest surviving son of the deceased inherits the *Igiogbe*. Similarly, in *Idehen v Idehen*,⁴² the Supreme Court held that the custom of the Bini people with regard to the disposition of property cannot be brushed aside. In *Arase v Arase*,⁴³ per Idigbe JSC stated that:

...The principal house in which the deceased lived in his lifetime and died is called the *Igiogbe*, that always passes by way of inheritance on distribution to the eldest son. However, until the exercise of distribution under customary law has been performed, the eldest son retains all the property of the deceased in trust for himself and the children of the deceased.

⁴¹ (1996) 6 NWLR 302 -303.

⁴² (1991) 6 NWLR (pt. 198) 382.

⁴³ (1981) 5 SC 33.

This means that when making a will, a testator must avert his mind to the fact that under Benin Customary Law, the *Igiogbe* cannot under any circumstances be given out to any person except the eldest surviving son. The reason for the *Igiogbe* inheritance is that it acts as a control measure to ensure that the property of the testator does not dissipate and also for the age-long customs and traditions of the Bini people not to go into extinction.

The Igbo Customary Law of Inheritance

The Igbo customary law on inheritance is very similar to the others as discussed above where a widow cannot inherit the property of her late husband. In the case of *Nezianya v Okagbue*,⁴⁴ the court stated that:

In the view of the custom of the Onitsha, that the real property of a man who died without a male issue should not go to his female issue who, on her marriage, would carry the property to her husband's family; it is right, the custom postulates that the property should remain in the man's family to the exclusion of the female issues.⁴⁵

Additionally, apart from the female child, such customary law practices usually discriminate against widows' rights to inherit property of their deceased spouses under intestacy. In some customs, the right a widow can assert is a life interest to occupy the building or part of it as long as she is of good behaviour.⁴⁶ She is completely deprived of inheritance rights and her situation becomes more pitiable if she has no issues at all or has only female children.⁴⁷ This was another aspect of the decision in *Nezianya's* case mentioned above where the appellant challenged the Native Law and Custom of the Onitsha people. The court held that:

A married woman, after the death of her husband, can never under Native Law and Custom be a stranger to her deceased husband's property, and she could not, at any time acquire a distinct possession of her own to oust the family's rights of ownership over the property...That a married woman, on the death of her husband without a male issue, with the concurrence of her husband's family, may deal with his (deceased's) property; her dealing, of course, must receive the consent of the family. The consent, it would appear,

⁴⁴ (1963) N.S.C.C 27 at 278, (1963) 1 All N.L.R. 352.

⁴⁵ Ibid at page 357.

⁴⁶ Garuba JO, "Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention," (2018) 26 U. Botswana L.J. 84, pg. 87.

⁴⁷ Adekile OI, "Property Rights of Women in Nigeria as impediments to Full Realisation of Economic and Social Rights," (2010) *Social Science Research Network* 1, 18-19.

may be actual or implied from the circumstances of the case, but she cannot assume ownership of the property or alienate it.⁴⁸

Furthermore, in the case of *Nzekwu v Nzekwu*,⁴⁹ the court stated that “the rights of a widow in her husband’s property in customary law have been settled.”⁵⁰

The Court per Nnamani, J.S.C. stated that:

A widow who chooses to remain in the husband’s house and in his name is entitled, in her own right and notwithstanding that she has no children to go on occupying the matrimonial home and to be given some share of his farmland for her cultivation and generally to maintenance by her husband’s family...Her interest in the house and farmland is merely possessory and not proprietary so that she cannot dispose of it out-and-out.⁵¹

Court Declarations denouncing discriminatory customary law practices

The attitude of the Courts in the 20th Century appears to have favoured the application of such discriminatory customary law practices against the inheritance rights of Nigerian women under intestacy. There are nevertheless recent decisions of the courts setting aside customs and traditions that have inflicted and have resulted in hardship situations for widows and women in general. For instance, the Court of Appeal in *Mojekwu v Mojekwu*⁵² condemned such customary law practices that discriminate against the inheritance rights of women. In that case, the plaintiff/appellant, a nephew to the defendant/respondent’s deceased husband who relied on the *Nnewi* Native law and custom (*Oli-ekpe*) to claim/assert title over the property of the deceased to the exclusion of the defendant/respondent, had his case dismissed by the Court.⁵³

In dismissing the appeal, Tobi, J.C.A., stated:

⁴⁸ (1963) N.S.C.C 27 at 278, (1963) 1 All N.L.R. 352 at 358.

⁴⁹ (1989) 2 N.W.L.R (pt. 104) 373.

⁵⁰ Garuba J O, “Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention,” (2018) 26 *U. Botswana L.J.* 84, pg. 88.

⁵¹ *Ibid.*

⁵² (1997) 7 NWLR (pt. 512) 283.

⁵³ Garuba J O, “Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention” (2018) 26 *U. Botswana L.J.* 84, pg. 92.

...We need not travel 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 live today...On my part, I have no difficulty in holding that the Oli-ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience.

The case of *Mojekwu v. Mojekwu*,⁵⁴ thus marked a turning point. The Court of Appeal in that case struck out, as repugnant to natural justice, equity, and good conscience, the *Oli-ekpe* custom in Ibo land, which bars women from inheriting the properties of the deceased.

Again, the Supreme Court in *Ukeje v Ukeje*⁵⁵ per Rhodes-Vivour, J.S.C., held that:

No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her 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) & (2) of the Constitution.⁵⁶

Similarly, in the case of *Asika v Atuanya*,⁵⁷ the Onitsha customary law was condemned as being discriminatory against the rights of daughters to inherit from their deceased father. The Court per Denton-West, J.C.A., stated that:

Again, one may ask why in some parts of Nigeria women are by subordinate laws and customs deprived of ownership and right of inheritance to acquire and own immovable property. Why are the women subjected to this disability or deprivation by reason only of their feminine attribute? The Constitutional provisions are quite clear and unambiguous. Despite the lack of ambiguity in the Constitution, Nigerian women are not entitled to inherit any landed property as was envisaged in this appeal...In my humble view, it is the duty of the court to stand firm and assert the rights of ownership of land by women in any part of the Country as enshrined in the Constitution. Whatever the Constitution stipulated must be adhered to. The Constitution may be stiff or hard, but it takes supremacy over and above

⁵⁴ (1997) 7 NWLR (pt. 512) 283.

⁵⁵ (2014) 11 NWLR (pt. 1418) 384.

⁵⁶ Garuba J O, "Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention" (2018) 26 *U. Botswana L.J.* 84, pg. 91.

⁵⁷ (2008) 17 NWLR (pt. 1117) 484.

any form of social engineering, equitable engineering, negative law and custom and indeed other enactments.⁵⁸

In *Anekwe v Nweke*⁵⁹ the respondent a widow who had six daughters with her late husband was ordered by the 1st appellant (her late husband's nephew) to vacate the matrimonial home she shared with her late husband because she did not have any male child with him. The appellant's claim was based on the *Awka* custom that discriminates against daughters and widows to inherit under intestacy. The Appellant's claim was dismissed unanimously and the Supreme Court declared that "the custom of Awka people of Anambra state to the effect that a married woman without a male issue cannot inherit landed property of her late husband, pleaded and relied on by the appellants in the instant case, is barbaric and repugnant to natural justice, equity and good conscience and ought to be abolished." Similarly, in *Okonkwo v Okonkwo*,⁶⁰ the Court of Appeal dismissed a claim based on customary law practice that discriminates against the rights of a childless widow to inherit from her deceased spouse. In this case, it was established that the widow, the legal wife of the deceased contributed her life savings to acquire the estate in issue.

In allowing the appeal, the Court of Appeal per Agube, J.C.A held that:

Section 120 (1) (b) of the Administration and Succession (Estate of Deceased Persons') Law of Anambra State, 1991, no doubt, to the extent that it discriminates or dichotomizes between male and female intestate spouses is inconsistent with Section 42 (1) (a) of the Constitution of the Federal Republic of Nigeria, 1999 and to the extent of such inconsistency ought to be void. This is because by providing that only one third of the estate shall go to the surviving spouse whose interest shall be absolute in the case of a husband or for her life or until remarriage (whichever comes first) in the case of a wife," the widow is put under great disadvantage particularly in the case of this appellant who had toiled all these years with her husband and invested her life savings in building the estate now in dispute only for her to be entitled to a life interest of one third of the estate and the bulk of the residue of two thirds of the estate shall devolve on the children of an adulteress who will now enjoy same absolutely...⁶¹

⁵⁸ Garuba J O, "Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention" (2018) 26 *U. Botswana L.J.* 84, pg. 92.

⁵⁹ (2014) 9 NWLR (pt. 1412) 393.

⁶⁰ (2014) 17 NWLR (pt. 1435) 18.

⁶¹ Ibid.

Therefore, statutes have been enacted governing intestate succession declaring that it is not only the personal law of the deceased that determines how the properties may be distributed in a situation where the deceased died without writing a Will. It is trite that if the deceased married under the Marriage Act (Marriage conducted in a Registry or registered place of worship), the Administration of Estates Laws of the various states in the Federation can be applied. This changes the whole gamut of imposing customary norms which may be discriminatory against the female members of a family.

Statutory Provisions Governing Intestate Inheritance

These discriminatory customary practices against the inheritance of women no doubt infringes on their fundamental rights which are recognized and guaranteed in the 1999 Constitution (as amended). These are rights derivable from the Universal Declaration of Human Rights.

The 1999 Constitution (as amended) is the basic law of Nigeria and as such is superior to every other law in force in any part of the Country whether written or unwritten.⁶² Section 1 (1) provides that “this Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.” Subsection (3) provides that “if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.” Thus, any law may include native laws or customs which are essentially unwritten and a number of such have been declared to be in breach of the express provision of the Constitution of Nigeria.⁶³ Therefore, any native law or custom that discriminates against the rights of any Nigerian on grounds of sex shall be deemed to be inconsistent with the provisions of the Constitution. Although, the Constitution did not provide for inheritance or succession rights, however, Section 42 prohibits any form of discrimination against any person amongst others on the grounds of sex.

In response to this problem of discrimination against women in inheritance, some states in the Eastern States namely Anambra, Enugu and Ebonyi States have adopted the Succession Law Edict. This legislation deals with inheritance/succession to real and personal estate on intestacy. Section 120 of the Administration and Succession (Estate of Deceased Persons) Law, 1987 prescribed

⁶² Garuba J O, “Discriminatory Customary Inheritance in Nigeria: Judicial Activism or Legislative Intervention” (2018) 26 *U. Botswana L.J.* 84, pg. 90.

⁶³ Ibid.

detailed rules of distribution of real and personal estate on intestacy: Sub-sections (a) and (b) appears to protect the interest of a wife who bears no children and one who bears children as follows:

a) If the intestate leaves a husband or wife but no children, parents or brothers or sisters of the whole blood, the residuary estate shall be held on trust for the surviving spouse absolutely. However, where the surviving spouse is the wife and the intestate leaves brothers or sisters of the half blood, the wife's interest will be for her life or until she marries whichever first occurs. Thereafter, the residue of her interest shall go to the intestate's brothers and sisters absolutely in equal shares. The children of a deceased brother or sister will take the share to which his parent would have been entitled if alive.

b) Where the intestate leaves a husband or wife as well as children's children (whether or not he also leaves parents or brothers or children of brothers and sisters), the residuary estate shall be held on trust as to the value of one third thereof for the surviving spouse. The interest of such spouse shall be absolute in the case of a husband and in respect of a wife, for her life or until remarriage, whichever first occurs.

Administration of Estates Laws for the Western States of Nigeria (including Mid-Western States)

The relevant law in the South-Western states with regard to the intestate of a person married under the Marriage Act in the life time of the deceased is the Administration of Estates Law 1959. Most states have enacted this law at different times and thus have more recent versions of the law.⁶⁴ It is important to note that, under the 1959 law, provisions of that law do not apply where the distribution, inheritance and succession of any estate is governed by customary law. This is because under the Administration of Estates Law 1959, the distribution of intestate estate applies only where persons are married in accordance with the Marriage Act. Section 49 provides in detail for devolution of real and personal property on intestacy. According to section 49(5):

Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this law leaving a widow or husband or any issue of such marriage, any

⁶⁴ See for instance Administration of Estates Law, 1978, Laws of Oyo state and Administration of Estates, 1991, Laws of Lagos state.

property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this law, any customary law to the contrary notwithstanding.

Hence, it has been established from the above provision of the law that under the statutory laws of succession, a woman married to a man under the Act has every right to inherit his property alongside with his children. The Administration of Estates Law of Oyo state⁶⁵ in similar terms acknowledges this which ensures that a widow does not necessarily have to suffer the negative effects of customary law of succession once it can be proved that she married under the Act. For instance, this position of the law was restated in the case of *Obusez v Obusez*⁶⁶ where the Supreme Court held that: “it is not disputed that the deceased and the first respondent were married under the Marriage Act in 1972, but that prior to their marriage both parties were subject to customary law with the deceased being particularly subject to *Agbor* customary law. It follows therefore that by virtue of the said marriage and upon the death of the deceased intestate, the provisions of the Administration of Estates Law, laws of Lagos State becomes applicable....it is very clear from sub section 5 of section 49 of the said law that the intention of the law maker is that customary law be excluded in relation to the estate of persons to which the sub section applies.”

It is thus important that women are aware of their rights in order to ensure that properties co-owned by both husband and wife can be secured under the Wills Laws rather than customary law or if the spouse dies intestate and the marriage is a statutory marriage, properties of the deceased can be protected from undeserving relatives under the Administration of Estate laws in Nigeria.

Conclusion

It is not in doubt that Nigeria is a signatory to virtually all United Nations Human Rights instruments (treaties, declarations, covenants) without any reservations including the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).⁶⁷ By being a party to the adoption and ratification of the instruments particularly without reservations, Nigeria is

⁶⁵ Section 49 (5) Administration of Estates Law 1978 Oyo state.

⁶⁶ (2007) 10 NWLR Pt 1043 p.430.

⁶⁷ On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations had agreed to be bound by its provisions.

committed to full implementation of the spirit of the International Human Rights instruments. However, Nigeria has failed to domesticate CEDAW, the women's Bill of Rights to accord with the provisions of the constitution stating that before any treaty can be applicable to Nigeria it has to be enacted as a domestic law⁶⁸ and buttressed in the case of *Abacha v Fawehinmi*.⁶⁹ It must be noted that ratification is an executive act while domestication is a legislative duty. Therefore, one can easily state that failure to domesticate International Treaties which will make life much easier for the greater members of the society is due to insensitivity of the National Legislature in Nigeria. It is posited that the legislature must be alive to its duty of domestication of international treaties ratified by the executive arm of government. It is noteworthy that the contents of covenants including the 1948 Universal declaration on Human Rights and part of CEDAW are contained in the African Charter on Human and People's Rights (African Charter) which has been domesticated and has formed part of the Nigerian law⁷⁰ including the right to property and right to freedom from any form of discrimination based on sex.⁷¹

Therefore, apart from legislative enactments, any discriminatory customary law practice contrary to the provisions of the African Charter is unconstitutional and thus void. The provisions of the African Charter as part of the domestic legislation can thus be adopted by the Nigerian courts to pronounce any custom or practice null and void if it violates the rights of the citizens particularly the rights of women and girls.

⁶⁸ Section 12 (1) of the 1999 constitution (as amended).

⁶⁹ (2006) 6 NWLR (pt. 660) p. 228.

⁷⁰ African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap10 Laws of the Federation of Nigeria 1990 now cited as Cap A9 Laws of the Federation of Nigeria 2004.

⁷¹ See Article 2 and Article 18 (3) of the African Charter.